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Division II
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No. 52061-3-II

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

STATE OF WASHINGTON, Respondent

v.

JEREMY FENNEY, Appellant

APPEAL FROM THE SUPERIOR COURT OF KITSAP COUNTY
THE HONORABLE JUDGE JEANETTE M. DALTON

AMENDED BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Mr. Fenney's Constitutional Right To Due Process And A Fair Trial Were Violated.

LEGAL ISSUE: Where the trial judge goes beyond the State's reasons and theories by developing its own reason for improper admission of ER 404(b) evidence, has the trial court crossed the line from neutral arbiter to advocate for the State, violating Mr. Fenney's right to due process and a fair trial?

B. Mr. Fenney's Attorney Provided Ineffective Assistance of Counsel By Failing To Object To Inadmissible Profile Testimony And An Unfairly Prejudicial Exhibit.

LEGAL ISSUE: Did Defense counsel provide ineffective assistance by failing to object to inadmissible profile testimony and a highly prejudicial and cumulative exhibit?

C. The Trial Court Erred When It Admitted Propensity Evidence.

LEGAL ISSUE: Did the trial court err when it admitted text messages in unrelated matters to show he acted in conformity with character?

D. The Trial Court Erred When It Admitted Evidence of Alleged Gang Affiliation.

LEGAL ISSUE: Did the trial court err when it admitted the witnesses' beliefs about gang affiliation to show witness general state of mind rather than requiring a nexus between the crime and alleged gang membership?

E. The Conviction For Human Trafficking In The First Degree Must Be Vacated.

LEGAL ISSUE: Where a general and a specific law are concurrent, the specific law applies to the exclusion of the general. If one who promotes prostitution has also violated the general statute prohibiting human trafficking, must the charges brought under the general statute be vacated?

F. The Trial Court Erred When It Denied Defendant's Motion For Severance Of An Offense Against K.W.

LEGAL ISSUE: Did the trial court err when it denied a motion for severance after it found the evidence was not cross admissible but was relevant because it was typical of the violence of a pimp?

G. The Evidence Was Insufficient To Sustain A Conviction For Felony Harassment in Count 26.

LEGAL ISSUE: Where the complaining witness does not testify the defendant threatened to kill her, is the evidence insufficient as a matter of law to sustain a conviction for felony harassment? (CP 230).

H. The Evidence Was Insufficient To Sustain A Conviction For Assault In The Second Degree.

LEGAL ISSUE: Was the evidence insufficient to sustain a conviction for assault in the second as charged?

I. The Evidence Was Insufficient To Sustain A Conviction For Robbery First Degree.

LEGAL ISSUE: Is the evidence insufficient to sustain a conviction for robbery in the first degree if testimony establishes the alleged victim was not threatened or hurt and voluntarily handed over a phone?

J. Mr. Fenney's Constitutional Right To Be Free From Double Jeopardy Was Violated.

LEGAL ISSUE: Did the trial court err when it did not merge three separate convictions for kidnapping with the conviction for human trafficking in the first degree?

K. The Trial Court Abused Its Discretion And Imposed A Clearly Excessive Sentence.

LEGAL ISSUE: RCW 9.94A.535(1)(g) permits imposition of an exceptional mitigated sentence when the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of the SRA. Did the trial court err when it believed it had no discretion and imposed consecutive sentences for the multiple firearm related convictions and serious violent offenses which resulted in clearly excessive sentence?

L. The Trial Court Erred When It Did Not Conduct The Requisite *Blazina* Inquiry Into Mr. Fenney's Ability To Pay Legal Financial Obligations.

LEGAL ISSUE: Where the trial court fails to conduct an individualized inquiry into the defendant's financial circumstances as required by statute, but imposes discretionary legal financial obligations on a defendant, must the matter be remanded for a *Blazina* inquiry?

II. STATEMENT OF FACTS

In 2011, B.C. met Jeremy Fenney (Fenney) through mutual friends and online social media. RP 672. She worked for him as a prostitute. RP 858. Their relationship ended until Spring 2016 when

B.C. saw Fenney. She kept up contact with him and he called her when he finished work release. RP 671, 848. The two met up at her friend's home. RP 849. Shortly after that she went to his mother's home to see him. RP 850. B.C. knew Fenney was a pimp. She wanted to be in a relationship with him. RP 674, 702, 851.

When B.C. and Fenney got reacquainted, he lived with another woman who supported him. RP 673-74. After spending a week together, B.C. and Fenney began an intimate relationship. RP 674-75, 678. They moved into his mother's home and slept on the living room floor. RP 677-78. B.C. was a daily methamphetamines user. RP 680.

In the first week, Fenney and B.C. discussed her working as a prostitute. They decided they could save money and when they had a certain amount she would not work anymore. RP 675.

B.C. said it was her choice to work as a prostitute because she wasn't "just a girl working for him." RP 852,859. Fenney promptly ended his relationship with the other woman. RP 674, 849, 850. The following day B.C. posted ads on the internet offering sex for money. RP 678-79. B.C. had another job opportunity but did not pursue it because she was using drugs daily and believed she would be drug tested for the job. RP 855.

On March 28th or 29th 2016, B.C. and Fenney used methamphetamines together. RP 690. Angry and agitated, because most of the money they saved for a road trip was gone, Fenney directed B.C. to drive them to Bremerton. RP 680-682. He hit her with his gun as she drove. RP 687. He directed her to a park and walked her through it with a gun to her head. He threatened to kill her. RP 689-690. She said Fenney was “freaking out” because they were both high on methamphetamines and he feared his mother would know if they went back home. RP 690-91. They left the park and drove to a motel. RP 691.

Alone, B.C. went inside to rent a room. The clerk asked her if she was okay and B.C. made an excuse for her appearance. RP 691. While inside the motel office B.C. texted a friend and called Fenney’s mother twice. RP 692. She did not call the police or tell the clerk she was afraid. RP 691-92.

As she and Fenney walked toward the motel room, she said he repeatedly punched her. Once inside the room, he continued to hit her. She testified after he forced himself on her sexually without her consent, they fell asleep together until after motel checkout time. RP 692-94. Based on B.C.'s allegations, prosecutors charged

Fenney with first-degree assault, felony harassment and, first-degree rape. CP 193-196.

They checked out of the motel, and B.C. drove Fenney to his mother's home. She left in her car to go visit a friend. RP 694. As she drove, she saw her parents in their car and pulled over. RP 893. The police arrived at the behest of B.C.'s mother. RP 1234.

B.C. told her mother to let her handle it and disclosed nothing to the officer. RP 894. She reported she had the chance to leave Fenney that day but had not wanted help or police involvement. RP 694.

Within a week or two, the pair moved to a home on Silver Street in Bremerton, where numerous acquaintances passed through or lived. RP 696-97, 1275. She and others used methamphetamines or heroin regularly. RP 696, 1280.

Fenney did not accompany B.C. to prostitution calls. RP 700, 858. She drove alone to meet clients. RP 857-58, 897, 1261. B.C. usually gave Mr. Fenney the money she made, but at times kept some for herself. RP 704-06, 783.

B.C. left Fenney on numerous occasions by either sneaking out of the house and driving away or leaving after she went on a call. She usually went to a friend's home or stayed with her mother.

RP 707, 775, 857, 897-88, 1261. K.W., who lived at the Silver Street home, reported that B.C. had her own car and came and went from the house as she wished. RP 1319. She said B.C. sometimes left for days, but always returned. RP 1320-21.

B.C. reported between March and November 2016, there were times Fenney did *not* want her to prostitute herself, but she continued to work. RP 858-59. Other times, when she wanted to stop working or did not get enough calls, he hit her or threatened her. RP 706-07. Based on her allegations, prosecutors charged Fenney with human trafficking first degree and promoting prostitution first degree. CP 189-191.

On April 9th, B.C. received a call for her services. RP 728. Fenney did not want her to go because he wanted to celebrate her birthday with her. RP 728; 736. She took the call and drove herself to the motel date. RP 729. B.C. smoked meth with her customer and did not engage in prostitution or collect any money. RP 730-31. After some time, Fenney met her at the motel. At gunpoint he hit her as she drove to the Silver Street home. RP 731-732.

When they arrived at the house, he beat her with a belt and threatened her with a knife and a gun. RP 735-36, 740-742. She said he threatened to kill her. He directed B.C. to stand, and then

he fell asleep on the bed. RP 736. B.C. did not leave while he slept. RP 737. Prosecutors charged Fenney with first-degree kidnapping, and two counts of assault second degree, and felony harassment. CP 198-203.

Without objection the State presented a picture of Fenney being arrested and asked her to identify whether the belt he was wearing at his arrest was the same belt with which he allegedly beat her. 2/2/18 RP 12-13.

In May she reported he beat her with a wooden pole. RP 741. She said he had a gun in his hand. Prosecutors charged Mr. Fenney with first-degree assault. CP 204.

That same month, she said he punched her and knocked her out. RP 746. She reported he held a gun to her head and threatened to kill her. RP 747-49. He burned her feet and ankle with a propane torch and cut her leg with a machete. RP 750-752. He took her phone and keys. RP 754. Prosecutors charged Fenney with felony harassment, unlawful imprisonment, assault in the first degree, and assault in the second degree. CP 206, 208-09, 211.

In late August, B.C. left Fenney. She stayed at a friend's home, and from there contacted the father of her child. RP 774-

775. She returned to Fenney out of concern he might end his life. RP 775. When she returned, he beat her. RP 777.

Shortly after that, B.C. sent pictures of the bruises on her body to the father of her child. RP 778, 986. Fenney saw the pictures and the text messages on her phone. RP 778-79. He beat B.C., and she reported they engaged in nonconsensual sex, which he videotaped and sent to the father of her child. RP 779-780, 984-85. Prosecutors charged Fenney with rape in the first degree, and assault in the second degree. RP 1881, 1883; CP 212, 214.

