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Supreme Court No. 99105-7
(COA No. 78926-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

POY PUTH,

Appellant.

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 AND COURT OF APPEALS DECISION

Poy Puth, petitioner here and appellant below, asks this Court to accept review of a Court of Appeals decision, issued on September 8, 2020, affirming his conviction. Mr. Puth has attached a copy of this opinion to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Courts should preclude the admission of evidence if the evidence contains the danger of causing the defendant undue prejudice. Sex crimes are particularly stigmatizing, and individuals with convictions for these crimes are threatened, harassed, assaulted, and killed. Here, the court admitted multiple exhibits that detail the numerous crimes a person can commit in order for the State to require him to register as a sex offender, including the crimes of incest, rape of a child, and commercial sexual exploitation of a child. Did the Court of Appeals err in finding that these exhibits failed to unduly prejudice Mr. Puth? RAP 13.4(b)(4).

2. Courts have no discretion to admit irrelevant evidence, and courts should preclude the admission of evidence that will confuse the jury. Here, the court admitted several exhibits that contained a complete analysis of each subsection of the failure to register statute. Some portions of this analysis had no bearing on this case, as the State only charged Mr.

Puth with violating specific portions of the statute. Did the Court of Appeals err in concluding these exhibits did not confuse the jury regarding the applicable law? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Poy Puth was previously convicted of a sex offense that requires him to register as a sex offender. CP 9. From 2013 to 2014, Mr. Puth abided by this duty and registered in both Pierce and King County. *See* Exs. 2, 4, 5, 7.

By 2017, the State charged Mr. Puth with failing to register between May 23, 2016 and July 3, 2017. CP 1. The failure to register statutory scheme provides eight different ways a person can be convicted of this crime. RP 14. In order to receive notice of the State's specific allegations and prepare an effective defense, Mr. Puth moved for a bill of particulars. RP 13, 15. The court ordered the State to furnish a bill of particulars. RP 22-23, 26-27. The bill of particulars did not allege Mr. Puth failed to comply with the subsection of the failure to register statute that requires an individual to register in a certain manner when they move out of the state. CP 30-31; *see* RCW 9A.44.130(4)(a)(viii).

At trial, the testimony revealed differing narratives regarding Mr. Puth's whereabouts during the charging period. Narath Kim, Mr. Puth's landlord for a time, stated Mr. Puth moved into Des Moines home in May

of 2016 but left soon afterwards. RP 508. King County records revealed Mr. Puth's last registered address in King County was at this address. Ex. 10. However, the evidence revealed Mr. Puth registered at Mr. Kim's address at various times in 2014, not 2016. RP 507-08, 612, 681; Exs. 7, 10, 12 (2:07-2:23).

Moreover, in May of 2016, Mr. Puth was arrested in Minnesota on an unrelated charge. RP 691. Mr. Puth did not plead guilty to this charge until June 30, 2016. Ex. 15. Indeed, Mr. Puth estimated that he lived in Minnesota for at least a year and a half, ranging from a time between the middle of 2015 and sometime in 2017. Ex. 12 (6:17-6:55). During a police interview, Mr. Puth admitted to not registering in Minnesota. Ex. 12 (10:09-10:25).

Mr. Puth's sister also testified at trial. She claimed Mr. Puth lived with her at her Tacoma home beginning in May of 2016 but that he only stayed at the home a few days a week. RP 574-75, 579, 595, 638, 658. But again, Mr. Puth was arrested and detained in Minnesota in May of 2016, and he was not sentenced until late June of 2016. RP 691; Ex. 15. Mr. Puth's sister also claimed Mr. Puth lived with her during the summer of 2017. RP 595.

At trial, Mr. Puth stipulated to his previous conviction for a felony sex offense. CP 9. However, over his objection, the court admitted

exhibits that contained information detailing the numerous crimes a person can commit in order for the State to require him to register as a sex offender. Exs. 3, 6, 8, and 9, pg. 1; RP 535, 540. These same exhibits also contained a legal analysis of each different subsection of the failure to register statute, including the subsection that details that a person must register if he moves out of the state. Exs. 3, 6, 8, 9, pgs. 2-3.

The jury convicted Mr. Puth. CP 105. The Court of Appeals affirmed the conviction on September 8, 2020. Op. at. 1.

D. ARGUMENT

This Court should accept review because the Court of Appeals erred in finding no error where the trial court admitted numerous inflammatory, cumulative, and confusing exhibits.

