No. 68766-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

D'MARCO MOBLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Monica Benton

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

D'Marco Mobley was prosecuted for multiple criminal offenses arising out of his alleged pimping of three young women. Prior to trial, the State tendered a plea offer in which the State miscalculated the potential sentence that Mobley faced if he went to trial. Instead of conducting his own research regarding the potential sentence, defense counsel accepted the State's calculation as correct. As a consequence, he told Mobley that if he was convicted, his sentences for two counts of rape in the first degree would run concurrently, not consecutively. In reliance on his counsel's erroneous advice, Mobley went to trial.

The United States Supreme Court has held that an accused person who does not accept a plea offer, and instead goes to trial based upon his counsel's misadvice, has been denied his Sixth Amendment right to the effective assistance of counsel at a critical stage of the proceedings and is entitled to relief. Here, Mobley is entitled to have his convictions and sentence set aside so that he may be placed in the status quo ante, and decide whether to accept the State's plea offer based upon a correct apprehension of the sentencing consequences of being convicted at trial.

Mobley's ineffective assistance of counsel claim is dispositive. If this Court nevertheless reaches the trial errors, this Court should hold that Mobley's conviction for kidnapping in the first degree with a firearm

enhancement merges into the rape in the first degree convictions of which it was an element, and that under the law of the case doctrine the State did not prove that Mobley committed the offense of promoting commercial sexual abuse of a minor. Other errors, both pretrial and during trial, separately warrant reversal of Mobley's convictions and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. Defense counsel's misadvisement regarding the sentencing consequences of trial versus a guilty plea denied Mobley the effective assistance of counsel he was guaranteed by the Sixth Amendment.

2. In violation of the Fourteenth Amendment guarantee of equal protection, the trial court erred in denying Mobley's Batson objection to the State's peremptory challenge of an African-American juror.

3. The trial court abused its discretion in finding testimony from the State's prostitution expert witness was relevant, not cumulative, and admissible.

4. Prejudicial misconduct by prosecution witness Richard McMartin violated Mobley's Fourteenth Amendment right to a fair trial and was not cured by an instruction telling the jury to disregard the testimony.

5. The evidence was insufficient to support Mobley's conviction on count I, commercial sexual abuse of a minor, as the crime was prosecuted by the State and submitted to the jury.

6. The trial court's failure to merge at sentencing count 3, charging kidnapping in the first degree, with counts 6 and 7, charging rape in the first degree based on kidnapping, violated Mobley's Fifth Amendment right to be free from double jeopardy.

7. The use of juvenile adjudications to elevate Mobley's SRA offender score and the maximum punishment to which he was exposed violated his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process.

8. Cumulative error denied Mobley his Fourteenth Amendment right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment right to the effective assistance of counsel at critical stages of the proceedings extends to the plea bargaining stage, and is applicable when, based on the erroneous advice of counsel, an accused person rejects a plea offer and goes to trial. Defense counsel affirmatively misadvised Mobley that if he was convicted as charged at trial, his sentences on serious violent offenses would run concurrently with, rather than consecutive to, one another. In reliance on this advice

Mobley rejected a guilty plea offer that would have substantially reduced the charges and his potential penalty. Did defense counsel render ineffective assistance of counsel, requiring remand so the State can reoffer the original plea deal? (Assignment of Error 1)

2. The equal protection clause of the Fourteenth Amendment prohibits racial discrimination in jury selection. The prosecutor struck a black potential juror claiming that her answers to a question from defense counsel caused him to want more information from her, instead of asking the court's permission to ask follow-up questions. Did the strike violate the equal protection clause of the Fourteenth Amendment? (Assignment of Error 2)

3. Expert testimony is admissible only if it concerns a topic outside the knowledge of the average lay juror and is relevant to an issue to be decided at trial. Expert testimony should be excluded if it is unduly prejudicial or cumulative of other evidence in the case. Where the State called as witnesses three prostitutes who educated the jury about pimp-prostitute culture, the subject-matter of the prosecution expert's testimony was highly prejudicial, and the expert's testimony had the effect of vouching for the prostitutes' veracity, should the expert's testimony have been excluded? (Assignment of Error 3)

4. Prejudicial misconduct by the prosecution may deny an accused person his right to a fair trial guaranteed by the Fourteenth Amendment. Did testimony from a police officer regarding Mobley's extensive criminal history and known possession of weapons constitute misconduct that denied Mobley a fair trial? Was a curative instruction insufficient to dispel the taint from the prejudicial testimony? (Assignment of Error 4)

5. Under Washington's "law of the case doctrine", the State assumes the burden of proving added elements that have been included without objection in the "to convict" instruction. For purposes of count I, Promoting Commercial Sexual Abuse of a Minor, the "to convict" instruction required the State to prove that Mobley "knowingly profited from a minor engaged in sexual conduct." Where the State presented no evidence that Mobley knew that the young woman in question was a minor or was aware of facts or circumstances that would cause a reasonable person to believe she was a minor, did the State fail to present sufficient evidence to prove the elements of the offense under the law of the case? (Assignment of Error 5)

6. Where the evidence was insufficient to prove the alternative means of committing the crime – that Mobley knowingly advanced J.J.'s commercial sexual abuse – must Mobley's conviction be reversed and dismissed? Alternatively, where this Court cannot conclude that the jury

was unanimous as to this means, is Mobley entitled to a new trial? (Assignment of Error 5)

7. The Fifth Amendment's double jeopardy clause protects against multiple punishments for the same offense. Washington's merger doctrine is predicated on double jeopardy principles and requires that where a defendant is charged with multiple offenses, one of which merges into another completed offense, the offense that merged with the separately charged offense be extinguished. Mobley was prosecuted, inter alia, for kidnapping and two counts of rape. Both rape counts were elevated from second- to first-degree rape by the kidnapping. Must the kidnapping conviction be vacated and Mobley resentenced? (Assignment of Error 6)

8. An accused person has the Sixth Amendment and Fourteenth Amendment right to a jury determination, on proof beyond a reasonable doubt, of the facts necessary to punishment. Did the use of prior juvenile adjudications, which were found by a judge, not a jury, to enhance Mobley's punishment violate his rights under the Sixth and Fourteenth Amendment? (Assignment of Error 7)

9. Even where no single error standing alone merits reversal, the cumulative effect of multiple errors may deny an accused person his Fourteenth Amendment right to a fair trial. Was Mobley denied a fair trial by the accumulation of prejudicial errors? (Assignment of Error 8)

D. STATEMENT OF THE CASE

1. Substantive facts and criminal charges.

D'Marco Mobley met A.W. in the autumn of 2010 through a mutual friend. 2/14/12 RP 44; 3/12/12 RP 112.[1] A.W. was working as a prostitute, and Mobley entered into an intimate relationship and eventually a pimp-prostitute relationship with her.[2] 2/14/12 RP 45, 52-55, 57; 3/12/12 RP 116. Later that fall, the two traveled together to California, where A.W. worked for Mobley as a prostitute. 2/14/12 RP 58-64.

Mobley told A.W. soon after they met that he was involved with another girl, but that she was in jail. 2/14/12 RP 56. When the other girl, Victory Rogers, came to California, Mobley resumed his relationship with her, which distressed A.W. 2/14/12 RP 64-65, 69-70. Her own relationship with Mobley deteriorated, and, according to A.W., Mobley was violent towards her. 2/14/12 RP 74-76. When they returned to Seattle, upset by Mobley's treatment of her, A.W. stopped working for Mobley and they had no further contact for a couple of months. 2/14/12 RP 80-81.

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[1] The verbatim report of proceedings consists of 3,448 pages of transcripts. They are cited herein by hearing date followed by page number, e.g., 2/14/12 RP 44.

[2] A.W. testified that Mobley became her pimp a week and a half after they met. 2/14/12 RP 52-53. According to Mobley, A.W. did not start working for him until the two traveled with other friends to California. 3/12/12 RP 116-17.

In March 2011, A.W. returned to Mobley and resumed working for him based on an agreement that he would stop seeing Rogers and she would stop working as a street prostitute, and only get dates via the internet. 2/14/12 RP 80-81. Later that spring, they met J.B., also a prostitute. 2/14/12 RP 83-85. According to A.W., Mobley suggested that J.B. should come and work with them.[3] 2/14/12 RP 85. He told A.W. that if J.B. worked with them, A.W. would not have to work so hard, and asked her to persuade J.B. to join them. Id.

J.B. thought that A.W. seemed happy, secure, and confident that she would not be hurt by a date. 2/28/12 RP 120. She liked A.W., and liked Mobley, who seemed nice, respectful, and kind. 2/28/12 RP 121-22. A.W. told J.B. that she adored Mobley, that Mobley took care of her, and that she would probably be homeless without him. 2/28/12 RP 122. J.B. found Mobley attractive and wanted to be his girlfriend. 2/28/12 RP 123-24. She started staying with him and A.W. and began to work for Mobley. 2/28/12 RP 124-28. Eventually, J.B. and Mobley had sex with one another. 2/14/12 RP 88; 2/28/12 RP 129-30.

This new relationship caused problems between Mobley and A.W. 2/28/12 RP 136. J.B. felt that A.W. was angry because J.B. was treated as well as she was and that she was jealous of J.B. 2/28/12 RP 137. The

[3] Mobley testified that he never had a pimp-prostitute relationship with J.B. 3/12/12 RP 138.

situation came to a head at a Best Western on Denny Way, in Seattle, where, according to A.W., Mobley and J.B. blamed her for some missing money. 2/14/12 RP 91-94. Mobley and A.W. argued, and A.W. decided to leave Mobley. 2/14/12 RP 95. She packed her things and called a friend to pick her up. 2/14/12 RP 96.

