No. 98977-0
COA No. 79911-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NGHIA H. NGUYEN,

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

Nghia Nguyen asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Nghia H. Nguyen*, No. 79911-8-I (August 3, 2020). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Due process and the right to a fair trial are violated when the State fails to disclose important impeachment evidence under *Brady v. Maryland* and CrR 8.3. The State here did not disclose to Mr. Nguyen a letter one of the complainants, S.V., submitted for the sentencing of a person involved in this case until late in the State's redirect of the victim. The letter directly contradicted her testimony in Mr. Nguyen's case. Is an issue of substantial public interest that should be determined by this Court involved where the trial court erred in failing to dismiss where the State violated its *Brady* and CrR 4.7 obligations thus prejudicing Mr. Nguyen and requiring reversal of his convictions?

2. Due process and the right to a fair trial require a trial court to declare a mistrial where there is a substantial likelihood a witness's remark prejudiced the defendant and affected the jury verdict. Hope Henderson's non-responsive testimony told the jury that Mr. Nguyen encouraged her to get a criminal justice degree so that she could smuggle cellphones and drugs into prison. Mr. Nguyen's objection was sustained and his motion to strike the remark was granted. Nevertheless, the remark was a serious irregularity that a jury instruction could not cure. Is an issue of substantial public interest that should be determined by this Court involved entitling Mr. Nguyen to reversal of his convictions where the trial court erroneously denied his motion for a mistrial?

D. STATEMENT OF THE CASE

1. S.V.

S.V. was born and raised in New Jersey. RP 1221-22. In late October 2016, S.V. was 16 years old and, while working at a Burger King in her hometown in New Jersey, she was raped by her two bosses. RP 1224-25. She was raised in a religious household, but when she sought solace through her church and from her family, she was repulsed. RP 1227. S.V. ran away from home, was brought back, and

then attempted suicide. RP 1228-30. Approximately two weeks later, in late November 2016, S.V. stole money from her parents and bought a bus ticket to Seattle. 1231-32, 1234.

Upon arrival in Seattle, S.V. met a man at the bus station who she noted was "nice." RP 1237. This man gave S.V. some marijuana and took her to Tent City in "the Jungle" in Seattle. RP 1238-39. S.V. met several people who took her around and introduced her to cocaine and methamphetamine use. RP 1240-45. One of these people tried to talk S.V. into committing acts of prostitution but she refused. RP 1247-48. S.V. began injecting and smoking methamphetamine regularly during this period. RP 1250-54.

In early December 2016, S.V. ended up back at the Tent City in the Jungle. RP 1257-58, 1260. S.V. stayed with a man nicknamed "Coconut" for a period of time. RP 1279-80, 1286. She then moved and stayed with a woman named "Tina," where she met "Asian Mike," the nickname of appellant, Nghia Nguyen. RP 1288-89. When speaking to Mr. Nguyen, S.V. lied to him about her age, telling him she was 21 years of age. RP 1290. S.V. stayed with Tina a few more days then left with Mr. Nguyen at his invitation. RP 1293.

S.V. stayed with Mr. Nguyen in his tent for approximately a week. RP 1294. During that time, she claimed she saw him threatening people with a gun. RP 1294-95. S.V. also claimed Mr. Nguyen threatened her when she tried to leave. RP 1295. According to S.V., the first night she stayed in Mr. Nguyen's tent, he tried to have sex with her but she told him she did want to. RP 1296. S.V. claimed that Mr. Nguyen ignored her and forcibly raped her. RP 1296-99. Mr. Nguyen had sexual intercourse two additional times that night, but S.V. stated that she relented and did not resist. RP 1299. According to S.V., Mr. Nguyen told her that he provided things for her so in return, she owed him in the form of sex. RP 1299.

S.V. stated that during the time she was staying with Mr. Nguyen, she told him her true name,[1] that she was sixteen years of age, and was from New Jersey. RP 1452-53.

On January 5, 2017, Seattle Police received a tip from the King County Sheriff's Office regarding the safety of a girl associated with Mr. Nguyen. RP 1169, 1201. The police went to the Jungle and located Mr. Nguyen's tent. RP 1504-07. Inside the tent they discovered S.V. RP 1510. S.V. identified herself to the police as "Vicky" and

[1] While living in the Jungle, S.V. used the name "Vicky." RP 1268.

"Victoria." RP 1512. She eventually told the police her true name. RP 1513.

2. M.S.

M.S. moved to Washington from Idaho with her mother when she was 12 years old. RP 2053-55. In August 2016, M.S. was 13 years old when she ran away to Westlake Center in Seattle, where she met a name who went by "JJ", and whose real name was James Walker. RP 2057-58, 2060. JJ, who was 27 years old, took M.S. to the Tent City in the Jungle and became M.S.'s pimp. RP 2057-59. Originally, the two would ingest drugs together, but at some point, JJ forced M.S. into prostitution by continually assaulting M.S. RP 2060-62. M.S. developed an addiction to heroin and methamphetamine. RP 2062.

At some point in their relationship, JJ passed off control of M.S. to Mr. Nguyen. RP 2066. According to M.S., one of the first things she and Mr. Nguyen did was travel to Portland to pick up drugs. RP 2069. On the way to Portland, the two stopped and spent the night in a hotel. RP 2072-73. According to M.S., after she had ingested some methamphetamine provided by Mr. Nguyen, he forcibly had sexual intercourse with her. RP 2073-75.

