

NO. 66957-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BARUTI HOPSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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**A. ISSUES PRESENTED**

1. Whether the trial court acted within its discretion in admitting evidence that at the same time defendant Baruti Hopson promoted the prostitution of the 15-year-old victim, he also provided housing and acted as the pimp for two other women.

2. Whether any error admitting evidence about two other women who worked as prostitutes for Hopson was harmless.

3. Whether the trial court acted within its discretion in admitting the victim's testimony about Hopson's relationship with another woman.

4. Whether Hopson may not complain on appeal that the jury may have considered certain testimony for the truth of the matter asserted when the trial court indicated that it was not admitting the testimony for the truth of the matter asserted and Hopson never requested a limiting instruction.

5. Whether Hopson has not shown that the prosecutor's remarks during closing argument were improper.

6. Whether Hopson has not shown a substantial likelihood that the prosecutor's allegedly improper remarks during closing argument affected the jury's verdict.

**B. STATEMENT OF THE CASE**

**1. THE SUBSTANTIVE FACTS.**

J.S. lived with her parents and older sister in Auburn. 2RP 18-21; 3RP 9-10.<sup>1</sup> In March of 2010, at the age of fifteen,<sup>2</sup> she ran away from home due to some problems with a boyfriend. 2RP 22; 3RP 11-12. During the time she was away, she met a girl named Candace, who introduced her to prostitution. 3RP 12-13. Nine days later, J.S. was picked up by the police and taken home. 2RP 22-23; 3RP 14.

A few months later in June 2010, J.S. ran away again. 2RP 25-26. Candace had sent a text message to her, suggesting they both travel to California. 3RP 15-17. J.S. sneaked out of her home at night, and began living with Candace at a motel on Aurora Avenue. 3RP 19-20. Candace worked as a prostitute and had a pimp named Ace. 3RP 20. Candace revealed to J.S. that she did not have a car or bus tickets to get to California and encouraged J.S. to work as a prostitute in order to earn money for the trip. 3RP 21-22.

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<sup>1</sup> The State adopts the abbreviations for the report of proceedings used in the Brief of Appellant.

<sup>2</sup> J.S. was born on December 21, 1994. 2RP 19; 3RP 6.

Candace told J.S. about Baruti Hopson, whom she referred to as "Makalani." 3RP 24-25. Candace stated that she loved Hopson and that she might be pregnant by him. 3RP 24. At Hopson's request, Candace gave J.S. his phone number. 3RP 26-28.

Over a period of two days, J.S. lived with Candace and earned money by engaging in acts of prostitution. 3RP 29-30. Candace posted ads for J.S. on the internet. 3RP 28-29. However, Candace kicked J.S. out of the motel room after J.S. resisted turning over the money that she earned. 3RP 30-31.

J.S. then called Hopson, and he brought her to his apartment in Seatac. 3RP 31-34. At the time, Hopson was 31 years old. 4RP 93. He was much larger than J.S.; he is 6'3" tall and weighed 180 pounds. 2RP 33; 4RP 93,161-62.

When they first met, Hopson asked J.S. how old she was, and she responded that she was 18. 3RP 37. J.S. told him that she was working as a prostitute in order to get money to travel to California. 3RP 39. Hopson indicated that he could help her and that he was a pimp. 3RP 39-40. She began working for him. 3RP 40.

Hopson posted advertisements for J.S. on the internet on websites like backpage.com.<sup>3</sup> 2RP 136-38; 3RP 40-42. He bought J.S. clothes and told her to always use a condom. 3RP 44, 49. He also paid for the motel rooms where she met her customers. 3RP 40-41. He would drive her to the "date," and she turned over all the money she made to him. 3RP 45-50, 55-56. Hopson told J.S. that he did not want his girls to be cheap, and he charged \$300 an hour for her. 3RP 42-43.

J.S. had two to five customers a week. 3RP 45. Many customers, after seeing her, questioned how old she was. 3RP 52-53. She would tell them that she was 18. 3RP 53.

Hopson told her to keep her head down if there were other pimps around. 3RP 46. He taught her how to check if the "date" was an undercover police officer. 3RP 53-54.

Hopson and J.S. began a sexual relationship within days of their first meeting. 3RP 35-36. He had sex with her approximately five times a week. 3RP 44. He told her that he loved her, and she believed him. 3RP 56.