After she left, Mobley called her on her cell phone because she left with the hotel room key and he was locked out. 2/14/12 RP 96. A.W. had left her identification card in the room and agreed to return so that they could swap possessions. 2/14/12 RP 98. According to A.W., when she came back, Mobley grabbed her and pushed her into a car driven by J.B. 2/14/12 RP 99. While J.B. drove, Mobley abused A.W. physically and J.B. abused her verbally. 2/14/12 RP 99-100; 2/28/12 RP 141-43. In SeaTac, Mobley got out of the car and A.W. ran away. 2/14/12 RP 101. She did not report the alleged beating to the police. 2/14/12 RP 114.

J.B. continued to work for Mobley. 2/28/12 RP 144. In May 2011, Mobley went to Tennessee for the funeral of a close relative. 2/27/12 RP 77-78. J.B. saw this as an opportunity to leave Mobley, and sent him a text message in which she told him she would not be working for him anymore. 2/28/12 RP 145-46. She met another prostitute, J.J., with whom she got along well, and worked with her frequently. 2/28/12 RP 146-50.

J.J. claimed that she met Mobley independently through her pimp, "Boom Boom", also in the spring of 2011. 2/15/12 RP 139. She said that Mobley tried to induce her to work for him, and that on a few occasions, she gave Mobley money. 2/15/12 RP 157-61. J.J. was 17 years old during this time period. 2/15/12 RP 121. J.J. represented to Mobley and others that she was over eighteen. She went to a strip club,"Little Darlings,"[4] with Mobley and others before working for him. 2/15/12 RP 141. She also told J.B. that she was 19. 2/28/12 RP 150. Mobley believed that J.J. was 18 because he encountered her at Little Darlings and saw her smoking. 3/12/12 RP 28.

On June 19, 2011, J.B. and J.J. got a room together at the Red Roof Inn in SeaTac with the assistance of one of J.B.'s regular customers, "Jesse." 2/16/12 RP 32-33. They met up with "Kyle,"[5] a cousin of Mobley, and went with him to the Supermall in Auburn, where J.B. bought a new cell phone. 2/16/12 RP 34. Back at the hotel they posted personal advertisements on Backpage.com, a website they used to solicit customers. 2/16/12 RP 37. When they returned downstairs, they saw Mobley, who was on his way in. 2/16/12 RP 42; 2/28/12 RP 154.

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[4] According to its website, "Little Darlings" is "An Intimate Gentlemen's Club" that restricts admission to persons aged 18 and over. See http://www.littledarlings-seattle.com/contact.php, last accessed July 10, 2013.

[5] Several individuals were referred to at trial only by their first names or nicknames. Those names are bracketed with quotation marks in this brief.

Seeing Mobley made J.J. and J.B. nervous. 2/28/12 RP 154. They ran to J.B.'s car, and J.B. took J.J. with her to an outcall. 2/28/12 RP 155. She asked Jesse if he could rearrange their hotel situation, but he explained that since she had already used the room, he could no longer cancel; she could choose to leave or stay. Id. Back at the hotel, J.B. called Mobley. 2/28/12 RP 156. He told her he just wanted to talk to her, and that he did not want her to run away. Id. J.B. agreed to speak with Mobley in his car. 2/16/12 RP 46.

Initially, when J.B. entered Mobley's car, he told her that he missed her, that he was worried about her, and that he had thought about her. 2/29/12 RP 12. J.B. explained to Mobley that she no longer had feelings for him and did not want to work for him anymore. 2/29/12 RP 8. According to J.B., Mobley became angry and aggressive. 2/28/12 RP 156; 2/29/12 RP 8, 13-14. J.B. averred that he grabbed her and took her cell phone, purse with money, and car keys. 2/29/12 RP 13-14. He told her angrily that she was with him, had been with him, and should pay him. 2/29/12 RP 16.

J.B. asked J.J. to call "Bill," J.B.'s former pimp and sometime boyfriend for assistance. 2/29/12 RP 20. Later, Bill called J.J.'s phone and told her that they should come outside. 2/19/12 RP 25. When they came downstairs to the hotel parking lot, Bill and three of his friends were

confronting Mobley. At least one was pointing a gun at him.[6] 2/19/12 RP 25-26; 3/13/12 RP 21.

One of the men hit Mobley with a gun, and then all four men jumped him. 2/16/12 RP 68-69; 2/29/12 RP 26, 49-50; 3/13/12 RP 21. They took his phone, his car keys, his money, and his shoes, and beat him so severely he was rendered unconscious. 2/29/12 RP 50; 3/13/12 RP 22-24. After J.B. got her car keys back from Bill, she broke out the windows on Mobley's car. 2/16/12 RP 71. She and J.J. later drove to her father's house, in Renton. 2/16/12 RP 145.

There, they slept. When they woke up, they discovered Mobley and Kyle had tried to call them numerous times. 2/16/12 RP 147-48. According to J.J., Mobley threatened J.B. on the phone, and they decided to call the police. 2/16/12 RP 149-50. After they called the police, someone threw a rock through the window. 2/16/12 RP 151. They saw a tall black man outside the window, but were not able to confirm his identity. 2/16/12 RP 152.

That same night, on June 20th, a friend of J.B., Chavez, stayed the night with her. 2/29/12 RP 77-78. While J.B. was driving him home, Mobley telephoned her repeatedly. 2/29/12 RP 79. He told her that he did not have a ride or any money, and that he needed a ride to his mother's

[6] J.B. claimed that only one person was armed with a gun. 2/19/12 RP 26. Mobley said that all four men had guns. 3/13/12 RP 21.

house. Id. J.B. felt sorry for Mobley and agreed to pick him up. 2/29/12 RP 82. She dropped Chavez off at home and drove to the Fred Meyer in Renton, where Mobley was waiting for her. 2/29/12 RP 81-82.

Mobley asked her for a ride to Wal-Mart. 2/29/12 RP 83. Once in her car, they argued about who should drive; he said he did not feel safe with her driving, and they switched sides. 2/29/12 RP 84-85. As soon as Mobley got in the driver's seat, he pointed a gun at J.B. 2/29/12 RP 85.

Mobley instructed J.B. to wrap a black sweater she was wearing around her face, and he drove her to the Riverside Casino. Id. There, he parked in the parking lot and spoke briefly on the phone to someone. 2/29/12 RP 88. A few seconds later, another car pulled up beside them. Both cars then drove to a different part of the parking lot. Id.

According to J.B., Mobley told her that he was going to put her in the trunk of the car and she should not scream or freak out. Id. He pushed her into the trunk and closed it. Id. J.B. believed that a second man was driving and Mobley was sitting in the back seat. Mobley questioned her about where Bill lived, and what his phone number was. He said he would not kill her, but he would kill Bill. 2/29/12 RP 91. J.B. claimed that there was a hole in the seat back, through which a gun would occasionally be inserted. 2/29/12 RP 93.

The car stopped several times. On a couple of occasions, J.B. could hear other people talking and laughing, but she could not see them. 2/29/12 RP 96-98. J.B. claimed that at one point when the car stopped, Mobley and his companion threatened to make her swallow a bullet. 2/29/12 RP 97. Mobley told her he was not really going to make her swallow the bullet, but she should pretend it had been slammed down her throat. Id. She did not believe him, and she "freaked out" and threw up. 2/29/12 RP 98. She later overheard Mobley and the other man arguing. The other man thought that Mobley was being too nice to her. 2/29/12 RP 103. He told Mobley that if he did not stop acting so nice to her, he could join her in the trunk. 2/29/12 RP 108.

Eventually J.B. fell asleep. When she woke up, Mobley let her out and put her in the back seat. 2/29/12 RP 102. According to J.B., he said he could not believe she had been in the trunk all night, and asked her how bad she felt about him being beaten up by Bill. Id. He asked if she was really sorry and if she would do anything for his forgiveness. Id. He then asked her to perform oral sex on him, and she agreed, but he was unable to sustain an erection. 2/29/12 RP 103. This made him angry, and he smacked her face away from his penis and said it was her fault that he did not get hard. 2/29/12 RP 104. She was put back in the trunk. Id.

The other man came over. Mobley put J.B.'s sweater back over her head and put her in the front passenger seat of the car. 2/19/12 RP 105. The other man was seated in the driver's seat. He told her she would have to finish what she started. 2/29/12 RP 105. She performed oral sex on the other man. Id.

After this she was put back in the trunk. Mobley got out of the car, and the other man told J.B. that she was a "brave bitch" who did everything she was told to do. 2/29/12 RP 109. He drove to a gas station where he bought her a bag of chips and an iced tea. Id. He told her that she was going to be let out, and that they were going to meet up with Mobley. 2/29/12 RP 109. Soon after, J.B. heard her Camaro pull up, her sweater was placed back over her head, and she was placed in the passenger seat of her car. 2/29/12 RP 110. When the other man drove away, Mobley told her she could take the sweater off her head. Id.

They drove to her house, where she changed her clothing. 2/29/12 RP 113. He then drove to Seward Park, where he instructed her to call her regular customers to set up dates. 2/29/12 RP 114-16. J.B. got a regular customer to book her a room at a Motel 6. 2/29/12 RP 120. While she was in the motel room, King County Detective Brian Taylor contacted her and persuaded her to leave Mobley. 2/29/12 RP 123-25; 3/1/12 RP 32-33.

The next day, J.B. participated in a sting operation that led to Mobley's arrest. 3/1/12 RP 33-35; 3/7/12 RP 151-58.

Mobley was charged in King County with eight criminal counts arising out of these events: Promoting Commercial Sexual Abuse of a Minor, Promoting Prostitution in the Second Degree; Kidnapping in the First Degree, Robbery in the Second Degree, Promoting Prostitution in the First Degree, two counts of Rape in the First Degree, and Unlawful Possession of a Firearm. CP 445-48.

Sometime after J.B. was contacted by Taylor at the Motel 6, she participated in an interview about what had occurred. She did not tell him about the alleged oral sex; indeed, J.B. did not report the alleged rape until the case was referred for prosecution. 3/1/12 RP 38, 42. J.B. also provided conflicting descriptions of the second man, who participated in the alleged abduction with Mobley. 3/1/12 RP 55-56, 75. J.B. acknowledged lying repeatedly to the police officer who came to take a report when she and J.J. called the police from her father's house, and admitted that she smoked marijuana every day. 3/1/12 RP 101-03; 3/5/12 RP 14.