- a. When evidence is minimally relevant, it should be excluded if it is prejudicial, cumulative, and confusing.

Courts have discretion to admit relevant evidence; however, courts should exclude even relevant evidence that is likely to confuse the jury and/or cause the defendant undue prejudice. ER 401, 403; *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010); *Jenkins v. Snohomish Cnty. Public Utility Dist. No. 1*, 105 Wn.2d 99, 107, 713 P.2d 79 (1986). Evidence is relevant if it tends to make the existence of any fact

of consequence more or less probable than it would be without the evidence. ER 401; *Salas*, 168 Wn.2d at 669.

Generally, evidence of acts that are remote in time affect the weight the jury should assign to the evidence. *See State v. Stevenson*, 169 Wash. 10, 12 P.2d 47 (1932). And evidence is cumulative if “it relates to a matter so fully and properly proved by other testimony as to take it out of the area of serious dispute.” Francis C. Amendola et. al., *C.J.S. Crim. Proc. and Rights of Accused* § 1686 (Apr. 2019).

Evidence is unduly prejudicial if it is “likely to stimulate an emotional response rather than a rational decision.” *Salas*, 168 Wn.2d at 671 (*referencing State v. Powell*, 126 Wn.2d 244, 264, 898 P.2d 615 (1995)). Furthermore, evidence is likely to confuse a jury if it will inappropriately cause it to focus on collateral issues or cause it to misconstrue the law. Karl B. Tegland, 5 Wash. Prac., *Evidence Law and Practice* § 403.4 (6th Ed. June 2018); *U.S. v. Nash*, 175 F.3d 429, 435 (6th Cir. 1999).

This Court reviews a trial court’s decision to admit evidence for an abuse of discretion. *Salas*, 168 Wn.2d at 668-69. A court abuses its discretion when its decision is based on untenable grounds or untenable reasons, if it rests on facts the record does not support, or if the court applied the wrong legal standard. *T.S. v. Boy Scouts of America*, 157

Wn.2d 416, 423-24, 138 P.3d 1053 (2006). Reversal is required if a reasonable probability exists that the trial court's erroneous evidentiary error materially affected the outcome of the trial. *In re Detention of Post*, 170 Wn.2d 302, 314, 241 P.3d 1234 (2010).

For the reasons expressed below, exhibits 3, 6, 8, and 9 were minimally relevant and cumulative yet highly inflammatory. The admission of these exhibits also had the near certainty of confusing the jury regarding the applicable law.

- b. The court erred in admitting exhibits 3, 6, 8, and 9 because these exhibits contained minimally relevant yet highly inflammatory information regarding the numerous crimes a person can commit in order for the State to require him to register as a sex offender.

The court erred in admitting exhibits 3, 6, 8, and 9 because the first pages of these almost identical exhibits contained minimally relevant and cumulative information that was highly inflammatory: information detailing the numerous crimes a person can commit in order for the State to require him to register as a sex offender.

The elements of failing to register as a sex offender require the State to prove (1) the defendant has a conviction that requires him to register a sex offender but; (2) the defendant knowingly failed; (3) to comply with one of the registration requirements. CP 92; RCW 9A.44.132(1); RCW 9A.44.130. Mr. Puth stipulated as to his identity and

his previous Class A felony conviction, and so he stipulated the State met its burden in proving the first element of failing to register. RP 466, 517, 654; CP 9, 98. The purpose of a stipulation to a prior conviction is to reduce the prejudicial effect of the defendant's prior conviction on the jury. *See State v. Case*, 187 Wn.2d 85, 91, 384 P.3d 1140 (2017).

At trial, the State asked the court to admit exhibits 3, 6, 8, and 9. RP 533, 536-38, 608, 611, 613-14. These exhibits consist of the King County Sheriff's Sex and Kidnapping Registration Notification form that Mr. Puth read and signed between the dates of June of 2013 and May of 2014. Ex. 3, pg. 4, Ex. 9, pg. 4. The first page of each of these exhibits contains an identical list of the numerous offenses a person must be convicted of in order to be required to register as a sex offender. Exs. 3, 6, 8, 9, pg.1. This list includes the crimes of child molestation, commercial sexual abuse of a minor, incest, rape of a child, and sexual exploitation of a minor. *Id.* Page three of each of these exhibits also states that if someone was convicted of a Class A felony, they have a duty to register for life. Ex. 3, 6, 8, 9, pg. 3.