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<sup>3</sup> The records from backpage.com concerning the ads for J.S. show that Hopson was the customer who paid for them. 2RP 78-79; Ex. 15 through 23.

At the beginning of July, J.S. left Hopson and began working for a different pimp. 3RP 57-60. Within a few days, on July 4, 2010, the Bellevue Police arrested her during an undercover sting operation targeting prostitution. 2RP 65-68; 3RP 60-62. Officer Tor Kraft immediately noticed that J.S. looked young. 2RP 69. However, J.S. had no identification on her, and she insisted that she was 18. 2RP 69. The police questioned her and, suspicious about her answers, transported her to the police station. 2RP 70-73. They took photographs of her and tried to determine her identity. 2RP 73-74. However, because they did not have sufficient grounds to arrest her, she was released. 2RP 72-75.

J.S. returned to Hopson. 3RP 64. A short time later, Hopson told her, "I know how old you are." 3RP 66-67. When she inquired what he meant, Hopson stated that Candace had told him that J.S. was 16. 3RP 67, 164-65. He told her that they could make it work, and he discussed getting her a fake identification. 3RP 68. She continued to have sex with Hopson approximately three times a week. 3RP 69-70.

When J.S. returned, another girl, Goldie, was living with Hopson. 3RP 69-70, 95. J.S. had previously heard Hopson ask other girls to work for him, and Hopson even had J.S. call other girls

to encourage them to work for him. 3RP 77, 95-96. She had made such a call to Goldie for him. 3RP 95-96. Goldie stayed with Hopson and J.S. for approximately two months. 3RP 102. During this time, Goldie also worked as a prostitute for Hopson and slept in the same bed with J.S. and Hopson. 3RP 75-76.

One day in August, J.S. left Hopson for a day and traveled to Everett. 3RP 102-03. While there, she was arrested for stealing clothing. 3RP 104-05. After providing a false name and date of birth, she was released from jail. 3RP 104-06. J.S. had tried calling Hopson from the jail, but the calls did not go through. 3RP 106. However, as J.S. walked out of jail, Goldie appeared and led her to Hopson, who was waiting in his car. 3RP 107-08. J.S. told Goldie that she did not want to go back with them, and Goldie and Hopson left. 3RP 109.

When J.S. was unsuccessful in finding an alternative place to stay, she returned to Hopson and discovered another woman named Candita was now living with him. 3RP 108-10. Hopson had seen Candita's ad on backpage.com and contacted her. 3RP 111. She lived with Hopson and J.S. for approximately two weeks. 3RP 111. Though Hopson posted internet ads for her, she did not generate any business. 3RP 111.

J.S. received some paperwork after being released from jail that listed her false name and false birth date. 3RP 149-54. She showed them to Hopson, who recommended that they keep them in his car so that she would have some kind of identification if the police pulled them over. 3RP 178.

In August, Hopson became angry at J.S. because of the amount of time she had spent on a "date" and due to a sex act she had allowed. 3RP 78-79. He hit her in the face and caused a bloody nose. 3RP 79. J.S. then told him that she was going to leave him, and Hopson began to strangle her. 3RP 80-83. She could not breathe, and he suddenly stopped. 3RP 83. Later that day, Hopson apologized to her. 3RP 86.

## **2. THE POLICE INVESTIGATION.**

After she ran away in June, J.S.'s parents reported to the police that she was missing. 2RP 26; 4RP 27-28. They searched for her, handing out fliers with her picture and checking ads on internet sites. 2RP 26-28; 4RP 28. They arranged to have a flier prepared with J.S.'s picture on it listing her as an "endangered runaway." 2RP 50-51; Ex. 9.

From time to time, J.S. called her parents from pay phones. On July 27, 2010, J.S. called her mother from a pay phone to wish her a happy birthday. 2RP 28; 3RP 71-72. On August 20, 2010, J.S. called again, and her parents asked her to come home. 2RP 32-33; 4RP 30. On both calls, they tried to trace the call back to the area where it originated. 2RP 29-34. During one call, J.S.'s mother told her that they had filed a missing persons report. 3RP 118. J.S. reported this to Hopson, who was not concerned, telling her to just use her fake name. 3RP 119.

Meanwhile, Officer Kraft, who had arrested J.S. on July 4, 2010, continued to try to determine her true identity. He was concerned because he was convinced that she was a juvenile. 2RP 76. He looked at high school yearbook pictures and monitored ads at backpage.com. 2RP 76-79. One day he received an e-mail containing the flier about J.S., and he immediately recognized her. 2RP 82-83; Ex. 9.

