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61654-4

NO. 61654-4-I  
NO. 61573-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY DUBOSE, AND  
KEVIN LAMONT SPEARS,

Appellants.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD McDERMOTT  
THE HONORABLE CHRISTOPHER WASHINGTON

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED<sup>1</sup>**

1. Whether the trial court properly allowed the State to amend the information after the first trial to add a charge alleging that the defendants raped victim D.S.

a. Whether the defendants were not entitled to dismissal of the rape charge under the mandatory joinder rule because they opposed the State's motion to add the charge before the first trial.

b. Whether the rape of D.S. was not a "related offense," as defined under the mandatory joinder rule, to any of the charges at the first trial.

c. Whether DuBose has failed to show that double jeopardy was violated by prosecution on the rape charge.

d. Whether DuBose has waived any double jeopardy claim because he opposed adding the rape charge at the first trial.

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<sup>1</sup> On appeal, defendants Kevin Spears and Anthony DuBose raise some identical issues and some unique issues. The State addresses each issue in the order in which it arose during the case, identifying at the outset which defendant has raised the issue.

2. Whether the trial court properly denied Spears's Batson<sup>2</sup> challenge to the State's use of a peremptory challenge against Juror 28.

3. Whether the trial court acted within its discretion in denying Spears's motion for a mistrial based upon the victim's emotional outburst.

4. Whether the trial court properly denied Spears's motion for a mistrial based upon alleged prosecutorial misconduct.

5. Whether the trial court acted within its discretion in finding that DuBose's and Spears's convictions for rape and kidnapping did not constitute the same criminal conduct.

6. Whether Spears's case should be remanded for a determination of whether his California burglary conviction is comparable to a Washington offense.

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<sup>2</sup> Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

**B. STATEMENT OF THE CASE**

**1. SUBSTANTIVE FACTS<sup>3</sup>**

a. Background

In the spring of 2004, 19-year-old M.M. met Kevin Spears. 8RP 80-81; 51RP 11-20; 53RP 108-10.<sup>4</sup> She was strongly attracted to him; within a few days, she had moved out of her parents' house and began living with Spears. 8RP 83-85; 51RP 13-21; 53RP 39. At Spears's urging, she began to work as a prostitute. 8RP 87-92; 51RP 20-22. Spears acted as her pimp. He told her how to dress, where to go and how much to charge; she gave him all the money that she made. 8RP 91, 106-12; 51RP 24-26. Within weeks of meeting M.M., Spears quit his job and used the money that she made to pay all his bills. 9RP 167-68.

After a few weeks of walking the streets, M.M. complained, and Spears arranged for her to meet men in hotel rooms through ads he placed in the newspaper. 8RP 92, 98-99; 51RP 43-45.

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<sup>3</sup> There were three trials in this case. Spears and DuBose were convicted of some charges at the first trial, and the remaining charges at the third trial. In discussing the facts of the crime, the State cites to the testimony at the first and third trials. A few witnesses testified only at the first trial, and victim D.S. testified at the third trial, but not the first trial.

<sup>4</sup> The verbatim report of proceedings consists of over 71 volumes. An index setting forth the relevant abbreviations is attached as Appendix A. Spears and DuBose did not order identical transcripts; the State has moved to transfer relevant transcripts where appropriate.

M.M. was still unhappy about prostituting herself and, instead, began dancing at Sugar's strip club. 8RP 111-13; 51RP 55-56, 60. She continued to give all the money that she made to Spears. 51RP 64.

At some point during this time, M.M. and Spears moved into a house in Tukwila and began living with Anthony DuBose. 52RP 28; 53RP 39-40; 65RP 68-69. DuBose was Spears's close friend. 8RP 120; 51RP 49-51; 65RP 59-64.

b. The Kidnapping And Rape

Spears frequently berated M.M., telling her that she was worthless and ugly. 51RP 36-43, 65. After getting advice from other dancers at the strip club, M.M. decided to leave Spears. 52RP 14-15, 28-29. One day in late October 2004, Spears beat her with a belt after she told him that she was feeling sick and did not want to go to work. 8RP 122-23. That night, after her shift ended, she went to stay at a friend's house. 8RP 123; 52RP 29. In a telephone conversation, M.M. told Spears that she was moving on and she was not going back to his house. 52RP 30.

A few days later, Spears asked M.M. if he could meet her in person, and she agreed to meet him at the club. 8RP 124-25; 52RP 29-37. On October 30, 2004, near the end of shift, Spears and DuBose showed up at the club. 52RP 40-41. M.M. told her manager and the bouncer that she did not want them there. 54RP 23. The bouncer asked them to leave, and they went across the street, watching the front door. 6RP 16-19, 66-71; 54RP 23-27.

The club manager noticed that M.M. appeared to be very upset and suggested that M.M. could come stay at her house. 6RP 76; 54RP 26-29. When her shift ended, M.M. told the club manager that she was going with Spears because she was afraid of what would happen to everyone if she stayed. 6RP 29; 54RP 38. M.M. then approached Spears and asked him if he would leave. 54RP 41.

Spears told M.M. to get in the car and promised her that they would stay in the parking lot and talk. 6RP 84-87; 8RP 129-30; 52RP 42-49; 54RP 34-37. However, after M.M. got in the car, DuBose drove off and headed for the freeway. 8RP 130-35; 52RP 49-50. M.M. asked to be let out of the car, but they refused. 8RP 134-35.

Spears demanded that M.M. turn over the money that she had made since she left him. 8RP 131-32; 52RP 50-51. Both men hit her repeatedly, and Spears went through her possessions and took approximately \$700 from her. 8RP 132-33; 52RP 50-53; 53RP 45-46.

When they arrived at the house in Tukwila, the men told M.M., "welcome to hell." 8RP 138-39; 52RP 58-59. Spears told her that she was going to be punished for trying to leave him. 52RP 60. Inside the house, DuBose told M.M. to put on her dancing outfit and "lube up." 8RP 141-43; 52RP 62-63. She heard DuBose make a telephone call, and state, "I have someone over here for you to fuck." 8RP 145; 52RP 64. Spears and DuBose told M.M. that she was in "lockdown," and that she was going to be a slave and make them money. 52RP 67.

A short time later, three men, Jerry Myers, Curtis Rose, Josh Kidd, and one female, D.S., arrived at the house. 8RP 146-47; 52RP 65-66; 53RP 52-53. D.S. knew Kidd because he frequented the convenience store where she worked. 11RP 111-13; 60RP 16-18; 61RP 111-12. Earlier that night, she had met Kidd and Myers at a party. 11RP 114-17; 60RP 18-23; 61RP 115. D.S. left the party with Kidd and Myers and picked up Rose. 11RP 117-21;

60RP 24-26, 103-07. While in the car, Myers received a call and the group headed for DuBose and Spears's house. 62RP 35-36.

When they stopped at the house, D.S. thought they were there to use the restroom before going to another party. 60RP 26-29. However, after she exited the restroom, Kidd told her that they were going to stay. 60RP 31-32.

DuBose ordered M.M. to start dancing for the new arrivals. 8RP 148; 52RP 68; 60RP 36-38. D.S. noticed that M.M. appeared scared. 60RP 38. The men danced with M.M. and threw money at her, which DuBose collected. 8RP 151; 52RP 74.

After she finished dancing, M.M. used a cell phone to call 911 and hung up. 7RP 108-09; 8RP 153; 52RP 96; 63RP 96. An officer responded to the general area, but could not locate the source of the call. 7RP 108-13; 55RP 120-22.

DuBose forced M.M. into his bedroom, and made her get on her knees and perform oral sex. 8RP 154-55; 52RP 79-81. Spears, Myers and Rose entered the room and proceeded to rape M.M. 8RP 158-65; 52RP 82-83. They held her down, and among other things inserted a beer bottle into her vagina. 8RP 161-62; 52RP 83. M.M. stated that she did not want to do this and asked the men to get off her. 52RP 83-84. M.M. claimed that she had

AIDS and herpes, but the men did not stop. 52RP 83. When one man tried to anally rape her, she stated that she was about to defecate and the man stopped. 8RP 161; 52RP 83.