According to Mobley, after he was beaten up by Bill and his cohorts, he went to the home of Rogers' mother to recover, where he remained for approximately four days, up until the day that he was

arrested. 3/12/12 RP 42-44; 3/13/12 RP 28. Rogers' mother corroborated this testimony. 3/12/12 RP 42-44.

Mobley admitted to the jury that he was A.W.'s pimp, but denied having a pimp-prostitute relationship with J.J. or J.B. 3/12/12 RP 135, 138. He denied kidnapping J.B., and theorized that A.W., J.J., and J.B. invented the allegations in order to get rid of him. 3/13/12 RP 38; 3/15/12 RP 96-97.

2. The sentencing proceeding.

Mobley was convicted as charged. CP 343-51. At sentencing, the court rejected Mobley's argument that the two rape in the first degree counts were the same course of criminal conduct. 4/27/12 RP 15. The court imposed consecutive low-end sentences on the kidnapping and rape counts, a 60-month firearm enhancement on the kidnapping count, and ran the sentences on the remainder of the counts concurrently. 4/27/12 RP 44. The total term of confinement imposed by the court was 444 months. CP 399. Mobley appeals. CP 559.

E. ARGUMENT

1. **Mobley was denied the effective assistance of counsel he was guaranteed by the Sixth Amendment when his lawyer misadvised him regarding the sentencing consequences of going to trial versus taking a plea deal, requiring remand so he can decide whether to accept the original plea offer.**

a. Defense counsel misadvised Mobley during plea negotiations regarding the sentencing consequences of going to trial versus pleading guilty.

On January 4, 2012, prior to trial, the State conveyed a written plea offer to Mobley. CP 491-94.[7] The written memorandum apparently was prepared in response to defense counsel Phil Mahoney's "request to convey plea negotiations in written form so that they can be shared with [Mobley]." CP 492. The memorandum listed Mobley's criminal history, as the State understood it, the eight criminal charges, their seriousness levels under the Sentencing Reform Act of 1981 ("SRA"), and the standard sentence ranges that the State believed Mobley would face on each count. CP 492-93. The State warned:

> If the defendant is maxed out following trial and convicted of any rape or the [promoting commercial sexual abuse of a minor] charge, the State will be recommending the high end of the range (318 months) plus the 5 year weapon enhancement. That would bring his total time to 378 months, or 31.5 years.

CP 493.

[7] A copy of the memorandum is attached as Appendix A to this brief.

The State advised Mobley that it was "prepared to discuss" a resolution with Mobley that would entail the reduction of some counts, the dismissal of another count, and the dismissal of the firearm enhancement charged in connection with count III, the kidnapping count. Id. The State promised to recommend a sentence of 210 months, which the State believed would be 14 years less than what Mobley would face if convicted at trial. Id. The State gave Mobley a one-week deadline to accept the offer. Id. Mobley did not accept the offer. Trial commenced on February 6, 2013, and Mobley was convicted of all counts as charged.[8]

The State's sentencing memorandum misrepresented the potential consequences Mr. Mobley faced in going to trial in two material respects. Most critically, the State mistakenly failed to advise Mobley that if he was convicted of both counts of rape in the first degree and kidnapping, those counts would run consecutively, not concurrently with one another. RCW 9.94A.589(b).[9]

At sentencing, defense counsel noted the error in the State's calculation of Mobley's presumptive sentence. 4/27/12 RP 20, 24. Defense counsel made an offer of proof that Mobley "would say that it

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[8] Mid-trial, the State amended the information to reduce the robbery in the first degree charge to robbery in the second degree. CP 445-48.

[9] As argued infra, Mobley believes that the kidnapping count should have merged into the rape in the first degree convictions. See argument 6.

was in reliance on this that he failed to accept the plea." 4/27/12 RP 24. Defense counsel confessed that he himself was ineffective in regard to the sentencing calculation:

> I should have researched this and should have advised him that the consecutive service of sentences on various counts was a possibility, and that instead of relying on what was in the memorandum given to us by the State that I should have looked at these things.

4/27/12 RP 24-25.

He continued:

> I would merely say, as an offer of proof, that I had no strategic reason for not doing so. Whether or not it is ineffective assistance for me not to have – or for me to have relied on the State and not to have gone in to look at greater consequences, I don't feel it's appropriate for me to say.

4/27/12 RP 25.

The State interposed an objection to the court considering or ruling upon the issue, on the basis that it was untimely. 4/27/12 RP 25-26. The court did not rule on the issue, but noted that it was "part of the record." 4/27/12 RP 26. Without conducting any inquiry into when Mobley was made aware of the actual sentencing consequences of going to trial or otherwise explaining the reason for its comment, the court added, "the fact that you are bringing up this issue in an untimely fashion really rests squarely on your shoulders, Mr. Mobley, and not your lawyer's." Id.

b. The right of accused persons to the effective assistance of counsel extends to the plea bargaining process.

The Sixth Amendment guarantees to accused persons the right to counsel, a right that necessarily comprehends the right to the effective assistance of counsel. Missouri v. Frye, __ U.S. __, 132 S.Ct. 1399, 1404, 182 L.Ed.2d 379 (2012); Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 1082, 80 L.Ed.2d 674 (1984); U.S. Const. amend. VI; Const. art I, § 22. The right to the effective assistance of counsel extends to the plea bargaining process. Lafler v. Cooper, __ U.S. __, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012); Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010).[10] "[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Padilla, 130 S.Ct. at 1486.

As the Supreme Court noted in Frye, the vast majority of criminal cases are resolved by guilty plea. Frye, 132 S.Ct. at 1407.

> [P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.

[10] At the time of this writing, citations to the US reporter were not yet available on Westlaw.

Id. "[P]lea bargaining is ... not some adjunct to the criminal justice system; it is the criminal justice system." Id. (quoting Scott and Stuntz, Plea Bargaining as Contract, 109 Yale L. J. 1909, 1912 (1992) (emphasis in original)).

In Cooper, the Supreme Court held that the right to the effective assistance of counsel during plea bargaining is not limited to the situation where, based on the erroneous advice of counsel, an accused person accepts a plea offer, but extends to the circumstance where a person rejects a plea offer and goes to trial. Cooper, 132 U.S. at 1385. The violation is not cured if it is followed by a "fair trial": "[e]ven if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." Id. at 1386. Thus, the Court held:

> If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

Id. at 1387.

c. Mobley was denied the effective assistance of counsel when he was misinformed of the sentencing consequences of going to trial versus accepting the State's plea offer.

When the State tendered a written plea offer to Mobley, defense counsel Mahoney did not bother to investigate whether the State's determination of Mobley's potential punishment if he went to trial was accurate. 4/27/12 RP 25-26. It was not: by failing to identify the rape and kidnapping counts as counts that had to be served consecutively, the State underestimated Mobley's maximum sentence by as much as 251 months. RCW 9.94A.589(b).[11]

The two-part Strickland test requires a defendant to first show that his lawyer's performance was deficient, i.e., that "counsel's representation

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[11] RCW 9.94A.589(b) provides:

> Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

The crime of rape in the first degree has a seriousness level of XII and a standard sentence range, based on an offender score of zero, of 93-123 months incarceration. RCW 9.94A.515; .520. Kidnapping in the first degree has a seriousness level of X and a standard sentence range, based on an offender score of zero, of 51-68 months incarceration. Id. A court must impose 60 months confinement for a firearm enhancement on a class A felony. RCW 9.94A.533.

fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. If a defendant establishes deficient performance, he must then show prejudice, by demonstrating "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

i. Counsel's misadvice was deficient performance.

There is no question that counsel's failure to correctly determine and advise Mobley of the sentencing consequences of going to trial versus accepting a guilty plea was deficient performance. Frye, 132 S.Ct. at 1307-08; State v. A.N.J., 168 Wn.2d 91, 113-14, 225 P.3d 956 (2011); State v. Mendoza, 157 Wn.2d 582, 587-88, 141 P.3d 49 (2006). The question on review is "whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Here, counsel's error was not some minor oversight. Mahoney failed to investigate and correctly resolve the basic question of what direct consequences would flow if Mobley were convicted of the charged offenses. Instead, counsel elected to rely on the prosecutor's determination of the potential sentence, incorrectly assuming that the prosecutor got it right, and abdicating his own duty to properly advise his

client. Counsel's misadvice regarding the sentencing consequences of a trial versus a guilty plea was deficient performance.

ii. Counsel's deficient performance prejudiced Mobley.

In the context of an accused person who has rejected a guilty plea and gone to trial predicated on counsel's misadvice, to establish prejudice,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Cooper, 132 S.Ct. at 1385. Stated differently, if the right to the effective assistance of counsel has been denied in deciding whether to take a plea, "prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." Id. at 1387.

Defense counsel's deficient performance prejudiced Mobley under this standard. Mahoney, as an officer of the court, made an offer of proof that in reliance upon the incorrect advice that Mobley received, Mobley decided to reject the plea offer and go to trial. 4/27/12 RP 24. The plea offer dramatically reduced the potential penalties that Mobley faced. Most critically, the State offered to dismiss one of the rape in the first degree

counts, reduce the other to rape in the second degree, and dismiss the firearm enhancement on the kidnapping charge. CP 493. Although the State noted that the offer was contingent upon the victims' agreement, it was made by the State in good faith, presumably based upon a reasonable, factually-grounded expectation that the victims would approve it.

There is no reason to think that the offer, if accepted, would not have been ratified by the court. The State is afforded substantial discretion in plea bargaining, circumscribed chiefly by the bounds of what due process demands. State v. Moen, 150 Wn.2d 221, 227, 76 P.3d 221 (2003). A court will enforce a plea agreement "if the agreement is consistent with the interests of justice, and with the prosecuting standards." RCW 9.94A.431; see also CrR 4.2(f).

