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

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STATE OF WASHINGTON,

Respondent,

v.

JEREMY BLAINE FENNEY,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-01410-9

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether Fenney fails to show any actual bias on the part of the trial court arising either from the trial court's discussion with Fenney's counsel of the State's points in response to his motion for severance or from its lengthy colloquies regarding the admission of text messages and the appropriate limiting instruction?

2. Whether Fenney fails to demonstrate that trial counsel was ineffective for failure to object to proper expert testimony regarding the pimp and prostitute culture or the admission of a photo of him wearing the belt he used to assault BLC?

3. Whether the trial court properly admitted a text message exchange between Kornegay and Fenney in which Fenney threatened to harm KW in order induce Kornegay, KW's boyfriend, to comply with his wishes, in response to Fenney's argument to the jury that KW fabricated the rape charge?

4. Whether the trial court properly admitted evidence that KW and BLC were aware of Fenney's claimed gang membership to allow the jury to evaluate the victims' credibility?

5. Whether, because the all of the elements to convict under the allegedly general statute (human trafficking) are not also elements that

must be proved for conviction under the allegedly specific statute (promoting prostitution) the statutes are not concurrent?

6. Whether the trial court acted within its considerable discretion in denying Fenney's motion to sever Count 42?

7. Whether the evidence of felony harassment as alleged in Count 26 was insufficient because BLC did not testify that Fenney threatened to kill her during the charged time frame? [CONCESSION OF ERROR]

8. Whether evidence that Fenney beat BLC "everywhere" with a belt until she passed out when the buckle hit her in the face was sufficient to prove second-degree assault by torture as alleged in Count 16?

9. Whether the evidence of robbery as alleged in Count 19 was insufficient because BLC did not testify that Fenney took the phone against her will? [CONCESSION OF ERROR]

10. Whether the kidnapping convictions should merge into the human trafficking conviction? [CONCESSION OF ERROR]

11. Whether resentencing is not required where there is no possibility the trial court would impose a mitigated exceptional sentence?

12. Whether the matter should be remanded to correct Fenney's

legal financial obligations? [CONCESSION OF ERROR]

## II. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Jeremy Blaine Fenney was charged by information filed in Kitsap

County Superior Court with 42 separate offenses:

<b>Ct</b>	<b>Charge</b>	<b>Date<sup>1</sup></b>	<b>Victim</b>	<b>Special</b>	<b>Aggravator</b>
1	Human Trafficking 1	3/1-11/22	BLC <sup>2</sup>	FA DV	DV Lack of Remorse Deliberate Cruelty
2	Promoting Prostitution 1	3/1-11/22	BLC	FA DV	DV Lack of Remorse Deliberate Cruelty
3	Rape 1	3/28-3/29	BLC	FA DV	DV
4	Assault 1	3/28-3/29	BLC	FA DV	DV Deliberate Cruelty
5	Felony Harassment – Threat to Kill	3/28-3/29	BLC	FA DV	DV Deliberate Cruelty
6	Kidnapping 1	4/9	BLC	FA DV	DV Deliberate Cruelty
7	Assault 2	4/9	BLC	FA DV	DV Lack of Remorse Deliberate Cruelty
8	Assault 2	4/9	BLC	DV	DV Lack of Remorse Deliberate Cruelty
9	Felony Harassment – Threat to Kill	4/9	BLC	FA DV	DV Lack of Remorse Deliberate Cruelty
10	Assault 1	4/1-6/1	BLC	FA DV	DV Lack of Remorse Deliberate Cruelty

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<sup>1</sup> All dates are for 2016 unless indicated otherwise.

<sup>2</sup> See CP 477.

<b>Ct</b>	<b>Charge</b>	<b>Date<sup>1</sup></b>	<b>Victim</b>	<b>Special</b>	<b>Aggravator</b>
11	Felony Harassment – Threat to Kill	4/1-6/1	BLC	FA DV	DV Lack of Remorse Deliberate Cruelty
12	Unlawful Imprisonment	5/1-5/12	BLC	FA DV	DV Deliberate Cruelty
13	Assault 1	5/1-5/12	BLC	FA DV	DV Deliberate Cruelty
14	Assault 2	5/1-5/12	BLC	FA DV	DV
15	Rape 1	8/20-8/21	BLC	FA DV	DV Deliberate Cruelty
16	Assault 2	9/1-9/30	BLC	FA DV	DV Lack of Remorse Deliberate Cruelty
17	Kidnapping 1	9/1-9/30	BLC	FA DV	DV Deliberate Cruelty
18	Assault 2	9/1-9/30	BLC	FA DV	DV Deliberate Cruelty
19	Robbery 1	10/5-10/6	BLC	FA DV	DV
20	Assault 2	10/5-10/6	BLC	FA DV	DV Deliberate Cruelty
21	Assault 2	10/5-10/6	BLC	FA DV	DV Deliberate Cruelty
22	Kidnapping 1	10/5-10/6	BLC	FA DV	DV Deliberate Cruelty
23	Rape 1	10/5-10/6	BLC	DV	DV Deliberate Cruelty
24	Assault 1	10/5-10/6	BLC	SM DV	DV Deliberate Cruelty
25	Assault 1	10/5-10/6	BLC	FA DV	DV Deliberate Cruelty
26	Felony Harassment – Threat to Kill	10/5-10/6	BLC	FA DV	DV Deliberate Cruelty
27	Attempted Murder 1	10/6	BLC	FA DV	DV Deliberate Cruelty
28	Assault 1	10/6	BLC	FA DV	DV Deliberate Cruelty
29	Assault 4	11/1-11/22	BLC	DV	
30	Unlawful Possession of a Firearm 1	10/1-11/22			

<b>Ct</b>	<b>Charge</b>	<b>Date<sup>1</sup></b>	<b>Victim</b>	<b>Special</b>	<b>Aggravator</b>
31	Unlawful Possession of a Firearm 1	10/1-11/22			
32	Possession of Methamphetamine	11/22			
33	Felony Violation of a Court Order	11/25	BLC	DV	
34	Felony Violation of a Court Order	12/9	BLC	DV	
35	Felony Violation of a Court Order	1/22/2017	BLC	DV	
36	Felony Violation of a Court Order	1/23/2017	BLC	DV	
37	Felony Violation of a Court Order	1/23/2017	BLC	DV	
38	Robbery 1	7/1-9/30	KW	FA	
39	Assault 2	7/1-9/30	KW	FA	
40	Felony Harassment – Threat to Kill	7/1-9/30	KW	FA	
41	Unlawful Imprisonment	7/1-9/30	KW	FA	
42	Rape 1	10/1-11/16	KW	FA	Ongoing Pattern of Sexual Abuse
43	Unlawful Possession of a Firearm 1	8/1-11/14			
44	Witness Tampering	11/22/2016-1/31/2017			
45	Possession of a Stolen Firearm	10/1-11/22			

CP 189-247.<sup>3</sup> The jury found Fenney guilty as charged on all counts except for Count 27, attempted murder. CP 555-630. Count 31 was subsequently vacated on the State’s motion as same criminal conduct. RP (5/4/18) 30, CP 745. Counts 23 and 24 were merged at sentencing, vacating Count 23. RP (3/26/18) 3.

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<sup>3</sup> All references to “CP” are to the Amended Clerk’s Papers filed on January 22, 2019.

**B. FACTS**

***1. Counts 1 and 2 (Human Trafficking 1<sup>st</sup> and Promoting Prostitution 1<sup>st</sup>)***

Fenney and BLC met through Facebook in 2011. 5RP 672. In March of 2016, BLC began dating Fenney again. 5RP 672. They lived for a while with Fenney's mother (during which time counts 3-5 occurred). 5RP 673, 677. Around the end of March, they moved to the house on Silver Street in Bremerton (during which time counts 6-42 occurred). 5RP 679, 696. They stayed there until BLC and Fenney were both arrested on November 22, 2016. 5RP 698.

When BLC met Fenney, she knew that he was a pimp. 5RP 674. Fenney had numerous tattoos, including one on his chest that said "True Northwest Pimp." 5RP 702. Fenney told her he was part of a gang, the GD Folks. Trevor Johnson and Eugene Kornegay were also members. 5RP 699. Kornegay eventually moved in with them. 5RP 699. This affected her fear of Fenney because of "the kind of stuff they did," and "they were just scary." 5RP 700.

When they began dating in 2016, Fenney was also seeing another woman, Breanna Thornberry, at the time. 5RP 673, RP (2/2/18) 9-10. Fenney was living with Thornberry in Marysville. 5RP 675. He was not working, and Thornberry was essentially supporting him. 5RP 674. Fenney suggested BLC post on Backpage and told her that after she made

a certain amount of money, he would stop seeing Thornberry. 5RP 675. She signed up with in a day or two. 5RP 678.

BLC considered him her boyfriend. 5RP 678. But she was also “going on calls” and giving him the money. 5RP 678. She initially thought she was allowed to talk to other women but found out that was not okay. 5RP 699. With men, she was expected to look at the floor and not speak to them or even acknowledge them. 5RP 699.

When they were in Everett, Fenney would go with her on calls, and text her angrily if she was inside for more than five minutes more than the customer had paid for. 5RP 700. He stopped accompanying her in Bremerton. 5RP 700. He was scared of being seen by the police to whom he was well-known. 5RP 700.

Fenney never had a job between February and November 2016. 6RP 725. He lived off the money BLC made as a prostitute. 6RP 725. BLC usually made \$200 per call. 5RP 705. She typically went on six or seven calls. 5RP 705. She gave him the money right after the call. 5RP 705. She gave all the money she made to Fenney. 5RP 701. He spent a lot of it on shoes. 5RP 701. She had only two pairs of Converse. 5RP 704. BLC occasionally tried to keep cash for herself. 5RP 704. If he found it he took it from her. 5RP 704. He would also dump out her purse to check for money. 5RP 704. She had to ask permission to purchase

anything. 5RP 705.

Fenney would not permit her to quit doing calls. 5RP 706. Once he thought she had not posted her ad and he beat her up. 5RP 706. Then he told her if she did not get a call in the next 15 minutes he would kill her. 5RP 706. BLC was not free to leave. 5RP 707. He would tell she was not a hostage and was free to go, but if she packed a bag, he would block her exit and hit her. 5RP 707. And he had guns. 5RP 707. He punched her a lot, at times knocking her out. 5RP 708. He broke her glasses numerous times. 5RP 708. Sometimes he struck her with a gun. 5RP 708.

One day, toward the end, he became “super paranoid” and began binding her hands and head with duct tape. 5RP 708. She was unable to get herself free. 5RP 708. After a few minutes he cut it off. 5RP 708-09. She did not know why he had done it. 5RP 708.

He also used various other threats to keep her from leaving. 5RP 709. He frequently threatened to kill himself. 5RP 709. He threatened to kill her kids. 5RP 709. BLC explained why she did not just call the police:

I was brainwashed, and I thought I was in love with him. I thought, “Oh, well, maybe after this time, he would apologize.” “I’m so sorry I did that.” Maybe this time -- he won’t -- he really meant it. He was really sorry, or it was my fault, or I wasn’t fast enough when I was trying to open the door. I was just scared, and I felt like I couldn’t -- like he made -- he broke me down to the point where I felt I couldn’t survive without having him there because he made me, like, so dependent on him and feel so stupid and

nobody would want me.

