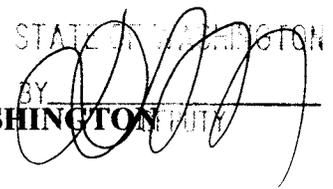


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STATE OF WASHINGTON

BY 

Court of Appeals No. 34539-1-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON

Respondent,

v.

LELAND JERMAINE JOHNSON,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

PIERCE COUNTY SUPERIOR COURT

CAUSE NO. 05-1-02265-7

THE HONORABLE BRYAN E. CHUSHCOFF,

Presiding at the Trial Court

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I. ASSIGNMENTS OF ERROR

1. Mr. Johnson's Sixth Amendment right to confrontation was violated by admission of testimonial hearsay.
2. The trial court erred in admitting unnecessary "expert" testimony that constituted profile evidence.
3. There was insufficient evidence to convict Mr. Johnson of promotion of prostitution in the second degree.
4. There was insufficient evidence to convict Mr. Johnson of identity theft in the first degree.
5. The prosecutor committed misconduct during closing argument that was prejudicial to the defense.
6. Mr. Johnson was denied a fair trial because of cumulative error.

II. ISSUES PRESENTED

1. Was Mr. Johnson's Sixth Amendment right to confrontation of witnesses violated where testimonial hearsay was introduced through the testimony of investigating officers and repeated by the prosecutor during closing argument? (Assignment of Error No. 1)
2. Did the court err in permitting an investigating officer to testify as an "expert" on prostitution where the testimony constituted profile evidence? (Assignment of Error No. 2)

3. Was there insufficient evidence to convict Mr. Johnson of promotion of prostitution in the second degree where Mr. Johnson picked Ms. Williamson up in a car that contained pictures of Ms. Williamson in various states of undress 45 minutes – one hour after Ms. Williamson attempted to engage an undercover officer in a sexual act for money? (Assignment of Error No. 3)

4. Was there insufficient evidence to convict Mr. Johnson of identity theft in the first degree where the State failed to prove that Mr. Johnson obtained, possessed, or used his “fake” identification with the intent to commit a crime? (Assignment of Error No. 4)

5. Does a prosecutor commit misconduct when she reveals testimonial hearsay, misstates the law, and mischaracterizes testimony of a witness during closing argument? (Assignment of Error No. 5)

6. Was Mr. Johnson denied a fair trial where his right to confront witnesses was violated, testimonial hearsay evidence was introduced, unnecessary “expert” testimony in the nature of profile evidence was admitted, and the prosecutor committed misconduct during closing argument? (Assignment of Error No. 6)

III. STATEMENT OF THE CASE

On May 9, 2005, three off-duty sheriff's deputies working for Pierce Transit were looking for prostitution activity around Pierce Transit property. RP 92; RP 192-194; RP 238-240. One officer in plain clothes (David Shaffer), suspecting that Ms. Bridget Williamson was a prostitute, pulled his unmarked car over to the side of the road and Ms. Williamson got inside and solicited an act of prostitution. RP 195-201.

Deputy Shaffer then drove Ms. Williamson to a prearranged location where uniformed Pierce County Sheriff Sergeant Cassio was waiting in a patrol vehicle. RP 201-202. Sergeant Cassio detained Ms. Williamson and during that time, her cell phone rang. RP 202. Deputy Shaffer picked up Ms. Williamson's phone and used the direct connect feature to dial the person who had just called Ms. Williamson. RP 203. Deputy Shaffer told the person who answered the phone that Ms. Williamson had been arrested. RP 204.

Sergeant Cassio interviewed, cited, and released Ms. Williamson, then he and the two deputies decided to follow her. RP 206. Eventually, one of the deputies saw a maroon Chrysler Sebring stop and saw Ms. Williamson get in the car. RP 207. The driver of the car was appellant Leland Johnson. *Id.* The deputy radioed Sergeant Cassio, who initiated a traffic stop of the Sebring. RP 208; RP 84.

Sergeant Cassio testified that he saw Mr. Johnson start to reach inside of the center console and saw a knife in front of the shifting column, so he ordered Mr. Johnson out of the car. RP 120-121. Sergeant Cassio stated that Mr. Johnson told Sergeant Cassio that his name was "Wayne," and produced an Oregon I.D. card and a Washington state driver's license identifying him as "Wayne King." RP 124. Sergeant Cassio had previous contacts with Mr. Johnson, and recognized him, but not as "Wayne King." RP 125. Before determining his real name, Mr. Johnson was arrested for "promoting prostitution." RP 126.

Sergeant Cassio continued to question Mr. Johnson about his identity, and took Mr. Johnson's wallet out of his back pocket, discovering other pieces of identification and documents for "Wayne King. subsequently discovered that "Wayne King" was, in fact, Mr. Johnson. RP 126-131.

The vehicle was searched, and a gun and several knives were discovered. RP 133.

On May 10, 2005, Mr. Johnson was charged with unlawful possession of a firearm in the second degree and promoting prostitution in the second degree. RP 1-4. On August 22, 2005, an Amended Information was filed, adding one count of identity theft in the first degree. RP 13-15. Defendant's motion to suppress evidence and dismiss the case was denied. RP 176; CP 19-21.

On the second day of the CrR 3.5/3.6 hearing, defense counsel John Chamberlain asked for permission to withdraw, concluding:

First of all, I want to clarify that I know you've ruled on Mr. Johnson's motion to fire me or withdraw, but I've got to reiterate this, Your Honor, I can't continue. I've got a conflict with Mr. Leland, and, I'm sorry, that's developed. We've got a rule that specifically addresses that. And I'm handcuffed to tell the Court all the details, but I will indicate to the Court that I can – as an officer of the court and with candor to the Court, Mr. Leland and I have a conflict. I cannot continue to represent Mr. Johnson.

8/22/05 CP 100.

The motion to continue the hearing in order to permit withdrawal and substitution of counsel was denied. RP 102.

Trial to the jury began on February 13, 2005. 2/13/05 RP 68. The defense half-time motion to dismiss all charges was denied. RP 329. The jury returned verdicts of guilty as charged on all counts. CP 95-97. Mr. Johnson was sentenced to 43 months for identity theft, 29 months for unlawful possession of a firearm, and 29 months for promoting prostitution in the second degree.

Notice of appeal was timely filed on March 10, 2006. CP 113-123.