The lights in the room were off, and M.M. could not say exactly which man did what; she knew multiple men raped her because they held her down when they switched off. 52RP 86-87, 111. She believed that some of the men used condoms. 53RP 54.

While the men were raping M.M., D.S. and Kidd had stayed in the kitchen, drinking and kissing. 11RP 131-32; 60RP 52-53; 61RP 138. At one point, DuBose asked them to come into the bedroom. 60RP 53-54. D.S. briefly entered and saw that someone was having intercourse with M.M. 60RP 54-55.

After the men finished raping M.M., Spears ordered her to take a shower because she was covered in beer and semen. 8RP 166; 52RP 92. As she showered, men entered the bathroom, pulled back the curtain, made lewd comments and touched her body. 8RP 166; 52RP 95, 113-14.

Meanwhile, DuBose drove D.S. to a store to get cigars. 60RP 56-57. DuBose had promised to drop D.S. off at her car on the way back, but he then claimed that he was too tired and took her back to the Tukwila house. 60RP 59-60. When they arrived

back at the house, Kidd, Myers and Rose were leaving. 60RP 61-62. DuBose locked the car doors and told her that she was going to stay with him. 60RP 62.

When D.S. reentered the house, DuBose hit and slapped her. 9RP 23-24; 52RP 128; 57RP 25-26; 60RP 65-69. Spears then forced his penis into D.S.'s mouth. 60RP 66-69. Spears and DuBose ordered D.S. and M.M. to perform oral sex on one another. 9RP 21-28; 52RP 126-31; 60RP 69-72. The men then made the women perform oral sex on the men. 9RP 30-33; 52RP 133-34; 57RP 27; 60RP 72-78. When M.M. protested, Spears told her that he owned her and that she had to do what he told her. 52RP 135.

Afterwards, DuBose took D.S. into his bedroom. 9RP 34; 52RP 137; 60RP 79. She saw that he had guns in the room. 60RP 79-80. DuBose forced D.S. to perform oral sex on him. 60RP 81.

c. The Police Investigation

At around 5:30 a.m., M.M. made a second call to 911, reporting that she had been raped and beaten, but hung up before the police could get her exact location. 6RP 122; 8RP 168-71; 52RP 124; 55RP 61; 64RP 5-6.

The police traced the 911 call and saw lights on at the Tukwila house. 6RP 124-28; 54RP 138-40; 55RP 62-68. As a police officer approached the house, he saw DuBose holding D.S.'s arms down while she was performing oral sex. 6RP 128-31; 54RP 144-47. When the officer looked in again, he saw that her hands were behind her head. 6RP 133-34. The light in the house suddenly went out, and an officer knocked on the front door. 6RP 135-36; 54RP 148; 55RP 70-71. Spears answered the door, and standing behind him, M.M. motioned that she had made the phone call. 6RP 136-37; 52RP 142-43; 54RP 149-51; 55RP 71-72. She whispered to the officers, "I'm the one that called. Get me out of here." 6RP 137; 9RP 36-37; 54RP 152-53; 55RP 92. She appeared scared and nervous. 54RP 152.

DuBose and D.S. were in his bedroom when the police arrived. 60RP 81. DuBose grabbed his guns, put them next to his bed and told D.S. that if she valued her life she would not say anything. 60RP 81, 98-99. DuBose left the bedroom, naked, and yelled at the police that they could not enter without a warrant. 6RP 9; 54RP 156; 55RP 73-75. He stated, "There's nothing going on here. We are just doing some fucking in here." 54RP 156.

An officer instructed DuBose to put his clothes on and to have D.S. come out. 54RP 156-57. When D.S. did not emerge, the officer and DuBose went to the bedroom where D.S. was in bed. 6RP 15; 54RP 158-59. She appeared to be intoxicated. 6RP 16; 54RP 159. The officer briefly spoke to D.S. with DuBose present; D.S. responded that DuBose was a friend, that she did not know anything about M.M., and that she just wanted to go to sleep. 6RP 20-21; 54RP 162-63.

M.M. told the police that nothing had happened and that she wanted to go to a friend's house. 55RP 129. After the police took her to the Tukwila Police Department, she began crying and revealed that she had been raped. 6RP 138-44; 9RP 41-44; 52RP 145-46; 55RP 133. She was uncertain whether she wanted to make a report, and expressed concern that the men would retaliate against her family. 54RP 90-91; 55RP 135-36, 166.

The police took M.M. to Harborview Medical Center, where a nurse conducted a physical exam. 9RP 45-46; 12RP 17-46; 52RP 149-50; 54RP 106-07. M.M. had spotting in her throat resembling petechiae, an indication that something had been shoved into her mouth. 12RP 36-37; 59RP 137-38. A nurse observed bruising and a cut on her face. 12RP 35-43; 59RP 130-31.

That morning, police detectives returned to the Tukwila house and contacted Spears and DuBose. 11RP 18-23; 57RP 82-93; 59RP 64-68. DuBose claimed that no one else was in the house, but a detective then discovered that D.S. was still in DuBose's bedroom. 7RP 213-15; 11RP 24-31; 57RP 92-93; 59RP 69-70.

D.S. reluctantly disclosed to the police what had occurred and was taken to Harborview. 59RP 75-77; 60RP 88, 92; 61RP 94-97. There were several bruises on her face and body. 12RP 50; 59RP 79-80, 154-58; 60RP 52; 64RP 47. D.S. reported that she had been assaulted. 59RP 146. She described how she was forced to perform oral sex on another woman and engage in oral sex with two different men. 59RP 146-49. She reported that one man ejaculated in her mouth. 59RP 150.

After obtaining a search warrant, the police found a handgun and several rifles in DuBose's bedroom. 8RP 14, 30-51; 57RP 97-105. They also found condoms and condom wrappers. 11RP 44-49; 57RP 115; 59RP 94-103.

DNA analysis established that (1) D.S.'s oral swab contained DuBose's DNA, (2) M.M.'s perineal swab contained D.S.'s DNA and (3) Myers's DNA was found on M.M.'s vaginal swabs, perineal

swabs, anal swabs and two condoms left at the scene. 58RP 54-63, 81-97.

## **2. PROCEDURAL FACTS AND THE DEFENSE**

The State charged DuBose with one count of first-degree kidnapping (M.M.), one count of second-degree rape (M.M.), two counts of fourth-degree assault (M.M. and D.S.), and four counts of first-degree unlawful possession of a firearm. CP(DuBose) 14-18. The State charged Spears with one count of first-degree kidnapping (M.M.), one count of second-degree rape (M.M.), and one count of second-degree robbery (M.M.). CP(Spears) 10-13. With respect to the kidnapping charges, the State alleged an exceptional sentence aggravating circumstance that the crime was committed with sexual motivation. CP(DuBose) 16; CP(Spears) 12. The court severed the four counts of first-degree unlawful possession of a firearm against DuBose from the remaining counts. CP(DuBose) 454-55.

The first trial occurred in November and December of 2005 before the Honorable Christopher Washington. See 4RP-16RP. The jury convicted DuBose of one count of first-degree kidnapping (M.M.) and one count of fourth-degree assault (D.S.) and hung on the remaining counts. 16RP 9-14; CP(DuBose) 133-37. The jury

convicted Spears of one count of first-degree kidnapping (M.M.) and hung on the remaining counts. 16RP 14-17; CP(Spears) 57. The jury was also apparently hung on the sexual motivation allegation on the kidnapping charges. CP(DuBose) 135; Supp. CP(Spears) \_\_\_\_ (Spears Sub No. 65F).

The case was reassigned to the Honorable Richard McDermott for retrial. 17RP 4. Prior to the second trial, the State added Myers and Rose as defendants, charging them with the second-degree rape of M.M. CP(DuBose) 138; CP(Spears) 58. The trial court permitted the State to amend the information and charged DuBose and Spears with the second-degree rape of D.S. 21RP 5-8; CP(DuBose) 195-99; CP(Spears) 69-73.

The second trial occurred in June and July of 2007 and ended in a hung jury on all charges. 38RP 41-86; CP(DuBose) 293; CP(Spears) 123.