5RP 709-10.

BLC was a daily methamphetamine user. 5RP 680, 698. It kept her awake for a long period of time and blunted her emotions. 6RP 725. She used it to numb what was going on in her life. 6RP 725. Fenney supplied her the drugs because she was not allowed to talk to anyone. 5RP 698. Fenney got her the drugs from someone he knew. 5RP 680.

**2. Counts 3 through 5 (Rape 1<sup>st</sup>, Assault 1<sup>st</sup>, and Harassment – Threat to Kill)**

The relationship was pretty calm up until Easter weekend. 5RP 679. That weekend, they planned a road trip south. Fenney rented a car, but then he went shopping and bought some clothes. 5RP 680. Fenney became upset and told her they did not have enough money. 5RP 680. They had saved enough, but then he had spent it on shoes or other stuff. 5RP 681. She was generally not allowed to spend money, and had not spent any of the money. 5RP 681. Fenney nevertheless blamed BLC for the shortage. 5RP 681. He announced he was just going to leave. 5RP 682. BLC responded that she would leave as well. 5RP 682. Fenney snatched her by the coat and threw her against the car and told her she was not going anywhere. 5RP 682. She got into her car but he pulled her out. 5RP 682. Fenney's mother arrived home, and they went back inside. 5RP 682. Fenney told her to "thank her lucky stars" that his mother had shown up

because he would have killed her. 5RP 682.

Since they still had the rental car, he said they would go to his “brother” Trevor Johnson’s house in Bremerton instead. 5RP 683. They had Easter brunch and then returned to Everett. 5RP 684.

That evening BLC went out on calls, one in Kirkland, and then to Lake Stevens. 5RP 684. Fenney went with her. 5RP 684. When she got in the car after the second call, Fenney was “super agitated.” 5RP 684. She was driving and Fenney began laughing under his breath and then started punching her. 5RP 684. He knocked her glasses off. 5RP 685. He kept talking about her phone. 5RP 685. He had gone through her Facebook messages. 5RP 685. Someone had been trying to message her and she was ignoring him. 5RP 685. The person turned out to be Fenney. 5RP 685. He was angry because he thought she was trying to make him look stupid. 5RP 685.

Then he hit her with his gun, a black pistol. 5RP 685-86. She was driving and trying to find her glasses because she could not see well without them. 5RP 687. Then he dropped her phone and it slipped under the seat or something and he accused her of trying to hide it from him. 5RP 687. He had her pull off the highway at 41<sup>st</sup> Street in Everett. 5RP 687. He kept saying “Bitch, stop trying to hide the phone” and “give me the fucking phone.” 5RP 687. She kept telling him she did not have it and

eventually he located it under the seat. 5RP 687.

He still had the gun in his hand and got back in and told her to drive to Forest Park. 5RP 687. When they got there, he told her to park. 5RP 689. It was around 1:00 a.m. and the parking lot was empty. 5RP 688-89. After they parked he put the gun to her head and had her walk down to a picnic shelter. 5RP 689. When they got her, he told her to keep walking. 5RP 689. They walked for what seemed like a long way, off the walkway and into the woods. 5RP 689. He told her to turn around and pointed the gun directly at her. 5RP 689. He told her he was going to kill her. 5RP 690. Then he just turned around and told her to go back to the car. 5RP 690. He told her he did not kill her by the picnic area because he did not want some kid to find her. 5RP 690. When they got back to the car he said they could not go back to his mother's house because they were on methamphetamine and it was too late. 5RP 690. Instead he had her drive to the Motel 6. 5RP 691.

They would not let her check in without also seeing Fenney's ID. 5RP 691. Fenney began to freak out and was concerned about his parole officer find out because he was only supposed to stay at his mother's. 5RP 691. They went then to the Days Inn by Everett Mall. 5RP 691. The clerk asked if she was all right because of the marks on her face. 5RP 691. She told her that she had been in a bar fight and they checked in. 5RP 691.

BLC tried calling Fenney's mother to ask her to call him home because she was scared to be alone with him. 5RP 691. When she got no answer, she texted a friend and told her what happened. 5RP 692. After deleting the messages, she rejoined Fenney and they went to the room, which was in the back on the second floor. 5RP 692. He began punching her in the face and arms as they went up the stairs. 5RP 692. She fell down into a corner and was screaming. 5RP 692. He said, "Oh, bitch, you want to make noise. Get the fuck in the room." 5RP 692.

After they got in the room, he told her take off her clothes. 5RP 692. He still had the gun in his hand. 5RP 692. Once she was naked, he told her to stand by the door. 5RP 692. Then he threw her on the bed and started punching her again, all over. 5RP 692. Then he raped her anally. 5RP 693.

They fell asleep and she was awakened by housekeeping knocking on the door because it was past check-out time. 5RP 693. Ashley had responded to her text messages, asking BLC if she could take her Ashley to a doctor's appointment. 5RP 694. Fenney said she could and she dropped him off at his mother's house. 5RP 694.

BLC explained why she did not leave at that point:

I had a chance to and I didn't. I was scared. That was the first -- not the worst, but it was the first big assault. But I was already scared to death at that point. I didn't feel like,

with my appearance -- to call the police. I didn't even -- I didn't want the help. I didn't feel like nobody could...

5RP 694. She also did not think they could keep Fenney away from her.

6RP 724. After that Fenney started hitting her almost every day. 5RP 695.

**3. Counts 6 through 9(Kidnapping 1<sup>st</sup>, two counts of Assault 2<sup>nd</sup>, and Harassment – Threat to Kill)**

On April 9, 2016, which was BLC's birthday, Fenney told her she did not have to do a call because it was her birthday. 6RP 728. However, because they were short of cash, she knew it would be an issue later if she did not go, so she did. 6RP 728. Around noon or 1:00 she went to the Midway Inn. 6RP 729. The client was with another prostitute and asked her to wait in her car, which she did. After a while Fenney texted wanting to know where she was. 6RP 729. She told Fenney she had the money, but then the client stiffed her. 6RP 730. Fenney was texting a lot and she began to panic. 6RP 731. She accidentally answered a call from him and he heard her arguing with the client about the money. 6RP 731. Fenney showed up at the motel shortly after that. 6RP 731. He told her to get her in the car and drive to the home. 6RP 731-32. Then he pointed the gun at her and started screaming at her and hitting her in the arms and face. 6RP 732. When they got home he walked her into the living room at gunpoint and told a friend of his who was there to sit on the couch. 6RP 733.

Fenney had BLC go up to the master bedroom and told her to strip

and lay on the bed. 6RP 733. He still had the gun in his hand. 6RP 733. Fenney usually had a gun on him or nearby. 6RP 734. Then he took off his belt and had her lay face down while he whipped her repeatedly, from her head to her ankles with his belt. 6RP 734. She could not even sit for a long time afterwards. 6RP 734.

After whipping her, Fenney had her raise her arm and he held a knife to her armpit. He told her that a person could bleed out in 30 seconds after a cut to the armpit. 6RP 735. He threatened to cut her. 6RP 735. He next had her open her legs and put the knife inside her vagina. 6RP 735. He called her a “stupid bitch” and asked her why she was making him do this. 6RP 735. Then he put the gun in her mouth and told her to stand up. 6RP 735. He kept asking why she was making him do this and that he was going to kill her. 6RP 736. She just silently prayed that she would not die on her birthday. 6RP 736. He told her to stand still and not to move a muscle. 6RP 736.

Eventually he fell asleep, which was not uncommon. 6RP 736. She kept standing there naked until he woke up and told her to sit down. 6RP 737. She could barely sit because of the welts, and was bleeding. 6RP 737. He cried, but kept blaming her for making him do it. When he beat her, he always used the same belt. 6RP 737. The time on her birthday he did not strike her with the buckle, but he did on other occasions. 6RP 739.

**4. Counts 10 and 11 (Assault 1<sup>st</sup> and Harassment – Threat to Kill)**

Sometime in May or June, Fenney came into the room and was angry with BLC, though she did not recall why. 6RP 740. She was on the bed leaning against the headboard. 6RP 741. He took the wooden clothes pole from the closet and began to beat her legs and hands with it. 6RP 740-41. Tyrone McCrae came into the room and Fenney told him to close the door. 6RP 741. Fenney continued to beat her with the pole, occasionally stopping to talk to McCrae. 6RP 742. He had his gun in his other hand. 6RP 742. He ordered her into the other bedroom where he continued to beat her with the gun and the pole, on her back as well as her arms and legs. 6RP 743. He stopped beating her and told her to sit still and not even breath. 6RP 743. He left and she sat there in the dark for about an hour. 6RP 743-44.

After, she could barely walk. 6RP 744. He hands were so swollen she thought he knuckles were broken. 6RP 744. Her legs had permanent dents in them. 6RP 744. Fenney later painted “beat that ass stick” on the pole and kept it in her room. 6RP 744. She hid it from him sometimes when he got angry. 6RP 744.

**5. Counts 12 through 14 (Unlawful Imprisonment, Assault 1<sup>st</sup>, and Assault 2<sup>nd</sup>)**

In May, Fenney and Johnson went somewhere and left her alone in

the house with Johnson's girlfriend, Afton Von Arb, which was unusual. 6RP 745, 753. Von Arb was not engaged in prostitution. 6RP 753. BLC and Von Arb made small talk while they were gone. 6RP 745. The next day Fenney and Johnson were talking about something and she commented that she and Von Arb had talked about it the day before. 6RP 746. Fenney looked at her and punched her, knocking her to the floor. 6RP 746. She lost consciousness. 6RP 746. He demanded that she get up and tell him everything she and Von Arb talked about, ever. 6RP 746. He told Johnson to call Von Arb and have her come over. After Von Arb arrived, Fenney threatened to kill BLC if Von Arb mentioned anything she left out. 6RP 747. He was holding a machete and a gun at the time. 6RP 747-48. They had the two women sit back to back and interrogated them. 6RP 748-50. Fenney kept telling them both he would kill BLC if they did not give them more information. 6RP 750. Fenney told her to lift up her foot and he took a blow torch to the bottom of her foot. 6RP 750. She flinched away and he yelled at her to be still. 6RP 750. Then he held the torch to her ankle and pushed down on her foot with the machete. 6RP 751. Her foot started bleeding and Fenney freaked out and yelled at her to go put her foot in the bathtub. 6RP 751. He began berating her about making him do this to her. 6RP 751. BLC had permanent scars from the burns and the machete cut. 6RP 751-52. He would not let her go to the hospital, but she went to see a doctor a few weeks later after the burn became infected. 6RP

753. She told the doctor she had fallen into a bonfire. 6RP 753. She could not leave during the incident because Fenney had her phone and keys, and because he would not have let her leave. 6RP 754.