The following month, September, B.C. was alone in her car, wanting some time to herself. RP 784. She spoke with Fenney by phone and agreed to meet him at the local Dairy Queen. RP 785. He got into her car and as they drove home Fenney hit her. At home, Fenney beat her, threw urine on her, and directed her at gunpoint to sit in the garage. RP 788. He later left the home. After he left, she went upstairs but did not leave. RP 792-93. Prosecutors charged Fenney with kidnapping in the first degree, and assault in the second degree, by knowingly inflicting bodily harm which by design was the equivalent pain or agony produced by torture. RP 1885-1887; CP 216-217.

In the first part of October, B.C. left Fenney again. RP 794. While she was gone, she spent time with another man. RP 795. She kept up communications with Fenney, and when he begged her to return to him, she did. RP 795. When she got home, Fenney demanded her phone. She handed the phone to him, as she had done in the past. RP 796. She reported she was not nervous. RP 796. Fenney did not threaten her. RP 796-97. She did not remember if his firearm was nearby. RP 796-97. She gave the phone to him, believing she had erased the texts between herself and the other man. RP 795-96¹. He saw the texts and hit her, and broke her phone. RP 801. The prosecutor charged Fenney with first-degree robbery. CP 219; RP 1888.

That same night, Fenney hit her. RP 798. He burned her face with a hot meth pipe and used pepper spray on her. RP 797,801. He directed B.C. to call the man and arrange to meet him. RP 800-801. In the car on the way to the meeting, Fenney hit her and poured Rain-X on her head. RP 802-803. The man did not

¹ On cross-examination, counsel asked B.C. if on that October day if Fenney took away her money and she replied "When I had money" and he asked again and she said she did not think she had any money that day. Counsel then asked if there was anything else taken against her will and she replied her cell phone and car keys. RP 900. In context, she reported a number of times Fenney took away her keys and phone, and the record does not point to the idea that she was referencing that he took her phone away on that October day. 2/2/18 RP 7.

show up, and Fenney drove them back to the Silver Street home. RP 804. She said Fenney had his firearm in his hand or on his lap for the entire incident. RP 803-04.

At home B.C. alleged that Fenney burned her legs and genitals with a pen torch. RP 807. She said he used a machete to hit and cut her leg. RP 807-09. He told her to go to the hospital before he fell asleep. RP 809. When he awoke, he carried her to the car and Kornegay and K.W. took her to the hospital for treatment. RP 809. She later left against medical advice before surgeons could assist her. RP 810-811. B.C. did not report that Fenney threatened to kill her.

Prosecutors charged Fenney with robbery in the first degree, two counts of assault in the second degree, one count of kidnapping first degree, and one count of rape in the first degree for burning her genitals with the pen torch, and one count of assault in the first degree, and one count of felony harassment. RP 1888-1897; CP 219, 221-22, 224-25, 227, 229-30, 234.

The following day, Fenney put a gun to her head. RP 816. The gun went off and a bullet went through the wall. RP 816. Prosecutors charged Fenney with assault in the first degree and attempted murder. CP 232, 234; RP 1898, 1901.

About a week before their arrests, Fenney hit B.C. in the face. RP 818-19. Prosecutors charged him with assault in the fourth degree. RP 1902; CP 236.

K.W.

K.W. and Ernest Kornegay were in a relationship. Kornegay beat K.W. RP 1277. They lived at the Silver Street home for several months with B.C. and Fenney. RP 1276. K.W. did not use drugs or prostitute. RP 1275, 1281.

In the summer of 2016, K.W. was in a car with Fenney, Kornegay, and B.C. RP 1293-94. Fenney was experiencing paranoia and demanded everyone's phone. RP 824, 1294. K.W. initially resisted but gave up the phone after Kornegay told her to give it to Fenney. RP 1294. According to K.W., Fenney had a gun in his lap but did not threaten her with it to get her phone. RP 1294. Prosecutors charged Mr. Fenney with first-degree robbery. CP 242; RP 1908.

When K.W. tried to leave the car, Fenney held a gun to her and threatened to kill her. RP 1294. Prosecutors charged him with assault in the second degree, felony harassment, and unlawful imprisonment. RP 1910-1911; CP 243-45.

On October 16-17, Fenney learned Kornegay had stolen property from their drug dealer. He was upset he would be held responsible for Kornegay's actions. RP 908; Exh. 335. That day K.W. was at the Silver Street home, but Kornegay was not.² RP 1297. Fenney told K.W. to not leave the house until he had talked with Kornegay³. RP 1298. However, she went to work while Fenney slept. RP 1298. B.C. testified that she was supposed to prevent K.W. from leaving while Fenney slept, but she also fell asleep. 2/2/18 RP 3-4.

K.W. did not return to the Silver Street house for about a week but eventually went back to collect her belongings. RP 1299-1300. The second time she returned to the house she said Fenney raped her. RP 1312-13. Prosecutors charged Fenney with rape in the first degree. RP 1912; CP 245.

On November 16, 2016, officers arrested Kornegay and K.W. RP 601-17. Police officers executed a search warrant for the Silver Street home on November 22, 2016. RP 617-20. They arrested B.C. and Fenney. RP 617-20. Officers retrieved a sawed-

² After the accusation of theft, Kornegay never returned to the Silver Street house. RP 1297.

³ The text messages in the following section are in reference to this day.

off shotgun, a semi-automatic handgun, a machete, drugs, shotgun shells, ammunition, drug paraphernalia, and small torches. RP 620-22. Prosecutors charged Fenney with three counts of unlawful possession of a firearm, one count of possession of a stolen firearm, and possession of a controlled substance. CP 236-37, 246-47.

EVIDENTIARY ISSUES AT TRIAL

1) Expert Testimony On Pimp/Prostitution Subculture

Without objection, the State presented Detective Washington, trained in “the field of human trafficking or promoting prostitution” as the first witness. RP 568; 570, 12/11/17 RP 5.

He testified “it’s an understatement to say it’s [prostitution] a sub-culture because on the criminal side of it, it probably pulls in somewhere around 55.5 million -- or billion dollars per year. The only thing underneath that is narcotics and gun sales, and then narcotics and gun sale totals don’t bring in the amount of money that is being brought in through human trafficking.” RP 572.

He stated that most women working as prostitutes “has or have had a pimp or trafficker that is involved.” RP 593.

He testified there are rules, some of which are “pimp or

traffickers specific...Some of the rules are you are not allowed to talk to other pimps, so a lot of times that comes up as no African American males because, you know, there is this stigma that a lot of African American males are related to or of that sub-culture versus other races that you may see. So, there might be a rule: Don't talk to any African American males, meaning you can't have that type of customer." RP 576.

Washington described a pimp as a "master manipulator." He said "You see everything from the finesse pimp to the gorilla pimp, alright?... but it basically is a sliding scale that goes from a person that has a gift of gab, so to speak, and can talk anyone into anything to the gorilla pimp who uses physical violence and force to get the girl to do what they want to do....And so, if they need to be more violent to get them under control, they will be more violent. If they need to be more of this person that talks a lot, they will be down along that side." RP 577, 580-81.

He said many pimps first entered a romantic relationship to recruit someone to work as a prostitute. RP 581. He added "Most victims that are in this prostitution sub-culture will not tell you that they are a victim. They will tell you that they are doing this because they want to do it, and they are not looking or focusing on that lens

of that the person is actually controlling and pulling those strings, that they have actually been duped and tricked into doing something that no other person would want to do.” RP 583. He opined, “Basically, it’s modern day slavery, and, you know, on the base (sic) of it, no one would want to do that. No one would want to give up their freedoms so that this other person can make money from it.” RP 583. When asked why prostitutes do not report abuse to law enforcement, he referred to a “trauma bond” between the pimp and prostitute. RP 591.

2) Gang Evidence

The State did not allege or prove that Fenney committed any crimes to promote a gang, gang membership, or as part of a gang criminal enterprise. RP 56. The State wanted B.C. and K.W. to testify they believed Fenney and others were members of a gang based on what they had seen and heard: “So, it’s not so much that he was a part of a gang so much as he led these two individuals to believe that he was a part of the gang through his actions, through his appearance, and through his associations. RP 53, 55.

The State asserted that statements about gang affiliation were useful for credibility of K.W. and B.C. and to explain any

inconsistent statements, delayed reports, and fears as related to the harassment charges. RP 53,54,57-58; CP 286.

Defense counsel objected, citing evidence of gang affiliation was highly prejudicial and the state could not show the required nexus between the crime and the gang, making the evidence irrelevant. RP 59, 61.

The court did not use an ER 404(b) analysis. It reasoned the state of mind of the alleged victims was relevant, regardless of the truthfulness of their belief about fear of reprisal; and the prejudice was minimized because there was no individual corroboration of their beliefs. 1/22/18 RP 64. The court ruled no law enforcement officer could testify as to gang membership, but B.C. and K.W. could testify as to what made them afraid. RP 64. The court believed instruction would allow the jury to consider the information to explain why K.W. and B.C. delayed reporting the crimes or gave different statements at different times. 1/22/18 RP 64.

During her testimony B.C. reported Fenney told her was part of a gang and that she met several of his associates. She said she was afraid because she “knew the kind of stuff they did. They were just scary.” 1/30/2018 RP 699-700. When asked why she did not report her injuries to hospital personnel or others when Fenney was

not present, B.C. said, "I just felt like there was nothing that people could do. I mean, even if he did get arrested, he was going to be able to get out. 2/2/18 RP 8-9.

When asked why she did not report to the police, she again answered she thought no one could stop what was happening or keep Fenney away from her. The prosecutor asked: "can you tell me why you were fearful of reporting to police, why that fact increased your fear?" she answered that the people Fenney affiliated with were not good people. The prosecutor added "So you were worried about your safety from the other gang members that he was associated with?" B.C. answered 'yes.' RP 724-25.

3) Text Messages Between Fenney And Kornegay

The State sought to introduce a string of text messages to use as evidence of motive for the alleged rape of K.W. and to show Fenney was "in charge" of the Silver Street house. RP 1362, 1374, 1383, Exh. 335. The texts, between Kornegay and Fenney, were about a robbery of drugs and money committed by Kornegay⁴ and for which Fenney was being held responsible. RP 1382, Exh. 335.