IV. SUMMARY OF TESTIMONY

- *William Cassio*

William Cassio is a deputy sheriff for the Pierce County Sheriff's Office. RP 82. Over the objection of defense counsel, he was permitted to

testify as an expert. Deputy Cassio described his training and experience, particularly undercover work in vice, and explained prostitution as a business relationship, or “criminal conspiracy” between a pimp and a prostitute. RP 82-91. He explained that officers work during off-hours for Pierce Transit (RP 92), responding to complaints about prostitution activity on and around Pierce Transit property (RP 93), which is what he was doing on May 9, 2005, the date of Mr. Johnson’s arrest. RP 94. Deputy Cassio described working as a team with two other officers, Dave Shaffer and Kory Shaffer, to detect prostitution activity and make arrests. RP 94-100.

Deputy Cassio then described the arrest of a female (Ms. Williamson) suspected and confirmed to be a prostitute. RP 101-102. He stated that Ms. Williamson was issued a misdemeanor citation for soliciting prostitution, “and it was my hope that by releasing her there with, basically, a ticket that she would then be contacted by her pimp.” RP 114. Cassio testified that he and two other officers then followed Ms. Williamson “until she was picked up,” for the purpose of seeing “if she would get picked up by her pimp.” RP 115. Deputy Cassio described seeing Ms. Williamson getting into a vehicle, the driver of which “turned out to be Mr. Johnson” (RP 116), 45 minutes to one hour after she had been released. During that period, Deputy Cassio stated that Ms. Williamson had been walking and making calls on her cell phone. RP 144.

Deputy Cassio then testified about the arrest of Mr. Johnson. RP 116-141. He described the evidence (photographs, knives and a gun) obtained from the vehicle Mr. Johnson was driving. RP 122, 123, 129, 132. He also testified about his discovery inside Mr. Johnson's wallet of an identification card from Oregon and a Washington state driver's license in the name of "Wayne King," as well as debit cards in the name of "Wayne King," some of which were imprinted with a photograph of Mr. Johnson. RP 124-127.

● *Sue Clovis*

Ms. Clovis is a fraud investigator with the Department of Licensing. RP 170. Ms. Clovis testified about investigating the Washington state driver's license found in Mr. Johnson's wallet, issued in the name of Wayne King, and concluding on the basis of digital photos of Mr. Johnson that he and "Wayne King" were the same person. RP 171-179.

● *David Shaffer*

David Shaffer is a deputy sheriff for Pierce County. RP 192. He described his experience and training, then explained that he works with Pierce County Transit "for enforcement on their bus routes and bus stops for safety of their patrons." RP 194.

David Shaffer worked with Deputy Cassio and Deputy Kory Shaffer on the arrest of Ms. Williamson and Mr. Johnson. RP 195-. Deputy Shaffer testified that while Ms. Williamson was being arrested, her Nextel phone

rang, and he picked it up, but not in time to answer it. RP 202-203. He then “scrolled to the name of the person who had shown up from the call, and I used the Nextel direct connect feature,” and saw the name of the person who was calling (“Daddy”). RP 203-204. Deputy Shaffer stated that he “hit the button to talk to “daddy,” and had a conversation with the person who answered the phone. RP 204. Deputy Shaffer told the person that Ms. Williamson was being arrested. *Id.*

Deputy Shaffer stated that he saw Mr. Johnson stop and pick up Ms. Williamson, then arrived after Deputy Cassio had initiated a traffic stop of Mr. Johnson’s vehicle. RP 207-208. Deputy Shaffer testified that while the arrest of Mr. Johnson was proceeding, he retrieved a Nextel phone from the passenger compartment that was set to “daddy,” and hit the button corresponding to “daddy, and another cell phone that had been in Mr. Johnson’s hand “beeped to indicate that was “daddy’s” phone beeping. RP 209-210.

Deputy Shaffer identified the evidence he retrieved from the vehicle Mr. Johnson had been driving, including a gun, photographs of Ms. Williamson and other women, traffic citations issued to Wayne King, and knives. RP 211-222. He also testified that the vehicle was registered to a Ms. Jackson, and that there was also a traffic citation for her found in the glove box of the car. RP 224.

● ***Kory Shaffer***

Kory Shaffer is a deputy sheriff for Pierce County Sheriff's Department. RP 238. Deputy Shaffer worked with Deputy Cassio and Deputy David Shaffer on May 9th, 2005 in the arrest of Ms. Williamson and Mr. Johnson. RP 238-240. He described following Ms. Williamson around an area on Pacific Avenue, watching for a vehicle that matched the description given by Ms. Williamson of her pimp's car (RP 244), then testified that he saw Ms. Williamson get into the vehicle Mr. Johnson was driving. RP 245. Deputy Shaffer took photographs of the vehicle and evidence retrieved at the time of the arrest of Mr. Johnson, and identified the photographs. RP 248-253.

Deputy Shaffer testified that although he had requested the gun and the magazine to be checked for fingerprints, he had not received information from the lab that any fingerprints had been recovered. RP 264.

● ***Michael Ames***

Michael Ames is a detective with the Pierce County Sheriff's Department. RP 269. Detective Ames conducted the follow-up investigation into allegations of identity theft. RP 270. Detective Ames testified that he received documents from Bank of America associated with a particular account number. RP 272-273.

● ***Karen Doran***

Karen Doran is an assistant vice president for legal order processing in the Seattle branch of Bank of America. RP 288. Ms. Doran discussed a packet of documents belonging to Bank of America, including an application for a checking/savings account and debit card in the name of Wayne King, listing the applicant's Social Security number as 115-64-2502. RP 293-295. Ms. Doran testified that \$150 was deposited into the checking account and \$50 was deposited into the savings account when they were opened on May 13, 2004. RP 297-298. Ms. Doran also stated that the account was closed on October 19, 2004 for overdraft in the amount of \$8,870.85. RP 298.

● ***Joseph Rogers***

Mr. Rogers is a special agent with the Social Security Administration Office of Inspector General. RP 307. As such, Mr. Rogers conducts criminal investigations related to identity theft and misuse of social security numbers. RP 307. Mr. Rogers testified that using someone else's social security number to open a bank account constitutes an unauthorized use of a social security number. RP 308.

Mr. Rogers testified that the social security number used to open the Bank America account was not issued to Mr. Johnson. RP 310.

● ***Barbara Tainter***

Ms. Tainter is a fraud investigator with Washington Mutual Bank. RP 313. Ms. Tainter testified that a Washington Mutual account previously

opened by one Erica Brown in California later had another person named Wayne King added to the account. She testified that a Washington Mutual debit card shown to her by the prosecutor was associated with Erica Brown's account. RP 313-315.