On September 23, 2010, Officer Kraft saw a photo on backpage.com that he believed to be J.S. 2RP 83-84. He contacted the Seattle Police Department and requested their help in finding J.S. 2RP 162. Seattle Police Detective Trent Bergmann, posing as a

"date," called the number on the ad, and arranged to meet J.S. at the Silver Cloud Inn in Seattle. 2RP 163-64, 172-74; 3RP 119.

Hopson drove J.S. to the motel. 3RP 120. After J.S. arrived and was escorted to the room, she asked Detective Bergmann for \$170.00. 2RP 175. She asked the detective to expose himself, expressing concern that if his penis was too large she could not have sex with him. 2RP 175; 3RP 121. The detective then revealed that he was a police officer, and an arrest team entered the room. 2RP 176-77. J.S. became enraged and cursed at the officers. 2RP 168, 177; 3RP 121-22.

The police arrested Hopson, who was in the parking lot waiting in his car. 2RP 145-47; 3RP 185-86. At the time of arrest, he had nearly \$600.00 in cash. 3RP 186-87; 4RP 33-35.

After being arrested, J.S. told the police that Hopson was just her boyfriend and that he believed that she was 18 years old. 3RP 123-24.

J.S. was then detained in the juvenile detention facility. 2RP 49. When her mother came to visit her, J.S. remained angry and defiant. 2RP 52-53. She was upset with her mother that Hopson had been arrested and stated that she loved him. 2RP 54. She accused her mother of disliking Hopson because of his race.

2RP 54. When J.S.'s mother expressed concern that he was pimping her, J.S. suggested that her father was a pimp because her mother worked (as a teacher) outside of the home. 2RP 54.

### **3. THE CHARGES, THE TRIAL, AND HOPSON'S TESTIMONY.**

The State charged Hopson with two counts of promoting commercial sexual abuse of a minor, one count of second-degree assault and three counts of third-degree rape of a child. CP 39-41.

Hopson testified at trial. He stated that within minutes of meeting J.S., she told him that she was 18 years old. 4RP 82. He acknowledged that he never asked to see any identification. 4RP 170. He insisted that he did not associate with minors. 4RP 152-53.

He admitted that J.S. lived with him. 4RP 81. He stated that he allowed her to use his credit card to post ads on line. 4RP 84-85. He admitted that he drove her to dates. 4RP 91, 154.

He admitted that both Goldie and Candita had stayed at his place when J.S. lived there, and that they were both prostitutes. 4RP 85-86, 102-03. He testified that both women used his computer and his credit card to post ads on backpage.com. 4RP 129-32.

Hopson acknowledged that he wrote rap songs about pimping. 4RP 108-15; Ex. 35 and 36. In one song, he proclaimed, "I'm with the pimpin' so the pimpin' stay with me.... Keeps these ladies payin' me." 4RP 108-10; Ex. 35.

Hopson insisted that he did not consider himself a pimp. 4RP 105. He claimed that he discouraged J.S. from engaging in prostitution, but that she would not listen. 4RP 139, 165. He told her to go to school or get a job. 4RP 138. He testified that he took her in because he was concerned about the dangers that she faced by walking the streets. 4RP 138.

He denied that he ever received money from J.S. 4RP 92. He testified that it was a coincidence that the women who lived with him, J.S., Goldie and Candita, all worked as prostitutes. 4RP 136-37. He claimed that the large amount of cash that he had when arrested came from selling weed. 4RP 92, 166. According to Hopson, J.S. "didn't lift a finger when she was at my house... I cooked, cleaned for her, gave her a place - cool place to come..." 4RP 128.

He denied that he ever had sex with J.S. 4RP 86. Instead, he claimed that J.S. "was irate with me about not wanting to be with her sexually." 4RP 87.

The day after Hopson testified, he failed to appear for trial. 5RP 3-17. The trial court found that Hopson had voluntarily absented himself from the trial, and the parties proceeded to closing argument. 5RP 15-31.

