

NO. 63914-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

BRANDON LEMAR BROWN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

---

**BRIEF OF RESPONDENT**

---

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A. **ISSUES PRESENTED**

1. Whether the evidence is sufficient to sustain the jury's guilty verdicts for two counts of rape of a child in the third degree when the victim's testimony provided a basis for the jury to find two separate acts of intercourse on the basis of timing, location, and the particular type of sexual act performed.

2. Whether the trial court exercised sound discretion in admitting expert testimony regarding the street prostitution trade in Seattle when Washington case law holds that such testimony is admissible because it is helpful to the trier of fact.

3. Whether the trial court exercised sound discretion in denying the defendant's motion for a mistrial because a witness's remarks that violated a motion in limine did not result in any prejudice and the trial court's admonition to the jury was sufficient to cure the error.

4. Whether the defendant has met his burden of showing that the prosecutor's remarks in closing argument were improper and that the defendant suffered prejudice when the remarks in question were based on the evidence and evidence was overwhelming.

5. Whether cumulative error should result in reversal when the errors the defendant alleges lack merit.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Brandon Lemar Brown (dob 5/9/84), with two counts of rape of a child in the third degree and one count of promoting commercial sexual abuse of a minor based on Brown having a sexual relationship with and promoting the prostitution of D.H. (dob 6/3/93) in 2008 and early 2009. CP 1-5. A jury trial on these charges was held in May 2009 before the Honorable Douglass North. At the conclusion of the trial, the jury convicted Brown of all three counts as charged. CP 58-60. The trial court imposed a standard-range sentence totaling 144 months in prison. CP 63-74; RP (6/26/09) 637. Brown now appeals. CP 91-103.

**2. SUBSTANTIVE FACTS**

15-year-old D.H. met Brown on a bus in Renton in December 2007. D.H. gave Brown her phone number, and they soon began "hanging out" together. RP (5/18/09) 201-05. D.H. spent time with Brown at his mother's house, including in Brown's

bedroom. D.H. recalled that Brown's bed had black sheets. RP (5/18/09) 205-06.

As D.H. began spending more time with Brown, Brown brought up in conversation that D.H. could work for him as a prostitute so that they could make money for a future together. D.H. agreed. RP (5/18/09) 207-09. Brown then taught D.H. everything she needed to know in order to become a street prostitute. Brown told D.H. to make sure her customers were not police officers; he said that she could find out by feeling a customer's "private area" and then gauging his reaction. RP (5/18/08) 208. Brown told D.H. to "always have five condoms" with her. Brown reasoned that five condoms were enough to keep D.H. in business, but not enough to raise suspicion with the authorities. RP (5/18/09) 211. Brown told her to charge \$50 for fellatio and \$100 for vaginal intercourse, and he instructed her to always get the money first. RP (5/18/09) 212-13. Brown told D.H. to call him each time she finished with a customer, and he told her to call him if something went wrong. RP (5/18/09) 214, 216-17. D.H. said that Brown made her feel safe. RP (10/18/09) 218.

In addition to teaching D.H. how to be a street prostitute, Brown established a number of rules that D.H. was required to

follow. For instance, D.H. was not allowed to talk to other prostitutes or other pimps. RP (5/18/09) 223. Brown also told D.H. that she was not allowed to talk to black men other than himself, because he said they could be pimps. RP (5/18/09) 224. Brown told D.H. that she was "out of pocket" when she did something that he considered to be against the rules. RP (5/18/09) 225. Brown sometimes slapped D.H.'s face if he thought that she was disobeying him. RP (5/18/09) 253-54. On the other hand, Brown told D.H. that she was his "bottom bitch," meaning his main girl. RP (5/18/09) 226. Brown did not have a job other than pimping D.H.; Brown used the money D.H. made as a prostitute for all of their expenses. RP (5/18/09) 210, 215-16, 219.

At different times in 2008, Brown and D.H. stayed together in cheap motels in areas known for street prostitution. In early February 2008, they stayed at the Garden Suites on Pacific Highway South in Des Moines. RP (5/18/09) 288-94. Beginning in August 2008, they spent three or four months at the Seal's Motel at 125th and Aurora in north Seattle. RP (5/18/09) 280-88. In addition to streetwalking, D.H. had "dates" with customers in these motel rooms. RP (5/18/09) 219-22.

