

34531-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANTE OLIVER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in failing to declare a mistrial after a State witness violated a pretrial order prohibiting testimony that appellant had prior criminal sexual history.
2. The trial court erred in denying appellant's argument that his convictions for promoting commercial sexual abuse of a minor and second degree trafficking constituted the same criminal conduct and should have been scored as a single offense for sentencing.

II. ISSUES PRESENTED

1. Whether a witness's stray remark that she was provided a photograph of the defendant by the "registered sex offender coordinator" prevented the defendant from having a fair trial, where the trial court struck the statement, instructed the jury twice to disregard the statement, and the defendant's theory of the case was that while he engaged the victim in prostitution, he did not know her age and she willingly participated?
2. Whether the trial court erred in determining that the defendant's convictions for promoting commercial sexual abuse of a minor and second degree human trafficking were not the same criminal conduct when the crimes occurred at different times, did not further each other, and the criminal intents of the crimes differed?
3. Whether any error in calculating the defendant's offender score is harmless where the trial court sentenced the defendant to a determinate sentence of 147 months - a permissible standard range sentence possible regardless of whether his crimes were calculated as the same criminal conduct, and the trial court expressed its intent to sentence the defendant to a specific sentence possible under either offender score calculation?

III. STATEMENT OF THE CASE

Dante Oliver was charged in Spokane County Superior Court by amended information on February 17, 2016, with one count of promoting commercial sexual abuse of a minor and one count of human trafficking in the second degree, each occurring on or about between November 20, 2014 and February 13, 2015, as well as one count of felony violation of a domestic violence no contact order, occurring on or about between September 11, 2014 and February 8, 2015. CP 46-47. On February 29, 2016, during trial, the information was amended to delete irrelevant charging language in count 2, trafficking in the second degree. CP 48-49; RP 280.

Substantive facts.

V.B., who was born on May 3, 1998, was a sophomore enrolled at Lewis and Clark High School in the fall of 2014. RP 189-191. V.B. had previously worked as a prostitute for a group of individuals, and had run away from home on July 21, 2014, to live with them. RP 194-195. Ultimately, the police became involved, and returned V.B. to her mother's house. RP 196.

V.B. was an active user of Facebook, and met a woman by the name of Rosie Williams on the website around Halloween of 2014. RP 193. Ms. Williams began making comments on V.B.'s Facebook pictures, and

also commented on V.B.'s status updates regarding when V.B. "was previously trafficked" in June and July 2014. RP 194. V.B. met Ms. Williams for the first time on November 10, 2014, at which time V.B. again ran away from home. RP 199, 380. V.B. took a bus to a McDonald's restaurant, where a man met her, and took her to Ms. Williams' house. RP 199, 310. Ms. Williams and V.B. began a physical, sexual relationship. RP 208.

Less than a week after running away and meeting Ms. Williams for the first time, V.B. also met the defendant, Dante Oliver, who "came to the house when he got released." RP 204.¹ Mr. Oliver and Ms. Williams also had a sexual relationship, and V.B. was aware that Mr. Oliver was Ms. Williams' pimp. RP 207. V.B. did not converse with Mr. Oliver much on the day of his return. RP 206. However, on a day shortly thereafter, Mr. Oliver "said that he wanted to go to McDonald's and we were going to talk, and so then we went to McDonalds." RP 206. At McDonalds, Mr. Oliver explained to V.B. how he became a pimp. RP 207. He also told V.B. that "when he got home [they] were going to pick out pictures to put ... on Backpage," a website used for posting advertisements for prostitution

¹ V.B. met Mr. Oliver for the first time on a Sunday morning in November 2014. RP 217. V.B. estimated that she spent six days with Ms. Williams before Mr. Oliver returned home. RP 312.

and “escorting.” RP 209. While the two were at McDonalds, V.B. told Mr. Oliver that she was 17 years old and a senior at Lewis and Clark High School, even though, at the time, she was only 16 years old.² RP 212. The defendant then dropped V.B. off at Ms. Williams’ house and went to purchase a pre-paid card to allow them to post ads for V.B. RP 210-12.

Mr. Oliver, who V.B. knew as “Tay,” chose “look-alike” pictures of partially clothed individuals, so that V.B.’s family would not be able to identify her on Backpage. RP 209, 213. Mr. Oliver then used his phone to set up an advertisement for V.B., utilizing her phone number as contact information.³ RP 213-214. Mr. Oliver set the prices that V.B.’s visitors would pay for sexual intercourse - \$200 for an hour, \$150 for a half hour, and \$100 for 15 minutes. RP 214. Mr. Oliver placed restrictions on the types of customers V.B. could see and on how V.B. was to act before and during calls. RP 215-216, 219, 222-223.

When V.B. received a call from a customer, she would direct them to go to McDonalds, and then would send them her “real address.” RP 217.

² At some point after Mr. Oliver and V.B. began posting advertisements for V.B.’s services online, Mr. Oliver asked V.B. for identification and whether she knew how to drive because they were attempting to buy a car. RP 301, 347.

³ Mr. Oliver set up the advertisement for V.B. three days after the two first met. RP 217.

While the customer visited V.B. at Ms. Williams' house, Mr. Oliver and Ms. Williams would go to McDonalds, and V.B. would text message them after her customer left. RP 218. From the day she met Mr. Oliver to December 10, 2014, V.B. estimated that she had 10 or 15 calls. RP 220. V.B. turned over all of the money she made to Mr. Oliver, which amounted to a few thousand dollars. RP 221.

