NO. 93132-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES GOTCHER,

Appellant

BRIEF OF APPELLANT

(PETITION FOR REVIEW)

CHARLES GOTCHER #371646
Appellant – Self-representation
Coyote Ridge Correction Center
PO Box 769- FA06-2U
Connell, WA 99326

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2. Section IV, Personal Restraint Petition, A., PRP Principle, and decided "Failure to disclose separate prosecution was not a Brady violation.

3. On April 14, 2016 Oder Denying Motion for Reconsideration of both above appeal decision's.

   i. A copy of the Appeal decision is in the Appendix at pages 15. A copy of the order denying the petitioners Motion for Reconsideration is in the Appendix at pages 15.

III. ISSUES PRESENTED FOR REVIEW .....

a. Whether the appeal court should have vacated the verdict for count 3 or send it back to Grays Harbor County Superior Court for a retrial because the

charging dates did not match the testimony.

b. Whether the appeal court should have found that the trial prosecutor violated my right to a fair trial by not supplying my attorney with information of a previous case that A.E. was involved in.

IV. STATEMENT OF THE CASE .....

The Grays Harbor County prosecutor charged me with one count of Child Molestation in the Third Degree, and two counts of Child Rape in the Third Degree . A. E was said to be the victim of each count. After several days of trial and jury deliberation I was found guilty of all three counts.

a. The charges for count three, Third Degree Child Rape

was "on or between June 1, 2010 and September 15, 2010" CP 2. My attorney asked A.E during her testimony, "Then it was after that in early the summer before July 26 when you turned 16 that the bonfire incident happened, is that right?" A.E. answered "yeah" RP2 92(5-8). The charging dates and A.E.'s testimony do not match on this charge. The prosecutor had stated that the events happened in order- the car, the bedroom and the bonfire. During closing arguments, the Prosecutor told the jury that the dates didn't matter RP2 63(16-25)-64(11-20).

The jury returned with a guilty verdict. I submitted my appeal to the appeals court and was denied on February 23, 2016 CP 1. On March 14, 2013 my Motion to Reconsider was denied CP 4.

b. I filed a Personal Restraint Petition (PRP) with the court of appeals and was denied on February 23, 2016 CP 1 because I believe the prosecutor violated the Brady Rule when she failed to supply my attorney with information on another case that A.E. was involved in that happened at the same time as the charges in my case that might have helped me prove my innocence. I then filed a Motion to Reconsider with the court and was denied April 14, 2016 CP 4.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED .....

a. The date I was charged with in Count 3 CP 2 and the dates that A.E. testified to RP2 92(5-8) at the trial are off by a year and do not match. The prosecutor told the jurors that the dates did not matter RP2 64(11-15)

They do. The prosecutor stated that the three Counts occurred in a certain order, one, two, three. First the car on the road, second the bedroom and third the bonfire. A.E. testified that Count 1 RP2 89(6-10), the car on the road, happened during the Halloween season in 2010, Count 2 RP90(5-15), the bedroom, happened at the end of 2010 or the beginning of 2011 and according to A.E.'s testimony these allegations ended with the culmination of events, Count 3 RP2 92(4-8), the bonfire. My attorneys question "Then it was after that in early the summer before July 26 when you turned 16 that the bonfire incident happened, is that right?" to which A.E. answered "yeah" RP2 92. This would have made the date of the bonfire incident in the summer of 2011 since A.E. was born on July 26, 1995 RP2 14(3). The charging dates for the bonfire incident on the

sentencing papers -Count 3 CP 2, was "On or between June 1. 2010 and September 15, 2010." The charging dates and the dates testified to in court by A.E. do not match RP 61(16-24) Also according to A.E.'s testimony, even if they had changed the charging dates to one year later, she would have turned 16 RP2 14(2-3) during that time and it would have changed the charges or dismissed them RP2 11(4-8). It was impossible to defend myself, since the dates did not match A.E's testimony.

b. The Grays Harbor County Prosecutor failed to disclose information to me of a previous case, March 2010 - Defendant - Jacob Gaiser CP 3, pg.1 that A.E. was involved in. According to the *Brady Rule – Google Legal Definition,* n. Evidence or information favorable to the defendant in a criminal case that is

known by the prosecution under the *United States Supreme Court case of Brady v. Maryland (1963),* the prosecution must disclose such material to the defendant if requested to do so. According to *Fordham Law Review, Volume 6, Issue 3, Article 13, 2000 Prosecutors Duty to Disclose Exculpatory Evidence by Lisa M Kurcias - Rule 3.8 (d)* states that a prosecutor must disclose to the defense all evidence or information known to the prosecutor that might negate the guilt of the defendant or mitigates the offense. In *United State v. Bagley*, the court said that there isn't a difference between impeachment evidence and exculpatory evidence with respect to prosecutorial disclosure obligations. The court ruled that evidence that would be useful to impeach a prosecution witness also falls within the scope of the *Brady Rule.* A. E. was involved in a case that

happened at the same time as this case is supposed to have happened. Things that were said by A. E.'s mom, Beth Eaton CP3, pg 2, II in that case contradict some of the testimony in this trial. Beth Eaton had said in the Jacob Gaiser case CP3, pg.2, part II, second paragraph, that A.E. was depressed and not spending time with her friends and was isolating herself. Also CP3, pg. 2, part II first paragraph, that during the period of the corn maze RP2 84 (7-13) and when A.E. claims the incident happened in the car, that Beth had been concerned because A.E. was spending time with Jacob Gaiser. Also Jacob Gaiser had said that they were hanging out at football games which are also during that same time of year. This also calls into question whether we were spending all the time together that was testified to and the prosecution claimed we were in their testimony at