KW and Kornegay moved into the Sliver Street house around July or August. 6RP 726, 9RP 1276. BLC had met KW before that but was not allowed to talk to her until she moved in because KW “wasn’t a ho and wasn’t on drugs.” 6RP 727. KW was present for a lot of the assaults. 6RP 726. BLC and KW talked a lot and BLC thought of her as a friend. 6RP 726. Because KW did not use drugs, her “thinking [was] the most normal of the people.” 6RP 726. KW would tell BLC that she should leave. 6RP 726. BLC sometimes did not have food, and KW would give her some. 6RP 727.

Sometime in July or August they went to California. 6RP 758. BLC, Fenney, Johnson, and another woman went in Thornberry’s Dodge Charger. 6RP 759. The car was in Thornberry’s name, but Fenney made BLC pay Thornberry \$500 a month for him to use it. 6RP 759. BLC had earned about \$800 that they used to pay for the trip. 6RP 760. They were already running short on money by the time they got to Portland. 6RP 760. She posted ads there and went on one unsuccessful call. 6RP 761.

Next they went to San Francisco, where she again posted ads. 6RP 762. She was not getting responses to the ads, so Fenney told her she

would “have to walk the track.” 6RP 762. A call eventually came in, so she did not have to. 6RP 762. They eventually made their way to Compton. 6RP 762. During the trip he made her perform oral sex on him at rest stops and became angry because he could not ejaculate due to the drugs he was using. 6RP 762. He kept blaming her and punching her and at one point told her to leave. 6RP 763.

Eventually they ran out of money, and they were in a Wal-Mart parking lot and Fenney was blaming BLC because she was not making any money. 6RP 764. Fenney called Thornberry and his mother. 6RP 764. They sent money and they continued the trip. 6RP 765. BLC had texted her mother too, but after the others sent money, BLC let her phone battery go dead. 6RP 770.

On their way back to Washington Fenney was driving and BLC was playing music on his phone but his mother kept calling, but he kept saying it was fine. 6RP 770. Eventually at a rest stop in Oregon, Fenney listened to his mother’s voice mails and told them it was an emergency. 6RP 770. They called his mother and she asked what BLC had told her mother. 6RP 770. He put the phone on speaker and Fenney’s mother told them that BLC’s mother was going to tell the police that he had kidnapped her if he did not bring her home. 6RP 771. Fenney dropped the phone and started punching BLC. 6RP 771. Her nose started bleeding and would not

stop. 6RP 771-72. He would not let her explain or call her mother. 6RP 771. They got in the car and kept driving. 6RP 771.

When they got back to Bremerton she was having such pain that she was having trouble breathing. 6RP 773. After Fenney fell asleep, she drove herself to Harrison Hospital. 6RP 773. She had a broken rib and they gave her pain medication. 6RP 773-74.

**6. Counts 15 and 16 (*Rape 1<sup>st</sup> and Assault 2<sup>nd</sup>*)**

In August 2016 there was an incident involving Andre Thompson, who was BLC's daughter's father. 6RP 774, 7RP 983. The daughter was born in 2013. 6RP 775, 7RP 984. Fenney told her she was not permitted to contact Thompson. 6RP 776. When she got home one day Fenney began hitting her with his belt. 6RP 776. The belt buckle hit her in the face and she lost consciousness. 6RP 777. She sent Thompson a picture of the bruises. 6RP 778, 7RP 986. When Fenney found the text he anally raped her and sent a video of the rape to Thompson. 6RP 779, 7RP 984. Fenney threatened to do the same to Thompson. 7RP 987. The video was admitted into evidence. 7RP 988.

**7. Counts 17 and 18 (*Kidnapping 1<sup>st</sup> and Assault 2<sup>nd</sup>*)**

On another occasion in September of 2016, BLC was having a hard time on her child's first day of school and wanted to be alone. 6RP 783-84. Fenney called and thought BLC was trying to leave him. 6RP 785.

She told him she was going to go to Dairy Queen and he said he would meet her there. 6RP 785. He pulled up, and Kornegay got out of the passenger side and walked around to the driver's side of Fenney's car. 6RP 786. Fenney got in her car and said, "Oh, bitch, you think you're going to fucking leave?" and snatched the food. 6RP 786. Then he said, "Bitch, give me your phone. Give me your phone." 6RP 786. He took it and told her to "[d]rive to the fucking house now." 6RP 786. At the house he started beating her, and then dumped a bottle of urine on her and then told her to get out of the room because she "smell[ed] like piss." 6RP 787. Then he made her sit in a closet in the garage. 6RP 788. He threatened her with the gun and told her not to move or make a noise. 6RP 789. Fenney went upstairs and began having loud sex with another woman. 6RP 789-80.

**8. *Counts 19 through 28 (Robbery 1<sup>st</sup>, two counts of Assault 2<sup>nd</sup>, Kidnapping 1<sup>st</sup>, Rape 1<sup>st</sup>, three counts of Assault 1<sup>st</sup>, Harassment – Threat to Kill, and Attempted Murder 1<sup>st</sup>)***

In early October, Fenney discovered that BLC had been texting and kissed another male, Eric. 6RP 794-97, 798. He punched her and hit her with a machete. 6RP 799. Then he hit her with a hot a meth pipe and burned her cheek, leaving a permanent scar. 6RP 799-80. He made her call Eric and Eric agreed to meet her at Ross. 6RP 800. After the call, Fenney threw her phone at the wall, smashing it. 6RP 800-01. Then he sprayed her

with pepper spray. 6RP 801. Fenney had his firearm during this assault, which lasted about an hour. 6RP 801.

Fenney then made BLC get in her car and continued to assault her while they drove to Ross with Kornegay. 6RP 801-02. When they got to Ross they did not see Eric so Fenney squirted a bottle RainX all over her head, which burned because of the pepper spray, burns, and punches she had received. 6RP 802. His gun was in his lap. 6RP 803. Eric never arrived so they dropped Kornegay off to find KW and Fenney drove them back to the house. 6RP 804.

Fenney called Eric and asked him why he was “talking to [his] bitch.” 6RP 805. Eric hung up on him. 6RP 805. Fenney started hitting her again and forced her to strip. 6RP 806. He felt that she was not undressing fast enough, and ripped her clothes off. 6RP 806. He forced her to sit on an ottoman and watch as Fenney lit a pen torch and heated it up. 6RP 806. He then had her spread her legs and tried to burn her vagina with the hot torch. 6RP 807. He also burned a lot of her legs. 6RP 807. After Fenney burned BLC, he allowed her to get dressed and continued to strike her with the machete. 6RP 808. The worst wound was the last time Fenney struck her, which caused BLC to bleed profusely. 6RP 809. They were unable to control the bleeding, so Fenney had Kornegay take KW with BLC to the hospital. 6RP 809.

Fenney told KW and BLC to say that the injury was caused by a go-kart accident. 6RP 810. The hospital staff did not believe BLC's story and recommended surgery. 6RP 810-11. BLC refused and left the hospital with Kornegay and KW. 6RP 811. When BLC returned from the hospital, Fenney was still angry with her. 6RP 815. He continued to attempt to convince BLC to admit she'd slept with Eric. 6RP 815. At one point he got on top of her on the bed, with the firearm pressed against her head. 6RP 815. The gun went off, but did not hit her and the bullet went through the wall into the bathroom floor. 6RP 816. Detectives were able to locate these bullet holes.

BLC returned to the hospital because the wound was not healing. 6RP 817. She eventually had to have surgery to repair the wound to her knee. 6RP 818.

**9. Count 29 (Assault 4<sup>th</sup>)**

The last time that BLC could remember Fenney assaulting her was several days prior to her arrest. 6RP 819. She was riding in the car with Fenney and said something and Fenney became angry and backhanded her in the face. 6RP 818-19. Detectives could still see bruising on her face from the strike.

On November 16, 2017, KW and Kornegay were contacted in the Safeway parking lot. Kornegay was driving a stolen vehicle and had a

Department of Corrections arrest warrant. Kornegay was arrested and admitted to driving a stolen vehicle and having a firearm in a backpack that he had given to KW. KW handed over the backpack to law enforcement at the request of Kornegay. 9RP 1305. KW was interviewed by police and finally told them about the violence she had witnessed on a daily basis inflicted on BLC by Fenney. 4RP 671, 9RP 1305.

**10. *Counts 30 through 32 (two counts of Unlawful Possession of a Firearm 1<sup>st</sup> and Possession of Methamphetamine)***

On November 22, 2016, detectives executed a search warrant on the Silver Street house and BLC's vehicle. 4RP 617, 635. Two firearms were located in the trunk of the vehicle. Methamphetamine was located inside the vehicle. 4RP 620, 681, 690, 693-94, 9RP 1251. BLC was arrested for possession with intent to deliver methamphetamine and Fenney was arrested for assaults against BLC.

A human trafficking specialist met with BLC after her arrest. 5RP 638. She first met her at the scene on Silver Street. 5RP 639. BLC appeared both calm and agitated at the same time. 5RP 639. They were in a van and whenever law enforcement left the van she became anxious, fidgeting and looking around out the window. 5RP 640. BLC kept asking where Fenney was, concerned that he might think she was talking to the police. 5RP 644.

Later that day they met at the Silverdale precinct office. 5RP 644. At one point during their conversation, BLC heard two males speaking outside the room, and the sound of someone being handcuffed. 5RP 645. Her eyes got huge, the blood drained from her face and she became visibly scared and began shaking. 5RP 646. She asked if it was Fenney and whether he was there. 5RP 646. She did not want him to know she was eating and was concerned that he would think she was talking to the police. 5RP 646. During three subsequent interviews, BLC was calm. 5RP 647. When she disclosed certain events, she would become visibly shaken. Her voice would drop off. 5RP 647. She would have to take several moments before she could complete a statement, and sometimes there was some anger, but oftentimes it was sadness. 5RP 647.

The specialist also assisted KW during interviews. 5RP 647. When she was describing things that happened to others KW seemed sad. 5RP 647. However, when KW described things that happened to her, she “entered into almost a dissociative state.” 5RP 648. Her eyes would go blank, she would stare straight ahead, and her face would drop. 5RP 648. When she would finally respond, she would cry while describing what happened. 5RP 648.

BLC had participated in the human-trafficking diversion program for about 10 months at the time of trial. 5RP 648. BLC entered the

diversion program in mid-March. 5RP 656.

**11. Counts 33 through 37 (five counts Felony Violation of a Court Order)**

(VNCO)

Fenney stipulated that he had two prior conviction for violation of a court order. CP 263. Feeney was served with a no-contact order barring him from contacting BLC. 7RP 1023. It went into effect on November 23, 2016. 7RP 1024. The evidence showed that Fenney contacted BLC by phoning her from jail on November 25 and December 9, 2016, January 22, and twice January 23, 2017. 6RP 835-837, 7RP 1068, 13RP 1907.