On December 10, 2014, the defendant went to jail, and V.B. went to a family member's house. RP 221. V.B. then went to a home for "troubled kids" after her mother and police intervened. RP 226, 387. She left the home after a few days, but was quickly located by police who returned her to her mother. RP 227, 387. Thereafter, V.B.'s mother allowed her to live with another family member.⁴ RP 228, 406.

Around Christmastime 2014, after V.B. received a cell phone as a gift,⁵ V.B. again contacted Ms. Williams. RP 229, 406. She was allowed to stay the night with Ms. Williams, at which time Ms. Williams gave her a

⁴ Her mother also obtained domestic violence no contact orders on her daughter's behalf, protecting V.B. from any contact with Mr. Oliver or Ms. Williams. RP 387-390. The no contact orders were filed on January 30, 2015. RP 390.

⁵ V.B.'s mother confiscated both of V.B.'s cell phones immediately after V.B. was located on December 10, 2014. RP 226.

letter from Mr. Oliver. RP 229.⁶ V.B. again ran away from home on January 9, 2015, and stayed with Ms. Williams. RP 229, 411. She left the letter from Mr. Oliver in her bed, which was ultimately discovered by another family member. RP 231, 413, 425. Upon returning to live with Ms. Williams, V.B. resumed “doing calls,” after posting services on “Adult Hobby Board,” another website used to solicit customers for sex; sometimes she would do these calls alone, and sometimes with Ms. Williams. RP 231-232, 332-333. The money she earned went to Ms. Williams and was used to pay rent, pay for advertisements, and to “put[] money on Tay’s phone” so that he could make telephone calls from the jail. RP 232.

At the time of these events, Erica Rivas was working for the Spokane County Sheriff’s Office as a technical assistant in the major crimes and sex crimes division, and was in charge of locating juvenile runaways and missing persons. RP 430. She received a runaway report on V.B. in

⁶ In the letter, Mr. Oliver told V.B. “I want you posting every day and making at least 200 a day,” “We’ve been through this already,” that Ms. Williams and V.B. should make at least \$2800 per week, that they were to keep the money for him, and pay the rent, the bills, and survival needs. RP 243-244. The letter also told V.B. she needed to have “naked pics done” but “no face for you,” indicating that the pictures should not show V.B.’s face. RP 244. The letter directed V.B. to change her “stage name” and telephone number so her family could not locate her. RP 245.

January 2015. RP 431. Ms. Rivas looked at V.B.'s Facebook page⁷ and identified that V.B. claimed she was "married to" Rosie Williams, and her page listed "Tay Inya-Mouf" as one of V.B.'s friends. RP 436.

Ms. Rivas searched Rosie Williams in a police database, which revealed the last police contact with Ms. Williams was on December 10, 2014, in a court order violation case with Dante Oliver listed as the suspect. RP 437. Ms. Rivas then obtained a photograph of Dante Williams from the registered sex offender coordinator. RP 437. Ms. Rivas then testified that she compared the known photograph of Mr. Oliver to the Facebook photograph of "Tay Inya-Mouf," noticing similarities. RP 438.

Ms. Rivas also transcribed over 70 jail phone calls and interviews related to this case; the jail phone calls included communications occurring between January 12 and February 9 of 2015. RP 439. The telephone calls involved Dante Oliver, Rosie Williams and V.B. RP 440.

Damon Simmons was assigned by the Spokane County Sheriff's department to investigate the case, and reviewed the runaway reports, Facebook information, cell phone information, and the letter authored by Mr. Williams to V.B. RP 449-460.

⁷ During trial, it was established that V.B. used the name "LaQuita Johnson" for her Facebook communications. RP 435-436.

The detective testified that he had V.B.'s cell phones analyzed and data extracted. Text messages dating from November 20, 2014 were recovered, and included a number of messages relating to prostitution activity.⁸ RP 586-588. Approximately eight pages of text messages occurring between 6:00 p.m. and midnight were recovered from November 20, 2014 alone. RP 587-588.

The detective also requested inmate telephone call records from Mr. Oliver to V.B. and Ms. Williams from both the Spokane County and Benton County jails for January 20, 2015 through February 4, 2015. RP 592. The telephone calls included a number of conversations⁹ wherein Mr. Oliver gave Ms. Williams directions for maintaining the household. RP 593. During his investigation, the detective found that the Spokane Municipal Court had issued a no contact order on September 11, 2014 prohibiting Mr. Oliver from any contact with Ms. Williams. RP 594-95. The order expired on September 11, 2016. RP 595. The defendant had twice

⁸ "On 11-20, I see a text at 18:52:42 that was sent that asked, 'Do you want a call?'" RP 586-587. "Several references to donations. 11-20-2014 at 19:17:59 there's an incoming where someone is still inquiring about donations and also a location with a question mark. The response was 'McDonalds on Monroe and Indiana.'" RP 587.

⁹ The detective testified that there were 32 total telephone calls between Mr. Oliver and Ms. Williams made while Mr. Oliver was in jail. RP 626.

been convicted of violating domestic violence no contact orders. RP 596-597.

The detective read verbatim the letter sent by Mr. Oliver to V.B. which included directions for V.B. to resume prostituting herself:

I would have ... sent you to that school knowing that your mom was tripping. We could've just did the online thing – or we could've just did the online thing. So yeah, this whole ordeal was way preventable. And I'm a little upset with you for not being honest. Now I'm going to be in jail and miss all the holidays and most of all miss being at home doing what we do. With all that being said, maybe I'm not easy to talk to. Maybe you're just too afraid to tell me the truth about certain things. So from here on out, tell me the fucking truth. I don't give a fuck what you're afraid of. It's my job to protect y'all, but y'all gotta look out for Daddy, too. Never let me go on not knowing what the fuck is going on. I could really get off in your ass right now. Okay.... The damage is done. So we have to figure out where do we go from here. My reply is we keep mashing and keep representing the program, but we gotta be extra, extra careful, but I need ... You're still representing Tay.

