69005-1

69005-1

NO. 69005-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LUIS PEREZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH ANDRUS

BRIEF OF RESPONDENT

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2. Whether the trial court properly exercised its discretion in denying Perez's motion for a mistrial where the trial irregularity alleged was not serious, involved cumulative evidence, and was not prejudicial.

3. Whether the trial court's evidentiary rulings are reasonable and based on tenable grounds, and whether any possible error is harmless due to overwhelming evidence of Perez's guilt.

4. Whether the admission of the victim's hearsay statements to a police officer should be reviewed on appeal because there was no objection at trial and any possible error is harmless because the testimony was merely cumulative of other evidence.

5. Whether this Court should reject Perez's claim that his right to confrontation was violated by the admission of his non-testifying co-defendant's statement because the statement is an adoptive admission by Perez and because any possible error is not "manifest" under RAP 2.5.

6. Whether this Court should remand for the trial court to enter an order amending the judgment and sentence to correct a term of community custody.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Luis Perez, and his co-defendant, Christopher White, with assault in the second degree, two counts of rape in the first degree, two counts of rape in the second degree (in the alternative to rape in the first degree), and unlawful imprisonment based on a series of acts committed against E.C. between January 20 and January 22, 2010. CP 1-10, 64-67. Perez was also charged with possession of a controlled substance (oxycodone).[1] CP 2-3, 66-67.

A jury trial on the assault, rape, and unlawful imprisonment charges was held in November and December 2011 before the Honorable Beth Andrus. At the conclusion of the trial, the jury found both Perez and White guilty of assault in the second degree, two counts of rape in the second degree, and unlawful imprisonment. CP 152-55; RP (12/21/11) 6-9.

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[1] Perez pled guilty to this charge and it is not at issue on appeal. CP 170-95.

At sentencing, the trial court found that the two counts of second-degree rape constituted the same criminal conduct, and imposed a standard-range sentence totaling from 147 months to life in prison. CP 200-12; RP (2/23/12) 2606-09. Perez now appeals. CP 255-57.

2. SUBSTANTIVE FACTS

In January 2010, Troy O'Dell, his girlfriend Candice Sanders, and defendant Perez were living together in a house in the Burien area. Co-defendant White had been staying there for a couple of weeks, and E.C. had been staying there for about a month. RP (12/6/11) 1168-69. O'Dell and Perez had known each other since Perez was 13 years old; Perez was like a little brother to O'Dell. RP (12/6/11) 1156; RP (12/7/11) 1436. White is O'Dell's "little cousin"; White's father is O'Dell's maternal uncle. RP (12/6/11) 1164. E.C. is O'Dell's older sister's best friend. RP (12/6/11) 1182. Although they are not related, E.C. considered O'Dell to be her little brother, and they referred to each other as "brother" and "sister." RP (12/12/11)1753-54. E.C. thought of Perez and White as family members as well. RP (12/12/11) 1759, 1761.

E.C. was spending a lot of her time caring for O'Dell and Sanders's two young children because O'Dell was busy with his music career[2] and Sanders was abusing prescription drugs. RP (12/12/11) 1757. Tension arose between E.C. and Sanders because of Sanders's drug use. RP (12/12/11) 1757-58. E.C. told O'Dell's sister that Sanders was using drugs in front of the children, and Sanders found out about what E.C. had said; this caused further tension between them. RP (12/12/11) 1770-71. Two or three days before the events in question, E.C. left the house because she was "fed up" with babysitting the children and arguing with Sanders. During those two or three days, E.C. stayed in a series of motels and went on a crack cocaine binge. RP (12/12/11) 1766-67, 1771-72.

Eventually, E.C. decided to go back to O'Dell's house to get some rest, despite her problems with Sanders. RP (12/12/11) 1769-70. When E.C. arrived at the house, O'Dell told her that she and Sanders were going to fight each other because E.C. was "talking mess" about Sanders. RP (12/12/11) 1773. E.C. thought that if she fought with Sanders that the issue would be resolved, so she agreed. RP (12/12/11) 1773-74.

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[2] O'Dell was an aspiring hip-hop artist, and he had a music studio on the lower level of the house. RP (12/6/11) 1160, 1166, 1255.

E.C. and Sanders started fighting immediately inside the front doorway. RP (12/7/11) 1446. When E.C. and Sanders stopped fighting, co-defendant White stepped in and punched E.C. in the face so hard that she hit the floor and lost consciousness. RP (12/7/11) 1450-51. When E.C. regained consciousness and got up on her knees, Perez punched her in the face. RP (12/6/11) 1451. Sanders tried to light E.C.'s hair on fire with a cigarette lighter. RP (12/12/11) 1777. E.C. was moaning and crying. RP (12/7/11) 1452. O'Dell told her she was "going to die." RP (12/12/11) 1778. After White punched E.C. a second time, Sanders told White and Perez to stop hitting her and pointed out that "she's a female." RP (12/7/11) 1453.

E.C. was bleeding heavily from being punched in the face; there was blood on the wall by the door and a pool of blood on the carpet where she fell. RP (12/7/11) 1454. E.C. tried to stand up and she stumbled; Perez and Sanders laughed at her. RP (12/7/11) 1457-58. O'Dell told Perez and White to take E.C. downstairs and "get her cleaned up." RP (12/12/11) 1781. Perez and White then helped E.C. down the stairs, and E.C. thought the incident was over at that point. RP (12/12/11) 1781.

White and Perez gave E.C. some clean clothes and told her to change out of her bloodstained clothes. When E.C. tried to shut the bathroom door for privacy, Perez and White prevented her from doing so and forced her to change in front of them. RP (12/12/11) 1785. Perez took E.C.'s bloody clothing and put it in the washing machine. RP (12/12/11) 1787. After E.C. changed clothes, Perez and White led her to Perez's room, which was also located downstairs. E.C. thought that they were finally going to let her go to sleep. RP (12/12/11) 1789.

At that point, Perez and White told E.C. that O'Dell had told them to kill her. RP (12/12/11) 1789. White said, "If you let us fuck you, then we will not kill you." When E.C. told them that she was menstruating, White said, "Well, we'll – we'll fuck you in the ass." RP (12/12/11) 1790. E.C. told them she had HIV in an attempt to dissuade them from raping her. When that did not work, she begged them to at least wear condoms, and they agreed. RP (12/12/11) 1791-93.