**12. Counts 38 through 41 (Robbery 1<sup>st</sup>, Assault 2<sup>nd</sup>, Harassment – Threat to Kill, and Unlawful Imprisonment)**

Around August, KW was riding in a vehicle with Fenney, Kornegay, and BLC. 6RP 823. The police had just been to the Silver Street house and Fenney was paranoid that someone had been informing on him. 6RP 823. He demanded that everyone hand over their phones. 6RP 823. KW denied having a phone on her. 6RP 824. Fenney did not believe her. 6RP 824. Kornegay told KW to hand over the phone, and Fenney put a gun to her head and told her to give him the phone. 6RP 825. KW eventually handed over her phone. 6RP 824-25. Fenney drove the group back to the house. 6RP 825.

**13. Count 42 (Rape 1<sup>st</sup>)**

At some point between September and October, Kornegay and Fenney had a falling out. 9RP 1297. KW moved out of the house because Kornegay told her not to go back. 9RP 1299. Eventually she went back to pick up some clothes, with Fenney's permission and without incident. 9RP 1299. A week or so later she went back to get more of her stuff. 9RP 1299, 1311. Fenney was the only one there. 9RP 1299, 1311. While she was gathering her things, Fenney came up behind her and dragged her into the bedroom. 9RP 1311. There was a gun on the bed. 9RP 1311. He told her he was going to kill her. 9RP 1311. He told her to get on the bed. 9RP 1311. He took off her clothes and then his own and forced her to have vaginal sex with him. 9RP 1312.

**14. Count 43 (Unlawful Possession of a Firearm 1<sup>st</sup>)**

Fenney stipulated that he had a prior conviction for a serious offense. CP 266. BLC and others saw Fenney with the gun that was admitted as Exhibit 2. 6RP 826; 13RP 1913-14.

**15. Count 44 (Witness Tampering)**

During the jail calls Fenney tried to persuade BLC to not testify. 6RP 839.

**16. Count 45 (Possession of a Stolen Firearm)**

Fenney obtained the stolen gun, Exhibits 123 (photo) and 302

(gun), in August or September. 6RP 819, 8RP 1172, 1174, 9RP 1220-22. The gun was operable. 9RP 1222. Fenney's knowledge of the stolen nature of the firearm was shown by his googling of the gun's serial number, 11RP 1526, which had been obscured by the time the police seized it. 9RP 1220-21.

### III. ARGUMENT

**A. NEITHER THE TRIAL COURT'S DISCUSSION WITH FENNEY'S COUNSEL OF THE STATE'S POINTS IN RESPONSE TO HIS MOTION FOR SEVERANCE NOR ITS LENGTHY COLLOQUIES REGARDING THE ADMISSION OF TEXT MESSAGES AND THE APPROPRIATE LIMITING INSTRUCTION EVIDENCE BIAS.**

Fenney argues for the first time on appeal that the trial court denied him a fair trial by acting as an advocate of the state. This claim is without merit because neither the trial court's discussion with Fenney's counsel of the State's points in response to his motion for severance nor its lengthy colloquies regarding the admission of text messages and the appropriate limiting instruction evidence bias.

First, it must be noted that this claim was not raised below. Objection relating to the appearance of fairness are waived when not raised in the trial court. *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998). As such, this claim should be rejected.

Even were the claim properly before the Court, the burden of establishing an appearance of fairness violation is on the proponent, who must “provide sufficient evidence to overcome the presumption that the trial court performed its functions without bias or prejudice.” *State v. Witherspoon*, 171 Wn. App. 271, 289, 286 P.3d 996 (2012), *aff’d*, 180 Wn.2d 875 (2014). “The party must produce sufficient evidence demonstrating actual or potential bias, such as personal or pecuniary interest on the part of the judge; mere speculation is not enough.” *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 24, 317 P.3d 481 (2013), *review denied*, 180 Wn.2d 1016 (2014).

A judicial proceeding satisfies the appearance of fairness doctrine if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *Tatham v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012). “The test for determining whether the judge’s impartiality might reasonably be questioned is an objective test that assumes that ‘a reasonable person knows and understands all the relevant facts.’” *Tatham*, 170 Wn. App. at 96 (*quoting Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995) (*quoting In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d cir.1988))). This Court reviews a trial judge’s recusal decision for abuse of discretion—whether “the decision was manifestly unreasonable or based on untenable

reasons or grounds.”<sup>4</sup> *Kok*, 179 Wn. App. at 23-24.

As noted, there is a presumption that a trial judge properly discharged his/her official duties without bias or prejudice. *In re Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). The party seeking to overcome that presumption must provide specific facts establishing bias. *Id.* Judicial rulings alone almost never constitute a valid showing of bias. *Id.*

Fenney, however, fails to cite any evidence of bias *except* the trial court’s adverse rulings. He thus fails to meet his burden. Fenney’s claim is remarkably similar to that presented in *Davis*, where the Supreme Court accepted the State’s response that Davis’s claim was frivolous:

Davis asserts the trial court denied him a full and fair reference hearing because it had an “actual bias” against him. To support his claim Davis argues the trial court: (1) “consistently ruled in favor of the State on evidentiary issues;” (2) “ruled that the State could ask the jurors whether seeing [Davis] in shackles influenced their verdict but it would not permit [Davis] to question jurors about possible bias;” (3) entered findings directly contrary to the record; and (4) “refused to enter any of [Davis’s] proposed supplemental findings.” The State counters that Davis’s claim is frivolous because there is no evidence the trial judge had any monetary, professional, or personal interest in the outcome and had no personal relationship with any of the witnesses or attorneys involved in the case.

It is unquestionably true, as Davis points out, that trial before an unbiased judge is an essential element of due process. At a minimum, due process “requires a ‘fair trial in a fair tribunal,’ before a judge with no actual bias against

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<sup>4</sup> There is not actually a ruling below here, because Fenney has raised this claim for the first time on appeal.

the defendant or interest in the outcome of his particular case.” There is a presumption that a trial judge properly discharged his/her official duties without bias or prejudice. The party seeking to overcome that presumption must provide specific facts establishing bias. Judicial rulings alone almost never constitute a valid showing of bias.

Davis has not provided specific facts establishing that the trial judge had a personal bias against him. Instead Davis points to the record as “reflective of actual bias,” but there is no evidence in the record that the trial judge had a personal interest in the outcome of the reference hearing or was otherwise personally prejudiced against him. Consequently, Davis has failed to establish the trial court was biased against him thereby denying him a full and fair reference hearing.

*Davis*, 152 Wn.2d at 691–93 (editing the Court’s, footnotes omitted).

None of the cases Fenney cites are to the contrary. In were called as witnesses before a ‘one-man judge-grand jury.’ In *In re Murchison*, 349 U.S. 133, 134-35, 75 S. Ct. 623, 99 L. Ed. 942 (1955), the defendants were interrogated at length in secret hearings by the judge in a Michigan process referred to as a “one-man grand jury.” The judge concluded one defendant had committed perjury and ordered him to appear and show cause why he should not be punished for criminal contempt. The second defendant refused to answer questions in the secret proceedings without counsel and was likewise charged with contempt. The same judge who acted as the one-man grand jury then held the trial and found both defendants guilty. *Murchison*, 349 U.S. 135. The Supreme Court held that the process denied the defendants their right to a fair trial: “It would be

very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations.” *Murchison*, 349 U.S. at 137. No such improper conduct occurred here.

*State v. Moreno*, 147 Wn.2d 500, 511–12, 58 P.3d 265 (2002), is also inapposite. There, the Supreme Court upheld Washington’s infractions rules, which allow adjudication without the presence of a prosecutor. In so doing it distinguished cases from other jurisdictions, which revealed a much greater prosecutorial role on the part of the trial court:

The Puerto Rico procedure in *Figueroa Ruiz* required the judge to advocate the state’s position: choosing witnesses to call, developing the state’s case by redirect examination and rebuttal witnesses, and undermining the defense by cross-examination. In *Martinez* and *Cofield* the trial judges advocated the states’ cases by objecting to defense counsel’s questions, cross-examining defense witnesses, and impeaching a witness testifying favorably to the defense. These activities, undertaken in addition to calling witnesses and asking neutral questions, turn a neutral judge into the state’s advocate.

*Moreno*, 147 Wn.2d at 511. However, nothing in the court below remotely resembles what occurred in the cases cited in *Moreno*.<sup>5</sup>

Likewise, in *State v. Ra*, 144 Wn. App. 688, 705, 175 P.3d 609 (2008), the court found “inappropriate the trial court’s proposal of theories

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<sup>5</sup> *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000), seems only to be cited for the black-letter concept that the constitution protects the right to a fair trial. Brief of Appellant, at 25.

for the State to use in admitting improper ER 404(b) evidence.” However, the court ultimately reversed on other evidentiary grounds, and as a result did not directly consider “whether the trial court’s violation of the appearance of impartiality alone would warrant reversal.” *Id.*

Moreover, this case is distinct from *Ra*. The holding in *Ra* was in the context of numerous other statements by the trial judge that evinced disdain for the defendant. *Id.* The trial court in *Ra* stated that the defendant was a ““distorted character who lives and breeds violently.”” *Id.* At one point, the prosecution stated, ““I think it is accurate that the reason he shot [the victim] was to elevate his status among his peers,”” to which the court responded in agreement: ““[b]ravado, distorted importance.”” *Ra*, 144 Wn. App. at 696. At no point below did the trial court below personally attack Fenney.

***1. The trial court’s discussion with Fenney’s counsel of the State’s points in response to his motion for severance do not evidence bias.***

The passages on which Fenney relies here do not betray any bias on the part of the trial judge. To the contrary they just show a thoughtful colloquy with defense counsel, primarily based on the briefing that the court had read.

Fenney asserts that the court “theorized the state’s case was about human trafficking.” Brief of Appellant at 27. This was not “theorizing” on

the part of the trial court. Fenney was charged with human trafficking. Fenney also accuses the trial court of theorizing about how “[t]he brutality...is a huge feature and the manipulation in terms of the charged crimes.” 12/11/17 RP 11. Fenney goes on to argue that the “court saw brutality as ‘a common feature of pimps.’” Brief of Appellant at 27.<sup>6</sup>

During the hearing the trial court specifically noted that it had read all the briefing. RP (12/11/17) 12. It should be noted that the court initially rejected the idea that “late reporting” was sufficient to make the crimes cross-admissible:

So the victim’s fear in a delayed reporting case is not enough, in my estimation, to get it over the hump, in terms of the admissibility of the crime of rape against [KW] versus the crime of rape against [BLC].

RP (12/11/17) 9. This is the very point Fenney argued in his motion to sever. CP 167.