Mr. Puth objected to the introduction of this portion of the exhibit because it was irrelevant and unduly prejudicial. RP 535. He also objected to the entirety of the exhibit because it was wholly irrelevant to the charging period, which spanned between May 23, 2016, and July 3, 2017.

CP 1; RP 542. In response, the State argued the exhibit was relevant because it demonstrated Mr. Puth knew of his duty to register. RP 536. In rebuttal, Mr. Puth argued his defense was not that he was unaware of his duty to register; furthermore, the instructions would inform the jury that Mr. Puth has a Class A sex offense that required him to register, so this also suggested Mr. Puth knew of his duty to register. RP 540. Mr. Puth also argued the State could prove Mr. Puth knew of his duty to register through other means that did not include admitting the first page of the exhibits. RP 535-36.

Ultimately, the court admitted page one of the exhibits, opining no danger existed in admitting it because it did not “think there’s a danger that the jury is going to assume that Mr. Puth is guilty of all of [the offenses] listed,” and because it did not believe the jury was going “to guess which [offense] he is guilty of [committing].” RP 535, 540. The court did not explain how this particular page was relevant to proving Mr. Puth knew of his duty to register.

The court was wrong in admitting these exhibits because this evidence was minimally relevant yet highly inflammatory. First, it is important to highlight this *entire* exhibit was minimally relevant, as it was temporally disconnected (ranging from 2013 to 2014) from the charging period (ranging from May 23, 2016-July 3, 2017). It was also minimally

relevant because Mr. Puth stipulated to having a conviction that required him to register as a sex offender. If the State wanted to use these exhibits to establish Mr. Puth was aware of his duty to register, then it only needed to admit the portion of the exhibit where Mr. Puth signs and dates that he understood he had a duty to register. Exs. 3, 6, 8, 9, pg. 4. The State could have also had a witness describe the relevant contents rather than admitting this evidence. No reason existed for the State to admit a laundry list of possible convictions Mr. Puth could have committed that would require him to register in order to prove he knew of his duty to register.

But the admission of this list had a high probability of inflaming the jury. Undoubtedly, sex crimes “inspire [a] passionate response,” and the knowledge that someone has committed such a crime, “car[r]ies a significant danger of interfering with the fact finder’s duty to engage in reasoned deliberation.” *Salas*, 168 Wn.2d at 586. Courts have correctly recognized “there is little doubt” sex offenders suffer a significant stigma as a result of their crimes. *Toney v. Owens*, 777 F.3d 330, 330 (5th Cir. 2015). People who commit the crimes listed in page one of the exhibit—child molestation, incest, or rape—are considered “the lepers of our time.”

Ex. 3, 6, 8, 9, pg.1; Susan Campbell, *Connecticut is Rethinking its Policies Toward Jobs and Housing for Sex Offenders*, NPR (June 21, 2016).¹

These crimes are so incendiary that some vigilantes have threatened, harassed, assaulted, and killed individuals convicted of these crimes. *See, e.g.*, Michelle A. Cubellis et. al, *Sex Offender Stigma: An Exploration of Vigilantism Against Sex Offenders*, 40 *Deviant Behavior* 225, 226 (2018); Mike Carter, *Letter tells killer's reasoning for slaying 2 pedophiles*, *Seattle Times* (Sept. 15, 2005);² Rob Csernyik, *How Sex Offender Registries Can Result in Vigilante Murder*, *Vice* (Mar. 30, 2018).³

Mr. Puth attempted to inoculate the inflammatory effect his previous conviction could have upon the jury when he stipulated to his prior offense, and yet these exhibits nullified this attempt. It invited the jury to speculate as to what crime Mr. Puth could have possibly committed in order to require him to register as a sex offender.

While the court reasoned the jury could not reasonably conclude that Mr. Puth committed every sex crime detailed in the exhibits, this

¹ <https://www.wnpr.org/post/connecticut-rethinking-its-policies-toward-jobs-and-housing-sex-offenders>.

² <https://www.seattletimes.com/seattle-news/letter-tells-killers-reasoning-for-slaying-2-pedophiles/>.

³ https://www.vice.com/en_us/article/ne9ew7/how-sex-offender-registries-can-result-in-vigilante-murder.

reasoning missed the point. The jury did not need to believe that Mr. Puth committed every crime listed in this page of the exhibit for this exhibit to nevertheless draw the ire of the jury against Mr. Puth. The introduction of all of these highly maligned crimes unquestionably inflamed the jury's perception of Mr. Puth. The minimal, almost non-existent, relevance of this evidence was vastly outweighed by the danger of unfair prejudice this evidence posed towards Mr. Puth. Consequently, the court's decision to admit this portion of the exhibit undoubtedly materially affected the outcome of the trial.

