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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TERENCE FRANKLIN HOPWOOD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Shelly K. Speir

No. 16-1-01323-8

Brief of Respondent, Cross Appellant

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion by admitting text message evidence under an applicable exception to the hearsay rule?
2. Did the trial court abuse its discretion by admitting evidence from the defendant's detention and arrest where the trial court's findings and conclusions as to the detention were supported by substantial evidence?
3. Did the trial court abuse its discretion when it permitted the detective to testify about having fired a cartridge from the defendant's gun where the testimony was neither scientific nor opinion evidence?
4. Was the defendant denied the right to present a defense when his proffered evidence was inadmissible hearsay that was not supported by a hearsay exception?
5. Did the trial court abuse its discretion when it allowed the detective to testify about the out-of-state origins of the investigation in terms that were not calculated to arouse passion or prejudice?
6. Was sufficient evidence introduced to prove the victim was under the age of eighteen where it was undisputed that she was a reported runaway from Oregon, her driver's license photo was an admitted exhibit, and her date of birth was testified to?

B. CROSS APPELLANT'S ASSIGNMENT OF ERROR.

1. The trial court erred by ruling orally and in writing that text message and other out-of-court statement evidence was not admissible as coconspirator statements under ER 801(d)(2)(v).

2. The trial court erred in the following findings of fact found on page two of its April 7, 2017, written order:

Based on the facts presented and on applicable law, the court found that G.S.W. could not be deemed a co-conspirator in this case.

* * * *

The court held that, because G.S.-W. (sic.) was the defendant's victim in Count I at trial, she could not "as a matter of law" have entered into any conspiracy with the defendant.

CP 195-97.

C. ISSUE PERTAINING TO CROSS APPELLANT'S ASSIGNMENT OF ERROR.

1. Did the trial court commit harmless error by excluding text message and other out-of-court statements evidence as coconspirator statements but admitting the same evidence as statements against penal interest?

D. STATEMENT OF THE CASE.

1. Procedural History.

On March 30, 2016, Appellant Terence Franklin Hopwood (the "defendant") was charged with two felony offenses, commercial sexual abuse of a minor and first degree unlawful firearm possession. CP 1-2. The charges were amended twice as to the firearm count, the second time was during the trial. CP 7-8 and 53-54. The second amendment was allowed in conjunction with a defense motion to dismiss the first degree firearm charge. 5 RP 305. The motion was premised on an allegation that the prior

conviction related to the first degree firearm charge was unconstitutionally obtained. 5 RP 296-305. The amendment was allowed and the defendant tried on a second degree firearm charge rather than the original first degree charge.

The trial commenced on February 13, 2017. 1 RP 2. The court heard several pre-trial motions, including a motion to suppress text message evidence and other statements of the victim on the ground the evidence was hearsay, and not admissible as co-conspirator statements. CP 34-44, 208-214, and 64-84. After several rounds of colloquy and argument, the trial court granted the motion. 5 RP 288-90. At the same time the trial court authorized admission of the evidence as statements against penal interest. *Id.* The court formally memorialized these rulings in written findings and conclusions. CP 195-97, 200-202. The defendant assigns error to the admission of the statements under the penal interest exception while the state assigns error to the exclusion of the statements as coconspirator statements.

The trial court also held a pre-trial voluntariness hearing concerning custodial statements from the defendant. 2 RP 62, *et. seq.* The arresting officer testified about statements made by the defendant during a video tape recorded interview conducted later at the police station. *Id.* The defendant did not raise any issue related to the lawfulness of his arrest during the hearing but instead argued that the advisements of the defendant's constitutional rights were insufficient. 2 RP 84-98. The defendant did not

bring any other motion related to the lawfulness of the defendant's arrest to include challenges to the consent searches or warrant searches of his cell phone and vehicle.

During the trial the court ruled on several additional evidentiary issues. These included, (1) an objection to the primary detective's testimony about the out of state character of the investigation [5 RP 383.], (2) an objection to the detective's testimony about having successfully fired the defendant's gun [6 RP 472-77.], and (3) an objection to exclusion of an out of court statement from the victim [7 RP 680, *et.seq.*]. The trial court overruled the first two objections and sustained the third. 5 RP 383, 6 RP 477, and 7 RP 689.

The parties presented evidence from February 21st through February 28th. The state called seven witnesses, the defendant none. CP 220. The victim was not called as a witness. *Id.* The court found in connection with its penal interest ruling that the victim was unavailable and that her statements were sufficiently corroborated. CP 195-97. 5 RP 290. The trial court admitted a number of exhibits containing the content of communications between the victim, the undercover officer, and a third party, all extracted from the defendant's cell phone. CP Trial Exhibits 39-47, and 51. *See* 8 RP 912 *et.seq.*

The jury was instructed on May 1, 2017, and the parties presented their closing arguments the same day. 10 RP 1169, *et.seq.* The jury returned

guilty verdicts for both charges the following day. CP 140-41, 168-81.

Sentencing was set for April 7, 2017. *Id.*

2. Statement of Facts.

In March 2016 Lakewood Police Detective Ryan Larson received an investigation referral from the National Center for Missing and Exploited Children (the “NCMEC”) through the FBI of a juvenile “prostituting on Backpage.” 5 RP 345-46. Larson was assigned to an FBI task force dedicated to the investigation of human trafficking. 5 RP 341. He had been with the task force for seven years and was certified by the FBI to conduct undercover investigations. 5 RP 342-43. He testified that a primary purpose of the task force was to “recover” juveniles from prostitution activity. 5 RP 345, 382.

The subject of the investigation was a juvenile prostitute victim, G.S.W. 5 RP 381. The victim had been reported as a runaway in Oregon and come to the notice of NCMEC because of a Backpage.com advertisement offering her for prostitution services. 5 RP 349-51. Detective Larson explained how ads on Backpage work and a copy of the ad that led to the investigation was admitted into evidence. CP Trial Exhibit 2. 5 RP 51-54.

After receiving the Backpage ad, Detective Larson made electronic contact with the person or persons posting the ad and with G.S.W. herself. 5 RP 361-63. This was in an undercover capacity, using technology to mask

his law enforcement identity. 5 RP 363-66. Using a copy of the text messages Detective Larson described the communications by which he negotiated a meeting with G.S.W. pretending to be an adult male customer interested in engaging her services as a prostitute. 5 RP 375-84.

The prostitution transaction was set up to take place at a Lakewood motel with the actual first face to face meeting to occur at a nearby McDonald's restaurant. 5 RP 384. The messaging that led up to the meeting included exchanges of both information and digital images. 5 RP 385-90. Some of the images included images from the Backpage ad but there were other images that had not appeared in the Backpage ad. *Id.* Prior to the face to face meeting Detective Larson had the Backpage digital images, the images from the text message exchange, and a copy of G.S.W.'s driver's license photo and other identifying information and thus knew who he was meeting at the McDonalds before he went there. 6 RP 432-39, 454. The driver's license photo was admitted into evidence. 6 RP 437.

The messages included graphic content concerning the transaction for sexual services as well as logistics in accomplishing the face to face contact. For example the messages included the following:

- Q. What did you say?
- A. "I can't wait to see you. You are amazing looking."
- Q. And the next text you sent her?
- A. "Any chance you got a sexy friend too?"

- Q. What was her response when you asked that second question?
- A. Well, first she sent me more pictures. Her first actual text was, "We meet. Let's talk about that."
- Q. Okay. So in sequence, the last three pictures that you got came after you asked about a sexy friend?
- A. Yes, sir.
- Q. And did she talk about whether she had a friend?
- A. Yes.
- Q. What'd she say?
- A. The first text was, "I can see, probably not though, I'm not from out here." The next text she says, "I'm on my way to see you sweetheart. I'm from Oregon, though, is that okay, hun?"
- Q. And you said?
- A. "Hell ya."

6 RP 447-48.

Insofar as the face to face meeting, they exchanged necessary logistics messages right up to minutes before the defendant was spotted dropping her off at the McDonalds:

- Q. How did you communicate to her where you would be meeting her specifically, the McDonald's itself?
- A. I sent her the actual address to McDonald's.
- Q. What time did you send that message?
- A. At 12:40 p.m.
- Q. What exactly did it say?
- A. "10417 Pacific Highway SW, Tacoma, Washington 98499."