Ms. Tainter testified that the account had been overdrawn in the amount of \$1,666 and then was closed by the bank. RP 316. On cross-examination, Ms. Tainter stated that she did not know whether Wayne King or Erica Brown created the overdraft.

● ***Leland Johnson***

Leland Johnson is the defendant/appellant. He testified that he had been denied a cosmetology license after completing the course because he was a felon (RP 358), so to avoid other problems that come with being a felon, he selected a fictitious name ("Wayne King"), birth date, and place of birth, then ordered and paid for a birth certificate from an individual who "makes identifications." RP 363-364.

Mr. Johnson testified that he applied for a bank account with the Bank of America under the name of Wayne King, then made deposits and withdrawals from the account. RP 360. He stated that the overdraft on that account was a result of a car accident in which he damaged a Hertz rental car while his insurance was lapsed. *Id.* He testified that Hertz contacted him and told him they would send him a bill for the damages, but had not done so

before he was jailed on the charges in this case. RP 361. Hertz used the Bank of America debit card number to get the money for the damages to its vehicle. RP 355. Mr. Johnson testified that Bank of America told him they would contact him to arrange for repayment, but did not do so. RP 361-362.

Mr. Johnson stated that Erica Brown, a friend of his, permitted him to add his name (“Wayne King”) to her existing Washington Mutual bank account. RP 362.

Mr. Johnson testified that on May 9, 2005, he was babysitting his son when he received a phone call from a police officer telling him that Ms. Williamson wanted him to pick her up because “[s]he had just been in a fight,” so he called his son’s mother and asked her if he could borrow her car. RP 365. She did not deliver the car for “hour and a half to two hours,” and then he began looking for Ms. Williamson, calling her on the cell phone to learn her location. RP 366. After he found her and she got into the vehicle, he was stopped and arrested. *Id.*

Mr. Johnson testified that Ms. Williamson provided the photographs to the police; that he did not know the gun and knives were in the car; and that he was not involved with Ms. Williamson as her pimp. RP 367-368. When shown the two Nextel cell phones, Mr. Johnson testified that one of them was his son’s mother’s phone, and when Ms. Williamson punches in his number, the phone read-out says “baby’s dad,” not “daddy.” RP 376-377.

● ***Talitha Jackson***

Ms. Jackson is the owner of the car borrowed by Mr. Johnson to pick up Ms. Williamson and the mother of Mr. Johnson's son. RP 390-391. Ms. Williamson testified that before handing the car over to Mr. Johnson, she locked the center console because she had a gun inside the console. RP 391. She also stated that when she retrieved her car from "the towing place," the console had been broken into. RP 394.

Ms. Jackson testified that she had a Nextel cell phone in her car and identified her phone as Exhibit 4. RP 393.

V. ARGUMENT

A. Mr. Johnson's right to confront witnesses was violated when the trial court allowed officers to discuss testimonial hearsay statements of Ms. Williamson.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004). The "principal evil" at which the Confrontation Clause is directed is the use of ex parte examinations as evidence against the accused." *Crawford*, 541 U.S. at 51, 124 S.Ct. 1363, 158 L.Ed.2d 177.

In this case, the jury learned that while working as one of a three-man team "investigating street level crimes at bus stops . . . includ[ing] . . .

prostitution activity” (RP 195), Deputy David Shaffer saw a woman he “suspected” was a prostitute, and made contact with her. RP 198. The woman, identified as Bridget Williamson (RP 208), agreed to perform a sex act on Deputy Shaffer (RP 199-201), and Deputy Shaffer then drove Ms. Williamson to a prearranged location where Sergeant Cassio, in full uniform, was waiting in his Sheriff’s Department vehicle. RP 201.

The jury learned that Sergeant Cassio arrested Ms. Williamson (RP 101) and conducted an interview (RP 102), as he “usually” (RP 87; RP 113) does, to determine, in part, whether Ms. Williamson was “working alone” or not. RP 87-88. Sergeant Cassio explained that some prostitutes do work alone, but some prostitutes “work with a pimp.” RP 88.

Sergeant Cassio stated that, after issuing Ms. Williamson a misdemeanor citation, “it was [his] hope that by releasing her there with, basically, a ticket that she would then be contacted by her pimp.” RP 114. The only possible inference was, of course, that Ms. Williamson told Sergeant Cassio that she was, in fact, “work[ing] with a pimp.” Sergeant Cassio stated that the three officers then followed Ms. Williamson “[t]o see if she would get picked up by her pimp.” RP 115.

Deputy Kory Shaffer testified:

A. . . . Sergeant Cassio Nextel’d me and told me that Ms. Williamson was possibly working for a pimp. They had a vehicle description and a physical description of –

MR. CAIN: Objection.

THE COURT: Overruled.

You may continue.

A. They had a description of the male driver. . . . He wanted me to do a close follow on Ms. Williamson to see if this vehicle was to come into the area and pick her up.

* * *

Q. What was your task at that point as far as the surveillance?

A. I was just going to observe her and see if anything that matched that vehicle description came by to pick her up.

* * *

Q. And at some point in time, did she get picked up by another car?

A. Yes, she did.

Q. Can you please tell the jurors whether the car that stopped and picked Ms. Williamson up matched the description of the car that Sergeant Cassio had indicated may be her pimp's car?

MR. CAIN: Objection.

THE COURT: I will allow this one.

A. Yes. It was given to me as a red vehicle with a black hood. The vehicle was a maroon reddish vehicle with a black top, convertible top.

Q. And you had also received a description of the driver from Sergeant Cassio, the driver of the maroon car with the

black hood. . . .

Q. And the driver of the maroon car, did that match the description that Sergeant Cassio had given you?

A. Yes.

MR. CAIN: Objection.

THE COURT: Overruled.

RP 243-245.

Sergeant Cassio testified that he made a traffic stop of the “car that had been identified,” which was a “maroon Chrysler Sebring convertible” with a “black top,” which was being driven by Mr. Johnson. RP 117-118.

The following question and answer immediately followed:

A. Was this information consistent with information that you developed based on your conversation with Ms. Williamson?

A. Yes, it was.

RP 118.

The State did not present Ms. Williamson as a witness, nor did Mr. Johnson have an opportunity to cross-examine Ms. Williamson pretrial.