- c. The court also erred in admitting these exhibits because they contained statements of law that were irrelevant to the charges against Mr. Puth; consequently, the exhibits contained statements that confused the jury regarding the applicable law.

In addition to exhibits 3, 6, 8, and 9 containing highly prejudicial content, other portions of these exhibits also contained irrelevant and confusing information. The exhibits contained the King County Sheriff Department's legal analysis of the numerous subsections of the Failure to Register statute, and many portions of its legal analysis were irrelevant to Mr. Puth's case. *See Exs. 3, 6, 8, 9, pgs. 2-4.* As the admission of these exhibits undoubtedly resulted in the jury's confusion regarding the applicable law, the court also erred in admitting these portions of the exhibits.

Before trial, Mr. Puth moved for a bill of particulars in order to receive notice of the State's specific allegations and prepare an effective defense. RP 13, 15. Mr. Puth explained there are eight different subsections in the failure to register statute and therefore eight different ways the State could potentially prove he violated the statute. RP 14. Mr. Puth emphasized he could not prepare specific defenses, conduct adequate defense interviews, and prepare adequate cross-examination unless he knew which subsection the State alleged he violated. RP 14-15. The court agreed, granted the motion, and ordered the State to furnish a bill of particulars. RP 22-23, 26-27.

The bill of particulars narrowed down the number of ways Mr. Puth may have violated the failure to register statute. CP 22, 30-31. Notably, it did not allege Mr. Puth violated the statute by moving to another state but failing to register in that new state and notifying authorities in Washington. *See* RCW 9A.44.130(4)(a)(iv). But the State still presented evidence at trial that could lead a jury to conclude Mr. Puth did not register, and therefore did not abide by RCW 9A.44.130(4)(a)(iv), when he moved to Minnesota. Ex. 12 (10:08-10:25).

Exhibits 3, 6, 8, and 9 contain a legal analysis of the different ways a person must register, which differ depending on the person's (1) custodial status; and (2) sanity at the time of the offense. Exs. 3, 6, 8, 9,

pg. 2; *see also* RCW 9A.44.130(4)(a)(i), (iii), (v). These exhibits also explain how a person must register if he is (1) moving or returning to Washington; (2) moving within the State; (3) becomes employed in the State; (4) enrolls as a student or is employed at a school; or (5) moves to another State. Exs. 3, 6, 8, 9, pg. 3; *see also* RCW 9A.44.130(4)(a), (iv), (viii); RCW 9A.44.130(5)(a), (b).

Mr. Puth moved to exclude these portions of the document because they contained statements of law that would confuse the jury. RP 533-34. Mr. Puth emphasized the exhibits would mislead the jury, as the State was not seeking to prove Mr. Puth violated *any* one of the eight subsections of the failure to register statute. RP 534-35. He argued the exhibits “invade[d] the province of the [court] to tell the jury what the law is.” RP 535. Mr. Puth also cautioned the State did not even demonstrate the statements of law in the exhibits were accurate, and he reminded the court he was not arguing he had no knowledge of his obligation to register. RP 538-39.

In response, the State argued it needed the court to admit these exhibits into evidence to demonstrate Mr. Puth knew of his obligation to register and knew he was “supposed to continue to register.” RP 536-37. And in response to Mr. Puth’s argument that the exhibits would confuse the jury, the State argued it would be sufficient for the court to instruct the

jury that the law is contained only in the instructions. RP 537-38. Mr. Puth argued this remedy was insufficient. RP 539.

The court admitted these documents, opining the jury was “capable of understanding the purpose for which [the exhibits were] being offered.” RP 540. The court also believed an instruction was sufficient to cure any potential confusion regarding the applicable law. RP 541.

The court was wrong for various reasons. First, as previously discussed, the State did not need to introduce this evidence in order to prove Mr. Puth knew of his duty to register. If the State wanted to use these exhibits to establish Mr. Puth was aware of his duty to register, then it only needed to admit the portion of the exhibit where Mr. Puth signs and dates that he understood his duty to register. Exs. 3, 6, 8, 9, pg. 4.

Alternatively, the State could have redacted the portions of legal analysis that were unrelated to the subsections of the statute charged per the bill of particulars to prevent confusing the jury regarding the applicable law.