...

And if you're still about me and what's going on, I'll send instructions on how to get rocking and stay out of sight and out of trouble. You see, yeah, I get mad, and yeah, I flip out, but I always stand behind what's mine. So while I have to sit here, I'm still focused on the next move. So now what we do is stack. Play that money -- put that money together and keep stacking. That way when I get out, we can head straight to the car lot.

...

[L]ie to me again, let's just say I strongly advise against that. I'm still in charge and running this. But I want you to check in with Rosie every day...

...

So don't let me hear about no shit while I'm gone. No niggas, no bitches, no nothing. Just make these... Moves and stay out of sight. And be smart. And don't be all on FB ... Telling is slipping. So don't post shit on FB that tells your business or mine. I'll call you guys on Friday. Keep ... on your mind and stay – stay focused on getting mine. I'll continue to keep you guys first on my mind, and I'm always praying for your safety. I'll talk to you soon. Tay.

RP 602-604.

Invoices reviewed by FBI agent Jason Benedetti, who specialized in juvenile prostitution, revealed that advertisements were posted on Backpage each day from November 20 through November 23, 2014, then again on November 25, and 30, 2014. In December 2014, advertisements were placed on the 1st, 3rd, 4th, 7th and 8th. RP 504, 528-529; Ex. 14. He also reviewed one of Ms. Williams' Adult Hobby Board posts advertising services including two prostitutes. RP 531. Agent Benedetti also testified that, in his opinion, the letter authored by Mr. Oliver was indicative of his involvement in human trafficking and juvenile prostitution, that he was the pimp, and Ms. Williams and V.B. were working for him. RP 532-535, 546.

Procedural history.

Before trial, defense counsel made an oral motion to exclude any testimony regarding Mr. Oliver's prior sex offense conviction. RP 179. After Ms. Rivas testified that she obtained a photograph of Dante Williams through the registered sex offender coordinator, defense counsel objected

and requested a limiting instruction. RP 437. The court sustained the objection, struck the testimony, and instructed the jury to disregard Ms. Rivas' comment. RP 437-438.

However, after Ms. Rivas concluded her testimony, and mid-way through Detective Simmons' testimony, the court took a recess. Defense counsel then asked, outside the presence of the jury, for the court to grant a mistrial, arguing a limiting instruction was insufficient to cure the error. RP 471, 474. Although he recognized that the State did not intentionally solicit testimony that Mr. Oliver was a registered sex offender, defense counsel argued that Ms. Rivas' testimony that she located Mr. Oliver's picture through the registered sex offender coordinator was extremely prejudicial to the defendant, and would prevent him from having a fair trial. RP 471.

The State argued that the cases cited by the defendant were inapplicable to the situation arising from Ms. Rivas' testimony. RP 475. The State further argued that "one would have to take a couple of analytical jumps to say because of where Ms. Rivas got the photograph that Mr. Oliver must be a sex offender and then get to Mr. Oliver must be a convicted sex offender." RP 476.

After the court ascertained that the State had previously admonished its witnesses not to discuss the defendant's prior criminal history, RP 477-480, the Court discussed its reasons for denying the motion for a mistrial:

I have thought for the last almost two hours about this issue. Let me start by the motion in limine, which was an oral motion that was brought up before we started the testimony. So, you know, how much advance notice there was, the state may have anticipated that this would be raised and that I would rule in the way I did, but it was brought up before trial started.

This particular witness, Ms. Rivas, I do not believe was in the courtroom. I'm pretty certain she wasn't because I had excluded witnesses. But the request was to limit any testimony to the fact that Mr. Oliver was a registered sex offender or had, I think, two prior sex offenses, and I think one was a misdemeanor -- see if I can find my notes: A misdemeanor for some sort of sexual offense and a fail to register. But that he had prior sex offense convictions. I granted that motion.

...

[T]he specific question was:

“Question: Okay. And did you then look for a photo of Dante Oliver?”

Answer: Not at all. I didn't have a SPRS photo. I got that photo from the registered sex offender coordinator.

Mr. Griffin: Objection, Your Honor. I'd ask for a limiting instruction.

The Court: I'm going to sustain the objection and strike that answer at this point. The question was whether you looked for a photograph, and the answer was, 'Not at that time.' So that's the answer I'm allowing to stand. The rest of it I'm

striking and telling the jury to disregard.” And then we moved on to another area.

Gresham, 173 Wn. 2d 405, is not exactly on point...

...

... And in this case, in *Gresham*, the court concluded that it was not harmless error because there were no eye witnesses to the allegations of molestation. And while that would by no means be insufficient for a jury to convict the defendant, there was a reasonable probability that absent that highly prejudicial evidence of Gresham’s prior sex offense -- see *Saltarelli* -- that the jury’s verdict would’ve been materially affected. Thus the court couldn’t say that the erroneous admission of the evidence of Gresham’s prior conviction was harmless error.

So that’s what got me to then look at *Saltarelli*. *Saltarelli*, I think, is closer to being on-point, and that’s 98 Wn.2d 358. I don’t know if I cited *Gresham*, 173 Wn.2d 405. *Saltarelli* was a case where the defendant had -- was a customer to Safeway, I believe, and he had asked a cashier at Safeway out a few times. She had said no. He asked her to go out to dinner one night. She said no, she was sick, but did agree that he could drive her home.