The third trial began in late January of 2008. All four defendants testified. Spears admitted that he had encouraged M.M. to work as a prostitute, explaining that "if you like having sex you might as well get paid for it." 65RP 174, 203. He denied that he was a pimp and claimed that M.M. gave him money because she liked him. 65RP 178, 188; 66RP 48. He stated that she

voluntarily gave him \$400 on October 30, 2004 because their rent was due. 65RP 186. He denied having sex with anyone that night. 65RP 187. He testified that he saw M.M. and D.S. flirting with each other. 67RP 15-17.

DuBose testified that he had consensual sex with both M.M. and D.S. that night. 65RP 79-80, 89-90, 93-94. He admitted that he asked D.S. to perform oral sex on M.M., but claimed that he thought she was interested in that. 65RP 91-92. He admitted to striking D.S. twice, but claimed that it was "in a joking type manner." 6RP 85-86, 100.

Myers testified that he had consensual sex with M.M. and that afterwards she asked for his telephone number. 64RP 121-25. Rose testified that he did not rape M.M. and did not observe anything untoward occurring at the house that night. 67RP 31-50.

The jury convicted Spears and DuBose of all remaining charges at the third trial. CP(DuBose) 366-67; CP(Spears) 126-28. The jury acquitted Myers and Rose. CP(DuBose) 580.

Prior to sentencing, DuBose pled guilty to one count of first-degree unlawful possession of a firearm, and the State dismissed the remaining three counts. 70RP10-18; CP(DuBose) 421.

In summary, the charges were resolved as follows:

	<b>Spears</b>	<b>DuBose</b>
Kidnap 1 - M.M.	Convicted - 1 <sup>st</sup> trial	Convicted - 1 <sup>st</sup> trial
Assault 4 - D.S.	n/a	Convicted - 1 <sup>st</sup> trial
Rape 2 - M.M.	Convicted - 3rd trial	Convicted - 3rd trial
Rape 2 - D.S.	Convicted - 3rd trial	Convicted - 3rd trial
Robbery 2 - M.M.	Convicted - 3rd trial	n/a
UPFA 1	n/a	Pled Guilty

Spears and DuBose both appealed their convictions. While the appeals were not consolidated, this Court linked them and authorized the State to file one consolidated brief.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO AMEND THE CHARGES AFTER THE FIRST TRIAL.**

Spears and DuBose claim that the trial court erred by permitting the State to amend the information after the first trial to add a charge alleging the rape of D.S. Both defendants argue that the amendment violated the mandatory joinder rule, and DuBose further claims that because he was convicted of the fourth-degree assault of D.S. at the first trial, double jeopardy prevented the State from pursuing the rape charge at the subsequent trials.

This Court should reject these claims. The defendants' mandatory joinder claim fails because the State attempted to join

the rape charge with the other charges before the first trial began. The court rule recognizes that dismissal is unwarranted when a motion for consolidation of the offenses was previously denied.

In addition, not all of the acts of rape qualified as "related offenses" subject to the mandatory joinder rule. Offenses are related only when they are based upon the same conduct or are part of a single criminal incident or episode. Here, there were multiple acts of rape; the defendants raped D.S. at various times during the night. While some acts of rape occurred at the same time the defendants raped M.M., other acts of rape occurred independently and in different locations. Because not all of the acts of rape were part of the same criminal episode, the defendants were not entitled to the wholesale dismissal of the rape charge under the mandatory joinder rule.

DuBose's double jeopardy claim is also without merit. This Court has recognized that second-degree rape and fourth-degree assault contain elements not found in the other, and therefore, under the same evidence test, double jeopardy is not violated by pursuing successive prosecutions on the two crimes. In addition, the trial court ensured that the jury did not rely upon the same acts for both crimes by giving a limiting instruction at the subsequent

trials. This Court should affirm the defendants' convictions for the rape of D.S.

a. Relevant Facts

Several weeks before the first trial, the State gave notice that it would seek to amend the information to add an additional count of second-degree rape based upon the rape of D.S. 2RP 12. A hearing on the amendment was scheduled one week before trial, but the motion was reserved for the trial court to address. Supp. CP(Dubose) \_\_\_ (DuBose Sub No. 164); Supp. CP(Spears) \_\_\_ (Spears Sub No. 57). Spears and DuBose objected to the amendment, arguing, among other things, that they were not prepared to defend against a charge alleging the rape of D.S. 2RP 7-11. DuBose argued that the State had mismanaged the case and asked the court to deny the amendment under CrR 8.3(b). 2RP 7-19; CP(DuBose) 22-31.

The prosecutor responded that the rape charge was based upon evidence already in the possession of the defense; the discovery given to the defense indicated that D.S. reported that she had been forced to have sex with both men. 2RP 11-14, 23-25. The prosecutor also noted that defense counsel had extensively

interviewed D.S., and argued that they had time to re-interview her. 2RP 11-14, 24-25.

The court denied the motion to amend, accepting the defense's representations that they could not be properly prepared within the speedy trial time period. 2RP 30-32. However, the court rejected the defense argument that the State had mismanaged the case. 2RP 29 ("I would not characterize this in any event as being mismanagement"). The court suggested that the State could dismiss the charge alleging the fourth-degree assault of D.S. and file a separate case involving charges relating to D.S.<sup>5</sup> 3RP 30-32. The court inquired of defense whether they would object if the State filed a new case involving charges relating to D.S., and DuBose's counsel responded that he did not have an answer. 2RP 31. The judge responded it was a significant concern for him and that he was willing to grant a motion from the State to dismiss the fourth-degree assault charge involving D.S. without prejudice to re-file the same or an amended charge. 2RP 32.

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<sup>5</sup> The court's suggestion that the State pursue a separate case involving D.S. was not based upon mandatory joinder or double jeopardy concerns. Rather, the court expressed concern that, in defending against the rape of M.M. charge, the defendants might exploit the fact that the State had charged only the fourth-degree assault of D.S., despite the evidence that they also raped D.S. 2RP 21-22, 30.

The next day, for unrelated reasons, the court recessed the case for two weeks. 3RP 33. The prosecutor renewed the motion to amend the information, which the court denied. 3RP 64-73.

D.S. did not testify at the first trial. DuBose was convicted of the fourth-degree assault of D.S. CP(DuBose) 134.

Prior to the beginning of the second trial, the State again moved to amend the information to add a count alleging the second-degree rape of D.S. 18RP 14-18. The defense attorneys for Spears and DuBose had both re-interviewed D.S. CP(DuBose) 512; Supp. CP(Spears) \_\_\_ (Spears Sub No. 121). Spears and DuBose objected to the amendment, arguing that it was barred under the mandatory joinder rule. 18RP 26-30. DuBose also argued that the amendment would violate double jeopardy because he had been convicted of the fourth-degree assault of D.S. at the first trial. 18RP 14-25.

The trial court ruled that the mandatory joinder rule did not prevent the amendment because the State had attempted to join the charges prior to the first trial. 21RP 5. The court held that double jeopardy was not violated because the facts supporting DuBose's rape of D.S. had not been admitted at the first trial. 21RP 7-8. In order to ensure that the jury did not find the forcible

compulsion element of rape based upon the same facts supporting DuBose's conviction for the fourth-degree assault, the court instructed the jury that:

The State alleges that the defendant, Anthony DuBose, committed acts of rape against [D.S.] on multiple occasions. You may consider only those acts which occurred after the defendant and [D.S.] went into the defendant's bedroom. You may not consider any acts of forcible compulsion or sexual intercourse involving the defendant and [D.S.] which occurred before that.

CP(DuBose) 382.

The defendants renewed the motion to dismiss the rape charge before the third trial, and the trial court denied it. 40RP 71-79.

b. The Mandatory Joinder Rule Did Not Require Dismissal Of The Rape Charge.

Under the mandatory joinder rule, two or more offenses must be joined in a single trial if they are "related offenses." CrR 4.3.1(b)(3). Offenses are related if they are within the jurisdiction and venue of the same court and are based on the "same conduct." CrR 4.3.1(b)(1). "Same conduct" is conduct that involves a single criminal incident or episode. State v. Lee, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997).