Q. And the response to that was what?

A. "Okay."

Q. And the next one?

A. "Okay. See you shortly. I'm by 74th and South Tacoma Way."

6 RP 449-50.

G.S.W. did not drive herself to the McDonalds. 7 RP 753. This was confirmed by surveillance at the McDonalds which was arranged for by Detective Larson after he made arrangements for the "date" with G.S.W. 6 RP 444. Larson stayed in contact with both G.S.W. and surveillance while G.S.W. was *en route* and testified about multiple messages indicating her progress. 6 RP 447-54. Larson successfully met and picked up G.S.W. at the McDonalds. 6 RP 454. From the digital photos he confirmed that she was the subject of the Backpage ad and her identity from the driver's license photo. 6 RP 454. This was approximately 15 minutes after the last text. *Id.*

Once inside the motel room there was no question what G.S.W. was there for; she immediately began disrobing. 6 RP 458. After final negotiation for particular sexual services, the "close cover" team entered the room and arrested G.S.W. 6 RP 460. Detective Larson testified about the options available, considering that G.S.W. was the victim:

A. If she's going to be arrested, we can book her into the juvenile facility at Remann Hall or we could release her to a guardian and forward the case to the prosecutor for charges.

6 RP 463.

While G.S.W. was at the motel the surveillance officers kept the defendant in sight. 7 RP 763. He had dropped G.S.W. at the McDonalds then drove to the adjacent park and ride where he backed his vehicle a Hummer SUV into a parking space, got out, put on a hat and walked to a picnic table. 7RP 758-66. After Detective Larson gave the signal indicating that the undercover part of the operation was a success, the surveillance team moved in on the defendant and detained him at the picnic table at the park and ride. 6 RP 463-64, 7 RP 769-74.

At the motel, the officers opted to book G.S.W. into juvenile custody. 6 RP 490-91. They also detained the defendant at the McDonalds where he had dropped G.S.W. off. 6 RP 463-64, 7 RP 769-74. Detective Larson subsequently had contact with the defendant, interviewed him and took into evidence a gun and his cell phone. 6 RP 465-66. The defendant's vehicle was searched with his consent. The cell phone and the gun, a .40 caliber Winchester handgun found during the search were admitted into evidence. 6 RP 478, 506. The detective testified without objection that he successfully fired a cartridge from the gun before the trial. 6 RP 481. The detective also identified the recording of the defendant's interview which was published to the jury. 6 RP 488, 509 *et.seq.*

The state's evidence included not just testimony about the text and electronic communication but hard copies of the same. CP Trial Exhibits 39 – 47, 51. These were recovered from the defendant's phone and admitted

during testimony from the forensic cell phone examiner, Detective Kenneth Lewis. 8 RP 912, *et seq.* The extraction reports admitted into evidence included digital files containing text messages, phone call logs, images, data files, and timeline files. CP Trial Exhibits 39 – 47, 51. Exhibit 51 in particular was a compilation of all of the files presented in a color-coded timeline format. CP Trial Exhibit 51. 9 RP 1015-23. It included (1) the content of the undercover text messages between Detective Larson and G.S.W. or the defendant’s phone; (2) the content of messages with another individual identified as “Bosko”, (3) cell tower location information showing where the phone was physically located at any given time, and (4) the start time and duration of telephone conversations. *Id.*

As to the content of the communications between Detective Larson and G.S.W., the extraction reports included the text message conversation excerpt quoted above from Detective Larson’s testimony. CP Trial Exhibit 51, p. 5. But the communications in the exhibit were much more comprehensive. They included negotiations between the defendant and Bosko for the transfer of a commodity, namely a teenage victim, to Bosko so that he too could “make some money”:

Outgoing text to Bosko, Exhibit 51, p. 5, 10:06:22	“My pimping is on just trying to make some money with my hoe So How much you want to pay or who do you know
Incoming text from Bosko, Exhibit 51, p. 5, 10:09:03	“Lol, I really know you’re not asking me to pay for some pussy?”

Outgoing text to Bosko, Exhibit 51, p. 5, 10:11:29	“Say mane from pimp to pimp I’m selling my hoe and you can make money off her.”
Incoming Text from Bosko, Exhibit 51, p. 5, 10:14:50	“Put me on a payment plan”
Incoming Text from Bosko, Exhibit 51, p. 5, 10:15:27	“Let me work with her for a couple of days and I will pay you?”

Id.

According to the time stamp these messages were exchanged after partially clothed images of G.S.W. had been sent to Detective Larson and before Detective Larson exchanged the logistics messages for the prostitution transaction that included the address of the meeting location. *Id.* Overall, review of the content of the defendant’s cell phone shows that virtually all of the communications related to the prostitution services requested by Detective Larson, the negotiation of other prostitution-related transactions, or with the logistics of delivering G.S.W. to Detective Larson so that she could deliver the services. *Id.*

On the day of the arrests, Detective Larson made a preliminary examination of the defendant’s cell phone with his consent. 6 RP 500-08. He therefore confirmed that the text messages and images he had exchanged with G.S.W. were actually on the defendant’s cell phone. *Id.* The phone itself was admitted into evidence but with an instruction that ordered the jury not to turn it on or otherwise examine the content during deliberations. CP 112-139, Instruction No. 24. 6 RP 506.

Detective Lewis was the final witness. The jury was instructed on May 1, 2017, and the parties presented their closing arguments the same day. 10 RP 1169, *et.seq.* The jury returned guilty verdicts for both charges the following day. CP 140-41, 168-81. Sentencing was set for April 7, 2017. *Id.* The defendant was sentenced to ten years in prison, which was a mid-range sentence for the commercial sexual abuse of a minor charge. CP 168-81. He filed a timely notice of appeal the same day as the sentencing. CP 203.

E. ARGUMENT.

1. TEXT MESSAGE AND OTHER EVIDENCE OF
OUT OF COURT STATEMENTS INVOLVING
THE DEFENDANT WAS PROPERLY
ADMITTED INTO EVIDENCE.

The state offered and the trial court admitted text message evidence to which the defendant has assigned error. The state offered the evidence as coconspirator statements under ER 801(d)(2)(v), and has assigned error on cross appeal to the trial court's ruling excluding the evidence on that basis. *See* CP 200-202. The trial court admitted the evidence under a different evidence rule, namely as statements against penal interest under ER 804(b)(3). *See* CP 195-97. On appeal the defendant does not address either of these trial court rulings. Instead he argues that there was insufficient evidence of authentication and a confrontation violation. *See* Opening Brief, Sections D.3, D.4. The discussion below addresses each of these issues.

- a. The messaging evidence and other communications were properly admitted as exceptions to the hearsay rule.

The state initially offered the text messages included in the extraction reports from the defendant's phone as non-hearsay statements of a co-conspirator. ER 801(d)(2)(v). The trial court committed error in its ruling even though the error was harmless because the same evidence was admitted under an alternate hearsay exception.

Co-conspirator statements are classified as non-hearsay in the same section of the evidence rules that classifies statements of a party opponent as non-hearsay. *Id.*, ***State v. Israel***, 113 Wn. App. 243, 280, 54 P.3d 1218 (2002). The rule states, "A statement is not hearsay if-- . . . The statement is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." *Id.* As non-hearsay, statements of coconspirators are admissible as substantive evidence. ***State v. Garland***, 169 Wn. App. 869, 886, 282 P.3d 1137, 1145 (2012) ("Prior inconsistent statements generally do not constitute substantive evidence—they may be considered only to determine witness credibility—whereas party-opponent admissions may be admitted as substantive evidence.") *citing* ***Saldivar v. Momah***, 145 Wn. App. 365, 400, 186 P.3d 1117 (2008).