my trial. This could have also called into question whether these things could have happened as A.E. has said or could have proved my innocence as I have maintained. The jury should have been able to hear this information to help make their decision. They never had a chance since the prosecutor never disclosed anything about this other case to my attorney. This information RP2P 3(12-25), RP2P 4(1-9) could have changed the verdict and outcome of this case since at one point the jury seemed to be hung. Since it was that close, all it would have taken was one piece of evidence for more of the jury members to question what had happened and could have caused the ones that were undecided to stick with that decision and remain a hung jury or the jury members could have all changed their minds and found me innocent as I have maintained. The prosecutor has

said that she did not need to tell us about the other case because A.E. mentioned the case during a recorded phone conversation with myself. It was stated several times during the trial that I could not always hear A.E. well on speaker phone on a cell phone RP2 155(1-25), 156(1-25),157(1-22). I also stated that I had put the phone down and walked away several times so I missed some of what A.E. said during that conversation. Just because A.E. mentioned the case during that phone call, how does the prosecutor know what I actually heard or what I actually know about the other case. The job of the prosecutor is to make sure there is a fair trial. Even if she "*thinks*" I know something she is still required to supply my attorney with the information that he requested according to the *Brady Rule, Rule 3.8 and the Omnibus Order.* It is not the prosecutors job to

determine what I may or may not know. The prosecutor works for the people of the state and her job is to make sure there is a fair trial. So for reasons of full disclosure and a fair trial, the prosecutors job is to give all the information she has that may or may not be relevant to the case whether it is to my benefit or not as requested.

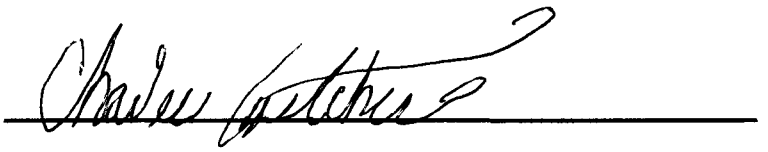
V. Conclusion

For the reasons indicated in parts IV and V, on count 3, I am asking this court to vacate the judgement from the trial and this case either be resubmitted to Grays Harbor County Superior Court to be dismissed or retried.

For the reasons indicated in parts IV and V, on counts 1, 2, and 3, because of the Brady Rule oversite, I am asking that the judgement be vacated on all three counts and sent back to Grays Harbor Superior Court to either be dismissed or retried.

June 10, 2016

Respectfully Submitted,



Charles Gotcher
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Filed
Washington State
Court of Appeals
Division Two

February 23, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHARLES R. GOTCHER, Appellant.	No. 46119-6-II Consolidated with
In the Matter of the Personal Restraint Petition of CHARLES R. GOTCHER, Petitioner.	No. 47142-6-II UNPUBLISHED OPINION

WORSWICK, J. — Charles Gotcher appeals his conviction for one count of third degree child molestation and two counts of third degree child rape. He argues that the trial court (1) denied his right to a public trial by allowing counsel to choose two alternate juror seat numbers in private and (2) abused its discretion by refusing to impose an exceptional sentence downward from the standard range. In a statement of additional grounds (SAG), Gotcher claims that (3) the victim's testimony was inconsistent with the charging document regarding the offense dates, and (4) the trial court should not have admitted evidence of poems Gotcher wrote to the victim. Finally, in a personal restraint petition (PRP), Gotcher alleges that (5) the prosecutor withheld favorable evidence—namely, information about an unrelated prosecution of another defendant for raping the same victim. We disagree, and affirm Gotcher's convictions. We deny his PRP.

FACTS

AE[1] was born in July 1995. She met Gotcher at church when she was 11 or 12 years old. Gotcher, who was 27 or 28 years old, began to pursue AE romantically. Over the course of their association, he kissed her several times. Gotcher often gave AE alcohol and Vicodin. On several occasions when AE was 14 and 15, Gotcher put his hand in her underwear and touched her on or in her vagina. Another incident occurred during the summer before AE's 16th birthday.[2] During this period, she was spending a lot of time at her sister's house where Gotcher was also living. Gotcher supplied AE with alcohol, and she became very intoxicated. Gotcher had sexual intercourse with AE.

AE had previously been the victim of a sexual assault. In 2010, AE was raped by another man: Jacob Gaiser. Katherine Svoboda, the prosecutor in the instant case, also prosecuted Gaiser.

AE eventually disclosed that Gotcher had raped her. In April 2013, in an effort to gather evidence against Gotcher, AE participated in a phone call with detectives and Gotcher to attempt to solicit an admission from Gotcher.[3] During the phone call, Gotcher asked AE whether she had filed a police report against him. AE responded: "No, I've been refusing. . . . I don't like having

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[1] We refer to the minor victim using her initials.

[2] AE turned 16 in July 2011.

[3] The jury heard a recording of this phone call during Gotcher's trial.

[anything] to do with it. You know about like the whole Jacob Gaiser thing, and everything." Br. of Resp't (Attachment A). Gotcher did not contradict this statement.

The State charged Gotcher with one count of third degree child molestation[4] and two counts of third degree child rape.[5] The charging information alleged that Gotcher committed the child molestation count "on or between July 26, 2009, and October 31, 2010," the first child rape count on or between "July 26, 2009, and July 25, 2011," and the second child rape count "on or between June 1, 2010 and September 15, 2010." Clerk's Papers (CP) at 1-2. The case proceeded to a jury trial.

Before jury selection began at 9:10 a.m. on the first day of trial, the parties selected two seat numbers of potential jurors to serve as blind alternate jurors. The clerk's minutes from 8:45 a.m. read in part: "Let the Record show: Prior to Court starting both the State and Defense Counsel choose Blind Jurors; Mr. Strophy picked #10 and Ms. Svoboda #8 in that order." Suppl. CP at 25. Thus, counsel for both parties chose two seat numbers of potential jurors who would serve as alternates before the jury had been empaneled and before the jury venire arrived to fill those seats. The record does not show that the courtroom was closed during the selection of alternate juror seat numbers.

The State sought to prove that Gotcher had a lustful disposition towards AE. At the start of trial, the State sought to lay a foundation for several messages it alleged Gotcher wrote to AE;

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[4] RCW 9A.44.089.