He then attempted -- allegedly attempted to rape her in the back of his van, got scared when the police drove by, left. She was able to get her clothes on and escape. And Mr. Saltarelli alleged that it was a consensual intercourse, and that was really the dispute in that case. And the court in *Saltarelli* allowed evidence of an act four years earlier, I believe -- four-and-a-half years earlier -- of an attempt by Mr. Saltarelli to forcibly have sex to rape a woman who had come to his house for a dinner; never reported it. He threatened to harm her if she did.

And the court there allowed that evidence in, saying that those acts were similarly the same, and the supreme court reversed. Part of the reason they reversed was that there

wasn't a good 404(b) or 403 analysis to talk about the purpose for the admission of this evidence and also to weigh the prejudicial effect and whether it substantially outweighs the probative value.

But there was some language in *Saltarelli*, primarily looking at -- it looks like some sort of an article out of an Iowa Law Review, Slough and Knightly: *Other Vices, Other Crimes*. This was a 1956 study where that study said that once an accused has been characterized as a person of abnormal bent driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty. He could not help but be otherwise.

And the court went on and again cited another provision in that law review: "When deciding the issues of guilt or innocence in sex cases where prejudice has reached its loftiest peak, our courts have been most liberal in announcing and fostering a nebulous expectation, offering scant attention to inherent possibilities of prejudice. Just when protection is most needed, the rule collapses." So there's some real compelling language that *Saltarelli* looked at and concluded that especially in sex offense cases, bringing in evidence of prior bad sex acts is highly prejudicial.

So what I have been thinking about is the evidence that came in. And I've thought about whether the jury -- and of course, I have instructed them not to consider evidence that I struck. There's a general closing instruction that tells them not to consider evidence that I struck. I tried, when I dealt with this issue when it first came up, to really focus on the nonresponsiveness of the question. I didn't want to mention or dwell on the comment about the registered sex offender coordinator, and so I tried to focus on sustaining the objection, that it was nonresponsive. And I tried to restate what I was allowing in, and that is that they didn't look at the photograph at that time.

But the more I look at what was said, it just seems like it is not to the same extent that these cases talk about where there

was evidence of prior bad sex acts by Mr. Oliver, discussions about convictions. The witness said that they found -- that they got a photo from the registered sex offender coordinator. Now, is it possible that a jury may connect dots and in their mind conclude that Mr. Oliver is a registered sex offender? I certainly suppose that is possible. I don't know that that's necessarily the most logical conclusion, but it's possible.

I also have been thinking about really what has been acknowledged already in this case and what the issue is. Mr. Oliver's acknowledged that he was involved in promoting prostitution with Ms. Williams. He's acknowledged -- and in fact, I think in opening statement acknowledged a violation of a DV protection order, acknowledges that he was in jail, those type of things.

The main defense, as I understand the defense, is that the defendant never knew about the alleged victim's age and had no reason to doubt it. And as we talked about yesterday, I'm going to say that there's limitations as to how far that defense can go because consent is not a defense.

And as the jury instructions point out, there's an affirmative duty for the defense to show some evidence that Mr. Oliver did something other than rely on what the alleged victim said. And without spending time going back through that, it seems like the statute's requiring to actually see an identification or a birth certificate or a marriage license or a driver's license.

So I don't think there's any dispute, and the defense has acknowledged that Mr. Oliver has been engaged in the sex trade, I think is a fair way of calling it. And the real issue here is, I think, his knowledge, in light of what defenses are available, of the victim's -- alleged victim's age, whether he thought she was an adult or not. Again, I'm not trying to rule ahead of time on jury instructions or things like that. We talked about those yesterday.

So given what this issue is -- and I don't think I do a harmless error analysis. I think that's really more of an appellate court analysis. *But when trying to decide whether this evidence that they got a photo from a registered sex offender coordinator, that prejudicial effect of that information, to me, is not so egregious that it justifies declaring a mistrial.*

I have acknowledged and I recognize that there are other judges that are smarter than me on these issues, and they may have a different view, and I'll respect that. But that's my call, the best I can make it, that I don't think that this evidence that came in -- even if the jury is going to disregard my instructions to disregard it and me striking it -- *that it's not that type of clear evidence that shows that Mr. Oliver is a registered sex offender or did anything else other than being on the radar of this coordinator.* So I'm going to deny the motion for a mistrial.

RP 484-492 (emphasis added).

After the defendant was found guilty of the three charges, the defense argued that the court should treat the second degree human trafficking and promoting commercial sexual abuse of a minor as the same criminal conduct for purposes of sentencing. The court denied the motion, and determined the defendant had an offender score of "4" (as opposed to "2" if the charges had been considered the same criminal conduct). Based on that offender score, the court sentenced the defendant to a standard range sentence of 147 months on count 1 and count 2, to run concurrently. The sentence on count 3 was also ordered to run concurrently to the first two counts.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT DECLARING A MISTRIAL AFTER THE WITNESS MADE A STRAY REMARK.

The standard of review for denial of a motion for a mistrial is abuse of discretion. *State v. Perez-Valdez*, 172 Wn.2d 808, 858, 265 P.3d 853 (2011); *State v. DeLeon*, 185 Wn. App. 171, 195, 341 P.3d 315 (2014).

