Supreme Court No. 101808-8
(COA No. 82784-7-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BERNARD GORDON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Bernard Gordon, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Gordon seeks review of the Court of Appeals decision dated February 13, 2023, a copy of which is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Does the government's failure to establish reasonable suspicion before detaining Mr. Gordon require suppression?

2. Does the government's failure to establish sufficient evidence that three or more persons engaged in an enumerated offense require dismissal of the charge of leading organized crime?

3. Does the government's misconduct in suggesting Mr. Gordon may have influenced a witness's testimony require reversal?

D. STATEMENT OF THE CASE

The police set up a prostitution sting operation in a highly commercial area in south Snohomish County, including Hobby Lobby, a fitness center, and a small shopping area with a 7-Eleven. RP 48, CP 757. This area has many residential apartment buildings. *Id*.

An undercover officer walked down the 10,000 block of Evergreen Way, wearing blue jeans, flip flops, and a tight V-neck T-shirt. RP 49-50, CP 757. Bernard Gordon approached the officer and said, "Hey." RP 54, CP 758. She responded with a "Yeah?" and said she was trying to make money. RP 56, CP 758. Mr. Gordon gave an elongated "what?" and asked whether she

worked for anyone. RP 56, 58, CP 758. The officer said she was "independent." RP 59, CP 758.

Mr. Gordon then asked the officer for her phone number. RP 60, CP 758. The officer said she did not make appointments, to which Mr. Gordon replied, "I thought you were trying to make money." RP 60, CP 758. The officer stated appointments were a waste of time and money. RP 61-62. Mr. Gordon told her he would not stand her up if he made an appointment. RP 62, CP 758. The officer stated she wanted to make money now and not later. RP 62, CP 758. Mr. Gordon gave her his phone number. *Id*. The conversation lasted no more than five minutes. RP 63.

Mr. Gordon returned to his car, which drove away. RP 125, CP 759. Although the police did not know it at the time of Mr. Gordon's arrest, Jacqueline Schulz was the driver. RP 90, CP 761. Breanna Dolan

sat in the front passenger seat. RP 129, CP 761. She had a warrant. RP 86, CP 759.

The police stated they stopped Mr. Gordon's car for violating Everett's Municipal Code for prostitution loitering. *See* EMC 10.24.110(A).[1] The government also argued the stop of Ms. Schulz provided independent grounds, but the court found this reason invalid. RP 255, CP 769.

The police took Ms. Schulz out of the car. RP 97, CP 761. Ms. Schulz's arrest was very upsetting to her. RP 99, CP 761. While in custody, Ms. Schulz claimed Mr. Gordon was acting as her pimp, taking the money she earned for sexual acts. RP 133, CP 761.

Breanna Dolan was also arrested for a DOC warrant. RP 129, CP 762. Ms. Dolan did not implicate Mr. Gordon in any illegal activity.

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[1] https://everett.municipal.codes/EMC/10.24.110

When arresting Mr. Gordon, the police seized his car. RP 137, CP 763. They also took his Samsung telephone from his hand. RP 228, CP 764. Before getting a warrant, the police searched the car, seizing two purses containing drugs, paraphernalia, and condoms. RP 139-140, CP 762. Mr. Gordon did not consent to this search. RP 137.

The police did not secure a warrant to search the car until three days after they searched it. CP 91, 763. The warrant did not include the seizure of phones or any other electronic devices from the vehicle. CP 93. The government did not get a search warrant for Mr. Gordon's phone until months later. CP 102, 764.

Although in custody, Mr. Gordon was released when the venue was transferred from Snohomish to King County. CP 765. Mr. Gordon was rearrested a month later in King County, and a Nokia cell phone

was seized from him. RP 176, 765. The police got a warrant for this phone on November 19, 2019. CP 153.

When Mr. Gordon was arrested, the police found a stolen car in the lot. RP 177, 766. Kaylee Johnson-Das was sleeping in the front seat. *Id*. She told the police she met Mr. Gordon when working as a prostitute on Aurora Avenue about one week prior. RP 180. She denied that Mr. Gordon was her pimp. *Id*.

The government charged Mr. Gordon with promoting prostitution, human trafficking, and leading organized crime. CP 509-511.

Ms. Johnson-Das appeared for Mr. Gordon's trial. She stated when she met Mr. Gordon, he solicited her for a sex act, which he paid for with heroin. RP 1276-77. The next day, she met Mr. Gordon, who was with Ms. Schulz. RP 1284. Ms. Johnson-Das spent the next several days with them, sharing meals and sleeping in

the car. *Id*. Ms. Johnson-Das said she gave Mr. Gordon money for gas but never the proceeds from her prostitution. RP 1286. Ms. Johnson-Das admitted that Mr. Gordon offered to manage her money but that she continued to have control over it. RP 1288.

Ms. Schulz did not testify at Mr. Gordon's trial, although the government shared her texts and other social media with the jury. RP 1143.

Ms. Dolan appeared after she was arrested on a DOC warrant. Her initial statements to the police did not implicate Mr. Gordon. RP 1487. When she was arrested again, she told the government Mr. Dolan had been her pimp. RP 1488. At trial, Ms. Dolan returned to her original statements. RP 1701-02.

The government asked Ms. Dolan if she had changed her story because she was worried about being

labeled a "snitch." RP 1708. She said that such a worry did not really exist. *Id*.

Outside the jury's presence, the government suggested Ms. Dolan changed her story because of some sort of witness intimidation she heard through the jail vents. RP 1713. The government admitted it had no proof Mr. Gordon acted improperly but wanted to question Ms. Dolan about whether she had been improperly influenced. *Id*. Mr. Gordon objected, pointing out no evidence supported the assertion. RP 1714-15. He also raised concerns it would highlight his in-custody status. RP 1723. Over Mr. Gordon's objection, the court permitted the government to ask Ms. Dolan whether anyone reached out to her through the vents. *Id*.

In attacking Ms. Dolan's credibility, the government returned to its theory Ms. Dolan had been

tampered with, suggesting words that came through the vents forced her to alter her story. RP 1877.