⁴ The context of the messages indicates the property was stolen from Tim Chancellor who had been fronted drugs and money from Guamanians. Exh. 335 No. 93; 2/2/18 RP 19.

Defense counsel objected citing the texts were irrelevant and the overly prejudicial because they involved threats by Fenney. RP 1365;1390.

The court agreed the texts were prejudicial “in that they show him to be controlling, hostile, menacing, and that, coupled with [B.C.]’s testimony and [K.W.]’s testimony about the type of violence that he is capable of inflicting, those are highly prejudicial to the defendant.” RP 1390. It found the text messages relevant “on a critical issue in the case, which is the victim’s credibility; her state of mind, his intent.” RP 1397. The court went further and encouraged the use of the text messages to show how Fenney used force and coercion in other situations: it reasoned “even though Mr. Fenney did not communicate those words [threats] through Kornegay to the two women in this case, they are evidence of his intent and their evidence of how he engages in what he does to further force and coerce, and it is all a part of the plan to make money through human trafficking and prostitution.” RP 1447-1457; App. A.

The court proposed the parties develop a limiting instruction that would allow the jury to consider the text messages as relevant to the elements of forcible compulsion, coercion, use of force to

effect human trafficking, promoting prostitution, kidnapping with intent to inflict extreme emotional distress, kidnapping with intent to inflict bodily injury, rape, and unlawful imprisonment. RP 1447-1457.

Defense counsel again resisted the court's ruling, saying, "But to me, it just seems like the more things we are saying it has to do with state of mind with all of these other crimes that aren't mentioned in here starts to feel like a comment on the evidence." RP 1457. Defense counsel ultimately declined use of a limiting instruction: "For the reasons that the limiting instruction the court seems to want to prepare I believe places undue attention on the evidence in ways that I don't know if a jury would surmise if they were not given that instruction." RP 1459.

Content of text messages

In the texts, Fenney complained that Korengay had robbed others, and he was taking the blame for it. He feared the others and was angry he was being held responsible, and had not even gotten a cut from the robbery. Exh. 335 Nos. 89,91,92,94,144,149, 180-81,191,218, 265, 266. Kornegay protested Fenney's outrage about the robbery stating Fenney knew he was going to rob the other man. Exh. 335 Nos. 86, 88.

The texts detailed feeling betrayed by Kornegay, threats, and pleading for Kornegay to respond to him. Exh. 335. Fenney threatened to cut off K.W.'s fingers or let the other party abduct her as she left work, or possibly shoot her himself. Exh. 335, No. 90, 97 104, 108, 167, 199, 202-03, 208-11, 255-56. He warned Kornegay that K.W. would not leave the house until Korengay contacted him. Exh. 335, Nos. 79-82.

However, instead of harming K.W. Fenney gave her her phone when she left work for the day. Exh. 335, No. 264. Kornegay's response texts did not exhibit distress at the threats. Exh. 335, Nos. 118, 128, 143, 145,168.

PRETRIAL SEVERANCE MOTION

Pretrial, defense counsel moved to sever the charges involving K.W. from those related to B.C. because the counts were not properly joined for trial. CP 166-167. The court saw the case as "a primarily human trafficking case. And the rapes and assaults would be relevant to human trafficking." 12/11/17 RP 5. The court reasoned, "And so to me, the rapes of – the alleged rapes and alleged assaults, I must say of both [B.C.] and [K.W.]....are not so much connected to the credibility of each other's allegation of rape,

but rather proving the first charge, which is human trafficking in the first degree.” 12/11/17 RP 6.

The court noted it would not ordinarily allow the two allegations of rape to be tried together unless there was a “bizarre signature”, but “this is part of, in my humble estimation of how you get to human trafficking in the first degree.” 12/11/17 RP 10. The court said sexual violence was a “common feature of pimps” and the allegation of rape by K.W. fit with the charge of human trafficking. 12/11/17 RP 10, 11.

Defense counsel objected, pointing out to the court that K.W. was not a prostitute nor had she been involved in human trafficking. The court responded the brutality and manipulation were features of the charged crimes, and “who knows where it would have gone had he not been intercepted, with respect to K.W. I would put “yet” after that sentence. If, in fact, the prosecution's case is centralized onto the human trafficking piece. And I can -- I just infer that it is. Because as I looked through the three different informations, the one charge that got charged first and remains is the human trafficking, and then the other assaults, et cetera, come on later.” 12/11/17 RP 13-14.

The court denied the motion to sever the offenses, finding the allegation of rape of K.W. as highly relevant to the charge of human trafficking. 12/11/17 RP 11; CP 187. Counsel did not renew the motion.

JURY VERDICT AND SENTENCING

The jury found Mr. Fenney guilty on all charges except for attempted murder in the first degree. CP 416-49. The jury found special verdicts for firearm enhancements and exceptional circumstances. CP 570-630. The court entered findings of fact and conclusions of law for the exceptional sentences and vacated counts 31 and 24. CP 746-751; 588, 607-12, 622-39.

The court imposed a 340.3-year sentence. The firearm enhancements totaled 104 years. The exceptional sentence added 65 years. CP 725-728. The court imposed the high end of the range for all counts with counts 3,4,6,10,13,15,17,22,24,25,28, and 42 to be served consecutive to one another. Counts 38-41 were set to be served concurrent to one another and consecutive to all other counts and count 1 (44.08 years) consecutive to all other counts. 3/26/18 RP 35. The court imposed a minimum of 85 years for the rape counts. CP 725-728.

The court did not conduct a *Blazina* inquiry and stated it would not reducing the fines because Fenney could work while in prison. 3/26/18 RP 36. It imposed a \$10,000 fine for human trafficking, a \$3,00 fine for promoting prostitution, a \$200 criminal filing fee, and a \$100 DNA collection fee. CP 732. Fenney filed a timely notice of appeal. CP 601. The trial court entered an order of indigency. CP 741-43.

III. ARGUMENT

A. The Trial Court Denied Mr. Fenney A Fair Trial When It Assumed The Role Of An Advocate For The Prosecution.

A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed.942 (1955); *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). The Fourteenth Amendment to the United States Constitution and Article I § 3 of the Washington State Constitution protect a fundamental liberty, the right to a fair trial. *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). Failure to provide “an accused with a fair hearing violates even the minimal standards of due process.” *Id.* (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.E.2d 751 (1961)”. When the trial court crosses the

line from neutral arbiter to advocate, it implicates the due process right to a fair trial. See *Moreno*, 147 Wn.2d at 507, 509-11.

“Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. A judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.” *State v. Ra*, 144 Wn.App. 688, 704-05, 175 P.3d 609 (2008) (quoting *State v. Landenburg*, 67 Wn.App. 749, 754-55, 840 P.2d 228 (1992)). Here, the trial court improperly “entered into the fray of combat” and assumed the role of the prosecutor.

1. Denial of The Severance Motion

The defense motioned for severance of the count of alleged rape against K.W. CP 167. The State objected citing judicial economy outweighed potential prejudice: the charged offenses were somewhat similar, occurred at the same place and same timeframe, and K.W. and B.C. witnessed some of the alleged assaults. CP 177-78.

Likening to domestic violence case law, the State contended the evidence was relevant and necessary to assess the credibility of K.W. and B.C. to prove the charged assaults actually occurred. CP 179. Although neither B.C. or K.W. recanted their testimony, the State relied on *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008) for the notion that allowing the jury to hear other acts of domestic violence would assist the jury in judging the credibility of a *recanting* victim. *Id.* 186.

The trial court went far beyond the State's argument denying the severance motion. The court theorized the state's case was about human trafficking and "[t]he brutality...is a huge feature and the manipulation in terms of the charged crimes." 12/11/17 RP 11. The court saw brutality as "a common feature of pimps" and postulated that K.W. *might* have been trafficked in the future.

K.W. was not a prostitute and the State never alleged she was recruited to work as a prostitute. The State did not seek to have the counts joined to show brutality common to pimps. And, although B.C. initially denied any wrongdoing, neither she nor K.W. recanted their testimony.

The court court's reasons for denying the motion to sever were improper: Mr. Fenney fit a profile of individuals who acted as

pimps and engaged in human trafficking, they were manipulative and brutal. The court's reasoning and ruling amounted to advocating for the State's case rather than remaining a neutral arbiter.

b. Text Messages

The court also proposed its own theory based on inadmissible propensity evidence to admit the text messages between Kornegay and Fenney. The State had not charged Mr. Fenney with any crimes based on the content of the text messages. But it wanted the jury to know that Mr. Fenney was angry with Kornegay, and to conclude that anger was the motive for the alleged rape of K.W.

The trial court's reasoning and ruling again went far beyond the State's argument. In *State v. Ra* the trial court ruled that gang evidence was not admissible. Before doing so, however, it speculated on Ra's possible motives for his alleged crimes. The court speculated that maybe the defendant felt like a "big" man, and wanted to show off for others with his weapon, and could "get away with it" and innocent people should "not be subjected to some distorted character who breeds and lives violently." *Ra*, 144 Wn. App. at 695. The State capitalized on the court's theory during

closing argument. On review, the Court found the trial court's proposal of theories for the State to use in admitting improper ER 404(b) evidence was inappropriate.. *Ra*, 144 Wn.App. at 705.

As in *Ra*, the trial court's comments here were inappropriate:

THE COURT: It's -- I agree that the nature of the statements made by the defendant are prejudicial to him in that *they show him to be controlling, hostile, menacing, and that, coupled with [B.C.]'s testimony and [K.W.]'s testimony about the type of violence that he is capable of inflicting, those are highly prejudicial to the defendant.*

RP 1390. Additionally, the court laid out an entire argument for the prosecutor to use the text messages to prove elements of force, forcible compulsion, intent to inflict extreme emotional distress, intent to inflict bodily injury, rape, kidnapping and unlawful imprisonment. RP 1438, 1439-1457.