M.S. related she was under Mr. Nguyen's control and stayed in his tent for approximately two weeks. RP 2082. During this time period, Mr. Nguyen would have other men come to his tent and he would instruct M.S. to have sex with them. RP 2088-91. One night, M.S. told Mr. Nguyen she was going one place, but went to another, a man named "Cowboy's" tent where she stayed. RP 2093-94. In addition, M.S. claimed that in return for drugs, she worked as a prostitute for Mr. Nguyen about 10 to 11 times. RP 2092.

During the interview with S.V., she disclosed to the police that M.S. was in the camp as well. RP 1539. At about the same time, "Cowboy" contacted the Seattle Police regarding M.S.'s situation. 2/27/2019RP 34. M.S. was subsequently detained by the Seattle Police on January 25, 2017. RP 2038-40.

3. Hope Henderson.

30 year old Hope Henderson came to Seattle from Idaho when she was 16 years old. RP 2345. Ms. Henderson began using drugs while in high school and began a long-term addiction to alcohol, methamphetamine, crack cocaine, and marijuana. RP 2441.

When Ms. Henderson left Idaho, she had met several men who gave her a ride to Seattle and then forced her to work as a prostitute.

2448-50. Ms. Henderson did this for approximately a month. RP 2450-51.

Not too long after she escaped these men, Ms. Henderson met Mr. Nguyen in the International District (ID). RP 2452. Mr. Nguyen took Ms. Henderson to the Jungle. RP 2453-54. During this period, Ms. Henderson did sexual favors for Mr. Nguyen in return for drugs. RP 2457-59. These favors consisted of having sex with men at Mr. Nguyen's direction. RP 2458-59. Ultimately, Ms. Henderson said Mr. Nguyen ran away with another woman and she found other drug dealers and continued to work as a prostitute. RP 2460-61.

Over the next several years, Ms. Henderson went back and forth between Seattle and Idaho, where she occasionally worked as a prostitute. RP 2461-62. In May 2016, Ms. Henderson returned to Seattle and moved into an apartment in Ballard with a friend. RP 2484-85. About two weeks after she moved into the apartment, Mr. Nguyen, among others from the Jungle, began hanging out there. RP 2488-89. Mr. Nguyen would bring drugs for Ms. Henderson and her friend. RP 2497-98.

When Mr. Nguyen began appearing at the apartment, Ms. Henderson began working as a prostitute again. RP 2517. This went on

for several months. RP 2517. On one occasion, Ms. Henderson claimed that two men came to the apartment when Mr. Nguyen was present. RP 2517. According to Ms. Henderson, Mr. Nguyen told her to entertain the men and stated that she felt obligated to have sex with one of the men. RP 2517-18.

On March 4, 2017, a fight with another man she was living with led her to contact the police. RP 2439-44. Ms. Henderson disclosed her past to the police including her relationship with Mr. Nguyen. RP 2445.

4. Charges.

Mr. Nguyen was arrested by the Seattle Police on February 13. 2017. He was subsequently charged with one count of a second degree rape and unlawful imprisonment regarding S.V. CP 223-24. Regarding M.S., Mr. Nguyen was charged with a count of second degree rape and a count of promoting the commercial sexual abuse of a minor. CP 224. Lastly, he was charged with a count of a count of first degree promoting prostitution and a count of first degree rape of Hope Henderson. CP 224-25.

5. Mr. Nguyen moved to dismiss under *Brady* and CrR 8.3 for a failure of the State to provide S.V.'s prior statement.

During argument regarding the admissibility of testimony of another resident of the Jungle, it came to light that S.V. had given a written statement that was used in the sentencing of JJ in a related prosecution:

> MR. SEWELL: Defense can't imply or at least strongly imply that our victim is trying to protect J.J. now, as he did throughout his entire cross-examination, when she was extremely supportive of him being prosecuted.
>
> THE COURT: What did she do that was supportive of prostitution [sic]?
>
> MR. SEWELL: She wrote a letter with regard to sentencing saying -- you know, talking about what he had done to her, et cetera. So I mean this wasn't a situation where –

RP 1441. This statement had not been previously disclosed to Mr. Nguyen and included statements that directly contradicted her testimony at trial. RP 1443-48; 1460-70. Mr. Nguyen subsequently moved to dismiss the prosecution for a violation of the State's obligation under *Brady v. Maryland*, and CrR 8.3. CP 301-12; RP 1928-37, 1942-43. The court denied Mr. Nguyen's motion, finding neither a *Brady* violation nor a violation of CrR 8.3(b). RP 1943-51. Regarding the CrR 8.3 motion, the court did find "grossly negligent misconduct" on the part of the State but ultimately, the court found Mr.

Nguyen suffered no prejudice from the State's mismanagement. RP 1950-51.