There was also a factual basis for the proposed plea offer. The plea agreement, if entered, would have served the interests of justice by enabling the parties to avoid the time and expense of a trial, thus conserving judicial resources and saving the victims the stress of having to testify. The potential sentence Mobley would have faced would have been commensurate with the punishment prescribed by the Legislature for his offenses, based upon his criminal history.

Finally, "the conviction[s] or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence

that in fact were imposed." Cooper, 132 S.Ct. at 1385. If Mobley had pleaded guilty in accordance with this offer, Mobley would have faced a standard sentence range of 210-280 months incarceration, and the State would have recommended he serve a sentence at the low end of this range of 210 months, or 17.5 years. Instead, based upon the range that the parties believed was applicable,[12] Mobley received a low-end sentence of more than twice that which the State promised to recommend in the plea offer, 444 months, or 37 years. This Court should conclude that Mobley was prejudiced by the incorrect advice he received from his attorney regarding the sentencing consequences of going to trial.

d. Mobley's objection was timely, and, assuming *arguendo* that counsel's performance at trial was effective, this is a *non sequitur* to the question whether Mobley is entitled to a remedy.

The court declined to consider the legal issue presented by Mahoney's misadvice to Mobley on the basis that it was "untimely." 4/27/12 RP 26. The court wrongly viewed his counsel raising the issue as an effort to delay the sentencing proceeding, rather than a basis to set aside the conviction. Id. The court also rejected out of hand the notion that Mahoney was ineffective, stating, "I watched five weeks of trial, and I'm certainly satisfied and said so on the record there was no ineffective

[12] As argued in section 6, infra, the pertinent range is slightly lower than the range to which Mobley was actually sentenced due to application of merger principles to the kidnapping and rape counts.

assistance of counsel." Id. Finally, the court inexplicably blamed Mobley for the timing of the motion. The court admonished him, "the fact that you are bringing up this issue in an untimely fashion really rests squarely on your shoulders, Mr. Mobley, and not on your lawyer's." Id.

The court's treatment of the issue was incorrect in all significant respects. As Mahoney indicated in court, he misadvised Mobley regarding the potential sentencing consequences of the charges because he accepted the State's incorrect assessment of Mobley's presumptive sentence range. 4/27/12 RP 20, 24. Mobley went to trial on the charged offenses on February 6, 2012, just one month and two days after the State provided Mahoney with its written plea offer, and the trial concluded on March 21, 2012. Given Mahoney's representation to the court that he relied on the State's calculation of Mobley's anticipated punishment, there is no basis to believe that he took the time to investigate the true sentencing consequences and accurately advise his client while preparing for a six-week trial.

Mahoney did not receive the State's presentence report until April 18, 2012, two days before the originally-scheduled sentencing hearing. Supp. CP __ (Sub No. 169, Motion to Continue Sentencing). Mahoney noted that the presentence report raised "important issues" to which he needed time to respond. Id. Mahoney submitted a two-page presentence

report just three days before the new hearing date in which he argued that the rape counts were the same criminal conduct.[13] He submitted a response to the State's sentencing memorandum on April 27, 2012, the day of the rescheduled hearing. CP 414-42. The court noted at the sentencing hearing that it had only received this second document that same day. 4/27/12 RP 4. Mahoney appears to have faxed the State's memorandum regarding the plea offer to the court on April 25, 2012, and it was filed by the clerk on April 27, 2012. CP 491-94.

In light of this timing, it appears that Mahoney brought the issue to the court's attention as soon as he realized he had misadvised his client. Mobley himself relied upon his lawyer's incorrect advice in declining the plea offer and choosing to take his chances at trial, 4/27/12 RP 24, and would have had no reason to doubt or independently research the accuracy of Mahoney's representations regarding his sentencing consequences, particularly since they were vouchsafed by the prosecutor.[14] Thus, while the court's frustration with Mahoney's failure to alert the court of the issue sooner may be understandable, there is no basis in the record for the

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[13] The document is dated April 24, 2012, but it was not filed until April 27, 2012, when the sentencing hearing took place. CP 444.

[14] Mobley was *pro se* early in the proceedings after he discharged his public defender, but he sought to discontinue his *pro se* status less than three months later because he found the process of representing himself to be far more challenging than he anticipated. See 12/5/11 RP 64 (Mobley moves to withdraw his *pro se* status, telling the court, "[T]his is too much for me").

court's puzzling comment to Mobley that the timing of the motion "rest[ed] ... on [his] shoulders." 4/27/12 RP 26. Rather, given that Mahoney apparently faxed the document to the court on April 25, 2012, one week after he received the State's sentence recommendation, all available evidence supports the opposite inference: that the motion's timing was entirely in Mahoney's hands, and Mahoney's responsibility.

The timing of the objection and the lack of prior notice of the issue to the State were the court's principal bases for punting the question to the Court of Appeals. 4/27/12 RP 26. The other reason for the court's disinclination to entertain the objection was its perception that Mahoney had provided effective representation at trial. Id. But the Supreme Court in Cooper rejected this rationale as a justification for denying an ineffective assistance of counsel claim arising from deficient performance during the plea bargaining stage. The Court explained:

> The goal of a just result is not divorced from the reliability of a conviction ... but here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance.

Cooper, 132 S.Ct. at 1388 (internal citation omitted); see also Frye, 132 S.Ct. at 1407 ("it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process").

In short, the court's perception of the motion as "untimely" was misplaced. Counsel appears to have alerted the court to the issue as soon as he realized his error. Similarly, the court's sense that Mobley was somehow to blame for the timing of the motion had no factual basis. Finally, the court's assessment of counsel's performance at trial as having a neutralizing effect on any error mistakes the question. Cooper, 132 S.Ct. at 1388; Frye, 132 S.Ct. at 1407.

Because the decision whether to enter a guilty plea or go to trial is a critical stage, the Sixth Amendment demands the right to the effective assistance of counsel. Cooper, 132 S.Ct. at 1385, 1387. And, "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." Id. at 1388.

e. The remedy is remand to place Mobley in the status quo ante.

The determination of what remedy should be afforded following a violation of the right to the effective assistance of counsel during plea bargaining depends on the specific injury suffered. Cooper, 132 S.Ct. at 1389. Where, as here, "an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial ... the proper exercise of discretion to remedy the constitutional injury

may be to require the prosecution to reoffer the plea proposal." Id. Once this has occurred, the court then has discretion to decide whether to vacate the conviction to permit the defendant to plead guilty or leave it undisturbed. Id.

This Court should remand so the State can reoffer its plea proposal. If Mobley accepts the offer, the State can take all reasonable steps to obtain the victims' approval. Assuming that the plea serves the interests of justice and is consistent with prosecutorial charging standards, the court should then vacate the trial convictions, and permit the guilty plea.

2. **In violation of the Fourteenth Amendment guarantee of equal protection, the trial court erred in denying Mobley's *Batson* objection to the State's peremptory challenge of juror 91.**

a. The State exercised a peremptory challenge to Juror 91, an African-American juror.

Juror 91 was African-American. 2/9/12 RP 145. Juror 91 participated actively in voir dire. She stated in response to a question from the prosecutor that a person might become at risk for being involved in prostitution because of drug addiction.[15] 2/9/12 RP 62. She attested to being familiar with the dynamics of domestic violence relationships, explaining that she had a cousin who stayed with an abusive boyfriend for four years. 2/9/12 RP 110. Juror 91 said that she tried to talk to the

[15] The prosecutor did not follow up on this response.

cousin about the abuse, but the cousin wouldn't listen. Id. Juror 91 also said that relatives had been prosecuted for drug offenses and burglary, but explained that these experiences would not affect her ability to be fair. 2/9/12 RP 130-131.

During Mobley's second round of questions, Juror 91 stated in response to Mahoney's question whether anyone knew anyone who had been a prostitute that three cousins, two aunts, and her mother had prostituted themselves. 2/9/12 RP 144. Juror 91 explained that "[t]hey all got into it due to drugs; desperation, drugs." 2/9/12 RP 145. Juror 91 did not think this would create a potential for bias against Mobley; she stated, "I would be totally fair." Id.

Following voir dire, the prosecutor announced he would be exercising a peremptory challenge against Juror 91. 2/9/12 RP 171. Mobley objected. 2/9/12 RP 172. The prosecutor explained,

> I had asked, as I do in every trial, if there was anything else I should know about the jurors and Juror 91 did not raise her card. Then Mr. Mahoney asked if anybody knew a prostitute, at which point the juror indicated that I believe three of her cousins, her aunt and her mother had all prostituted.
>
> It's beyond me how that information she would not think to respond to my initial question [sic], but perhaps she didn't think of it or whatever. The problem is that Mr. Mahoney followed up why they were involved and she said drugs. There were no other questions. I have no information about her opinion about women who prostitute. I have no

> information about what bias she may have against them or what frustrations she may have against them or how she may view that world at all.
>
> That is – it happened after my round, and I gave her the opportunity, and she did not respond. I absolutely cannot seat a juror with that experience level, where I know no information how she thinks about it. And for that reason I most definitely will be exercising a peremptory.

2/9/12 RP 173-74.

The prosecutor reiterated, "[M]y concern is that I did not have an opportunity then to follow up on what I feel is a pretty extensive lack of information about this person's involvement in a world that is the whole centerpiece of this case with who – involving family members who were involved in—" 2/9/12 RP 174.

At this point the court interrupted the prosecutor to remind him that he did ask questions concerning prostitution, and that Juror 91 had responded that she believed people were likely to become involved in prostitution due to drugs. 2/9/12 RP 174-75. The prosecutor complained, however, that "she did not respond to any attitudes regarding it, which is – which was an opportunity to get that information." 2/9/12 RP 175. The prosecutor characterized the information she later provided as a "bombshell." Id. The prosecutor did not explain why he did not seek the court's permission to question the juror further in light of the information she gave in response to Mahoney's questions.

b. Race-based challenges in jury selection violate the equal protection clause of the Fourteenth Amendment.