The court stepped outside of its role as a neutral arbiter. The court proposed and then ruled the text messages were substantive evidence "of his intent and their (sic) evidence of how he engages in what he does to further force and coerce, and it is all a part of the plan to make money through human trafficking and prostitution." RP 1443.

Acting as an advocate for the State, the court itself invited the jury to make the prohibited inference that Fenney's texts

showed a propensity to commit other charged crimes. It is improper for a trial court to propose theories for the State to use in admitting improper ER 404(b) evidence. *Ra*, 144 Wn.App.705.

The court did not display impartiality or the appearance of impartiality necessary to guarantee due process and a fair trial for Fenney. *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674 (1995). This Court should reverse the convictions.

B. Mr. Fenney's Attorney Provided Ineffective Assistance of Counsel By Failing To Object To Inadmissible Profile Testimony And An Unfairly Prejudicial Exhibit.

A criminal defendant is guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI, Wash.Const. Art. 1. The purpose of the requirement is to ensure a fair and impartial trial. *State v. Thomas*, 109 Wn.2d 222,225, 743 P.2d 816 (1987). To ensure a fair and just trial, counsel must advocate for a reliable adversarial testing process. *Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Jones*, 183 Wn.2d 327, 352 P.3d 776 (2015). When trial counsel unreasonably fails to object to inadmissible evidence, the guarantee of a fair and impartial trial is violated. As here, where counsel unreasonably failed to object to "profile" testimony central

to the State's case, his performance is deficient. *State v. Johnston*, 143 Wn. App. 1,19, 177 P.3d 1127 (2007).

1. Profile Testimony Should Not Have Been Admitted Because It Was Unduly Prejudicial, Equated Pimp with Trafficker And Invaded The Province Of The Jury.

The State's expert witness testified on the pimp/prostitute subculture to explain the street terms, and the development and intricacies of the relationship between human trafficker, pimp, and prostitute. This testimony should not have been admitted because it was unduly prejudicial profile testimony and conflated "trafficker" with "pimp". Defense counsel's failure to object to the testimony deprived Fenney of counsel for Sixth Amendment purposes.

"Profile testimony" is testimony which identifies a person as a member of a group as more likely to commit a crime and is generally "inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice." *State v. Avendano-Lopez*, 79 Wn.App. 706, 710-11, 904 P.2d 324 (1995); *State v. Braham*, 67 Wn.App. 930, 936, 841 P.2d 785 (1992). It is unfairly prejudicial because it implies a specific person's guilt based on behavioral characteristics typically displayed by other known offenders. *Braham*, 67 Wn.App. at 939.

Here, two major questions before the jury for this testimony were: 1) did the state prove beyond a reasonable doubt that Fenney violated the anti-human trafficking statute, and 2) did he promote prostitution. Witness testimony which amounts to “an explicit or almost explicit” opinion on a defendant’s guilt or a victim’s credibility is an impermissible statement on an ultimate issue of fact because it invades the constitutional right to a jury trial. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009). Here, counsel’s failure to object to the profile testimony resulted in due process harms.

First, without objection, Washington equated promoting prostitution with human trafficking. RP 572-73. He used the words “pimp” and “trafficker” interchangeably throughout his testimony. RP 575-76;589-90. By linking “pimp” with “human trafficker” it misled the jury to believe the roles were interchangeable and a rational jury could easily conclude if Fenney were guilty of promoting prostitution, he was guilty of human trafficking.

An explicit example of the profile testimony invading the province of the jury occurred when Washington opined that prostitution was “modern day slavery.” RP 583. He told the jury that even if a prostitute did not self-identify as a victim, she had

nonetheless been forced into involuntary servitude. RP 583. This was a commentary on the credibility of the witness: even if B.C. testified she prostituted because she wanted to, the expert testimony was that she was trafficked and a victim of “modern day slavery.” This amounted to a nearly explicit opinion on the guilt of Fenney regarding the human trafficking charge. *State v. Aguirre*, 168 Wn.2d 350, 360-61, 229 P.3d 669 (2010)(citing to *State v. Haga*, 8 Wn.App. 481, 490, 507 P.2d 159 (1973)). No witness, whether lay or expert, may give an opinion on the defendant's guilt either directly or inferentially “because the determination of the defendant's guilt or innocence is solely a question for the trier of fact.” *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

When an ineffective assistance of counsel claim is based on counsel's failure to object, the appellant must show that the objection would likely have succeeded. *State v. Gerdtz*, 136 Wn.App. 720, 727, 150 P.3d 627 (2007). Testimony... is objectionable if it expresses an opinion on a matter of law or... 'merely tells the jury what result to reach.' 5A Teglund, Wash Prac., Evidence § 309 at 84 (2d ed. 1982). Here, the testimony amounted to a nearly explicit opinion of guilt and an objection should have been sustained.

The profile testimony continued when Washington opined the reason a prostitute would not report the abuse by their pimp to law enforcement was because of a “trauma bond” and victims in the prostitution culture have been tricked into believing they are not being manipulated. RP 590-91. He did not define “trauma bonding” but likened it to a “dysfunctional family” relationship; trauma bonding was not specific to a prostitute/pimp relationship.

In *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987), the State’s expert testified the alleged rape victim suffered from rape trauma syndrome or post-traumatic stress disorder. The expert described symptoms of rape victims and identified the alleged victim as fitting that profile. On review, the Supreme Court held that such testimony inadmissible because it lacked scientific reliability, and most important, unfairly prejudiced the defendant accused of rape. *Id.* at 339. The Court reasoned the symptoms associated with “rape trauma syndrome” encompassed a broad spectrum of human behavior; the stress and trauma associated with rape was merely one type of a larger phenomenon of post-traumatic stress disorder. *Id.* at 344.

The prejudicial nature of the testimony was so great as to render it inadmissible: it constituted an opinion on the guilt of the

defendant, thus invading the exclusive province of the finder of fact. *Black*, 109 Wn.2d at 348. Such is the case here.

Here, Washington did not specifically identify B.C. as having a trauma bond. The result, however was a near explicit opinion on the credibility of B.C. It also served as a nearly explicit opinion on Fenney's guilt and was unfairly prejudicial.

The third impermissible inference generated by the profile testimony which should have been objected to was that as a black man, Fenney was probably guilty of promoting prostitution and violating the human trafficking law, based on behavioral characteristics of other known offenders. Washington referred to a rule for prostitutes:

you are not allowed to talk to other pimps, so a lot of times that comes up as no African American males because, you know, there is this stigma that a lot of African American males are related to or of that sub-culture versus other races that you may see. So, there might be a rule: Don't talk to any African American males, meaning you can't have that type of customer. RP 576.

Washington also referenced two types of pimps: the finesse pimp and the gorilla pimp. He told the jury a "gorilla" pimp used violence rather than words to control others.

The explanation of the rules regarding black men being stigmatized as more involved in the prostitution subculture combined with the words “gorilla pimp” in the trial of a black man should have had no place in the courtroom. This testimony during the State’s case in chief was remarkably prejudicial and should have been objected to by defense counsel.

The profile evidence presented to the jury was especially significant considering that despite the broad reach and purpose of the anti-human trafficking statute enacted 16 years ago, as of the writing of this brief, each of the 5 human trafficking cases reviewed on appeal involve prosecution of a young black man⁵ also charged with promoting prostitution or promoting commercial sexual abuse of a minor. There are 4 unpublished cases⁶, and 1 published case where the state charged human trafficking: Unpublished cases: *State v. Parker*, 190 Wn.App. 1037 (2015 WL6126551); *State v. Escalante*, 5 Wn.App.2d 1040 (2018 WL 5013781); *State v. Oliver*, 2 Wn.App. 2d 1029 (2018 WL 7222855); *State v. Williams*,

⁵ The race of the appellants is listed online for each Department of Corrections inmate on “Vine Link”. (<https://vinelink.vineapps.com/person-detail/offender>) (last visited 6/3/19).

⁶ The unpublished cases cited in this section are not being used for precedential value. They are listed to illustrate for the Court the number of cases prosecuted in Washington State that have gone forward on appeal. The race of the defendant was found

3Wn.App.2d 1052 (2018WL 2114053); *State v. Pointec*, 2019 WL 366429 (January 29, 2019); and the first prosecution for human trafficking in Washington State and the only published case, *State v. Clark*, 170 Wn.App. 166, 283 P.3d 1116 (2012).

Washington has a history of racial and ethnic disparity in the criminal justice system. Recently, the Washington Supreme Court embraced objective research that demonstrated the state death penalty was administered in an arbitrary and racially biased manner. *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

In *Gregory*, the Court bluntly held: “Given the evidence before this Court and our judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is *not* attributed to random chance.” *Id.* at 22. The trend of charging only young black men with human trafficking and promoting prostitution also suggests a racial bias which is also not by random chance.

Testimony that prostitutes are not allowed to talk to black men because there is a stigma that more black men are in the prostitution subculture compared to other ethnic and racial groups. is an example of a perpetuation of the implicit and overt racial bias recognized by the Court. The testimony gave the jury permission to

see Fenney as more likely to be involved in the subculture of prostitution.

In *Walker*, the Court noted “we have recognized that our State criminal justice system is not immune from unconscious, implicit, racial bias and that we need to devise strategies to deal with it.” The Court cited the National Center for State Courts which counseled that “implicit bias is pervasive and operates without our awareness: ‘Unlike *explicit bias* (which reflects the attitudes or beliefs that one endorses at a conscious level), *implicit bias* is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g. implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.’” *State v. Walker*, 182 Wn.2d 463, 491 n.4, 341 P.3d 976 (2015).

The testimony here was objectionable and unfairly prejudicial and reflected both implicit and explicit bias. Fenney’s attorney should have objected to it and the trial court should have found it inadmissible.

2. Overly Prejudicial Photo

Last, defense counsel’s performance was deficient when he failed to object to introduction unfairly prejudicial photos. The State

first introduced a picture of the belt Fenney was alleged to have worn regularly. Exh. 315: RP 737-38. B.C. identified the belt as the one he used to beat her. RP 738-39. The State next introduced a photo of Fenney wearing the belt. The second photograph was taken while Fenney was being arrested. 2/2/18 RP 11-12. Exh. 322.