The portions of legal analysis unrelated to the specific subsections the State charged Mr. Puth with violating bore no relevance to Mr. Puth’s case. And the portions of legal analysis actually related to the subsections the State charged Mr. Puth with violating was minimally relevant, as Mr. Puth never claimed he was unaware of his duty to register. This exhibit was also cumulative because the State presented other evidence

demonstrating Mr. Puth knew of his duty to register. *See, e.g.*, Ex. 12 (10:20-10:31).

Perhaps most importantly, the wholesale admission of the King County Sheriff's legal analysis of the failure to register statute bore a high likelihood of confusing the jury concerning the relevant law. *Nash* is instructive. In *Nash*, the government accused the defendant of willfully failing to file income tax returns and of presenting fraudulent tax claims. 175 F.3d at 431. The defendant claimed that while he failed to comply with the tax code, he did so in good faith. *Id.* The defendant explained that after attending various lectures and studying tax laws, he believed he was not within the jurisdiction of the federal government and therefore had no obligation to pay federal taxes. *Id.* To substantiate this claim, he attempted to admit several exhibits that demonstrated the source of his good faith belief: (1) a report from the American Institute for the Republic that contained extensive statutory citations; (2) a letter by a purported public accountant that contained case law and his conclusions regarding the tax code; and (3) a response in opposition to the government's motion for summary judgment in an unrelated case that contained legal citations. *Id.* at 435. The court refused to admit these exhibits because the legal citations and analysis contained within them had a likelihood of confusing the jury in light of the court's instructions. *Id.*

On appeal, the defendant challenged the court's exclusion of these exhibits, but the court affirmed. *Id.* The court concluded, "[t]he proffered exhibits held the danger of confusing the jury by introducing purported legal analysis that was at odds with [the court's] instructions." *Id.*

As in *Nash*, here, the wholesale introduction of exhibits 3, 6, 8, and 9 also held the danger of confusing the jury with purported legal analysis; moreover, this danger was compounded by the court's instructions. The State charged Mr. Puth with only violating certain subsections of the failure to register statute, but these exhibits contained *all* of the different ways a person can possibly violate the failure to register statute. Exs. 3, 6, 8, and 9, pgs. 2-3. While the court told the jury to apply the law from its instructions, this was insufficient to clarify the law to the jury in light of the other instructions. CP 86. For example, Jury instruction 4 states,

A person commits the crime of failure to register as a sex offender when that person, having been convicted of a felony sex offense [...] knowingly fails to comply with *any* of the requirements of sex offender registration.

CP 92 (emphasis added).

Jury instruction 5 (the to-convict instruction) states the jury could find Mr. Puth guilty of failing to register if, during the charging period, he "failed to comply with *a* requirement of sex offender registration." CP 93 (emphasis added). While jury instruction 6 includes the subsections of the

failure to register statute reflected in the bill of particulars, nowhere in the instruction does it state that the jury can *only* convict Mr. Puth of this charge based on these particular subsections. CP 94.

It is important to note that the jury instructions, standing alone, are proper. However, the introduction of these exhibits, both standing alone *and* in conjunction with the jury instructions, stood a high likelihood of confusing the jury regarding the applicable law.

- d. Because the Court of Appeals failed to recognize these errors, this Court should accept review.

Evidentiary errors require reversal if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Post*, 170 Wn.2d at 314 (internal citations omitted).

The portions of the exhibits that confused the jury regarding the law had a reasonable probability of materially affecting the trial. Mr. Puth relied on the bill of particulars when he prepared his opening and closing statements, questioned witnesses, filed motions, and designed his defense to the charge. RP 186-87, 190. Consequently, Mr. Puth did not mount a defense to the subsections of the failure to register statute the State did not charge him with violating. But these exhibits invited the jury to find Mr.

Puth guilty if he violated subsections of the statute he had no opportunity to defend against.

While the jury instructions stated the law was only contained in the instructions, the court did not appropriately caution the jury regarding the limitations of this evidence, and the court repeatedly instructed the jury to decide the case based on the evidence. CP 86-87, 93; *see City of Seattle v. Pearson*, 192 Wn. App. 802, 817-20, n.8, 369 P.3d 194 (2016) (reversing conviction in part because the court admitted evidence that misstated the law and rejecting argument that the jury instructions cured the misstatement of law).

Additionally, the portion of exhibits 3, 6, 8, and 9 that contained a list of every potential crime a person could be convicted of in order to require registration was highly inflammatory. “Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” *Salas*, 168 Wn.2d at 673 (internal quotations omitted).