E. ARGUMENT

1. The police lacked sufficient cause to stop Mr. Gordon's vehicle.

The Court of Appeals held that the police conducted a valid Terry stop of Mr. Gordon's vehicle. App. 5. Because the police relied entirely on factors that could have been associated with innocence and their hunch that Mr. Gordon was involved in illegal activity, this decision conflicts with decisions of this Court and the United States Supreme Court. RAP 13.4(a). This Court should take review of this significant question of constitutional law. *Id.*

The Fourth Amendment and article I, § 7, prohibit the seizure of a person without a warrant. *State v. Fuentes*, 183 Wn.2d 149, 157–58, 352 P.3d 152 (2015). Few exceptions exist that allow the police to

seize a person without a warrant. *Id.* (citing *State v. Garvin*, 166 Wn.2d 242, 248, 207 P.3d 1266 (2009)). No exception exists to justify Mr. Gordon's stop and seizure. *State v. Doughty*, 170 Wn.2d 57, 65, 239 P.3d 573 (2010). The fruits of that seizure must be suppressed. *Id.*

The Court of Appeals determined that the police had the authority to stop Mr. Gordon to conduct an investigative stop. App. 5. A valid *Terry* stop requires the investigating officer to have "reasonable suspicion of criminal activity based on specific and articulable facts known to the officer at the inception of the stop." *Fuentes*, 183 Wn.2d at 158; *see also Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The Court of Appeals' opinion focuses on the hunches developed by the police to determine they had reasonable suspicion to detain Mr. Gordon. First, the

Court notes where the police stopped Mr. Gordon was a known prostitution area. App. 6. But the record also established that this area was a "highly commercial area." RP 48. Many businesses were open, including a Hobby Lobby, a fitness center, a Motel 6, and several retail stores. *Id*. Many apartment buildings are also in the area. *Id*.

The Court also determined that the conversation between the officer and Mr. Gordon was sufficient to show that Mr. Gordon was either trying to solicit sex or recruit the undercover to work for him as a prostitute. App. 6. But this determination can only be made by jumping to the conclusion that Mr. Gordon was acting illegally and then fitting his words into a model of illegality.

In a conversation of no more than ten minutes, Mr. Gordon never mentioned prostitution or pimping.

RP 68, CP 797. Importantly, there was never an offer to exchange money or anything else for sex. *Id.* Instead, Mr. Gordon asked the officer if she was working for anyone, and she said she was independent. RP 58-59, CP 758. He then asked her for her phone number, which she declined. RP 60, CP 758. Mr. Gordon then asked if she wanted to make money, and the officer told him that making appointments was a waste of time. RP 61, CP 758. Mr. Gordon then gave the officer his number and left. RP 61, 758.

The only other information that the police had before seizing Mr. Gordon was that he was in a car with two other women, which was initially parked in front of a 7-Eleven. RP 83, CP 760. The police also determined he had a prior conviction for promoting prostitution. RP 125, CP 759.

The Court of Appeals determined that Mr. Gordon's behavior violated Everett Municipal Code § 10.24.110. App. 7. But this finding is in error. EMC 10.24.100 outlines how a person can commit this crime, none of which apply to Mr. Gordon. Instead, all the evidence establishes is that the police had a hunch that Mr. Gordon was acting illegally, which is insufficient to conduct a *Terry* stop.

The Court of Appeals' decision conflicts with prior decisions of this Court and the Court of Appeals. First, this Court can find the Court of Appeals decision conflicts with *Doughty*, 170 Wn.2d at 62. In *Doughty*, the police stopped the defendant's car approaching a known drug house late. *Id*. at 60. This Court recognized that a person's presence in a high crime area late at night was insufficient to establish reasonable suspicion. *Id*. at 62 (citing *State v. Ellwood*,

52 Wn. App. 70, 74, 757 P.2d 547 (1988)). This Court also recognized a person's "mere proximity to others independently suspected of criminal activity does not justify the stop." *Id.* (citing *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)).

This decision also conflicts with the Court of Appeals decision in *State v. Diluzio*, 162 Wn. App 585, 254 P.3d 218 (2011). In *Diluzio*, the officer observed the defendant speaking to a female in a known prostitution area. *Id.* at 589. Like here, the officers had significant experience with prostitution and were in an area known for prostitution. *Id.* Still, the Court of Appeals held that without witnessing an exchange of money or an actual solicitation, the information was too speculative to support reasonable suspicion. *Id.*

The Court of Appeals relies on the conversation between Mr. Gordon and the undercover to justify

disregarding these cases. App. 10. But this holding requires the Court to assume Mr. Gordon's words were intended to solicit an illegal act, which cannot be assumed from the plain language of the conversation. Mr. Gordon never solicited a sex act, offered any money or other goods in exchange for a sex act, or asked the undercover to perform any other illegal act.

The Court of Appeals' holding also requires the Court to find that Mr. Gordon's acts were committed in a high crime area. But as the record established, this neighborhood is a place where many people live and work. There is a Hobby Lobby, a supermarket, barbershops, drug stores, and other businesses that people frequent. RP 86. This is not an abandoned neighborhood where a person would only be on the street to solicit a prostitute.

This case provides this Court with the opportunity to repudiate the notion that persons living in a high-crime neighborhood are entitled to less protection than others. Mr. Gordon, who is Black, is entitled to no less protection than any other person. And when courts continue to rely on characterizations that neighborhoods are known for their high crime rates to justify police intrusion, they necessarily impact persons of color, especially Black men and women. Reshaad Shirazi, *It's High Time to Dump the High-Crime Area Factor*, 21 Berkeley J. Crim. L. 76, 88 (2016). This Court should abandon this factor in determining whether police have the authority to make a warrantless stop. *Id*., *see also State v. Suarez-Bravo*, 72 Wn. App. 359, 365, 864 P.2d 426 (1994).

The totality of the circumstances did not justify arresting Mr. Gordon for violating Everett's Municipal

Code or any other statute. The police did not have reasonable suspicion of criminal activity individualized to Mr. Gordon or anyone in his car that would justify an investigatory stop. *Thompson*, 93 Wn.2d at 841. Mr. Gordon had not committed any crime that warranted an unlawful police intrusion.

This Court should accept review to address whether the police had reasonable suspicion to seize Mr. Gordon and his vehicle. *Doughty*, 170 Wn.2d 57, 60; *Diluzio*, 162 Wn. App. at 585. Because the police lacked a sufficient basis for an investigatory stop, the stop should have been suppressed. This Court should accept review.

2. The government failed to prove that Mr. Gordon committed the crime of leading organized crime.

Due process requires the government to prove all elements of an offense beyond a reasonable doubt. *In re*

Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV.

RCW 9A.82.010(4) requires the government to prove that the defendant engaged three or more people in an enumerated crime. In a departure from this Court's precedence, the Court of Appeals determined that non-enumerated crimes could be considered to find a conviction for leading organized crime sufficient. App. 11. This decision conflicts with this Court's holding in *State v. Linville*, 191 Wn.2d 513, 423 P.3d 842 (2018), where this Court held that crimes not enumerated in RCW 9A.82.010(4) cannot be joined in a criminal profiteering prosecution. *Id*. at 523. This conflict warrants review. RAP 13.4(b).

a. This Court's interpretation of the legislature's intent to exclude prostitution from the crime of leading organized crime requires review.