1. The prosecutor violated and the court permitted the violation of its ruling on the defense motion in limine and renewed objection regarding the officer’s references to Ms. Williamson’s testimonial hearsay statements.

Defense counsel interrupted Sergeant Cassio’s testimony with an

objection:

Your Honor, my objection was based upon – it appeared that we were getting into out-of-court statements that were allegedly made by the woman who was arrested. We already had a motion in limine, which, I believe was granted, that such statements were going to be excluded. I renew that objection.

RP 102-103.

The defense counsel was correct. Pretrial, he had argued for exclusion of any statements by the investigating officers “that she has [sic] alleged to have made statements implicating my client.” RP 35. The court asked the prosecutor whether she was seeking to introduce such statements, and the prosecutor answered, “No, Your Honor.” *Id.* The court ruled: “Out-of-court statements by Ms. Williamson are not admissible, or at least **the motion in limine as to that will be granted.**”) RP 35-36. (Emphasis added).

In argument on counsel’s objection during Sergeant Cassio’s testimony, the prosecutor stated that she had “not asked him the contents of the discussion yet,” and that she didn’t “anticipate” that she would do so. RP 103. The court stated that if the prosecutor simply asked whether the officers conducted further investigation in a specific manner based on the “conversation” with Ms. Williamson, there would not be a problem. “The problem starts if he starts saying, she told me she had a pimp. She told me what the guy looked like. That becomes a problem.” RP 103-104.

When the prosecutor responded, “I think that he is going to say that he got a description of a male and a description of a car” (RP 104), defense counsel argued that “[i]t’s now sidestepping around a very clear problem,” and “should not be allowed[.]” *Id.* The court agreed: “I think that is right. He can say that he did have a conversation with her, that he did learn some information, and that information guided other things that he did, but I’m going to sort of leave it at that.” *Id.*

The prosecutor told that court that she “intend[ed] to ask if that was consistent with information that they got from Ms. Williamson.” RP 107.

Defense counsel again objected:

That is, again, going to an out-of-court statement and then trying to back door it in by saying, is it consistent. . . . I think it is very clear that they can testify to what they did, but they can’t testify that they were acting upon information that they gathered from Ms. Williamson.

RP 107.

After further argument, the court ruled:

[B]ecause of the *Crawford* and the constitutional implications of that, I do think there is an issue here as to why the officers had contact with Mr. Johnson, and it seems to me that he is to say, at least generally, that talking to Mr. Johnson was consistent with other information that they had **without necessarily saying that it was the same or was it or – you know, and so on. I’m going to let it be as generic as that, but no more specific than that**, Ms. Platt. That’s my ruling. (Emphasis added.)

RP 111.

The prosecutor elicited the very testimony that the court had ruled would not be allowed: that Ms. Williamson gave a description of her pimp and the car he was driving to Sergeant Cassio, who passed her descriptions on to Deputy Shaffer. The prosecutor committed misconduct when she asked Deputy Shaffer whether the car Mr. Johnson was driving matched the description given by Ms. Williamson to Sergeant Cassio and whether Mr. Johnson matched Ms. Williamson's description of her pimp given to Sergeant Cassio. The prosecutor also committed misconduct when she asked Sergeant Cassio whether the car he stopped and the driver were "consistent" with the information he had obtained from Ms. Williamson.

In spite of its ruling on the defense motion in limine and in spite of the court's ruling on defense counsel's renewed objection, the court permitted all of the information it had ruled could not be given to the jury to be presented through the testimony of Sergeant Cassio and Deputy Shaffer.

2. The statements made by Ms. Williamson to Sergeant Cassio were testimonial hearsay.

This Court recently wrote:

Hearsay is an out-of court statement offered to prove the truth of the matter asserted. ER 801(c). . . . A statement is "testimonial" if the declarant would reasonably expect it to be used prosecutorially. (Citations omitted.) This definition includes statements elicited in response to structured questioning during a police investigation. (Citation omitted.)

State v. Monschke, ___ Wn. App. ___, 135 P.3d 966, 977 (2006). *See also*

Crawford, 541 U.S. at 68, 124 S.Ct. at 1374, 158 L.Ed.2d 177 (“Whatever else the term [testimonial] covers, it applies at a minimum to . . . police interrogations.”).

Ms. Williamson’s statements to Sergeant Cassio describing her pimp and the car her pimp was driving were given in the course of her custodial interrogation; thus, they were “testimonial.”

Ms. Williamson’s statements were made out of court, and were offered to prove the matter asserted, i.e., that the investigating officers stopped the car that matched the description given by Ms. Williamson of her pimp’s car, and that the car was being driven by the man that matched Ms. Williamson’s description of her pimp. The statements were hearsay under ER 801(c). Ms. William’s statements made to Sergeant Cassio were testimonial hearsay.

“The admission of testimonial hearsay violates a defendant’s right of confrontation unless the declarant is unavailable and there was a prior opportunity to cross-examine the declarant.” *Monschke*, ___ Wn. App. ___, 135 P.3d at 978, citing *Crawford*, 541 U.S. at 68. Mr. Johnson’s right to confrontation was violated when the **substance** of Ms. Williamson’s testimonial hearsay statements was conveyed to the jury through the testimony of Sergeant Cassio and Deputy Shaffer, even if her exact words were not repeated by the officers.

The jury was informed that, during her interview by Sergeant Cassio, Ms. Williamson had described her pimp and had described the car her pimp was driving. The jury was informed that the officers had stopped the car Mr. Johnson was driving because it matched the description given by Ms. Williamson, and that Mr. Johnson matched the description Ms. Williamson gave of her pimp to Sergeant Cassio.

As is clear from the trial court's ruling, it was well aware of the "*Crawford* . . . implications" that would arise if Sergeant Cassio and/or Deputy Shaffer were permitted to connect their decision to stop Mr. Johnson with the testimonial hearsay statements made by Ms. Williamson during her interview by Sergeant Cassio. The trial court nevertheless permitted that connection to be made during trial.

3. The prosecutor's misconduct was prejudicial to the defense.

An appellant claiming prosecutorial misconduct must establish the impropriety of the prosecuting attorney's conduct and the prejudicial effect thereof. *State v. Russell*, 125 Wash.2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

In this case, the prosecutor's misconduct was "prejudicial" because it violated Mr. Johnson's Sixth Amendment right to confront witnesses. A violation of constitutional rights is presumed to be prejudicial. *State v.*

Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

4. The trial court's rulings permitting references to testimonial hearsay statements of Ms. Williamson constituted abuse of discretion requiring reversal.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Bottrell*, 103 Wn. App. 706, 711, 14 P.3d 164 (2000), *review denied*, 143 Wn.2d 1020, 25 P.3d 1019 (2001). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998).