In addition to their pimp/prostitute relationship, Brown and D.H. also had a sexual relationship. Brown and D.H. had sex "almost every day" they were together. RP (5/18/09) 246. They had both oral sex and vaginal intercourse. RP (5/18/09) 246-47. They had sex in their room at the Garden Suites when D.H. was done walking the street. They had sex in their rooms at the Seal's Motel. They also had sex in Brown's bedroom at his mother's house, in the bed with the black sheets. RP (5/18/09) 247.

Brown convinced D.H. that they would get a permanent home together and "[b]uild a future." RP (5/18/09) 244. D.H. loved Brown, and she endangered her own life to make money for him. RP (5/18/09) 259. D.H. was afraid of contracting a sexually transmitted disease, and she was afraid of being assaulted or killed by a "trick." One of these fears came true on one occasion when a customer held her at knifepoint in his car and threatened to cut off her ponytail before she was able to get away. RP (5/18/09) 259-62.

Nonetheless, Brown held D.H. so under his sway that she got a tattoo on her back that said "Lady Lamar" as a surprise for him. RP (5/18/09) 250-51. Brown's middle name is "Lemar," and he liked to be called by this name instead of his first time. RP (5/18/09) 204. But Brown was not pleased when D.H. showed him

the tattoo because he did not think she had "earned" it yet. RP (5/18/09) 252. The tattoo also misspelled "Lemar" as "Lamar." RP (5/20/09) 566.

On February 11, 2009, Brown was driving southbound on the Alaskan Way viaduct with D.H. in the front passenger seat when D.H. received a call on her cell phone from a male friend. This was against the rules, and Brown became angry. RP (5/18/09) 255; RP (5/19/09) 347-51. Brown slapped D.H. and grabbed her phone. D.H. tried to get out of the car, which was barely moving in stop-and-go traffic, but Brown pulled her back. RP (5/18/09) 254-56; RP (5/19/09) 461-62. The driver in the vehicle immediately ahead of them saw the commotion in his rearview mirror, and he called the police. RP (5/19/09) 461-63.

Seattle Police Officers Cross, Bruneau, and Cooke responded to the motorist's 911 call, and they pulled Brown over in a parking lot just south of the viaduct. RP (5/19/09) 349-50. The officers immediately separated Brown and D.H. to try to figure out what was going on; they placed Brown in Bruneau's patrol car while Bruneau talked with D.H. some distance away. RP (5/18/09) 173-74; RP (5/19/09) 351-52. Brown was yelling at D.H. and giving her dirty looks from the back seat of the police car. Officer Cross told

Brown to stop yelling at D.H. because "she's just a child, she's only 15 years old," to which Brown replied, "yeah, yeah, I know she is." RP (5/18/09) 176.

Officer Bruneau searched D.H. with her permission, and found several condoms in her pocket. D.H. initially told Officer Bruneau that Brown was her cousin and that "nothing had happened." RP (5/19/09) 353. At the same time, D.H. kept looking over at Brown, who continued to yell at her. RP (5/19/09) 358. At this point, Officer Bruneau suspected that D.H. was a juvenile prostitute and that Brown was her pimp. RP (5/19/09) 359. D.H. tried to deny it, but after Bruneau spoke with her some more, she started crying and admitted that she had been prostituting herself for Brown for several months. RP (5/19/09) 360-62.

Officer Bruneau contacted Detective Trent Bergmann of the Seattle Police Vice Unit and transported Brown to the West Precinct. RP (5/19/09) 365. D.H. was transported there as well. RP (5/18/09) 177. Detective Bergmann and Detective Todd Novisedlak began their investigation by speaking with D.H. D.H. told the detectives that Brown was her pimp, and that he was having sex with her. RP (5/19/09) 403-05.

The detectives then spoke with Brown. RP (5/19/09) 407. During the interview, Brown was "abrasive," "confrontational," and used "a string of profanities directed at" the detectives. RP (5/19/09) 383. Brown told the detectives that D.H. was his cousin, but could not provide her last name. RP (5/19/09) 384, 407-08. Brown said that D.H. had never been to his mother's house. RP (5/19/09) 385, 410. Brown denied hitting D.H., and he said they were "dancing" in the car when the other motorist spotted them. RP (5/19/09) 386-88, 408. Brown denied being a pimp, and he denied having sex with D.H., acknowledging that "that would be illegal." RP (5/19/09) 389, 409-10.