Booking photos are “notoriously prejudicial and inflammatory, and are generally admissible only if specifically relevant.” *State v. Walker*, 182 Wn.2d at 489-90. Here, B.C. had already identified the belt as belonging to Fenney. Introduction of the second photo depicting his arrest was far beyond a booking photo: it was unnecessary, inflammatory, cumulative, and not *specifically* relevant. Had counsel objected the court should have held the photo duplicative and unnecessary.

Where a lawyer’s performance is so deficient that a defendant was deprived of counsel for Sixth Amendment and there is a reasonable probability that the deficient performance prejudiced his defense, the defendant will prevail on a claim of ineffective assistance of counsel. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Gregory*, 192 Wn.2d at 22.

Here, the deficient performance was sufficient to undermine confidence in the jury verdict of human trafficking in the first degree. This matter must be reversed.

C. The Trial Court Committed Reversible Error In Admitting The Text Messages Because They Were Irrelevant, Overly Prejudicial And Constituted Improper Propensity Evidence Under ER 404(b).

Evidence Rule 404(b) categorically prohibits admission of evidence to prove the character of a person and to show he acted in conformity with that character. It restricts the admissibility of related, but uncharged, criminal activity in a criminal case. Misconduct for which a defendant has not been charged is likely to be more prejudicial than probative value. *State v. Bowen*, 48 Wn.App. 187, 738 P.2d 316 (1987)(abrogated on other grounds by *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995).

ER 404(b) is designed to prevent the State from suggesting that a defendant is guilty because he is a criminal-type person who would be likely to commit the crime charged. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Admission of evidence under ER 404(b) is reviewed for an abuse of discretion. *Id.* at 174. Abuse of discretion means “no reasonable judge would have ruled

as the trial court did.” *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

To satisfy the requirement that evidence of prior misconduct is not being used for a prohibited purpose a trial court must first “(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *State v. Thang*, 145 Wn.2d at 642. Close cases must be resolved in favor of exclusion. *Id.*

“The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true.” *State v. Arredondo*, 188 Wn.2d 244, 257, 394 P.3d 348 (2017). Here, there was no dispute that text messages between Fenney and Kornegay were exchanged. The dispute is the purpose for admission, whether the evidence was relevant to prove an element of a charged crime, and whether the prejudicial effect outweighed the probative value.

Here, the trial court improperly created its own purpose for introducing the evidence: “evidence of the alleged methods that he used to control and force or coerce B.C. and K.W.” And they

showed “his intent and their (sic) evidence of how he engages in what he does to further force and coerce, and it is all a part of the plan to make money through human trafficking and prostitution.” RP 1443. The heart of the court’s relevance reasoning was the texts showed Fenney’s character was “controlling, hostile, menacing” and could prove he acted in conformity therewith. ER 404 categorically bars use of evidence for that purpose.

The third step in the analysis is to determine whether the text messages were relevant to prove an essential element the charged crimes. If prior bad acts are presented for admission, the evidence must not only fit one of the specific exceptions found in ER 404(b), but must also be “relevant and necessary to prove an essential ingredient of the crime charged.” *State v. Tharp*, 96 Wn.2d 591, 596, 637 P.2d 961 (1981).

The State’s initial argument, the texts were useful to show a motive for the alleged rape of K.W., does not stand up to reason. “Motive is an inducement which tempts a mind to commit a crime” and is not an essential element of a crime.” *State v. Yarbrough*, 151 Wn.App. 66, 94, 210 P.3d 1029 (2009). Intent is different from motive and it was unnecessary to prove intent for a charge of rape.

“Rape criminalizes nonconsensual sexual intercourse regardless of criminal intent or knowledge.” *Id.* at 895.

Fenney had opportunity to harm K.W. on the day the text messages were sent and instead of harming her, Fenney went to sleep. When K.W. left work Fenney did not abduct her, instead he gave her back her telephone. RP 1338.

The trial court’s stated purpose for admission of the text messages was improperly based on character evidence. Given the context and contents of the texts, the court’s rationale the texts were evidence of examples of his force and compulsion belying an intent to make money from promoting prostitution is unreasonable and a distortion of the application of ER 404.

The prejudicial impact of the text messages far outweighed any probative value. The texts threatened violence, accused Kornegay of betrayal, included profanities, and showed Fenney’s undisguised fear he was being held responsible for a robbery Kornegay had committed. There were no crimes charged based on the text messages. The jury could only impermissibly conclude the texts showed Fenney acted in conformity with a character that was, as the trial characterized it, controlling, hostile and menacing.

A trial court abuses its discretion when a decision is “manifestly unreasonable, or exercised on untenable grounds or for untenable reasons...’ A discretionary decision rests on untenable grounds or is based on untenable reasons if the trial court relies on unsupported facts or applies the wrong legal standard; the court’s decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The trial court’s decision was manifestly unreasonable, falling outside of the range of acceptable choices. The court proposed its own purpose for the texts, encouraged the State to use the text messages to show propensity to use force or coercion, and unreasonably found the probative value significantly outweighed the prejudicial impact. The court abused its discretion and combined with other significant errors, requires a new trial.

D. The Trial Court Erred In Admitting Evidence of Alleged Gang Affiliation Without A Nexus To The Alleged Crimes.

Gang membership is constitutionally protected under the right of association guaranteed by the First Amendment to the United States Constitution. *Dawson v Delaware*, 503 U.S. 159, 112

S.Ct. 1093, 117 L.Ed.2d 309 (1992). Evidence of gang affiliation is inadmissible in a criminal trial unless there is a nexus between the alleged crime and gang membership. *State v. Scott*, 151 Wn.App. 520, 526, 213 P.3d 71 (2009). When there is no connection between a defendant's gang affiliation and the charged offense, admission of the gang evidence is prejudicial error. *Scott*, 151 Wn.App. at 527; *State v. Asaeli*, 150 Wn.App. 543, 208 P.3d 1136 (2009). Such is the case here.

ER 404(b) governs the admission of gang evidence. *Scott*, 151 Wn.App. at 526. The trial court must identify a *significant* reason for admitting the evidence and determine whether the relevance of the evidence outweighs any prejudicial impact. *Id.* at 527. Even if evidence is relevant and probative, ER 404(b) is a categorical bar to admission of evidence to prove the character of a person to show action in conformity therewith.

The court appears to have found Fenney was a gang member. RP 62. The State did not want to prove gang membership and only wanted the jury to know what B.C. and K.W. believed and that thought they would face reprisals from these gang members. The State did not charge him with gang-related crimes or allege he

committed crimes to advance a gang or gang membership. The point was to suggest guilt by association.

The State identified the crime of harassment as the relevant crime. RP 57-58. The felony harassment counts as charged had no relation to gang affiliation. When Fenney allegedly threatened to kill B.C. and K.W., he was alone with them and had a firearm. RP 604, 747, 807-809, 1294. The circumstances of the alleged threats had nothing to do with gang membership but rather, were impulsive and designed to gain compliance to his demand at that moment. Their beliefs about gangs and gang reprisals were not relevant to any material element of the alleged crimes of harassment.

The court identified a second purpose for admitting the beliefs of B.C. and K.W. was to show “state of mind” as to why neither reported the assaults to police officers. It is not a crime to not report a crime and explaining to a jury why B.C. did not go to the police earlier was irrelevant to the charges against Mr. Fenney.

B.C. was clear in her testimony: the reason she did not report being assaulted the first time was because she was not ready for help, and thought no one could help her, not because she thought Fenney belonged to a gang. She testified that she met some of Fenney’s friends and they were scary people. It was only

at the prompting and leading of the prosecutor did B.C. agree she was worried about her safety from other gang members. Whether Fenney was guilty of the alleged crimes had nothing to do with B.C.'s uncorroborated beliefs.

Without prejudicial testimony about her belief in gang affiliation, her testimony and reasonable inferences from it showed the reasons for not seeking help were more than sufficient for explaining why she did not report the crimes or seek aid. She believed she and Fenney were in love. She suffered from an addiction to methamphetamines. She had reason to fear being arrested for prostitution; she was ashamed and sad at what was happening to her life and wanted to be numb. RP 725. She was afraid of Fenney because of the violence she experienced.

Beliefs about gang affiliation were irrelevant to the alleged crime of felony harassment or to explain her reasons for not going to the police. She reported there were times she left in her car, turned off her phone, was aware she was not being "tracked", and could have gone to the police or a hospital. She returned to Fenney not because she feared gang retaliation, but because Fenney apologized, promised things would be different, and she feared he would end his life. RP 898.

At the time of her arrest, K.W. told a detective she had been raped by Fenney. RP 1313. K.W. testified at one point she considered denying the rape allegation *because B.C. asked her not to say anything*. It was not because she feared gang retaliation. RP 1313-14. When police interviewed K.W. they told her Kornegay had told them about activities inside the Silver Street house. RP 1332. K.W. told police about the violence “Because [B.C.] was my friend, and that was the only way that things would stop happening in that house.” RP 1333. If K.W. and Kornegay feared retaliation from gang members, neither of them would have talked to police.

Even if the witnesses’ belief about gang affiliation passed the low bar of relevance, which appellant contends it does not, the court did not articulate a sufficient nexus between any charged crimes and alleged gang membership because there wasn’t one.

The trial court erred when it admitted the testimony. It was irrelevant because there was no nexus between the alleged crimes and gang membership. As in *Scott*, without a connection of gang membership to the crimes, “the only reasonable inference for the jury to draw from the testimony” is that Fenney “was a bad man.” *Scott*, 151 Wn.App. at 529. This violated the protections of ER 404(b) and was unduly prejudicial.

While this error may not on its own require reversal, coupled with the other erroneous admissions of evidence, and the violation of Fenney's right to due process, this was not harmless error, and likely contributed to the verdicts, requiring a new trial. *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462, 466 (2017).