Two elements are required by the rule for admissibility. They are that the statement (1) was made by a coconspirator, and (2) that it was made in furtherance of the conspiracy. ***State v. Sanchez-Guillen***, 135 Wn. App. 636,

642, 145 P.3d 406 (2006), citing *State v. St. Pierre*, 111 Wn.2d 105, 118-119, 759 P.2d 383 (1988). Courts generally interpret the second element broadly. *State v. Baruso*, 72 Wn. App. 603, 615, 865 P.2d 512 (1993). A statement that furthers participation in the conspiracy or informs a coconspirator about the status of the conspiracy is sufficient. *State v. Israel*, 113 Wn. App. at 280, citing *United States v. Herrero*, 893 F.2d 1512 (7th Cir. 1990). Furthermore the conspiratorial “agreement” need not be formal; a “concert of action, all the parties working together with a single design for the accomplishment of a common purpose” is enough. *Id.* at 28 quoting *State v. Casarez-Gastelum*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987). Once the State shows a conspiracy, even a slight connection by the defendant is enough to support the admission of the statement. *Id.* citing *State v. Brown*, 45 Wn. App. 571, 579, 726 P.2d 60 (1986).

Finally, the State did not have to show that the recipient of the statement was a member of the conspiracy. The definition requires that the statement be made by a conspirator, not to one. ER 801(d)(2)(v). The State need only show the declarant coconspirator was a member of a conspiracy and that the statement furthered the conspiracy. *State v. Dictado*, 102 Wn.2d 277, 283-284, 687 P.2d 172 (1984). The evidence must only establish the connection between the declarant and defendant to the conspiracy. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985).

In this case in its pre-trial motion and offer of proof, the state satisfied the elements required for admission of a coconspirator statement. CP 64-84, 208-214. The purpose of the conspiracy was to deliver prostitution services to a customer personified by the undercover officer or to other customers. *Id.* The defendant was privy to the messages between the victim and the undercover officer because they were on the defendant's phone and recovered from his phone with his consent and via a search warrant. 6 RP 523-24, 7 RP 574-87. CP Trial Exhibit 51. The details of the transaction were also on the defendant's phone, including the meet up location, the location of the motel, the sex acts and certain stipulations such as "No cops please for real tho u aint a fed right." CP Trial Exhibit 51. There was evidence of the conspiratorial agreement because the arrangements between the customer (the undercover detective), the prostitute (the victim), and the prostitute's transportation (the defendant) was coordinated through messages shared by all three individuals. The defendant was shown to be party to the agreement by delivering the prostitute to the customer at the agreed upon time and place.

The trial court ruled that the text message evidence could not be admitted as non-hearsay, coconspirator statements. The sole basis for the ruling was that the victim would have been excluded from being a party to a conspiracy because she was the victim of the crime charged in Count One. CP 198-202. This ruling was erroneous but was also harmless error since the

evidence was admitted under the alternative basis that the text messages were statements against penal interest. CP 195-97.

The case relied upon by the trial court involved a federal charge of “engaging in a child exploitation enterprise (“CEE”), in violation of 18 U.S.C. § 2252A(g)(2), (II). . . .” *United States v. Daniels*, 653 F.3d 399, 404 (6th Cir. 2011). That charge is similar to a federal drug racketeering charge, and Washington’s own Leading Organized Crime statute in that three or more people must have been involved in the enterprise. *See* 21 U.S.C. §848 and RCW 9A.82.060. The issue in *Daniels* was whether the child pornography victim could suffice as one of the three enterprise participants. *United States v. Daniels*, 653 F.3d at 411. *See* 18 U.S.C. § 2252A(g). The issue was thus sufficiency of the evidence for an element of the crime rather than admissibility of coconspirator evidence.

Daniels provides little support for the trial court’s rejection of the state’s coconspirator theory of admission. While the victim of a child exploitation charge may not be counted as one of three who “commits [federal child exploitation offenses in concert with three or more other persons” that does not mean that the child’s statements would be inadmissible. Admissibility of evidence is a distinct issue compared to guilt for a particular federal offense.

In contrast to the federal statutes at issue in *Daniels*, Washington’s conspiracy statute does not exclude victims. The statute expressly provides

that it is not a defense to conspiracy that a coconspirator “has not been prosecuted or convicted” . . . “is not amenable to justice”. . . “lacked the capacity to commit an offense” . . . or “is a law enforcement officer or other government agent who did not intend that a crime be committed.” RCW 9A.28.040(2)(a), (c), (e), and (f).

Individuals such as “Bosko” and the undercover officer in this case are expressly accounted for by Washington’s conspiracy statute. Bosko was never identified and was thus not “prosecuted or convicted.” But that does not mean that the defendant could not be a conspirator with him, nor that his statements could not be admitted as coconspirator statements. The same holds true of the undercover law enforcement officer’s statements. The statute expressly provides for conspiracy even where one of the conspirators was an undercover officer. In short, these two categories of statements should have been admitted as non-hearsay, coconspirator statements.

So too should the victim’s statements. According to *Daniels* under federal child exploitation statutes, a victim does not have capacity to be an organized crime participant. Under Washington’s conspiracy statute the same does not hold true. A defendant can be a conspirator in Washington even if a person with whom he conspires lacks capacity. RCW 9A.28.040(2)(e). Moreover, the crime that was the purpose of the conspiratorial agreement was prostitution. As to that crime the victim was not a victim *per se* but was instead to fellow perpetrator. Even though prostitution was not charged, the

fact that the victim was not “prosecuted or convicted” did not provide a reason to exclude the statements. Since Washington conspiracy law does not exclude the victim from conspiracy liability, it follows that in this case the victim’s statements in the course and furtherance of the conspiracy should have been admitted as non-hearsay, coconspirator statements.

An additional theory of admission for the evidence was the statement against penal interest exception. CP 195-97. It should be noted that the defendant did not assign error to the admission of the statements under that theory, nor did he assign error to the trial court’s findings of fact and conclusions of law. They are therefore verities on appeal. *State v. Smith*, 165 Wn.2d 511, 516, 199 P.3d 386, 388 (2009) (“Unchallenged findings of fact entered following a suppression hearing are verities on appeal.”), *citing State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005), *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363, 371 (1997) (“We conclude there is no more foundation existing in Washington law for a principle of independent review of the record in a confession case than in one involving search and seizure. We hold that the rule to be applied in confession cases is that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record.”).

The admission of the evidence under the penal interest theory is supported by the law of the case. For the sake of argument, if the court were

to review admission of the evidence under that theory on the merits the evidence nevertheless was properly admitted. A statement against penal interest is not rendered inadmissible merely because the declarant is unaware that the police are involved. *State v. Parris*, 98 Wn.2d 140, 150, 654 P.2d 77, 82 (1982). The court in *Parris* observed that “courts have been willing to assume that a reasonable man would be aware of the disserving nature of his remarks even when they are made to a supposed friend.” *Id.* Statements to a cellmate or undercover officers are treated the same. *Id.*, citing *United States v. Lang*, 589 F.2d 92 (2d Cir.1978) and *United States v. Bagley*, 537 F.2d 162 (5th Cir.1976).

In this case the trial court’s findings are unchallenged and are thus verities on appeal. They include:

On March 30, 2016, Det. Larson initiated communication with a person he thought was G. S.-W., a confirmed juvenile runaway from Oregon, intending to set up a prostitution date with her so that she could be recovered and returned to her home. The communication included cell phone calls and text messages. As a result of the conversation with Det. Larson, G. S.-W. appeared at the agreed-upon location, at the approximate time, got into Det. Larson’s car, went with him to a motel, and entered the room with him. G. S.-W. then engaged in conversation with Det. Larson wherein she asked for her “donation” and then agreed to a “blow job” and “anal” sex with Det. Larson in exchange for additional money. G. S.-W. also put condoms on a dresser and took off her shirt.

The communication between Det. Larson and G. S.-W. was entirely dedicated to setting up and confirming the specifics of their prostitution date. The telephone and text message discussions included words and phrases that could have had more than one meaning, and that were not directly about

illegal acts, but that were clearly understood by Det. Larson, and apparently by G. S.-W., to be about their “date,” wherein illegal acts (sexual acts in exchange for money) would occur. In other words, while individual phrases could have innocent interpretation, when considered in the context of the entire conversation, and with the backpage.com ad as the backdrop, the illegality of the conversation as a whole was obvious and apparent.

CP 197-97.

The circumstances in which the evidence was obtained qualified the statements of all of the participants as statements against penal interest. Their admission was not challenged on appeal but in the event the court were to review the penal interest issue the trial court’s ruling should be affirmed.