As the detectives were leaving the room, Brown stopped Detective Bergmann and asked him to come back. Brown said, "my penis is really fucked up and that [sic] if I actually had sex with [D.H.], she would know how fucked up it was." RP (5/19/09) 439. Brown claimed that his penis was "shorter than a midget," and indicated that there was some sort of "deformity[.]" RP (5/19/09) 440. Brown insisted that Bergmann photograph his penis to document his claims. RP (5/19/09) 438. But when Bergmann got a camera and Brown exposed himself, Bergmann could not see anything abnormal about Brown's penis. RP (5/19/09) 442-43.

Bergmann explained that he "was actually shocked because [Brown] was so convincing that [his penis] was messed up, that [Bergmann] thought when he finally exposed it, something unusual was going to happen. But that just -- but that wasn't the case." RP (5/19/09) 443.

Brown exercised his right to testify at trial. He claimed that D.H. was "just a friend," and that he "barely" ever saw her. RP (5/19/09) 427. He said he "[n]ever, never" accepted money from D.H., and that he "never, never had sex" with her. RP (5/19/09) 473. On the other hand, Brown admitted that D.H. had been to his mother's house "on many occasions," and he admitted that his bed had black sheets. RP (5/19/09) 473, 492-93. Within two sentences, Brown called D.H. "a nice person" and "a drunken liar." RP (5/20/09) 528.

Brown denied that D.H.'s tattoo was for him because of the misspelling, but he also said that D.H. was always "in pursuit" of him. RP (5/19/09) 476-77, 490. Brown admitted that he had stayed at the Garden Suites and the Seal's Motel, but denied that D.H. had stayed there with him. RP (5/19/09) 485-89. Brown also denied ever seeing any prostitution-related activity in and around these notorious establishments. RP (5/20/09) 531, 534. Brown

claimed that he did not even know where the areas of high prostitution activity were in Seattle. RP (5/20/09) 529.

Additional facts will be discussed below as necessary for argument.

C. **ARGUMENT**

1. **THE EVIDENCE WAS SUFFICIENT FOR A UNANIMOUS JURY TO FIND TWO SEPARATE ACTS AS THE BASIS FOR ITS GUILTY VERDICTS ON COUNTS I AND II.**

Brown first argues that the evidence was insufficient for the jury to have unanimously agreed upon two incidents of sexual intercourse during the charging period as the basis for its guilty verdicts on counts I and II for rape of a child in the third degree. More specifically, Brown claims that D.H.'s testimony was insufficiently detailed for the jury to find two particular acts as the basis for these two verdicts, and thus, that the charges should be reversed and dismissed. Appellant's Opening Brief, at 7-18. This claim should be rejected. D.H.'s testimony, other corroborating evidence in the case, and the prosecutor's closing argument explaining several bases upon which the jury could find two acts beyond a reasonable doubt were more than sufficient to sustain the jury's verdicts. This Court should affirm.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any rational jury could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all rational inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Furthermore, the reviewing court defers to the jury's determination as to the weight and credibility of the evidence and its resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. Circumstantial evidence is not to be considered any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In State v. Hayes, 81 Wn. App. 425, 914 P.2d 788, rev. denied, 130 Wn.2d 1013 (1996), this Court addressed the issues that often arise in considering evidentiary sufficiency claims in the context of multiple sexual assaults on a child by a resident abuser where the victim provides "generic testimony." Hayes, 81 Wn. App.

at 438. For such cases, this Court set forth a three-part test for gauging evidentiary sufficiency: 1) the victim should be able to describe the sexual acts with sufficient specificity to allow the jury to determine what offense has been committed; 2) the victim should be able to describe the number of acts committed with enough certainty to support each of the counts alleged; and 3) the victim should be able to describe the general time period within which the offenses occurred. Id. Under this test, this Court found that the child victim's "generic testimony" was "specific enough to sustain separately each of the four counts charged." Id. at 438-30.