E. The Conviction For Human Trafficking Must Be Vacated.

It is a rule of statutory construction that when conduct is punished under a specific statute and the same conduct is punished under a general statute, they are concurrent statutes. *State v. Presba*, 131 Wn.App. 47, 52, 126 P.3d 1280 (2005). Whether two statutes are concurrent is reviewed de novo. *State v. Chase*, 134 Wn.App. 792, 800, 142 P.3d 630 (2006). The reviewing court examines the elements of each statute without regard to the facts of the particular case. *Id.* at 802-03. This rule "gives effect to legislative intent and ensures charging decisions comport with that intent." *State v. Ou*, 156 Wn.App. 899, 902, 234 P.3d 1186 (2010). It is not "relevant that the special statute may contain additional elements not contained in the general statute." *State v. Conte*, 159 Wn.2d 797, 811, 154 P.3d 194, 200-01 (2007).

Washington was the first state to enact an anti-human trafficking statute. Modeled on the federal anti-trafficking laws, the 2003 legislation was a response to the murders in Washington State of foreign mail order brides between 1995 and 1999.⁷ The original statute did not explicitly include commercial sex acts as part of human trafficking, but the legislative history notes, “A person may be trafficked for a number of reasons including forced prostitution.” *Clark*, 170 Wn.App. at 193.

The human trafficking statute is a broad general statute. It punishes the trafficking of persons for purposes of involuntary servitude that range from commercial sex work, to domestic worker, nail salon worker, factory worker, nursing home worker, construction, begging and panhandling, restaurants, and mail order brides⁸. It punishes the individual who recruits, hides, buys, sells, keeps, or transfers another, or benefits financially from that servitude. It requires a knowing or reckless disregard that force, fraud, or coercion will be used to keep that person in servitude. First degree human trafficking requires a kidnapping or attempt to

⁷ <https://law.seattleu.edu/Documents/sjsj/2011spring/Veloria.pdf> (last visited 3/27/19)

⁸ McClung, Margaret and Espinosa, Deborah, King County Labor Trafficking Report, July 2017. <https://www.documentcloud.org/documents/4193027-King-County-Labor-Trafficking-Report.html>

kidnap, a sexual motivation, a death, or the sale of human organs.

RCW 9A.40.100.

Promoting prostitution in the first degree is a specific statute punishing conduct relating to prostitution: it prohibits individuals from engaging in any conduct that causes or aids a person to engage in prostitution or the enterprise of prostitution. *State v. Putnam*, 31 Wn.App. 156, 159, 639 P.2d 858 (1982). RCW 9A.88.070(1)(a); RCW 9A.88.060. “Any agreement to engage in or cause the performance of prostitution activity constitutes “conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.” *Putnam*, 31 Wn. App. at 160.

On a practical level “any other conduct” includes recruitment, use of force or coercion, knowledge that force or coercion will be used to keep the prostitute in involuntary servitude, and intentionally abducting⁹ another to facilitate the commission of a felony, such as promoting prostitution. *Id*

⁹ Abduct means to restrain a person by either holding them in a place where they are not likely to be found, or by using or threatening to use deadly force. Restrain means to restrict another person’s movement without consent and without legal authority in a manner that interferes substantially with that person’s liberty. Restraint is without consent if it is accomplished by physical force, intimidation or deception. RCW 9A.40.010(1),(6). Involuntary servitude means a condition of servitude in which the victim was forced to work by the use or threat of physical

Human trafficking is a general statute which prohibits individuals from conduct that will place an individual in involuntary servitude of some sort, including forced prostitution, knowing or in reckless disregard that force, or coercion may be used to maintain that servitude, and involves kidnapping or attempted kidnapping.

Thus, an individual who causes or aids another to engage prostitution through force or threat or any other conduct would also violate the anti-human trafficking statute.

Where it is not possible to commit the specific crime without also committing the general crime, the specific supersedes the general. *State v. Shriner*, 101 Wn.2d 576, 583, 681 P.2d 237 (1984). It is longstanding Washington law that a prosecutor is “not at liberty to charge under the general statute a person whose conduct brings his offense within the special statute.” *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912(1979). The human trafficking conviction must be reversed. *Putnam*, 31 Wn.App.at 160.

F. It Was Reversible Error To Join Count 42 With The Other Charged Counts.

restraint or physical injury by the use of threat of coercion through law or legal process... RCW 9A.40.010(4).

Whether offenses are properly joined is a question of law reviewed de novo. *State v Bryant*, 89 Wn.App. 857, 864, 950 P.2d 1004 (1998). Prejudice to a defendant and judicial economy are factors in joinder decisions. However, judicial economy cannot outweigh a defendant's right to a fair trial. *State v. Bluford*, 188 Wn.2d 298, 305, 393 P.3d 1219 (2017). If joinder is not proper, but the offenses were consolidated in one trial, the convictions must be reversed unless the error is found to be harmless. *Bryant*, 89 Wn.App. at 864.

Denial of a motion to sever is reviewed for abuse of discretion. *State v. Huynh*, 175 Wn.App. 896, 307 P.3d 788 (2013). To show the trial court abused its discretion in denying a severance, "the defendant must be able to point to specific prejudice" which outweighs judicial economy. *Id.*, *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990).

CrR 4.3(a) authorizes a trial court to join two or more offenses of "the same or similar character, even if not part of a single scheme or plan"; or (2) are "based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.3(a)(1)(2); *Bythrow*, 114 Wn.2d at

717. If multiple offenses are properly joined, they are consolidated for trial unless the court orders severance under CrR 4.4.

Even if offenses are properly joined under CrR 4.3(a), the court may exercise its discretion to sever the offenses “if the trial court determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” *Bythrow*, 114 Wn.2d at 717; CrR 4.4(b). Under the rules, a party must move for severance pretrial and renew a denied pretrial motion for severance either before or at the close of all the evidence. CrR 4.4(a)(2). If the party fails to renew a severance motion, it is waived. CrR 4.4(a)(1),(2).

Here, by filing the information with all charges of offenses against B.C. and K.W., the State joined the offenses. Precedent “does not allow joinder ‘if prosecution of all charges in a single trial would prejudice the defendant.’” *Bluford*, 188 Wn.2d at 310.

Joinder of offenses is inherently prejudicial. *State v. Ramirez*, 46 Wn.App. 223, 227, 730 P.2d 98 (1986). Evidence of other sexual offenses is considered especially prejudicial. *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Prejudice may result if the “use of a single trial invites the jury to cumulate

evidence to find guilt or infer a criminal disposition.” *State v. Bryant*, 89 Wn.App. 89 Wn.App. 857, 867, 950 P.2d 1004 (1998).

The challenge here is two-fold: (1) whether in a trial with 45 charges, the majority of which were violent offenses, a jury could follow a cautionary instruction to consider the evidence of each crime separately, or the cumulative evidence would simply lead the jury to infer a criminal disposition; and (2) because the court found the evidence would not be cross-admissible, whether allowing evidence of the alleged rape of K.W. unduly prejudiced Mr. Fenney.

The trial court must consider four factors that may mitigate the prejudicial effect of joinder: (1) the strength of the State's evidence on each count; (2) the clarity of the defenses to the respective counts; (3) the probable effect of a cautionary instruction to consider the evidence of each crime separately; and (4) whether, in separate trials, the evidence of the other charged crimes would be admissible. *Bythrow*, 114 Wn.2d at 721; *State v. Sanders*, 66 Wn.App. 878, 885, 833 P.2d 452 (1992).

Here, because the State had medical records, eye witness accounts, and B.C.’s own testimony, the strength of the evidence on the charged offenses against B.C. was strong. Similarly, the evidence on the charged offenses against K.W. were witnessed by

others, except for the charge of rape. Second, Mr. Fenney maintained a defense of general denial for all charges.

The third factor, whether the cautionary instruction to consider the evidence of each crime separately is problematic. The jury could not be expected to compartmentalize the charges and consider evidence of each crime separately from the other. The court's own ruling rested on its theory the case was primarily a human trafficking case and "rapes and assaults would be relevant to human trafficking." The court reasoned that sexual violence was a "common feature of pimps." 12/11/17 RP 10,11. The court itself inferred a criminal disposition and linked the charge of human trafficking of B.C. with the charged assault and rape of K.W. 12/11/17 RP 5,6.

Fenney was not charged with human trafficking of K.W. The record at the time of the ruling and throughout the trial was that K.W. was neither a prostitute nor a drug user, nor was she a subject of human trafficking. 12/11/17 RP 13. The evidence of an alleged rape was not logically relevant to the material issue before the jury as the court defined it. The joinder of the offense prejudiced Mr. Fenney because it allowed the jury to infer a criminal

disposition, just as the court had done. Joinder that results in a fundamentally unfair trial violates due process.

The fourth factor, whether evidence of the alleged rape of K.W. would be cross-admissible, the court looked to an ER 404(b) analysis. 12/11/17 RP 10.

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The court found the evidence highly probative, stating the alleged rape was “vastly relevant to prove the human trafficking in the first-degree charge...This is how pimps do their thing, if you will. This is a common feature among traffickers and their victims.” 12/11/17 RP 10.

In weighing the prejudicial effect, the court agreed it was prejudicial to have two women allege rape against the same man. It determined the evidence of the allegation was not cross-admissible except in so far as it supported the human trafficking in the first degree.

The court made a highly prejudicial and erroneous leap of logic in its analysis. The allegation of rape by K.W. had nothing to do with human trafficking and the evidence was not cross-admissible under ER 404(b) exceptions. Using the allegation of rape to prove human trafficking is prohibited by ER 404(b). The rule bars admission of evidence of other crimes, wrongs, or acts to prove the character of a person to show action in conformity therewith. Here the court allowed the joinder because it believed Fenney to be a pimp and that he acted in conformity with that character.

In *Ramirez*, the defendant was alleged to have fondled two school aged children on separate occasions. The court denied a defense motion to sever the two counts. *Id.* On review, the Court noted it had previously held “because of the inherently prejudicial nature of joinder, where the *prejudice mitigating* factor that evidence of each crime *would be admissible in a separate trial for the other is absent*” it is an abuse of discretion to deny a defendant’s timely motion to sever. *Ramirez*, 46 Wn.App. at 226 (emphasis added).