White and Perez took turns anally raping E.C. for about 15 to 20 minutes. RP (12/12/11) 1794. Both defendants also put their penises in E.C.'s face and told her to "suck it" while laughing at her. RP (12/12/11) 1830. E.C. did not resist being anally raped by the

defendants because she believed their threats to kill her if she did not comply with their demands. E.C. had seen both Perez and White in possession of firearms, and she knew there were guns in Perez's room "all the time." RP (12/12/11) 1788-89, 1791, 1863, 1866.

When Perez and White stopped raping E.C., they would not let her leave the room; White slept on the couch with her in Perez's room, and the defendants followed her when she got up to go to the bathroom. RP (12/12/11) 1792. They warned her not to leave the house. RP (12/12/11) 1794. E.C. believed that they would kill her if she tried to leave. RP (12/12/11) 1796.

The next morning, O'Dell, Sanders, Perez and White were upstairs in the living room watching television when White stated, "We fucked her." At that point, Sanders realized that all of them "were in a lot of trouble." RP (12/7/11) 1467. Perez was present when White made this statement; his only reaction was biting his fingernails, which he often did when he was nervous. RP (12/7/11) 1469.

At some point that day, Sanders went downstairs and gave E.C. some food and a cigarette. Sanders told E.C. that she would let her leave to go to the hospital, except for the fact that E.C.

would "probably bring the police to [her] house." RP (12/12/11) 1796.

E.C. finally made her escape a day or so later when everyone had left the house except for a music business associate of O'Dell's.[3] RP (12/12/11) 1799. E.C. ran to Milton Chatman's house, which was about a block away from O'Dell's. RP (12/12/11) 1799. Chatman's wife, Karen Santos, saw that E.C. was obviously injured and invited her inside. RP (12/7/11) 1417. When Chatman came home, he saw that E.C. was crying and "all beat up." E.C. told him that she had been raped and held against her will at her "brother's" house. RP (12/7/11) 1403. Chatman drove E.C. to Highline Hospital because she was in pain and "very injured." RP (12/7/11) 1402, 1406.

Nurse Christine Hoolboom treated E.C. at Highline. E.C. told Hoolboom that she was beaten and raped by two men, but she refused to say where it happened. RP (12/1/11) 978. E.C. was "afraid she would get hurt if she gave a lot of information," and she did not want to call the police. RP (12/1/11) 977-78. E.C. told Dr. Lance Young, who also treated E.C. at Highline, that she was assaulted by two men and a woman, and that she was anally raped

[3] E.C. knew this person only by his nickname, "Blessed Hands." RP (12/12/11) 1798-99.

by two men. RP (12/13/11) 2004. E.C. also told Dr. Young that she did not want to be transferred to Harborview Medical Center "because she was concerned that the people who did this to her might . . . find her there," and that they would "show up at the hospital and execute her with handguns." RP (12/13/11) 1999.

E.C.'s CT scan revealed a blowout fracture of the orbital bone on the left side of her face. RP (12/13/11) 2001-02. Despite E.C.'s reluctance, she was transferred to Harborview for treatment of her injuries and for a sexual assault examination. RP (12/13/11) 2110-11. E.C. told Harborview social worker Joanne Veneziano that she was afraid that her assailants would kill her because she was reporting the crime. RP (12/13/11) 2052. In spite of these fears, E.C. finally named her assailants; she told Veneziano that she was physically assaulted by Sanders, Perez, and White, and that Perez and White had anally raped her. RP (12/13/11) 2058-59. Although E.C. was afraid to make a police report, it was a relief when she finally did so. RP (12/12/11) 1803.

Deputy Gerald Meyer of the King County Sheriff's Office was the first police officer to contact E.C. at Harborview. Deputy Meyer was "stunned" and "taken aback" by the amount of swelling on her face. RP (11/30/11) 653. Deputy Meyer took a brief statement

from E.C. and drew a diagram of O'Dell's house with E.C.'s help in order to assist detectives in obtaining a search warrant. RP (11/30/11) 654; RP (12/1/11) 688-92. E.C. told Meyer that she was afraid to talk about "snitching" because she believed that "she would be killed." RP (12/1/11) 692. After lead Detective Marylisa Priebe-Olson spoke with Deputy Meyer and took a recorded statement from E.C., she directed other officers to arrest O'Dell, Sanders, Perez and White. RP (12/14/11) 2225-28.

After all four suspects had been arrested, they were transported to the Burien precinct to be interviewed and processed. RP (12/14/11) 229-31. During their initial interviews, O'Dell and Sanders both claimed that E.C. was already injured when she arrived at their house, and that they would not allow her to come in because she was drunk.[4] RP (12/14/11) 2231, 2234-35, 2237-38. Perez also claimed during his first interview with Detectives Chris Knudsen and Sue Peters (which was video- and audio-recorded) that E.C. was already injured when she arrived, and that they would not let her come in the house because she was intoxicated and

[4] Eventually, O'Dell and Sanders entered plea agreements with the State and they both testified against Perez and White at trial. RP (12/6/11) 1276-80; RP (12/7/11) 1427-29.

belligerent. Perez denied assaulting and raping E.C.[5] Pretrial Ex. 4. However, the detectives noticed that the knuckles of Perez's right hand were obviously swollen. RP (12/8/11) 1594-95.

After Perez's interview was concluded, the detectives seized his clothing as evidence. Perez refused to remove his underwear, so Detective Knudsen asked Sergeant John Hall to remove them. RP (11/21/11) 74. Sergeant Hall discovered that Perez had a large baggie of oxycodone tablets "tucked underneath his testicles."[6] RP (11/21/11) 75. According to Perez's testimony during the CrR 3.5 hearing, Sergeant Hall asked him about the drugs, asked if he was willing to help the Sheriff's Office with a "sting" operation, and also said regarding the rape allegation that "[g]irls do lie sometimes. But if it was consensual, then maybe the charges will get dropped." RP (11/22/11) 224-25.

Knudsen later asked Perez if he was willing to undergo a polygraph examination, and Perez agreed.[7] RP (11/21/11). Perez was then transported to the King County Courthouse, where

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[5] White denied it as well. Pretrial Ex. 1.