“A mistrial should be granted when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly.” *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). Stated alternatively, when reviewing a trial irregularity, an appellate court asks whether, when viewed against the backdrop of all the evidence, the irregularity so prejudiced the jury that the defendant did not receive a fair trial. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

Determining whether an irregularity during trial is so prejudicial as to warrant a mistrial depends on (1) the seriousness of the irregularity, (2) whether the statement was cumulative of other properly admitted evidence, and (3) whether the irregularity could be cured by an instruction. *Perez-Valdez*, 172 Wn.2d at 818. The trial court is in the best position to determine if a trial irregularity caused prejudice. *Perez-Valdez*, 172 Wn.2d at 819. An improper reference to the defendant’s criminal

history is not necessarily so prejudicial that it automatically warrants a mistrial. *State v. Hopson*, 113 Wn.2d 273, 285-286, 778 P.2d 1014 (1989).

As to the first factor, the appropriate inquiry is whether Ms. Rivas' brief comment that she obtained Mr. Oliver's photograph from the sex offender registration coordinator, when viewed against all of the evidence, so tainted the proceeding that Mr. Oliver did not receive a fair trial. The State does not dispute that the comment was improper and inadvertently violated the motion in limine; however, given all of the evidence adduced at trial, the violation does not reach a level requiring the trial court to grant a mistrial.

The seriousness of an irregularity is measured considering the nature of the irregularity, the effect of it on the defense strategy and the overall strength of the State's case. *Hopson*, 113 Wn.2d at 286; *Escalona*, 49 Wn. App. at 254–55. Contrary to Mr. Oliver's argument, the brief comment by Ms. Rivas did not overtly state that Mr. Oliver was a convicted and registered sex offender. It is possible that the registration coordinator had Mr. Oliver's photograph for some other reason: as a person of interest, a witness to another person's criminal activity, or, conceivably, as a victim of a crime. As the State argued below, and as the court determined, "Now, is it possible that a jury may connect dots and in their mind conclude that Mr. Oliver is a registered sex offender? I certainly suppose that is possible.

I don't know that that's necessarily the most logical conclusion, but it's possible." RP 490. No evidence was proffered, admitted or argued that indicated Mr. Oliver was, in fact, a registered sex offender; there was no reference to his specific crimes of conviction which required him to register as a sex offender, and no discussion of the specific facts of those cases. The State did not follow up on Ms. Rivas' brief remark, and the court immediately struck the testimony and instructed the jury to disregard the comment. Unlike the cases cited by Mr. Oliver, the jury did not hear any testimony regarding the defendant's prior conviction for a sex offense or the factual allegations underlying that conviction.

Additionally, the irregularity did not alter the defendant's trial strategy. The defendant did not deny engaging V.B. in prostitution. To the contrary, it was his theory that V.B. willingly engaged in prostitution in exchange for his protection, and lied about her age in order to do so. RP 267-288, 682-698. It was also the defense theory that once Mr. Oliver went to jail on December 10, 2014, he was not present to cause V.B. to engage in prostitution. RP 684-685, 688. The defense even agreed that the jury "shouldn't find that [Mr. Oliver] is an angel, but he wasn't there." RP 692.

The evidence of Mr. Oliver's guilt was overwhelming. The juvenile victim testified at trial. She described in detail the machinations of Mr. Oliver's prostitution enterprise. The jury saw the advertisements posted

online selling V.B.'s sexual services. Ex. P-9, P-14. The jury observed the letter from Mr. Oliver to V.B. directing her to continue working for him. Ex. P-4. The jury observed the text messages received by V.B. in response to the internet advertisements placed by Mr. Oliver. Ex. P-12.

As to the other factors, the irregularity was not cumulative as no other evidence of defendant's prior sex offenses was admitted. However, the record was replete with references to the defendant being in and out of jail, and violating no contact orders. The jury could also infer that the defendant had committed crimes in multiple jurisdictions because he was detained in both the Spokane County and Benton County jails. This additional evidence of the defendant's wrongdoings was admitted without objection – likely because it was the defendant's theory that he was not physically present to direct V.B.'s actions.

Because the irregularity was insignificant in light of the strength of the State's case and the other untainted evidence admitted at trial, the trial court properly determined that a limiting instruction was sufficient to protect the defendant's right to a fair trial. The court should presume that the jury followed the trial court's instruction to disregard the testimony. The trial judge is best suited to judge the prejudice of the statement; the trial court gave thoughtful consideration to Mr. Oliver's request for a mistrial, and properly exercised its discretion in denying the motion.

The cases cited by the defendant are unhelpful. For instance, in *State v. Acosta*, the court admitted a “laundry list” of the defendant’s prior arrests and convictions. 123 Wn. App. 424, 439, 98 P.3d 503 (2004). Here, the witness made a passing comment that did not refer to any specific arrest or conviction. In *State v. Sanford*, 128 Wn. App. 280, 115 P.3d 368 (2005), the court permitted an officer to testify he viewed the defendant’s booking photograph before arresting him on the current charge. The court held that “there was no reason to expose the jury to the prejudice of Sanford’s criminal propensity that Sanford’s prior police computer booking photo implied,” especially in a case where identity was not at issue. *Id.* at 287. The court further determined that the error was not harmless because the evidence of the defendant’s guilt was not overwhelming, and in some respects, was ambiguous, favoring the defendant’s versions of events. *Id.* Such is not the case here; as explained above, the court did not permit the jury to consider the improper testimony, and the overwhelming evidence admitted at trial against Mr. Oliver favored heavily toward a finding of guilt.

In *State v. Henderson*, 100 Wn. App. 794, 998 P.2d 907 (2000), also cited by Mr. Oliver, the prosecutor asked the officer the following question without objection: “The photo montage you have identified, No. 3 and No. 4, those were put together with photographs that were already on hand;

is that correct?” *Id.* at 803. The court indicated “*this single reference may or may not have suggested to the jury that the police had a mug shot of Henderson from previous criminal activity*” but that the prosecutor further *argued in closing* that the photograph was “on hand,” suggested the defendant had previously been arrested or convicted of another charge. *Id.* (emphasis added). The scenario in *Henderson* is a far cry from the scenario here, in which a witness made an *unsolicited* statement, that was objected to, and stricken by the court, and which the State did not use to make any argument in closing.