The *Ramirez* Court held that unless it were (1) logically relevant to a material issue before the jury, and (2) only if its

probative value outweighed its potential for prejudice, evidence that Ramirez fondled one child *would not* be admissible to prove the offense against the other child in a separate trial on that charge. *Id.* at 226. As in *Ramirez*, this Court should find the prejudice mitigating factor was absent: evidence of each crime would not be admissible in a separate trial and presented an undue prejudice to Mr. Fenney. *Id.* at 226.

Nor does the interest in judicial economy outweigh the prejudice to Mr. Fenney. *Bythrow*, 114 Wn.2d at 720, 722. The inherently prejudicial effect of joinder of sexual offenses and lack of cross-admissibility of evidence outweigh any judicial economy in holding a separate trial for the charge. The State would only need to call one witness, K.W. This conviction should be reversed.

The court also justified the denial of severance because neither B.C. nor K.W. had immediately reported the alleged assaults to police, or on the off chance that K.W. might recant her earlier statements. 12/11/17 RP 12-13. Neither basis related to any material fact regarding human trafficking and the offenses should not have been joined. The trial court abused its discretion, Fenney suffered prejudice, and the remedy is a reversal of the conviction.

G. The Evidence Was Insufficient To Sustain A Conviction For Felony Harassment in Count 26.

A challenge to the sufficiency of the evidence may be raised for the first time on appeal. *State v. Hickman*, 135 Wn.2d 97, 95 P.2d 900 (1998). Whether evidence is sufficient to support a conviction is an issue of law. *State v. Knapstad*, 107 Wn.2d 346, 351-52, 729 P.2d 48 (1986).

The Due Process Clause of the Fourteenth Amendment and Article 1 §§ 3, 22 of the Washington State Constitution require the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. Art. 1, §§3, 22; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

As charged in this case, the State had to prove beyond a reasonable doubt that without lawful authority, Fenney knowingly threatened to kill B.C. between October 5, and October 6, 2016, and the threat was made in a context or under circumstances, wherein a reasonable person would foresee the statement as a

serious expression of intent to kill and she was in reasonable fear the threat would be carried out. CP 91; RCW 9A.46.020(1),(2). The State also charged special allegations of being armed with a firearm at the time of the threats, a special allegation of domestic violence, and aggravating circumstances of deliberate cruelty and domestic violence. CP 92-93.

B.C. testified to the events as she recalled them. She did not testify that Mr. Fenney threatened to kill her in the specific charged time period. RP 796-817. As a matter of law, because there was no threat to kill, the evidence is insufficient to find Mr. Fenney guilty of felony harassment beyond a reasonable doubt. The conviction and the accompanying special verdicts and enhancements must be reversed and dismissed with prejudice. *Hickman*, 135 Wn.2d at 103.

H. The Evidence Was Insufficient To Sustain A Conviction For Assault In The Second Degree For Count 16.

A reviewing court should reverse a conviction for insufficient evidence where no reasonable trier of fact, even viewing the evidence in a light most favorable to the State, could have found the elements of the charged crime beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d 419, 421-22, 895 P.2d 403 (1995).

Based on an incident in September 2016, the State charged Fenney with assault in the second degree¹⁰. The State elected to charge him under RCW 9A.36.021(1)(f), requiring it to prove beyond a reasonable doubt that Fenney knowingly inflicted bodily harm which by design caused such pain or agony as to be the equivalent of that produced by torture. RCW 9A.36.021(1)(f). CP 214, 507.

The term “torture” is not defined by statute, but in *State v. Madarash*, the Court used a dictionary definition to find it meant “to cause intense suffering, inflict anguish on; subject to severe pain.” *State v. Madarash*, 116 Wn.App. 500, 514, 66 P.3d 682 (2003). In *Brown*, the Court found the phrase “by design” could be commonly understood to mean “intentionally.” *State v. Brown*, 60 Wn.App. 802 P.2d 803 (1990).

The evidence in this record does not support an intention to cause such pain or agony so intense as to be the equivalent of that produced by torture for the October incident. B.C. testified that Fenney was angry after he checked her phone. RP 786. He hit her

¹⁰ During closing argument, the prosecutor confused the time frames and charges for Counts 16-18. She told the jury that Count 16 occurred during an August incident. RP 1883. However, as charged and testified to at trial, this incident occurred in September and did not involve a belt.

and subsequently, poured urine on her head. RP 787-78. He told her to go into the hallway, and then to sit in the garage. It is unclear if he was pointing a firearm at her or toward the direction he wanted her to go. RP 787. He told her to be quiet. RP 788-89. Then he left. RP 789.

In *Madarash*, the Court considered examples of “torture” in a homicide by abuse case. The Court found sufficient evidence for assault and torture where, among other violent events, the defendant forced the child to take cold baths or showers, threw water in her face to cause her to fear water, duct taped her mouth, hands, and legs and left her in a dark closet. The defendant forced her to stay in a hot car with the windows rolled up, left her in a crib covered with blankets on a hot day and tied her to her bed, and forced the child to stand in the corner in extreme positions for prolonged periods of time. She padlocked the child in her room, would not allow her to use the bathroom and made her wear her soiled underwear over her head, and used an elk head to terrorize the child. *Madarash*, 116 Wn.App. at 515.

Here B.C. testified she was assaulted by being hit and having urine poured on her. She did not testify that the incident lasted a particular duration of time. She did not testify she had

bruises, or other injuries. Nor did she testify the pain was intense or severe or caused her anguish such that a jury could reasonably consider it equivalent to torture.

Viewing the evidence in a light most favorable to the State, the evidence only showed that Fenney hit B.C. and poured urine on her. The evidence is insufficient to sustain a conviction for assault in the second degree, under the charged alternative. This conviction must be reversed and dismissed with prejudice, along with the aggravators of domestic violence and deliberate cruelty. *Hickman*, 135 Wn.2d at 103.

I. The Evidence Was Insufficient To Sustain A Conviction For Robbery In the First Degree in Count 19.

The State charged Fenney with robbery in the first degree for the October 5 and 6, 2016 incident. CP 219. To be guilty of robbery in the first degree, the State must prove that in the commission of a robbery, an individual is armed with a deadly weapon or displays what appears to be a firearm or deadly weapon or inflicts bodily injury. RCW 9A.56.200. And the taking must be against the will of the property owner, and there must be a use or threat of use of force, violence, or fear of injury. RCW 9A.56.190..

The State bears the burden to prove every element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364. Sufficiency of the evidence is a question of constitutional law which is reviewed *de novo*. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Evidence is sufficient to support a conviction if any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Johnson*, 188 Wn.2d 742, 750-51, 399 P.3d 507 (2017). A challenge to sufficiency admits the truth of the State's evidence and all reasonable inferences must be drawn in favor of the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, the "to convict" instruction specified that in the commission of or in immediate flight from the defendant inflicted bodily injury. CP 510. (Appendix B). The record does not support a conviction for robbery in the first degree. B.C. handed the phone to Fenney. Fenney did not take the phone from her against her will. It is reasonable to assume this had occurred often because B.C. said, "he automatically asked for my phone." B.C. understood it was for him to check the phone, not to steal it. B.C. was not afraid when she handed the phone to him. Fenney did not threaten her with

immediate or future injury or violence to obtain or keep the phone.

Nor did he inflict injury on her get or keep the phone.

No reasonable trier of fact could find beyond a reasonable doubt that Fenney committed first degree robbery.

Where sufficient evidence does not support a conviction, it “cannot constitutionally stand.” *Jackson v. Virginia*, 443 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Reversal for insufficient evidence is equivalent to an acquittal and is an absolute bar to retrial. *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009). This conviction should be reversed and dismissed with prejudice along with the special verdicts for aggravated domestic violence and the firearm enhancement.

J. Mr. Fenney’s Constitutional Right To Be Free From Double Jeopardy Was Violated.

The Double Jeopardy Clause guarantees that no person shall be twice put in jeopardy for the same offense. U.S. Const. Amend. V; Wash.Const. Art. I §9. The State may bring multiple charges arising from the same criminal conduct, but the double jeopardy provisions bar multiple punishments for the same offense. *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). Whether

convictions violate double jeopardy is a question of law reviewed de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

The judiciary has developed the merger doctrine as an extension of double jeopardy principles. *State v. Berg*, 181 Wn.2d 857, 864, 337 P.3d 310 (2014). The merger doctrine serves as a tool of statutory construction designed to prevent the pyramiding of charges on a criminal defendant. *State v. Saunders*, 120 Wash. App. 800, 820, 86 P.3d 232 (2004). It arises when a defendant has been found guilty of multiple charges and the court asks if the Legislature intended only one punishment for multiple convictions. *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999).

Whether the merger doctrine bars multiple punishments is a question of law reviewed de novo. *State v. Williams*, 131 Wn.App. 488, 498, 128 P.3d 98 (2006). It applies at the time of sentencing and its purpose is to correct violations of the prohibition of double jeopardy. *State v. Chesnokov*, 175 Wn.App. 345, 355, 305 P.3d 1103 (2013).

When proof of a crime proscribed in one section of the criminal code elevates a second crime found in another section to a higher degree, the merger doctrine applies. *Saunders*, 120 Wn.App. at 820. The presumption is that “the Legislature

intended to punish both offenses through a greater sentence for the greater crime.” *Freeman*, 153 Wn.2d at 773. A predicate offense will merge into the second crime, and the court may not punish the predicate crime separately. *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). The usual remedy for violations of the prohibition of double jeopardy is to vacate the lesser offense. *State v. Hughes*, 166 Wn.2d 675, 686 n.13, 212 P.3d 558 (2009).

Here, whether the kidnapping convictions merge with the human trafficking conviction is a matter of first impression. The difference between human trafficking in the first degree and the second degree, as charged, is the element of kidnapping. RCW 9A.40.100(1)(a)(i)(b)(i). and (3)(a)(i,ii). The State was required to prove the act of kidnapping to elevate the crime of human trafficking to first degree.