This Court and the legislature have been clear. "Leading organized crime" is defined as "[i]ntentionally organizing ... any three or more persons with the intent to engage in a pattern of criminal profiteering activity ...." RCW 9A.82.060(1)(a). "Criminal profiteering" is then defined in RCW 9A.82.010(4); that statute contains an exclusive list of crimes that fit within the definition of "criminal profiteering." *Linville*, 191 Wn.2d at 519. Non-enumerated crimes cannot be joined in a criminal profiteering prosecution. *Id*. at 523.

Despite this clear directive, the Court of Appeals determined that Mr. Gordon needed to be the only person engaged in an act of criminal profiteering. App. 12. Instead, the Court of Appeals held that the evidence was sufficient to prove that Gordon led

organized crime by directing, managing, or supervising the prostitution activities of three women for his financial gain. App. 18.

This decision warrants review. In *Linville*, this Court held that the list of predicate profiteering crimes is exclusive and that the "pattern of criminal profiteering activity" must be based on three or more of those crimes. 191 Wn.2d at 521. Like here, *Linville* involved a defendant charged with multiple crimes. *Id.* at 516. The charge of leading organized crime encompassed the acts of others engaged in non-enumerated crimes. *Id.* This Court found that "criminal profiteering" crimes include only the predicate offenses listed explicitly in RCW 9A.82.010(4). *Id.* at 525.

Despite this clear directive, the Court of Appeals sought to anchor its decision in out-of-court statutes.

App. 16. But this Court has already examined the federal RICO statute, upon which the leading organized crime statute is based, to determine that acts beyond enumerated offenses cannot be a predicate for a conviction of RCW 9A.82.010. *Linville*, 191 Wn.2d at 521.

And this Court made clear that unless an offense is an "act of criminal profiteering" that fits within the definition of a "pattern of criminal profiteering," it cannot be joined with a violation of the leading organized crime statute. *Id*. at 523. "The conclusion is inescapable that predicate CPA criminal profiteering acts, like predicate RICO racketeering acts, are limited to the predicate crimes that the legislature expressly listed. That is why we said in *Trujillo v. Northwest Trustee Services, Inc.* that '[c]riminal profiteering' is defined as commission of specific enumerated felonies

for financial gain." *Id.* (citing *Trujillo v. Northwest Trustee Services, Inc.*, 183 Wn.2d 820, 837, 355 P.3d 1100 (2015) (citing RCW 9A.82.010(4))).

Nor does this Court of Appeals' decision comport with legislative intent. Every legislative act is presumed to have a material purpose. *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). Since its enactment, the legislature has amended the list in RCW 9A.82.085 to add new crimes. *See, e.g.,* Laws 2013, ch. 302 § 10 and Laws 2012 ch. 139 § 1 (subsection (4) (ss) (rr) and (tt) adding crimes related to trafficking and promoting commercial sexual abuse of minor); Laws 2008, ch. 108 § 24 (subsection (4)(qq) adding mortgage fraud). If the legislature intended criminal profiteering to include prostitution, these additions were unnecessary and meaningless. Plainly, the legislature only intended to include the

listed crimes within the definition of "criminal profiteering activity."

There is good reason for the exclusion of prostitution from the enumerated offenses. In *State v. Barbee*, the Court examined the purpose of the promoting prostitution statute. 187 Wn.2d 375, 387, 386 P.3d 729 (2017). "The history of Washington's promoting prostitution statute indicates that the statute is 'victim-centered' and focused on criminalizing the promotion of prostitution as it related to each individual exploited." *Id*. at 390. The history reinforces the statute's plain meaning, which is to protect those who are being prostituted. Under this analysis, the women who are prostitutes are not engaging in the promotion of prostitution.

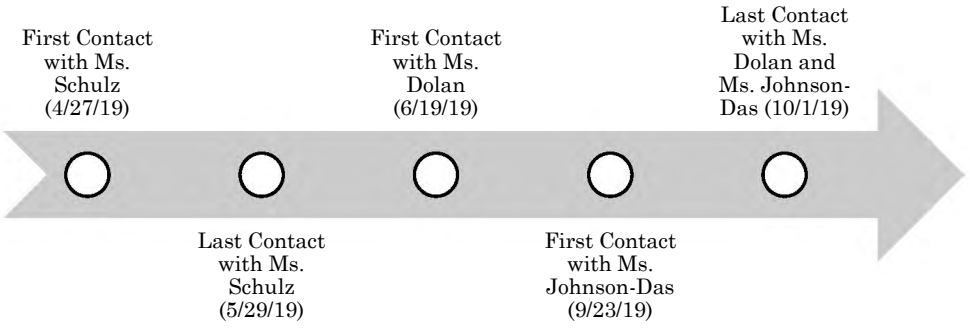
No allegations support that anyone other than Mr. Gordon was promoting prostitution or trafficking.

The government may have established all three women were involved in prostitution. And in the light most favorable to the government, the facts established Mr. Gordon engaged in promoting prostitution and trafficking. However, proof of Mr. Gordon's guilt for these crimes is insufficient to prove the crime of leading organized crime. RCW 9A.82.060(1)(a). The Court of Appeals' interpretation of this statute conflicts with this Court's prior decisions. This Court should take review.

b. This Court should review whether Mr. Gordon led "three or more persons" in an organized crime.

At no time were more than two people engaged in prostitution with Mr. Gordon. Mr. Gordon's first contact with Mr. Schulz occurred on April 27, 2019, and ended on May 29, 2019. CP 723. Mr. Gordon did make contact with Ms. Dolan until June 19, 2019. His

first contact with Ms. Johnson-Das was on September 23, 2019. *Id.* Communication with both of these women ended on October 1, 2019. *Id.*



Even if the evidence supported that the women were involved in an enumerated offense, Mr. Gordon never led an organized crime group of three people. RCW 9A.82.060(1). His transitory relationships with the three separate women are insufficient to support an essential element of the crime of leading organized crime. This Court should also review whether sufficient evidence of this statutory requirement exists.

3. The government's misconduct deprived Mr. Gordon of a fair trial.

The Court of Appeals held that the government's insinuation that Mr. Gordon had improperly influenced Ms. Dolan's testimony was not misconduct. App. 21. Because this decision conflicts with decisions of this Court and raises significant questions of constitutional law, this Court should accept review. RAP 13.4(b).

The Sixth and Fourteenth Amendments and Article I, §§ 3 and 22, protect against prosecutorial misconduct. U.S. Const. amend. VI, XIV; Const. art. I, § 3, § 22. Misconduct violates the "fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

At trial, Ms. Dolan provided inconsistent testimony from an interview she had with the government. RP 1713. After raising the issue with the

court, it permitted the government to ask her whether she had changed her story because of what she had heard through the vents. RP 1723. No evidence suggested Mr. Gordon had acted to influence her testimony. *Id*.