This Court should accept review.

E. CONCLUSION

Based on the foregoing, Mr. Puth respectfully requests that this Court accept review.

DATED this 8th day of October, 2020.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON,)	No. 78926-1-I
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
POY PUTH,)	
)	
Appellant.)	

BOWMAN, J. — Poy Puth appeals his jury conviction for failing to register as a sex offender. He argues the trial court abused its discretion by admitting four “Sex and Kidnapping Offender Registration Notification” forms to show he knew of his registration requirements. He also argues that the trial court mistakenly concluded that it lacked discretion to impose a sentence concurrent to one he was already serving. We conclude that any prejudice from admitting Puth’s registration notification forms did not substantially outweigh their probative value and that the trial court did not err in determining that former RCW 9.94A.589(2)(a) (2015)¹ compels consecutive sentences for offenders convicted of a new felony crime while under community custody for a prior felony conviction. We affirm Puth’s conviction for failing to register as a sex offender.

¹ We note that the legislature amended RCW 9.94A.589(2)(a) in 2020 to provide that “any terms of community custody shall run concurrently to each other, unless the court pronouncing the current sentence expressly orders that they be served consecutively.” LAWS OF 2020, ch. 276, § 1. The amendments do not pertain to Puth’s argument before us.

FACTS

In 2004, a jury convicted Puth of rape of a child in the second degree. His conviction carries a lifetime sex-offender registration requirement and lifetime community custody. Since his release from custody in June 2013, the King County Sheriff's Office notified Puth of his registration responsibilities several times. Puth acknowledged notice of the requirements each time he changed addresses by signing a Sex and Kidnapping Offender Registration Notification form. The form lists the different crimes for which conviction requires registration as a sex offender, applicable statutes, notice of the requirement to register "within three business days" of an address change, penalties for failing to register, and contact information for questions. Puth signed each Sex and Kidnapping Offender Registration Notification form in the presence of a law enforcement officer and acknowledged, "It is your responsibility to understand and obey the law. Failure to comply is a criminal offense."

In November 2017, the State charged Puth with failure to register as a sex offender between May 23, 2016 and July 3, 2017. The State alleged that Puth traveled out of the state during that time and failed to register within three days of his return to Washington. The State also alleged that Puth left King County to reside in Pierce County and did not inform King County of the move or register in Pierce County within three days of the move.

Before trial, Puth stipulated that he had a prior conviction for "a Class A felony sex offense in 2004." At the conclusion of trial, the court instructed the jury that "[a] person convicted of a Class A felony sex offense must register for

life” as a sex offender.

At trial, the State offered four identical Sex and Kidnapping Offender Registration Notification forms signed by Puth on different dates between 2013 and 2014. Puth objected to the admission of his registration notification forms “in their entirety.” Defense counsel argued that the forms were irrelevant and unduly prejudicial because they “invade[] the province of the judge to tell the jury what the law is.” The State argued that the forms were relevant because the “whole crux of this case is whether Mr. Puth knew he had to register, whether he knew how to [register], whether he understood how he was supposed to do it, and whether he received notice of it.” The court admitted the forms as exhibits. The jury convicted Puth as charged.

At the time of sentencing, Puth was serving lifetime community custody for the underlying 2004 rape of a child in the second degree conviction and was currently in custody for violating the conditions of that sentence. The prosecutor told the court that the State “has no interest in over-prosecuting Mr. Puth” and recommended credit for time served of about 9 months. But the prosecutor argued the statute “requires it to run consecutive.” The State also argued the court had to impose 12 months of community custody. Defense counsel asserted the court had the discretion not to impose a consecutive sentence or community custody. The defense asked the court to impose 30 days in jail and no community custody “just to close the case” because “the conditions under the [underlying rape of a child in the second degree] case are much broader.”

The court told the parties it wanted to impose a sentence concurrent to the

one Puth was currently serving for the community supervision violation because it would not “be in the best interest of the community to impose consecutive jail time.” But the court determined that former RCW 9.94A.589(2)(a) compelled a consecutive sentence because Puth was currently “under sentence” for another felony conviction. The court sentenced Puth to serve 90 days in jail to run consecutive to his revoked sentence for the 2004 rape of a child in the second degree conviction, credit for time served, and no community custody.

Puth appeals.

ANALYSIS

Sex and Kidnapping Offender Registration Notification Forms

Puth argues that the trial court erred when it admitted his Sex and Kidnapping Offender Registration Notification forms as notice of his registration requirements. At trial, Puth argued that the forms were irrelevant. On appeal, he acknowledges that the forms were “minimally relevant” but claims that they were unduly prejudicial because they were confusing and cumulative. We disagree.