6. Mr. Nguyen moved for a mistrial based upon Ms. Henderson's prejudicial statements.

During the direct testimony of Ms. Henderson, the prosecutor asked:

> Q Did you get your degree, your high school diploma, GED? How did that finish out?
>
> A I got my high school diploma.
>
> Q Did you ever do any college courses, anything along those lines?
>
> A I did real little high -- or college online, but maybe three credits.
>
> Q Who is that through?
>
> A Huh?
>
> Q What was that through?
>
> A I think it was DeVry, I think. I don't know. I was really out of it.
>
> Q Were you using drugs pretty hard at that time?
>
> A Yeah.
>
> Q And why did you get involved in DeVry University when you did?

> A Because I wanted to -- I want to say I wanted to, but can you give me one second. I need to get my thoughts together before I answer this.
>
> Q Okay.
>
> A Um, I -- I -- I was going for criminal justice, and I was convinced to go to become a prison guard. *So that if someone got in trouble and went to prison, I could sneak in cell phones and drugs*.
>
> Q *Who convinced you to do that?*
>
> A *The defendant*.
>
> Q Is that Mr. –
>
> MR. BIBLE: Your Honor, I'm going to object. Move to strike. Sidebar.
>
> THE COURT: We will have a sidebar.
> (Side bar discussion held.)
>
> THE COURT: All right. I'm going to sustain the objection, and the jury should disregard the last answer and -- the last answer. We'll move on.

RP 2438-39 (emphasis added). Mr. Nguyen subsequently moved for a mistrial. RP 2464-66. The court recounted,

> Mr. Bible at sidebar indicated he wanted to move for a mistrial, indicating that this was 404(b) evidence that had not been disclosed to him, and that would prejudice the jury. And Mr. Sewell responded that he believed this information was in discovery, it wasn't a surprise, and also that it is part of the -- essentially, he didn't say these words, but part of the res gestae of the relationship between Mr. Nguyen and Ms. Henderson.

RP 2464. The court denied the motion for a mistrial trial, opining:

> I denied the motion for a mistrial. I did at this time, because it -- I didn't see a connection between what was being asked and sort of the answer to the question and didn't understand necessarily the relevance of it at that point.
>
> I agree though that the relationship between Mr. Nguyen and Ms. Henderson, and how that relates to her allegedly acting as a prostitute at his behest, is part of the testimony here. It's part of the way that this testimony is going to come out, and it is relevant as to what kind of relationship they had, what they asked each other to do, what they did with each other.
>
> But at that point there had been no discussion of anything else, so I sustained the objection and granted the motion to strike, which I instructed the jury to do, to disregard, and we moved on.

RP 2464-65. Mr. Nguyen continued to press his motion for a mistrial:

> We'll continue to maintain that frankly there should be a mistrial, and at the very least anything related to Hope Henderson now should definitely be severed. That's totally different than anything that anybody else had done in this case, or any sort of relationship that they had, or anything like that.

RP 2465-66. The court again denied Mr. Nguyen's motion:

> I don't think it's any more or less shocking than anything else that Ms. Henderson or either of these other two women have indicated occurred between themselves and your client. In fact, it's – I think it's a lot less shocking than most of it. And I do think it's part of the relationship that they had.
> . . .

> And so I don't find it particularly prejudicial. I don't find it some bell that can't be unrung or something that the jurors can't disregard. And therefore, I'll deny the motion for mistrial.

RP 2467.

Following the jury trial, Mr. Nguyen was found guilty as charged of all counts. CP 271-76; 1RP 79-84.[2] On appeal, there was not a reasonable probably the outcome would have been different had the letter been timely provided and Ms. Henderson's remarks were not incurable. Decision at 10-12.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. The State's tardy production of S.V.'s letter violated Mr. Nguyen's right to due process and required dismissal.

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States Supreme Court explained a prosecutor's disclosure obligations prior to a criminal trial. The Court held that a prosecutor's decision not to disclose material "evidence favorable to an accused" violates the defendant's due process rights. *Brady,* 373 U.S. at 87. This duty to disclose includes impeachment evidence probative of witness credibility where that evidence is

[2] 1RP refers to the transcript containing multiple dates.

favorable to the defendant. *Giglio v. United States,* 405 U.S. 150, 153-54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *United States v. Bagley,* 473 U.S. 667, 676-78, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

"[T]o establish a *Brady* violation, a defendant must demonstrate the existence of each of three necessary elements: '[(1)] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [(2)] that evidence must have been suppressed by the State, either willfully or inadvertently; and [(3)] prejudice must have ensued.'" *State v. Mullen,* 171 Wn.2d 881, 895, 259 P.3d 158 (2011), *quoting Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed. 2d 286 (1999).

Similarly, under CrR 8.3(b), "[t]he court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." *Brady* violations are also a possible basis for dismissal under CrR 8.3(b). *See State v. Martinez,* 121 Wn.App. 21, 31-34, 86 P.3d 1210 (2004) (affirming dismissal for State's prejudicial failure to provide evidence in a timely manner).

A defendant must show two things in order for the trial court to dismiss the charges under CrR 8.3 (b). First, he must show arbitrary action or governmental misconduct. *State v. Michielli,* 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Second, a defendant must show prejudice affecting his right to a fair trial. *Michielli,* 132 Wn.2d at 240.

Here, the trial court agreed the letter by S.V. wrote to the court regarding J.J. was impeachment evidence. RP 1946-47. Thus, the failure to disclose constituted a violation under CrR 8.3 and *Brady*. *Strickler,* 527 U.S. at 281-82; *Martinez,* 121 Wn.App. at 31-34.