But the prosecutor used this opportunity to vouch for Ms. Dolan's previous version of what had happened. In its closing argument, the government highlighted this question to explain why Ms. Dolan had not told the same version of events at trial. RP 1877. Because Mr. Gordon objected and this misconduct unfairly influenced the outcome of Mr. Gordon's trial, reversal is required.

The Court of Appeals holds that Mr. Gordon did not object, but the record does not support this finding. While the objection was not contemporaneous, Mr. Gordon made significant argument about why this

testimony should not have been permitted. RP 1708. Again, Mr. Gordon objected when the government suggested Ms. Dolan had been coerced into changing her story through the vents. RP 1717. Even so, this Court could also find the argument flagrant and ill-intentioned. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

The Court of Appeals found no vouching occurred. App. 22. But vouching occurs when the government puts its credibility behind a story or implies additional information supports it. *State v. Robinson*, 189 Wn. App. 877, 892-93, 359 P.3d 874 (2015). When the government asked questions and then made arguments that Ms. Dolan had been improperly influenced, suggesting it was Mr. Gordon's fault, it improperly vouched for its witness. Vouching for a witness is misconduct. *Berger v. United States*, 295 U.S. 78, 88, 55

S. Ct. 629, 79 L. Ed. 1314 (1935). Improper vouching implicates the right to a fair trial and impartial jury under the Sixth Amendment and article I, § 22. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009).

The government returned to this unfounded speculation by attacking Ms. Dolan's credibility during closing arguments, arguing she might have changed her story because of what Ms. Dolan heard in the jail "vents." RP 1877. When it claimed Mr. Gordon still had "control" over Ms. Dolan, it suggested he could manipulate her testimony improperly. RP 1879. Again, no evidence was presented that Mr. Gordon had such an ability.

The prosecution's misconduct in closing arguments reinforced its earlier misconduct. A prosecutor must "seek convictions based only on probative evidence and sound reason." *State v.*

Casteneda–Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991). Suggesting Mr. Gordon influenced Ms. Dolan's testimony was improper. It was designed to inflame the passions and prejudices of the jury. *Glasmann*, 175 Wn.2d at 704 (citing *State v. Brett*, 126 Wn.2d 136, 179, 892 P.2d 29 (1995); *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988)). Without evidence to support the claim, this was flagrant and ill-intentioned. *Id.* at 704.

Likewise, arguments that shift or misstate the government's burden to prove its case beyond a reasonable doubt are misconduct. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (quoting *State v. Gregory*, 158 Wn.2d 759, 859–60, 147 P.3d 1201 (2006)). This misconduct is flagrant and ill-intentioned misconduct when made in closing arguments. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010). Here, by arguing Mr. Gordon was still controlling Ms.

Dolan, the government attempted to shift its burden, requiring Mr. Gordon to show that he had not influenced Ms. Dolan's testimony. This argument was flagrant and ill-intentioned, depriving Mr. Gordon of this right to a fair trial.

When the government suggested Mr. Gordon tampered with one of the witnesses, Mr. Gordon's ability to defend himself became impossible. *Lindsay*, 180 Wn.2d at 434. This misconduct could not be cured. *Glasmann*, 175 Wn.2d at 711. This Court should take review.

F. CONCLUSION

Based on the preceding, Mr. Gordon asks this Court to grant review pursuant to RAP 13.4(b).

This petition is 4,157 words long and complies with RAP 18.17.

DATED this 15th day of March 2023.

Respectfully submitted,

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APPENDIX

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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BERNARD GORDON, Appellant	No. 82784-7-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, C.J. — Bernard Gordon appeals his convictions for human trafficking, promoting prostitution, and leading organized crime. Gordon challenges his initial detention, contending the police stopped him without reasonable suspicion that he was committing a crime. He also contends the State presented insufficient evidence to establish that he was the leader of organized crime. Finally, he argues the prosecutor committed misconduct by suggesting that one witness changed her testimony based on Gordon's improper influence. We affirm.

FACTS

On May 29, 2019, the Everett Police conducted an operation in a high prostitution area in Everett, in which Detective Molly Spellman worked undercover as a decoy prostitute. Detective Spellman, with extensive training in undercover work and a thorough understanding of the subculture of prostitution and its

distinctive language, relationships, and context, dressed in a manner typical for prostitutes working in that area and walked slowly and deliberately, making eye contact with drivers. Detective Spellman explained that, "in that environment, the way I was dressed, the actions I was taking by saying I was trying to make money was indicative that I was trying to make money as a prostitute."

Gordon approached Detective Spellman at approximately 11:00 a.m. Calling out to get her attention, Gordon asked what she was doing. Detective Spellman told him she was trying to make money. Gordon asked if she worked for anyone, which Detective Spellman understood to mean whether she had a "pimp" or boss. She told him she was independent. He asked if he could make an "appointment," which Detective Spellman understood to be a request for sex or an inquiry about becoming her pimp. She told Gordon she did not take appointments because she had been stood up in the past. Gordon assured her he would not stand her up but when she refused a second time, Gordon gave her his name, "Terrance," and his phone number.

Detective Spellman reported this conversation to other officers, who surveilled Gordon as he left. They observed Gordon enter a nearby store before getting into a car with two women, later identified as J.S. and B.D. The officers, Detective Gregory Mueller and Officer Anatoliy Kravchun, checked the car registration and learned it was registered to Gordon and that Gordon had prior convictions for promoting prostitution and luring.[1]

[1] Under RCW 9A.40.090(1), a person commits the crime of luring when he "[o]rders, lures, or attempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public, or away from any area or structure constituting a bus terminal, airport terminal, or other transportation terminal, or into a motor vehicle" if the perpetrator

Based on Gordon's conversation with Detective Spellman and these prior convictions, Detective Mueller and Officer Kravchun stopped Gordon's car to investigate a possible violation of Everett's Municipal Code (EMC) prohibiting prostitution loitering. EMC 10.24.110.

J.S., who was driving the car when police stopped it, became very nervous and began hyperventilating. The police confirmed her identity and then arrested her on an outstanding Department of Corrections (DOC) warrant and put her into the back seat of the police vehicle. At that point, J.S. told police she worked as a prostitute for Gordon, had been doing so for "quite a while," hated it, and Gordon had abused her. As they drove away, J.S. shouted at Gordon "I [f---ing] hate you. I can't do this anymore. I hate it." The police also learned B.D., the other occupant of the car, had an outstanding DOC warrant and they placed her under arrest as well.