The equal protection clause of the Fourteenth Amendment prohibits discrimination on the basis of race or other protected status in jury selection. Miller-El v. Dretke, 545 U.S. 231, 237-38, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005); Batson v. Kentucky, 476 U.S. 79, 86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); U.S. Const. amend. XIV. The harm that flows from discrimination during jury selection is two-fold. Defendants are harmed when racial discrimination compromises the right to trial by impartial jury, but jurors are also harmed, "for prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.'" Miller-El, 545 U.S. at 237-38 (quoting J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 128, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994)). Indeed, the "the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' ... and undermines public confidence in adjudication." Miller-El, 545 U.S. at 238 (internal citations omitted).

To establish that a potential juror was challenged due to discriminatory criteria, a defendant first must make out a prima facie case of purposeful racial discrimination. Batson, 476 U.S. at 85-86. If a prima facie showing is made, then the State must articulate a race-neutral

explanation for the challenge. Id. at 86. The court then considers the State's explanation to determine whether the defense has made out a case of intentional racial discrimination in jury selection. Id. at 98. Although the trial court did not inquire into the adequacy of Mobley's prima facie showing of purposeful discrimination, here, a prima facie showing "is unnecessary once the State has offered a purported race-neutral explanation and the trial court has ruled on the ultimate question of intentional discrimination." State v. Cook, __ Wn. App. __, __ P.3d __, 2013 WL 2325117 ¶ 3 (May 28, 2013).[16]

c. The prosecutor's explanation for the strike was not race-neutral because the prosecutor's stated concerns were either unfounded or could easily have been allayed by further questions to the juror.

In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Batson, 476 U.S. at 93 (citation omitted).

> When conducting the analysis at the third step, the trial court must decide not only whether the reasons stated are race-neutral, but whether they are relevant to the case, and whether those stated reasons were the prosecutor's genuine reasons for exercising a peremptory strike, rather than pretexts invented to hide purposeful discrimination.

Green v. LaMarque, 532 F.3d 1028, 1030 (9th Cir. 2009).

[16] At the time of this writing, no pagination to the Washington or Pacific Reporter for Cook was available on Westlaw.

Here, the court failed to undertake the "sensitive inquiry" into the circumstantial and direct evidence of discriminatory intent required by Batson. An examination of the questions and answers given and the prosecutor's options, however, establish that the prosecutor's peremptory strike was not race-neutral.

Juror 91 was not hiding the ball from the prosecutor. When he asked the jurors why people might become prostitutes, she volunteered the response that drug addiction might be the reason, which she later elaborated was why her family members had entered prostitution. 2/9/12 RP 62, 144-45. She forthrightly answered questions about domestic violence relationships, volunteering that her cousin had stayed with her abuser for four years, even though Juror 91 had tried to reach out to her. 2/9/12 RP 110-111.

While the prosecutor's question whether there was "anything that you think that I should know before we pick you to be on the jury or to exclude you"[17] may have been asked in good faith, it is reasonable to conclude that a lay juror might not understand that the prosecutor would want to know her personal family history, especially if she believed it would not affect her ability to be fair. Indeed, it was because of Juror 91's

[17] See 2/9/12 RP 133.

candor that the prosecutor was made aware of the issues that he claimed caused him concern.

Tellingly, however, although the prosecutor averred that Juror 91's responses to Mahoney's questions were inadequate for him to be able to assess whether she held any bias and what that bias might be, he did not ask the court's permission to question the juror further or in any way interpose his concerns while the juror was still available to be questioned. Instead, he remained silent and raised the issue only after it was too late for him to actually develop the record.

Juror 91's answers could certainly have been indicative of bias. But, as Mahoney recognized, a juror whose family members had been prostitutes would more probably be biased against the defendant, who stood accused of being a pimp, than the State, who sought to vindicate the rights of his prostitutes. 2/9/12 RP 145. The prosecutor, however, did not try to find out whether the juror actually held any biases as a result of her experiences, but instead utilized a peremptory challenge against her.

In Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008), the Court instructed that a factor in determining whether a strike was race-neutral is "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." Id. at 477. Here, the trial court could not have engaged in

this inquiry, as the prosecutor did not know whether the juror held a bias or otherwise was likely to be disposed against the State. In addition, Juror 91 was one of two African-American jurors in the panel. 2/9/12 RP 145-46, 193. In striking Juror 91, the prosecutor struck 50% of the black potential venire members. Compare Miller-El, 545 U.S. at 232.

The State's principal complaint was that it did not know what impact the juror's life experiences would have had on her attitudes. Given this complaint, the prosecutor's decision to forgo any further inquiry when it would have been relevant, and instead to simply strike the juror, should be viewed as evidence of discriminatory intent. Mobley's Batson challenge should have been granted.

3. **The trial court abused its discretion by admitting the prejudicial and irrelevant testimony of the State's prostitution expert witness.**

a. Mobley moved to exclude testimony from the State's prostitution 'expert.'

Prior to trial, Mobley moved to exclude the testimony of the State's prostitution 'expert,' police officer Ryan Long. 2/6/12 RP 6. Mobley noted that although some of the jargon is outside the ken of the ordinary juror, the subject-matter itself was not. Id. at 6-7. Mobley further noted that much of the testimony would come in through the several prostitute witnesses, and that thus the evidence was cumulative and would have the

effect of vouching for these witnesses' veracity. Id. Relying on this Court's opinion in State v. Simon, 64 Wn. App. 948, 831 P.2d 139 (1991), the court admitted the testimony.

At trial, Long testified about not only the vernacular used by pimps, prostitutes, and their clients, but also about the dynamic between pimps and prostitutes. 2/13/12 RP 90-125. He testified that a pimp will engage in a process of "selling a dream" to a potential prostitute, in which he supposedly lures her to work for him by telling her about the wonderful life she will lead working for him. 2/13/12 RP 113. Long testified that this encounter is "fraudulent" and that subsequently love and affection are withheld. 2/13/12 RP 114. He testified several times that the relationship is like a domestic violence relationship and analogized the cycle between a pimp and prostitute to the cycle of violence in a domestic violence relationship. 2/13/12 RP 115-16. He testified that violence is a consistent feature in pimp-prostitute relationships, and tends to manifest itself when the prostitute wants to terminate the relationship. 2/13/12 RP 121.

b. The evidence was cumulative and its prejudicial effect outweighed its probative value.

Before an expert witness's testimony may be introduced before the jury, the trial court must find (1) that the witness is qualified as an expert and (2) that the testimony will assist the jury "to understand the evidence

or to determine a fact in issue." ER 702; Simon, 64 Wn. App. at 692-93. Expert evidence should be excluded if "the prejudicial nature of the testimony is so great as to render such testimony inadmissible." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Here, while Long may have been qualified to testify as an expert, the evidence was both cumulative and unduly prejudicial.

i. The evidence was cumulative and irrelevant.

As noted, three witnesses testified who were prostitutes, A.W., J.J., and J.B. A.W. testified for nearly an entire day, and offered much of the same testimony that was given by Long regarding the jargon and terminology used within the pimp-prostitute culture. See 2/14/12 RP 26 (A.W. testifies about walking "the strip, the blade"); 2/14/12 RP 70 (A.W. testifies about the meaning of the terminology "madam" and "bottom bitch"). J.J. also testified for a lengthy period of time, over the course of three days. She too was conversant with the terminology identified by Long and able to explain it to the jury. See e.g. 2/15/12 RP 155 (J.J. explains meaning of phrase, "give you game,"); 2/16/12 RP 28 (J.J. explains meaning of terminology "knocked"); 2/16/12 RP 49 (J.J. testifies to meaning of word "renegade"). The principal basis for introducing the evidence identified by the State – to explain pimp-prostitution culture and jargon to the jury – could easily have been accomplished by the State's

prostitution witnesses, and in fact was done so. The evidence was cumulative.

At the same time, its relevance was minimal. Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." ER 401. While Long's testimony may have provided some general insight into the pimp-prostitute culture, its relevance to the facts of this case was marginal. Although Long testified about the 'rules' that govern the relationship between a pimp and a prostitute, 2/15/12 RP 18-19, A.W. testified that on the first occasion that she was interviewed by Detective Taylor, she told him that there were no set rules in her relationship with Mobley. 2/14/12 RP

As noted, Long testified that a pimp will engage in the process of "selling a dream" to the potential prostitute to persuade her to work for him. 2/9/12 RP 113. All of the prostitute witnesses, however, had already been working as prostitutes when they encountered Mobley. A.W. had a pimp when she met Mobley, and decided to start working for Mobley of her own accord. 2/14/12 RP 52-54. A.W. believed, initially, that Mobley was her boyfriend. Id. at 57.

J.J. also had a pimp when she met Mobley. 2/15/12 RP 148. She left him when she got arrested, but continued to prostitute. 2/15/12 RP

149-50. Mobley was very straight with J.J. He told her that he would help her make more money, and, according to her, she gave him money on two or three subsequent occasions.[18] 2/15/12 RP 158-61. She left him of her own accord.

J.B. also became a prostitute on her own. 2/28/12 RP 97, 101-02, 105. She met Mobley when he arranged a "date" with her, and that evening they talked in the parking lot outside of a hotel. 2/28/12 RP 107-08. The next time she saw him, she was invited to his hotel room by A.W. 2/28/12 RP 111. He asked her to leave due to the bad behavior of a friend of J.B. 2/28/12 RP 112. J.B. reinitiated contact with Mobley when she felt lonely. 2/28/12 RP 113. She sent him a text message and he invited her to a hotel room, where he was staying with A.W. 2/28/12 RP 114. She was depressed, and he consoled her. Although he told her he saw her potential to become a better prostitute, he did not try to talk her into working for him. Id. She decided of her own accord she wanted him to be her pimp after she saw how well he treated A.W. 2/28/12 RP 120-28.