- b. The messaging evidence and other communications from the victim and Bosko during the undercover investigation was properly authenticated.

The text message evidence to which error has been assigned in this appeal consists of extraction reports from the forensic examination of the defendant’s cell phone. Trial Exhibits 39 – 47 and 51¹ The extraction reports were admitted through two detectives. It was not disputed at trial nor is it

¹ The extraction reports were marked for identification as trial exhibits 39, 40, 41, 45, and 51. All five were admitted into evidence but Exhibit 51 is the most complete. Exhibit 51 is a color-coded compilation of the other four exhibits that includes the entirety of the extraction report telecommunications evidence highlighted and color coded for ease of reference. Exhibit 51 thus includes, the relevant (1) text messages to and from the victim and the undercover detective, (2) text messages to and from the defendant and the victim, (3) text messages to and from another individual identified only as “Bosko”, (4) verbal phone calls to and from the victim and “Bosko”, (5) photographic images of the victim, and (6) cell tower location information for the defendant’s cell phone.

disputed in this appeal that the defendant's phone was the source of all of the reports.

Authentication as a condition precedent to admission of physical or documentary evidence is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). In this case the prosecution was the proponent and at all times claimed that the extraction reports were derived from forensic examination of the defendant's cell phone. That claim was not contradicted.

Authenticity is a preliminary question for the trial court to decide and, except for privileges, the trial court is not bound by the rules of evidence in making the determination as to admissibility. ER 104(a). *State v. Young*, 192 Wn. App. 850, 854–55, 369 P.3d 205 (2016). "Because under ER 104 authenticity is a preliminary determination, the court may consider evidence that might otherwise be objectionable under other rules. . . . A trial court may, therefore, rely upon such information as lay opinions, hearsay, or the proffered evidence itself in making its determination." *Id.*, quoting *In re: Detention of H.N.*, 188 Wn. App. 744, 751, 355 P.3d 294 (2015) (citations omitted).

In this case there was overwhelming evidence that the extraction reports were exactly what the state claimed they were. To start with the reports included the verbatim content of messages that the undercover detective exchanged with the victim when he was setting up the prostitution

transaction. *See* Trial Exhibits 39 – 47 and 51. The messages themselves related to the particulars of the prostitution transaction, and included details needed for the meeting to take place such as the location of the motel, images of body parts, and types of sex acts. *Id.* 5 RP 384-89. The jury had the undercover officer's testimony about the messages in addition to the extraction reports. 6 RP 502-23, 528-31. The cell phone itself was recovered from the defendant's person and with his express consent. 6 RP 523-24, 7 RP 574-87.

The messages were also corroborated by surveillance. The agreed upon drop off location from the text messages was under surveillance. 6 RP 455-62, Trial Exhibits 39 – 47 and 51. The surveillance team confirmed that the victim was dropped off by the defendant and the undercover detective made contact with the victim exactly as per the arrangements documented in the text messages. *Id.* 6 RP 515-21.

The phone was examined first briefly in conjunction with the defendant's police interview. 6 RP 465-69. The defendant acknowledged it was his phone and gave consent. *Id.* 6 RP 500-01. In fact, he asked the detectives to use the phone, or information from it, to contact his mother. 7 RP 579-81. The preliminary look was done by the same detective who had engaged in the text message exchange that led to the defendant delivering the victim to the agreed upon location for the purpose of prostitution. He confirmed that messages and photos included in his communications with the

victim appeared verbatim on the defendant's phone. 6 RP 502-03. *Id.* 8 RP 894 *et seq.* The photos included the photos that had been posted to advertise her on backpage.com. Trial Exhibit 51. In short, the defendant's phone contained the entire offer and acceptance prostitution transaction along with the backpage.com advertisement that was the genesis of the undercover investigation.

After taking the phone into police custody, and after the initial consensual, preliminary examination, the phone was also subjected to a more complete examination via a search warrant. Both the phone and the extraction reports were admitted into evidence². 6 RP 506, 8 RP 918-43. Trial Exhibits 23, 39-47, and 51. In support of the extraction reports, the forensic examiner provided extensive testimony about the methods and process by which the phone was examined and about how he compiled the content into the extraction reports. 8 RP 890-94.

The forensic examination identified the subscriber information from the defendant's phone and confirmed it was the defendant. 8 RP 912. There were also "over hundreds" of selfie photos from the defendant. 8 RP 913-14. The extraction reports also included photos of the victim, including the image that was included in the original backpage.com prostitution advertisement

² The defendant also assigned error to the cell phone having been permitted to go to the jury during deliberations. The cell phone was admitted into evidence and accompanied by a limiting instruction when it went with the jury during deliberations. CP Trial Exhibit 23, 112-139, Instruction 24. There is no evidence in the record indicating that the jury violated the limiting instruction. Nor has the defendant assigned error to the instruction itself.

that led to the start of the investigation. 8 RP 943-45. Trial Exhibits 23, 39-47, and 51. It is not overstatement to say that the extraction reports were overwhelmingly shown to be what the state claimed they were by nearly all of the evidence admitted in the state's case.

Authenticity was established in this case through multiple witnesses and overwhelming evidence. Since the standard for admissibility required only "evidence sufficient to support a finding", it follows that authenticity was more than sufficiently established for the extraction reports.

- c. The messaging evidence and other communications from the victim and Bosko during the undercover investigation did not violate the confrontation clause.

The defendant argues that admission of the extraction reports constituted a violation of the Sixth Amendment's confrontation clause. Violations of the rules of evidence are reviewed for abuse of discretion while alleged confrontation clause violations are reviewed *de novo*. *State v. Chambers*, 134 Wn. App. 853, 858, 142 P.3d 668 (2006). Insofar as the confrontation clause is concerned, after 2004's *Crawford* decision, the question is whether out of court statements admitted during a criminal trial are testimonial. *Id.*, *Crawford v. Washington*, 541 U.S. 36, 50, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). That question in turn is analyzed under the primary purpose test. *State v. Wilcoxon*, 185 Wn.2d 324, 335, 373 P.3d 224 (2016).

The primary purpose test is concerned with whether an out of court statement was given under circumstances analogous to formal interrogation.

State v. Scanlan, 2 Wn. App. 2d 715, 725, 413 P.3d 82, 87 (2018).

Statements to medical providers are an example of statements that are not and that therefore satisfy the primary purpose test: “Applying *Clark* and the primary purpose test to [the victim’s] statements to his medical providers supports the trial court’s conclusion that the statements were not testimonial. The primary purpose of the statements was to obtain proper medical care for his injuries.” The court in *Scanlan* further explained:

[T]he United States Supreme Court made clear in [*Ohio v. Clark*] that:

under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimony. “Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.”

State v. Scanlan, 2 Wn. App. 2d at 725, quoting *Ohio v. Clark*, — U.S. —, 135 S. Ct. 2173, 2179, 192 L. Ed. 2d 306 (2015), and *Michigan v. Bryant*, 562 U.S. 344, 359, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011).

As with statements to medical providers, statements among perpetrators of a crime are not testimonial for obvious reasons. *Crawford* itself recognized that co-conspirator statements were exempted from the confrontation clause. *Crawford v. Washington*, 541 U.S. at 56. More recently the Washington Supreme Court concluded that statements from a

non-testifying co-perpetrator of a burglary were likewise not testimonial. *State v. Wilcoxon*, 185 Wn.2d 324, 335, 373 P.3d 224, 230 (2016). “[The co-conspirator’s] statements were that he and a friend had discussed burgling Lancer Lanes and that his friend had called him while burgling Lancer Lanes. The statements were not designed to establish or prove some past fact, nor were they a weaker substitute for live testimony at trial; rather, [the co-conspirator] was casually confiding in a friend.” *Id.*

The statements in the case before the court were not testimonial and did not have a primary purpose of furthering a prosecution. To begin with, the undercover detective’s statements in the extraction reports were those of a witness who took the stand, testified, and was fully subjected to cross examination. *Crawford* applies to statements from a non-testifying witness, not a witness who appears in court: “The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.” *Crawford v. Washington*, 541 U.S. at 57, citing *Mattox v. United States*, 156 U.S. 237, 244, 15 S. Ct. 337, 39 L. Ed. 409 (1895).