Based on J.S.'s statement, Officer Kravchun arrested Gordon for first degree promoting prostitution. Gordon was released from custody in early August 2019 and rearrested on October 1, 2019. At the time of his second arrest, police learned that Gordon was associated with a stolen vehicle located nearby. They found K.J.-D. sleeping in the front seat of that car. K.J.-D. told police and later testified at trial that she had met Gordon a week earlier, when he solicited her to engage in prostitution. The next day she met up with Gordon while he was with J.S., whom K.J.-D. knew as "Caitlyn." K.J.-D. testified that she spent a week with the couple, sharing meals and sleeping in the car. K.J.-D. explained that Gordon repeatedly

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is unknown to the victim and does not have the consent of the victim's parent or guardian. Gordon was convicted of luring in 2009.

sought to "manage" her and her money. While she originally told police she never shared the proceeds from her prostitution with Gordon, she later testified at trial that he let her sleep in his car and "he would basically just hold on to whatever money I made so that I wouldn't spend it on things that I guess didn't need it to be spent on."

At trial, the State called Detective Maurice Washington, an expert on human trafficking, to explain the subculture of prostitution to the jury. He testified that traffickers or "pimps" often patrol areas of prostitution seeking to recruit independent prostitutes to work for them. According to Washington, once the trafficker has a recruit, he establishes a code of conduct dictating how the woman dresses, to whom she can speak, what prices she must charge for her services, and how much money she must earn each day. He stated that traffickers often discipline rule violations with beatings, public humiliation, the withholding of resources, and threats toward the woman's family.

The State presented evidence that Gordon operated consistent with this structure with J.S., B.D., and K.J.-D. K.J.-D. testified Gordon expected her to follow certain rules, including not going on "dates" with Black men, working a particular section of Aurora Avenue, and not talking to anyone on the street that was not a customer. She explained that Gordon communicated with her through text message codes, and reprimanded her for not "following instructions." K.J.-D. also testified Gordon withheld her belongings and controlled the women's money.

The State also introduced Facebook messages in which J.S. confronted Gordon about his violence toward her and asked "[W]hy do you even want me?

There's plenty of other obedient women out there who would gladly take my place."[2] And the State presented evidence that even after his arrest, Gordon gave B.D. directions from jail and told her that the "[o]nly thing you need is the blueprint, these instructions. The instructions don't stop baby."

A jury convicted Gordon of one count of second degree human trafficking, two counts of first degree promoting prostitution, one count of second degree promoting prostitution, and one count of leading organized crime. He was sentenced to 252 months imprisonment. Gordon appeals.

ANALYSIS

Reasonableness of Police Detention

Gordon first contends the police illegally seized him when they stopped his vehicle without a warrant because they lacked reasonable suspicion that he was committing a crime. We disagree.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution, a police officer generally cannot seize a person without a warrant. *State v. Fuentes*, 183 Wn.2d 149, 157-58, 352 P.3d 152 (2015) (citing *State v. Garvin*, 166 Wn.2d 242, 248, 207 P.3d 1266 (2009)).

A *Terry*[3] investigative stop is a recognized exception to the warrant requirement. *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003). To conduct a valid *Terry* stop, the investigating officer must have "reasonable suspicion of

[2] These messages were sent between "Bishop MegaMac MegaMac" and "Amber Kings" who police determined were Gordon and J.S. based on photographs sent in those Facebook messages. "Bishop" was an alias Gordon commonly used.
[3] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

criminal activity based on specific and articulable facts known to the officer at the inception of the stop." *Fuentes*, 183 Wn.2d at 158. In determining whether the officer had reasonable suspicion, we consider the totality of the circumstances known to the officer at the inception of the stop, including "the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect's liberty." *Id.* (citing *Acrey*, 148 Wn.2d at 746-47.) The showing necessary to meet the reasonable suspicion standard for a *Terry* stop is much lower than the showing necessary to meet the probable cause standard for a search warrant. *State v. Lee*, 147 Wn. App. 912, 921-22, 199 P.3d 445 (2008). Whether a warrantless investigative stop was justified or represents a constitutional violation is a question of law that we review de novo. *State v. Bailey*, 154 Wn. App. 295, 299, 224 P.3d 852 (2010).

Gordon argues that, at the time the police detained him, the police knew only that he had spoken to a female undercover agent in a high-prostitution area, information insufficient to raise a reasonable suspicion of criminal activity. This argument is inconsistent with the record.

Before detaining Gordon, the police knew Gordon was in a location well known for prostitution activity, and that he had approached Detective Spellman, who was walking in a manner intended to look like a prostitute waiting for customers. They also knew he asked Detective Spellman who she worked for and if she would consent to an "appointment" with him. Detective Spellman's experience led her to conclude that Gordon was either soliciting sex or trying to

recruit her to work for him as a prostitute, testimony the trial court found credible. Also before detaining Gordon, police were aware that he had a recent criminal conviction for promoting prostitution and luring. As the trial court found, these specific and articulable facts, in combination, supported a reasonable suspicion that Gordon had violated Everett Municipal Code § 10.24.110, an ordinance criminalizing prostitution loitering.[4]

That provision states

> A person commits the offense of "prostitution loitering" *if he or she remains in a public place and intentionally solicits, induces, entices or procures another to prostitution.* Among the circumstances which may be considered in determining whether a person intentionally solicits, induces, entices or procures another to commit prostitution are:
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> 1. Repeatedly beckoning to, stopping, or attempting to stop or engage passersby in conversation; or
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> 2. Repeatedly stopping or attempting to stop motor vehicle operators by hailing, waving of arms or other bodily gestures; or
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> 3. Being a known prostitute or panderer. "Known prostitute or panderer" means a person who within one year previous of date of arrest for any violation hereof is known by the arresting officer to have been convicted of an offense involving prostitution; or
>
> 4. That the actor inquires whether a potential patron, procurer or prostitute is a police officer or requests the touching of genitals or female breasts or requests exposure of genitals or female breasts with the purpose of establishing that the person is not a police officer.

EMC § 10.24.110(A) (emphasis added).

[4] When Officer Kravchun searched Gordon's vehicle registration, he learned that J.S. was associated with the car and that she had an active DOC warrant. Detective Mueller and Officer Kravchun testified that they recognized J.S. as the driver of the vehicle and pulled the car over to arrest her on the outstanding DOC warrant. The trial court, however, rejected this justification for the detention, finding insufficient evidence to establish that the officers had identified J.S. before the stop.

Gordon argues that the police lacked any evidence that he had engaged in any of the actions described in subparagraphs one through four of EMC §10.24.110(A). But under the plain language of the code provision, the elements of the crime are (1) remaining in a public place and (2) intentionally soliciting, inducing, enticing or procuring another to prostitution. The numbered subparagraphs that follow are nonexclusive circumstances that a trier of fact may consider when determining a person's guilt. They are not elements of the crime itself. *See State v. Brown*, 30 Wn. App. 344, 348-49, 633 P.2d 1351 (1981) (interpreting a near identical Seattle ordinance), *overruled on other grounds by State v. Commodore*, 38 Wn. App. 244, 684 P.2d 1364 (1984). Gordon could be guilty of prostitution loitering even if he did not engage in any of the activities described in subparagraphs one through four. Instead, the police only needed reasonable suspicion that he was intentionally soliciting another to prostitution while in a public place. That suspicion is supported by the facts here.