[6] As noted previously, Perez pled guilty to possessing a controlled substance. The trial court suppressed all evidence of drugs and drug dealing at trial on the other charges, so the jury did not hear about the baggie of pills. RP (11/23/11) 492-95, 501-02.

[7] All references to the polygraph were suppressed by agreement of the parties.

polygraph examiner Jason Brunson administered the test. RP (11/21/11) 78. During the test, Perez again denied that he had assaulted E.C. and denied that he had anal sex with her. CP 295. Perez failed the test. RP (11/21/11) 84. Detective Knudsen then conducted another recorded interview of Perez with Brunson present. RP (11/21/11) 84-85. During this second recorded interview, Perez admitted to having anal sex with E.C., but he insisted that it was consensual. Pretrial Ex. 6.

O'Dell's house was searched pursuant to a search warrant. Among other items of evidence, the police found a gun case,[8] ammunition, ammunition magazines, and ski masks. These items were found in Perez's room and in the music studio, both of which were downstairs where E.C. had been raped and held against her will. RP (12/1/11) 750-51, 756, 859-60, 862, 869; RP 12/8/11) 1604-05, 1608, 1610, 1612-13. A condom wrapper was found in Perez's room, and two condom wrappers were found in a bag of wet clothing nearby. RP (12/1/11) 760, 849, 858.

When the police later drove E.C. to the house to retrieve her belongings, everything was gone. The only things that had not been thrown away before the four suspects were arrested were the

[8] No gun was found.

bloody shirt, jeans, and underwear that E.C. had been wearing when she was beaten. These items were still wet from the washing machine, as if the defendants had simply forgotten to throw them out. RP (12/12/11) 1829.

Perez testified at trial, and claimed that he had lied during all of his interviews with the police because he was afraid of Troy O'Dell. RP (12/14/11) 2281. Perez denied raping E.C., and he claimed that O'Dell was the one who had hit E.C. RP (12/14/11) 2297-98; RP (12/15/11) 2375. Perez acknowledged that his trial testimony was substantially different from his testimony during the CrR 3.5 hearing in a number of significant ways, but he claimed that this was because he had received threats. RP (12/15/11) 2345, 2348-49, 2370, 2373, 2375-76.

Perez testified that he had never possessed a gun. RP (12/14/11) 2282. But four months before E.C. was assaulted and raped, Deputy Jeff Hancock had conducted a pat-down of Perez during a traffic stop and found a Springfield 9mm pistol in his waistband. RP (12/13/11) 2398-99. The gun's brand, caliber and model matched the empty gun case that was found by the police in the lower level of O'Dell's house. RP (12/13/11) 2399-400.

Perez also testified that when he told the police that he had consensual anal sex with E.C. during his second recorded statement, it was a "false confession." RP (12/14/11) 2295. But during Perez's allocution at sentencing, he stated that he had consensual sex with E.C., and that his lawyer had prevented him from presenting a consent defense at trial. RP (3/23/12) 2604-05.

Additional facts will be discussed below as necessary for argument.

C. ARGUMENT

1. THE TRIAL COURT'S RULING THAT PEREZ'S STATEMENTS TO THE POLICE WERE MADE VOLUNTARILY SHOULD BE AFFIRMED BASED ON A TOTALITY OF THE CIRCUMSTANCES.

Perez claims that his second recorded interview with the police (during which he admitted to having anal intercourse with E.C., but claimed that it was consensual) should have been suppressed because he did not make these statements voluntarily. More specifically, Perez claims that Sergeant John Hall made a "promise of leniency" after Perez's first recorded interview that rendered his subsequent statements involuntary. Appellant's Opening Brief, at 18-30. This claim should be rejected. As found

by the trial court, the totality of the circumstances demonstrates that Perez's will was not overborne by any coercion by the police, and thus, Perez's statements were properly admitted at trial.

A reviewing court will uphold a trial court's CrR 3.5 findings of fact, if challenged, if substantial evidence in the record supports them. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Unchallenged findings of fact are verities on appeal. Id. An appellate court reviews the trial court's legal conclusions *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). The trial court's ruling may be affirmed on appeal on any legal basis fairly supported by the record. State v. Sondergaard, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997), rev. denied, 133 Wn.2d 1030 (1998). The trial court's credibility determinations cannot be reviewed. State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964, rev. denied, 135 Wn.2d 1015 (1998).

The question of whether a criminal suspect's custodial statements were made voluntarily requires consideration of the totality of the circumstances; no single factor is dispositive to the court's analysis. Schneckloth v. Bustamonte, 412 U.S. 218, 225-27, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). A custodial statement is involuntary only "if [the suspect's] will has been

overborne and his capacity for self-determination critically impaired" by police coercion. Id. at 225-26 (quoting Culombe v. Connecticut, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961)). A custodial statement may be coerced by an "express or implied promise or by the exertion of any improper influence" by the police. State v. Unga, 165 Wn.2d 95, 101, 196 P.3d 645 (2008).

But a promise by the police, in and of itself, does not render a suspect's custodial statements involuntary under the "totality of the circumstances" test:

> A promise made by law enforcement does not render a confession involuntary per se, but is instead one factor to be considered in deciding whether a confession was voluntary.

Unga, 165 Wn.2d at 101. In any case where the defendant claims that a promise by the police coerced him or her into giving an involuntary confession, the court must make two determinations: 1) whether a promise was actually made; and 2) "if one was made, the court must then apply the totality of the circumstances test and determine whether the defendant's will was overborne by the promise," meaning that "there must be a direct causal relationship between the promise and the confession." Id. at 101-02.

The police may employ psychological tactics and ruses in an effort to obtain a confession without engaging in coercion that will render that confession involuntary:

> A police officer's psychological ploys such as playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess, "but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary."

Id. at 102 (quoting Miller v. Fenton, 796 F.2d 598, 605 (3d Cir. 1986)). A custodial statement is rendered involuntary only if the interrogating officer's tactics "were so manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess." Unga, 165 Wn.2d at 102 (quoting Miller, 796 F.2d at 605)) (alteration in Unga). The facts of Unga are instructive here.