After a trial on one offense, a defendant may move to dismiss a charge for a related offense. The relevant portion of the rule provides:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule.

CrR 4.3.1(b)(3).

The purpose of the mandatory joinder rule is "to protect defendants from 'successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a hold upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials.'" State v. Russell, 101 Wn.2d 349, 353 n.1, 678 P.2d 332 (1984) (quoting ABA Standards Relating to Joinder and Severance 19 (Approved draft 1968)).

Spears and Dubose's mandatory joinder claim fails for two reasons: (1) the State's motion to consolidate the rape charge with the other charges was previously denied, and (2) the rape of D.S. was not a "related offense" as defined by the rule.

CrR 4.3.1(b)(3) provides that a defendant may move to dismiss a charge for a related offense "unless a motion for

consolidation of these offenses was previously denied." Here, prior to the first trial, the State attempted to add the second-degree rape count. Spears and DuBose successfully objected to the amendment of the information, claiming they could not be prepared for trial on that count. Under the plain language of CrR 4.3.1(b)(3), they were not entitled to dismissal of that count at the second trial because a motion for consolidation of the offenses was previously denied. Accordingly, the trial court properly allowed the State to add the charge after the first trial.

DuBose argues that only a *timely* motion for consolidation bars a later dismissal under the rule and that the State's motion to consolidate was untimely. However, while other sections of the rule expressly refer to a "timely motion to consolidate,"<sup>6</sup> the provision governing dismissal of charges does not. The exclusion of language from one section of a rule when included in another part indicates an intent to do so. State v. Delgado, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). Given the extreme remedy of dismissal and the purposes of the mandatory joinder rule, this is understandable. The purpose of the rule is to prevent the State from pursuing

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<sup>6</sup> CrR 4.3.1(b)(2).

successive prosecutions based upon the same conduct or harassing a defendant through multiple trials. Here, the State sought to pursue all of the charges in one trial. The trial court at the second trial properly recognized that DuBose and Spears could not complain that the mandatory joinder rule was violated when they had opposed joinder of the charges at the first trial.<sup>7</sup>

Dubose and Spears were also not entitled to dismissal of the rape charge under the mandatory joinder rule because the rape of D.S. was not a "related offense" to the charges at issue in the first trial. A related offense is one "based upon the same conduct." CrR 4.3.1(b)(1). Only offenses based upon the same conduct or conduct involving a single criminal incident or episode are related offenses. State v. Kindsvogel, 149 Wn.2d 477, 482, 69 P.3d 870 (2003). "[T]he mandatory joinder rule does not extend to offenses which are part of a common plan." Lee, 132 Wn.2d

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<sup>7</sup> Though CrR 4.3.1(b)(3) does not provide for dismissal of charges when the defendant opposes an untimely motion to consolidate, dismissal may be warranted under CrR 8.3(b). Under that rule, a defendant may be entitled to dismissal of untimely filed charges if he can show that the government mismanaged the case and that the mismanagement prejudicially affected his right to a fair trial. State v. Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). Here, when denying the motion to amend before the first trial, the trial court expressly rejected the defense claim that the State had mismanaged the case. On appeal, neither defendant argues that dismissal was warranted under CrR 8.3(b).

at 505. "Merely because some of the allegedly criminal activity was the same is not enough to conclude all the offenses are based on the same conduct." Id. "A critical characteristic of a single episode... is the fact that proof of one offense necessarily involves proof of others." 2 ABA Standards for Criminal Justice, Joinder and Severance 13-1.2, Commentary (2d ed. 1980).

In Kindsvogel, after the defendant assaulted his wife, she reported the assault to the police and also revealed that her husband was growing marijuana in their basement. 149 Wn.2d at 479-80. The State charged Kindsvogel with fourth degree assault, and after he pled guilty in that case, the State charged him with possession of marijuana. Id. at 480. The Washington Supreme Court held that the mandatory joinder rule did not prohibit the possession of marijuana charge:

This case is not close. Fourth degree assault and possession of marijuana do not involve the same physical acts or actions. The actions underlying the two charges had different purposes and did not involve the same victim or victims....

The ABA Standards for Criminal Justice std. 13-1.2 commentary limits the acts that constitute a "single criminal episode" to offenses which occur in close proximity of time and place, where proof of one

offense necessarily involves proof of the other. Id.  
at 13-10.

Id. at 483.

Here, while all of the crimes occurred over the period of one night, they were not based upon the same series of acts, and proof of one offense did not necessarily require proof of the other. For example, late that night, DuBose raped D.S. when he was alone with her in his bedroom and forced her to perform oral sex. Similarly, D.S. testified that Spears raped her by forcing his penis into her mouth when she was between the kitchen and the hallway. 30RP 117-18; 60RP 66, 197-98. Evidence of these rapes did not necessarily involve proof of the charges at the first trial.<sup>8</sup> The trial court properly rejected the defendants' argument that the mandatory joinder rule prohibited the State from adding the rape charge prior to the second trial.

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<sup>8</sup> The crimes at issue in the first trial were the kidnapping, rape and robbery of M.M. and DuBose's fourth-degree assault of D.S. D.S. did not testify at the first trial. The fourth-degree assault of D.S. at issue in the first trial was based upon M.M.'s testimony that DuBose slapped D.S. See 15RP 38, 44.

c. The Trial On The Rape Charge Did Not Violate DuBose's Double Jeopardy Rights.

DuBose also argues that because he was convicted of the fourth-degree assault of D.S. at the first trial, the prosecution of the rape charge at subsequent trials violated the double jeopardy clause. This claim fails because (1) the rape and assault charges do not qualify as the same offense for double jeopardy purposes, and (2) DuBose waived any double jeopardy claim by opposing joinder of the charges at the first trial.

The double jeopardy clause protects against a second prosecution for the same offense after conviction. State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). The "same evidence" test applies to determine whether successive prosecutions violate the double jeopardy. Id. at 101-07. In order to be the same offense, the offenses must be the same in law and in fact. In re Percer, 150 Wn.2d 41, 50, 75 P.3d 488 (2003). If there is an element in each offense that is not included in the other, the offenses are not the same in law and the double jeopardy clause does not prevent convictions for both offenses. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

DuBose fails to offer any analysis on whether second-degree rape and fourth-degree assault are the same offense for purposes of double jeopardy. In fact, Washington courts have recognized that second-degree rape and fourth-degree assault contain elements not found in the other; therefore, the crimes are not the same in law. In State v. Walden, 67 Wn. App. 891, 894-96, 841 P.2d 81 (1992), this Court held that fourth-degree assault was not a lesser-included offense of second-degree rape because it contained an element not included in the other. The court explained:

The crime of assault requires proof of intent; rape does not. Because one can be convicted of rape without proof of the existence of any mental state, while one cannot be convicted of assault without proof of the mental element of intent, the legal prong fails. [Citations omitted].

Although intent is not an express statutory element of second degree rape, at first blush it might appear that intent is at least implicit in the crime of second degree rape by forcible compulsion.... This first impression is misleading. Rape criminalizes nonconsensual sexual intercourse regardless of criminal intent or knowledge. Whenever confronted with the issue, our courts have consistently rejected the argument that intent or knowledge is an implied element of the crime of rape. [Citations omitted].

....

Moreover, there is good reason to refrain from engrafting a culpable mental state onto the crime of rape by forcible compulsion. Requiring proof that the actor intended to forcibly compel intercourse would lead to the troubling result that a perpetrator could be exonerated by arguing that he did not intend to overcome resistance or did not intend his conduct as an express or implied threat.

We therefore conclude that fourth degree assault does not meet the legal prong of the lesser-included test.