Gordon analogizes his case to *State v. Diluzio*, 162 Wn. App. 585, 254 P.3d 218 (2011) and *State v. Doughty*, 170 Wn.2d 57, 239 P.3d 573 (2010) to suggest that there was an inadequate quantum of facts known to police at the time of the stop. Neither case is analogous.

In *Diluzio*, a police officer saw the defendant stop his car in a high prostitution area and talk through the passenger window to a female pedestrian. 162 Wn. App. at 588-89. The officer also saw the female then get into his car. *Id.* at 589. The officer, who assumed the female was a prostitute from whom Diluzio had solicited sex, conducted a *Terry* stop. Diluzio gave the police officer a false name and was

subsequently arrested on an outstanding warrant. A search incident to his arrest led to the discovery of methamphetamine and heroin. *Id.* at 589.

Diluzio challenged his drug convictions, arguing the officer lacked reasonable suspicion to believe he was committing the crime of solicitation. *Id.* at 591. Division III of this court agreed. *Id.* at 593. The court noted that the officer did not see an exchange of money or overhear any conversation between Diluzio and the female, and neither was known to the police to have been involved in prostitution. It concluded "[t]hese incomplete observations do not provide the basis for a *Terry* stop." *Id.* The court concluded that the totality of circumstances did not support a reasonable suspicion that Diluzio was engaged in soliciting prostitution and reversed his convictions. *Id.* at 588.

In *Doughty*, the police stopped the defendant's car on suspicion of drug activity after observing him park his car at 3:20 a.m., approach a known drug house, return two minutes later, and drive away. 170 Wn.2d at 60. After he was arrested for driving without a valid license, a search incident to arrest led to the discovery of a glass pipe containing methamphetamine. When booked into jail, police found methamphetamine in Doughty's shoe. *Id.* On appeal of a conviction for possession of methamphetamine, Doughty challenged his investigative detention, arguing the police lacked reasonable suspicion to stop him. The Supreme Court agreed and reversed his conviction.

The court noted that a person's presence in a high-crime area late at night does not, by itself, give rise to a reasonable suspicion to detain a person. *Id.* at 62. The police relied on the fact that the house had previously been identified, from

neighbor complaints, as a drug house and the fact that Doughty had visited the house late at night and spent less than two minutes inside. *Id.* But the court noted that the police officer who made the arrest had not observed Doughty's actions inside the house, could not tell if Doughty had interacted with anybody in the house, and had not heard any conversations or observed any suspicious activities other than Doughty's very brief presence in the middle of the night. *Id.* at 64. The court concluded the totality of the circumstances did not justify the stop. *Id.*

Both cases are distinguishable from Gordon's case. In both *Diluzio* and *Doughty*, the police stopped the defendants based on little more than their presence in an area where police suspected criminal activity. Gordon was observed in an area known for prostitution—which is why Detective Spellman was operating undercover in the area. But there was considerably more information known to police when they stopped Gordon than was known by the police in either *Diluzio* or *Doughty*. Unlike the arresting officers in those cases, Detective Spellman had a direct conversation with Gordon, someone police confirmed had prior convictions for promoting prostitution and luring, in which he explicitly solicited her either to engage in sex or to allow him to operate as her pimp. The police based their suspicion on his own words and actions. We conclude the police had a reasonable suspicion based on specific and articulable facts that Gordon had engaged in prostitution loitering and the *Terry* stop was lawful.

Leading Organized Crime

Gordon next challenges his conviction for leading organized crime under RCW 9A.82.060, arguing that the State failed to present sufficient evidence that

Gordon directed three people to engage in criminal profiteering activity. We disagree with Gordon's interpretation of this criminal statute.

Due process requires that the State prove each element of a charged offense beyond a reasonable doubt. *State v. Chacon*, 192 Wn.2d 545, 549, 431 P.3d 477 (2018). The facts that the State must prove under a criminal statute are a question of law that we review de novo. *State v. Olsen*, 10 Wn. App. 2d 731, 736, 449 P.3d 1089 (2019).

Gordon was convicted of "leading organized crime" under RCW 9A.82.060(1). This statute reads:

> (1) A person commits the offense of leading organized crime by:
>
> (a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity.

"Criminal profiteering activity" is statutorily defined as committing one of several enumerated predicate offenses, including promoting prostitution, for financial gain. RCW 9A.82.010(4)(y). The court instructed the jury in a manner consistent with both RCW 9A.82.060(1) and RCW 9A.82.010(4)(y). Instruction no. 28 read:

> To convict the defendant of the crime of Leading Organized Crime as charged in Count 5, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) that between August 1, 2018, and October 1, 2019, the defendant intentionally organized, managed, directed, or supervised three or more persons;
> (2) that the defendant acted with the intent to engage in a pattern of criminal profiteering activity; and
> (3) that any of these acts occurred in the State of Washington.

The statute also defines a "pattern of criminal profiteering activity." RCW 9A.82.010(12). The court instructed the jury consistent with this statutory definition. Instruction no. 27 provided:

> A pattern of criminal profiteering activity means at least three acts that meet all of the following requirements:
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> (1) Each act was committed for financial gain;
> (2) Each act constituted the crime of promoting prostitution;
> (3) The acts had the same or similar intent, results, or methods of commission, or were otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise;
> (4) The acts were not isolated events;
> (5) At least one of the acts occurred after July 1, 1985; and
> (6) The last of the acts occurred within five years after the commission of the earliest act.

Gordon did not object to either of the instructions as an incorrect statement of the elements of this crime.

Gordon now argues for the first time on appeal that RCW 9A.82.060 requires the State to prove that the three people Gordon managed had themselves committed an enumerated predicate criminal profiteering crime. Gordon concedes the State proved he engaged in three acts of promoting prostitution and that promoting prostitution is a predicate criminal profiteering crime but he contends the State did not prove that J.S., B.D., and K.J.-D., engaged in criminal profiteering activities.

We reject Gordon's contention that the statute requires the State to prove that the defendant and those whom he managed all engaged in an act of criminal profiteering, as that argument is inconsistent with the plain language of RCW 9A.82.060.

We review issues of statutory interpretation de novo. *State v. Dennis*, 191 Wn.2d 169, 172, 421 P.3d 944 (2018). The purpose of statutory interpretation is to give effect to the intent of the legislature. *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012). To derive legislative intent, we look to the "plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). If the statute's meaning is unambiguous, our inquiry ends. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A statute is ambiguous when it is susceptible to two or more reasonable interpretations, not merely because two different interpretations are possible. *In re Det. of Aston*, 161 Wn. App. 824, 842, 251 P.3d 917 (2011).