After making that observation, the court then turned to whether the evidence underlying the human trafficking charge would be cross-admissible. RP (12/11/17) 10. Fenney, clearly also understanding the issues presented, responded, “We’re talking specifically -- basically 404(b) argument that is a common scheme or plan. You are saying – . *Id.* The trial court then addressed the argument that the *State* had made in its

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<sup>6</sup> Although not cited in the brief, the comment appears at RP (12/11/17) 13.

briefing: that the evidence was admissible under the common scheme or plan exception to ER 404(b). The State had concluded its written argument thus:

In this case, the defendant had an overarching plan to assault and control [KW] and [BLC] in the Silver Street residence, creating an environment where they felt forced to comply with his demands. [KW] and [BLC] lived in the same house for several months, during which time they were both restricted in what they were allowed to do, where they were allowed to go, when they could leave the house, and to whom they could talk. Kornegay also engaged in controlling behavior towards [KW]. The defendant abused both girls whenever they upset or disobeyed him, including by assaulting and raping [KW] and [BLC] on multiple occasions. Both could see and hear the abuse that was being inflicted on the other. Fear of this abuse effectively prevented [KW] and [BLC] from reporting the crimes to law enforcement or extricating themselves from the situation, which completed the defendant's plan of maintaining complete control.

CP 181-82.

In that briefing the State also presented a six-page, single-spaced, summary of the facts it expected to show at trial, and detailed a steadily escalating eight-month pattern of violence first against BLC and then against KW. CP 172-77. The trial court's words are reflective of the State's briefing and do not reflect that it was acting as an advocate for the State.

2. *Nothing in the trial court's lengthy colloquy regarding the admission of text messages nor in its equally lengthy discussion of the nature of an appropriate limiting instruction evidences any bias on its part.*

Fenney next asserts that the trial court displayed bias with regard to the colloquy on the admissibility of certain text messages. Before addressing the cited comments by the court, which were part of several lengthy colloquies, some context is necessary.

Before presenting continued testimony from Detective Manchester, the State advised the court that it would be seeking the admission of redacted portions of items found on Fenney's phone and another phone, but that Fenney had objections. 10RP 1362-63. Fenney then laid out his objections. 10RP 1364-65. The State explained why it felt the exhibits were relevant. The State first noted that there were a number of videos and texts from November pertaining to Fenney's attempts to recover his gun from Kornegay and threatening Kornegay. 10RP 1366-67. Fenney noted he was not contesting the relevance of the videos or threats to KW to the firearm charge. 10RP 1368-69, 1400.

Fenney pointed out that his issue was how the evidence related to the State's theory that Fenney assaulted KW. 10RP 1370. The State responded that that was a separate issue. 10RP 1370. That issue related to an October incident. 10RP 1373. In that incident, the prosecutor explained that KW—

was held hostage by Fenney and not allowed to leave, and the reason she was not allowed to leave was because of this. So this documents everything that was going on in these text messages. Fenney is threatening to harm [KW] while she is at the house. He is going to cut her fingers off. This is all -- ...

And these text messages document -- and even in these text messages the defendant said she left the house to go to her Safeway orientation --...

-- even in these text messages. So he is aware that she had this Safeway orientation. ...

10RP 1374-75. The texts were from Fenney to Kornegay. 10RP 1376, 1378. The State continued to explain:

And as you read through this, you will recall also [BLC]'s testimony, she testified that at one point that the defendant was going to give her to the Guamanians, and this was all related to this incident. Both [KW] and [BLC] testified about this. ...

And this was [BLC]'s testimony that she let [KW] go when she was supposed to be watching [KW]. And then the defendant threatened her and told her because she had let [KW] go that he was going to give her to the Guamanians because he didn't have [KW] to give to the Guamanians.

10RP 1377-78. The State further explained that the texts showed Fenney's status or position:

He is the one that is in charge of the house. It is his house. He is the one that allows people to stay there or not stay there. He is the one that doles out punishment when punishment -- when he feels punishment needs to be doled out. So that is one of the inferences that we would like to draw for the jury. The other inference is that the very next time -- the last text message says he better watch his back, basically forever, until he gets him, and the very next time he sees [KW], he rapes [KW], and it is the State's belief that this is the motive.

10RP 1383. There was then a lengthy discussion about whether Kornegay would testify. 10RP 1386-89.

At this point, the trial court made the comment Fenney quotes.<sup>7</sup> The the quote, however, is taken entirely out of context. The trial court was not sua sponte offering an opinion on Fenney, but instead agreeing with defense counsel estimation's of the prejudicial effect of the evidence the parties and the court had been discussing:

MR. KIBBE: My point to this is that I don't -- this is, I think, highly prejudicial because it involves alleged acts of violence or threats by the defendant.

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 [BLC]'s testimony and [KW]'s testimony about the type of violence that he is capable of inflicting, those are highly prejudicial to the defendant.

10RP 1390. The State went on to explain its rationale for offering the evidence:

The State's main theory for introducing this evidence relates to [KW] and his attempts to harm [KW], but it also corroborates [BLC]'s statements about Fenney trading -- agreeing to trade her to the Guamanians. Both [BLC] and [KW] testified about this robbery, that there is already evidence in the record about that, and this furthers that as well.

CP 1394.

In response, while accepting the relevance of the evidence, the

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<sup>7</sup> Brief of Appellant at 29.

court did not display bias against Fenney, but to the contrary, repeatedly expressed concern that the evidence would be unduly prejudicial:

So there is -- so my concern is that I see it as relevant, but I am concerned about the nature of the prejudicial impact by the volume of the statements and the mania that is displayed in terms of just rapid-fire texts; you know, dozens and dozens of them just over a short amount of time.

I am considering the impact and whether a limiting instruction might eliminate the potential for prejudice or inflaming the passions of the jury while still focusing them appropriately on how to use this particular evidence without that evidence painting the defendant in such a violent light that this is what would convict in these exhibits, as opposed to the testimony of the others.

CP 1395 (emphasis supplied). The court noted that they were Fenney's own words, but again worried about the prejudice:

I agree, but it does corroborate from the defendant's own mouth. So if there is a -- there is a subtle difference in the nature of the evidence. It is Mr. Kibbe's theory that [BLC] is lying. Now, certainly there is a lot of independent corroboration of the injuries, et cetera. There is independent corroboration of certain events for [BLC] with respect to her testimony today. But, you know, the defendant -- during the episodes with [BLC], the defendant's statements came through [BLC]. So if she was lying -- theory being, if she is lying, then her statements are also untrue; although the injuries are *res ipsa loquitur*.

Having said that, these are the defendant's words, and the different's [sic] own language corroborates what [BLC]'s testimony was about the issue of power and control and force. So for that reason, I do find it to be relevant when the defense is: Didn't happen. She is lying, or it did happen, and it was consent. She is freaky that way, I guess. So it has relevance on a critical issue in the case, which is the victim's credibility; her state of mind, his intent. *But I am troubled by his words*. And granted, it is

his words. He is the defendant. *His words paint a picture of him that is a very unattractive picture to a jury from the community.*

10RP 1396-97 (emphasis supplied). The court then asked the parties to try to prepare a limiting instruction, but again noted it was still “struggling” with the issue, 10RP 1398, and wanted to see some research:

But there is -- I am a little bit -- I have to be careful about the way evidence is used or targeting the jury in the right direction so that we can get a fair result, impartial.

10RP 1399. The parties continued to discuss the scope of limiting instructions. 10RP 1399-1403. After that discussion of the issue was suspended for further testimony before the jury. Before breaking, the State asked the court to read its brief on gang evidence (*see* CP 278) because it was relevant to the admissibility of the texts. 10RP 1404. The court noted that it had read the brief:

I have read that. That is one of the reasons why I brought it up at this moment because I do feel it’s relevant to that dynamic, that culture of violence and control in terms of getting revenue for the gang through prostitution, which, by the way, was another thing that the detective who first testified talked about; that prostitution is a -- makes more money for the gang -- or the revenue from prostitution is more than drugs and guns combined.

10RP 1404.

Manchester then testified until the lunch break. 10RP 1405-22. On return, the jury heard testimony from another witness. 10RP 1423-32. At that point discussion of the text evidence resumed. 10RP 1432. Fenney

presented a proposed limiting instruction. 10RP 1433. The court discussed the elements of the various counts to which the evidence pertained. 10RP 1434-38.

The court then made the observations that Fenney characterizes as having “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.” Brief of Appellant at 29 (*citing* 10RP 1438-57). As the foregoing discussion makes clear, however, by this time, the court had already agreed to allow the evidence. The entire cited colloquy was regarding how the limiting instruction should be crafted.<sup>8</sup>

**B. FENNEY FAILS TO DEMONSTRATE THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO PROPER EXPERT TESTIMONY REGARDING THE PIMP AND PROSTITUTE CULTURE OR THE ADMISSION OF A PHOTO OF HIM WEARING THE BELT HE USED TO ASSAULT BLC.**

Fenney next claims that his trial counsel was ineffective for failing to object to alleged profile testimony and to the admission of a photo of his belt. This claim is without merit because Fenney fails to show deficient performance or prejudice with regard to either claim.

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<sup>8</sup> Ultimately, after all the discussion, Fenney made a “strategic decision” to not request a limiting instruction. 10RP 1460.

***1. Standard of review.***

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*,

466 U.S. at 687.

**2. Fenney fails to show that the expert testimony regarding the pimp and prostitute culture was improper.**

Because Fenney fails to show that this evidence was inadmissible, he fails to show either deficient performance or prejudice. A trial court's decision to admit opinion testimony is reviewed for abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992), *disapproved on other grounds*, *State v. Condon*, 182 Wn.2d 307, 324, 343 P.3d 357, 365 (2015). A court abuses its discretion when it bases a decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable. *State v. Valdobinos*, 122 Wn.2d 270, 279, 858 P.2d 199 (1993). When considering the admissibility of testimony under ER 702, the reviewing court engages in a two-part inquiry: (1) does the witness qualify as an expert; and (2) would the witness's testimony be helpful to the trier of fact. *Ortiz*, 119 Wn.2d at 309.<sup>9</sup>

The issue of "helpfulness" is a question of relevance--whether it "will assist the trier of fact to understand the evidence." ER 702. Expert testimony is thus helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and is not misleading. *State*

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<sup>9</sup> Fenney does not appear to challenge Washington's qualifications as an expert. In any event his qualifications were extensive, including a degree in criminal justice, numerous trainings, and "hundreds" of investigations into human trafficking and prostitution. 4RP 468-71.

*v. Groth*, 163 Wn. App. 548, 564, 261 P.3d 183, 192 (2011) “Courts generally interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases.” *Id.* (internal quotes and citations omitted).

Washington courts have previously concluded that expert testimony on the topic of prostitution is helpful to the jury “because the average juror would not likely know of the mores of the pimp/prostitute world.” *State v. Simon*, 64 Wn. App. 948, 964, 831 P.2d 139 (1991), *reversed on other grounds*, 120 Wn.2d 196 (1992); *see also State v. Yates*, 161 Wn.2d 714, 765-66, 168 P.3d 359 (2007) (expert properly testified about the general practices of prostitutes and “the pimp/prostitute relationship”), *cert. denied*, 554 U.S. 922 (2008); *State v. Abdulle*, 193 Wn. App. 1033, 2016 WL 1627660, \*5-6, *review denied* 186 Wn.2d 1021 (2016) (trial court properly admitted expert testimony regarding the “pimp and prostitute relationship”); *State v. Mobley*, 182 Wn. App. 1005, 2014 WL 2960374, \*9 (2014) (same).<sup>10</sup> Fenney fails to acknowledge any of these cases.