[5] RCW 9A.44.079.

these included poems saved on an iPod. Gotcher's counsel stated: "I received copies of these in advance of trial." 2 Verbatim Report of Proceedings (VRP) (Jan. 7, 2014) (Jury Trial) at 3. He objected on the grounds that there was "no indication, other than [Gotcher's] own testimony through the author, who they were intended for," and there was "no chain of custody established." 2 VRP (Jan. 7, 2014) at 3. The trial court reserved ruling on the admissibility of these poems until the State laid a foundation.

At trial, AE testified to the facts described above. She also testified that Gotcher gave her an iPod near the end of 2012. She testified that Gotcher showed her some poems he had written for her on the iPod. AE testified that one of the messages read: "'[AE] and Charles [Gotcher] forever and always.'" 2 VRP (Jan. 7, 2014) at 61. The poems were not admitted into evidence during AE's testimony. Gotcher did not object to AE's testimony about the iPod or the poems.

The following day, the State sought to admit photographs of the poems as exhibits during Detective Darrin Wallace's testimony. The State laid a foundation for their admission through Detective Wallace's testimony of how he received the iPod from AE and then photographed the poems individually. Apparently satisfied by this foundation, Gotcher repeatedly said, "No objection" to the admission of each photo. VRP (Jan. 8, 2014) at 47-50. Accordingly, the trial court admitted each poem.[6] Detective Wallace testified that he had inadvertently changed one of the dates shown on the iPod, but stated he did not alter anything else concerning the poems.

[6] The poems are not in the record before us.

The jury convicted Gotcher as charged. At sentencing, Gotcher requested an exceptional sentence downward, arguing that under RCW 9.94A.535(1)(g), the operation of the multiple offense policy of former RCW 9.94A.589 (2002) would result in a presumptive sentence that was clearly excessive. Gotcher also asked the trial court to consider his lack of prior convictions and the amount of support he received from his community.

The trial court considered this request, saying:

> I can conclude that there's always, shall we say, [a] Catch 22 here. And the Catch 22 is the issue of getting treatment . . . . [Y]ou need someone to stand in and say, yep, I did it. I really screwed up. Sorry about that. Not going to do it again. Yeah, I need some treatment. And, therefore, there is no risk of re-offense in the future. . . . And so therefore, I believe, Counsel, [Gotcher] doesn't qualify for this Court to be more lenient than what the standard ranges are, because it's—I'm placed in the position of, I didn't do anything wrong. So, therefore, I'm not entertaining the issue of being more lenient or less stringent in the sentencing of the Court.

VRP (March. 10, 2014) at 9. The trial court also noted that it did not wish to "supplant [its] opinion for that of a jury," and sentenced Gotcher to 45 months on the child molestation count and 46 months on each child rape count, to run concurrently. CP at 18. In its written ruling, trial court said that it did not find any "substantial and compelling" reasons to justify an exceptional sentence above or below this standard range. CP at 7. Gotcher appeals.

ANALYSIS

I. PUBLIC TRIAL

Gotcher argues that the trial court denied his right to a public trial by permitting counsel to select alternate juror seat numbers in private. We disagree.

A. *Standard of Review*

The United States and Washington Constitutions guarantee a defendant the right to a public trial. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22. Whether this right was violated is a question of law we review de novo. *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012). We consider whether (1) the trial court closed proceedings to the public, (2) the proceedings implicate the public trial right, and (3) the closure was justified. *State v. Smith*, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014). It is the defendant's burden to provide a record that establishes a closure occurred. *State v. Andy*, 182 Wn.2d 294, 301, 340 P.3d 840 (2014).

Not every interaction between the court, counsel, and defendants implicates the right to a public trial. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). Our Supreme Court has already established that certain proceedings implicate the public trial right; for other proceedings, we apply the "experience and logic" test announced in *Sublett* to determine whether a courtroom closure implicating the public trial right has occurred. 176 Wn.2d at 75-78. Under this test, the experience prong asks "'whether the place and process have historically been open to the press and general public,'" and "[t]he logic prong asks 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Sublett*, 176 Wn.2d at 73 (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). If the answer to both prongs is yes, the public trial right attaches. *Sublett*, 176 Wn.2d at 73.

When the public trial right attaches, the trial court must consider the *Bone-Club* factors and make specific findings on the record justifying closure. *State v. Bone-Club*, 128 Wn.2d 254,

258-59, 906 P.2d 325 (1995). Violation of the right to a public trial is a structural error, so the remedy is reversal and remand for a new trial. *State v. Wise*, 176 Wn.2d 1, 15, 20, 288 P.3d 1113 (2012).

B. *Private Selection of Alternate Juror Seats*

1. *Implication of Public Trial Right*

Gotcher argues that *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013) establishes that the public trial right was implicated in the selection of blind alternate juror seats. We disagree.

In *Jones*, a court staff member conducted a drawing to choose alternate jurors during an afternoon court recess, and notified Jones, counsel, and the jurors after it occurred. 175 Wn. App. at 102. Therefore, the selection of the alternates occurred off the record and outside the trial proceedings without a *Bone-Club* analysis. 175 Wn. App. at 102-03. We held that the procedure, which constituted an off-the-record selection of alternate *jurors*, violated Jones's right to a public trial, requiring a new trial. 175 Wn. App. at 102-03.

The procedure in *Jones* differs from the procedure in Gotcher's trial in a significant way. In *Jones*, the selection of alternate jurors occurred after the jury was empaneled. *See* 175 Wn. App. at 102. The alternate jurors who were selected were among the empaneled jurors. But in Gotcher's case, counsel selected two *juror seat numbers* to serve as alternates. Counsel chose juror seats, rather than jurors, before voir dire began and before the jury venire had arrived in the courtroom. Because of this critical difference, *Jones* does not control our analysis of whether the

public trial right attached to the procedure in this case. We turn to the experience and logic test to determine whether the public trial right attaches to the procedure in Gotcher's case.