This situation also significantly differs from the facts of *Escalona, supra*, a second degree assault with a deadly weapon case. In *Escalona*, the victim testified that he was afraid of the defendant because the defendant “already had a record and had stabbed someone.” 49 Wn. App. at 253. The trial court struck the testimony but did not declare a mistrial. Determining that the victim’s testimony, which was essentially the state’s entire case, contained many inconsistencies, and that the statement was not cumulative with other evidence admitted at trial, the court then looked to whether the court’s oral instruction directing the jury to disregard the testimony could cure the error. The court found, in that “close case,” it would be difficult, if not impossible, for the jury to ignore the seemingly relevant fact that the

defendant had previously stabbed a different victim. The court determined that in not granting a mistrial, the trial court abused its discretion.

However, in *State v. Weber*, 99 Wn.2d 158, 659 P.2d 1102 (1983), our high court affirmed the defendant's conviction, even where a witness *twice* testified to an inculpatory statement the defendant made at the time of his arrest which was not provided to the defense prior to trial pursuant to CrR 4.7. After the first time the witness made the statement, the court ruled that the State could not use the statement and instructed the jury to disregard the testimony. However, the witness then repeated the "forbidden statement." *Id.* at 160-161. Despite the twice repeated irregularity, our Supreme Court determined that the trial judge properly denied the motion for a mistrial because it did not meet the requirements discussed above. The court stated that it must presume that the jury followed the judge's instructions to disregard the remark. Here, the court gave the jury two oral instructions and one written instruction to disregard the remark: it first instructed the jury to disregard at the time the comment was made and stricken, and additionally instructed the jury to disregard any stricken evidence in its closing instruction. RP 437-438, 652; CP 53. As in *Weber*, this Court should presume the jury followed the trial court's instructions.

The trial court did not abuse its discretion when it denied the defendant's motion for a mistrial. The irregularity was not one that was

solicited or used in any way by the State. The State's evidence overwhelmingly militated a finding of guilt. The defendant did not object to other evidence properly admitted at trial that he was in and out of jail during the time of the events because it was his theory that he was not there to direct V.B.'s actions. The defendant argued that, while he was "not an angel," he did nothing to coerce V.B. into prostituting herself, and was unaware of V.B.'s age. While error did occur by Ms. Rivas' errant remark, the trial court cured the error by instructing the jury to disregard the testimony, and the jury is presumed to have followed the court's instructions. Thus, any prejudice to the defendant was also cured by the court's instructions.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE CRIMES OF PROMOTING COMMERCIAL SEXUAL ABUSE OF A MINOR AND SECOND DEGREE TRAFFICKING ARE NOT THE SAME CRIMINAL CONDUCT; IN ANY EVENT, ANY ERROR WAS HARMLESS.

Standard of review.

An appellate court reviews a trial court's determination of what constitutes the same criminal conduct for abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 537, 295 P.3d 219 (2013). A trial court abuses its discretion if it makes a manifestly unreasonable decision based on untenable grounds or for

untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

When sentencing a person for multiple current offenses, the sentencing court determines the offender score by considering all other current and prior convictions as if they were prior convictions. RCW 9.94A.589(1)(a). However, if the sentencing court finds that some or all of the current offenses encompass the same criminal conduct, then those offenses may only be counted as one single crime. RCW 9.94A.589(1)(a).

Because the finding that two crimes constitute the same criminal conduct favors the defendant by lowering his presumed offender score, it is the defendant who must convince the sentencing court to exercise its discretion in his favor. *Graciano*, 176 Wn.2d at 537.

The scheme – and the burden – could not be more straightforward: each of a defendant’s convictions counts towards his offender score *unless* he convinces the court that they involved the same criminal intent, time, place and victim. The decision to grant or deny this modification is within the sound discretion of the trial court, and like other circumstances in which the movant invokes the discretion of the trial court, the defendant bears the burden of production and persuasion.

Id.

“Under this standard, when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” *Id.* at 537-38.

However, where the record adequately supports several conclusions, the matter lies in the trial court's discretion. *Id.* at 538. An appellate court narrowly construes the same criminal conduct analysis to disallow most assertions of same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

RCW 9.94A.589(1)(a) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *See, State v. Chenoweth*, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). In this context, "intent" does not mean the particular statutory mens rea required for the crime. *State v. Davis*, 174 Wn. App. 623, 642, 300 P.3d 465, *review denied*, 178 Wn.2d 1012, 311 P.3d 26 (2013). Rather, it means the defendant's "objective criminal purpose in committing the crime." *Davis*, 174 Wn. App. at 642 (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030, 793 P.2d 976 (1990) ("[F]or example, the intent of robbery is to acquire property, and the intent of attempted murder is to kill someone.")). As part of this analysis, courts also look to whether one crime furthered another. *Graciano*, 176 Wn.2d at 540.

In order to determine that two crimes are the same criminal conduct, all three of the factors under RCW 9.94A.598(1)(a) must be present. *State v. Price*, 103 Wn. App. 845, 14 P.3d 841 (2000), *review denied*,

143 Wn.2d 1014, 22 P.3d 803 (2001). “If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score.” *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).¹⁰

1. The crimes for which the defendant was convicted do not necessitate a finding of “same criminal conduct.”

To the extent that the State argued to the trial court that the same criminal conduct analysis for purposes of calculating a defendant’s offender score is the same as the analysis for merger or double jeopardy, the State was incorrect.¹¹ RP 779. However, the trial court recognized that the analysis for these principles is different:

So I’m going to find, for purposes of double jeopardy, that the crimes are not the same, and one requires proof of facts that the other doesn’t; so it does not violate double jeopardy.