The jury found Hopson guilty as charged. CP 80-85. Less than two weeks later, the police arrested Hopson in San Diego. 6RP 3. The trial court imposed standard range sentences on all counts. CP 89-93.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE CONCERNING THE OTHER WOMEN WHO WORKED AS PROSTITUTES FOR HOPSON.**

Hopson claims that the trial court erred in admitting evidence that two other women, Goldie and Candita, lived with Hopson and J.S. and also worked as prostitutes for him. Among other things, the testimony established that Hopson had J.S. try to recruit Goldie and that Goldie then slept with J.S. and Hopson. All of these events occurred at the same time that Hopson was acting as J.S.'s pimp, and, therefore, this evidence was clearly admissible under the res gestae exception to ER 404(b). It was also admissible because it was directly relevant to an element of the crime of

promoting the commercial sexual abuse of a minor; the evidence established that Hopson "operated a house" for the purpose of engaging in commercial sexual abuse of a minor. Moreover, after Hopson denied that he was a pimp and claimed to have actually discouraged J.S. from engaging in prostitution, it was certainly relevant to rebut his testimony. The trial court did not err in admitting this evidence.

a. Relevant Facts.

Prior to trial, the prosecutor indicated that he intended to offer evidence about Goldie and Candita. The prosecutor made an offer of proof that J.S. would testify that at the same time she was living with and working for Hopson, two other women also lived with Hopson and worked as prostitutes. 1RP 18-21. Hopson objected and argued that evidence that he was promoting the prostitution of other women was inadmissible under ER 404(b). 1RP 19.

The court noted that it was significant that the events with the other women occurred at the same time as the charged crimes, and observed that the evidence "tends to fall into that rubric of res gestae." 1RP 19. The court explained, "If [J.S.] who was working for him, says I lived with him, I lived with the other

prostitutes, we lived as a family, that's admissible." 1RP 20. The prosecutor then asked the court, "Is it fair for me to say that you would find that offer of proof more probative than prejudicial?"

1RP 24. The judge replied:

Is it relevant to a jury determining that indeed he was acting to promote her engaging in commercial sex? And if she testifies, I was there with 12 other girls... and we were all doing the same thing, it's admissible. .... [I]f this was in Nevada, and let's say Nevada is illegal for a while, and... she's working out of a house of prostitution. She'd certainly be able to testify, you know, I was working out of a house of prostitution with the madam. And there were 12 other girls; we were all doing the same thing. You won't just limit it to just saying I was in a house of prostitution; it was me and the madam. There's context to it.

1RP 24.

During the course of the trial, defense counsel raised an objection when the prosecutor had the backpage.com ads for Goldie and Candita marked as exhibits. 2RP 129-31. The court rejected the objection: "it's not propensity if there's testimony that these are the same girls that [J.S.] was working with." 2RP 132.

As discussed above, at trial, J.S. testified that Hopson would have her call other girls "so I can get at them for him." 3RP 76, 95. At Hopson's request, she called Goldie, who also worked as a prostitute. 3RP 75, 95-96. After J.S. briefly left Hopson, she returned

to discover that Goldie was now living with Hopson and working for him as a prostitute. 3RP 69-70, 95. Hopson posted internet ads for Goldie, and she gave him the money she earned. 3RP 75-76. Goldie lived with Hopson and J.S. for approximately two months. 3RP 102.

On another occasion, when J.S. was released from jail, Goldie appeared and led her to Hopson, who was waiting in his car. 3RP 107-08. J.S. told Goldie that she did not want to go back with them, and Goldie and Hopson left. 3RP 109.

After J.S. had briefly left Hopson a second time, she returned to find yet another woman, Candita, living at the house. 3RP 110. Candita lived with them for approximately two weeks, and although Hopson posted internet ads for her, she did not generate any business. 3RP 111.

b. The Evidence Was Admissible Under The Res Gestae Exception.

The trial court has wide discretion to determine the admissibility of evidence, and the court's decision to admit evidence will not be reversed on appeal unless the defendant can establish that the trial court abused its discretion. State v. Rivers, 129 Wn.2d

697, 709-10, 921 P.2d 495 (1996). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court did not abuse its discretion in admitting evidence that other women lived with Hopson and J.S. and worked as prostitutes.

Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with it. However, under the “res gestae” exception to ER 404(b), “evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.” State v. Lane, 125 Wn.2d 825, 831-35, 889 P.2d 929 (1995); State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980).