In addition, the circumstances of the remaining statements shows that they were anything but testimonial. Aside from the undercover detective, none of the other contributors to the text message conversations suspected that they were communicating with a police officer. At the time each of them wrote the texts there could have been no thought in any of their minds that

they were making statements that might later be used as evidence in court. Any such thought would have compromised the undercover operation. This further establishes that the primary purpose was not to provide evidence to the police but to facilitate a prostitution transaction. Such a purpose is the antithesis of statements that are the concern of the confrontation clause.

The defendant would have the court not apply the primary purpose test. Instead the defendant would have the court apply a so-called emergency test. That test is not distinct from the primary purpose test; it is actually an application of it. In *Clark* the United States Supreme Court stated:

And we reiterated our view in *Davis* that, when ‘the primary purpose of an interrogation is to respond to an ‘ongoing emergency,’ its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause. . . . At the same time, we noted that ‘there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. . . . [T]he existence vel non of an ongoing emergency is not the touchstone of the testimonial inquiry.’ . . . Instead, “whether an ongoing emergency exists is simply one factor ... that informs the ultimate inquiry regarding the ‘primary purpose’ of an interrogation.

Ohio v. Clark, — U.S. —, 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (2015), quoting *Michigan v. Bryant*, 562 U.S. 344, 366, 369, 374, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011).

The defendant’s contention that only a police emergency will satisfy the confrontation clause is not well taken. Rather the test to be applied is the

primary purpose test and under that test there is little room for argument that the text messages bore any resemblance to police interrogation much less that they were given as a substitute for testimony in a criminal trial. It follows that as to the confrontation clause, the extraction reports were properly admitted.

2. THE DEFENDANT WAS LAWFULLY
DETAINED AND THE TRIAL COURT'S
FINDINGS OF FACT AND CONCLUSIONS OF
LAW WERE SUPPORTED BY SUBSTANTIAL
EVIDENCE.

RAP 2.5 expressly states that, “The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise . . . manifest error affecting a constitutional right.” This preservation rule applies even where an objection is lodged in the trial court but on a different basis than is sought to be appealed. *State v. Higgs*, 177 Wn. App. 414, 423, 311 P.3d 1266 (2013). “The purpose underlying issue preservation rules is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.” *Id. citing State v. Robinson*, 171 Wn.2d 292, 304–05, 253 P.3d 84 (2011) and *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). *See also State v. Lee*, 162 Wn. App. 852, 857, 259 P.3d 294, 296–97 (2011) and *State v. Embry*, 171 Wn. App. 714, 741, 287 P.3d 648, 662 (2012).

Manifest error affecting a constitutional right requires more than a theoretical error. *State v. Kirkman*, 159 Wn.2d at 926–27. “The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *Id. citing State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995) and *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Furthermore, there is a requirement that the facts supporting the claimed manifest error appear in the record. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251, 1256 (1995). “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *Id. citing State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

The facts necessary to adjudicate the lawfulness of the defendant’s detention appear in the record but only incidentally. Only two of the arrest team officers were called to testify and neither party delved into the details of the defendant’s detention and arrest because lawfulness of the detention was not contested. The defendant did not bring even so much as an oral motion concerning the lawfulness of the defendant’s arrest. This included during his argument at the CrR 3.5, voluntariness *Miranda* hearing. 2 RP 89 *et.seq.* At that hearing the defendant acknowledged that the defendant was detained but never suggested that the detention was unlawful. *Id.* Consequently, there was no reason for the trial court to address lawfulness of the detention in its

initial oral ruling and no objection or clarification from the defendant. 2 RP 98. In short, without objection from the defendant the trial court implicitly concluded that the defendant had been lawfully detained and that his statements at the police station were therefore admissible. *Id.*

Nor did the defendant contest lawfulness of the detention during colloquy and argument about admissibility of statements made at the scene of the arrest. *See* 2 RP 158 *et. seq.* In fact, the defendant continued with his implicit argument that although the detention was lawful, the police had nevertheless failed to properly give the defendant a timely *Miranda* advisement. 2 RP 163-70. As a consequence, the trial court ruled that the detention was lawful and that certain statements that did not require a *Miranda* advisement were admissible. 2 RP 170-74. This ruling was memorialized in the court's written findings of fact and conclusions of law. CP 187-91.

Had the lawfulness of the defendant's detention been raised in the trial court, this court would review the trial court's conclusions of law de novo whereas "[u]nchallenged findings of fact are treated as verities on appeal." *State v. Betancourth*, ___ Wn.2d ___, 413 P.3d 566, 569 (March 22, 2018), *citing State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Furthermore, the trial court's ruling would be evaluated to determine whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207

P.3d 1266 (2009). Here, the defendant has not discussed the CrR 3.5 hearing which was the only hearing that even tangentially involved lawfulness of the detention of the defendant. Accordingly, it can be said that the error complained of is not manifest and that the trial court's tacit ruling that the defendant was lawfully detained has not been shown to be erroneous or prejudicial.

Without waiving the foregoing arguments, the uncontroverted evidence from the CrR 3.5 hearing established that the defendant was lawfully detained. "In the investigative detention context, a reasonable suspicion requires only sufficient probability, not absolute certainty." *State v. Bonds*, 174 Wn. App. 553, 566–67, 299 P.3d 663 (2013), citing *New Jersey v. T.L.O.*, 469 U.S. 325, 346, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). In this case the defendant was detained because of an undercover operation which included extensive communications between the undercover officer and a confirmed juvenile prostitute. 2 RP 66, *et.seq.* Those communications consisted of negotiations for an act of prostitution. They led to the officer meeting the juvenile at a motel room to consummate the transaction. *Id.* The relevant transaction was the payment of money in exchange for sexual relations. *Id.*

The culmination of the undercover negotiations with the juvenile prostitute took place within minutes after she had been delivered to the agreed upon meet location by the defendant. The defendant dropped her off at a

nearby fast food establishment and was detained while waiting for her. 2 RP 66-68, 75-78, 108-13, 120-25, 126-30, 136. In the very first contact with the surveillance officers, the defendant was asked about having dropped the girl off and gave inconsistent responses. He claimed at first that he had dropped off a friend, and later changed it to he was an Uber driver. 2 RP 122, 123 134, 142, 146. He did not explain why he was waiting after dropping off an Uber fare.

After the initial contact the defendant consented to going to the police station to give an interview. 2 RP 133. He was thereupon transported by the surveillance officers. Under these circumstances the defendant was lawfully detained because the officers had both a reasonable suspicion and probable cause to believe that he was assisting the prostitute in meeting her customer and was therefore knowingly aiding the transaction by providing transportation. It follows that there was reasonable suspicion, and subsequently probable cause justifying the detention for prostitution and sexual exploitation of a minor once the victim's identity was confirmed by the undercover officer. The defendant's superficial argument that this was "clearly an illegal arrest" offers no legal or factual reason that would serve to undermine the trial court's implicit ruling that the detention and arrest were lawful. At the very least it can be said that the ruling is supported by substantial evidence and should be upheld on the merits on appeal.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED THE DETECTIVE TO TESTIFY THAT HE TEST FIRED THE DEFENDANT'S GUN.

The defendant claims without citations to the record that “there were numerous instances where discovery was presented for the first time during the course of the trial.” Opening Brief, p. 13. The only citation to the record supporting this assertion is to testimony from Detective Larson about having fired a cartridge from the defendant’s gun. This was neither expert testimony nor a violation of discovery.

The expert testimony rule applies to “scientific, technical or other specialized knowledge” and permits testimony by “a witness qualified as an expert by knowledge, skill, experience, training, or education” to testify in the form of an opinion. ER 702. The admission of such testimony by such a witness is reviewed for abuse of discretion. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995).

Where a subject matter of a witness’ testimony is not scientific, technical or otherwise specialized, the only foundation requirements are relevance under ER 401 and personal knowledge under ER 602. In addition, non-expert witnesses may provide testimony consisting of “those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination

of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.” ER 701.