The Court of Appeals incorrectly ruled that the letter was not material nor was the untimely disclosure prejudicial to Mr. Nguyen. Decision at 9-10. In fact, the letter was material because it was critical impeachment evidence in Mr. Nguyen's matter. S.V.'s credibility was *the* issue before the jury as there was no independent evidence of her allegations against Mr. Nguyen. If she was untruthful about the events involving J.J., then the jury had reason to disbelieve her regarding her claims against Mr. Nguyen. Thus, the letter was not impeachment on a collateral matter but went to the heart of the prosecution of Mr. Nguyen. Thus, contrary to the Court of Appeals conclusion, the letter was material.

Since the letter was material, it is clear Mr. Nguyen suffered prejudice under CrR 8.3 and *Brady*. As noted, in light of the fact there was no independent evidence of S.V.'s claims against Mr. Nguyen, her credibility was the issue before the jury. Had counsel for Mr. Nguyen had this letter in a timely manner, a different defense investigation may have been done and a different cross-examination may have been necessary. As a consequence, this Court can have no confidence that the jury's verdict in Mr. Nguyen's trial would have been the same had S.V.'s letter been timely disclosed. *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *In re Stenson*, 174 Wn.2d 474, 493-94, 276 P.3d 286 (2012). Under *Brady*, Mr. Nguyen's convictions must be reversed.

Similarly, the failure to timely disclose the letter constituted prejudice under CrR 8.3 as it prevented Mr. Nguyen's counsel from being adequately prepared in a timely manner to cross-exam S.V. and in presenting his defense of Mr. Nguyen. *State v. Brooks*, 149 Wn.App. 373, 390, 203 P.2d 397 (2009).

Mr. Nguyen established a violation of his rights under CrR 8.3 and *Brady* as well as establishing he was prejudiced by the State's failure to timely disclose S.V.'s letter.

This raises an issue of substantial public interest which this Court should grant review to decide. RAP 13.4. This Court should then reverse Mr. Nguyen's convictions and remand for a new trial.

2. Mr. Nguyen's rights to due process and a fair trial require reversal where there was a substantial likelihood Ms. Henderson's remarks affected the jury's verdict.

A trial court's denial of a mistrial motion will be overturned when there is a substantial likelihood that the error affected the jury's verdict. *State v. Rodriguez,* 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). A mistrial should be ordered where "the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *Id.* at 270.

A trial court's denial of a mistrial is reviewed for abuse of discretion. *State v. Young*, 129 Wn.App. 468, 472-73, 119 P.3d 870 (2005), *review denied*, 157 Wn.2d 1011 (2006). A trial court abuses its discretion where no reasonable judge would have reached the same conclusion. *Rodriguez*, 146 Wn.2d at 269. When reviewing a trial court's denial of a motion for a mistrial based on a witness's objectionable remarks, courts consider: (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether it could be cured by an instruction. *State v. Emery*, 174 Wn.2d

741, 765, 278 P.3d 653 (2012); *Young*, 129 Wn.App. at 473. A mistrial is warranted when the prejudice is so great that a new trial is the only way to ensure that the defendant will be fairly tried. *Emery*, 174 Wn.2d at 765.

Contrary to the Court of Appeals conclusion, Ms. Henderson's statement regarding Mr. Nguyen telling her to get a degree in criminal justice so she could smuggle drugs and cellphones into prison constituted a serious irregularity. *State v. Babcock*, 145 Wn.App. 157, 163-64, 185 P.3d 1213 (2008) (A witness's improper statement about a defendant's prior bad acts may be a serious irregularity).

In addition, and contrary to the Court of Appeals conclusion, the trial court's actions in sustaining Mr. Nguyen's objection and instructing the jury to ignore the remark was insufficient to cure the prejudice. While it is presumed that juries follow court instructions to disregard testimony, *see State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994), no instruction can "'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." *State v. Escalona*, 49 Wn.App. 251, 255, 742 P.2d 190 (1987); *see also State v. Suleski*, 67 Wn.2d 45, 51, 406 P.2d 613 (1965) ("where evidence is

admitted which is inherently prejudicial and of such a nature as to be most likely to impress itself upon the minds of the jurors, a subsequent withdrawal of that evidence, even when accompanied by an instruction to disregard, cannot logically be said to remove the prejudicial impression created.").

Mr. Nguyen asks this Court to grant review, reverse his convictions, and remand for a new and fair trial.

F. CONCLUSION

For the reasons stated, Mr. Nguyen asks this Court to grant review, reverse his convictions and remand for a new trial.

DATED this 31st day of August 2020.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NGHIA NGUYEN aka NHAN NGUYEN, Appellant.	No. 79911-8-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Nghia Nguyen appeals his conviction for two counts of second degree rape, one count of unlawful imprisonment with sexual motivation, one count of promoting the commercial sexual abuse of a minor, and one count of first degree promoting prostitution. On appeal, Nguyen contends the trial court erred in failing to dismiss for governmental mismanagement based on a Brady[1] violation. He also contends the trial court erred in denying his motion for mistrial based on a witness's improper statement. In a statement of additional grounds for review, Nguyen also argues that he was denied a unanimous jury verdict and deprived of a speedy trial. We reject all of these claims. However, we agree that the court improperly imposed an indeterminate sentence for promoting the commercial sexual abuse of a minor. Accordingly, we affirm Nguyen's conviction but remand for resentencing.