State v. Lillard, 122 Wn. App. 422, 431, 93 P.3d 969 (2004) is instructive. Nordstrom loss prevention personnel identified Lillard as having repeatedly used altered electronic gift cards to buy merchandise and then returned the items for cash. Based upon a single incident, he was charged with first-degree possession of stolen property. The trial court admitted evidence about a number

of the uncharged thefts and incidents that Lillard was involved in. Rejecting Lillard's claim that this evidence encouraged the jury to conclude that he had a propensity to steal, the court held:

A defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events. Under the res gestae or "same transaction" exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.

Id. at 431-32 (footnotes omitted).

Here, the trial court did not abuse its discretion in admitting the evidence about Goldie and Candita. Goldie and Candita lived with J.S. and Hopson during the period of the charged crimes. Hopson used J.S. to recruit other women as prostitutes and he had J.S. call Goldie. Hopson also used Goldie to encourage J.S. to return to him after she had left him. J.S.'s testimony about these women completed the story of the crimes and provided context for the events while J.S. was living with and working for Hopson. Hopson was not entitled to a sanitized version of the months that J.S. spent working for him.

This evidence was probative on whether Hopson knowingly promoted the commercial sexual abuse of J.S. The fact that at the same time he placed internet ads for J.S., he also placed ads for other prostitutes, who also lived with him, indicated that he knew that he was promoting prostitution. The trial court did not abuse its discretion in admitting this testimony.

Hopson claims that the trial court failed to analyze the proffered evidence under ER 404(b) and weigh the prejudice against its probative value. In fact, the court identified the proper ER 404(b) exception, *res gestae*, and debated the probative value and possible prejudice of this evidence at great length with both counsel. 1RP 18-25. Even if the court failed to fully articulate this weighing on the record, the record is nevertheless sufficient to permit meaningful review of the trial court's decision to admit the evidence. State v. Hughes, 118 Wn. App. 713, 725, 77 P.3d 681 (2003); State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000). Hopson does not claim otherwise. This Court should affirm the admission of the evidence.

- c. The Evidence Was Also Admissible Because It Established An Element Of The Crime And Rebutted Hopson's Assertion That He Was Not A Pimp.

The evidence relating to Goldie and Candita was admissible under several alternative theories not considered by the trial court. Even when the trial court does not consider other bases for admission, the appellate court can affirm a trial court's ruling on the admissibility of evidence when it is sustainable on alternative grounds. Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

First, the evidence was directly relevant to proving an element of the crime of promoting commercial sexual abuse of a minor. See Barragan, 102 Wn. App. at 759 (recognizing that when the prior bad act establishes an element of the current charge, it is admissible under ER 404(b)). The State was required to prove that Hopson knowingly advanced commercial sexual abuse of a minor. CP 57. The element "advances commercial sexual abuse of a minor" has multiple definitions, including "operates or assists in the operation of a *house* or *enterprise* for the purpose of engaging in commercial sexual abuse of a minor." CP 55 (emphasis added). The fact that Hopson provided housing and posted ads for other

prostitutes at the same time J.S. lived with him was directly relevant to showing he knowingly operated such a "house or enterprise."

In addition, the evidence was admissible to rebut Hopson's claim that he was not a pimp, that he received no money from prostitution, and that he discouraged J.S. from engaging in prostitution. See 4RP 92, 105, 138-39, 165. The fact that at the same time J.S. lived with him, Hopson housed two other women who worked as prostitutes for him was relevant to rebut his claim that he was not a pimp and that he discouraged prostitution. See State v. Ciskie, 110 Wn.2d 263, 281, 751 P.2d 1165 (1988) (recognizing that the State may offer evidence of other misconduct to rebut an assertion by the defendant). The evidence relating to Goldie and Candita was properly admitted.

d. Any Error In Admitting The Evidence Was Harmless.

"An evidentiary error which is not of constitutional magnitude, such as erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome." State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997) (citing State v. Halstien, 122

Wn.2d 109, 127, 857 P.2d 270 (1993)). Even if it was error to admit the evidence about Candita and Goldie, it was clearly harmless given the contested issues in the case. Hopson claims that due to this evidence, the jury may have been more willing to believe that he promoted J.S.'s acts of prostitution. Brief of Appellant at 23. Yet at trial, he ultimately did not contest this issue.<sup>4</sup> In opening statement, Hopson's attorney conceded that Hopson knew that J.S. was working as a prostitute and suggested that Hopson was guilty of promoting prostitution in the second degree. 2RP 15-17. Again, in closing, Hopson's counsel acknowledged that Hopson was guilty of promoting prostitution in the second degree. 5RP 49. His defense to the charges of promoting commercial sexual abuse of a minor was that he made reasonable, bona fide attempts to determine J.S.'s true age. 5RP 49-56; CP 59. The evidence relating to Candita and Goldie, both of whom were adults, did not go to this defense.