As in these cases, the evidence offered by Seattle Detective Maurice Washington was properly admitted as helpful to the jury. the detective’s testimony provided context and background for this foreign

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<sup>10</sup> *Abdulle* and *Mobley* are unpublished; *see* GR14.1(a).

culture and business. He provided an overview of the pimping and prostitution landscape in Western Washington; the overall structure, geographic areas of operation, and terminology; and methods of procuring business including street walking and advertising (online and print).

Moreover, even if contrary to existing precedent the evidence should have been excluded, Fenney fails to show any prejudice. The jury heard ten days of testimony, mostly detailing Fenney's vicious treatment of BLC and KW. The detective's testimony consumed less than 30 pages of the report of proceedings. 4RP 568-92. Of that, two and half pages were cross examination and four were devoted to establishing his credentials. 4RP 568-71, 593-95.

Moreover, the detective testified that he had not heard any of the facts of the case. 4RP 572. This fact was reemphasized on cross. 4RP 593. As such it is difficult to follow Fenney's claim that the detective commented on Fenney's guilt. Indeed, in *Simon*, this Court rejected the very analogy to *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987), that Fenney makes:<sup>11</sup>

Simon asserts that Detective Benson's testimony regarding the pimp/prostitute relationship was unfairly prejudicial because it constituted an opinion as to Simon's guilt, namely, that Simon did not have to threaten Bartall to force her to remain with him.

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<sup>11</sup> Brief of Appellant at 34.

Detective Benson's testimony regarding the pimp/prostitute relationship was helpful to the jury because the average juror would not likely know of the mores of the pimp/prostitute world. *State v. Ciskie*, 110 Wn.2d 263, 273–74, 751 P.2d 1165 (1988). In addition, unlike *Black, supra*, the testimony did not constitute an opinion as to Simon's guilt. Detective Benson did not testify that Simon did or did not threaten Bartall; rather, Detective Benson testified in general terms about the nature of the pimp/prostitute relationship. Bartall gave similar testimony and she also testified that some degree of physical force was in fact applied when she tried to leave and that an implied threat was made when she suggested leaving.

*Simon*, 64 Wn. App. at 964. And again, the extensive evidence of Fenney's actual brutality toward both BLC and KW, and their testimony about their fear of him and why they stayed, he fails to show that the exclusion of the detective's testimony could have had any effect on the verdict.

Finally, based on Fenney's review of five appellate human trafficking cases, he compares human trafficking prosecutions to the issues presented in *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). This claim was not raised below, and the facts have not been developed at all. Notably, between 2013 and 2018 there were 125 reported cases of human trafficking statewide.<sup>12</sup> Given the disparity between the number of cases reported by law enforcement and the results in the miniscule percentage of

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<sup>12</sup> Washington State Statistical Analysis Center, *Washington State County Criminal Justice Data Book: 1990 to 2018*, (Oct. 2019), available at <https://sac.ofm.wa.gov/washington-state-county-criminal-justice-data-book-1990-2018> (viewed Nov. 21, 2019).

those cases addressed on appeal, Fenney fails to provide a factual basis for this Court to consider. Notably the decision in *Gregory* came after a scholarly report was presented, and that report was subject to extensive adversarial testing. *Gregory*, 192 Wn.2d at 12-13. As such Fenney's claim, which is ill-defined, fails for lack of factual support.

While the State would in no way attempt to justify a race-based prosecution, Fenney fails to show that that occurred here. Moreover, in the context of this claim of ineffective assistance of counsel, Fenney fails to show that the outcome of the trial would have been different if the detective's brief comments had been excluded. Even if they were improper, the comments were not tied to Fenney. And as noted previously, the evidence of what Fenney actually did was extensive and quite damning. This claim should be rejected.

**3. *Fenney fails to show counsel was deficient for not objecting to the admission of a photo of him wearing the belt he used to beat BLC or that he was prejudiced by its admission.***

Fenney argues trial counsel was ineffective for not objecting to the admission of Exhibit 322 (CP 787), a photo of Fenney wearing the belt he beat BLC with, on the grounds that it was unduly prejudicial. Fenney fails to show that the photo was not properly admitted. As such he fails to show deficient performance. He likewise fails to show prejudice.

First, the only authority Fenney offers in support of this claim is a citation to the concurring opinion in *State v. Walker*, 182 Wn.2d 463, 489-90, 341 P.3d 976 (2015) (Gordon-McCloud, J. concurring). This reliance is misplaced. First, *Walker* was a case about the use of altered exhibits in closing argument. Secondly, Exhibit 322 was not a booking photograph. It was a photo taken at the scene at the time of Fenney's arrest. Moreover, even if the exhibit were a booking photo, a booking photo from the defendant's arrest in the case on trial is not more probative than prejudicial because the jury obviously is aware that the defendant has been arrested. *State v. Rivers*, 129 Wn.2d 697, 711, 921 P.2d 495 (1996).

Fenney also offers no authority for his contention, Brief of Appellant at 39, that the photo was not "*specifically* relevant" (emphasis Fenney's). Even if "specific relevance" were the standard, the photo shows Fenney wearing the belt that he used to beat BLC into unconsciousness. This places the belt directly in his possession. It is difficult to see how that fact is not "specifically relevant."

Nor has Fenney shown prejudice. The jury heard several days of testimony detailing his cruelty and assaults against BLC. The photo appears to have been the subject of less than one page of testimony, RP (2/2/18) 12-13, and the State did not mention the exhibit at all during closing. 13RP 1830-1917, 1965-79. It cannot be said there is any

likelihood the verdict would have been different if the photo had been excluded. This claim should be rejected.

**C. THE TRIAL COURT PROPERLY ADMITTED A TEXT MESSAGE EXCHANGE BETWEEN KORNEGAY AND FENNEY IN WHICH FENNEY THREATENED TO HARM KW IN ORDER INDUCE KORNEGAY, KW'S BOYFRIEND, TO COMPLY WITH HIS WISHES, IN RESPONSE TO FENNEY'S ARGUMENT TO THE JURY THAT KW FABRICATED THE RAPE CHARGE.**

Fenney next claims that the trial court improperly admitted text messages because they were irrelevant, overly prejudicial and improper under ER 404(b). This claim is without merit because the evidence was part of the res gestae of the offense, and rebutted Fenney's claim that the rape charge was fabricated.

This Court reviews a trial court's decision to admit evidence for abuse of discretion. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, these rules, or by other rules or regulations applicable in the courts of this state." ER 402.

For the first time on appeal, Fenney challenges the admissibility of the text messages under ER 404(b). ER 404(b) addresses the admissibility of evidence of other crimes, wrongs or acts of the defendant. Such evidence “is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). But evidence of the defendant’s prior bad acts may be admissible to show “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.*

However, the texts admitted below do not fall under ER 404(b) because they are not evidence of Fenney’s “other crimes, wrongs, or acts.” Rather, the messages are evidence of the charged crimes. The State charged Fenney with raping KW.

Fenney argues the evidence is irrelevant because rape has no element of intent. But Fenney argued in his opening statement that KW was making up the rape allegation:

The State has also alleged that Mr. Fenney raped another woman in the house, Krystal Whitley, another female that lived in the house, was the girlfriend of Ernest Kornegay. And you are going to hear her name during the course of this trial.

You will know that Mr. Fenney did not do this. You will know that because Ms. Wittily, herself, has admitted shortly thereafter that this, in fact, did not occur, and she doesn’t disclose that, given the opportunity for many months later, and you are going to find out there is no physical evidence to support this.

4RP 561-62. The text messages are relevant because they show Fenney was willing to harm KW as a means of getting what he wanted from KW's boyfriend, Kornegay. Because they are part of the res gestae of the crime, ER 404(b) does not apply.

Moreover, because Fenney himself put KW's credibility in issue, and argued that the crime never occurred, the evidence was highly relevant to explain why Fenney would sexually assault KW. The trial court acted well within its discretion in admitting this evidence.

**D. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT KW AND BLC WERE AWARE OF FENNEY'S CLAIMED GANG MEMBERSHIP TO ALLOW THE JURY TO EVALUATE THE VICTIMS' CREDIBILITY.**

Fenney next claims that that the trial court improperly admitted evidence of gang membership. This claim is without merit because the the trial court acted within its discretion in admitting evidence that KW and BLC were aware of Fenney's claimed gang membership to allow the jury to evaluate the victims' credibility.

As noted previously, the admission of evidence at trial is reviewed for an abuse of discretion. "Evidence of gang affiliation is admissible when it is relevant to a material issue in the case." *United States v. Takahashi*, 205 F.3d 1161, 1164 (9th Cir. 2000). Conversely, evidence of

gang association is inadmissible when it proves nothing more than a defendant's abstract beliefs. *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995). While evidence of gang affiliation may be prejudicial, it is still admissible where there is a nexus between the crime and the defendant's gang membership. *State v. Scott*, 151 Wn. App. 520, 526, 528, 213 P.3d 71 (2009) (noting with approval that gang evidence can be admissible to explain a victim's reluctance to identify assailants).

In this case, the State requested that the Court allow gang evidence to show the victims' state of mind. CP 285. Fenney was charged with multiple counts of felony harassment for threatening to kill both KW and BLC. *See* RCW 9A.46.020(1)(b) ("A person is guilty of harassment if ... [t]he person by words or conduct places the person threatened in *reasonable* fear that the threat will be carried out." (emphasis added)). Evidence that the victims believed Fenney's claims of gang association was directly relevant to BLC and KW's fear that the defendant would carry out the threats that he indicated. It is also relevant for the jury to understand why KW and BLC did not report these crimes to the police when they occurred. Both witnesses testified that they were afraid of retaliation from fellow gang members if they spoke to the police about the abuse they suffered at the hands of the defendant.

Several courts have allowed gang affiliation evidence for reasons

outside of ER 404(b). *See, e.g., State v. Craven*, 67 Wn. App. 921, 927, 841 P.2d 774 (1992) (trial court properly allowed prosecutor to question defense witnesses about whether they were in the same gang as defendant to show bias); *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009) (in addition to motive, gang evidence showed defendant’s mental state); *State v. Boot*, 89 Wn. App. 780, 789–90, 950 P.2d 946 (1998) (in addition to motive, gang evidence relevant to show “the context in which the murder was committed,” premeditation, and under the *res gestae* exception “to complete the story of the crime on trial by proving its immediate context of happenings near in time and place’ “ (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff’d*, 96 Wn.2d 591, 637 P.2d 961 (1981))).

In this case, KW and BLC were properly permitted to explain their state of mind as it related to the charges of harassment so that the jury could make a determination as to whether KW and B.C’s fear of the Fenney was reasonable.