In this case, Brown was charged with only two counts of third-degree child rape during a charging period of January 1, 2008 through February 11, 2009. CP 1-2. As to the first part of the Hayes test, D.H. confirmed that she and Brown had "[o]ral sex and penis to vagina sex," which was sufficient for the jury to confirm that they had had intercourse as defined in their instructions. RP (5/18/09) 247. As to the second part of the Hayes test, D.H.'s testimony established that she met Brown on a bus in December 2007, that they began "hanging out" shortly after that, and that they had sex "[a]lmost every day" they were together. RP (5/18/09) 202, 205, 246. There was no dispute that the last day they were

together was the day of Brown's arrest, which was February 11, 2009. RP (5/18/09) 257, 263; RP (5/19/09) 346. This testimony was sufficient to establish dozens of acts that could form the basis for each of the two counts. As to the third part of the test, in addition to establishing that Brown had sex with D.H. almost every day during the charging period, D.H. testified that Brown had sex with her in three specific locations: the Garden Suites motel (after D.H. was done prostituting herself for the day), the Seal's Motel, and Brown's bedroom in his mother's house. RP (5/18/09) 247. Considered in the light most favorable to the State, this testimony was sufficient to meet the Hayes test, and to support the jury's guilty verdicts for two counts of rape of a child in the third degree.

But in addition, other evidence produced at trial corroborated D.H.'s testimony and was helpful to the jury in unanimously finding two counts of child rape beyond a reasonable doubt. For instance, motel records established that Brown and D.H. stayed at the Garden Suites in early February 2008, and that they stayed at the Seal's Motel for several months beginning in August 2008. RP (5/18/09) 283, 294. Brown's mother confirmed that Brown had brought D.H. to her house, and she also confirmed that Brown's bed had black sheets, just as D.H. had described. RP (5/18/09)

451-53. Detective Bergman also testified that D.H. told him that she had had both oral and vaginal intercourse with Brown in multiple locations. RP (5/19/09) 404.

Finally, the prosecutor's closing argument made it clear to the jury that they had to be unanimous that at least two separate acts of intercourse had been proved beyond a reasonable doubt, and that there were several bases upon which the jury could differentiate between the two counts, e.g., by location or by the type of intercourse (oral or vaginal). RP (5/20/09) 598-600. Taken together, D.H.'s testimony, the corroborative evidence, and the State's closing argument were more than sufficient to provide the jury with a basis to convict Brown of two counts of rape of a child in the third degree, and Brown's claim to the contrary should be rejected.

Nonetheless, Brown argues that the evidence was insufficient to sustain the jury's verdicts because D.H. "failed to provide a single date or other clarifying characteristic to set a timeline for her alleged liasons with" Brown. Appellant's Opening Brief, at 15. As demonstrated above, this misstates the nature of the State's evidence, which established that two types of intercourse occurred in three particular locations almost every day

during the charging period. This evidence provided a sufficient basis for the jury's unanimous verdicts, particularly under the deferential standards for a sufficiency challenge. Brown's claim fails, and this Court should affirm.

2. **THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING EXPERT TESTIMONY ON PROSTITUTION, A SUBJECT OUTSIDE THE COMMON EXPERIENCE OF THE AVERAGE JUROR.**

Brown next argues that the trial court abused its discretion in allowing the State to present expert testimony from Sergeant Ryan Long regarding the prostitution trade in Seattle. He argues that this testimony was irrelevant, cumulative, and unfairly prejudicial, and that Sergeant Long did not qualify as an expert in any event. Appellant's Opening Brief, at 18-21. This claim should be rejected. Sergeant Long's qualifications were not even at issue at trial, and the trial court exercised sound discretion in admitting expert testimony on a subject that is outside the common experience of the average juror. Brown is not entitled to a new trial on this basis.

Under ER 702,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. The decision to admit expert testimony is addressed to the sound discretion of the trial court. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). A trial court abuses its discretion only if its decision is manifestly unreasonable or is based on untenable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The Washington Supreme Court and this Court have previously held that a trial court exercises its discretion appropriately in admitting expert testimony regarding street prostitution. State v. Yates, 161 Wn.2d 714, 764-66, 168 P.3d 359 (2007); State v. Simon, 64 Wn. App. 948, 962-64, 831 P.2d 139 (1991), *rev'd in part on other grounds*, 120 Wn.2d 196, 840 P.2d 172 (1992). In Simon, the expert testimony in question was the testimony of a police detective with extensive experience investigating prostitution and promoting prostitution who testified "regarding the pimp/prostitute relationship[.]" Simon, 64 Wn. App. at 964. This Court held that the trial court did not abuse its discretion because "the average juror would not likely know of the mores of the pimp/prostitute world," and because the detective

testified "in general terms" rather than expressing an improper opinion on the defendant's guilt. Id. A virtually identical case presents itself here.