Id. at 894-96; see also State v. Allen, 116 Wn. App. 454, 66 P.3d 653 (2003) (holding that second-degree assault was not a lesser-included offense of first-degree rape, because assault contains the element of intent while first-degree rape does not).<sup>9</sup>

Even if the crimes were the same in law, the record establishes that the fourth-degree assault conviction and the second-degree rape conviction were not the same in fact. Two offenses are not the same in fact when the first one is over before the second one is committed. In re Fletcher, 113 Wn.2d 42, 49,

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<sup>9</sup> At trial, DuBose cited State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979), overruled on other grounds in State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999). However, Johnson, concerned the charge of *first-degree* rape. The court held that convictions for first-degree kidnapping, and first-degree assault merged with the rape conviction because "the restraints and use of force elevated the acts of sexual intercourse to rape in the first degree" and "were intertwined with the rape." 92 Wn.2d at 681. Johnson is distinguishable; unlike first-degree rape, second-degree rape does not include the use of a deadly weapon or the infliction of serious physical injury as elements. 92 Wn.2d at 674.

776 P.2d 114 (1989). Here, the trial court gave a limiting instruction in order to prevent the jury, in deciding the rape charge, from relying upon the same acts supporting the assault conviction. D.S. did not testify at the first trial, and the fourth-degree assault charge was based upon M.M.'s observations of DuBose slapping D.S. At the third trial, the court instructed the jury to consider only those acts that occurred after DuBose and D.S. went into DuBose's bedroom. CP(DuBose) 382.

DuBose speculates that the jury at the first trial may have based his assault conviction on Officer Devlin's observations through the window of DuBose and D.S. in the bedroom. The record does not support this claim. At the first trial, Officer Devlin testified that when he first looked through the window, he saw DuBose holding D.S.'s hands down while she performed oral sex. 6RP 130-32. When the officer looked in again, he saw that her hands were behind her head, and he told his fellow officer that D.S. was not being forced. 6RP 133-34; 7RP 38-39. Officer Devlin further testified that when he then spoke with D.S., she appeared very relaxed and told him that everything was fine. 7RP 20, 37. Not surprisingly, in closing the prosecutor did not suggest in closing

that these observations supported the assault charge, and, instead, argued that DuBose assaulted D.S. by slapping her in the presence of M.M. 15RP 37. The convictions were not the same in fact.

Finally, even if the second-degree rape and fourth-degree assault charges satisfied the same evidence test, DuBose waived any double jeopardy objection to successive prosecutions by objecting to consolidation of the offenses before the first trial. The United States Supreme Court has recognized that a defendant may waive a double jeopardy claim by opposing consolidation of offenses. In Jeffers v. United States, 432 U.S. 137, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977), a federal grand jury returned two indictments: one charged Jeffers with conducting a continuing criminal enterprise to violate the drug laws and the other charged him with conspiracy to distribute drugs. Jeffers successfully opposed the government's motion to consolidate the indictments for trial. On appeal, Jeffers argued that the successive trials violated the prohibition against double jeopardy. The Supreme Court rejected Jeffers' argument, holding that he had waived his right to raise a double jeopardy claim. "[A]lthough a defendant is normally entitled to have charges on a greater and a lesser offense resolved

in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." 432 U.S. at 154; see also State v. Lange, 495 N.W.2d 105, 107-08 (Iowa 1993).

As in Jeffers, DuBose opposed consolidation of the rape and assault charges at the first trial. Accordingly, he waived his right to complain that a subsequent prosecution on the rape charge violated the prohibition against double jeopardy.

**2. THE TRIAL COURT PROPERLY REJECTED SPEARS'S BATSON CHALLENGE TO THE STATE'S REMOVAL OF JUROR 28.**

Spears claims that the trial court erred by permitting the State to exercise a peremptory challenge against Juror 28. During voir dire, Juror 28 volunteered his opinion that "lots" of people lied about being raped, and he was equivocal when asked if he could be fair. In light of these comments, the trial court acted within its discretion in finding that Spears failed to prove purposeful racial discrimination. This Court should hold that the trial court properly denied Spears's Batson challenge.

a. Relevant Facts

During voir dire at the third trial, the prosecutor posed an open-ended question to a number of jurors, asking what they thought "about all this." 49RP 34-35. Juror 28, the sole African-American juror, responded:

I walked in here, I seen these four guys, you know, four black guys, and that's a lot of stuff, being the victim, you know, it's a rape trial, too, and I have mothers and sisters who are close to me, so it'll be a tough trial, but I'd be fair.

49RP 35. When the prosecutor asked a follow-up question about Juror 28's reference to his mother and sister, he responded:

JUROR 28: I think rape is one of the worst things to do to a person, but there's lots of peoples that say they were raped and they wasn't raped, you know, they'll say that, lie about it, so it's a two-way street. And then the victim, you know, these guys here, it'll be tough on them, too.

I look around and like, wow, you know, this is tough so it would be hard for me, so --

PROSECUTOR: Yeah. And when you say it'll be tough, you look around and see you're the only African-American man in the jury.

JUROR 28: I wouldn't want to be in their spot right now.

PROSECUTOR: Are you afraid that with the other jurors there will be some race-based decision?

JUROR 28: They'll say not, but race is a part of everything. Uh, when they first walk in here, you could see the look on their face, everybody's. I looked around, you know, so it will be intentionally I wouldn't say, but it's a different environment, people come from a different environment.

PROSECUTOR: Would that knowledge or that feeling that you had affect your ability to be impartial?

JUROR 28: Uh, probably. I would listen to all the evidence and I will listen to all the testimonies and everything, and I wouldn't go their side because they're black, or the victim's side, I would be fair, try to be fair as best I can.

49RP 36-37.

The next day, the prosecutor alerted the court that he intended to use a peremptory challenge to remove Juror 28. 50RP 7. After the defendants raised a Batson challenge, the prosecutor stated that he was exercising the peremptory challenge because Juror 28 had volunteered that he believed that "a lot" of people falsely reported being raped. 50RP 15. The prosecutor also noted that Juror 28 had given an equivocal answer as to whether he could be fair. 50RP 16.

The court then rejected the Batson challenge, explaining:

I think that [the prosecutor] has the right to exercise a peremptory challenge if he feels a juror can't be fair. I think that on balance, this man has given him, although clearly it does not rise to the level of being excusable on a challenge for cause, nevertheless, he

certainly has raised some issues in his response to questions put to him by [the prosecutor]....

I don't think that [the prosecutor's] peremptory challenge is race-based. I think it's based on his perception of whether or not this potential juror could be fair. And I think he has indicated that he brings some baggage to the decision-making process, and I think the State has the right to challenge him, so that will be my ruling.

50RP 19-20.

b. The Trial Court Acted Within Its Discretion In Finding That Spears Failed To Establish Purposeful Racial Discrimination.

The trial court applies a three-part test when responding to a challenge under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). First, the trial court must determine whether the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. Rice v. Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006). Second, if the defendant makes a *prima facie* case, the burden shifts to the prosecutor to give a race-neutral explanation for the strike. Id. "Although the prosecutor must present a comprehensible reason, '[t]he second step of this process does not demand an explanation that is persuasive, or even

plausible; so long as the reason is not inherently discriminatory, it suffices." Id. (quoting Purkett v. Elem, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam)). Third, the trial court considers the proffered explanation and determines whether the opponent of the strike has proved purposeful racial discrimination. Rice, 546 U.S. at 338. "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" Id. (quoting Purkett, 514 U.S. at 768).

Here, the trial court did not find that Spears had made a *prima facie* case. Instead, the prosecutor offered a race-neutral explanation for the strike, and the court proceeded to address the second and third portions of the test. Once a prosecutor offers a race-neutral explanation for the strike and the trial court rules on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a *prima facie* case is moot. Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

The court found that the prosecutor's race-neutral explanation for striking Juror 28 was valid and not pretextual. The trial court's determination on the third part of the test is accorded great deference on appeal. Hernandez, 500 U.S. at 364. The evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province. State v. Hicks, 163 Wn.2d 477, 493, 181 P.3d 831 (2008). It will be upheld unless it is clearly erroneous. Luvone, 127 Wn.2d at 699.

Spears has not shown that the trial court's ruling was clearly erroneous. Juror 28 volunteered his opinion that many people lied about being raped. He also expressed some equivocation about whether he could be impartial. Given that the defense in this case was that M.M. and D.S. were lying about being raped, it was understandable that the prosecutor would have serious reservations about having Juror 28 serve as a juror on the case. The trial court did not err in finding that the defense failed to establish an improper racial motive for the strike.