First, we cannot find, as an element of this crime, any requirement that Gordon managed others in *their* pattern of criminal profiteering activity. RCW 9A.82.060(1) merely requires the State to prove that Gordon acted "with the intent" to engage in a pattern of such activity; it does not require the State to prove that those whom Gordon managed or directed acted with such an intent. The phrase "with the intent to engage" in subsection (1)(a) unambiguously relates back to the defendant charged with committing the offense, not to the "three or more persons" being managed by the defendant. It would make little sense to require the State to prove the intent of those whom Gordon managed in order to prove Gordon guilty of the crime.

Second, Gordon's interpretation would require us to delete the phrase "with the intent" from the statute completely. We will not delete words from an otherwise unambiguous statute. *State v. Roggenkamp*, 153 Wn.2d 614, 624,106 P.3d 196 (2005) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

Third, had the legislature intended for a defendant to be guilty of this crime only when he manages others who engage in an enumerated predicate crime, it could easily have said so. Subsection (1)(b) of the same statute criminalizes "[i]ntentionally inciting or *inducing others* to engage in violence or intimidation with the intent to further or promote the accomplishment of a pattern of criminal profiteering activity." RCW 9A.82.060(1)(b) (emphasis added). The legislature did not, in subsection (1)(a), criminalize intentionally inducing others to engage in criminal profiteering activities.

Finally, Gordon relies heavily on the crime's name, "leading organized crime," to suggest the legislature intended to limit the statute's application to classic organized criminal enterprises made unlawful by the federal Racketeer Influenced and Corrupt Organizations Act (RICO)[5] where a defendant, at the head of a criminal enterprise, directs others to engage in a predicate crime.

It is true that our "pattern of criminal profiteering activity" parallels the federal RICO statute's "pattern of racketeering activity." *State v. Linville*, 191 Wn.2d 513, 521, 423 P.3d 842 (2018) (comparing RCW 9A.82.010(12) with 18 U.S.C. § 1961(5)). But while some of the definitions are similar, the elements of crimes outlined in RICO and RCW 9A.82.060 differ.

[5] 18 U.S.C. § 1961 *et seq.*

RICO requires more than proof that a defendant engaged in a pattern of racketeering activity. RICO makes it unlawful (a) to engage in a pattern of racketeering activity and to invest money derived from that activity in the establishment or operation of an enterprise engaged in interstate commerce; (b) to acquire or maintain, through a pattern of racketeering activity, an interest in or control of any enterprise engaged in interstate commerce; and (c) to be employed by or associated with an enterprise engaged in interstate commerce whose affairs are conducted through a pattern of racketeering activity. 18 U.S.C. § 1962(a) - (c).

To establish a RICO crime under 18 U.S.C. § 1962, the federal government must prove either that the defendant derived income from a pattern of racketeering activity and then used or invested some part of that income in the establishment or operation of an enterprise engaged in commerce, *United States v. Vogt*, 910 F.2d 1184 (4th Cir. 1990), or that the defendant associated with an enterprise which conducted its affairs through a pattern of racketeering activities. *United States v. Goldin Indus.*, *Inc.*, 219 F.3d 1271, 1274 (11th Cir. 2000). This RICO enterprise must have some sort of structure, formal or informal, for carrying out its objectives and the various members and associates of the enterprise must function as a continuing unit to achieve a common purpose. *Boyle v. United States*, 556 U.S. 938, 945-46, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009).

The federal RICO crimes actually parallel a different Washington criminal statute, RCW 9A.82.080, under which it is unlawful to use proceeds from criminal profiteering to acquire an interest in or to operate any enterprise, or to acquire an

interest in any enterprise through a pattern of criminal profiteering. RCW 9A.82.060's "leading organized crime" has no federal RICO equivalent.

Only four states, Arizona, North Dakota, New Jersey, and Washington, have enacted similar laws. Susan Brenner, "*RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*", 2 Wm. & Mary Bill Rts. J. 239, 281-82 (1993). But unlike Washington's leading organized crime statute, Arizona's law requires proof that the defendant intentionally engaged in activities designed or intended to further the illegal objectives of a "criminal syndicate." *State v. Tocco*, 156 Ariz. 110, 750 P.2d 868, 872 (Ar. App. 1986), citing Ariz. Rev. Stat. § 13-2308. A "criminal syndicate" is defined by statute as a combination of persons "engaging, or having the purpose of engaging, on a continuing basis in conduct that violates [a felony] statute of this state." Ariz. Rev. Stat. §13-2301(C)(7).

North Dakota's law makes it unlawful to intentionally organize, manage, direct, supervise, or promote the criminal objectives of a "criminal association," defined as "any combination of persons or enterprises engaging, or having the purpose of engaging, on a continuous basis in conduct which violates any [felony statute] of this state." North Dakota Century Code §§ 12.1-06.1-02; 12.1-06.1-01(1)(b). Washington's statute includes no such criminal association element.

New Jersey's statute more closely follows Washington's statute by explicitly making it unlawful for a person to be a "leader of organized crime." N.J. Stat. Ann. 2C:5-2(g). But that state has statutorily defined "leader of organized crime" to be someone who "purposefully conspires with others as an organizer, supervisor, manager or financier to commit a continuing series of crimes which constitute a

pattern of racketeering activity." *Id.* RCW 9A.86.060 contains no analogous conspiracy requirement.

Thus, although the crime is called "leading organized crime," it defines that crime much differently than either the federal RICO statute or other similar state RICO laws. When a Washington statute defines a term, that definition controls. *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001). We cannot impose a criminal syndicate, criminal association, or conspiracy element that our legislature chose not to include.

Here, the statutory elements of "leading organized crime" are: the defendant (1) organized, managed, directed, supervised or financed three or more people; and (2) the defendant did so with the intent to engage in a "pattern of criminal profiteering activity."

Gordon suggests that by using the word "pattern," the legislature intended to require proof of a criminal enterprise. But "pattern" is statutorily defined as "engaging in at least three acts of criminal profiteering" within a five-year period. It does not require proof that more than one person engaged in such acts.

Indeed, the statute further explains that "the three acts must have the same or similar intent, results, accomplices, principals, victims, *or* methods of commission, *or* be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events." RCW 9A.82.010(12) (emphasis added). Certainly, had Gordon recruited his three victims to act as accomplices in the commission of three predicate crimes, that activity would fall within the definition of a "pattern."

But the legislature defined "pattern" more broadly, using the disjunctive, requiring neither principals nor accomplices to the predicate crimes. When the legislature uses the term "or," as they did in the definition of "pattern," we presume it is being used in the disjunctive sense unless the legislative intent is clearly to the contrary. *Childers v. Childers*, 89 Wn.2d 592, 595-96, 575 P.2d 201 (1978). Use of the disjunctive in a statute indicates alternatives. *See generally*, A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, Conjunctive/Disjunctive Canon, 116 (2012). Based on this reading, the State may establish a pattern by showing that the defendant directed accomplices to commit criminal profiteering activities or, alternatively, by showing that the defendant committed the predicate crimes himself but managed or directed three people to further his own ability to profit from this criminal conduct.