In terms of the merger or same course of criminal conduct, again, there -- it may be subtle, but there are different things that these charges are trying to prohibit. They are in different sections of the statute. They’re enacted at different times. I am not going to find that one merges into the other and ignore one for purposes of sentencing.

¹⁰ At sentencing, sentencing courts merge crimes to avoid double jeopardy. *Chenoweth*, 185 Wn.2d at 222. “Same criminal conduct” is a principle courts use when calculating a defendant’s offender score. *Graciano*, 176 Wn.2d at 535-36. A determination that a conviction does not violate double jeopardy does not automatically mean that it is not the same criminal conduct. *Chenoweth*, 185 Wn.2d at 222.

¹¹ See n. 10, supra.

Now, I have some discretion, I suppose, when it gets to my sentencing to make sure that I'm comfortable ultimately with a sentence that will, I guess, take into account some of the things that overlap even though I'm not finding that they implicate double jeopardy, but I'm going to not find that they are the same course of criminal conduct and that they do not merge. So I'm treating them separately as crimes, and I'm going to use the offender score of 4.

RP 787-88.

The trial court did not abuse its discretion in determining that the crimes of trafficking and promoting commercial sexual abuse of a minor were not the same criminal conduct in this case. Although the State agrees that the victim was the same for both crimes, the State does not agree that the time and intent of the crimes was also the same.

First, the time periods of the crimes was not the same. The mere fact that the charging periods contained within the information overlap is not dispositive of whether the time was the same for same criminal conduct analysis. Although both the second degree trafficking and promoting commercial sexual abuse of a minor were alleged to have occurred between November 20, 2014 and February 13, 2015, that allegation alone does not demonstrate that both crimes occurred at the same time. *See, Graciano*, 176 Wn.2d at 541 (suggesting that in order for crimes to occur at the same time, the incidents must be "continuous, simultaneous, or happened sequentially within a short time"); *State v. Grantham*, 84 Wn. App. 854,

932 P.2d 657 (1997) (multiple rapes against the same victim do not constitute same criminal conduct where other activities occurred between each rape and each rape was committed by different means).

As demonstrated above, there was a significant break between the communications between the defendant and the victim, V.B. in December 2014, when he went to jail and she returned to her family. Then, in January 2015, V.B. returned to Ms. Williams, and was given the letter from the defendant again recruiting her to work for him as a prostitute. The court could well determine that the acts of promoting commercial sexual abuse of a minor occurred in November and early December 2014, when the defendant repeatedly posted sexual advertisements for the victim. Then, in January 2015, after the two had not communicated for nearly a month, Ms. Williams gave V.B. the letter from Mr. Oliver, in which he again recruited V.B. to engage in commercial sex acts knowing that she was under the age of 18 in violation of the human trafficking statute. Viewing the facts in this light – that the trafficking actually occurred after the initial incidents of promoting commercial sexual abuse of a minor, the earliest-in-time criminal act does not further the later-in-time criminal act. The trial court did not abuse its discretion in determining the same “time” element of the same criminal conduct inquiry was not met under these facts.

Likewise, the trial court did not abuse its discretion in determining the defendant had different criminal intent in committing the crimes of trafficking and promoting commercial sexual abuse of a minor. While the defendant has proffered one reasonable criminal intent that could apply to both crimes – to financially profit from V.B.’s prostitution, Br. at 23, other criminal intents are also possible. For instance, both statutes provide that a person can violate the statute *without actually receiving any financial gain*.

The defendant’s objective criminal intent in committing the two crimes was not necessarily the same.¹² Mr. Oliver’s intent for one crime could be to recruit a juvenile prostitute, and for the other, to profit from her “work.” And, even assuming this Court determines Mr. Oliver’s criminal intent was the same for both crimes, the defendant’s argument fails because he has not met the same time and place element of the test.

The trial court did not abuse its discretion in determining that the defendant’s crimes were distinct and did not amount to the same criminal conduct for purposes of determining his offender score. As indicated above,

¹² The criminal intents of the two crimes are not necessarily the same, especially here, where the jury was given the option to convict the defendant of promoting commercial sexual abuse of a minor by (1) advancing commercial sexual abuse of a minor or (2) profiting from V.B. who was engaged in sexual conduct; and to convict the defendant of second degree trafficking by (1) recruiting, harboring, obtaining or receiving a person less than 18 years of age who was caused to engage in a commercial sex act, or (2) benefitting or receiving anything of value from participating in a venture in which the victim was less than 18 years of age and caused to engage in a commercial sex act. CP 63, 76.

most claims of same criminal conduct are to be disallowed, and the burden of persuasion is on the defendant to demonstrate why his crimes constitute the same criminal conduct. He did not do so below, and has not done so here.

2. Error, if any, in the court's determination that the defendant's crimes were not the same criminal conduct, was harmless.

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, creates a grid of standard sentencing ranges based on the defendant's offender score and the seriousness level of the current offense. The trial court calculates a defendant's offender score by totaling the defendant's prior convictions for felonies and certain juvenile offenses. RCW 9.94A.525.