In Unga, a police officer arrested and questioned a 16-year-old suspect about some graffiti that had been written in black marker on the dashboard of a stolen car. Unga, 165 Wn.2d at 98. The officer advised the juvenile suspect of his rights, which he acknowledged and waived, and then the officer promised the juvenile that he would not be charged with a crime for vandalizing

the car if he would tell the officer who was making death threats against another officer. Id. at 98-99. Subsequently, the juvenile confessed to writing the graffiti, and also admitted that he had ridden in the car with knowledge that it was stolen. Id. at 99. The State then charged him with taking a motor vehicle without permission and vehicle prowling. Id. At trial, the juvenile argued that he was coerced into confessing by the officer's promise that he would not be charged with a crime related to the graffiti. Id. The juvenile court rejected that argument, ruled that the confession was voluntary and admissible, and found him guilty as charged. Id. at 99-100.

On appeal, the Washington Supreme Court applied the "totality of the circumstances" test and affirmed the trial court, holding that the juvenile's confession was not coerced by the officer's promise of leniency. Id. at 108-13. In reaching this conclusion, the court focused on coercive factors in other cases that were notably absent in Unga's case. *See* id., at 111-12 (observing that Unga had not been awakened in the middle of the night at gunpoint, had not been interrogated persistently for hours on end, had not been deprived of food, water and rest, had not been threatened, was not particularly young or inexperienced with

respect to the criminal justice system, and was not subjected to hostile interrogation techniques, citing numerous cases). Based on a totality of the circumstances, the court concluded that Unga's will was not overborne and that his confession was voluntary, despite the officer's promise that charges relating to the graffiti would not be filed. *See also* Miller, 796 F.2d at 608-11 (holding that a detective's promises that he would obtain psychiatric help for a murder suspect and that the suspect was not responsible for his actions due to mental illness did not render the subsequent confession involuntary). A far less compelling case of alleged police coercion presents itself here.

In this case, Detective Knudsen advised Perez of his rights at the beginning of his first recorded interview at the Burien precinct, and Perez acknowledged and waived them.[9] Pretrial Ex. 4, pg. 1-4; RP (11/21/11) 57-60. Knudsen had no concerns that Perez was under the influence of drugs or alcohol or that he was having any difficulty understanding or following the conversation, and Knudsen described his interactions with Perez as cordial and conversational. RP (11/21/11) 59, 72-73. Perez was not in

[9] Although Perez does not challenge the admissibility of his first recorded statement, the circumstances of the first statement are a part of the totality of the circumstances, and thus, that statement is relevant to the issue at hand.

handcuffs and, despite Perez's pretrial testimony to the contrary, Knudsen was not withholding food or water. RP (11/21/11) 62, 73. During that first interview, Perez denied that anyone in the house had raped or assaulted E.C., claimed that E.C. had already been beaten when she showed up at the house, and said that no one would let her come inside because she was drunk, high, and belligerent. Pretrial Ex. 4. This first recorded interview ended at 12:45 a.m. Pretrial Ex. 4, pg. 50.

After this first interview, the police collected Perez's clothing as evidence. When Perez refused several commands to remove his underwear, Detective Knudsen asked Sergeant Hall to remove it for him. RP (11/21/11) 74. It was then discovered that Perez had a baggie of pills "bigger than [Knudsen's] fist" "tucked underneath his testicles." RP (11/21/11) 75. The baggie contained oxycodone tablets with a total street value of approximately $50,000. RP (11/22/11) 267.

Perez testified at the CrR 3.5 hearing that as Sergeant Hall was escorting him back to the holding cell, Hall asked him about the drugs in his underwear. According to Perez, Hall said, "That was a large amount of drugs that you had on you. I'd like to know more about this, maybe it could help you out with your case."

RP (11/22/11) 224. Perez testified that Hall asked him where he got the drugs, whether he sold drugs, and whether he would "help [Hall] out in a sting." RP (11/22/11) 224. Perez testified that after he told Hall that he was not going to assist him with a sting, Hall then spoke to him about E.C.'s report that she had been raped:

> And then [Hall] says, "Well, about this other charge," he says, "man, the girl's not going to say it if you didn't do it." I told him – I said, "I did not rape that girl." He says, "Who says anything about rape? Girls do lie sometimes. *But if it was consensual, then maybe the charges will get dropped.*"

RP (11/22/11) 225 (emphasis supplied).

The next time that Perez was interviewed by law enforcement personnel was at 3:40 a.m., when Jason Brunson administered a polygraph examination.[10] RP (11/21/11) 169. Prior to the test, Brunson re-advised Perez of his constitutional rights. RP (11/21/11) 172-73. Perez initialed the rights form and signed the waiver. RP (11/21/11) 174-75. Brunson did not threaten Perez or promise him anything, and his demeanor with Perez was calm and conversational. RP (11/21/11) 173. Brunson, like Knudsen, observed no signs that Perez was under the influence of drugs or alcohol, or that he was impaired from lack of sleep. RP (11/21/11)

[10] In the meantime, Detective Knudsen offered to get Perez some food, but Perez declined. RP (11/21/11) 79.

179. During the test, Perez again denied assaulting or having any sexual contact with E.C. CP 295. Perez failed the test. RP (11/21/11) 180-81.

After Perez failed the test, Detective Knudsen spoke with Perez, and then conducted a second recorded interview with Perez with Brunson present. RP (11/21/11) 85-87. Knudsen advised Perez of his rights a third time during the second recorded interview. Pretrial Ex. 6, pg. 1-2. During the second recorded interview, which began just before 5:00 a.m., Perez admitted that he had anal intercourse with E.C., although he claimed that it was consensual. Pretrial Ex. 6. Perez then testified at the CrR 3.5 hearing that he did not have sex with E.C., but that he told Knudsen and Brunson that he did because he was tired and because Sergeant Hall "promised" that the charges would be dropped if he said it was consensual.[11] RP (11/22/11) 281-82, 298.

Based on a totality of the circumstances, this record does not establish that Perez's will was overborne by police coercion that

[11] At sentencing, however, Perez changed his story yet again and stated that he had consensual sex with E.C., but his trial counsel had prevented him from presenting a consent defense at trial. RP (3/23/12) 2604-05. In other words, Perez claimed that his attorney's strategy essentially forced him to commit perjury during the CrR 3.5 hearing and the trial. In any event, Perez's allocution at sentencing certainly undermines his claim on appeal that he told Knudsen and Brunson that he had consensual anal sex with E.C. because of Sergeant Hall's alleged coercion.

rendered his second recorded statement involuntary. First, as a threshold matter, Sergeant Hall's statement as testified to by Perez does not constitute a promise at all.[12] But even if this Court were to construe Hall's statement as a promise, it does not render the statements that Perez made during his second recorded interview involuntary.