2. *Experience and Logic: Public Trial Right Does Not Attach*

i. *Experience*

While it is true that the Washington experience of alternate juror selection has historically been open to the press and public, *Jones*, 175 Wn. App at 101, the process used by the trial court here, allowing trial counsel to choose an empty juror seat, is different. No alternate juror was chosen during this process. Counsel merely chose juror seats numbers 8 and 10, and agreed that the persons who would come to be seated thereon would be the alternate jurors. This is akin to the procedure many trial courts employ: determining before the jury venire arrives in the courtroom that juror seats numbers 13 and 14 will be the alternate juror seats. This procedural determination, prior to any jury venire being brought into the courtroom, has not historically been open to the press and public.

ii. *Logic*

Moreover, logic does not require the pre-voir dire selection of alternate juror seats to be part of the public trial right. In *Jones*, we considered the purposes of the public trial right and concluded that a public selection of alternate jurors was necessary to protect two interests: "basic fairness to the defendant and reminding the trial court of the importance of its functions." 175 Wn. App. at 101-02. In *Jones*, the trial court had announced that it would select alternate jurors randomly at the end of trial. 175 Wn. App. at 102. But the trial court instead allowed the court staff member to select the alternates in private. 175 Wn. App. at 102. Because that procedure

did not adequately protect against the possibility of "manipulation or chicanery," we held that logic required the selection of alternate jurors to occur in open court. 175 Wn. App. at 102.

But as stated above, the procedure in Gotcher's trial was critically different from the procedure in Jones's trial. The procedure here was completely disconnected from any sitting jurors. It occurred before the jury venire arrived in the courtroom, and it involved counsel for both parties merely choosing a seat number. This was the selection of an empty seat, not an individual juror. This procedure does not involve the same risk of manipulation or chicanery as did the procedure used in *Jones*. It does not raise any serious questions about the overall fairness of the trial because we are assured by the timing of this procedure that the selection was truly random. Thus, we hold that logic does not require the pre-voir dire selection of alternate juror seats to occur in open court.

Both *Sublett* prongs are required to implicate the public trial right, and neither prong has been met here. 176 Wn.2d at 73. We hold that the public trial right was not implicated and Gotcher's argument fails.[7]

II. SENTENCE

Gotcher argues that the trial court abused its discretion by failing to consider an exceptional sentence downward from the standard range. We disagree.

[7] Because we hold that the public trial right does not attach to the pre-voir dire selection of alternate juror seats, Gotcher's claim fails. But we note also that, even if the public trial right attached to this procedure, Gotcher's claim would fail because he has failed on the record before us to carry his burden of demonstrating that the court was closed.

A. *Standard of Review*

Generally, the length of a sentence is not appealable so long as it falls within the correct standard sentencing range. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). While a defendant may appeal the sentencing court's determination of the appropriate standard range, he may not challenge the court's discretionary imposition of a sentence that lies within that range. *Williams*, 149 Wn.2d at 146-47. "[S]o long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length." *Williams*, 149 Wn.2d at 146-47.

When a sentencing court declines to grant a downward departure from the standard range, appellate review is limited to circumstances where the trial court entirely refuses to exercise its discretion, or where it has relied on an impermissible basis for refusing to grant a downward departure. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). "A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range." *Garcia-Martinez*, 88 Wn. App. at 330. The failure to consider a downward departure is reversible error. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). However, a trial court has exercised its discretion, and its decision is not reviewable, if it has "considered the facts and concluded there is no legal or factual basis for an exceptional sentence." *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

B. *Standard Sentence Not Appealable*

Gotcher argues that the trial court refused to consider a downward departure, making his standard range sentence reviewable. We disagree: the trial court did consider a downward departure.

Gotcher mischaracterizes the record of sentencing. He argues, without citing the record, that "the court categorically denied to even consider an exceptional sentence downward because Gotcher denied guilt and put the prosecutor to the test to prove the charges against him." Br. of Appellant at 19. The record does not support these allegations. Instead, the record contradicts Gotcher's assertion that the trial court categorically refused to consider a downward departure. The record shows that the trial court reviewed the parties' briefing and supporting documentation and heard argument, then concluded that no legal basis had been established on which to impose an exceptional sentence below the standard range.

The trial court did not fail to exercise its discretion. Gotcher's standard range sentence is not reviewable.

III. STATEMENT OF ADDITIONAL GROUNDS

In his pro se SAG, Gotcher alleges two further errors: he claims that we should reverse the jury verdict because (1) AE's testimony was inconsistent regarding the offense dates, and (2) the trial court should not have admitted evidence of poems Gotcher wrote to AE. We disagree.

A. *Victim's Testimony*

First, Gotcher urges us to reverse the jury verdict because "the charging dates and the dates given by [AE] in court do not match." SAG at 1. He contends that the State charged

incidents between June 1, 2010, and September 15, 2010, whereas AE stated that the incidents occurred "in the summer before she turned 16 and that she was 15 years old at the time."[8] SAG at 1. Because AE was born in July 1995, she turned 16 in July 2011. AE was therefore 15 from July 2010 until her birthday in July 2011; thus, the charging dates of June to September 2010 align with her testimony that Gotcher raped and molested her when she was 15 and in the summer "before [she] turned 16." 2 VRP (Jan. 7, 2014) at 42.

Moreover, the persuasiveness, credibility, and weight of the evidence are matters for the trier of fact and are not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Thus, Gotcher's assertions about the dates AE provided do not support reversal of his conviction. Gotcher attacked AE's credibility at trial through his own testimony as well as that of other witnesses. The jury weighed these witnesses' credibility and determined the facts; this determination is not subject to appellate review.