[1] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

FACTS

Nghia Nguyen was arrested by Seattle police on February 13, 2017. He was subsequently charged with one count of second degree rape and one count of unlawful imprisonment with sexual motivation regarding S.V., one count of second degree rape and one count of promoting the commercial sexual abuse of a minor regarding M.S., and one count of first degree promoting prostitution regarding H.H.[2] At trial, witnesses testified to the following events.

S.V.

In October 2016, S.V. was 16 years old and living with her family in New Jersey. S.V.'s life was upended after she was raped by two coworkers and rejected by her church and family. In November 2016, S.V. stole money from her parents and bought a bus ticket to Seattle. At the Seattle bus terminal, S.V. met a man who gave her marijuana and convinced her to accompany him to a large homeless encampment in Seattle known as "Tent City" or "The Jungle." S.V. met several other people who introduced her to methamphetamine and cocaine use. One of them tried to convince S.V. to commit acts of prostitution, but she refused.

After a few weeks of "bouncing around," S.V. returned to the Jungle. There she met Nguyen, who went by the nickname "Asian Mike." S.V. eventually accepted Nguyen's invitation to stay with him in his tent. On the first night in the tent, Nguyen physically overpowered and forcibly raped S.V. S.V. said she stopped resisting Nguyen's demands for sex after that because "it seemed like something I had to do."

[2] An additional charge of first degree rape regarding H.H. was severed prior to trial and later dismissed on the State's motion.

Nguyen told her she owed him sex because he was giving her food and shelter, and threatened to kill her if she tried to leave his tent without permission. This conduct formed the basis for one charge of second degree rape and one charge of unlawful imprisonment.

Bruce Watson, who lived in the Jungle and often purchased drugs from Nguyen, testified that he observed S.V. inside Nguyen's tent. He thought S.V. appeared fearful and was "cowering" in the back of the tent. Watson asked Nguyen who S.V. was, and Nguyen replied that she was his daughter.

On January 5, 2017, police received a tip that an endangered juvenile was staying in the Jungle with "Asian Mike." Police went to Nguyen's tent and located S.V. She initially identified herself to police as "Vicky" or "Victoria" but eventually provided her real name and age. After obtaining a search warrant for the tent, police recovered a pellet gun, drug paraphernalia, documents bearing Nguyen's name, and a cell phone containing pictures of Nguyen and S.V. together.

M.S.

M.S. moved from Idaho to the Seattle area with her mother when she was 12 years old. M.S.'s mother was working as a prostitute, and they mostly stayed in motels along Aurora Avenue in Seattle. In August 2016, when M.S. was 12 years old, she ran away from her mother and began living on the streets. She soon met a man named James Walker, who took her to the Jungle. Walker provided M.S. with heroin and methamphetamine and eventually forced her into prostitution. At some point, Walker "pass[ed] off control" of M.S. to Nguyen.

Nguyen once asked M.S. to drive with him to Portland, Oregon, to pick up drugs. Along the way, they stopped at Nguyen's sister's house. There, Nguyen tried to pressure M.S. into sex, but she repeatedly refused and he backed off. They left and went to a motel, where Nguyen gave M.S. methamphetamine and began touching her "aggressive[ly]." M.S. testified that Nguyen grabbed her by the neck and ripped her clothes off. M.S. said she cried, asked him to stop, and tried to push him off, but he slapped her, put his hand over her mouth, and forcibly raped her. This conduct formed the basis for a charge of second degree rape. M.S. was approximately 14 years old at that time.

M.S. did not see Nguyen for some time after that. She later returned to Nguyen's tent in the Jungle because she was suffering from withdrawal and he offered her drugs. M.S. was under Nguyen's control and stayed with him for a couple of weeks. During that time, other men would come to Nguyen's tent, and he told M.S. to have sex with them. M.S. recalled working as a prostitute for Nguyen on 10 or 11 occasions. Nguyen sometimes scared M.S. by pointing a gun at her. M.S. sometimes left Nguyen's tent but returned because she needed the drugs he provided. This conduct formed the basis for the charge of promoting the commercial sexual abuse of a minor.

One night, M.S. left Nguyen and went to Bruce Watson's tent. Watson thought M.S. looked frightened and exhausted. Watson testified that M.S. told him she was tired of being "bought and sold" for sex by Nguyen and others. Watson took M.S. to a friend's apartment and eventually reported her presence to the police.

M.S. later left Nguyen and returned to Walker. M.S. and S.V. both associated with Walker for a time until they got in an argument and S.V. left. S.V. later told police

about M.S.'s presence in the Jungle. Police located M.S. near the Jungle on January 25, 2017.

H.H.

H.H., now approximately 30 years old, was 16 when she ran away from a foster home in Idaho and came to Seattle. She quickly became addicted to alcohol and drugs and was forced into prostitution. Not long after arriving in Seattle, she met Nguyen by a park near the International District. He took H.H. to the Jungle and told her he had a gun and could protect her. Nguyen provided drugs to H.H. and demanded that she repay him by performing sexual favors for him or his friends. H.H. also worked as a prostitute for Nguyen and gave him the money she earned. Nguyen intimidated H.H. with physical violence or threats, and she was afraid of him. At some point, Nguyen ran off with another woman, and H.H. continued working as a prostitute for other pimps.