The trial court's rulings permitting references to the testimonial hearsay statements of Ms. Williamson violated its previous rulings that such references would not be allowed. But even more egregious, admitting evidence of the testimonial hearsay statements through the testimony of Sergeant Cassio and Deputy Shaffer violated Mr. Johnson's rights under the confrontation clause and *Crawford, supra*.

"A violation of a defendant's rights under the confrontation clause is constitutional error." *State v. McDaniel*, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), *review denied*, 131 Wn.2d 1011, 932 P.2d 1255 (1997). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. *Guloy*, 104 Wn.2d at 425,

705 P.2d 1182.

In determining whether constitutional error is harmless, Washington courts use the “overwhelming untainted evidence test,” under which appellate courts look only to the untainted evidence to decide if it is so overwhelming that it necessarily leads to a finding of guilt.

McDaniel, 83 Wn. App. at 187-188, 920 P.2d 1218, citing *Guloy*, 104 Wn.2d at 426, 705 P.2d 1182.

On the charge of promotion of prostitution in the second degree, the untainted evidence would not include statements that Mr. Johnson and the car he was driving matched the description given by Ms. Williamson of her pimp and the car her pimp was driving. As the prosecutor candidly told the court during the CrR 3.5/3.6 hearing, the information given to Sergeant Cassio by Ms. Williamson constituted the “identifiers to who the pimp was in this case.” RP 5. The untainted evidence of promotion of prostitution includes an envelope containing pictures of women found in the car that Mr. Johnson was driving when he was stopped by Sergeant Cassio, and the fact that Ms. Williamson’s Nextel phone had a direct connection to a phone in Mr. Johnson’s possession. This does not constitute “overwhelming” evidence that Mr. Johnson was engaged in the promotion of prostitution.

This Court should reverse Mr. Johnson’s conviction for promotion of prostitution in the second degree.

B. The trial court erred in permitting Sergeant Cassio to testify as an “expert” on the relationship between a prostitute and her pimp.

This Court reviews evidentiary rulings for abuse of discretion. *State v. Poling*, 128 Wn. App. 659, 670, 116 P.3d 1054 (2005). “A court abuses its discretion when it bases its ruling on untenable grounds or reasons.” *Id.* at 670-671, 116 P.3d 1054.

Defense counsel urged the Court not to allow Sergeant Cassio to testify as an expert “as to how prostitutes act and their relationship with their pimp” for two reasons: (1) such information was not beyond the realm of common understanding; and (2) such testimony constituted “kind of profiling or business practice or what he believes the habit of people are or perhaps the habit of this particular individual.” RP 70-71.

The prosecutor asked the court to permit the investigating officers to present “expert” testimony on

pimps for one thing and how the system works with pimps, how close a pimp is likely to stay to a prostitute, how the profits are shared, what a pimp’s role is, just stuff like that.

RP 72-73.

In particular, the prosecutor wanted the investigating officers “to testify about . . . how closely the pimp stays to the scene where the prostitution activity is being conducted.” RP 75. Contrary to the prosecutor’s assertion that she only wanted to elicit “general” information,

this fact directly supported the State's position that Mr. Johnson was the pimp because he picked up Ms. Williamson near the place where she had been arrested.

Defense counsel argued:

I think one of the concerns – one of the concerns that I have is that she was the person, who is alleged to be a prostitute, that was stopped by the police officers and then released. My understanding is that she was then followed and trailed and was observed making some phone calls. . . .

And then she got into the car that was driven by Mr. Johnson. I think that what the police officer wants to – I think what they want to say is that pimps are in the area. Prostitutes will call their pimp; and, therefore – I don't know how far they are going to go, but then, therefore, he was the pimp. I think that, you know, prostitutes also call other people if their pimp is not available. They call cab services. They call a lot of people to get rides out of the area.

To elevate what is perhaps a logical, you know, to the area of expertise is to put weight on something that is not necessary and certainly not beyond the realm of common understanding. It is really an attempt to take, I think, anecdotal information and get it elevated to the type of expert testimony where you can give an opinion.

RP 76.

The court ruled that the officers could testify as experts because:

I think that there is some people who wonder, why are there pimps at all? What do they bring to the enterprise? As Ms. Platt points out, they provide at least potentially some business connections and some protection and some assistance, so that information is, of course, useful to the jurors so that they understand why someone might have – someone who is a prostitute might have someone assisting

them at all to make more probable the issue as to whether or not the woman involved here had a pimp or not.

RP 78.

ER 702 provides that a witness qualified as an expert may testify in the form of an opinion or otherwise “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]”

The jury did not need assistance to understand the relationship between a pimp and a prostitute. That relationship is the subject of common knowledge, and is not a proper subject for “expert” testimony.

No special skill, experience, knowledge, or education is required to formulate an opinion upon a matter that can be judged by people of ordinary experience and knowledge. In such situations, the jury does not need the assistance of an expert, and the courts tend to exclude expert testimony because the aura of expertise may cause the jury to place too much reliance on the testimony.

Karl B. Tegland, 5D WASHINGTON PRACTICE, *Courtroom Handbook on Washington Evidence* (2006), page 339.

The jury may be especially influenced by the “expert” testimony of police officers, as Washington courts have acknowledged. *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001) (“An officer’s live testimony offered during trial, like a prosecutor’s statements made during trial may often ‘carr[y] an “aura of special reliability and trustworthiness.’”) (quoting

United States v. Espinosa, 827 F.2d 604, 613 (9th Cir.1987) (quoting *United States v. Young*, 745 F.2d 733, 766 (2nd Cir.1984) (quoting *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir.1979))).

The trial court erred in allowing the State to present “expert” testimony about pimps under ER 702 because the subject of the testimony was not beyond common understanding.

Such testimony was prejudicial because it was in the nature of “profile” evidence. Sergeant Cassio testified about what pimps do for prostitutes in their “employ,” how pimps promote prostitution, and his own opinion that pimps manipulate prostitutes. *See* RP 88-90.

In *State v. Braham*, 67 Wn. App. 930, 841 P.2d 785 (1993), Mr. Braham was convicted of first degree child molestation. On appeal, Mr. Braham argued that the trial court had improperly admitted expert testimony about the “grooming” process, i.e., techniques that child molesters use to establish a relationship with the victim. *Braham*, 67 Wn. App. at 931, 841 P.2d 785.