In addition, the evidence of Hopson's guilt was overwhelming on the promoting commercial sexual abuse of a minor charges. In

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<sup>4</sup> Hopson probably did not contest this issue given the unchallenged evidence that he was promoting J.S.'s prostitution. Among other things, he admitted that his credit cards were used to pay for her internet ads, and that he drove her to her "dates." 4RP 84-85, 91, 154.

his testimony, he admitted that he had aided in the commercial sexual abuse of a minor by providing J.S. with his credit card to post internet ads and by driving her to "dates." His testimony completely undercut his defense that he made bona fide attempts to ascertain J.S.'s true age by requiring the production of proper identification.<sup>5</sup> CP 59. He testified that he never asked to see her identification. 4RP 170. It appears highly likely that he fled the trial after testifying because he realized that he had effectively admitted to the crimes and had completely undercut the only defense he had. Given the testimony at trial and Hopson's defense, it is not reasonably probable that any error admitting this testimony materially affected the outcome.

**2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING J.S.'S TESTIMONY ABOUT CANDACE.**

Hopson also claims that the trial court erred in allowing J.S.'s brief mention of the fact that Candace stated that she might be

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<sup>5</sup> The statutory defense provides: "[I]t is not a defense that the defendant did not know the alleged victim's age. It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor." RCW 9.68A.110(3).

pregnant by Hopson. Hopson's claim is premised on the notion that the jury would use this testimony as evidence that Hopson had a propensity to sleep with prostitutes. However, the trial court indicated that it was not admitting the evidence for the truth of the matter asserted. Because Hopson never requested a limiting instruction, he cannot now complain that the jury might have used the evidence for an improper purpose.

As discussed more fully above, J.S. testified that when she ran away the first time, Candace introduced her to prostitution. 3RP 12-13. Candace encouraged her to run away the second time, and for the first few days, J.S. stayed with Candace at a motel. 3RP 15-22. During this time, Candace told J.S. about Hopson. 3RP 24-28. At trial, Hopson objected to the following testimony:

Prosecutor: And how was it that you first came to know about Baruti Hopson?

J.S.: [Candace] was talking to him - she had told me about him before she had actually talked to him on the phone. And she told me that she loves him and that she might be pregnant by him and all this other (unintelligible)

Defense counsel: Objection Your Honor, relevance

Court: Overruled. The same - and the same reason.

3RP 24.

Hopson acknowledges that the court's "same reason" for overruling the objection was a reference to the court's ruling on an earlier objection to J.S.'s testimony about statements by Candace. In overruling that objection, the court stated that the testimony was allowed because it was not being offered for the truth, but for what information had been conveyed to J.S. at this time. 3RP 21; Brief of Appellant at 26. Hopson did not request a limiting instruction or offer any further objection to this testimony.

The trial court's admission of this testimony was not an abuse of discretion. Candace was responsible for introducing Hopson to J.S. What Candace first told J.S. about Hopson gave context to how they met and the ensuing relationship between J.S. and Hopson. Moreover, the court indicated it was not admitting the testimony for the truth of the matter asserted, thereby limiting any possible prejudice to Hopson.

On appeal, Hopson's argument presumes that the jury accepted J.S.'s testimony as being offered for the truth of the matter asserted, and that the jury would have assumed that if Hopson had sex with Candace, he would have had sex with J.S. Hopson's arguments should be rejected. He could have requested an appropriate limiting instruction, but he chose not to, and cannot now

complain about that on appeal. State v. Russell, 171 Wn.2d 118, 122-23, 249 P.3d 604 (2011); State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007).