B. *Poems*

Gotcher next asserts that the jury should not have heard evidence of poems Gotcher wrote, which were found on the iPod. First, Gotcher claims that the iPod evidence "was not shared with the Defense Counsel until minutes before it was presented at trial." SAG at 2. Thus, Gotcher asserts that he was not afforded time to prepare a defense to the evidence. This claim fails. The record does not support the assertion that defense counsel had no opportunity to

[8] As stated above, the child molestation count's charging dates were July 26, 2009 through October 31, 2010; the first child rape count's charging dates were July 26, 2009 through July 25, 2011; and the second child rape count's charging dates were June 1, 2010 through September 15, 2010. At the outside, these dates span from AE's fourteenth birthday through the day before her sixteenth birthday.

prepare a defense to the iPod evidence. When the State first moved to lay a foundation to admit the messages as exhibits, Gotcher's counsel stated, "I received copies of these in advance of trial." 2 VRP (Jan. 7, 2014) at 3. Thus, the record does not support Gotcher's assertion that this evidence was not timely disclosed.

Second, Gotcher argues that the poems were not properly authenticated, and may have been altered by the detective. We disagree: the iPod messages were properly authenticated, and Gotcher did not object to their admission as exhibits. Under ER 901(a), an item is authenticated if there is sufficient evidence to support a finding that the item is what the proponent claims it is. Here, AE and Detective Wallace testified to the chain of custody: AE testified that she received the iPod containing the messages from Gotcher, and Detective Wallace testified that he received the iPod from AE. This testimony supports a finding that the messages were written by Gotcher; thus, they were admissible under ER 901. Moreover, after the State laid a foundation for the admission of these messages during AE's and Detective Wallace's testimony, Gotcher said, "No objection" to their admission as exhibits. VRP (Jan. 8, 2014) at 47-50. Thus, this claim fails.

Third, Gotcher asserts that the iPod evidence supported the State's "lustful disposition" theory, but that because the poems were not written until nearly two years after the rapes, the poems were irrelevant to that theory. SAG at 2. But Gotcher never objected to the relevance of the poems; thus, this argument is not preserved for appeal, and we do not consider it. RAP 2.5.

IV. PERSONAL RESTRAINT PETITION

Finally, in a PRP, Gotcher argues that the prosecutor wrongly withheld exculpatory *Brady*[9] evidence of a separate prosecution of another defendant for raping AE. Specifically, he argues that evidence of this other prosecution involved "[s]tatements . . . made by [AE] and her mother," which "call into question whether anything could have happened between her and I and conflict with statements they made in this case." PRP at 3. We disagree and we deny the petition.

A. *PRP Principles*

A PRP is not a substitute for a direct appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). Accordingly, there are limits on the use of a PRP to collaterally attack a conviction. *Hagler*, 97 Wn.2d at 824.

Because a defendant's rights to due process are implicated when the State suppresses exculpatory evidence, a *Brady* violation claim implicates constitutional rights. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). When considering constitutional arguments raised in a PRP, we must decide whether the petitioner can show that a constitutional error caused actual and substantial prejudice. *Hagler*, 97 Wn.2d at 826-27. If the petitioner fails to make a prima facie showing of actual and substantial prejudice caused by constitutional error, we deny the PRP. *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

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[9] *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

B. *Failure To Disclose Separate Prosecution Was Not a* Brady *Violation*

The State violates a defendant's rights to due process when it suppresses evidence that is material to either guilt or punishment, regardless of whether the prosecutor acted in good faith. *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). To establish a *Brady* violation, the defendant must show that the State suppressed evidence favorable to the defendant and the suppression prejudiced the defendant. *Strickler*, 527 U.S. at 281-82. The State must disclose both impeaching and exculpatory evidence, and the prosecutor must disclose all favorable evidence known to either the prosecutor or the police. *Strickler*, 527 U.S. at 280-81. A defendant can show prejudice "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler*, 527 U.S. at 280 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). "'A *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information' at issue." *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998) (quoting *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir.1994)).

Here, Gotcher's *Brady* claim fails. First, as evidenced by the transcript of the telephone call, Gotcher either actually obtained, or could have obtained, the information about the Gaiser incident. In the course of telling Gotcher she did not want to file a police report, AE said, "You know about like the whole Jacob Gaiser thing." Br. of Resp't (Attachment A at 1). This statement, in its context, demonstrates that Gotcher was aware, or through the course of reasonable diligence could have been aware, that AE had reported Gaiser's crime and that a

prosecution followed. Despite this, Gotcher argues that "simply saying that I had heard about it is not enough since I did not know when it happened, the full name of the person who committed the crime or the details which could have put into question the alleged facts in my case." Reply PRP at 1. But Gotcher's phone call with AE shows that Gotcher had sufficient information about the Gaiser incident that Gotcher, exercising due diligence, could have obtained evidence of Gaiser's prosecution. Therefore, the State's failure to disclose this information was not a *Brady* violation. *Benn*, 134 Wn.2d at 916.

Second, Gotcher cannot show the required level of prejudice to establish a *Brady* violation. He must show a reasonable probability that the outcome of his trial would have been different had the prosecution disclosed the evidence. *Strickler*, 527 U.S. at 280. He does not do so here: he shows merely that there is a possibility that he could have impeached AE's general story about her mood during the summer of 2010 with evidence that she was going through another traumatic experience at the time. He does not show that evidence of Gaiser's rape of AE in any way made it less likely that Gotcher raped and molested her. Thus, his claim fails.[10]

CONCLUSION

In conclusion, we disagree with Gotcher's assignments of error and we deny his PRP. He has failed to show a public trial violation or that the trial court abused its discretion by failing to consider a downward departure. Nor did any evidentiary errors at trial require reversal. Finally,

[10] Alternatively, even if Gotcher could establish a *Brady* violation, he cannot succeed in his PRP because he fails to make a prima facie case of actual and substantial prejudice resulting from the prosecutor's failure to disclose information about the Gaiser trial. He merely speculates that being able to provide evidence of a prosecution relating to other traumatic events in AE's life around the time of the rapes in Gotcher's case would have altered the jury verdict.

he has failed to show a *Brady* violation. We affirm his convictions and sentence and we deny his PRP.