In this case, the State presented expert testimony from Sergeant Ryan Long of the Seattle Police Vice Unit regarding street prostitution in Seattle and the pimp/prostitute relationship. In his capacity as head of the Vice Unit, Sergeant Long teaches classes on prostitution enforcement, and he had personally investigated approximately 75 "pimping-related cases[.]" RP (5/18/09) 295-98. He was very familiar with the areas of high prostitution activity in Seattle. RP (5/18/09) 299-301. As was the case with the expert witness in Simon, Sergeant Long offered general testimony regarding the street prostitution trade in Seattle and the typical pimp/prostitute relationship. RP (5/18/09) 303-09.

As in Yates and Simon, the trial court here exercised its discretion appropriately in allowing Sergeant Long to testify as an expert. The testimony was helpful to the jury because street prostitution and the typical pimp/prostitute relationship are subjects outside the common experience of the average juror, and these subjects were certainly relevant to material disputed issues in this

case. As such, Brown has not shown that the trial court manifestly abused its discretion in admitting this testimony.

Nonetheless, Brown contends that the testimony was irrelevant because Sergeant Long "was not asked a single question concerning the complainant or the defendant," that the testimony was more prejudicial than probative, and that Sergeant Long did not qualify as an expert.<sup>1</sup> Appellant's Opening Brief, at 18-21. These arguments fail in light of Yates and Simon, and in light of the record in this case and the issues to be resolved by the jury. Moreover, Sergeant Long did not testify about Brown and D.H. specifically because he was an expert witness, not a fact witness. This Court should reject Brown's arguments, and affirm.

**3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING BROWN'S MOTION FOR A MISTRIAL BECAUSE THE OFFENDING TESTIMONY WAS NOT PREJUDICIAL.**

Brown next contends that the trial court also abused its discretion in denying his motion for a mistrial based on testimony from Officer Bruneau that violated a motion in limine. Specifically,

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<sup>1</sup> At one point, Brown refers to Sergeant Long as "this so-called expert witness[.]" Appellant's Opening Brief, at 21. Aside from being disrespectful, this remark belies the record, which establishes that Sergeant Long's qualifications were not only substantial, but unchallenged.

Brown claims he should have received a new trial because Officer Bruneau testified that Brown told her he had witnessed a police shooting at the Seal's Motel, which was among the topics the trial court had ruled were inadmissible. See Appellant's Opening Brief, at 21-24. This claim is without merit. Although the trial court had ruled that the information about the shooting at the motel was not admissible, the trial court exercised its considerable discretion appropriately in ruling that this testimony was not prejudicial to Brown and did not warrant the extraordinary remedy a mistrial. Moreover, the trial court gave an appropriate limiting instruction, which was more than sufficient to ameliorate any possible prejudice. This Court should reject Brown's claim, and affirm.

A trial court's decision to deny a motion for a mistrial is reviewed for manifest abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A reviewing court will find an abuse of discretion only if no reasonable trial judge could have decided that a mistrial was not necessary. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A mistrial should be granted "only 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. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

Accordingly, the reviewing court gives deference to the trial court's judgment, as the trial judge is clearly in the best position to determine whether irreparable prejudice has occurred. See Lewis, 130 Wn.2d at 707.

When reviewing a trial court's decision to deny a motion for mistrial based on a witness's objectionable remarks, appellate courts generally examine three factors: 1) the seriousness of the irregularity; 2) whether the error involved cumulative evidence; and 3) whether the trial court properly instructed the jury to disregard the remarks. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Jurors are presumed to follow the trial court's instructions to disregard inadmissible testimony. Johnson, 124 Wn.2d at 77. Moreover, the testimony in question must be examined "against the backdrop of all the evidence" and in light of the record as a whole. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). A trial court's decision to deny a motion for mistrial should not be overturned on appeal unless the record demonstrates that the irregularity prejudiced the defendant such that it affected the outcome of the trial. See Mak, 105 Wn.2d at 701. The record in this case demonstrates that Brown was *not* prejudiced, and therefore, his claim fails.