Perez was advised of his rights three times, including two advisements after his conversation with Sergeant Hall, and Perez acknowledged and waived his rights each time. Perez was not subjected to any harsh treatment or threatening interrogation techniques. Sergeant Hall's "promise" that "*maybe*" charges would be dropped if the sex was consensual is certainly far less explicit than the promises made in Unga (*i.e.,* that if the suspect submitted to questioning, he would not be charged with a crime related to the graffiti) and in Miller (*i.e.,* that the detective would obtain psychiatric help for the suspect, and that the suspect was not responsible for his actions due to mental illness), yet the confessions at issue in those cases were found to be voluntary.

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[12] Perez testified that Hall said, "Who says anything about rape? Girls do lie sometimes. *But if it was consensual, then maybe the charges will get dropped.*" RP (11/22/11) 225 (emphasis supplied). This statement does not constitute a promise that charges would be dropped if Perez admitted to having sex with E.C. Rather, it is a truthful conditional statement that charges *may* be dropped *if* the sex was consensual.

In addition, the timing of Perez's second recorded statement strongly indicates that it was not induced by Sergeant Hall's purported promise. At least three hours after Perez's conversation with Hall, Perez told Jason Brunson that he had not had sexual contact with E.C. Perez changed his story and told Knudsen and Brunson that he *had* had anal sex with E.C. only after being informed that he had failed the polygraph examination. This sequence of events logically establishes that Perez changed his story because of the polygraph results, not because of a conversation with Sergeant Hall that occurred several hours earlier.

In sum, the totality of the circumstances does not establish that Perez was coerced into making a statement by manipulative police tactics that overcame his will. Rather, the record establishes that all of Perez's statements, including those made during his final interview with Detective Knudsen and Jason Brunson, were made voluntarily after a valid waiver of constitutional rights.

Nonetheless, Perez argues that the trial court erred in finding that his second recorded statement was voluntary for essentially three reasons: 1) because the record does not support the trial court's finding that "[t]he defendant testified that Sgt. Hall promised him leniency in his likely drug case if the defendant would talk to

detectives about the rape allegations"; 2) because Sergeant Hall's statement constituted a "false promise of leniency"; and 3) because Perez is inexperienced, uneducated, and was in a "weakened condition" due to lack of sleep, lack of food, and a lengthy detention in police custody. Appellant's Opening Brief, at 18-28. These arguments are not well-taken.

First, the trial court's finding with respect to Perez's testimony, even if inaccurate, does not alter this Court's analysis. Even if the trial court has made a slight factual error, the question before this Court remains the same, *i.e.*, whether a totality of the circumstances shows that Perez's will was overborne by police tactics that "were so manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess,"[13] and that standard still has not been met in any event. *See* Sondergaard, 86 Wn. App. at 657-58 (the trial court's rulings may be affirmed on appeal on any basis supported by the record). Second, Hall's statement that "maybe" the charges would be dropped "if" the sex was consensual does not constitute a

[13] Unga, 165 Wn.2d at 102 (quoting Miller, 796 F.2d at 605)) (alteration in Unga).

false promise.[14] Rather, it is a truthful statement of hypothetical facts. Third, the trial court soundly rejected Perez's testimony that he was in a weakened condition from lack of sleep, lack of food, and prolonged detention, and it rejected the notion that he did not understand or validly waive his constitutional rights. In fact, the trial court expressly found that Perez's testimony in this regard was not credible. CP 247. This finding cannot be reviewed. Boot, 89 Wn. App. at 791. Moreover, the recorded statements themselves show that Perez was coherent and had no trouble understanding what was going on. Pretrial Exs. 4, 6.

In sum, the trial court correctly ruled that Perez's second recorded statement was made voluntarily after three proper advisements and knowing waivers of constitutional rights. A totality of the circumstances demonstrates that Perez's will was not overborne by coercive police tactics. Rather, the record demonstrates that the police acted properly and that Perez freely

[14] In support of his argument, Perez cites only his testimony on cross-examination, wherein he claimed that Hall said "if you say it was consensual, the charges will get dropped." RP (11/22/11) 282. However, Perez originally testified on direct examination that Hall said "if it was consensual, then maybe the charges will get dropped." RP (11/22/11) 225. Notably, Perez's testimony on direct examination is much closer to Sergeant Hall's recollection of the conversation. Hall testified during trial that he told Perez that "it's not a crime to have consensual sex with someone. I'm just asking you if you . . . had sex with her." RP (12/14/11) 2155-56.

chose to answer their questions. This Court should reject Perez's claim, and affirm.

2. PEREZ HAS NOT SHOWN THAT HE WAS PREJUDICED BY WHITE'S BEHAVIOR OR THAT THE JURY COULD NOT FOLLOW THE COURT'S INSTRUCTIONS TO CONSIDER EACH DEFENDANT'S CASE SEPARATELY.

Perez next claims that the trial court erred in denying his mid-trial motion to sever his case from that of co-defendant White after White purportedly nodded at E.C. when she testified that "snitches end up in ditches." Appellant's Opening Brief, at 30-38. This claim is without merit. Perez has not shown that he suffered prejudice as a result of White's behavior, and there is no evidence in the record indicating that the jurors were unable to follow their instructions to consider each defendant's case separately. Therefore, this Court should affirm.

As a preliminary matter, Perez's motion to "sever" is more accurately described as a motion for a mistrial, because the motion occurred in the middle of trial and was based on a trial irregularity that Perez claimed had impaired his right to receive a fair trial. RP (12/12/11) 1870-71. Accordingly, the legal standards governing a motion for a mistrial should apply to Perez's claim on appeal.

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). An abuse of discretion occurs only if the trial court's decision is manifestly unreasonable or is based on untenable grounds. State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). Put another way, the trial court abuses its discretion if it makes a decision "that no reasonable person" would make. Id.