Expert testimony should not be admitted where it is speculative and not relevant to the issues to be decided by the jury. State v. Lewis, 167 Wn. App. 367, 389, 166 P.3d 786 (2007); United States v. Devers, 270 Fed. Appx. 521, 522 (9th Cir. 2008) (trial court erred in admitting expert

[18] Mobley disputed that he had a pimp-prostitute relationship with J.J. 3/12/12 RP 138.

evidence regarding pimp-prostitute dynamic where the matters testified to by the expert were not alleged to have occurred at trial). Here, the evidence was both cumulative and irrelevant. It should have been excluded.

ii. The prejudicial effect of the evidence outweighed its probative value.

At the same time that the testimony was cumulative of the testimony from the State's prostitute witnesses and not relevant, it was extremely prejudicial. As noted, Long testified at length about how a pimp-prostitute relationship resembles a domestic violence relationship. 2/13/12 RP 115-16, 121. Where violence was not alleged to be a feature in all three of the relationships, this testimony was highly prejudicial.

The testimony also impermissibly vouched for the witnesses' veracity. A.W., J.J., and J.B.'s testimony was internally inconsistent and inconsistent with each other. The witnesses admitted to lying during earlier statements and to police officers. Long's testimony provided a basis for the jury to overlook the inconsistencies in the witnesses' testimony by vouching for the witnesses' credibility. The evidence was unduly prejudicial and should have been excluded.

4. **Misconduct by prosecution witness McMartin denied Mobley a fair trial.**

a. Prosecution witness Richard McMartin committed misconduct during his testimony.

Sergeant Richard McMartin was part of the arrest team on June 22, 2011. 2/16/12 RP 100. He testified about the protocol for Mobley's arrest, and during this testimony, stated, "[b]ecause of known history with him, we expected him to be armed." 2/16/12 RP 102. Then, when describing the arrest itself, he testified,

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

2/16/12 111. At this point the prosecutor interrupted McMartin and asked a different question. 2/16/12 RP 112.

When the court took a recess, Mobley moved for a mistrial. 2/16/12 RP 135. He noted that McMartin was a longtime police officer,[19] and that the references to Mobley's criminal history and that he "was known to have weapons from previous history" were not susceptible of being addressed by a curative instruction, as the instruction would only highlight the prejudicial testimony. Id.

The prosecutor agreed that the testimony was improper. 2/16/12 RP 136. He nevertheless opposed the mistrial motion, noting that Mobley

[19] McMartin testified that he had worked for the King County Sheriff's Office for 32 years and had been a sergeant for ten. 2/16/12 RP 99.

was alleged by J.B. to have a gun, was charged with unlawfully possessing a firearm, and had stipulated to having previously been adjudicated guilty of a serious offense. 2/16/12 RP 137. The State requested instead that the jury be issued a curative instruction. 2/16/12 RP 138. The court ruled that there was error, but that the error could be cured with an instruction. 2/16/12 RP 139.

The State subsequently proposed a curative instruction. 3/12/12 RP 4. Mobley reiterated that a curative instruction would not dispel the taint, but instead would highlight the improper testimony. 3/12/12 RP 7-8. The court noted but overruled Mobley's objection and read the following curative instruction to the jury:

> You heard information in this trial from Sergeant McMartin referencing alleged criminal history of the defendant. That portion of Sergeant McMartin's testimony is stricken and must not be considered by you.

3/12/12 RP 39.

b. The misconduct denied Mobley his right to a fair trial protected by the Fourteenth Amendment.

An accused person has the due process right to a fair trial, a right which it is the prosecution's responsibility to safeguard as much as the Court's. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935) (prosecutor has the obligation to ensure that the accused receives a fair trial); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551

(2011); U.S. Const. amend. XIV; Const. art. I, § 3. For purposes of this due process analysis, law enforcement officers are considered part of the prosecution team and share the same duty to refrain from misconduct. See Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); In re Stenson, 174 Wn.2d 474, 486, 276 P.3d 286 (2012); State v. Granacki, 90 Wn. App. 598, 602-03, 959 P.2d 667 (1998).

This Court recognizes that evidence of weapons is extraordinary prejudicial, "and courts have 'uniformly condemned ... evidence of ... dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged.'" State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001); see also id. at 501 n. 21 (citing cases). Similarly, references to a defendant's criminal history that are not relevant to an essential ingredient of the charged offense paint him before the jury as a person of bad character and are misconduct. See ER 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible ..."). Here, the State conceded, and the court properly found, that McMartin engaged in misconduct. 2/16/12 RP 136, 139.

The court determined, however, that the misconduct could be adequately addressed by a curative instruction. This was incorrect. In Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Supreme Court acknowledged that notwithstanding the

presumption that juries follow instructions, some kinds of evidence are too prejudicial for juries to be able to disregard, even if they are instructed to do so. See Bruton, 391 U.S. at 132 n. 8 (quoting with approval Judge Learned Hand's characterization of limiting instructions as "a 'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else'") and at 135 (warning, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored"). As the Court in Bruton recognized, in some instances, a limiting instruction is a type of placebo, a "judicial lie." 391 U.S. at 132 n. 8.

The testimony of Sergeant McMartin that Mobley was a person with extensive criminal history, a known history of being armed, and believed to be dangerous is the kind of testimony that creates an enduring prejudice that is not susceptible of being cured by an instruction. This Court should conclude that the testimony violated Mobley's right to a fair trial, and reverse his conviction.

5. **The evidence was insufficient to prove that Mobley committed the crime of promoting commercial sexual abuse of a minor as that crime was charged and prosecuted by the State.**

a. Washington's law of the case doctrine requires the State to prove otherwise-unnecessary elements when they are included without objection in the "to convict" instruction.

In Washington, where otherwise-unnecessary elements of an offense are included without objection in the "to convict" instruction, the State assumes the burden of proving such added elements. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The doctrine is "based on the premise that whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury." State v. Calvin, __Wn. App. __, __ P.3d __, 2013 WL 2325121, 10 (May 28, 2013). Thus, under the law of the case doctrine, the sufficiency of the evidence to sustain the verdict is tested with reference to the instructions that were given. State v. Kirwin, 166 Wn. App. 659, 671, 271 P.3d 310 (2012).

In Hickman, the Court found that the State did not prove the added element of venue in a prosecution for insurance fraud. Id. at 106. In State v. Abuan, 161 Wn. App. 135, 257 P.3d 1 (2011), the State was precluded from arguing a transferred intent theory on appeal, where the instructions that were given to the jury required the State to prove that Abuan intended to assault a specific person. Abuan, 161 Wn. App. at 156, 159. In Kirwin, the State failed to prove an uncharged alternative which was included in

the "to convict" instruction. Kirwin, 166 Wn. App. at 667-670. And in State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005), the State assumed the burden of proving that the defendant knew the victim was a law enforcement officer performing his official duties. Goble, 131 Wn. App. at 201.

b. The "to convict" instruction required the State to prove that Mobley knew that J.J. was a minor for purposes of the promoting commercial sexual abuse of a minor charge.

According to statute, "A person is guilty of promoting commercial sexual abuse of a minor if he or she knowingly advances commercial sexual abuse or a sexually explicit act of a minor or profits from a minor engaged in sexual conduct or a sexually explicit act." RCW 9A.68.101. Ordinarily, in a prosecution for promoting commercial sexual abuse of a minor, it is not a defense that the defendant did not know the alleged victim's age. RCW 9.68A.110(3); cf., State v. Rosul, 95 Wn. App. 175, 180-81, 974 P.2d 916 (1999) (for purposes of prosecution for possession of depictions of minors engaged in sexually explicit conduct, knowledge of the minor's age is not an essential element).

The Washington Pattern Jury Instructions do not include a sample pattern jury instruction for the crime of promoting commercial sexual

abuse of a minor. The "to convict" instruction proposed by the State and given by the trial court provided:

> To convict the defendant of the crime of Promoting Commercial Sexual Abuse of a Minor, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That during a period of time intervening between January 1, 2011 through June 20, 2011, the defendant:
>
> (a) knowingly advanced the commercial sexual abuse of J.J.; or,
>
> (b) knowingly profited from a minor engaged in sexual conduct; and
>
> (2) That J.J. was less than eighteen years old;
>
> (3) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that elements (2) and (3), and either of the alternative elements (1) (a) or (1)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count 1. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count 1. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

CP 269 (emphasis added).

c. The evidence was insufficient to prove that Mobley knowingly profited from a minor engaged in sexual conduct.

As with any challenge to the sufficiency of the evidence, when determining whether the evidence was sufficient to sustain the added element, the reviewing court inquires whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Hickman, 135 Wn.2d at 103; U.S. Const. amends. VI; XIV; Const. art. I, §§ 3; 22. If the reviewing court finds insufficient evidence to prove the added element, reversal is required. Hickman, 135 Wn.2d at 103.

i. The evidence was insufficient to prove that Mobley knowingly profited from a minor engaged in sexual conduct.

Here, the "to convict" instruction, given to the jury without the State's objection, obligated the State to prove that Mobley "knowingly profited from a minor engaged in sexual conduct." CP 269 (emphasis added). The instruction thus required the State to show that Mobley knew that J.J. was a minor for purposes of a conviction under this statutory prong. This the State did not show.

The jury was given the standard WPIC instruction regarding knowledge, which permits the jury to conclude that Mobley acted knowingly if the State proved either that he was aware of a fact described by law as being a crime, or that he had information which would lead a reasonable person to believe that facts exist which are described by law as being a crime. CP 271; see WPIC 10.02. The evidence established, however, that J.J., who was 17 when Mobley met her, deliberately gave every impression to the people with whom she interacted that she was over 18. One of Mobley's first encounters with J.J. was at the Little Darlings gentlemen's club, a club which restricts admission to persons over the age of 18. 2/15/12 RP 141; 3/12/12 RP 28. She told J.B. that she was 19. 3/28/12 RP 150. Mobley saw J.J. smoking cigarettes. 3/12/12 RP 28. J.J. testified that she thought that her pimp, "Boom Boom", told Mobley her age, but Mobley's hearsay objection to her further testimony that "Boom Boom" told her he told Mobley was sustained. 2/16/12 RP 20. The evidence was insufficient to prove that Mobley knowingly profited from a minor engaged in sexual conduct.

ii. The evidence was insufficient to prove that Mobley "knowingly advanced" J.J.'s commercial sexual abuse.