We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). A court abuses its discretion if a decision is “ ‘manifestly unreasonable or based upon untenable grounds or reasons.’ ” State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) (quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). We will reverse a trial court’s evidentiary decision only if no reasonable person would have decided the matter as the trial court did. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004).

Courts presume that relevant evidence is admissible, and the party seeking its exclusion bears the burden of establishing unfair prejudice. Carson v. Fine, 123 Wn.2d 206, 224-25, 867 P.2d 610 (1994). Evidence is “relevant” if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” ER 401. A trial court may exclude relevant evidence if the danger of unfair prejudice substantially outweighs its probative value. ER 403. Evidence is “not rendered inadmissible under ER 403 just because it may be prejudicial.” Carson, 123 Wn.2d at 224. Evidence is unfairly prejudicial if it is likely to elicit an emotional response rather than a rational decision. Powell, 126 Wn.2d at 264. Unfair prejudice is that caused by evidence of “ ‘scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.’ ” Carson, 123 Wn.2d at 223 (quoting United States v. Roark, 753 F.2d 991, 994 (11th Cir. 1985) (quoting United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979))). We afford trial courts broad discretion “in balancing the probative value of evidence against its potential prejudicial impact.” State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984).

A person commits the crime of failure to register as a sex offender if the person (1) has been convicted of a felony sex offense that requires offender registration and (2) the person knowingly fails to comply with the registration requirements. RCW 9A.44.130, .132(1). Puth’s sex-offender registration forms were probative to whether he “knowingly” failed to comply with his registration requirements. Puth signed the forms in the presence of a law enforcement

officer and they explicitly informed him when he must register, how he can register, that his obligation to register is continuous, and that failure to register is a criminal offense.

Puth argues that the danger of unfair prejudice outweighs any probative value to the forms because they risk confusing the jury. He claims that the forms' repeated references to the registration statute accompanied by "the King County Sheriff Department's legal analysis" of what the statute requires of offenders could cause confusion among jurors "regarding the applicable law."² But the form is discernibly designed to provide general information and instructions to sex offenders. And the court specifically instructed the jury as to the law of the case. The court instructed the jury, "The law is solely contained in my instructions to you"; "It . . . is your duty to accept the law from my instructions"; and, "You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case." We presume that jurors follow the court's instructions absent evidence to the contrary. State v. Sullivan, 3 Wn. App. 2d 376, 380, 415 P.3d 1261 (2018).

Puth next contends that the sex-offender registration forms are prejudicial and "highly inflammatory" because they include a list of crimes that require offenders to register. Puth claims the list invited the jury to speculate which sex

² In the alternative, Puth argues that the court could have redacted the registration forms to include only information relevant to notice. But Puth did not ask the trial court to redact the forms; he asked the court "to exclude them in their entirety." We may refuse to review any claim of error that the defendant did not raise in the trial court. RAP 2.5(a). The policy of the rule is to encourage the efficient use of judicial resources. State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). We will " 'not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct.' " O'Hara, 167 Wn.2d at 98 (quoting State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). For these reasons, we do not address Puth's redaction argument.

crime he committed, rendering his stipulation to his 2004 rape of a child in the second degree conviction superfluous. But the jury knew from the parties' stipulation that Puth was convicted of a "Class A felony sex offense." And the court instructed the jury that they were "not to speculate as to the nature of the conviction." It was not unreasonable for the trial court to conclude that the jury was "capable of understanding the purpose for which [the forms are] being offered" and that there was no "danger that the jury is going to assume that Mr. Puth is guilty of all of [the listed crimes] or . . . try to guess which one he is guilty of."

Finally, Puth argues that the court abused its discretion by admitting all four of Puth's registration forms as exhibits because they were cumulative. He argues that this was especially bad because the State "presented other evidence" that Puth knew of his duty to register. A trial court may exclude evidence if its probative value is substantially outweighed by the "needless presentation of cumulative evidence." ER 403. At the same time, the State has the right to present ample evidence to prove every element of the crime. State v. Rahier, 37 Wn. App. 571, 574, 681 P.2d 1299 (1984). And, generally, the prosecution is "entitled to prove its case by evidence of its own choice." State v. Taylor, 193 Wn.2d 691, 698, 444 P.3d 1194 (2019) (citing Old Chief v. United States, 519 U.S. 172, 186-87, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)), review denied, ___ Wn.2d ___, 446 P.3d 780 (2020). Here, the registration forms show that Puth acknowledged on at least four separate occasions in 2013 and 2014 that he was notified he must register as a sex offender before he failed to register

between May 2016 and July 2017. The registration forms were not needlessly cumulative.