**3. THE TRIAL COURT PROPERLY DENIED  
SPEARS'S MOTION FOR A MISTRIAL BASED  
UPON M.M.'S OUTBURST.**

Spears claims that his due process right to a fair trial was violated by M.M.'s emotional outburst during cross-examination at the third trial. The trial court observed and heard the outburst and concluded that it was not so prejudicial as to require a mistrial. This Court accords great deference to the trial judge in this area because he saw and heard the outburst. On appeal, Spears has not shown that the trial court abused its discretion in making this decision.

**a. Relevant Facts**

During the third trial, after nearly a day of cross-examination, DuBose's counsel began questioning M.M. about her relationship with Spears. 53RP 108-19. She broke down after a series of questions about her desire for a romantic relationship with him:

DEFENSE COUNSEL: You said that [Spears] put a facade or a dream in your head; is that right?

M.M.: Yes.

DEFENSE COUNSEL: In that facade, that dream, was love, a romantic relationship; is that right?

M.M.: Yes.

DEFENSE COUNSEL: That's what you wanted; isn't it?

M.M.: Yes.

DEFENSE COUNSEL: That's what you were desperate for, isn't it?

M.M.: Yes.

DEFENSE COUNSEL: And you would do anything for that; isn't that right.

M.M.: I guess so, obviously.

DEFENSE COUNSEL: And that's why you worked as a prostitute; isn't that right?

M.M.: I didn't hear the question.

DEFENSE COUNSEL: And that's why you worked as a prostitute; isn't that right?

M.M.: (Extreme crying and screaming by the witness.)

DEFENSE COUNSEL: Did the Court want to take a recess?

THE COURT: Yes.

53RP 119-20.

The next day, all four defendants moved for a mistrial, complaining about the intensity of M.M.'s outburst. 54RP 4-8. One defense counsel suggested that the outburst was contrived. 54RP 6. After inviting briefing and considering the issue, the court

denied the motion, concluding that it was not so prejudicial to the defense to require a mistrial. The court explained:

I believe that the jury is indeed ultimately the one in charge of deciding who has the most credibility here. And if it's [M.M.] or not and trying to figure out how credible [M.M.] is. And I think that her outburst can cut both wa[ys].... I don't know whether a jury is going to think that she was faking it or not faking it. We all were here.

Everybody I suppose has their own interpretation of what she did. Everybody can also I think agree that this was not something that the State put her up to. We all acknowledged that last Thursday before we recessed for the weekend. So, I think her credibility will be critically examined by the jury; and I think one of the factors that they are going to use to examine her credibility is her behavior on the stand....

And I do think there is two sides to determining... whether or not her behavior was prejudicial. I don't think that there is anything that's more likely that it was harmful or prejudicial to the defendants as it was to herself. I think that the jury is going to have to decide how to value her testimony, and I don't share the same sentiment, Mr. Frantz, that you are prohibited from aggressively cross examining her.

55RP 5-6.

Cross-examination of M.M. resumed several days later.<sup>10</sup>

56RP 21. Defense counsel used the same line of questioning that had prompted M.M.'s earlier outburst. 56RP 24. M.M. had no

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<sup>10</sup> The delay in resuming cross-examination of M.M. was due to scheduling issues and was not related to her outburst. 53RP 120-25.

further outbursts, and all four defense counsel cross-examined her at length over several days. See 56RP 21-132; 57RP 56-75.

b. The Trial Court Did Not Abuse Its Discretion In Denying Spears's Motion For A Mistrial.

In a criminal proceeding, the trial court should grant a mistrial only when the defendant “has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.” State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). The granting or denial of a mistrial is a matter within the discretion of the trial court, and an abuse of discretion occurs only when no reasonable judge would have reached the same conclusion. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000).

The appellate courts have long recognized that a witness's outburst is not automatic grounds for a mistrial and that the trial court is in the best position to determine the effect of any outburst. In State v. Wilder, 4 Wn. App. 850, 486 P.2d 319 (1971), the defendant was charged with carnal knowledge, and the victim sobbed uncontrollably at times while testifying. The defendant complained that “this behavior so aroused the sympathy of the

jurors that they were unable to deliberate impartially on the question of his guilt or innocence." 4 Wn. App. at 851. The Court of Appeals recognized that "the trial court had the distinct advantage of observing the behavior of the complaining witness, and the visible reaction, if any, of the jurors," and held that the court did not abuse its discretion in denying a motion for a mistrial. Id. at 851-52.

Spears does not discuss Wilder, but cites to a number of Missouri appellate decisions where convictions were also upheld despite emotional outbursts by witnesses at trial. Spears's Brief of Appellant at 20-21. The Wilder court's deference to the judgment of the trial court about the impact of an emotional outburst is consistent with decisions in other states. See Thomas v. State, 748 So.2d 970, 980 (Fla. 1999) (recognizing that the appellate court should defer to trial judge's judgment when reviewing motions for mistrial based upon emotional outbursts from witnesses); People v. Randall, 363 Ill.App.3d 1124, 1130, 845 N.E.2d 120 (Ill. App. Ct 2006) (holding that in attempted rape case, trial court did not abuse its discretion in denying a mistrial based upon the victim wailing within earshot of the jury after she testified); State v. Simmons, 662 S.E.2d 559, 561 (N.C. Ct. App. 2008) (holding that the trial court did

not abuse its discretion in denying a mistrial after rape victim suffered an “emotional breakdown” while on the stand).

Here, the trial court personally witnessed M.M.'s outburst in the context of her testimony and was in an excellent position to evaluate any possible prejudicial effect. The court found that M.M.'s outburst did not necessarily prejudice the defendants, and, in fact, suggested that M.M.'s behavior might cause the jury to view her negatively. In addition, there is no evidence that the outburst had any effect on defense counsel's cross-examination of M.M.; four defense counsel proceeded to cross-examine M.M. at length over several days. The court did not abuse its discretion in denying the motion for a mistrial.

**4. SPEARS HAS NOT SHOWN THAT PROSECUTORIAL MISCONDUCT JUSTIFIES A NEW TRIAL.**

Spears claims that he is entitled to a new trial based upon two instances of prosecutorial misconduct occurring at the third trial. He complains that (1) the prosecutor acted improperly by displaying a gun, an admitted exhibit, while questioning a witness and (2) the prosecutor improperly phrased a question to a co-defendant that linked prostitution with rape.

a. Relevant Facts

The first instance of alleged prosecutorial misconduct occurred when the prosecutor questioned a police officer about a handgun found in DuBose's bedroom. During the execution of the search warrant at the Tukwila house, the police found several firearms, including a loaded handgun, in DuBose's room. 57RP 103-09. The handgun (Ex. 46) was admitted at trial during M.M.'s testimony. 52RP 45-46.

D.S. testified that after DuBose pulled her into his room, she saw guns on his bed. 60RP 79. He wrapped them in a blanket and put them under the bed. Id. After seeing them she was scared, and she complied with his demand that she perform oral sex. 60RP 80-81. When the police arrived at the house, DuBose told D.S. that if she valued her life she should not say anything. 60RP 81.

Officer Devlin was one of the police officers who responded to M.M.'s 911 call. 54RP 136-49. He testified that he went into the back bedroom with DuBose and contacted D.S. 54RP 159. He talked to D.S. only while DuBose was present and then left her at the house with DuBose and Spears. 54RP 163-65. The officer

acknowledged that he did not look around DuBose's bedroom.

54RP 160. During the officer's testimony, the prosecutor showed the handgun to the officer and asked whether the officer had seen it in the bedroom. 54RP 161. Defense counsel objected on the grounds that it was inflammatory and that the witness had not seen the gun. Id. Though the handgun had already been admitted, the court instructed the prosecutor to put the gun in a box and then ask the officer whether he had seen it. Id.

Spears's counsel moved for a mistrial, which the court denied. 54RP 162-70. The court characterized the prosecutor's conduct as excessive and improper, but concluded that "I don't believe it rises to the level of egregious enough action for a mistrial." 54RP 169-70.