In this case, the trial court ruled pursuant to CrR 3.5 that Brown's custodial statements were generally admissible. RP (5/11/09) 96-97. The court also ruled, however, that some of these statements should not be presented to the jury:

[T]here's a number of things that although they're admissible under Miranda, are more prejudicial than probative. Discussions of the Defendant's DOC status, of whether he's got a history as a sex offender, of the long discussion about the murder at the Seal Motel. We just want to get the essence of the Defendant having lived at the Seal Motel, not the long discussion of what he thinks is going on there.

RP (5/11/09) 98.

Near the end of Officer Bruneau's direct examination, the prosecutor asked her if Brown said anything when she was transporting him to the precinct after his arrest. In response, Bruneau stated that Brown "said that he was at the incident when the North Precinct officers were involved in [an] officer involved shooting," and that he wondered if the police "were going to shoot him because he had been at the Seal's when the officers were shooting people[.]" RP (5/19/09) 365-66. Defense counsel asked for a sidebar, the prosecutor stated he was going to "move on," and the Court reiterated that he should move on. RP (5/19/09) 366.

Officer Bruneau was then asked about finding a motel key and \$243 in cash on Brown's person. RP (5/19/09) 366-67.

When the jurors were excused for the next recess, Brown moved for a mistrial based on Officer Bruneau's remarks. RP (5/19/09) 372-73. In denying Brown's motion, the trial court found that although "we weren't going to go into the Defendant's explanation of all the other things going on at the Seal Motel," "there isn't anything here that is prejudicial to the Defendant's rights." RP (5/19/09) 374. The trial court also instructed the jury to disregard the offending testimony as follows:

Ladies and gentlemen, the jury should disregard the testimony that Officer Bruneau gave about what she says that Mr. Brown said about some alleged incident of police misconduct at the Seal's Motel. That doesn't have anything to do with this case and it's not something the jury should consider at all.

RP (5/19/09) 378-79.

Based on this record, the trial court plainly acted within its discretion in denying Brown's motion for a mistrial. First, the error was not very serious, given that the testimony in question was more prejudicial to the police than it was to Brown. Second, although the testimony about a shooting was not cumulative, Detective Bergmann later testified that the Seal's Motel was a "seedy" motel

known for criminal activity. RP (5/20/09) 563-65. Third, the trial court gave a curative instruction to the jury, which the jury is presumed to have followed. This instruction was more than sufficient to cure any minimal prejudice caused by Officer Bruneau's remarks. In sum, Brown has not demonstrated that a mistrial was necessary to ensure a fair trial, and thus, his claim fails.

Nonetheless, Brown claims that Officer Bruneau's testimony implied "that Mr. Brown spends his time in a motel surrounded by unsavory characters who participate in shootings," and that this implication irrevocably tainted the proceedings. Appellant's Opening Brief, at 23. This argument is without merit for at least two reasons. First, as noted above, the testimony in question was more unfavorable to the police than to Brown, particularly when coupled with the trial court's instruction that referred to "police misconduct." And second, given that Brown was on trial for having sex with and pimping out a 15-year-old girl, any possibility that the jury would be unfairly prejudiced against Brown because of a shooting at the Seal's Motel that he had nothing to do with is remote at best. The trial court correctly ruled that a mistrial was not necessary, and this Court should affirm.

**4. BROWN'S CLAIM OF PROSECUTORIAL MISCONDUCT SHOULD BE REJECTED BECAUSE THE REMARKS WERE NEITHER IMPROPER NOR PREJUDICIAL.**

Brown claims that he was deprived of a fair trial by the prosecutor's remarks in closing argument. Specifically, Brown claims that the prosecutor "repeatedly implied that because Mr. Brown was charged with an 'evil' or 'villainous' offense, he was not entitled to the same constitutional protections as others." Appellant's Opening Brief, at 27. This claim should be rejected. The prosecutor's remarks, while dramatic, were within the wide latitude granted to prosecutors in closing argument, and in line with applicable case law. In addition, Brown cannot demonstrate that there is any likelihood that these remarks affected the verdict, particularly in light of the strength of the evidence and Brown's own antics during the last day of trial. This Court should affirm.