Examples abound of non-scientific testimony admitted pursuant to these rules. For example, a police officer or other lay witness is entitled to testify about a defendant’s state of intoxication. *City of Seattle v. Heatley*, 70 Wn. App. 573, 580, 854 P.2d 658, 661–62 (1993). “It has long been the rule in Washington that a lay witness may express an opinion on the degree of intoxication of another person where the witness has had an opportunity to observe the affected person.” *Id.*, citing *State v. Forsyth*, 131 Wash. 611, 612, 230 P. 821 (1924) and *State v. Dolan*, 17 Wash. 499, 50 P. 472 (1897). Such testimony is admissible even though there exist medical and scientific blood tests and breath tests that have the capacity to yield precise measurements of intoxication. It does not follow from the fact that intoxication can be a proper subject matter of expert testimony, that all testimony about intoxication is expert testimony. *State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603, 605 (1985) (“A lay witness may give an opinion, so long as it is rationally based on her perceptions and helpful to the jury. ER 701. A proper lay opinion would include the speed of a vehicle, the mental responsibility or health of another, the value of one's own property and identification of a person.”).

The testimony in this case was a lot less scientific than would have been testimony about intoxication, a vehicle’s speed, or a myriad other

permissible subjects of lay person testimony. *See* 6 RP 472-78. Here Detective Larson testified that he took the defendant's gun to the police gun range, loaded it with a cartridge, and pulled the trigger. 6 RP 472. The gun fired the cartridge. *Id.* There is no legitimate argument that this required scientific, technical or specialized knowledge. Shooting enthusiasts do exactly the same thing daily at gun ranges state-wide without any knowledge that could be characterized as technical or scientific.

Not only was this testimony not scientific, it was also not an opinion. It was in every sense direct, non-scientific evidence of a fact of consequence, namely that the defendant's gun was an operable firearm. The defendant lodged an objection based on the expert witness rule. *Id.* The specific question objected to and the ensuing colloquy indicated that the objection was to a question about how the gun fired the cartridge. The detective explained that pulling the trigger causes the firing pin to hit the cartridge and that gunpowder "will force the bullet out of the weapon through the barrel towards whatever you are aiming at." 6 RP 478. This testimony is exactly what anyone would say if asked to describe in a step by step fashion what happens when a gun is fired.

It can be said from the colloquy following the defendant's objection that he hoped the trial court would view the testimony as scientific in furtherance of a discovery violation claim. 6 RP 473-74. But the testimony wasn't scientific or technical. There was no testimony about lands and

grooves, or of a firing pin impression, or of extractor marks or of any of the other scientific aspects of firearms and tool mark expert testimony. There was no testimony about comparison of the test fired bullet to a recovered bullet because the gun had not been fired during the prostitution incident which was the subject matter of the charges being tried. The only testimony was fact testimony that the gun the detective recovered from the defendant successfully fired a cartridge in the same way that guns generally fire cartridges.

The ruling in this case was not so outlandish that it could be viewed as an abuse its discretion. In a common-sense fashion, the court excused the jury, patiently listened to the two attorneys, overruled the objection, urged the prosecutor to keep the testimony moving and brought the jury right back in to complete the testimony. 6 RP 477. The court likewise did not abuse its discretion by allowing the defense attorney to elicit testimony about the firing of the gun on cross. 7 RP 585.

The defendant includes an ineffective assistance of counsel argument related to the test fire of the gun. To prevail on an ineffective assistance of counsel claim a defendant must prove that his trial counsel's performance was deficient, and that deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A trial attorney's counsel can be said to be deficient when, considering the entirety of the

record, the representation fell below an objective standard of reasonableness.

State v. McFarland, 127 Wn.2d 322, 335, 880 P.2d 1251 (1995).

“Strickland begins with a strong presumption . . . counsel’s performance was reasonable.” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), *citing State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel’s performance.” *Id.* at 42, *citing State v. Richenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert. denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968).

The discussion above dispels any notion that testimony about the firing of the gun was a discovery violation. If for the sake of argument one were to assume that it was, there nevertheless has been no showing of ineffective assistance. “Exclusion or suppression of evidence or dismissal for a discovery violation is an extraordinary remedy and should be applied narrowly.” *State v. Vance*, 184 Wn. App. 902, 911, 339 P.3d 245, 249 (2014), *citing State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998), *State v. Smith*, 67 Wn. App. 847, 852, 841 P.2d 65 (1992). There is no evidence in the record that the defendant requested a lesser sanction such as a continuance, an opportunity to re-call the detective, or an opportunity to conduct his own test fire of the gun. Had the defendant requested and had the trial court denied any such lesser sanction, the defendant’s ineffective

assistance argument might have minimal support. Since there is not, there is no evidence in the record to support either deficient performance or prejudice. These assignments of error are not well taken.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID NOT DEPRIVE THE DEFENDANT OF HIS DEFENSE WHEN IT EXCLUDED INADMISSIBLE HEARSAY FOR WHICH NO EXCEPTION APPLIED.

The defendant challenges as a violation of the constitutional right to present a defense, the trial court's ruling excluding hearsay statements from the victim's interview by a detective. Criminal defendants have a constitutional right under both the United States Constitution and the Washington Constitution to present a defense. United States Constitution, Amendment VI. Washington Constitution, Article I, § 22. That right does not, however, include the right to introduce inadmissible evidence. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). *State v. Mee Hui Kim*, 134 Wn. App. 27, 41, 139 P.3d 354 (2006), quoting *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The right to defend means simply that “[a] defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.” *State v. Rafay*, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012), quoting *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

Criminal defendants also have a constitutional right to confront witnesses. Sixth Amendment. Washington Constitution, Art. I, § 22. “The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002), citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) and *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The right of confrontation, like the right to present a defense, does not do away with the rules of evidence. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). “In keeping with the right to establish a defense and its attendant limits, ‘a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.’” *Id.*, quoting *State v. Hudlow*, 99 Wn.2d at 15.

In the case before the court the precise statements at issue included the victim’s claim that she had worked as a prostitute for two other men whom she identified only by first names. As such the proposed testimony was properly deemed other suspect evidence. *State v. Thomas*, 150 Wn.2d at 856-57. In *Thomas*, a capital defendant argued that during his cross examinations he should have been permitted to delve into similar other suspect issues. *Id.* This was rejected: “We hold that the trial court did not abuse its discretion in limiting the evidence to that which was relevant to the consideration at issue by excluding ‘other suspect’ evidence and polygraph

evidence pertaining to Lynch when each was at once irrelevant and unreliable.” *Id.* at 861.

A trial court has considerable discretion regarding the admissibility of evidence. *State v. Stumpf*, 64 Wn. App. 522, 527, 827 P.2d 294 (1992). A trial court's ruling concerning admissibility of evidence is reviewed for an abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). Abuse of discretion occurs when a trial court's decision to admit or not admit evidence is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008), *citing State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The evidence at issue in this case consisted of hearsay statements of the victim to a police detective. The defendant argued that the statements should be admitted as statements against penal interest. ER 804(b) provides that statements are not excluded by the hearsay rule when the declarant is unavailable and the statement is “A statement which was at the time of its making . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.” ER 804(b)(3). The rule does not end however with the exception, it goes on to include a corroboration requirement in a criminal case: “In a criminal case, a statement tending to expose the declarant to criminal liability is not

admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” *Id.*

The parties’ colloquy and argument about the statements occurred during the testimony of Detective Faivre. 7 RP 678, *et.seq.* The defendant argued that the statements about working as a prostitute for two other unidentified individuals were admissible because they included her admission of having committed the crime of prostitution. The trial court acknowledged the potential for the statements to be incriminating but also inquired about the corroboration requirement:

THE COURT: Let me stop you there. Under 804(b)(3), which is the provision which I held applied to the evidence presented by the State, it does say that in a criminal case a statement intending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Is there going to be any corroborating evidence to support this information about Paco and Ricco or anything else in that statement that Gabriel gave?

MR. TALNEY: I don't have any additional information about Paco and Ricco, Your Honor.

7 RP 689.

The defendant’s admission that there was no corroboration was tantamount to an admission that they were not admissible in a criminal case under this evidence rule. Since there was no theory under which the evidence could be admitted as an exception to the hearsay rule, it follows that the evidence was properly excluded. It is not disputed that the defendant has a

right to present a defense but that right does not include the right to offer inadmissible evidence.