The alternative means that Mobley "knowingly advanced" J.J.'s commercial sexual abuse also was not proven. According to statute, a person "advances commercial sexual abuse of a minor" if:

> acting other than as a minor receiving compensation for personally rendered sexual conduct or as a person engaged in commercial sexual abuse of a minor, he or she causes or aids a person to commit or engage in commercial sexual abuse of a minor, procures or solicits customers for commercial sexual abuse of a minor, provides persons or premises for the purposes of engaging in commercial sexual abuse of a minor, operates or assists in the operation of a house or enterprise for the purposes of engaging in commercial sexual abuse of a minor, or engages in any other conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor.

RCW 9A.68.101(3)(a).

J.J. testified that "Boom Boom" persuaded her to start prostituting. 2/15/12 RP 128-29. He told her to start making money for him, and dropped her off with another girl on Denny Way the first time she worked as a prostitute. 2/15/12 RP 129. He decided the locations where she would work; in return, she gave him all of the money she earned. 2/15/12 RP 133-34. By contrast, although J.J. testified that she gave Mobley money on a few occasions, she always considered "Boom Boom" to be her pimp. 2/15/12 RP 151-60; 2/16/12 RP 19.

Where the State presents insufficient evidence to support an essential element of the charge, reversal is required. Hickman, 135 Wn.2d at 103. "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." Id. (quoting State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). The promoting commercial sexual abuse of a minor charge must be reversed and dismissed.

iii. Even if the evidence was sufficient to prove that Mobley knowingly advanced J.J.'s commercial sexual abuse, there is no way to determine whether the jury was unanimous that this alternative means had been proven, thus the conviction must be reversed.

Even assuming without conceding that the State presented sufficient evidence to prove the alternative means contained in section (1)(a) of the "to convict" instruction, the charge must nevertheless be reversed and remanded for a new trial because the State cannot show that the jury was unanimous as to this means. The jury in fact was affirmatively instructed that they need not be unanimous as to which means the State had proven. CP 269 (directing, "To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt").

If this Court concludes that the evidence was sufficient to support the alternative means charged in section (1)(a) of the "to convict" instruction, then the remedy is remand for a new trial on this means of committing the crime.

> The alternative means principle dictates that when a jury renders a guilty verdict as to a single crime, but one of the alternative means for committing that crime is later held to be invalid on appeal and the record does not establish that the jury was unanimous as to the valid alternative in rendering its verdict, double jeopardy does not bar retrial on the remaining, valid alternative mean ... This is the case even when one alternative mean has been reversed on appeal due to a finding of insufficient evidence, a finding that has the same double jeopardy implications as an outright acquittal in other circumstances.

State v. Ramos, 163 Wn.2d 654, 660-61, 184 P.2d 1254 (2008).

If this Court concludes that the evidence was sufficient to prove the means charged in section (a)(1) of the "to convict" instruction, this Court must nevertheless remand for a new trial on this means of committing the offense. Mobley's conviction should be reversed and remanded for retrial.

6. **Mobley's conviction and sentence for kidnapping in the first degree merged into his rape in the first degree convictions.**

a. The Fifth Amendment and article I, section 9 protect against double jeopardy.

The Fifth Amendment to the United States Constitution assures that no "person [shall] be subject for the same offense to be twice put in

jeopardy of life or limb." U.S. Const. amend. V. Article I, section 9 of the Washington constitution guarantees that "[n]o person shall be . . . twice put in jeopardy for the same offense." Const. art I, § 9. The Washington Supreme Court has held the protections of the state constitutional provision are coextensive with the protections provided by the federal constitution. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Like the federal courts, Washington courts apply the Blockburger[20] test to determine whether multiple prosecutions violate double jeopardy prohibitions. Gocken, 127 Wn.2d at 104-07. In the absence of express legislative intent for multiple punishments, this test provides a double jeopardy violation will be found where multiple convictions are the same in fact and in law. United States v. Dixon, 509 U.S. 688, 696-97, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); Whalen v. United States, 445 U.S. 684, 692, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). If two convictions violate double jeopardy protections, the remedy is to vacate the conviction for the crime that forms part of the proof of the other. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

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[20] Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

b. The kidnapping charge was used to elevate the rape charges and was an element of those charges, and so should have merged with the rape charges at sentencing.

The merger doctrine is a species of double jeopardy analysis. "'Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime.'" In re Francis, 170 Wn.2d 517, 524-25, 242 P.3d 866 (2010) (quoting Freeman, 153 Wn.2d at 772-73). The merger doctrine is applied in Washington:

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

State v. DeRyke, 110 Wn. App. 815, 823, 41 P.3d 1225 (2002).

"[W]hen a defendant is convicted under the kidnapping provision of the first degree rape statute, the merger doctrine applies to the kidnapping offense 'because it is one of the crimes accompanying the act of rape that elevate[s] it to a first degree felony.'" Id. (quoting State v. Eaton, 82 Wn.App. 723, 730, 919 P.2d 116 (1996)). As this Court recently reiterated, "the legislature intended that punishment for first-degree rape should suffice as punishment for crimes proven in aid of the

conviction, which are incidental to and elements of the central crime." State v. Phuong, __ Wn. App. __, 299 P.3d 37, 49 (2013) (quoting State v. Johnson, 92 Wn.2d 671, 678, 600 P.2d 1249 (1979) (emphasis in Phuong). Where a defendant is charged with multiple offenses, one of which merges into another completed offense, the offense that merged with the separately charged offense is extinguished. Johnson, 92 Wn.2d at 681.

The State prosecuted Mobley for two counts of first-degree rape. CP 447-48. Both crimes were elevated from second-degree rape by forcible compulsion to first-degree rape because the State elected to prosecute the rapes via the kidnapping provision of the statute. Id.; RCW 9A.44.040(1)(b). Jury instructions 37 and 47, defining rape in the first degree for purposes of counts VI and VII, stated, "[a] person commits the crime of rape in the first degree when he or she engages in sexual intercourse with another person by forcible compulsion when he kidnaps the other person." CP 300, 310. And the to-convict instructions for both offenses required the jury to find, as an element of each offense, "[t]hat the defendant kidnapped J.B." CP 301, 311.

The jury convicted Mobley of all counts as charged. CP 343-351. As the crimes were charged and prosecuted by the State, the kidnapping element elevated the rape counts from rape in the second degree to rape in the first degree. The kidnapping conviction and attached firearm

enhancement merged into the rape counts. "[O]nce the State has charged the defendant ... the State is stuck with what it chose ... All that matters on appeal is whether the ... charges merge as they were charged." Francis, 170 Wn.2d at 527 (emphasis in original).

At sentencing, however, the court did not merge the kidnapping count into the rape counts of which it was an element, but imposed a separate consecutive sentence of 51 months incarceration plus a 60-month firearm enhancement. CP 398-99. This violated Mobley's right to be free from double jeopardy, and requires remand for resentencing so that both the conviction and enhancement can be vacated.[21]

Where a court has determined multiple convictions violate double jeopardy, it has an affirmative obligation to vacate from the judgment the convictions that have been found to violate double jeopardy prohibitions. State v. Womac, 160 Wn.2d 643, 659-61, 160 P.3d 40 (2007). The kidnapping conviction and firearm enhancement must be vacated and extinguished from the judgment, and Mobley must be resentenced. Womac, 160 Wn.2d at 659-61; Freeman, 153 Wn.2d at 777.

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[21] Mobley may raise this error for the first time on appeal as a manifest error affecting a constitutional right. RAP 2.5(a); State v. Brewer, 148 Wn. App. 666, 673, 205 P.3d 900 (2009); see also Francis, 170 Wn.2d at 522 (guilty plea did not waive double jeopardy challenge).

7. **The use of juvenile adjudications to enhance Mobley's SRA offender score and resulting sentence violated his rights under the Sixth and Fourteenth Amendments.**

a. The use of juvenile adjudications to elevate Mobley's maximum punishment violated his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process of law.

At sentencing, the court utilized the current offenses and four prior juvenile adjudications in calculating Mobley's offender score. CP 405. The use of the juvenile adjudications violated Mobley's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process of law.

An accused person's constitutional rights to a jury trial and due process of law require the government to submit to a jury and prove beyond a reasonable doubt any "fact" upon which it seeks to rely to increase punishment above the maximum sentence otherwise available for the charged crime. Descamps v. United States, __ U.S. __, __ S.Ct __, __ L.Ed.2d __, 2013 WL 3064407, 7 (June 20, 2013); Alleyne v. United States, __ U.S. __, 133 S.Ct. 2151, 2155, __ L.Ed.2d __ (2013); Cunningham v. California, 549 U.S. 270, 290-91, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007); United States v. Booker, 543 U.S. 220, 243-44, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New

Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Jones v. United States, 526 U.S. 227, 239-52, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Only prior convictions are arguably excepted from this rule, Almendarez-Torres v. United States, 523 U.S 224, 243, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and this is because a prior conviction "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." Jones, 526 U.S. at 249; accord Apprendi, 530 U.S. at 488.

In United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001), the Ninth Circuit evaluated the Supreme Court's opinions in Apprendi, Jones, and Almendarez-Torres to determine whether juvenile adjudications which do not afford the right to a jury trial fall within the narrow prior conviction exception. Concluding they did not, the Court held Jones's recognition of the exception's viability was premised on the prior convictions being subject to the "fundamental triumvirate" of procedural protections – notice, proof beyond a reasonable doubt, and a jury trial guarantee – crucial to due process. Tighe, 266 F.3d at 1193-94.