The prosecutor subsequently explained that the firearm had been admitted and he had been attempting to show the shortcomings in the initial police response. 54RP 168-69; 55RP 11-12.

The second instance of alleged prosecutorial misconduct occurred when the prosecutor cross-examined defendant Myers about a conversation Myers claimed to have had with Spears. 65RP 4-7. Myers testified that Spears had told him that he was a

pimp, and Myers responded that he did not agree with it and thought Spears could do something better with his life. 65RP 6-7. The prosecutor inquired what Myers meant by doing something better and asked, "Did you mean that he could do something better in his life where he wasn't exposing women to being raped?" 65RP 7. The court granted Spears's motion to strike the question, but denied a motion for mistrial. 65RP 7-8.

Later, when the jury was excused, defense counsel did not argue that the single question itself justified a mistrial, but instead suggested that a mistrial was necessary due to the "cumulative effect of these issues." 65RP 28-29. The court denied the motion for a mistrial without hearing from the prosecutor. 65RP 29.

Later, during cross-examination of Spears, Spears agreed that M.M. was in danger of being raped when she acted as a prostitute. 66RP 7.

b. The Trial Court Did Not Abuse Its Discretion In Denying Spears's Motion For A Mistrial Due To Prosecutorial Misconduct.

This Court reviews rulings on allegations of prosecutorial misconduct for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). When the defendant moves for a

mistrial based on prosecutorial misconduct, the court gives deference to the trial court's ruling since "the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced the defendant's right to a fair trial." Id. at 719 (quoting Luvene, 127 Wn.2d at 701). Spears must establish that the prosecutor's conduct was both improper and prejudicial such that "there is a substantial likelihood the misconduct affected the jury's verdict." Stenson, 132 Wn.2d at 718-19.

Spears fails to show that the trial court abused its discretion by not granting a mistrial based upon the two incidents of alleged prosecutorial misconduct. With respect to the first instance, Spears fails to establish that the prosecutor's conduct was even improper. The prosecutor questioned the witness about an admitted exhibit. Through this line of questioning, the prosecutor was attempting to point out that the officer had been less than thorough in his handling of the situation, by failing to talk to D.S. outside the presence of DuBose and by failing to be aware of the guns in the bedroom. Spears cites no authority for the proposition that an attorney cannot question a witness about an admitted exhibit unless the witness was involved in the discovery of the evidence. Indeed, it is not uncommon for defense attorneys to cross-examine

police officers about evidence that the officer overlooked at the scene of a crime.<sup>11</sup>

Spears also fails to establish how he was prejudiced by this questioning. The gun was an admitted exhibit. The jury heard testimony from a variety of witnesses about the weapon. Moreover, it was found in DuBose's, not Spears's, bedroom. DuBose admitted that he had the guns in his room. 65RP 160-61. The fact that the prosecutor displayed an admitted exhibit during the questioning of a witness did not justify a mistrial.

With respect to the second incident involving the cross-examination of co-defendant Myers, Spears fails to show how he was prejudiced. The court sustained the objection and struck the prosecutor's question. The assumption of the question - that prostitution exposes women to being raped - was not disputed. During his own testimony, Spears admitted that M.M. was in danger of being raped when she acted as a prostitute. Spears has failed to

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<sup>11</sup> The trial court stated that the display of the gun was excessive and improper and indicated that the prosecutor should have placed the gun in a box before showing it to the officer. 54RP 169. It was certainly within the court's broad discretion to instruct the prosecutor on the handling of an exhibit. See State v. Hakim, 124 Wn. App. 15, 19, 98 P.3d 809 (2004) (recognizing that the trial court has broad discretion in controlling the conduct of a trial). However, as noted above, the State is unaware of any authority that establishes that the prosecutor's behavior was *improper*. The gun was an admitted exhibit, and no rule of evidence prohibited the prosecutor's question. Nor was there any ruling on a motion *in limine* on the subject.

show that there is a substantial likelihood that the struck question affected the jury's verdict.

**5. THE TRIAL COURT PROPERLY FOUND THAT SPEARS'S AND DUBOSE'S CONVICTIONS FOR RAPE AND KIDNAPPING DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT.**

DuBose and Spears argue that the trial court erred by finding that their convictions for the rape of M.M. and the kidnapping of M.M. did not constitute the same criminal conduct. Given the evidence that DuBose and Spears first kidnapped M.M. and then raped her later that night, the trial court did not abuse its discretion in finding that the crimes were not the same criminal conduct.

Under the Sentencing Reform Act ("SRA"), whenever a person is sentenced on two or more current offenses, the offender score for each current offense includes all other current offenses unless the court finds the current offenses involved the same criminal conduct. RCW 9.94A.589(1)(a). "Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. If any of these elements is missing, the offenses must be individually counted toward the offender score. State v.

Garza-Villarreal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993).

The court construes the statute narrowly to disallow most assertions of "same criminal conduct." State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). A trial court has considerable discretion in deciding whether crimes constitute the same criminal conduct. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Here, the trial court clearly acted within its discretion in finding that the kidnapping and rapes were not the same criminal conduct. 70RP 10. While the crimes involved the same victim, the crimes were not confined to the same time and place; the kidnapping began at the parking lot of the strip club and continued in the car and at the house. The rapes began later after M.M. was at the house.

Spears argues that the kidnapping was a continuing offense and that any crime that occurred during the kidnapping constituted the same criminal conduct. In State v. Larry, 108 Wn. App. 894, 916, 34 P.3d 241 (2001), the court rejected this argument. The defendants followed a Burger King Manager to a gas station and then forced him into their car. They took his money and then returned to the Burger King, where they stole more money. They

ultimately took the manager to a dead-end street and shot him.

The Court affirmed the trial court's finding that the kidnapping and robbery of the store manager were not the same criminal conduct:

Although the kidnapping and robbery of [the manager] involved the same victim, the kidnapping occurred over a period of time and in several locations, whereas the robbery occurred at a single time and place, not the same as that involved in the kidnapping. Moreover, comparing the two statutes demonstrates that there are different objective criminal intents for robbery and kidnapping.

Id. at 916.

Similarly, in State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992), Lessley forced his way into his ex-girlfriend's house and then kidnapped two of the occupants, taking them to various locations. The Washington Supreme Court held that his burglary and kidnapping convictions were not the "same criminal conduct" and explained:

[T]he "same time and place" element is unmet in this case. The burglary occurred in Seattle, in the Thomas's home, while the first degree kidnapping was carried out over several hours' time in Seattle, Maple Valley, North Bend, and White Center. The burglary and the kidnapping were not confined to the same time and place.

Id. at 778.

Here, as in Larry and Lessley, the same time and place

element was not met because the kidnapping and rapes were not confined to the same time and place.

DuBose and Spears cite State v. Longuski, 59 Wn. App. 838, 801 P.2d 1004 (1990) for the proposition that the kidnapping and rapes constitute the same criminal conduct. In Longuski, the defendant, a school teacher, spent several weeks in various motels with a teenage student where they had sexual contact. The defendant was convicted of first-degree kidnapping and third-degree child molestation. The Court of Appeals, addressing the issue *sua sponte*, held that the convictions were the same criminal conduct because they occurred at the same time and place. 59 Wn. App. at 847.

In Longuski, the kidnapping conviction was based upon the defendant's act of hiding out with the victim in various motels - the same place where the molestation occurred; the defendant did not abduct his victim as in Lessley, Larry and this case. To the extent that the defendants argue that Longuski establishes a general rule that convictions for kidnapping and other crimes committed against the kidnapping victim will always qualify as the same criminal conduct, such a rule would be inconsistent with Larry and Lessley. See also State v. Collicott, 118 Wn.2d 649, 667-69, 827 P.2d

263 (1992) (holding that a conviction of rape and kidnapping did not qualify as the same criminal conduct when the rape occurred a short time after the defendant kidnapped the victim).