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

Worswick, J.

We concur:

Johanson, C.J.

Maxa, J.

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

PRE-SENTENCE INVESTIGATION

TO: The Honorable David L Edwards
Grays Harbor County Superior Court
NAME: GAISER, Jacob J
ALIAS(ES):
CRIME(S): Rape Of A Child 3rd Dg
DATE OF OFFENSE: 3/15/10
PRESENT ADDRESS: Grays Harbor County Jail

DATE OF REPORT: 1/13/11
DOC NUMBER: 345780
COUNTY: Grays Harbor
CAUSE #: 10-1-195-9
SENTENCING DATE: 1/24/2011
DEFENSE ATTORNEY: David Mastachkin

I. OFFICIAL VERSION OF OFFENSE:

This information is taken from the Grays Harbor County Prosecuting Attorney's file, Grays Harbor County Sheriff's Office Police reports, witness statements, and an interview from the Children's Advocacy Center of Grays Harbor.

On 3/27/10, at approximately 1:20 pm, Grays Harbor County Sheriff's Deputies responded to a call from a Mrs. Eaton who reported a sex offense involving her 14 year old daughter, Aisha Eaton, and a man believed to be around 20 years old. Mrs. Eaton stated that her older daughter, Paige, told her that she heard from friend that Aisha may have had sex with 20 year old man. Mrs. Eaton stated that she confronted Aisha about this on 3/25/10, and Aisha admitted that she lost her virginity to Jacob Gaiser. Aisha told her mother that the sex occurred at their home on Cedar Creek Road when she was left home to babysit her seven year old brother and little baby sister a week before. Aisha told her mother that she met Jacob on the internet and he developed a relationship with her.

On 4/1/10, Detective McGowen conducted a forensic interview with Aisha at the Children's Advocacy Center (CAC) in Montesano. Aisha admitted during the interview that she met Jacob Gaiser a couple of days before St. Patrick's Day, which was 3/17/10. Aisha stated that she was home babysitting her younger siblings while her mother was

gone doing errands when Jacob Gaiser came to her home. Aisha said that she went with Jacob to an upstairs apartment in their home where one thing lead to another and they had sexual intercourse. Aisha said that they were laying on the floor with their clothes off and had sex. She said that Jacob used a condom which he brought with him and had vaginal intercourse with her. Aisha said that Jacob knew she was only 14. Aisha said that she had not planned on having sex with Jacob Gaiser, and she was surprised when it happened.

On 4/2/10, at approximately 1:45 pm, Sgt. Shumate interviewed Jacob Gaiser and he admitted that he went to Aisha Eaton's home a couple of weeks ago and had sexual intercourse with her. Jacob stated that he brought a condom and used it when he had sex with her. Jacob said that he knew Aisha was 14, and too young to have sex with, but he wasn't thinking of that at the time.

II. **VICTIM CONCERNS:**

On 10/28/10, the victim's mother (Beth Eaton) informed Prosectting Attorney (Katherine Svoboda) that an official at her daughter's school had seen Jacob Gaiser and Aisha together around the Oakville high school after the offense. On 1/6/11, I conducted a PSI interview with Gaiser at the Grays Harbor County Jail and he admitted to me that about two months after he had sex with Aisha that he sat with her at an Oakville high school football game and held her hand. Gaiser stated that he likes Aisha very much and would like to continue their relationship when he gets out of jail. Gaiser said that after he had sex with Aisha he communicated with her regularly on My-Space.

On 1/13/11, I called over the telephone and spoke to Aisha and her mother, Beth Eaton, regarding how the offense has affected her and her family. Beth stated that since the rape, Aisha has been depressed and doesn't want to do anything or spend time with her friends. Beth stated that Aisha has isolated herself and doesn't participate in the activities that she used to enjoy prior to the rape. Beth said that Aisha doesn't sleep very well at night and hasn't wanted to talk about the rape or get counseling. Aisha stated that since the rape she has been less happy and more depressed and has a worse relationship with her parents. Aisha said there has been a big lack of trust between her and her parents since the offense and she blames her mother for turning him in. Aisha said she still has feelings for Mr. Gaiser and has not decided if she wants to pursue a relationship with him when he gets out of prison.

III. **DEFENDANT'S STATEMENT REGARDING OFFENSE:**

On 1/6/11, I conducted a PSI interview with Gaiser at the Grays Harbor County Jail regarding his current conviction of Rape of a Child. Gaiser told me that he knew Aisha through her two older sisters and that they all have attended Oakville high school. Gaiser said through talking with Aisha at school and on My Space they became friends. Gaiser said that around Saint Patrick's Day in 2010, he received a phone call from Aisha asking him to come over to talk and help her clean. Gaiser said that when he came over Aisha's mother was not home and she was babysitting her two younger siblings. Gaiser said that he went with Aisha to a room above her garage to help her clean. Gaiser said that shortly after arriving in the room he sat down with Aisha and they began kissing and making out.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHARLES R. GOTCHER,

Appellant.

No. 46119-6-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **February 23, 2016** opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Worswick, Johanson

DATED this 14th day of April, 2016.

FOR THE COURT:

Maxa, A.C.J.
ACTING CHIEF JUDGE

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P R O C E E D I N G S

Friday, 11:10 a.m.

(Jury enters.)

THE COURT: I have called you back into the courtroom in order that I can clarify the situation of where we are at at this point. I caution you at this point, you are not to say one word in this courtroom. You are still in the deliberative phase. And it is highly improper to have any discussion with a jury.

I have been presented with a note that reads, "What will we do if we cannot come to a unanimous decision?" I have also, prior to receiving that, requested that the bailiff give you the menus to order lunch. And I had received a prior note that you wish to listen to the CD tape again. That places me in a position of: Normally we run into a question of whether or not a jury has a reasonable probability of arriving at a verdict. What I am going to do is ask you to, please, step back in the jury room, have a discussion among yourselves.