Under this reading of RCW 9A.82.060, the evidence was sufficient to prove that Gordon led organized crime by directing, managing, or supervising the prostitution activities of three women, J.S., B.D., and K.J.-D., for his personal financial gain. He dictated how the women dressed, with whom they interacted, and how much they charged customers for sex. Gordon acted with the intent to promote the prostitution activities of all three women—an enumerated criminal profiteering act.[6] We therefore affirm Gordon's leading organized crime conviction.

[6] Gordon also argues that the State failed to prove that he led J.S., B.D., and K.J.-D. at the same time. We reject this argument as well because the statute does not require proof that a defendant directed or managed three people simultaneously. The only temporal requirement is that the defendant's three criminal profiteering activities must occur within a five-year period.

Prosecutorial Misconduct

Finally, Gordon contends that the prosecutor committed misconduct in questioning B.D. about why she changed her story about Gordon's involvement in her sex work and suggesting in closing that Gordon had improperly influenced her testimony.

A prosecutor must ensure that they do not violate a defendant's right to a constitutionally fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). To establish prosecutorial misconduct, a defendant must show that the prosecuting attorney's questions or statements were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). We consider the prosecutor's conduct in the context of the record and all the circumstances at trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

B.D. initially denied engaging in prostitution and denied that Gordon managed her prostitution activities. She later informed the State that Gordon had trafficked her. B.D. described in great detail how Gordon had repeatedly abused her, took her money, and imposed rules as to where she could walk and to whom she could speak.

But immediately before the State called B.D. to testify at trial, the prosecutor informed the court that B.D. was being held in the jail and "is extraordinarily fearful being labeled [a] snitch. She's been hearing things through the [jail] vent. They've been—inmates have been yelling at her through the vent about this." The prosecutor explained that there was an inmate at the jail "[w]ho talked to her about why he knew she was here. So she's labeled a snitch in the jail right now. And

she's got to go back to prison where she [will have the] label [of] a snitch." The prosecutor indicated he was unsure how B.D. would testify and explained that, if she changed her testimony, he wanted "to explore to some degree what's motivating that."

When the State called B.D. to the stand, she denied that Gordon had promoted her prostitution activities. The prosecutor then impeached B.D. with her prior inconsistent statements. In the course of this examination, B.D. stated that, while not afraid of Gordon, she did not want to testify against him. The State elicited testimony that B.D. was in prison and B.D. confirmed she was raised in an environment that strongly discouraged talking to the police. After B.D. admitted she had told the prosecutor "things [she] knew would probably get [Gordon] in trouble," the prosecutor asked to address the issue of B.D.'s testimony outside the presence of the jury. With the jury absent, the prosecutor informed the court that he wanted to introduce evidence that B.D. had been threatened in jail and that these threats may have contributed to her changing tale.

The court recognized that there was no evidence that Gordon had directed threats at or otherwise communicating with B.D. at the jail. The court nonetheless allowed the prosecutor to ask a very limited, leading question regarding what B.D. had heard while in jail. The court specifically ruled that the prosecutor could not suggest that Gordon was in the same jail as B.D.

In accordance with the trial court's ruling, the prosecutor asked B.D. "You told me that while you've been in jail here, people were reaching out to you in the vents, talking about you testifying in this case, correct?" B.D. answered "Not

necessarily." The prosecutor then moved on to a different topic and pursued this line of questioning no further.

In closing argument, the prosecutor asked the jury to assess the credibility of the witnesses and argued

> it was quite obvious why [B.D.] testified the way she did. She's been taught since an early age that you don't snitch, no matter the harm, no matter the abuse, you don't snitch. You don't point your finger at someone, you don't talk to the police, you don't talk to somebody like me, even though she did that last week. She did it again when she met with [defense counsel] and his defense team.
>
> But we don't know what it's like. She has to go back into the jail here where she might not necessarily or might be hearing things in the vents. And then she has to go back down to Purdy and be in prison, labeled a snitch.

The prosecutor implied that B.D. changed her testimony because "[t]his defendant still has the control over her."

Gordon argues that the prosecutor improperly suggested that Gordon tampered with and controlled B.D.'s testimony. Gordon further contends that the prosecutor vouched for her story when he suggested that Gordon had improperly influenced her testimony.

We conclude that neither the prosecutor's questions of B.D. nor the comments in closing constitute misconduct. The prosecutor questioned B.D. after a thorough debate outside the presence of the jury and asked only the question the trial court permitted him to ask. The record does not support the contention that the prosecutor's question about the jail vents suggested either that Gordon was in custody or that he was the one attempting to influence B.D.'s testimony. The

question, taken in the context of B.D.'s testimony, merely implied that she was afraid other inmates might consider her a snitch.

The prosecutor's closing argument flowed from B.D.'s testimony. A prosecutor has "wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility." *State v. Thompson*, 169 Wn. App. 436, 496, 290 P.3d 996 (2012). The prosecutor here accurately recounted how B.D.'s testimony had changed over time and made a permissible inference that she changed her testimony because she was afraid of being labeled a snitch.

Contrary to Gordon's arguments, the prosecutor's comments do not amount to impermissible vouching because they did not put the government's credibility behind her story or imply that additional information supported her testimony. *See State v. Robinson*, 189 Wn. App. 877, 892-93, 359 P.3d 874 (2015) (vouching occurs where the prosecution places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony). To the contrary, the prosecutor attacked B.D.'s credibility. He highlighted the inconsistencies in her various versions of events and challenged the jury to consider her motivations for seeking to exculpate Gordon. Gordon cites no authority supporting his contention that permissible impeachment of a witness amounts to impermissible vouching.

To the extent that the prosecutor erroneously implied that Gordon had tampered with B.D.'s testimony, Gordon did not object and has not demonstrated

that the comment was so flagrant or ill-intentioned that it could not have been cured by an instruction.

We determine whether the defendant was prejudiced by prosecutorial misconduct under one of two standards of review. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant made a timely objection at trial, he must demonstrate that any improper conduct "resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Allen*, 182 Wn.2d at 375. But when a defendant fails to object at trial, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61. In order to prevail under this heightened standard, the defendant must show that (1) no curative instruction could have eliminated the prejudicial effect, and (2) there was a substantial likelihood the misconduct resulted in prejudice that affected the verdict. *Id.* at 761. Gordon has made neither showing here.

We therefore affirm.

Andrus, C.J.

WE CONCUR:

Coburn, J.

Mann, J.

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