Around 2016, when she was in her late 20s, H.H. moved into an apartment in Seattle that was being used for prostitution. About two weeks later, Nguyen and others from the Jungle began hanging out in the apartment. H.H. saw Nguyen bringing S.V. to the apartment for sex. H.H. resumed working as a prostitute for Nguyen around that time. H.H. felt that she was under Nguyen's control and was afraid he would become violent if she disobeyed him. This conduct formed the basis for the charge of first degree promoting prostitution. In March 2017, H.H. contacted police and disclosed her relationship with Nguyen.

Nguyen's Testimony

Nguyen testified in his own defense. He admitted that he has been to prison for selling drugs and that he continued to sell drugs after his release. He acknowledged

meeting S.V. in the Jungle but claimed that S.V. came to him for help because someone else raped her. He denied ever spending the night with S.V., having sex with her, giving her drugs, or forcing her to do anything. He testified that H.H. owed him money but denied threatening her or acting as her pimp. Nguyen denied knowing M.S. at all.

Motion To Dismiss for Governmental Misconduct

S.V. testified on direct examination that Walker was "really nice" to her and let her sleep in his tent. She denied that Walker ever asked her to work as a prostitute. On cross-examination, S.V. denied trying to protect Walker by falsely telling investigators that Walker never had sex with her. On redirect, S.V. testified that Walker was like "family" to her and that their relationship ended after a fight with M.S.

The prosecutor then sought to elicit testimony that Walker had been prosecuted for prostitution of M.S. When the court asked the prosecutor why this information was relevant, he explained that defense counsel cannot imply that S.V. is protecting Walker now given that S.V. was extremely supportive of Walker being prosecuted. The prosecutor then revealed that S.V. had given a written statement that was used in the sentencing of Walker in a separate prosecution. In the letter, S.V. said Walker is a "monster" who raped her and that he "should be punished to the maximum of whatever is possible."

During a break in S.V.'s testimony, the prosecutor located the letter and provided it to defense counsel. After interviewing S.V. during a recess, he cross-examined her about the statement. S.V. explained that she said Walker raped her because she was too intoxicated to consent. She also acknowledged testifying that she was comfortable with Walker, despite having called him a "monster" in her letter.

Nguyen subsequently moved to dismiss under Brady and CrR 8.3(b) based on the State's failure to provide S.V.'s written statement to the defense prior to trial. The trial court denied the motion, finding neither a Brady violation nor a violation of CrR 8.3(b). Regarding Brady, the court reasoned that the letter was "[a]t best . . . impeachment on a collateral matter." Although the court described the State's late disclosure as "unacceptable," it ruled that Nguyen was not prejudiced because defense counsel was able to interview and effectively cross-examine S.V. and the defense theory of the case remained viable.

Motion for Mistrial

While discussing her life history during direct testimony, H.H. discussed earning her high school diploma and then taking a few online college credits. H.H. acknowledged that she was using drugs "pretty hard" at that time. The prosecutor then asked why she decided to take online college courses at that time. H.H. responded, "Um, I -- I -- I was going for criminal justice, and I was convinced to go to become a prison guard. So that if someone got in trouble and went to prison, I could sneak in cell phones and drugs." The prosecutor asked who convinced her to do that, and she responded "[t]he defendant."

Defense counsel immediately objected and moved to strike the testimony. The court sustained the objection and instructed the jury to disregard it. Nguyen subsequently moved for a mistrial. The court later denied Nguyen's motion:

> [F]irst of all, I granted the objection. It's been stricken at this point. Secondly, I don't think it's any more or less shocking than anything else that [H.H.] or either of these other two women have indicated occurred between themselves and your client. In fact, it's -- I think it's a lot less shocking than most of it. And I do think it's part of the relationship that they had.

> . . . .
> And so I don't find it particularly prejudicial. I don't find it some bell that can't be unrung or something that the jurors can't disregard.

A jury convicted Nguyen on all counts as charged. The judge imposed indeterminate sentences for the rape counts and for the count of promoting commercial sexual abuse of a minor. Nguyen appeals.

ANALYSIS

Motion To Dismiss for Brady Violation

Nguyen asserts that the State's failure to disclose S.V.'s statement prior to trial violated the State's obligation under Brady and constituted governmental misconduct warranting dismissal under CrR 8.3. We disagree.

The constitutional right to due process requires fundamental fairness and a meaningful opportunity to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). A prosecutor's failure to disclose material evidence "favorable to an accused" violates that defendant's due process rights. Brady, 373 U.S. at 87. We review Brady claims de novo. State v. Davila, 184 Wn.2d 55, 74, 357 P.3d 636 (2015). To establish a Brady violation, the defendant must demonstrate the existence of three necessary elements: (1) "'[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching,' (2) 'th[e] evidence must have been suppressed by the State, either willfully or inadvertently,' and (3) the evidence must be material." Davila, 184 Wn.2d at 69 (alterations in original) (quoting Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)).