A mistrial should be granted only when the defendant has been so irreparably prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). The trial court's decision to deny a motion for a mistrial should be overturned on appeal only if the record shows that there is a substantial likelihood that the irregularity at issue affected the jury's verdict. Id. Put a different way, the relevant question is whether the irregularity was so prejudicial, even when "viewed against the backdrop of all the evidence," that the defendant was deprived of a fair trial. Id. (quoting State v. Thompson, 90 Wn. App. 41, 47, 950 P.2d 977, *rev. denied sub nom.* State v. Walker, 136 Wn. App. 1002 (1998)). In making this determination, the reviewing court considers the seriousness of the irregularity, whether it involved cumulative

evidence, and whether the jury was instructed to disregard it. Gamble, 168 Wn.2d at 177.

In this case, at one point during E.C.'s lengthy direct testimony, she stated that "[s]nitches end up in ditches." RP (12/12/11) 1796. Later in her direct testimony, after a recess, E.C. testified that White had nodded his head when she made that statement. Perez's trial counsel immediately asked for a sidebar, and no further questions on this topic were asked. RP (12/12/11) 1820-21.

During the next recess, Perez's trial counsel moved to sever (which, as discussed above, would have resulted in a mistrial for Perez), claiming that E.C.'s testimony about White nodding his head was prejudicial to Perez. Counsel also questioned White's mental stability. RP (12/12/11) 1870-71. In response, White's trial counsel stated unequivocally that he had no concerns about White's mental state, and explained that he had admonished White to observe proper courtroom decorum. RP (12/12/11) 1871-72. The prosecutor observed that the nodding behavior was limited to White, and suggested that a limiting instruction could be given to the jury to minimize any possible prejudice to Perez. RP (12/12/11) 1872-73.

The trial court denied Perez's motion, and invited Perez's counsel to propose a limiting instruction. RP (12/12/11) 1873. Despite assurances from Perez's counsel that an instruction would be forthcoming, no limiting instruction was proposed. RP (12/12/11) 1873. However, the jury was instructed to decide each count as to each defendant separately. CP 140. Also, when Perez testified on his own behalf, he agreed that a "snitch usually gets beat up, shot, or stuff like that." RP (12/15/11) 2377.

Based on this record, Perez has failed to show that the trial court abused its discretion in denying his motion. First, the irregularity at issue was not very serious. As the trial court observed in its written findings denying Perez's post-trial motion for a new trial on these same grounds, White's purported nodding was not observed by the court, may not have been observed by any members of the jury, and "was not serious enough to warrant a mistrial for Mr. Perez." CP 238, 240. And, as the trial court further observed, "Mr. Perez's decision to take the stand and testify did far more damage to his own case than did Mr. White's conduct[.]" CP 241. Second, White's apparent nodding in agreement with E.C.'s statement that "[s]nitches end up in ditches" was cumulative of Perez's own testimony that "snitches" get "beat up, shot, or stuff

like that." Third, although Perez's trial counsel ultimately decided not to propose a limiting instruction regarding White's behavior, the jurors were instructed to decide the case against each defendant separately. CP 140. The jury is presumed to follow the trial court's instructions unless there is evidence in the record to the contrary. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). No such evidence exists.

In sum, the trial court's ruling denying Perez's motion for a mistrial is entirely reasonable in light of the record and the applicable law. Accordingly, Perez has failed to demonstrate a manifest abuse of discretion, and thus, his claim fails.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING SKI MASKS AND OTHER PHYSICAL EVIDENCE THAT WAS RELEVANT TO PROVING THE ELEMENTS OF RAPE AND UNLAWFUL IMPRISONMENT.

Perez next claims that the trial court erred in admitting the two ski masks that were found by the police in the downstairs portion of the house pursuant to the search warrant. Perez claims that the admission of the ski masks served no legitimate evidentiary purpose and invited the jury to conclude that Perez was a "criminal type." Appellant's Opening Brief, at 38-41. This claim should be

rejected. The ski masks, in conjunction with the gun case, ammunition, and ammunition magazines, were admitted to corroborate E.C.'s testimony that she feared that the defendants would kill her and to prove that her fear was reasonable. In turn, E.C.'s fear was relevant to proving the forcible compulsion element of rape and the restraint element of unlawful imprisonment. This was a proper basis upon which to admit the evidence, and the trial court's ruling should be affirmed.

Evidentiary rulings are matters addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion in deciding whether evidence is admissible only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914.

Forcible compulsion is an element of second-degree rape as found by the jury in this case. RCW 9A.44.050(1)(a); CP 152, 156. Forcible compulsion does not require the use of physical force; rather, forcible compulsion may be established by evidence of an

express or implied threat to use a weapon or to otherwise inflict injury upon the victim. State v. Bright, 129 Wn.2d 257, 266-70, 916 P.2d 922 (1996); CP 149.

Restraint is an element of unlawful imprisonment. RCW 9A.40.040; CP 158. Restraint means "to restrict a person's movements without consent and without legal authority" in a manner that substantially interferes with that person's liberty. RCW 9A.40.010(6); CP 158. "And restraint is 'without consent' if it is accomplished by physical force *or intimidation*." State v. Atkins, 130 Wn. App. 395, 401, 123 P.3d 126 (2005) (emphasis supplied); RCW 9A.40.010(6)(a); CP 158.

In short, evidence of an express or implied threat of harm to the victim is relevant to proving second-degree rape, and evidence of intimidation of the victim is relevant to proving unlawful imprisonment. Therefore, evidence of a victim's fear that the defendant has both the intent and the capability to harm her is relevant to proving the elements of both crimes.

In this case, the trial court ruled that certain evidence discovered by the police during service of a search warrant was admissible during the State's case-in-chief. More specifically, the trial court allowed the State to introduce the gun case, ammunition,

ammunition magazines, and ski masks that were found in Perez's room and in the studio in the lower level of the house, where E.C. had been raped and restrained against her will. The basis of the trial court's ruling was that these items were relevant to prove why E.C. was afraid of the defendants, and to prove that her fear was reasonable. RP (11/23/11) 473-502.

During the trial, E.C. testified that she submitted to having anal intercourse with both Perez and White because they threatened to kill her if she refused. RP (12/12/11) 1789-91. In addition, E.C. explained that she stayed in the house after the rape when Perez and White told her that she was not allowed to leave; again, she believed that they would kill her if she tried to leave "because they would think [she] was going to tell the police" about what they had done. RP (12/12/11) 1794, 1796. E.C. also testified that she had seen both defendants in possession of firearms, and that Perez kept a firearm in his room. RP (12/12/11) 1788-89.