The crimes of kidnapping and rape also did not involve the same criminal intent. In deciding whether the crimes involve the same criminal intent, the court examines whether the criminal intent, as objectively viewed, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). If the defendant has time to pause and reflect between the crimes, the trial court acts within its discretion in finding that the crimes did not involve the same intent. State v. French, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).

In State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997), the Court of Appeals held that two convictions for second-degree rape that involved the same victim did not constitute "the same criminal conduct." Grantham lured the victim to an apartment, anally raped her, slapped and threatened her, and then forced her to perform oral sex. Although the two rapes occurred close in time, the court upheld the trial court's finding that the two rapes constituted separate criminal conduct because Grantham had the opportunity to pause and reflect between the two rapes,

and, therefore, the two crimes did not involve the same intent and were not committed at the same time. Id. at 860.

In this case, after kidnapping M.M. and bringing her back to the Tukwila house, Spears and DuBose had the time to pause, reflect, and cease their criminal activity. Instead, after making her dance for the men, they proceeded to rape her repeatedly. Given these facts, the trial court acted within its discretion in finding that the rapes and kidnapping did not involve the same criminal intent.

**6. THIS COURT SHOULD REMAND SPEARS'S CASE FOR A DETERMINATION OF WHETHER HIS CALIFORNIA CONVICTION IS PROPERLY INCLUDED IN HIS OFFENDER SCORE.**

Spears argues that the trial court erred by including his 1997 California burglary conviction in his offender score. The State concedes that the record below is insufficient to determine whether it is a comparable offense and that the matter should be remanded for a hearing on the issue.

At sentencing, Spears objected to the inclusion of his California burglary conviction in his offender score. 71RP 2-9. The State provided the charging document and other pleadings relating to the conviction. Id. The trial court concluded that the California

burglary statute was legally comparable to Washington's burglary statute and included the conviction in Spears's offender score. Id.

Though neither party brought the decision to the trial court's attention, this Court has previously held that the California burglary statute is broader than Washington's burglary statute. State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006). "Unlike Washington's burglary statute, the California crime of burglary encompasses a broader range of property and does not require proof that the defendant entered or remained unlawfully. California's law only requires the defendant enter with intent to commit larceny or any felony." Id. at 478. In Thomas, the court reviewed the charging document for the California burglary conviction and concluded that the State had not established that Thomas's California burglary was factually comparable to a Washington burglary. Id. at 483-87.

Spears's charging document is nearly identical to that in Thomas. Spears's information charged that he "did willfully and unlawfully enter Polo factory Store with the intent to commit larceny and any felony." CP 194. In Thomas, the Court held that this language was insufficient to establish that Thomas had pled to a comparable Washington burglary:

[T]he allegation in the charging documents that Thomas's entry was "unlawful" does not relate to an element of the California burglary statute.... [I]n California, any entry made with intent to commit larceny or any felony is unlawful. In Washington, the entry itself must be independently unlawful.

Id. at 486 (internal citations omitted).

Accordingly, the State concedes that the matter should be remanded for a determination of whether Spears's California conviction is comparable and properly included in his offender score.

Citing State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002) and State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), Spears argues that, because he raised the comparability issue at sentencing, the State should be held to the record as it existed at the sentencing hearing. Because that evidence did not establish the California conviction's comparability, he asks this Court to remand for resentencing without the California conviction.

Spears's argument ignores a recent amendment to the SRA that provides that at a resentencing hearing, the trial court should consider all relevant evidence relating to a defendant's criminal history. "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the

court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." RCW 9.94A.530(2). In its statement of intent, the legislature explained that this amendment was based upon its dissatisfaction with Lopez and Ford:

Given the decisions in In re Cadwallader, 155 Wn.2d 867 (2005); State v. Lopez, 147 Wn.2d 515 (2002); State v. Ford, 137 Wn.2d 472 (1999); and State v. McCorkle, 137 Wn.2d 490 (1999), the legislature finds it is necessary to amend the provisions in RCW 9.94A.500, 9.94A.525, and 9.94A.530 in order to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history, whether imposed at sentencing or upon resentencing. These amendments are consistent with the United States supreme court holding in Monge v. California, 524 U.S. 721 (1998), that double jeopardy is not implicated at resentencing following an appeal or collateral attack.

Laws of 2008, ch. 231, § 1.

Accordingly, this Court should not restrict the evidence that the trial court can consider at the resentencing hearing.

**D. CONCLUSION**

For all the foregoing reasons, this Court should affirm DuBose's and Spears's convictions, and remand for a hearing on whether Spears's California burglary conviction should be included in his offender score.

DATED this 26<sup>th</sup> day of September, 2009.

Respectfully submitted,

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# APPENDIX A

## Abbreviations for the Verbatim Report of Proceedings

		DUBOSE	SPEARS <sup>1</sup>
0aRP	January 27, 2005		x
0bRP	March 14, 2005		x
1RP	May 16, 2005	x	
1aRP	May 27, 2005		x
2RP	November 14, 2005	x	x
3RP	November 15, 2005	x	x
4RP	November 22, 2005	x	x
5RP	November 28, 2005	x	x
5aRP	November 29, 2005		x
5bRP	November 30, 2005		x
5cRP	November 30, 2005 (pm)		x
6RP	December 1, 2005	x	x
7RP	December 5, 2005	x	x
8RP	December 6, 2005	x	x
9RP	December 7, 2005	x	x
10RP	December 7, 2005	x	x
11RP	December 8, 2005	x	x
12RP	December 12, 2005 (a.m.)	x	x
13RP	December 12, 2005 (p.m.)	x	x
14RP	December 13, 2005	x	x
15RP	December 14, 2005	x	x
16RP	December 20, 2005	x	x
17RP	May 15, 2007	x	x
18RP	May 16, 2007	x	x
19RP	May 17, 2007 (a.m.)	x	x
20RP	May 17, 2007 (p.m.)	x	
21RP	May 22, 2007	x	x
22RP	May 23, 2007	x	x
23RP	June 7, 2007	x	x
24RP	June 11, 2007	x	x
25RP	June 12, 2007	x	x
26RP	June 13, 2007	x	x
27RP	June 14, 2007	x	x
28RP	June 18, 2007	x	x
29RP	June 19, 2007	x	x
30RP	June 20, 2007	x	x

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<sup>1</sup> The State has moved to transfer copies of volumes 20 and 67 to Spears's appeal.

31RP	June 21, 2007	x	x
32RP	June 25, 2007	x	x
33RP	June 26, 2007	x	x
34RP	June 27, 2007	x	x
35RP	June 28, 2007	x	x
36RP	July 2, 2007	x	
37RP	July 3, 2007	x	x
38RP	July 9, 2007	x	
39RP	December 19, 2007	x	x
40RP	December 20, 2007	x	x
41RP	January 2, 2008	x	x
42RP	January 3, 2008	x	x
43RP	January 7, 2008	x	x
44RP	January 22, 2008	x	x
45RP	January 23, 2008	x	x
46RP	January 24, 2008	x	x
47RP	January 28, 2008	x	x
48RP	January 29, 2008	x	x
49RP	January 30, 2008	x	x
50RP	January 31, 2008	x	x
51RP	February 4, 2008	x	x
52RP	February 5, 2008	x	x
53RP	February 6, 2008	x	x
54RP	February 7, 2008	x	x
55RP	February 11, 2008	x	x
56RP	February 12, 2008	x	x
57RP	February 13, 2008	x	x
58RP	February 14, 2008	x	x
59RP	February 19, 2008	x	x
60RP	February 20, 2008	x	x
61RP	February 21, 2008 (a.m.)	x	x
62RP	February 21, 2008 (p.m.)	x	x
63RP	February 25, 2008	x	x
64RP	February 26, 2008	x	x
65RP	February 27, 2008	x	x
66RP	February 28, 2008 (a.m.)	x	x
67RP	February 28, 2008 (p.m.)	x	
68RP	March 3, 2008	x	x
69RP	March 4, 2008	x	x
70RP	April 18, 2008	x	
71bRP	April 18, 2008		x

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Chris Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ANTHONY DUBOSE, Cause No. 61654-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame  
Name  
Done in Seattle, Washington

9/28/09  
Date

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STATE OF WASHINGTON  
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