A defendant who claims on appeal that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A defendant who did not make a timely objection at trial has waived any claim on appeal

unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. A defendant who did make a timely objection still must show a "substantial likelihood" that the prosecutor's remarks affected the jury's verdict before an appellate court will grant a new trial. Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Also, arguments that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). Moreover, the prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561.

In Brown, a capital case, some of the arguments alleged to be improper were as follows:

The legislature enacted the death penalty law so that it would be used in the most serious murder cases. So that in cases where the crime calls out for

a death sentence, the jury, in its discretion and its common sense and its good judgment, would impose such a sentence. *I suggest to you that this crime screams out for the death sentence.*

. . . .

*If the death penalty is not appropriate in this case, I'd ask you to try to think of a case that it would be appropriate in, considering his acts, considering his evil.*

Brown, 132 Wn.2d at 567-68 (emphasis in original). In rejecting the defendant's claim that these remarks constituted prejudicial misconduct, the court observed that the language "may be somewhat dramatic," but that the arguments were "supported by the evidence and thus were not improper." Id. at 568-69. A similar case presents itself here.

The beginning of the prosecutor's closing in this case was as follows:

MR. O'DONNELL: All right. Your Honor, Counsel, ladies and gentlemen of the jury. It should not be lost on any of us in this courtroom, but the real villain and the real evil that the laws of the State of Washington are designed to protect against (inaudible) criminalized that someone's profiting off the back of a child who is engaged in prostitution.

(COUNSEL CANNOT BE HEARD CLEARLY)

MR. O'DONNELL: The dangers that face these young women, face girls like [D.H.], are real. What do I mean by dangers? I mean that when she is

out there on that street, when she gets into a car with a stranger that she does not know, she does not know that there are harms in the night (inaudible) her life. That is a danger that she faces every day out there, every day on Aurora Avenue when she's --

RP (5/20/09) 572. Defense counsel then objected on grounds that the prosecutor's arguments were an "an appeal to emotion or sympathies," and that the arguments were "not the evidence nor the law." The trial court instructed the prosecutor that he could "cover this briefly," but that he should focus on the facts of the case. The prosecutor replied that he was talking about the facts of the case, and the trial court reiterated that the prosecutor should move on. RP (5/20/09) 572. The prosecutor then continued:

MR. O'DONNELL: Let it not be lost on anything [D.H.] described to you. Having a man threaten to cut her ponytail off as he pulled her back in the back seat of his car. That was the real (inaudible). Let it not be lost on anyone when [D.H.] told you that she was worried about getting sexually transmitted diseases or being assaulted or being robbed. That is an evil that our legislature created this law (inaudible) so when people like the Defendant, from profiting from [D.H.], putting herself at risk, putting her life in danger, that's why that crime is there and that's why he's charged today.

RP (5/20/09) 572-73. The prosecutor then went on to further discuss D.H.'s testimony about what it was like to prostitute herself for Brown. RP (5/20/09) 573-74.

As in Brown, the arguments here were proper because they were based on the evidence. Although the language the prosecutor used was dramatic, as it was in Brown, it was also accurate in describing the nature of the conduct proscribed by the relevant statute, and in describing D.H.'s testimony regarding the chances she took when she was working on the street as a prostitute. Given the issues in the case, the nature of the evidence, the instructions to the jury, and the context of the total argument, Brown has failed to show that the prosecutor's remarks were improper, and thus, this Court should affirm.

Nonetheless, Brown argues that the prosecutor committed misconduct because, "[a]s in State v. Fleming,<sup>2</sup> the prosecutor here repeatedly implied that because Mr. Brown was charged with an 'evil' or 'villainous' offense, he was not entitled to the same constitutional protections as others." Appellant's Opening Brief, at 27. But Fleming is not on point. The arguments at issue in Fleming were: 1) that in order to acquit the defendants, the jury would have to find that the rape victim was lying or confused; and 2) that there was no reasonable doubt in the case because the defendants

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<sup>2</sup> State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997).

presented no evidence that the victim was lying or confused.