At least three states have barred the use of non-jury juvenile adjudications to enhance a sentence above the otherwise-available maximum. State v. Harris, 118 P.3d 236 (Ore. 2005); State v. Chatman, 2005 Tenn. Crim. App. LEXIS 368, No. M2003-00806-CCA-R3-CD,

appeal denied by, 2005 Tenn. LEXIS 940 (2005); State v. Brown, 879 So.2d 1276 (La. 2004), cert. denied, 543 U.S. 826 (2004). Other courts appear to have concurred in dicta that whether a juvenile adjudication may be utilized to elevate the punishment turns on whether there was a jury trial right in the juvenile proceeding. See e.g. State v. Greist, 121 P.3d 811 (Alas. 2005) (Alaska grants jury trial right to minors in delinquency proceedings for conduct that would be a crime resulting in incarceration if committed by an adult; only these adjudications may enhance a sentence above the otherwise-available maximum); People v. Taylor, 850 N.E. 2d 134 (Ill. 2006) (noting conflicting authorities, and relying on statutory exclusion of juvenile adjudications from definition of "conviction" to bar their use to enhance sentence).

b. The Supreme Court's opinion in *Weber* was wrongly decided.

In State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137 (2007), a five-justice majority of the Washington Supreme Court sided with the courts that have found the jury trial guarantee a dispensable right, and so held that whether a prior adjudication may be used to enhance a sentence turns on its reliability, not whether a jury trial right was afforded in the prior proceeding. Weber, 159 Wn.2d at 255. But neither the history of the Sixth Amendment nor the opinions of

the United States Supreme Court provide a basis for substituting the right to a jury trial with some other, lesser, process.

To the contrary, as the Blakely opinion made clear, such a reading of Apprendi is fundamentally mistaken:

> Our commitment to Apprendi. . . reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict.

542 U.S. at 305-06.

The reliability analysis engaged in by the Weber majority also fails to account for the differences between the juvenile and adult systems, and accordingly does not address the reason why the due process safeguards required for a juvenile adjudication are less than what is required for an adult conviction.

The juvenile justice system emphasizes rehabilitation rather than assigning criminal responsibility and punishment. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); McKeiver v. Pennsylvania, 403 U.S. 528, 545, 91 S.Ct.1976, 29 L.Ed.2d 641 (1971) (plurality

opinion). The reason proffered for a less formal and less reliable procedure in juvenile court is that it protects juveniles from the stigma and consequences of conviction as adults. Cf., McKeiver, 403 U.S. at 540 with Duncan v. Louisiana, 391 U.S. 145, 155-56, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (jury trial in criminal cases is fundamental to our system of justice). Thus while juveniles are entitled to some of the procedural protections necessary to ensure due process, Gault, 387 U.S. at 31-58, the McKeiver plurality refused to require a jury trial for juveniles on the grounds that it would "remake the juvenile proceeding into a fully adversary process" and end "the idealistic prospect of an intimate, informal protective proceeding." McKeiver, 403 U.S. at 545.

Notwithstanding a legislative shift toward making the juvenile system more punitive, Washington has continued to assert that juvenile rehabilitation remains the paramount focus of the juvenile system. See State v. Chavez, 163 Wn.2d 262, 269-70, 180 P.3d 1250 (2008); State v. Watson, 146 Wn.2d 947, 952-53, 41 P.3d 66 (2002); Monroe v. Soliz, 132 Wn.2d 414, 419-20, 939 P.2d 205 (1997); State v. Meade, 129 Wn. App. 918, 925, 120 P.3d 975 (2005); State v. J.H., 96 Wn. App. 167, 183, 978 P.2d 1121 (1997). Washington courts still cite the rehabilitative goals of the juvenile justice system as a basis to deny jury trials to juveniles under both the federal and state constitutions. State v. Tai N., 127 Wash. App.

733, 738-39, 113 P.3d 19 (2005). Yet, as the Louisiana Supreme Court recognized, when a court enhances a sentence based on prior juvenile adjudications, the adjudications themselves become criminal in nature, undercutting the rehabilitative purpose of the juvenile system. Brown, 879 So.2d at 1289.

The majority opinion of the Washington Supreme Court refused to recognize this bait-and-switch and so does not identify a due process impediment to the use of juvenile adjudications to enhance the offender score. More importantly, the opinion discounts the significance of the Sixth Amendment jury trial guarantee and so does not follow the Supreme Court's decisions. See Weber, 159 Wn.2d at 261 ("Jones . . . advances the guaranties of 'fair notice, reasonable doubt, and jury trial' as one possible, not the exclusive, basis for the distinctive constitutional treatment of recidivism"); and at 263 ("the Apprendi Court did not specifically identify a jury trial as being a required procedural safeguard").

As found by the dissenting justices, the opinion is fundamentally inconsistent with the Supreme Court's reasons for excluding prior convictions from the Sixth Amendment requirement that facts which increase the penalty for a crime beyond the prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt, and condones a significant violation of due process. See Weber, 159 Wn.2d at

279-88 (Madsen, J., dissenting). This Court should find that Weber misapprehends federal constitutional law pertaining to the Sixth Amendment right to a jury trial right and hold the use of juvenile adjudications to elevate Mobley's maximum punishment violated his rights to a jury trial and due process of law.

8. Cumulative error denied Mobley his right to a fair trial guaranteed by the Fourteenth Amendment.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. U.S. Const. amend. 14; Const. art. I, § 3; Williams v. Taylor, 529 U.S. 362, 396-99, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (concluding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the trial errors set forth above standing alone merits reversal. Viewed together, the errors created a cumulative prejudice that was likely to have materially affected the jury's verdict. Mobley's convictions must be reversed.

F. CONCLUSION

This Court should conclude that D'Marco Mobley was denied the effective assistance of counsel when his lawyer misadvised him regarding the sentencing consequences of going to trial versus pleading guilty. He is entitled to have his convictions vacated and the original plea offer reinstated. In the alternative, this Court should reverse Mobley's convictions for violations of the Fourteenth Amendment guarantee of due process and equal protection. In the alternative, the Court should dismiss his conviction for promoting the commercial sexual abuse of a minor, and vacate his sentence and firearm enhancement for kidnapping in the first degree under Fifth Amendment double jeopardy and merger principles.

DATED this 15th day of July, 2013.

Respectfully submitted:

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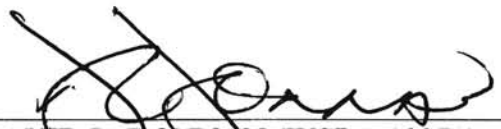

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APPENDIX

22068944

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4 January 2012

MEMORANDUM

TO: Phil Mahoney

FROM: Val Richey

SUBJECT: State v. D'marco Mobley, 11-1-06405-7 SEA

I have prepared this memorandum in response to your request to convey plea negotiations in written form so that they can be shared with your client.

Currently your client's history includes the following juvenile convictions:

1) VUCSA
2) Att Res Burg
3) Assault 2
4) Theft in the 1st Degree

Normally, these four felony convictions would count as 2 points in the adult system (.5 points each). However, in this case, his juvenile conviction for Assault 2, a violent offense, counts as 2 points the charges of PCSAM, Kidnapping, Robbery, and Rape. This brings the total points from juvenile convictions to 3.5, or 3 when rounded down.

In 11-1-06405-7, the defendant is charged with:

1) Promoting Commercial Sexual Abuse of a Minor (Level 12)
2) Promoting Prostitution in the 2nd Degree
3) Kidnapping in the First Degree (Level 10)
4) Robbery in the First Degree (Level 9)
5) Promoting Prostitution in the 1st Degree
6) Rape in the 1st Degree (Level 12)
7) Rape in the 1st Degree (Level 12)

Plus, there is also a firearm enhancement on the Kidnapping charge, which carries 5 years of hard time (no good time). He also has a pending Attempting to Elude a Pursuing Police Vehicle and VUCSA, and a pending referral for an UPFA. That means he faces a total of 9 current charges and 1 pending referral.

Assuming that the defendant's prior juvenile record will count as 3 points for many of the current crimes above (2 points for the Assault 2 + 1.5 points for the other 3 convictions), if he is

convicted of 7 of the pending 9 charges--including any one of the violent offenses like Rape, PCSAM, Kidnapping or Robbery--he will be maxed out at 9 points. He is also maxed out based on the fact that PCSAM and the Rapes all count as 3 points against each other.

If he is maxed out, he will face the following ranges:

1) PCSAM - 240-318
2) PP 2 - 51-60
3) Kidnapping 1 - 149-198
4) Robbery 1 - 129-171
5) PP 1 - 108-120
6) Rape 1 - 240-318
7) Rape 1 - 240-318

If the defendant is maxed out following trial and convicted of any rape or the PCSABM charge, the State will be recommending the high end of the range (318 months) plus the 5 year weapon enhancement. That would bring his total time to 378 months, or 31.5 years.

In the alternative, we are prepared to discuss the following resolution with your client (final resolution is dependent on reviewing the proposed resolution with the victims):

- drop one count of Rape 1 entirely
- reduce the other count to Rape 2
- reduce the Rob 1 to Rob 2
- reduce the PCSAM to Promoting Prostitution 1
- drop the firearm enhancement
- dismiss the Eluding and the VUCSA
- agree not to file the UPFA.

In exchange your client would plead to the following:

1) Promoting 1 (score = 7, range = 77-102)
2) Promoting 2 (score = 7, range = 33-43)
3) Kidnapping 1 (score = 10, range = 149 -198)
4) Robbery 2 (score = 10, range = 63-84)
5) Promoting 1 (score = 7, range = 77-102)
6) Rape 2 (score = 10, range = 210-280)

Both parties would agree to a low-end sentence recommendation of 210 months or 17.5 years. Of course, Rape 2 also carries an indeterminate sentence, as does Rape 1. This plea agreement would save the defendant 14 years of prison, of which 5 years would be hard time.

Your client has one week to accept these terms. The contingent offer will expire at the close of business on January 12, 2012.

22068944

CONFIRM REPORT

Apr. 25 2012 10:15AM

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68766-2-I
v.	)	
	)	
D'MARCO MOBLEY,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF JULY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

COURT OF APPEALS DIV I STATE OF WASHINGTON 2013 JUL 15 PM 4:50

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] D'MARCO MOBLEY 356883 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326-9723	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF JULY, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
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