Consecutive Sentence

Puth claims the trial court mistakenly believed that it lacked discretion to impose a sentence concurrent to the one that he was currently serving for violating the lifetime community custody conditions imposed as a result of his 2004 conviction for rape of a child in the second degree.

As a general rule, the length of a criminal sentence is not subject to appellate review if it falls within the standard sentence range under the Sentencing Reform Act of 1981, chapter 9.94A RCW. RCW 9.94A.585(1). But review is still available to correct legal errors or abuses of discretion in determining what sentence applies. State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). A trial court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or made for untenable reasons. State v. McCormick, 166 Wn.2d 689, 706, 213 P.3d 32 (2009). The failure to exercise discretion is itself an abuse of discretion. State v. O'Dell, 183 Wn.2d 680, 697, 358 P.3d 359 (2015) (citing State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)).

“ ‘A trial court’s sentencing authority is limited to that expressly found in the statutes.’ ” State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002) (quoting State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800 (1983) (citing State v. Eilts, 94 Wn.2d 489, 495, 617 P.2d 993 (1980))). Statutory construction is a question of law we review de novo. State v. Cooper, 176 Wn.2d 678, 680,

294 P.3d 704 (2013). The purpose of statutory interpretation is to determine and give effect to legislative intent and, when possible, we derive legislative intent solely from the plain language enacted by the legislature. State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). If the plain language of the statute is unambiguous, our inquiry ends. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Former RCW 9.94A.589(2)(a) provides:

[W]henver a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

Puth contends that the term “under sentence” as used in former RCW 9.94A.589(2)(a) should be narrowly construed to include only offenders who “commit[] a felony offense while on parole for another felony offense.” Puth asserts he “was not on parole when he committed his failure to register offense and was instead on community custody.” Division Three of this court has twice addressed this argument. See State v. Roberts, 76 Wn. App. 290, 884 P.2d 628 (1994) (interpreting former RCW 9.94A.400(2), recodified as former RCW 9.94A.589(2)(a) (LAWS of 2001, ch. 10, § 6)), review denied, 126 Wn.2d 1018, 894 P.2d 564 (1995); In re Post-Sentence Review of Allery, 6 Wn. App. 2d 343, 430 P.3d 1150 (2018).

In Roberts, the defendant stole a car the night he was released from prison into community custody. Roberts, 76 Wn. App. at 291. He pleaded guilty to the theft. At sentencing, Roberts argued that even though he was still under community custody for the prior conviction, the consecutive sentencing statute

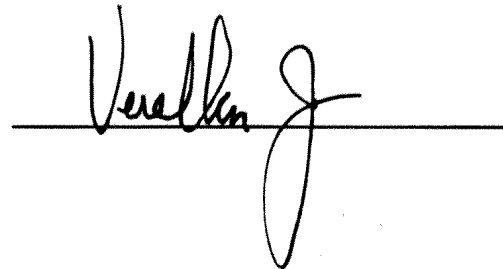
did not apply to him because he had completed his term of confinement.

Roberts, 76 Wn. App. at 291. The court disagreed and concluded that a “person under community supervision is clearly ‘under sentence of a felony’ within the meaning of that phrase in [former] RCW 9.94A.400(2).” Roberts, 76 Wn. App. at 292-93. We agree with the conclusion in Roberts that there is “no logical reason for differentiating between a person under community supervision vis-a-vis his being ‘under sentence of felony’ and the similar status of a parolee.” Roberts, 76 Wn. App. at 292.³

Because the trial court did not abuse its discretion in admitting the Sex and Kidnapping Offender Registration Notification forms or in imposing a consecutive sentence, we affirm Puth’s conviction for failure to register as a sex offender.

A handwritten signature in cursive script, appearing to read "Bunn, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Smith, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Verellen, J.", written over a horizontal line.

³ Allery cited Roberts to conclude that the defendant “was in community custody and thus still under sentence for the 2010 felony conviction when he committed the current assault.” Allery, 6 Wn. App. 2d at 347.

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. 78926-1-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:

- respondent Amy Meckling, DPA
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- Attorney for other party



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Washington Appellate Project

Date: October 8, 2020

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