Fleming, 83 Wn. App. at 213-16. These arguments were improper because they misstated the burden of proof and infringed on the defendants' right to remain silent. Id. The arguments in this case bear no resemblance to those found improper in Fleming, and Brown's reliance is misplaced.

Moreover, if this Court were to find that any of the prosecutor's arguments in this case were improper, reversal is still not required because Brown has not shown that he suffered prejudice. The evidence in this case was very strong, and included compelling testimony from D.H. as to exactly what it was like to work for Brown as a street prostitute on a daily basis. In contrast, even on a cold record, Brown's testimony was internally contradictory, lacking in credibility, and at some points, bordering on ludicrous.<sup>3</sup> Furthermore, Brown's antics on the final day of the trial, and the chaotic atmosphere his repeated outbursts created in

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<sup>3</sup> For example, after initially admitting that he stayed at the Seal's Motel more than 30 times, Brown later tried to claim that he had only used his identification to rent a room for a friend who had no identification. RP (5/19/09) 488; RP (5/20/09) 533. And although it was not responsive to any question that had been posed, Brown informed the jury that he had wanted to bring in an expert to examine his penis, but that the trial judge would not allow it. RP (5/20/09) 545. Brown's trial attorney then apologized for asking the question that resulted in that response. RP (5/20/09) 545.

the courtroom, were far more likely to have attracted the jury's attention than the nuances of the prosecutor's arguments regarding legislative intent. See RP (5/20/09) at 560, 562, 563, 565, 566-67 (Brown's outbursts during Detective Bergmann's rebuttal testimony); RP (5/20/09) 573, 576, 578, 585, 586, 587, 590, 592, 596-97, 598, 599, 600 (Brown's outbursts during the prosecutor's closing argument).

In sum, Brown has failed to meet his burden of showing either improper conduct by the prosecutor or prejudice resulting from improper conduct. This Court should reject Brown's claim, and affirm.

**5. BROWN'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED.**

Finally, Brown claims that the cumulative effect of the errors he alleges warrant a new trial, even if they do not justify a reversal individually. Appellant's Opening Brief, at 29-30. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny the defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997). But reversals due to cumulative error are justified only in

rather extraordinary circumstances.<sup>4</sup> As addressed above, no error occurred that warrants a new trial, either individually or cumulatively. Therefore, Brown's convictions should be affirmed.

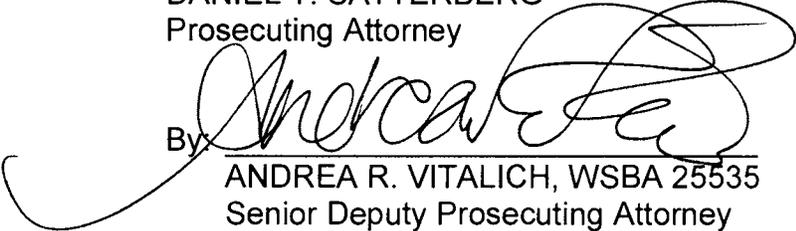
**D. CONCLUSION**

For all of the foregoing reasons, this Court should affirm Brown's convictions for two counts of rape of a child in the third degree and one count of promoting commercial sexual abuse of a minor.

DATED this 7<sup>th</sup> day of May, 2010.

RESPECTFULLY submitted,

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Prosecuting Attorney

By 

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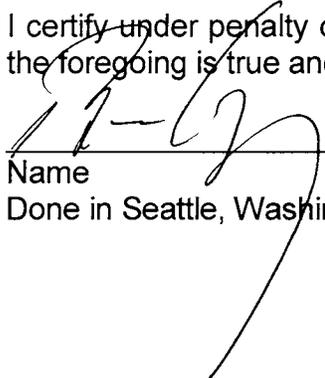
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<sup>4</sup> See, e.g., Perrett, 86 Wn. App. at 323 (police officer's comment on defendant's post-arrest silence, testimony regarding prior confiscations of defendant's guns, and trial court's exclusion of key witness's conviction for crime of dishonesty cumulatively warranted a new trial); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor's remarks regarding personal belief in defendant's guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

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 Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BRANDON BROWN, Cause No. 63914-5-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.

  
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Name  
Done in Seattle, Washington

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