A further reason supporting the trial court's ruling is the lack of foundation for the other suspect evidence. When a defendant seeks to introduce evidence connecting another person to a crime, he must lay a proper foundation and show proof of connection, such as a train of facts or circumstances that clearly points to someone else as the guilty party. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d. 1018 (1993). And, a defendant must show more than the possibility that another person could have committed the crime. The evidence must establish a nexus between the other suspect and the crime. *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). The evidence must do more than encourage the jury to speculate about other possible suspects. *Rehak*, 67 Wn. App. at 163, *State v. Drummer*, 54 Wn. App. 751, 755, 775 P.2d 981 (1989).

The defendant has the burden of showing that the "other suspect" evidence is admissible. *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). The defendant has no right to admit irrelevant evidence. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

While evidence tending to show that "another person might have committed the crime might be admissible, before such evidence can be received, there must be such proof of connection . . . or circumstances as tend

clearly to point out someone besides the one charged as the guilty party.”

State v. Russell, 125 Wn.2d 24, 97, 882 P.2d 747 (1994), *citing State v. Mak*, 105 Wn.2d 528, 532-533, 25 P.2d 104 (1933) *quoting State v. Downs*, 160 Wash. 664, 667, 13 P.2d 1 (1932). The rationale for this rule is set forth in *State v. Mak*, 105 Wn.2d at 692, 718 P.2d 407 (1986), *quoting People v. Mendez*, 193 Cal. 39, 223 P. 65 (1924), and adopted in *State v. Kwan*, 174 Wash, 528, 533, 25 P.2d 104 (1933) as follows:

It seems to us that there is a sound basis for this rule and that it rests fundamentally upon the same consideration which led to the early adoption of the elementary rules that evidence to be admissible must be both relevant and material. It rests upon the necessity that trials of cases must be both orderly and expeditious, that they must come to an end, and that it should be a logical end. To this end it is necessary that the scope of inquiry into collateral and unimportant issues must be strictly limited. It is quite apparent that if evidence of motive alone upon the part of other persons were admissible, that in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased; that a great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.

State v. Mak, at 716-717.

Other suspect evidence is not admissible when it is offered solely to encourage the jury to speculate as to other possible perpetrators. *State v. Drummer*, 54 Wn. App. 751, 755, 776 P.2d 981 (1989). Evidence tending to prove only that another person may have committed a crime is not enough to admit the evidence; such evidence is merely speculation. *State v. Maupin*,

128 Wn.2d 918, 913 P.2d 808 (1996). To be admissible, the evidence must point clearly to the other person as the guilty party. *Id.*

The victim's identification of "Paco" and "Ricco" was properly exclude both as lacking corroboration under ER 804(b)(3), and as lacking foundation as other suspect evidence. In the first place, even if true, the allegations against "Paco" and "Ricco" did not mean that the victim did not also work for the defendant as a prostitute. If her statement to the detective was true, it meant nothing more than that she worked for three pimps, not just the defendant.

More importantly, however the defendant offered no corroboration for the statements. There was not even a showing that "Paco" and "Ricco" were actual persons much less that they were involved in prostitution or that they were involved with prostitution with the victim. The trial court surely cannot be faulted for excluding the proposed evidence when it was demonstrably inadmissible under the plain terms of the evidence rule and further subject to exclusion as other suspect evidence.

5. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING AMENDMENT OF THE CHARGES DURING THE TRIAL PROCEEDING WHERE A LESS SERIOUS CRIME WAS CHARGED.

The criminal rules provide a framework for when charges may be amended. "The court may permit any information or bill of particulars to be

amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” CrR 2.1(d). Under this rule the only limitation on amendment is whether substantial rights of the defendant would be prejudiced. Where the charge involved exactly the same evidence but a lesser included offense there can hardly be prejudice to “substantial rights of the defendant.”

The explicit terms of CrR 2.1 undercut the defendant’s argument in this case that amendment of a charging document mid-trial implicates double jeopardy. So too does proper analysis of double jeopardy. Double jeopardy claims are reviewed *de novo*. *State v. Wilkins*, 200 Wn. App. 794, 805, 403 P.3d 890 (2017), *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014), citing *Sanabria v. United States*, 437 U.S. 54, 69, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). In the context of this case double jeopardy protects against a defendant being prosecuted for more than one offense for the same act. *State v. Anderson*, 96 Wn.2d 739, 745, 638 P.2d 1205, 1209 (1982) citing *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1947).

Even where a defendant is charged, tried and convicted on multiple counts based on the same act, the charging does not offend double jeopardy if the legislature intended that the crimes result in punishment. *State v. Freeman*, 153 Wn.2d 765, 779–80, 108 P.3d 753 (2005) (“We conclude that the legislature did intend to punish first degree assault and first degree

robbery separately, as the ‘lesser’ crime has the greater standard range sentence.”). The test to be applied is as follows:

“A ‘defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law.’ ... If, however, each charged offense includes elements not included in the other, then the offenses are different and there is no double jeopardy violation.” *State v. Wilkins*, 200 Wn. App. at 805, *quoting State v. Fuentes*, 179 Wn.2d 808, 824, 318 P.3d 257 (2014) and *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)). Double jeopardy claims are reviewed *de novo*. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014).

In this case the defendant’s double jeopardy argument is faulty for multiple reasons. First of all, he was not charged, tried, and convicted for multiple counts for firearm possession. CP 112-139, 168-181. Rather, he was convicted of only two offenses, commercial sexual abuse of a minor and second degree unlawful possession of a firearm. The defendant was not convicted and thus was not sentenced for first degree unlawful possession of a firearm. *Id.* That charge was dropped when the Second Amended Information was filed charging the defendant with a lesser included offense in place of the greater offense that was originally charged. CP 1-2, 7-8, and 53-54. Considering the defendant was convicted of only one firearm possession offense, it is incorrect to view him as having been twice punished for different charges for the same act.

It should be noted that even if the charging had included both degrees of unlawful firearm possession, the defendant's prosecution would not offend double jeopardy. Under double jeopardy analysis a court may not impose "multiple punishments for the same offense imposed in the same proceeding." *State v. Womac*, 160 Wn.2d 643, 651, 160 P.3d 40 (2007), quoting *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 48-49, 75 P.3d 488 (2003). While a particular criminal episode may be charged and submitted to a jury on multiple charges, at sentencing the court must vacate any lesser counts that amount to multiple punishment for the same offense. *Id.* at 660. *State v. Villanueva-Gonzalez*, 175 Wn. App. 1, 8, 304 P.3d 906 (2013), aff'd, 180 Wn.2d 975 (2014) ("When a conviction violates double jeopardy principles, we must reverse and remand a sentence that contains convictions for the same offense with instructions to vacate the lesser punished crime."), citing *State v. Schwab*, 163 Wn.2d 664, 675, 185 P.3d 1151 (2008). It follows that even if both the first degree and second degree firearm possession charges were submitted to the jury, and even if the jury had returned guilty verdicts as to both, no double jeopardy violation would have occurred so long as the lesser charge was vacated and dismissed.

There was no need to vacate and dismiss anything in this case. The defendant was not prosecuted for two offenses for the same act. Instead he was tried and convicted of an offense that was a lesser included offense of the

charge that he originally faced. As to the claim of double jeopardy the defendant's argument should be rejected and his conviction affirmed.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION, NOR DID IT ADMIT EVIDENCE CALCULATED TO AROUSE PASSION AND PREJUDICE, WHEN THE DETECTIVE TESTIFIED ABOUT THE OUT-OF-STATE ORIGINS OF THE INVESTIGATION.

The defendant argues that testimony from the undercover detective was improper because it appealed to passion and prejudice. The only authority cited is a closing argument case. *State v. Belgarde*, 110 Wn.2d 504, 510, 755 P.2d 174, 177 (1988) ("We likewise find that the prejudice engendered by the prosecutor's arguments regarding the American Indian Movement mandates a retrial."). *Belgarde* is not concerned with witness testimony and does not support the defendant's argument.