Further, courts have consistently held that evidence related to the defendant’s previous acts of domestic violence is relevant in cases involving recanting victims of domestic violence to allow the jury to evaluate the victim’s credibility. In *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996), the Court held that it was proper to admit the

defendant's prior assaults against the victim, reasoning that "victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others." *Grant*, 83 Wn. App. at 107. The Court found that a jury has the right to hear the full history of the relationship between a defendant and victim in order to understand the dynamics of a relationship that has been marked by incidents of violence. *Grant*, 83 Wn. App. at 108. Understanding those dynamics would allow a jury to understand why a victim might give inconsistent statements or recant. *Grant*, 83 Wn. App. at 109.

Subsequently, in *State v. Nelson*, 131 Wn. App. 108, 116, 125 P.3d 1008 (2006) the Court approved the admission of the defendant's violent and abusive conduct when he was drunk, finding the conduct provided the jury with an alternative explanation for the victim's inconsistent statements and was a way to rebut the defendant's claim that the victim fabricated the assault. Similarly, in *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991), the defendant was charged with statutory rape and indecent liberties. The Court permitted evidence that the defendant had physically assaulted the victim, reasoning that it was "relevant to rebut the evidence presented by Wilson and other witnesses that the sexual abuse did not occur." *Wilson*, 60 Wn. App. at 890.

The Washington Supreme Court approved *Grant* in *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008). There, the Court concluded that “prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim.” *Magers*, 164 Wn.2d at 186. In addition, in *Scott*, 151 Wash. App. at 527-528, the Court noted that evidence of gang associations would have been properly admitted to explain the victim’s refusal to initially identify her assailants.<sup>13</sup>

While gang evidence is different than evidence of prior assaultive behavior, the evidence was relevant for the same reasons. KW and BLC believed that Fenney was a gang member because he claimed to be one. This belief created fear in the victims. BLC believed that if she did not cooperate with him, there would be reprisal, not just from Fenney but from his fellow gang members, including Kornegay. This was particularly relevant to this case because if BLC or KW had reported Fenney’s assaultive behavior, the court system and law enforcement would have no means of protecting KW or BLC by the use of protection orders, conditions of release, or the imposition of bail from fellow gang members that did not involve themselves in the assaultive behavior. These individuals would still continue be permitted to continue to contact BLC

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<sup>13</sup> The Court went on to hold that the evidence admitted at trial did not match the

and KW.

In addition, BLC gave multiple stories through medical records and Facebook messages regarding how she had received the injuries on her body. She also initially denied that the defendant had been involved in assaulting BLC. At trial, BLC testified that the defendant caused the injuries through the defendant's assaultive behavior. BLC testified that she did not initially report these assaults because she both feared and cared about the defendant, and because she feared reprisal from fellow gang members. Because BLC gave inconsistent statements, the need to evaluate her credibility in light of all of the circumstances surrounding the assaults was increased. The jury might not have understood why she did not initially report a serious machete attack if they did not understand the Fenney's claimed gang associations. In this case, it did not matter whether Fenney was in fact a gang member. The importance of the evidence was that he convinced KW and B.C that he was a gang member and that his fellow gang members would be willing to assist him in carrying out his threats. Thus, in this case, the gang evidence was highly relevant to the victims' credibility. The trial court thus did not abuse its discretion when it allowed this evidence to permit the jury to fully evaluate KW and BLC's credibility.

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prosecutor's initial offer of proof and therefore, was inadmissible.

Finally, even if error occurred it would be harmless. the erroneous Admission of evidence “requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial.” *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

The trial court narrowly limited the evidence that could come in:

The fact of gang membership is something that ordinarily would reside with a jury; that is, was the defendant, yes or no? And so I would – it is my ruling that no witness can say – that no law enforcement witness can say or testify that the defendant, in fact, is a member of a gang and that that was verified through their investigation.

The alleged victims are free to testify as to what made them afraid. If that comes from the defendant’s own mouth, so be it. All of that testimony would be highly relevant to their state of mind and to their fear.

1RP 67.<sup>14</sup> It appears the State adhered to that ruling. 5RP 699, 6RP 725, RP (2/2/18) 5-7. Gang membership was not mentioned in closing argument. *See* 13RP. In light of the foregoing, and in light of the other evidence produced at trial, there is no probability that exclusion of the brief references to Fenney’s self-professed gang membership would have changed the outcome. This claim should be rejected.

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<sup>14</sup> The Court left it to Fenney as to whether a limiting instruction should be given. 1RP 68. It does not appear one was requested.

**E. BECAUSE THE ALL OF THE ELEMENTS TO CONVICT UNDER THE ALLEGEDLY GENERAL STATUTE (HUMAN TRAFFICKING) ARE NOT ALSO ELEMENTS THAT MUST BE PROVED FOR CONVICTION UNDER THE ALLEGEDLY SPECIFIC STATUTE (PROMOTING PROSTITUTION) THE STATUTES ARE NOT CONCURRENT.**

Fenney next claims that that his human trafficking conviction must be vacated because promoting prostitution is a more specific statute. This claim is without merit because the all of the elements to convict under the allegedly general statute (human trafficking) are not also elements that must be proved for conviction under the allegedly specific statute (promoting prostitution) and the statutes are thus not concurrent.

When the plain meaning of two statutes is in conflict, the specific statute will govern over the general statute. *Univ. of Wash. v. City of Seattle*, 188 Wn.2d 823, 833, 399 P.3d 519 (2017). But “before applying the general-specific rule, [the Court] must identify a conflict between the relevant statutes that cannot be resolved or harmonized by reading the plain statutory language in context.” *Id.*; see also *In re Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998) (“A more specific statute supersedes a general statute only if the two statutes pertain to the same subject matter and conflict to the extent they cannot be harmonized.”).

This Court reviews This court reviews the question of whether two

statutes are concurrent de novo. *State v. Ou*, 156 Wn. App. 899, 902, 234 P.3d 1186 (2010), *review denied*, 170 Wn.2d 1017 (2011). When a specific statute and a general statute punish the same conduct, the statutes are concurrent, and the State can only charge under the specific statute. *Id.* (citing *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984)). The rule gives effect to legislative intent and ensures charging decisions comport with that intent. *Id.* (citing *State v. Conte*, 159 Wn.2d 797, 803, 154 P.3d 194 (2007)).

If a person can violate the specific statute without violating the general statute, the statutes are not concurrent. *Ou*, 156 Wn. App. at 902. Statutes are concurrent only when *every* violation of the specific statute would result in a violation of the general statute. *Id.* As explained in *State v. Crider*, 72 Wn. App. 815, 818, 866 P.2d 75 (1994):

The determinative factor is whether it is possible to commit the specific crime without also committing the general crime; not whether in a given instance both crimes are committed by the defendant's particular conduct.

In determining whether two statutes are concurrent, the Court examines the elements of each to ascertain whether a person can violate the specific statute without necessarily violating the general statute. *Ou*, 156 Wn. App. at 903. Statutes are *only* concurrent if all of the elements to convict under the general statute are also elements that must be proved for conviction under the specific statute. *Id.* Moreover, the analysis is limited to

examination of the elements of the statutes, not the facts of the particular case. *Id.*

Thus, in *State v. Chase*, 134 Wn. App. 792, 795, 142 P.3d 630 (2006), the defendant argued the State had to charge him under the theft of rental property statute because based on the facts of the case, that statute was concurrent with the general first degree theft statute. But the Court rejected that argument because the underlying facts in a particular case has no bearing on whether statutes were concurrent. *Chase*, 134 Wn. App. at 802–03.

Consequently, the issue of whether first-degree human trafficking and first-degree promoting prosecution are concurrent must be made without regard to the facts in Fenney’s case. *State v. Clark*, 170 Wn. App. 166, 190–91, 283 P.3d 1116 (2012), which addressed whether convictions for human trafficking and promoting prostitution violated double jeopardy is instructive. The Court found that the dual convictions did not violate double jeopardy because the offenses contained different elements:

Promoting prostitution in the first degree requires proof that the defendant actually used force to compel a person to engage in prostitution. Under former<sup>[15]</sup> RCW 9A.88.070(1), a defendant “knowingly advances prostitution *by compelling* a person by threat or force to engage in prostitution.” By contrast, the human trafficking statute requires the State to prove the defendant knew that

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<sup>15</sup> The statute has not been amended in any way that affects the Court’s analysis. *See* Laws 2012, ch. 141, § 1.

force, fraud, or coercion “*will be used*” in the future to cause another person to engage in forced labor or involuntary servitude by engaging in prostitution. Former RCW 9A.40.100(2)(a)(i).<sup>10</sup> The human trafficking statute requires proof that force, fraud, or coercion “will be used to cause the person to engage in forced labor or involuntary servitude.” Former<sup>[16]</sup> RCW 9A.40.100(2)(a)(i). The human trafficking statute also requires proof that the defendant had knowledge that the victim would be subjected to forced labor or involuntary servitude. Again, no such intent is required to prove promoting prostitution in the first degree.

*Clark*, 170 Wn. App. at 190-91 (emphasis the Court’s). The Court further noted that proof that a defendant ““recruit[ed], harbor[ed], transport [ed], provide[d], or obtain[ed] by any means”” is not required to prove promoting prostitution in the first degree. *Clark*, 170 Wn. App. at 191 n.12 (alterations the Court’s). The Court therefore concluded that the two statutes are not the same in law. *Clark*, 170 Wn. App. at 191.

Because the all of the elements to convict under the allegedly general statute (human trafficking) are not also elements that must be proved for conviction under the allegedly specific statute (promoting prostitution) the statutes are not concurrent. This claim must therefore fail.

**F. THE TRIAL COURT DID NOT ABUSE ITS CONSIDERABLE DISCRETION IN DENYING FENNEY’S MOTION TO SEVER COUNT 42.**

Fenney next claims that it was error to join the Count 42, which

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<sup>16</sup> The statute was amended in 2014 to add, in addition to forced labor or involuntary servitude, a “sexually explicit act” or “a commercial sex act.” Laws 2014, ch. 188, § 1.

alleged the rape of KW, for trial with the remaining counts. The trial court did not abuse its considerable discretion in denying Fenney's motion to sever.

Under CrR 4.3(a), "two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both: (1) are 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." Generally, the joinder rule should be construed expansively to promote the public policy of conserving judicial and prosecution resources. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004, *review denied* 137 Wn.2d 1017 (1998). Separate trials are not favored. *State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982), *certiorari denied sub nom. Frazier v. Washington*, 459 U.S. 1211 (1983). A defendant seeking severance has the burden of demonstrating that a trial of the counts together would be manifestly prejudicial such that it would outweigh any concern for judicial economy. *State v. Cotten*, 75 Wn. App. 669, 686, 879 P.2d 971, *review denied*, 126 Wn.2d 1004, 891 P.2d 38 (1994).

Under CrR 4.4(b), "the court ... on application of the defendant ... shall grant a severance of offenses whenever before trial or during trial

with the consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." A court's refusal to sever counts is reversed only for manifest abuse of discretion. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). The defendant bears the burden of establishing manifest prejudice that outweighs a concern for judicial economy. *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). He can satisfy this burden by showing that he was embarrassed in the presentation of separate defenses or if a joint trial invited the jury to cumulate evidence to find guilt or infer a criminal disposition. *Russell*, 125 Wn.2d at 62-63.