It's quite simple: You would like your lunch. You would like to listen to the tape. And we will have you brought back. And we will order lunch. And you may continue deliberations.

Or in the alternative, you wish to be brought back in to discuss whether or not there is a reasonable probability of your arriving at a verdict.

I'm going to ask you to go back, have that discussion, and simply notify the bailiff that you either wish to be brought back in here, or you would like your lunch and brought back in here to listen to the tape, one or the other. Nothing further. Thank you. Back to the jury room.

(Jury leaves.)

(Recessed from 11:15 p.m. until 3:50 p.m.)

(Jury enters.)

THE COURT: Have a seat.

We're all ready, correct?

MR. STROPHY: I believe we're ready, your Honor.

THE COURT: Ms. Rohrer, I'm going to assume you are the presiding juror, correct?

PRESIDING JUROR: Yes, sir.

THE COURT: It took me quite awhile, but it's always the one with the paper in their hand.

Please, give it to the bailiff.

THE REPORTER: What was the name?

THE COURT: Rohrer, R-O-H-R-E-R.

THE CLERK: Verdict Form Count No. 1, "We, the jury finds the Defendant Charles Gotcher guilty of the

with a child who is at least 14 years old but less than 16 years old who is not married to him or her, and who is at least 48 months younger than the person.

A person commits the crime of rape of a child in the third degree when the person has sexual intercourse with a child who is at least 14 years old but less than 16 years old who is not married to the person, and who is at least 48 months younger than the person.

No. 3. Mr. Charles Gotcher has entered a plea of not guilty to all crimes charged. That plea puts in issue every element of each crime charged.

The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. Mr. Gotcher has no burden of proving that a reasonable doubt exists. Charles Gotcher is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It's such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If from such consideration you have an

A Aisha Eaton, A-I-S-H-A, E-A-T-O-N.
Q Aisha, what's your date of birth?
A July 26, 1995.
Q Have you ever been married?
A No.
Q Ms. Eaton, are you employed right now or go to school?
A I'm kind of employed. Seasonal job.
Q Do you know Charles Gotcher?
A Yes.
Q Do you recognize him in the courtroom today?
A Yes.
Q Could you point out to the jury what he's wearing?
A Black jacket with a tie and a shirt.
Q When did you first meet Mr. Gotcher?
A When I was 11 or 12 years old.
Q Where did you meet him?
A Water of Life Family Church.
Q Where is that located?
A Oakville, Washington.
Q At that time where did your family live?
A In Oakville.
Q Who all lived in your house?
A Me, my older sister -- I don't remember if that was before my older sister graduated or not. Both my older

that year, early of the following year, which would have been 2011, right, 2010 to 2011? That's when that second incident would have occurred. Again, Count 2 we're not disputing the dates, but that gives us a chronology.

And then she was also clear that that third incident at the bonfire where she claims they had sexual intercourse, that it happened in the summer before she turned 16, which by basic math, if she was born July 26 of '95 -- or maybe it was July '95. I don't remember the actual date now. I think it was the 26th or the 24th. And when it happened, if everything else happened in 2010 and then we move into 2011, it would have been that summer, but before she was 16, right, or else it wasn't a crime?

If it happened, well, the dates set forth for you in Count 3 don't extend into 2011; so even that count doesn't add up. And even if you were to believe everything else, you'd have find her -- him not guilty of Count 3 on that alone. Of course, there's plenty other reasons to find reasonable doubt, but that alone doesn't match the undisputed testimony from Aisha -- not undisputed testimony, but the clear testimony from Aisha about when this occurred.

But what it all comes down to, ladies and

that reasonable doubt. Right?

When you walk in there, the first thing everyone should be thinking is, "All right. For right now" -- "now let's start talking about it and work through it." And did they overcome that burden? When you see all those weaknesses in the credibility of the stories and the inconsistencies in the statement with logic and reason and other statements, that creates a reasonable doubt. And in having that reasonable doubt, we will ask you to return a verdict of not guilty to all three counts.

Thank you.

THE COURT: If you desire, you may readdress the panel, Counsel.

MS. SVOBODA: Thank you.

I'd like to talk a little bit about the dates and what you have in the instructions. And when Ms. Eaton testified -- and using the testimony of the other witnesses, when she testified on direct she said the first incident was when she first worked at the corn maze, which was -- or when first going to the corn maze fall of 2009. And the incident at her parents' house was later that winter, which -- so it would have been late '09, early 2010. And then the following summer was incident at her sister's house, and she termed it

the summer before her 16th birthday.

And so Mr. Strophy has extrapolated that to mean, well, the summer she turned 16 was 2011, so it was that summer before her birthday. Reasonably you'd say the summer before her 16th birthday was 2010. And that's consistent with what she described, that these incidents were spaced sort of one, two, three. It wouldn't really make sense that there was the incident in the car, the incident in the house, and then almost 18 months until something else was tried.

And so -- and the specific dates are not as important as the specific incidents. And so if you look at what she described and if it falls in those date ranges, that's really what's important. And sometimes those dates are -- it's hard to be exact. And because it's not a defense that -- he's saying he never did it. So the specific date is less important. And this goes to one of those places where the jury really needs to open their mind and take the law as it's given.

And the same with the charges, you may have come into jury selection with an idea of what a rape was and that that might describe force or that might describe a kidnapping. But in this particular case, because of Ms. Eaton's age, she was legally incapable of

A No. I don't think I did.
Q At the corn maze, there's two corn mazes, right?
A Yeah.
Q One is a regular maze and then another one is a haunted maze; is that right?
A That's right.
Q And you worked the haunted maze with Charles --
A Yes.
Q -- in 2010?
A Yes.
Q I believe you testified earlier you always worked with Charles. You didn't work separately in 2010, that is.
A Yeah.
Q In the different years that you've gone there and worked there was the maze always the same or did they change it every year?
A The haunted maze, I guess they kind of change it every year because they have to cut out a new pattern anyways. The regular maze always changes completely. They make it a different theme, a different pattern. The haunted maze they'll change it based on what they need to add.
Q Now, when you worked with Charles what location in the maze did you guys usually work?
A We were more towards the end.
Q By the tunnel there that's at the end usually,

everything yelling, "Anybody want water?" We could also go and exit the corn maze whenever we wanted to and go get stuff as well.