Whenever a person is sentenced for two or more current offenses (unless those offenses are the same criminal conduct) all current and prior convictions are treated as if they were prior convictions for the purpose of determining the offender score. RCW 9.94A.589. Here, the defendant had a prior conviction for violating a no contact order from January 14, 2015. The defendant was convicted of violating a no contact order in this case. Each of those two convictions would be treated as "prior convictions" for the defendant's current convictions of promoting commercial sexual abuse of a minor and human trafficking in the second degree, thus, giving the

defendant two points which count toward his offender score on the remaining charges. The question then is whether the current convictions for promoting commercial sexual abuse of a minor and human trafficking are countable in the defendant's offender score against each other.

Second degree human trafficking is a class A felony. RCW 9A.40.100(2). It is a violent offense under RCW 9.94A.030(55) ("Violent offense means ... any felony defined under any law as a Class A felony"). Promoting commercial sexual abuse of a minor is a Class A felony. RCW 9.68A.101(2). Therefore, it is also a violent offense.¹³ Violent offenses each count as two points against each other when they are not the same criminal conduct. RCW 9.94A.525(8). Thus, if each of those charges counts toward the offender score of the other, the defendant's offender score would be "4." If not, and the two crimes are the same criminal conduct, then the defendant's offender score would be "2."

Based on an offender score of "2" the defendant's standard range sentence for both promoting commercial sexual abuse of a minor and human trafficking second degree would be 111-147 months. Based on an offender score of "4" the defendant's standard range sentence for both promoting commercial sexual abuse of a minor and human trafficking second degree

¹³ Promoting commercial sexual abuse of a minor is also a sex offense. RCW 9.94A.030(47)(a)(iii).

would be 129-171 months. The sentencing court imposed a determinate 147-month sentence, a sentence available under either standard range. In doing so, the court expressly stated that it decided to sentence the defendant to a determinate sentence available under either standard range, in the event that it had improperly calculated the defendant's offender score.

Now, 129 to 171 months, *I normally start with the midpoint, which is 150*, and I look to see whether there's reasons to mitigate downwards or aggravating factors to go upwards. Certainly, a lot of the aggravating factors are built into these charges. The charges reflect and recognize that [V.B.] was a child, that she was engaged in being forced to sell herself for financial profit, was sexually exploited, emotionally exploited. Those are all recognized in the charge. I can't find that those aggravate upwards.

In terms of whether there's things to mitigate downwards, again, she's just one of three victims that we know just in the last couple of years here in Washington, not counting whatever the victim was in Vegas and not counting whoever else that we know that's out there, but at least one of three victims.

But again, going back to, I guess, my recognition that I had to make some tougher calls earlier, that I really spent a lot of time thinking about the double jeopardy and merger issue, *had I have gone to an offender score of 2, I would've found that that was a substantial benefit to Mr. Oliver, which, to me, would've caused me to look at the higher end of the standard range.*

And I guess we're going to call this hedging my bet a little bit. I'm going to go from 150 to 147. And again, that would've still been within the high end of the range. If I'm wrong on the double jeopardy argument or the merger or the same criminal course of conduct, I would've sentenced him to 147 because I would've given him several breaks that

would've been close calls. Dropping three months off the midpoint will make me feel that I've balanced that other issue.

147 months, credit for whatever time is served, concurrent with the other case; 500 victim assessment, 200 court costs, \$100 DNA collection.

RP 819 (emphasis added).

Thus, any error in calculating the defendant's offender score does not affect the defendant's sentence length, and is therefore harmless. "A harmless error is one which is trivial, formal, or merely academic and which in no way affects the outcome of the case." *State v. Gonzales*, 90 Wn. App. 852, 855, 954 P.2d 360 (1998). Harmless error analysis may be properly applied to sentencing errors. *See State v. Bobenhouse*, 166 Wn.2d 881, 896-897, 214 P.3d 907 (2009) ("Any error in not treating Bobenhouse's crimes as the "same criminal conduct was harmless..."); *State v. Argo*, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996) ("Here, Argo concedes that the standard range would remain the same whether his offender score was 16 or 13. Thus, [*State v.*] *Brown*, [60 Wn. App. 60, 802 P.2d 803 (1990)] does not mandate remand in this case, and the error in the trial court's calculation of Argo's offender score was harmless"); *see also, State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003) ("Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a

factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing”).

Assuming the defendant’s offender score should have been calculated as a “2” rather than as a “4” due to the “same criminal conduct” analysis set forth above, the record reflects that the trial court would have sentenced the defendant to the same amount of incarceration - 147 months. Any error resulting from not treating the defendant’s crimes of conviction as the same criminal conduct does not require resentencing, but rather, only remand for the sentencing court to correct the judgment and sentence so that it accurately reflects the defendant’s offender score.

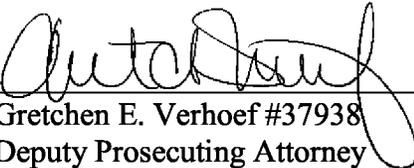
V. CONCLUSION

The State respectfully requests that the court affirm the trial court and jury verdicts. The errant remark made by Ms. Rivas was not so prejudicial that it could not be cured by the two instructions given by the court. Additionally, the trial court did not err in determining that the crimes of promoting commercial sexual abuse of a minor and human trafficking in the second degree are not the same criminal conduct for purposes of determining the defendant’s offender score, and in any event, any error in

calculating the defendant's offender score was harmless, and should only be remanded for a clerical correction rather than resentencing.

Dated this 30 day of June, 2017.

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

STATE OF WASHINGTON,

Respondent,

v.

DANTE OLIVER,

Appellant.

NO. 34531-9-III

CERTIFICATE OF MAILING

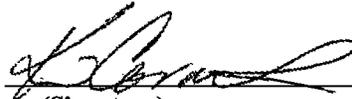
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