A Brady violation may warrant dismissal pursuant to CrR 8.3(b). See, e.g. State v. Martinez, 121 Wn. App. 21, 86 P.3d 1210 (2004) (affirming dismissal for State's prejudicial failure to timely disclose material evidence). Under CrR 8.3(b), the court is authorized to "dismiss any criminal prosecution due to . . . governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 8.3(b). To prevail on a CrR 8.3 motion to dismiss, the defendant must show by a preponderance of the evidence both (1) governmental misconduct and (2) actual prejudice. Martinez, 121 Wn. App. at 29. "[D]ismissal under CrR 8.3 is an extraordinary remedy, one to which a trial court should turn only as a last resort." State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). "A trial court's decision on a motion to dismiss under [CrR 8.3(b)] is reviewed for manifest abuse of discretion." State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). A trial court manifestly abuses its discretion when "no reasonable judge would have ruled as the trial court did." State v. Mason, 160 Wn.2d 910, 934, 162 P.3d 396 (2007).

We agree with the State that the disclosure of S.V.'s statement during trial, while untimely, was not material or prejudicial to Nguyen's defense.[3] "Evidence is material under Brady 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Davila, 184 Wn.2d. at 73 (internal quotation marks omitted) (quoting Kyles v. Whitley, 514 U.S. 419,

[3] The State also argued that S.V.'s letter was not "suppressed" within the meaning of Brady because it was disclosed during trial as opposed to after trial had concluded. The State acknowledges that no Washington opinion has expressly considered the analytical difference for Brady purposes between disclosure during trial or after trial, but urges that we adopt the prevailing federal standard. Because we conclude that there is no reasonable probability that the result of the proceeding would be different had the letter been timely disclosed, we need not reach this issue.

433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). A reasonable probability exists if the suppression of the evidence "'undermines confidence in the outcome of the trial.'" Davila, 184 Wn.2d at 73 (internal quotation marks omitted) (quoting Kyles, 514 U.S. at 434).

Here, defense counsel was able to interview S.V. and cross-examine her in detail. The court noted that defense counsel's cross-examination "was incredibly effective, hurt her testimony significantly, and made a, as I sat here, an impressive impact on the jury." During closing argument, defense counsel used discrepancies between S.V.'s letter and her testimony at trial to argue that S.V. was not credible. Moreover, it appears that S.V. had already stated during defense interviews that Walker raped her by having sexual intercourse with her while she was under the influence of drugs and unable to consent. Although Nguyen asserts that the late disclosure prevented counsel from being adequately prepared to cross-examine S.V., it is unclear how his cross-examination would have differed or how his defense would have materially changed. The letter referenced only Walker, whom the defense was already aware of, and M.S., who testified almost two weeks after S.V. While Nguyen claims earlier disclosure may have led to a different investigation, this claim is purely speculative. "The mere *possibility* that an item of undisclosed evidence *might* have helped the defense or might have affected the outcome of the trial . . . does not establish 'materiality' in the constitutional sense." State v. Kwan Fai Mak, 105 Wn.2d 692, 704-05, 718 P.2d 407 (1986).

Under these circumstances, we cannot say there is a reasonable probability the outcome of the trial would be different if the State had disclosed S.V.'s statement prior

to trial. The untimely disclosure did not constitute a Brady violation. For the same reasons, Nguyen has failed to demonstrate prejudice warranting dismissal under CrR 8.3(b). The trial court did not abuse its discretion in denying Nguyen's motion to dismiss.

Motion for Mistrial

Nguyen asserts that H.H.'s challenged testimony was a serious trial irregularity that warranted a mistrial. We disagree.

We review a trial court's denial of a mistrial for abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). Abuse of discretion occurs "'when no reasonable judge would have reached the same conclusion.'" State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)).

"A trial court's denial of a mistrial motion will be overturned only when there is a substantial likelihood that the error affected the jury's verdict." State v. Garcia, 177 Wn. App. 769, 776, 313 P.3d 422 (2013). A mistrial should be granted "'only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'" State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002) (quoting Kwan Fai Mak, 105 Wn.2d at 701). In determining the effect of a trial irregularity, we examine "(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." Hopson, 113 Wn.2d at 284.

Nguyen argues that H.H.'s statement regarding Nguyen telling her to get a degree in criminal justice so she could smuggle drugs and cell phones into prison was a

serious trial irregularity. He likens his case to State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), but that case is distinguishable. In Escalona, the defendant was on trial for second degree assault with a deadly weapon, a knife. 49 Wn. App. at 252. He successfully moved in limine to exclude his prior conviction for the exact same crime. Escalona, 49 Wn. App. at 252. At trial, the victim testified that he knew the defendant "'already has a record and had stabbed someone.'" Escalona, 49 Wn. App. at 253. The trial court denied the defendant's motion for a mistrial and instructed the jury to disregard the comment. Escalona, 49 Wn. App. at 253. This court reversed, holding that the irregularity was incurably prejudicial because the improper evidence related to the same misconduct as the charged crime. Escalona, 49 Wn. App. at 256.

The incurable prejudice in Escalona arose largely because the improper testimony implicating a propensity to commit the crime for which the defendant was charged. Here, in contrast, H.H.'s testimony regarding Nguyen's desire to obtain drugs in prison does not logically indicate a propensity to commit sex crimes. Moreover, unlike Escalona, any evidence suggesting that Nguyen sold drugs was cumulative. The jury heard a great deal of testimony regarding Nguyen's sale and use of illegal drugs throughout the trial. Any prejudice arising from the statement was not incurable.