Admission of evidence alleged to arouse unfair passion and prejudice is reviewed for abuse of discretion. *State v. Crenshaw*, 98 Wn.2d 789, 807, 659 P.2d 488, 498 (1983). Evidence need not be sanitized in order to be admissible: "We adhere to our previous statement that '[a] bloody, brutal crime cannot be explained to a jury in a lily-white manner'" *Id.*, quoting *State v. Adams*, 76 Wn.2d 650, 656, 458 P.2d 558 (1969).

The testimony in question in this case does not begin to approach the prejudice associated with gruesome crime scene photos, autopsy photos, or similar evidence involving a risk of improper passion and prejudice. In the

detective's description of how the investigation was initiated, he explained without objection the referral process to his task force known as the "FBI South Sound . . . Child Exploitation Task Force." 5 RP 341. Referrals include tips about juvenile prostitution and the primary concern of the task force is the "recovery" of the juvenile "who we think may be a juvenile advertising prostitution activities." 5 RP 345. After describing the tip in this case as originating in Oregon, the detective went on to describe the design of the investigation the lead to both the "recovery" of the juvenile prostitute and the arrest of the defendant. *See* 5 RP 346 *et. seq.*

During the detective's testimony, he was asked about establishing telecommunications contact with the juvenile. 5 RP 362-66. He described the text messages and the setup of the undercover face to face contact that would lead to the "recovery" of the juvenile. 5 RP 372-79. He then turned to the logistics of making sure that the telecommunications contact lead to actual face to face contact with the particular juvenile that was the subject of the investigation. 5 RP 380-83. It was in the context of the detective's description of the investigation, as he was being asked about complications from the crossing of state lines, that the defense objected. 5 RP 383. While the defense attorney used the word "passion" in his objection, his actual objection was relevance. *Id.*

The prosecution's question and the detective's answer leaves little room for a passion and prejudice claim. The testimony at issue was limited to the following:

Q. What affect does it have on your operation that this is not only a juvenile, but an out-of-state juvenile who is a runaway and who's on Backpage?

A. I don't know that it affects me in any way, but it makes it a priority type of situation to where it's something to where we want to attempt to contact her immediately and get her off of the streets and out of danger and see if indeed she's being exploited by someone.

5 RP 383.

The detective's answer was truthful, accurate and understated. He did not give explicit testimony about the types of sex acts that juvenile runaway prostitutes can be exposed to, nor did he dwell on other unsavory aspects of sex trafficking such as drug abuse, physical abuse, and sexual abuse. The only concern he expressed was conveyed using benign phrases such as "get her off of the streets" and "exploited by someone." *Id.* Considering the potential for physical, drug-induced, and psychological trauma that attends sex trafficking, the detective's testimony in this case did not approach any recognized passion and prejudice boundary. This assignment of error should be rejected.

7. SUFFICIENT EVIDENCE WAS INTRODUCED THAT THE VICTIM WAS UNDER THE AGE OF EIGHTEEN WHERE HER DATE OF BIRTH WAS PROVIDED AND WHERE SHE WAS BOOKED INTO AND HELD IN THE PIERCE COUNTY JUVENILE DETENTION FACILITY.

For an appellate court to find there was sufficient evidence for a conviction, it must determine, after viewing the evidence in the light most favorable to the state, whether any rational jury could have found the defendant guilty beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences which can be drawn from it. *State v. Thereoff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980); *State v. Salinas*, 119 Wn.2d at 201.

When reviewing an insufficiency allegation, deference must be paid to the trier of fact, which is responsible for determining witness credibility, resolving conflicting testimony, and evaluating the persuasiveness of evidence presented at trial. Washington Const. art. I, § 21. *State v. Furth*, 5 Wn.2d 1, 104 P.2d 925 (1940) ("Courts cannot trench on province of jury upon questions of fact. . . ."), *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d at 71, citing *State v. Casbeer*, 48

Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987).

The applicable standard of review requires that the evidence be viewed in the light most favorable to the state, not the defendant. *State v. Green*, 94 Wn.2d at 220-22, *State v. Camarillo*, 115 Wn.2d at 71, and *State v. Carver*, 113 Wn.2d at 604. Also, circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In this case the unchallenged jury instructions required the state to prove that the victim was “less than eighteen years old. . . .” CP 112-139, Instruction No. 13. The state did not have to prove the precise age of the victim, only that she was under the age of eighteen. Furthermore, the jury instructions specified that the jury could infer facts from circumstantial evidence, which was defined as, “evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.” CP 112-139, Instruction No. 4. Since circumstantial evidence is just as probative as direct evidence under *Delmarter*, there needed only to be a showing that there was circumstantial evidence that the victim was under the age of eighteen.

The jury in this case did not make an irrational decision when it determined that the state had proved that victim was under the age of eighteen. The second witness was the undercover detective. His testimony included that the purposes of his task force was to “recover” juveniles suspected of “advertising prostitution activities” and that the investigation in

this case was prompted by a report of a “runaway from Oregon who may be prostituting on Backpage.” 5 RP 345-50, 7 RP 618. The detective further testified that the investigation began as a result of, “one of the avenues I mentioned earlier with the NCMEC, the National Center for Missing and Exploited Children. A tip trickled down from them to the FBI to my supervisor, which at the time was Special Agent Kyle McNeal with the FBI. He informed me of the tip along with the information as to the juvenile involved and so forth.” 5 RP 346.

From the foregoing information alone, the jury could infer that the victim was under the age of eighteen. In the first place she was a runaway. From this the jury could infer that a parent or guardian had reported her as a runaway in Oregon. She could only have been a runaway if she was a juvenile, that is under the age of eighteen. Second the victim was an identified runaway according to information confirmed by three separate law enforcement agencies, the NCMEC, the FBI, and the task force that the undercover detective worked for. Under these circumstances the jury could infer that the investigation was of a known individual with known identifiers. The jury could thus infer that three separate agencies were not wasting their time on an investigation of an adult when their entire purpose was to investigate and recover juvenile runaways.

In addition to the identifying information from law enforcement, the detective had digital images confirming that the subject of the investigation

was in fact the Oregon runaway. 5 RP 389. These were admitted into evidence. 6 RP 435. The exhibits included a driver's license photo of the victim together with the prostitution-related photos exchanged with the detective as he set up the face to face meeting for delivery of prostitution services. 6 RP 436-37, 454. It was only after receiving and reviewing the digital images that he met with the victim and took her to the motel room and ultimately into custody. 6 RP 442-43, 454-57. Since the detective had a driver's license photo the jury could, again infer that he had confirmed the victim's identity, including her age via official Oregon records.

The arrest of the victim added to the evidence that she was under the age of eighteen. She was uncooperative and had possession of narcotics. The detective testified that he had to book the victim into the Pierce County juvenile detention facility, known as Remann Hall. 6 RP 463, 489. This was only after she was placed in contact with a victim specialist who worked for the FBI. *Id.*, 7 RP 727. The detective testified that he would have been unable to book a person known to have been an adult into the juvenile facility. 6 RP 489-91. In addition, a female detective testified about her interview of the victim during which she obtained the victim's name and date of birth preparatory to booking her into the juvenile facility. 7 RP 676-78. The victim's date of birth was later given by another detective as December 25, 1998. *Id.* That same detective re-contacted the victim while she was

being held in custody at the juvenile facility and re-interviewed her. 7 RP 711.

The evidence that the victim was a juvenile was not controverted. In the cross examinations of the investigating detectives the defendant did not suggest that this was a case of mistaken identity or false impersonation by an adult. Lacking a reason under the evidence that might have caused doubt as the age element, it should come as no surprise that the jury was “satisfied beyond a reasonable doubt” as to that element. CP 112-139, Instruction No. 2. Accordingly, since this insufficiency claim admits the truth of the state’s evidence and all reasonable inferences that can be drawn from it, the jury’s determination should be affirmed.

F. CONCLUSION.

For the foregoing reasons the defendant’s convictions and sentence should be affirmed.

DATED: Thursday, June 21, 2018

MARK LINDQUIST
Pierce County Prosecuting Attorney

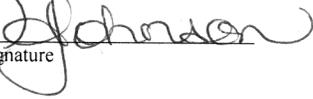


JAMES SCHACHT
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The undersigned certifies that on this day she delivered by ^{eFile} U.S. mail or ABC-LMI delivery or electronic service to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

4/21/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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