Q If you need to use the bathroom you could leave to go to the restroom and come back?

A Yeah.

Q That was Halloween season of 2010. It was that same year when he stopped the car that night and instead of taking you home he went passed your house?

A Yeah.

Q Now, on that occasion did he have anyone else in the car that he dropped off first or was it just the two of you?

A It was just the two of us.

Q When he made his move he just kind of put his hand in your pants? That was it?

A I know there was something that led up to it. I don't remember all that happened. I just remember vaguely that he did and put his hand in my pants and fingers in my vagina and I remember telling him "Stop" because I really wanted to go home and take a shower.

Q Do you remember if he tried to set the mood first by talking to you, sweet talking you, foreplay, playing with your hair, other types of romantic overtures?

A I don't really remember.

Q Do you remember talking to me on an earlier occasion

saying not that he didn't remember but that he didn't do anything, that he just went right for it. Do you remember that's what you said before?

A I don't remember.

Q The incident that you say happened at your parent's house in Oakville, was that after the alleged car incident?

A I think so, yeah.

Q Now, do you remember if it was before the end of the year or maybe sometime early 2011?

A Probably towards the end of the year, I think. I think it all ended up happening toward the end of that year.

Q It was sometime during the wintertime for sure. It's possible that it could have happened after the first of the year.

A I guess.

Q That's fine.

Now, you said earlier that your parents were home that day.

A Yeah.

Q Charles came over, wanted you to show him -- did he bring his guitar and want you to show him to play anything on the guitar that day or is that another occasion?

A I don't remember if he brought his guitar that time but I know he was bringing his guitar over a lot because he wanted me to teach him really badly how to play the guitar.

bedroom with you?

A Slightly.

Q What do you mean by that?

A Like it was partially closed, partially open.

Q Then it was after that in early the summer before July 26 when you turned 16 that the bonfire incident happened; is that right?

A Yeah.

Q And you were drunk that night?

A Yeah.

Q You had a lot to drink?

A Yeah.

Q So much so that you could barely walk?

A Yeah.

Q Now, you said that your brother and sister-in-law were there at the fire too.

A Part of the time, yeah.

Q Did they know you were drinking?

A I don't know if they knew. I feel like it would have been apparent.

Q Had they allowed you to drink at their house before?

A I don't think so. No.

Q But you agreed to follow Charles over to that shed, for lack of a better word?

A Yeah.

clearly?

A Not completely clear. It was on Dayna's cell phone. It was kind of a cheap little cell phone and we had it on speaker phone. And if you've ever had a phone on speaker phone, you generally have to shut it off of speaker phone and put it up to your ear. It's pretty mumbled and everything. I did my best to make out what she was saying, between what she was saying and me talking to Dayna about things, getting frustrated and setting the phone down.

Q Okay. Now, did you -- as we heard in the phone call, there were some long pauses. What -- why would -- why did that happen?

A Because I -- she would start getting -- she started out the phone call, you know, talking about how she didn't know what was going through Brooklee's head and all that. And I was, you know, reiterating what she said to make sure that I heard her clearly because, you know, it was through the speaker phone. And then she started getting -- you know, throwing out some wild accusations, and I was getting confused. And I'm like, you know, what just happened here?

And so then I'd put the phone down and I'd talked to Dayna and I'd be like -- I'd be like, did you hear what just happened? What's going on? I mean, am I losing my mind? Why would she, you know, suddenly do a 180 on the conversation like that? I mean, where did that come from?

A couple times she started yelling at me and I started getting really frustrated, and I'd set the phone down and walk away because I've learned not to -- not to have a conversation in -- in a fit of rage or a really heated conversation, because nothing gets resolved out of anger.

Q Okay. Now, when you said you set the phone down, what do you mean by that; you physically set it all the way down or...?

A Correct. There was -- there was at least two points in time where I just set the phone down and I was like, I don't even know what to do, and I threw my hands up in the air and I walked out of Dayna's sister's apartment. And Dayna came out and grabbed me, and she's like -- she's like hey, just calm down, you need to get back on the phone, finish the conversation, just keep talking to her, calm down. And she'd be calming me down and then we'd, you know, discuss, you know, what she was, you know, saying.

Q Okay. And when you talked to -- during that phone call were there times when you would talk to Dayna?

A Correct.

Q Okay. And when you did that, what -- did you -- what did you do with the phone?

A Dayna was giving me a lot of feedback on the conversation, as well as her sister. And when they'd be talking to me, then I'd -- then I'd muffle the phone kind of against, you know, my chest so that it wasn't completely audible what Dayna was

saying.

Q Okay. Now, at the end of the call, did you hear Aisha accuse you of having had sex with her?

A No, I didn't hear any of that. I had set the phone down when I started getting really frustrated and when I was like -- pretty much from the point when I was like, hey, I've got to plug the phone into the charger; I was pretty much away from the phone for the rest of that. I'd get back on for a second and be like hold on a second, I'll be right back, hold on, somebody is making a phone call. I just, you know, wanted off the phone.

Q Okay. Now, did you -- when you were trying to talk, could you hear what was coming through the speaker on the other side?

A While I was talking?

Q Yeah.

A I couldn't make out anything that was being said while I was talking. She'd say something and then I'd go to answer it or argue and then she'd talk right over the top of me.

Q When she did that, were you able to tell what she was saying?

A No. No, because I was still trying to continue, you know, my -- my sentence, finish what -- you know, my thought.

Q Now, why didn't you just blatantly deny whatever she was trying to say?

A That was a discussion that me and Dayna had had beforehand,