Given E.C.'s testimony, and given the elements of rape and unlawful imprisonment as discussed above, the physical evidence admitted by the trial court corroborating E.C.'s fear of the defendants was relevant to an issue of consequence at trial. *See* ER 401, 402. Accordingly, the trial court's ruling is reasonable

and rests on tenable grounds. In addition, the trial court excluded other evidence; specifically, the court excluded body armor and a holster that were found upstairs rather than downstairs, and all evidence of drugs and drug dealing. RP (11/23/11) 492, 496-502. The fact that the trial court admitted only the evidence found in the downstairs rooms and excluded all evidence of drug dealing further demonstrates that the trial court exercised its discretion carefully and appropriately. In sum, Perez cannot demonstrate that the trial court manifestly abused its discretion in allowing the ski masks to be admitted along with the gun case, ammunition, and ammunition magazines that were found in the basement rooms where E.C. was raped and held captive.

But even if this Court were to conclude that the ski masks should not have been admitted, Perez is still not entitled to a new trial. Evidentiary error will not result in reversal on appeal unless there is a reasonable probability that "the outcome of the trial would have been different if the error had not occurred." State v. Jackson, 102 Wn.2d 689, 696, 689 P.2d 76 (1984). In this case, the jury did not convict Perez of assault, rape, and unlawful imprisonment because the police found two ski masks in the basement. Rather, the jury convicted Perez of assault, rape, and unlawful

imprisonment because the evidence of Perez's guilt for those crimes was overwhelming, and because Perez's custodial statements and trial testimony were both incredible and inculpatory. In short, Perez has not shown that the ski masks had any effect on the outcome of the trial in light of the record as a whole. Perez's claim may be rejected for this reason as well.

4. E.C.'S STATEMENTS TO DEPUTY MEYER WERE ADMITTED WITHOUT OBJECTION, AND WERE MERELY CUMULATIVE OF HER STATEMENTS TO NUMEROUS OTHER WITNESSES THAT HAVE NOT BEEN CHALLENGED ON APPEAL.

Perez next claims that the trial court erred in allowing Deputy Meyer to testify that E.C. told him that she was afraid that she would be killed if she told him what had happened. More specifically, Perez claims that E.C.'s statement to Deputy Meyer was not a present sense impression under ER 803(a)(1), and that the trial court erred in ruling that it was. Appellant's Opening Brief, at 41-43. But whether or not this claim has any merit,[15] the claim is unpreserved, and any conceivable error is harmless because E.C. made the same statements to numerous other witnesses whose testimony is not challenged on appeal.

[15] The State does not concede that E.C.'s statement was not admissible. There is simply no need to address the issue.

Deputy Meyer was the first police officer to speak with E.C. at Harborview Medical Center. He testified that the topic of "snitching" came up when he spoke with her, and that she "didn't want to talk about the snitching" because she was "afraid she would be killed." RP (12/1/11) 692. This testimony was ultimately admitted without objection.[16] Accordingly, this claim is not preserved for review, and this Court should not address it. *See* State v. Powell, 126 Wn.2d 244, 257, 893 P.2d 615 (1995) (in the absence of a motion *in limine* or a request for a continuing objection, a contemporaneous objection is necessary to preserve a claim that hearsay has been admitted erroneously).

Moreover, Deputy Meyer's testimony was virtually the same as the testimony of numerous other witnesses. Christine Hoolboom, a nurse at Highline Hospital, testified that E.C. was "afraid she would get hurt if she gave a lot of information," and that she refused to contact the police. RP (12/5/11) 977-78. Similarly, E.C. told her pastor that she did not want to call the police because she was "afraid that they were going to come back and maybe beat

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[16] Perez contends that there was an objection to this testimony. Appellant's Opening Brief, at 41-42. But the record shows otherwise. Although co-defendant White's trial counsel objected when this subject was initially broached the previous day, no objection was made when Deputy Meyer actually testified about what E.C. told him. RP (11/30/11) 655-57; RP (12/1/11) 678-80, 692-93.

her some more[.]" RP (12/12/11) 1909. Dr. Lance Young, who treated E.C. at Highline Hospital, testified that E.C. told him that she did not want to be transferred to Harborview because "she was worried that the people who did this to her would know that that was where she would go, and that they would show up at the hospital and execute her with handguns." RP (12/13/11) 1999. E.C. also told Harborview social worker Joanne Veneziano that she was afraid that the defendants would kill her because she was reporting the crime. RP (12/13/11) 2052. Detective Priebe-Olson testified that E.C. was afraid to talk to the police because she thought that she would be killed. RP (12/14/11) 2225. And lastly, E.C. testified that she told the police that the defendants would try to kill her, and that she gave the police a written statement that said, "They will try and kill me now since I told. They threatened to kill me already." RP (12/12/11) 1804.

Given all of this testimony, which was admitted without objection and is not challenged on appeal, any conceivable error in admitting Deputy Meyer's testimony is plainly harmless because Deputy Meyer's testimony is merely cumulative of other evidence. *See* State v. Flores, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008) (the admission of evidence "that is merely cumulative of overwhelming

untainted evidence is harmless"). Perez's claim fails for this reason as well.

5. WHITE'S STATEMENT TO CANDICE SANDERS DOES NOT IMPLICATE PEREZ'S RIGHT TO CONFRONTATION, AND ANY POSSIBLE ERROR IS NOT "MANIFEST" UNDER RAP 2.5.

Perez next claims that Candice Sanders's testimony that co-defendant White said "we fucked her" was admitted in violation of the Confrontation Clause and Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Appellant's Opening Brief, at 44-47. This claim should be rejected for two reasons. First, White's statement qualifies as an adoptive admission by Perez, and thus, the Confrontation Clause is not implicated. Second, this statement was admitted without objection, and Perez cannot demonstrate actual prejudice; therefore, any possible error is not "manifest" under RAP 2.5, and thus, this claim cannot be raised for the first time on appeal.