The State charged first degree human trafficking over the entire 9 months or so that Mr. Fenney and B.C. were together. CP 189. In addition, the State charged three counts of kidnapping alleged to have occurred during the same time frame.

In *Freeman*, the Court held that second degree assault and first-degree robbery merged where “without the conduct amounting to assault” the defendant would have been guilty of only second-

degree robbery. *Freeman*, 153 Wn.2d. at 778. Here, because the State charged human trafficking as an ongoing crime, from March through November 2016, each of the kidnapping charges was essential to proof of first-degree human trafficking beyond a reasonable doubt.

The remedy is to merge the three kidnapping charges into the greater crime of human trafficking first degree. And the aggravators as found by the jury for the kidnapping charges must be vacated. *State v. Hughes*, 166 Wn.2d at 686 n.13.

K. The Matter Must Be Remanded For Resentencing In Which The Court Exercises Its Discretion.

The court imposed a 340-year term of incarceration: a de facto life sentence. The State, defense and the court all assumed the firearm enhancements were required to be run consecutive to one another, and all serious violent offenses, to run consecutive to one another and the firearm enhancements. CP 716; CP 659-663; 3/26/18 RP 35.

Remand for resentencing is necessary where a sentence is based on a trial court's erroneous interpretation of the law. *State v. McGill*, 112 Wn.App. 95, 100, 47 P.3d 173 (2002). RCW 9.94A.535(1)(g) authorizes the court to impose an exceptional

mitigated sentence when the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of the SRA. The multiple offense policy mitigating factor allows the court to impose concurrent sentences for multiple firearm related convictions. *State v. McFarland*, 189 Wn.2d 47, 55, 399 P.3d 1106 (2017).

This matter should be remanded for the trial court to exercise its discretion to consider an exceptional mitigated sentence in light of the purpose of the SRA. *Id.*

L. The Trial Court Erred When It Did Not Conduct The Requisite *Blazina* Inquiry Into Mr. Fenney's Ability To Pay Legal Financial Obligations.

Trial courts have an obligation to conduct an individualized inquiry into a defendant's current and future ability to pay before imposing discretionary legal financial obligations at sentencing. *State v. Ramirez*, 191 Wn.2d 732, 734, 428 P.3d 714 (2018). An adequate inquiry includes consideration of the *Blazina* factors, including the defendant's incarceration and other debts and the court rule GR 34 for indigency. *Id.*

Whether a trial court has made an adequate individualized inquiry is reviewed de novo. *Id.* at 741. After the inquiry, whether the court imposes discretionary LFOs is discretionary. *Id.* The trial

court has per se abused its discretion when it imposes discretionary LFOs without an adequate individualized inquiry because the exercise of its discretion is premised on a legal error. *Id.* Here, review is de novo, because the error is failure to make an adequate, individualized inquiry.

The mandatory inquiry by the trial court about a person's present and future ability to pay discretionary LFOs must be made on the record. *Ramirez*, 191 Wn.2d at 745. Here, the court made no inquiry into Fenney's ability to pay legal financial obligations. The court simply announced it intended to impose the full fines and Fenney could work in the prison to pay them. 3/26/18 RP 36. The matter must be remanded for the court to make the proper inquiry.

The court entered an order of indigency for Fenney at the time of sentencing. CP 741-43. RCW 10.01.160(3) prohibits courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. The prohibition includes the \$200 criminal filing fee on indigent defendants, and the DNA database fee if the offender's DNA has been collected because of a prior conviction. *Ramirez*, 191 Wn.2d at 747.

This matter should be remanded to the trial court to strike the criminal filing fee. The DNA collection fee should also be

stricken because Fenney has prior convictions for which the fee has been collected. CP 724. On remand, the court should also be instructed to reconsider reducing the fees imposed under RCW 9A.40.100 and RCW 9A.88.120.

IV. CONCLUSION

Based on the foregoing facts and authorities, this Court should reverse the convictions and remand for a new trial. In the alternative, this Court should dismiss the human trafficking conviction, and the convictions which are not supported by sufficient evidence.

Respectfully submitted this 5th day of June 2019.



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APPENDIX A

THE COURT: So if we look at the features of these behaviors or these words that the defendant spoke that are relevant to any of the elements of any of the crimes, then the analysis turns on the elements required by the State to prove by force or coercion and intent and -- well, force and coercion and intent for the crimes that I had mentioned, the counts that I mentioned, specifically the human trafficking with promoting prostitution, as well as the two rape allegations.

And the reason that the words that the defendant spoke became relevant are because they are evidence of the alleged methods that he used to control and force or coerce [B.C.] and [K.W.].

They aren't relevant if they are never communicated, [to B.C. or K.W.] other than just a few of the passages that talk about the Guamanians. Those are relevant to corroborate [K.W.]'s testimony and [B.C.]'s testimony.

So, the struggle that I continue to have is -well, with the -- we have to focus on the elements of the crimes that the State has to prove against the defendant. Bolstering the credibility of the witnesses is - - actually could be a comment on the evidence, and there is no element that says they have to be credible. The evidence is their testimony. If the jury believes their testimony, they have all of the elements satisfied.

These statements are evidence of the defendant's own state of mind, which infiltrates the force and coercion elements in the state of mind required for the human trafficking and promoting rapes and a couple of others that are mentioned. And so, I think it's more appropriate to have a limiting instruction that confines the jury's use of the evidence to the defendant's state of mind, as opposed to whether the evidence corroborates the victim, the alleged victims, because it has to focus on an element.

RP 1439.

THE COURT: It is relevant to his intent because it does involve using tools to accomplish the goal, and the tools are beating, raping, a high degree of control over the victim's environment, including whether she can even talk or not. Monitoring, you know, extortion (sic) all of those features are prominent here.

And so even though Mr. Fenney did not communicate those words through Kornegay to the two women in this case, they are evidence of his intent and their evidence of how he engages in what he does to further force and coerce, and it is all a part of the plan to make money through human trafficking and prostitution.

And so for that reason, I think that is how the jury should be instructed to use the evidence. That is the plan and relevant to the elements that I just described.

RP 1433.

It's relevant to the elements of forcible compulsion.

MS. SCHNEPF: Yes, so motive and intent for those crimes.

THE COURT: Well, the intent isn't just knowing. He has to use force in order to effect human trafficking and promoting. So, this is relevant to that element, as well to the elements of force under the human trafficking and promoting prostitution crimes. It's not just the force. It was the other --....

Okay. Under the human trafficking case, human trafficking requires the element of coercion. The defendant's interaction with Mr. Kornegay is evidence of how he coerces, right?

Well, I think it is. The coercion element in human trafficking is unique. The coercion in promoting prostitution, which is also that we get there. Okay. So, the element of the human trafficking case is, quote, That force or coercion would be used to cause another person to engage in a commercial sex act, so there is a few -- all of those words have a high degree of legal significance. He can't just

be someone who coerces people in general. The coercion and the force have to be used to cause [B.C.] to go and do what she is doing. So that's that element of the crime.

So by him forcing or coercing Kornegay to return the gun by threatening [K.W.] with cutting off her fingers or killing her or killing him, that is the same kind of threats, the same sorts of forcible words that the defendant used with [B.C.] in order to get her to engage in and stay, not talk, right?

So, I think that you can say the evidence is limited for the purpose of evaluating the force or coercion that is used to cause an individual to engage in a sexually explicit act or commercial sex act....

And then let's get to the promoting prostitution elements. Okay? So, the promoting prostitution charge requires -- this is another one that is remarkably similar. N.S. frequently sent text messages to Clark¹¹ calling him "daddy," and we have heard those words in this case as well.

The promoting prostitution crime requires that he use by threat to force, so he compels -- and it is also relevant to the element of the crime of Promoting Prostitution in the First Degree; to wit, compelling a person by threats or force to engage in prostitution.

You also have -- it is relevant to the element of Count III, which is the Rape in the First Degree; to wit, forcible compulsion, the unlawful or the restraint and the kidnapping charges.

RP 1446-1448.

¹¹ The court was referring to *State v. Clark*, 170 Wn.App. 166, 283 P.3d 1116 (2012).

THE COURT: So, once you have the firearm -well, the unlawful imprisonment for the ankle charge and the kidnapping for the basement charge, those two involve an element of the – [B.C.] doing as she is told. Because he didn't put his hands on her and just hold her there, right? He directed her to stay, and then he left the room.

MS. SCHNEPF: Yes.

THE COURT: So, the evidence is also relevant to [B.C.]'s state of mind in those two counts in the knowingly restrained because it's a part of how you restrain someone if you have been working on their psyche for a while.

In other words, a jury could struggle with, well, you sit there and don't move and don't talk to anybody and then leave, and then the person who makes that statement leaves.

A jury could struggle with how that could be elevated to the criminal conduct required -- or the criminal state of mind required knowing the restraint.

Here, the allegations are that the defendant not only brandished the weapon but by virtue of his conduct with her and controlling her environment, that is how he ensured compliance with the words. And that is revealed in the statement made about Mr. Kornegay. RP 1450-51.

His mindset is relevant to whether he had that intent or the state of mind to do the forcible compulsion and coercion and stuff. RP 1453.

APPENDIX B

INSTRUCTION NO. 46

To convict the defendant of the crime of Robbery in the First Degree as charged in Count 19, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 5, 2016 through October 6, 2016, the defendant unlawfully took personal property from the person of another;
- (2) That the person owned the property taken;
- (3) That the defendant intended to commit theft of the property;
- (4) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person;
- (5) That force or fear was used by the defendant to obtain or retain possession of the property;
- (6) That in the commission of these acts or in the immediate flight therefrom the defendant inflicted bodily injury; and
- (7) That any of these acts occurred in the State of Washington.

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on June 5, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Kitsap County Prosecuting Attorney at kcpa@co.kitsap.wa.us and to Jeremy Fenney/DOC#876212, Airway Heights Corrections Center, PO Box 2049 Airway Heights, WA 99001.


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