Moreover, Hopson cannot show prejudice. He asserts that the jury would have viewed this brief testimony as establishing that he had a propensity to have sex with prostitutes, and thereby undercut his testimony that he did not have sex with J.S. No one made such an argument; in fact, the prosecutor never mentioned this testimony in closing argument. Moreover, while Hopson did claim that he did not have sex with J.S., this was not the focus of his defense at trial. In opening statement, before J.S. ever testified, Hopson's attorney did not argue or suggest that Hopson did not have sex with J.S. Instead, he stated that Hopson's defense to the rape charges was that he reasonably believed that she was at least sixteen years old. 2RP 15-17. Similarly, in closing argument, defense counsel argued that it did not matter whether Hopson had sex with J.S. 5RP 57. Instead, defense counsel focused on the defense that Hopson reasonably believed that J.S. was at least sixteen. 5RP 56-59. Any error in admitting the testimony was harmless.

**3. HOPSON IS NOT ENTITLED TO A NEW TRIAL  
BASED UPON ALLEGED PROSECUTORIAL  
MISCONDUCT DURING CLOSING ARGUMENT.**

Hopson claims that the prosecutor improperly appealed to the passions of the jury by discussing the impact of the crimes on J.S. during closing argument. He cites one remark that he objected to and another remark, not objected to, made during rebuttal argument. Hopson has not shown that the prosecutor's remarks were improper. References during closing argument to the heinous nature of a crime and its effect on the victim are proper if they do not appeal to the passions and prejudice of the jury. An examination of the challenged comments in the context of the prosecutor's entire argument refutes any notion that the prosecutor was appealing to the passions and prejudice of the jurors. Moreover, given the brief nature of the comments and the trial court's instructions to the jury, Hopson has not shown a substantial likelihood that any misconduct affected the jury's verdict.

**a. Relevant Facts.**

The defense theme was that J.S. lied about her age to Hopson and that she made the relevant decisions that led to her working as a prostitute. Defense counsel's opening statement

began, "When [J.S.] ran away in March, she made the decision to live like an adult, act like an adult, and made people believe she was an adult." 2RP 15. During cross-examination of J.S., defense counsel highlighted the fact that J.S. had worked as a prostitute, albeit briefly, before she met Hopson. 3RP 133-35.

When Hopson testified, he insisted that he had discouraged J.S. from engaging in prostitution. 4RP 138-39, 165. He claimed that he cared for her and had her best interests in mind. 4RP 127. He acknowledged the dangers of prostitution, which he identified as physical harm, sexually transmitted diseases, rape and murder. 4RP 103-04. He suggested that by taking her in and driving her around, he ensured that she was safer than being out on the street. 4RP 138-40.

During closing argument, the prosecutor addressed the fact that J.S. had willingly stayed with Hopson and discussed why he was still criminally responsible.

PROSECUTOR: [O]ne of the things that - that - many people would take away from this case is, why did this girl stay with him? Why? Why would she - why wouldn't she go back to her parents? And you heard me ask [J.S.] that question and she - you know, I think she fumbled with that answer a bit - she wasn't really sure, I think with the distance and the time that has passed she was able to reflect back and see how stupid it was for her to leave like she did. But ladies

and gentlemen, she is a 15 year old and the Defendant is a 32 year old adult. And as we talk about the law, and what our legislature what - the will of the people have passed with this law, we account for that. We account for the poor judgment of a 15 year old. We account for the bad choices teens may make some times, and we hold the adult responsible. We hold the adult responsible, who takes it upon himself to facilitate and promote and profit from that child and her body, being out on the street, exposing herself to all those things we heard about in this trial. Starting at the very top - murder, rape, robbery, assault, pregnancy, sexually transmitted disease, and I daresay, ladies and gentlemen a lifetime - a lifetime of knowing what for four or five months, this child has done. A lifetime of knowing five years from now, 10 years from now, 35 years from now.

DEFENSE COUNSEL: Objection, Your Honor, to improper argument

THE COURT: Overruled.

PROSECUTOR: This is not a fact, these five months of her life will be with her for her life. You cannot erase them. You cannot erase the fact he manipulated her, used her, profited from her because he could.

5RP 32-33.

In the remainder and the bulk of his closing argument, the prosecutor engaged in a lengthy discussion of the trial testimony and the law governing the charges. 5RP 33-47.

In closing, defense counsel resumed his theme: "[J.S.] wanted to live like an adult, act like an adult, and she made people

believe that she was an adult." 5RP 48. Again, he repeatedly noted that J.S. was working as a prostitute before she met Hopson. 5RP 49, 51. With respect to the rape charges, defense counsel asserted that it did not matter whether Hopson had sex with J.S.: "And frankly, what doesn't actually matter, at all, for... these charges? What doesn't make any difference whatsoever, is actually whether they had sex or not. There's dispute - he said they didn't, she said they did. It actually doesn't even matter, when you think about it." 5RP 57.