"A trial court has wide discretion to cure trial irregularities resulting from improper witness statements." State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). The trial court properly instructed the jury to disregard H.H.'s comment. Juries are presumed to follow the trial court's instructions. State v. Williams, 159 Wn. App. 298, 321, 244 P.3d 1018 (2011). We conclude that the trial court did not abuse its discretion in denying Nguyen's mistrial motion.

Indeterminate Sentence

Nguyen argues that the trial court erred by imposing an indeterminate sentence for promoting the commercial sexual abuse of a minor. The State concedes that Nguyen is entitled to resentencing on this count. A trial court commits reversible error by exceeding its sentencing authority. State v. Murray, 118 Wn. App. 518, 522, 77 P.3d 1188 (2003). The court's legal authority to impose a particular sentence is reviewed de novo. State v. Church, 5 Wn. App. 2d 577, 580, 428 P.3d 150 (2018), review denied, 192 Wn.2d 1020 (2019).

RCW 9.94A.507(1)(a) lists offenses subject to indeterminate sentencing. Promoting the commercial abuse of a minor is not on the list. In addition, RCW 9.94A.507(1)(b) mandates indeterminate sentencing for any defendant with "a prior conviction for an offense listed in [ ]RCW 9.94A.030(31)(b), and is convicted of any sex offense other than failure to register." Nguyen has no relevant prior convictions. We therefore accept the State's concession and remand for resentencing on this count.

Statement of Additional Grounds

In a statement of additional grounds for review, Nguyen claims that he was unconstitutionally convicted by a nonunanimous jury. He contends that on the last day of trial, prior to deliberations, the court failed to replace an absent juror for deliberations, resulting in a nonunanimous decision of only 11 jurors. Nguyen correctly notes that a criminal defendant charged in superior court has a state constitutional right to be tried by 12 jurors. WASH. CONST. art. I, § 21; CrR 6.1(b); State v. Stegall, 124 Wn.2d 719, 728, 881 P.2d 979 (1994). However, the record clearly indicates that the absent juror was replaced by an alternate and that Nguyen was in fact convicted by 12 jurors.

Nguyen also claims that the 24-month delay before trial requires dismissal.[4] Criminal defendants have a constitutional right to a speedy trial. U.S. CONST. amend, VI; WASH. CONST. art. I, § 22. We review questions of constitutional speedy trial rights de novo. State v. Iniguez, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009).

To determine whether a speedy trial violation occurred, we apply the balancing test set out in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). In order to trigger the Barker analysis, the defendant must show presumptively prejudicial delay. Barker, 407 U.S. at 530. Although Washington courts have not adopted a bright line rule for when the delay is presumptively prejudicial, our Supreme Court has found that eight months was "just beyond the bare minimum needed to trigger the Barker inquiry." Iniguez, 167 Wn.2d at 293. If a defendant meets this threshold test, the court then considers a number of factors to determine if the delay constitutes a constitutional violation: (1) the length of the delay, (2) the reason for the delay, (3) whether and to what extent the defendant asserted his speedy trial rights, and (4) whether the delay caused prejudice to the defendant. Barker, 407 U.S. at 530-32.

Here, the delay exceeds the bare minimum necessary to pass the threshold test. But the Barker analysis indicates that no constitutional violation occurred. First, although the delay was sufficient to trigger the Barker analysis, it was not exceptionally long in light of the relatively complicated nature of the case. See State v. Ollivier, 178 Wn.2d 813, 828-29, 312 P.3d 1 (2013) (describing a number of speedy trial challenges involving delays ranging from 21 months to 58 months as not "exceptionally long").

[4] Nguyen asserted that the delay was 29 months. The record does not support this assertion.

Second, all of the continuances attached to Nguyen's statement of additional grounds indicate that defense counsel sought the continuances to enable defense investigation and preparation for trial. Nguyen asserts that the continuances violated his speedy trial rights because he refused to sign them. But a continuance sought to enable counsel to investigate or prepare for trial is binding on the defendant even if the defendant objects to the continuance. Ollivier, 178 Wn.2d at 824 (citing CrR 3.3(f)(2)).

Third, Nguyen did repeatedly assert his right to a speedy trial by objecting to continuances sought by his own attorney. But because his right to counsel was furthered by counsel's requests to obtain continuances in order to prepare his defense, this factor does not weigh in Nguyen's favor. See Ollivier, 178 Wn.2d at 840-41.

Fourth, Nguyen has not established prejudice. The delay was not lengthy enough to constitute "extreme delay" creating a presumption of prejudice. See Ollivier, 178 Wn.2d at 843-44. Nor has he demonstrated particularized prejudice such as oppressive pretrial incarceration, undue anxiety and concern, or an impairment of his defense. See Ollivier, 178 Wn.2d at 844-45 (citing Doggett v. United States, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)).

In sum, we affirm Nguyen's convictions but remand for resentencing on his conviction for promoting the commercial sexual abuse of a minor.

Affirmed in part and remanded.

WE CONCUR:

Andrus, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79911-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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