During pretrial motions, the *Braham* prosecutor told the court she would be calling one Ms. Berliner to testify as an expert regarding “grooming” of victims, and over the objection of the defense, the court allowed the testimony. *Id.* at 932, 841 P.2d 785. Mr. Braham argued on appeal that “the expert testimony on ‘grooming’ was erroneously admitted

because it is, in fact, a type of ‘profile’ testimony,” and as such, “it carries an unfairly prejudicial opinion on defendant’s guilt and hence invades the province of the jury.” *Id.* at 934, 841 P.2d 785.

Citing cases in which admission of “profile” evidence required remand, the Court stated: “[e]xpert testimony implying guilt based on the characteristics of known offenders is the sort of testimony deemed unduly prejudicial and therefore inadmissible.” *Id.* at 937, 841 P.2d 785.

The *Braham* Court found there was no need for the expert opinion on grooming:

we are unable to conceive of any basis for its admission in this case. Surely, expert opinion is not necessary to explain that an adult in a ‘close relationship’ with a child will have greater opportunity to engage in the alleged sexual misconduct.

Id. at 937-938, 841 P.2d 785.

Similarly, there was no need for expert opinion on the relationship between prostitutes and their pimps in this case. Like the *Braham* prosecutor (*see Id.* at 937, 841 P.2d 785), the prosecutor in this case stated she wanted to elicit testimony from the investigating officers “just generally about prostitution,” but then candidly admitted that she wanted the officers to “testify about . . . how closely the pimp stays to the scene where the prostitution activity is being conducted.” RP 75.

As in *Braham*, the “expert” testimony – here about pimps – had

“virtually no probative value under ER 401”; as in *Braham*, the prosecutor used the expert testimony “as circumstantial evidence of [Mr. Johnson’s] guilt”; and as in *Braham*, “it was unfairly prejudicial under ER 403.” *Id.* at 939, 741 P.2d 745.

Here, as in *Braham* (*Id.* at 940, 741 P.2d 745), the prosecutor reiterated Sergeant Cassio’s “expert” testimony during closing to support her argument that Mr. Johnson was Ms. Williamson’s pimp. *See* RP 456-459; RP 488-489.

As in *Braham*, “[e]vidence of [Mr. Johnson’s] guilt was not conclusive.” *Braham*, 67 Wn. App. at 939, 741 P.2d 745. Other than the evidence based on inadmissible testimonial hearsay statements of Ms. Williamson and the improper profile testimony, the State’s case on the charge of promotion of prostitution consisted of an envelope with photographs of Ms. Williamson and other women found inside the car Mr. Johnson was driving and the fact that Ms. Williamson’s Nextel phone had a direct connection to the phone in Mr. Johnson’s possession.

Here, as in *Braham*, the unnecessary “expert” testimony was in the nature of “profile” testimony, the purpose of which was to convince the jury that Mr. Johnson fit the profile of a pimp, and was thus likely Ms. Williamson’s pimp. The erroneous admission of the “expert” testimony on pimps and their relationship to prostitutes was not harmless. The Court

should reverse Mr. Johnson's conviction for promotion of prostitution.

C. There was insufficient admissible evidence to convict Mr. Johnson of promotion of prostitution in the second degree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citation omitted). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (citing *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)).

RCW 9A.88.080 defines the crime of promoting prostitution in the second degree:

- (1) A person is guilty of promoting prostitution in the second degree if he knowingly:
 - (a) Profits from prostitution; or
 - (b) Advances prostitution.

* * *

RCW 9A.88.060 defines the terms used in RCW 9A.88.080:

- (1) "Advances prostitution." A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, he causes or aids a person to commit or

engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

(2) "Profits from prostitution." A person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

* * *

Absent the inadmissible references to testimonial hearsay statements made by Ms. Williamson and the improper profile testimony, there was insufficient evidence to convict Mr. Johnson of promotion of prostitution in the second degree. The State presented no evidence whatsoever that Mr. Johnson accepted or received any money or property from Ms. Williamson or any other person engaged in prostitution. The State presented no evidence that Mr. Johnson caused or aided Ms. Johnson to commit or engage in prostitution, procured or solicited customers for prostitution, provided persons or premises for prostitution purposes, operated or assisted in the operation of a house of prostitution or a prostitution enterprise, or engaged in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

Aside from inadmissible evidence, the State merely showed that there were photographs of women in various stages of undress in the car Mr. Johnson was driving, including photographs of Ms. Williamson, and that Ms. Williamson's Nextel phone had a direct connection to a Nextel phone in Mr. Johnson's possession.

The Court should reverse Mr. Johnson's conviction and dismiss with prejudice the charge of promotion of prostitution in the second degree. *See State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000) (insufficiency of evidence mandates dismissal with prejudice).

D. There was insufficient admissible evidence to convict Mr. Johnson of identity theft in the first degree.

A person commits identity theft when s/he "knowingly obtain[s], possess[es], or transfer[s] a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1).

"Identity theft" in the first degree occurs "when the accused . . . uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value. . . ." RCW 9.35.020.

Mr. Johnson admitted that he purchased a "fake" birth certificate from an individual who "knows someone in the social security office" and "knows

someone in the DMV.” RP 363. Mr. Johnson stated that this individual “makes identifications” for which “you pay a lot of money because it is higher quality.” *Id.* Mr. Johnson stated that “Wayne King” wasn’t a “real person at all.” RP 363. Rather, he selected the name of “Wayne King,” a birth place of “Manhattan, New York,” and a birth date of “05/08/1978” (RP 364), and received a “fake” birth certificate and a social security number from the individual. RP 372. According to Sergeant Cassio, Mr. Johnson told him that he had used the “fake” identification “to get an Oregon identification card. And then he took the Oregon identification card and brought it to Washington and used that as the credentials that he needed for a Washington State driver’s license and the credit information for that as well.” RP 140.

Mr. Johnson testified that he “tried to change [his] identity to Wayne King” for “numerous reasons,” all related to the fact that he had been convicted of a felony: “it’s hard to find someone to rent to you with a felony.” RP 358. He completed cosmetology school but was denied the opportunity to take the test to receive his license because “with my felony, I couldn’t work with anyone that is older than me or younger than me.” *Id.*

The State based the charge of identity theft on the fact that Mr. Johnson had (1) obtained the “fake” identification, (2) used it to open a bank account which, as a result of a car accident, became overdrawn, (3) added his name to a friend’s account, which account was overdrawn, and (4) received

traffic citations made out to “Wayne King.”