The court looks to the following factors to determine the prejudicial effect: (1) the strength of the State's evidence on each count, (2) the clarity of the defenses as to each count, (3) the court's instructions to the jury to consider each count separately, and (4) the admissibility of evidence of the other charges if not joined. *Russell*, 125 Wn.2d at 63. Additionally, any residual prejudice must outweigh the need for judicial economy. *Id.*

In this case, Fenney challenges the refusal to sever of Count 42, involving the rape of KW. With regard to the first factor, the State's evidence for each count was strong, resting on direct testimony coupled with corroborating circumstantial evidence, for all of the charges. *See*

*Bythrow*, 114 Wn.2d at 721-22 (when the State's evidence is strong on both counts, the jury will not be tempted to base its finding of guilt on the strength of evidence on the other count).

Secondly, Fenney interposed a defense of general denial to all charges. Although prejudice may result where a defendant may become embarrassed or confounded in presenting separate defenses, *Bythrow*, 114 Wn.2d at 718, here, Fenney did not present two different defenses, therefore the trial court properly found this was not a concern. *See Russell*, 125 Wn.2d at 64-65 (when the defenses are identical on each charge, there is very little prejudice). Thirdly, the Court instructed to the jury to consider each count separately, which the jurors are presumed to follow. CP 471; *State v. Swan*, 114 Wn.2d 613, 661-64, 790 P.2d 610 (1990).

Finally, and most significantly, the evidence was cross-admissible. Much of the evidence, and most of the same witnesses would be presented in each case. All of the offenses involved would be admissible against each other in a separate trials under *State v. Magers* and the other cases discussed above with regard to the gang evidence. Both KW and BLC provided direct testimony, making their credibility a key issue. Both were cohabiting with Fenney. Neither reported the incidents until they were questioned by law enforcement. The defense is that these acts did not occur. The jury needed to understand why KW did not report the rape

when it occurred. The reasons for her failure to report was fear, as a result of the abuse Fenney perpetrated. KW was frightened of him because of the constant violence that she saw inflicted on BLC. These dynamics were critical in understanding the reason for the victims' failure to report these incidents at an earlier time. Therefore, evidence of what each knew about the defendant's abuse of the other, which contributed to this fear, would have been cross-admissible in both trials. The trial court did not abuse its discretion.

**G. THE EVIDENCE OF FELONY HARASSMENT AS ALLEGED IN COUNT 26 WAS INSUFFICIENT BECAUSE BLC DID NOT TESTIFY THAT FENNEY THREATENED TO KILL HER DURING THE CHARGED TIME FRAME.**

Fenney next claims that the evidence was insufficient to sustain his conviction for felony harassment as alleged in Count 26 because BLC did not testify that Fenney threatened to kill her during the time frame alleged. The State concedes that Fenney is correct as to this point and that the conviction under Count 26 must be vacated and dismissed with prejudice.

**H. EVIDENCE THAT FENNEY BEAT BLC "EVERYWHERE" WITH A BELT UNTIL SHE PASSED OUT WHEN THE BUCKLE HIT HER IN THE FACE WAS SUFFICIENT TO PROVE SECOND-DEGREE ASSAULT BY TORTURE AS ALLEGED IN COUNT 16.**

Fenney next claims that the evidence was insufficient to sustain his

conviction for second-degree assault as alleged in Count 16. He alleges the evidence was insufficient because pouring urine on BLC was not the equivalent to torture. This claim is without merit because Fenney confuses the incident to which Count 16 applied.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate

courts must defer to the trier of fact on issues involving “conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Fenney argues that the evidence in support of Count 16 was insufficient because the State did not show conduct equivalent to torture, as was alleged. *See* Brief of Appellant at 61-64; CP 214; RCW 9A.36.021(1)(f). Fenney misperceives the conduct that the State alleged supported that count, however. The urine incident pertained to Count 18, which alleged second-degree assault based on the use of a deadly weapon. *See* 13RP 1887; CP 217; RCW 9A.36.021(1)(c). BLC testified that Fenney threatened her with a gun during that incident. 6RP 789.

Count 16, on the other hand, pertained to the incident when Fenney whipped BLC with the belt until she was unconscious. 13RP 1883. This count was well supported by her testimony. 6RP 776-79. In *State v. Brown*, 60 Wn. App. 60, 67, 802 P.2d 803, 807 (1990), *review denied*, 116 Wn.2d 1025 (1991),<sup>17</sup> this Court held that evidence that the victim received eight or nine blows from a belt to his buttocks was sufficient for the jury to convict the defendant of second-degree assault based on torture.

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<sup>17</sup> *Brown*'s holding was disapproved with regard to its discussion of the abuse of trust aggravating circumstance. *State v. Grewe*, 117 Wn.2d 211, 813 P.2d 1238 (1991); *State v. Chadderton*, 119 Wn.2d 390, 832 P.2d 481 (1992).

Here, BLC testified that he beat her over and over again with the belt, and struck her in the face with the buckle, causing her to pass out. 6RP 776-77. She ended up with “a dark purple eye, and ... bruises all over my arms and like whip marks on everywhere.” 6RP 777. This evidence is more than sufficient under *Brown*. This claim should be rejected.

**I. THE EVIDENCE OF ROBBERY AS ALLEGED IN COUNT 19 WAS INSUFFICIENT BECAUSE BLC DID NOT TESTIFY THAT FENNEY TOOK THE PHONE AGAINST HER WILL.**

Fenney next claims that the evidence was insufficient to sustain his conviction for first-degree robbery as alleged in Count 19 because BLC did not testify that Fenney took the phone against her will. The State concedes that Fenney is correct as to this point and that the conviction under Count 19 must be vacated and dismissed with prejudice.

**J. THE KIDNAPPING CONVICTIONS SHOULD MERGE INTO THE HUMAN TRAFFICKING CONVICTIONS.**

Fenney next claims that his three convictions for kidnapping alleged in Counts 6, 17, and 22 should have been merged with his human trafficking conviction. The State agrees.

“Merger” is a “doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions.”

*State v. Vladovic*, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983). In *State v. Johnson*, 92 Wn.2d 671, 675-76, 600 P.2d 1249 (1979), the Supreme Court held that the Legislature intended kidnapping charges to merge into rape charges where the kidnapping elevated the seriousness level of rape. The Court arrived at this decision because the State was required to prove “not only that the defendant committed rape, but that the rape was accompanied by an act which is defined as a separate crime elsewhere in the criminal statutes.” *Johnson*, 92 Wn.2d at 675. Because the evidence there showed the sole purpose of the kidnapping was to compel the victim’s submission to rape, the court concluded the crimes merged.

In *Vladovic*, the Court further explained:

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

*Vladovic*, 99 Wn.2d at 420–21. The Court nevertheless set forth an exception to this rule where two offenses would otherwise merge but have “independent purposes or effects,” separate punishment may be applied. *Vladovic*, 99 Wn.2d at 421 (citing *Johnson*, 92 Wn.2d at 680).

The Court clarified this holding in *State v. Berg*, 181 Wn.2d 857, 864–66, 337 P.3d 310 (2014):

Essentially, the merger doctrine states that where crime A and crime B are charged separately and completion of crime A is also an element of crime B, crime A will definitely merge into crime B if crime A was incidental to the commission of crime B. If crime A was not incidental but rather had an independent purpose, it falls within the described exception and courts may impose separate punishment. Thus, the incidental nature of the crime is relevant to the application of an exception to the general merger doctrine.

Here, as Fenney notes, the human trafficking charge was elevated to a first-degree offense by the commission the kidnapping of the victim. Although three distinct kidnappings were proven, the State cannot say that any of them served an independent purpose other than to facilitate the ongoing human trafficking. As such it concedes that the kidnappings must merge into human trafficking.

**K. THERE IS NO POSSIBILITY THE TRIAL COURT WOULD IMPOSE A MITIGATED EXCEPTIONAL SENTENCE.**

Fenney next claims that that the case should be remanded for the trial court to consider a mitigated exceptional sentence. While Fenney must be resentenced because the state has conceded that two convictions must be vacated and the kidnappings merge into human trafficking, this claim would otherwise be without merit because the trial court imposed an aggravated exceptional sentence.

Fenney relies on *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d

173 (2002), which observed that remand for resentencing may be necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law. However, as the Court noted in that case, "[r]emand is not mandated when the reviewing court is confident that the trial court would impose the same sentence when it considers only valid factors." *Id.*

Here, Fenney did not request a mitigated sentence. RP (3/26/18) 21. Moreover, the trial court specifically entered an *aggravated* exceptional sentence based on the jury's finding of aggravating circumstances and the court's perception of the facts. RP (3/26/18) 35; CP 746. Finally the court's remarks at sentencing make it clear that it would not have considered a mitigated sentence even if Fenney had requested it:

For the record, Ms. Schnepf, in terms of the exceptional sentence here, the jury has spoken repeatedly special verdict after special verdict after special verdict. The defendant's standard range exceeds 75. He was a rapid recidivator. I looked at his criminal history. He – of the 15 years between the age of 15 and 30, he was given sentences totaling 13 years -- just shy of 13 years. He would get the benefit of good-time credit and get out early and reoffend. All of his felony offenses have to do with some degree of disregard for the rights of others; the first two, the attempted robberies; section two, the residential burglaries; and then the assault, assault, assault, et cetera. For those reasons, it is important to honor the jury's verdicts, as well as to recognize Mr. Fenney's criminal history and his recidivism rate, so I award an exceptional sentence accordingly.

RP (3/26/18). There is no possibility whatsoever that the trial court would

have imposed a mitigated exceptional sentence. *See State v. Knight*, 176 Wn. App. 936, 958, 309 P.3d 776 (2013) (declining to follow *McGill* where trial court imposed top-of-the-range sentence). This claim should be rejected.

**L. THE MATTER SHOULD BE REMANDED TO CORRECT FENNEY'S LEGAL FINANCIAL OBLIGATIONS.**

Fenney next claims that the matter should be remanded to strike the criminal filing and DNA fees pursuant to *State v. Ramirez*, 191 Wn.2d 732, 750, 426 P.3d 714 (2018), and RCW 10.01.160(3). The State agrees. The State also agrees that the discretionary portion of the fees under imposed for trafficking and promoting prostitution are improper under RCW 9A.40.100(4) and RCW 9A.88.120(2).<sup>18</sup>

**IV. CONCLUSION**

For the foregoing reasons, Fenney's convictions should be affirmed, except as to the kidnappings charged in Counts 6, 17, and 22, the robbery charged in Count 19, and the felony harassment charged in Count 26, and the matter remanded accordingly for resentencing and to correct the LFOs.

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<sup>18</sup> At sentencing the State noted that the trial court could only impose fees of \$3333 and \$1000 under those statutes respectively if it found the defendant was indigent. RP (3/26/18) 4.

DATED December 1, 2019.

Respectfully submitted,

CHAD M. ENRIGHT  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'CE', with a long horizontal flourish extending to the right.

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