In rebuttal, the prosecutor responded to the argument that whether Hopson had sex with J.S. did not matter. He noted that defense counsel had said "it doesn't - doesn't matter... the defendant was having sex with - he told you he wasn't. That matters. It matters. It matters." 5RP 61. The prosecutor later returned to this issue by stating, "he's guilty of raping her, and it does matter. It does matter that he prostituted her out. It does matter that he put her out on the street and exposed her to those dangers. It does matter that she sold her body for money; it does matter that she's going to have that memory, with her, for the rest of her life. It matters." 5RP 64. There was no objection to this argument.

b. The Prosecutor's Argument Did Not Improperly Appeal To The Jury's Passion And Prejudice.

When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the jury's verdict. Stenson, 132 Wn.2d at 718-19. "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks '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.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

The prosecutor has a duty to "seek a verdict free of prejudice and based on reason." State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). But references during closing argument to the heinous nature of a crime and its effect on the victim may be proper if they do not appeal to the passions and prejudice of the jury.

State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006); State v. Claflin, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984).

Here, the brief challenged comments made by the prosecutor during closing argument addressed an obvious equitable issue in the case: J.S. willingly worked as a prostitute for Hopson and had consensual sex with him. She stayed with him for many months. The prosecutor was entitled to explain why, despite J.S.'s willingness to engage in the activity, it was important to hold Hopson accountable. Moreover, the prosecutor's recitation of the dangers of prostitution was based upon the evidence at trial: Hopson testified, without objection, to the dangers that prostitutes faced.

A review of the entire argument belies the notion that the prosecutor intended to appeal to the passions and prejudice of the jurors. The objected-to remarks were brief, they occurred near the beginning of the closing argument, and they constituted a very small part of the State's closing argument. The prosecutor devoted virtually all of his closing argument to a discussion of the witnesses' testimony and the law governing the charges. Any fair reading of the entire closing does not support the notion that the prosecutor sought to inflame the jurors' passions.

Hopson also complains that in rebuttal the prosecutor argued that "it matters" what Hopson did to J.S. This comment was not objected to, and was in direct response to defense counsel's closing argument. Defense counsel repeatedly argued that it "did not matter" whether Hopson had sex with J.S. The prosecutor's argument in rebuttal was a fair reply to this argument. See State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (holding that remarks of the prosecutor, even if improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements).

In McKenzie, cited by Hopson, the defendant complained that the deputy prosecutor's references to the victim's "innocence" during closing were improper allusions to the victim's chastity, intended to inflame the passions of the jury. 157 Wn.2d at 60. While the court held that the comments were improper, they did not merit reversal in light of the lack of any objection. Id. at 60. Here, the prosecutor did not suggest that J.S. was innocent when she first met Hopson, nor did the prosecutor offer improper allusions to her chastity.

Even if some part of the prosecutor's closing argument could be construed as improper, Hopson has not shown a substantial likelihood that any instances of misconduct affected the jury's verdict in light of the total argument, the issues in the case, and the instructions given by the trial court. The remarks at issue were brief, they occurred at the beginning of a lengthy closing argument, and they constituted a very small part of the State's closing argument. The focus of the prosecutor's argument was, appropriately, on the evidence that had been admitted at trial.

Moreover, the court properly instructed the jurors that they must "not let your emotions overcome your rational thought process" and that their decision "must be based upon the facts proved to you and on the law given to you, not on sympathy, prejudice or personal preference." CP 46. The jury is presumed to have followed this instruction. State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990). Given these circumstances, this Court cannot conclude that there is a substantial likelihood that the challenged comments affected the jury's verdict.

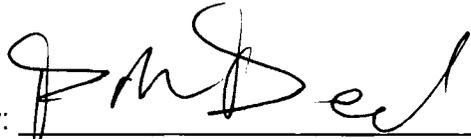
D. **CONCLUSION**

For the reasons cited above, this Court should affirm Hopson's convictions.

DATED this 19<sup>th</sup> day of December, 2011.

Respectfully submitted,

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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 David Koch, 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. BARUTI HOPSON, Cause No. 66957-5-1, 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 Bram  
Name  
Done in Seattle, Washington

12/19/11  
Date

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