● ***Bank of America account***

Mr. Johnson listed his own address when he obtained his “fake” Washington driver’s license on March 16, 2004, and listed his home address when he applied to the Bank of America for an account in the name of “Wayne King” on May 13, 2004. RP 360-361; RP 373; RP 294. Mr. Johnson presented his “fake” Washington driver’s license and listed the social security number he had been provided in order to open the Bank of America account. RP 295. Mr. Johnson received a debit card for use on his Bank of America account, but no credit card. RP 297; RP 303.

Mr. Johnson made deposits into that account as well as withdrawals for a number of months, with statements going to his home address. RP 299-300; RP 377.

Mr. Johnson testified that he had rented a 2004 Lincoln Navigator from Hertz, using it for “almost two weeks.” RP 360. The insurance on the rental car lapsed, and Mr. Johnson subsequently “wrecked the car,” leaving him “liable to pay for the whole damages.” *Id.* Hertz told Mr. Johnson that “they were going to send [him] a bill and a statement for the damages.” RP 361. Mr. Johnson stated that Hertz had his home address and phone number. *Id.*

On July 29, 2004 (RP 304), Hertz Rent-a-Car in Seattle, Washington

made a demand on Mr “King’s” account for \$8,802.04. RP 302. Bank of America paid the amount “out of the account,” which is a “common practice” of Bank of America. RP 303.

The account was closed by the bank on October 19, 2004. Mr. Johnson testified that he received a letter that the bank was closing out his account “due to the damages that was done to the vehicle to Hertz.” RP 361. He also stated that he contacted the bank “to find out what can I do” and “they told me that they were going to get back with me,” but did not do so. RP 361-362.

● *Washington Mutual account*

Mr. Johnson testified that after his account was closed by the Bank of America, one Erica Brown, a friend of Mr. Johnson and California resident, permitted him to add his name (“Wayne King”) to her existing account at Washington Mutual Bank. RP 362. To be added to the account, Mr. Johnson used his “fake” Washington driver’s license as identification. *Id.* Mr. Johnson received a debit card on the account. RP 314.

A representative from Washington Mutual testified that the account was closed because it was overdrawn in “early 2005”; that there were charges on the account made in Tacoma; the statements on the account were sent to Ms. Brown in California; and that the bank did not know whether Ms. Brown had been in Washington, and did not know who created the overdraft. RP

315-318.

● *Traffic citations to “Wayne King”*

Deputy Shaffer testified that he found two traffic citations to “Wayne King” in the glove box of the car Mr. Johnson was driving at the time of his arrest (RP 218), and Mr. Johnson admitted that he had signed them as “Wayne King.” The State presented no evidence that the citations were not paid.

1. The State did not prove the elements of identity theft in the first degree.

The jury was instructed that to convict Mr. Johnson of identity theft in the first degree, the State was required to prove beyond a reasonable doubt that, in the state of Washington, Mr. Johnson (1) “knowingly obtained, possessed, used or transferred a means of identification or financial information of another person, living or dead,” and (2) acted with the intent to commit, or to aid or abet, any crime; and (3) obtained any credit, money, goods, services or anything of value over \$1,500.” CP 92.

Mr. Johnson admitted that he knowingly obtained “false” identification, but testified that the identity was for a fictitious person whose name, birth place, and birth date he had selected. A representative of the Social Security Administration testified that the social security number used by Mr. Johnson to obtain his Oregon I.D. card and to open the Bank of

America account belonged to a living person who was residing in the state of New York. RP 311.

The State failed to prove beyond a reasonable doubt that Mr. Johnson obtained the “fake” identification with the intent to commit any crime. Mr. Johnson testified that he obtained the “fake” identification to avoid the consequences of having a felony conviction.

2. Criminal intent cannot be inferred from the facts of this case.

This Court has written that criminal intent can be inferred “as a logical probability from the facts and circumstances.” *State v. Whitfield*, 132 Wn. App. 878, 895, 134 P.3d 1203 (2006), citing *Delmarter*, 94 Wn.2d at 638, 618 P.2d 99.

No inference of intent to commit a crime flows from the facts and circumstances here: Mr. Johnson used his own home address to obtain his Oregon I.D. card and the “fake” Washington state driver’s license, as well as to open the Bank of America account. The monthly statements from the Bank of America went to Mr. Johnson’s residence. Similarly, the traffic citations issued to “Wayne King” would have been based on information obtained from the Washington driver’s license that included Mr. Johnson’s home address. *See* RP 178. Mr. Johnson had permission from Ms. Erica Brown to add his name to her Washington Mutual bank account.

The overdraft on “Wayne King’s” Bank of America account was the result of a car accident – this was not something Mr. Johnson intentionally caused to happen. The State presented no evidence whatsoever that Mr. Johnson had any knowledge that Bank of America would pay his acknowledged debt to Hertz at a time when there were insufficient funds in his account to cover the charge from Hertz. No criminal intent can be inferred from the facts of this case.

Under RCW 46.61.020, it is a misdemeanor to give “a false name **and** address” to a police officer while operating or in charge of any vehicle. By obtaining his “fake” identification, Mr. Johnson did not intend to commit this crime: his “fake” driver’s license listed his correct home address.

Under RCW 9A.76.020, it is a gross misdemeanor to “willfully hinder[], delay[], or obstruct[] any law enforcement officer in the discharge of his or her official powers or duties.” This statute has been interpreted to require an action or inaction that “in fact hinders, delays, or obstructs.” *City of Sunnyside v. Wendt*, 51 Wn. App. 846, 851, 755 P.2d 847 (1988), citing *State v. CLR*, 40 Wn. App. 839, 841-842, 700 P.2d 1195 (1985). There was no intent to “in fact hinder, delay, or obstruct” any law enforcement officer in discharging his or her official powers or duties, as the completed traffic citations made out to “Wayne King” made clear.

The State may argue that Mr. Johnson used his “fake” name in an

attempt to hinder Sergeant Cassio at the time of Mr. Johnson's arrest in this case. However, the officers were not "in fact" hindered in making the arrest. Mr. Johnson was under arrest as "Wayne King" **before** Sergeant Cassio discovered his real name. *See* RP 126 (Mr. Johnson was arrested "based on the information from Deputy Dave Shaffer," i.e., on the fact that Ms. Williamson got into the car Mr. Johnson was driving). Further, the State presented no evidence that Mr. Johnson had ever previously avoided arrest by presenting his "fake" Washington driver's license to a police officer.