As a general rule, a non-testifying co-defendant's statements directly implicating the defendant in the crime should not be admitted in a joint trial, because the admission of such statements

violates the defendant's right to confrontation under the Sixth Amendment. Bruton, 391 U.S. at 135-36. However, a statement made by someone other than the defendant is admissible as an adoptive admission by the defendant if the defendant "heard the accusatory or incriminating statement and was mentally and physically able to respond," and "the statement and circumstances were such that it is reasonable to conclude the [defendant] would have responded had there been no intention to acquiesce." State v. Neslund, 50 Wn. App. 531, 551, 749 P.2d 725, rev. denied, 110 Wn.2d 1025 (1988). Adoptive admissions are admissible under ER 801(d)(2)(ii) as statements of a party opponent in the same manner as if the defendant had made the statements himself. Id.

But even if a statement is admitted in violation of Bruton and the defendant preserves the error by objecting, "confrontation clause error is harmless if the evidence is overwhelming and the violation so insignificant" that the reviewing court is convinced beyond a reasonable doubt that the statement at issue did not affect the verdict. State v. Vincent, 131 Wn. App. 147, 155, 120 P.3d 120 (2005), *rev. denied sub nom.* State v. Carter-Vincent, 158 Wn.2d 1015 (2006). And, if the defendant did *not* object to the admission of the statement, the defendant cannot raise a Bruton

claim for the first time on appeal unless the alleged error was "manifest," meaning that it resulted in actual prejudice and had some demonstrable effect on the outcome of the trial. State v. Kirkman, 159 Wn.2d 918, 934-35, 155 P.3d 125 (2007); RAP 2.5(a)(3). Based on these principles, Perez's claim is without merit.

In this case, Candice Sanders testified that the morning after E.C. was beaten, Sanders was in the living room watching television with O'Dell and both defendants when White stated, "We fucked her." RP (12/7/11) 1467. Sanders explained that at that point she "knew that [they] were in a lot of trouble," and that she would be going to jail for a long time. RP (12/7/11) 1467-68. Sanders observed that when White made the statement, Perez was biting his nails, which was something that he often did when he was nervous or "in thought about something." RP (12/7/11) 1469. There was no objection to Sanders's testimony about White's statement and Perez's reaction (or lack thereof).

Based on this record, White's statement qualifies as an adoptive admission by Perez. Perez was present when White made the statement that "we fucked her," Perez was capable of responding to the statement, and the statement itself and the surrounding circumstances were such that Perez would have

responded to the statement if he had not intended to acquiesce. Indeed, Perez's nervous nail-biting is circumstantial evidence that he felt the same way that Sanders did, *i.e.,* that they were "in a lot of trouble." Accordingly, White's statement that "we fucked her" does not implicate Perez's right to confrontation because it is an adoptive admission by Perez.

But even if this Court were to assume that a Bruton violation occurred, Perez has not demonstrated that the alleged error was "manifest" as required under RAP 2.5 because the evidence of Perez's guilt is overwhelming.

E.C. testified at length and in detail about how after the defendants punched her in the face so hard that her eye socket was fractured and she was bleeding everywhere, they took her downstairs and took turns anally raping her, and they put their penises in her face and demanded fellatio while laughing at her. RP (12/12/11) 1777-81, 1790-94, 1830-31, 1890-91. When Perez was initially questioned by the police, he denied having intercourse with E.C. Pretrial Ex. 4. In a subsequent statement to the police, Perez admitted that he had anal intercourse with E.C., but claimed that "she wanted it." Pretrial Ex. 6. Considering E.C.'s serious physical injuries and the surrounding circumstances, Perez's claim

that E.C. consented to have anal intercourse with him is both completely incredible and highly inculpatory. Perez's trial testimony, wherein he claimed once again that he did not have intercourse with E.C., was thoroughly impeached and completely lacking in credibility.[17] *See, e.g.*, RP (12/14/11) 2280-82, 2287-98; RP (12/15/11) 2312-54, 2370-77.

In sum, the evidence against Perez was very strong and compelling, and he cannot demonstrate that material prejudice resulted from the admission of White's statement. Therefore, any potential error is not "manifest," and Perez cannot raise this claim for the first time on appeal under RAP 2.5.

6. PEREZ'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED.

Perez also claims that even if this court finds that none of the trial errors he alleges warrants reversal individually, the cumulative effect of these alleged errors justifies a new trial. *See* Appellant's Opening Brief, at 47-48. This claim should be rejected. An accumulation of trial errors that do not require reversal individually

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[17] At sentencing, Perez again claimed that he had consensual sex with E.C., but stated that his trial attorney had prevented him from raising consent as a defense to the rape charges. RP (3/23/12) 2604-05. It is worth noting that if Perez were granted a new trial, these statements would be admitted, thus undermining Perez's credibility even further. ER 801(d)(2).

may still deny the defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997). However, reversals due to cumulative error are rare and occur only in rather extraordinary circumstances.[18] As addressed at length above, no error occurred at trial in this case that warrants the extraordinary remedy of a new trial, either individually or cumulatively. Perez's convictions should be affirmed.

7. THE STATE CONCEDES THAT THE COMMUNITY CUSTODY TERM FOR COUNT I SHOULD BE AMENDED.

Lastly, Perez claims that the trial court erred in imposing a 36-month term of community custody as part of his sentence for count I, assault in the second degree. Appellant's Opening Brief, at 48-49. The State concedes that the applicable statute dictates that the term of community custody should be 18 months. RCW 9.94A.701(2). The judgment and sentence reflects that the term of community custody for count I is 36 months. CP 203.

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[18] *See, e.g.*, Perrett, 86 Wn. App. at 323 (holding that an officer's testimony that the defendant refused to give a post-arrest statement and that the officer had confiscated the defendant's guns on prior occasions, coupled with the trial court's exclusion of a key witness's theft conviction, required reversal); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (holding that the prosecutor's comments regarding personal belief in defendant's guilt coupled with two instructional errors of constitutional magnitude warranted a new trial under cumulative error doctrine).

Accordingly, the trial court should enter an order amending the judgment and sentence to reflect that the term of community custody on count I should be 18 months.[19]

D. CONCLUSION

The judgment and sentence should be amended to reflect the correct term of community custody for count I, assault in the second degree. In all other respects, this Court should affirm.

DATED this 11th day of October, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
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[19] Although this error in the judgment should be corrected, it is not prejudicial because Perez will be on community custody for life upon release from prison due to his convictions for rape in the second degree. CP 204.

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 Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. LUIS PEREZ, Cause No. 69005-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

C Brame
Name

10/11/13
Date

Done in Seattle, Washington