The facts here simply do not support an inference that Mr. Johnson obtained his "Wayne King" identification with intent to commit any crime. The State failed to prove criminal intent beyond a reasonable doubt, and Mr. Johnson's conviction for identity theft in the first degree should be reversed and the charge dismissed with prejudice.

E. The prosecutor committed misconduct during closing argument that was prejudicial to the defense.

During closing argument, the prosecutor committed misconduct repeatedly, as follows:

- The prosecutor told the jury that Sergeant Cassio got a description of her pimp and his car from Ms. Williamson that matched Mr. Johnson and the car he was driving. RP 457. This statement revealed the substance of testimonial hearsay statements made by Ms. Williamson to Sergeant Cassio,

in violation of Mr. Johnson's right to confrontation.

● The prosecutor stated that Karen Doran testified that the collections company used by the Bank of America would "go after" Wayne King, "who apparently lives in New York." RP 450. This statement was a mischaracterization of Ms. Doran's testimony: she did not say that the collections company would "go after" Wayne King who lived in New York.

The prosecutor stated a second time in closing that "[t]he bank is going after Wayne King in New York who has that social security number." RP 485. This statement is also a mischaracterization of the evidence. Ms. Doran testified:

Q. When you say that the account was overdrawn, what happens in a situation where an account is overdrawn and is closed? How does the bank get the \$8,000?

A. We write it off.

Q. When you say you write it off, does that mean that you simply forgive the debt or do you have other recourse?

A. Generally, it would be sent on collection.

Q. And if you were to send it on collection, what name would you send it to collections as being the debtor?

A. Wayne King.

RP 298-299.

Ms. Doran had before her the application documents completed by Mr. Johnson to open the Bank of America account as "Wayne King,"

including his “fake” Washington state driver’s license giving his Tacoma home address. RP 294-295. There was no indication by Ms. Doran that the “Wayne King” from whom payment would be sought was a Wayne King in New York.

- The prosecutor stated that Mr. Johnson committed “crimes of theft from the . . . Bank of America” and “Washington Mutual” and “getting citations.” RP 453. Mr. Johnson was not charged with theft, the State did not establish that any theft was committed by Mr. Johnson, nor was there sufficient evidence to support an inference that theft had been committed. Getting a traffic citation is not a crime.

- The prosecutor stated, “If you use a social security number that belongs to any person living or dead, you’re guilty of identity theft.” RP 453. This is a misstatement of the law. A person commits identity theft if s/he uses a social security number of another person **and** acts with the intent to commit a crime. RCW 9.35.020(1).

A prosecutor’s misconduct is “prejudicial when there is a substantial likelihood that the misconduct affected the jury’s verdict.” *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993). This Court will review the allegedly improper arguments “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *Stith*, 71 Wn. App. at 19, 856 P.2d 415 (quoting *State v. Graham*, 59 Wn.

App. 418, 428, 798 P.2d 314 (1990)).

The prosecutor's statement that Ms. Williamson gave Sergeant Cassio a description of her pimp and his car, which description matched Mr. Johnson and the car he was driving, undoubtedly affected the jury's verdict, and could not have been cured with a limiting instruction.

Mr. Johnson's counsel objected to only one of the prosecutor's improper comments during closing argument. *See* RP 485. Where defense counsel does not object to alleged misconduct or request a curative instruction, then reversal is required only if the misconduct was so prejudicial that it could not have been cured with a limiting instruction. *Stith*, 71 Wn. App. at 20, 856 P.2d 415.

Even if this Court determines that several of the identified comments of the prosecutor did not cause prejudice rising to the level requiring reversal, the statement that Ms. Williamson had given a description of her pimp and his car that matched Mr. Johnson and the car he was driving was so prejudicial that it could not have been cured with a limiting instruction. Reversal of Mr. Johnson's convictions is required on the basis of prosecutorial misconduct on this statement alone.

F. Cumulative error denied Mr. Johnson a fair trial.

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. Courts apply the

cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. Rather, the combined errors effectively denied the defendant a fair trial.

State v. Rooth, 129 Wn.App. 761, *at* 75, 121 P.3d 755 (2005).

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

In this case, several prejudicial errors occurred. The trial court permitted testimonial hearsay to be introduced through the testimony of Sergeant Cassio and Deputy Shaffer; the trial court permitted Sergeant Cassio to present unnecessary “expert” testimony that constituted profiling; and the prosecutor committed misconduct during closing argument by reiterating testimonial hearsay, misstating the law, and mischaracterizing the testimony of Ms. Doran. As a result, Mr. Johnson did not receive a fair trial.

This Court should reverse Mr. Johnson’s convictions and remand for a new trial on the basis of cumulative error.

VI. CONCLUSION

The Court should reverse Mr. Johnson's convictions for promotion of prostitution and identity theft and dismiss those charges with prejudice because the State presented insufficient evidence to convict him.

Alternatively, because cumulative error resulted in an unfair trial, the Court should reverse all of Mr. Johnson's convictions and remand for a new trial with instructions that evidence of Ms. Williamson's testimonial hearsay statements to Sergeant Cassio and any expert testimony "profiling" pimps is inadmissible.

Alternatively, because Mr. Johnson's Sixth Amendment right to confront witnesses was violated by presentation of testimonial hearsay through the testimony of the investigating officers, the Court should reverse Mr. Johnson's convictions on promotion of prostitution and identity theft and remand for a new trial on those charges with instructions that evidence of Ms. Williamson's testimonial hearsay statements to Sergeant Cassio and any expert testimony profiling pimps is inadmissible.

DATED this 3rd day of August, 2006.

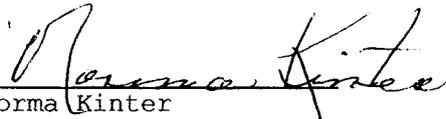
Respectfully submitted,



Sheri Arnold, WSBA No. 18760
Attorney for Appellant

Certificate of Service:

The undersigned certifies that on August 4, 2006, she delivered in person to the Pierce County Prosecutor, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and through the United States Post Office to appellant, Leland Johnson, DOC 726387, McNeil Island Corrections Center, P. O. Box 881000, Steilacoom, Washington 98388, true and correct copies of the Appellant's Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on August 4, 2006.


Norma Kinter

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