

61573-4

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No. 61573-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN LAMOR SPEARS,

Appellant.

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

The Honorable Richard McDermott  
The Honorable Christopher A. Washington

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the mandatory joinder rule when it allowed the State to amend the information after the first trial to add an offense.

2. Mr. Spears's Fourteenth Amendment right to due process and a fair trial was violated by the complaining witness' outburst.

3. Mr. Spears's Fourteenth Amendment right to due process and a fair trial was violated by prosecutorial misconduct.

4. The trial court erred in ruling the kidnapping and rape counts regarding Ms. Muhanji were not the same criminal conduct.

5. The trial court erred in including Mr. Spears's prior California burglary conviction in his offender score.

6. Mr. Spears's Fourteenth Amendment right to equal protection and due process were violated by the State's use of a peremptory challenge to excuse the lone African-American juror.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The mandatory joinder rule codified at CrR 4.3.1, requires that the State charge all related offenses at the same time. Here, prior to the second trial, the trial court allowed the State to join an additional rape count against a different victim, where the rape was a related offense and the State was aware of all the facts

underlying the offense prior to the first trial. Did the trial court's ruling violate the mandatory joinder rule necessitating dismissal of the rape conviction?

2. The Fourteenth Amendment to the United States

Constitution guarantees a defendant due process and a fair trial. Witness misconduct may violate due process and render a trial unfair where the defendant is prejudiced by the misconduct. The victim, Ms. Muhanji, during cross-examination by counsel for co-defendant, engaged in a breakdown that the judge and counsel described as "unique." Was Mr. Spears' right to due process and a fair trial violated by Ms. Muhanji's outburst which so prejudiced him that the only remedy was a new trial?

3. Prosecutorial misconduct violates a defendant's

Fourteenth Amendment right to due process where the misconduct prejudices the defendant. Over defense objection, the trial court denied Mr. Spears' motion for mistrial based upon two instances of misconduct by the prosecutor: first, during questioning of a police witness, the prosecutor produced a firearm he knew the officer was unaware; and second, during his cross-examination of co-defendant Mr. Myers, the prosecutor asked an inflammatory and inappropriate rhetorical question which prejudiced Mr. Spears

before the jury. Was Mr. Spears prejudiced by the misconduct necessitating reversal of his convictions and remand for a new trial?

4. All offenses involving the same victim, the same intent, and occurring at the same time and place are the same criminal conduct and are counted as a single offense. The kidnapping and rape counts involving Ms. Muhanji involved the same victim and same intent, and occurred at the same time and place. Did the trial court err in ruling the two offenses were not the same criminal conduct?

5. Foreign prior convictions are included in an offender score only if the foreign offense is legally and factually comparable to a Washington felony offense. This Court has previously ruled that California burglary convictions are not legally comparable to a Washington felony offense. Did the trial court err in including Mr. Spears' prior California burglary conviction in his offender score and the certified court documents failed to include an admission or stipulation by Mr. Spears regarding the facts underlying the conviction?

6. A party's use of race as a basis to exercise a peremptory challenge violates the Fourteenth Amendment's guarantee of equal

protection and due process. Here, over Mr. Spears's objection, the State utilized a peremptory challenge to strike the lone African-American in the jury *venire* on the basis the juror was equivocal on whether he could be fair, a rationale adopted by the trial court in allowing the challenge. Was Mr. Spears's right to due process and equal protection violated when the State's strike was racially based and the rationale utilized by the State was pretextual?

### C. STATEMENT OF THE CASE

Kevin Spears, along with his friend, Anthony DuBose, were charged with kidnapping, robbing, and subsequently raping Mr. Spears' former girlfriend, Masitsa Muhanji. CP 10-13. Specifically, Mr. Spears was charged with kidnapping in the first degree, robbery in the second degree, and rape in the second degree. *Id.* The charges arose after Ms. Muhanji refused to continue working as a prostitute under Mr. Spears's guidance. Following a jury trial, Mr. Spears was convicted of the kidnapping count, but the remainder of the charges were the subject of a motion for a mistrial based upon a deadlocked jury. CP 57; 12/20/05RP 14, 19.

Prior to the second trial, two additional co-defendants were joined. Jerry Myers and Curtis Rose, who were contacted by Mr. Spears inviting them to have sexual intercourse with Ms. Muhanji,

were charged with single counts of rape in the second degree. CP 69-73. In addition, over Mr. Spears' objection, the State was allowed to add an additional count of rape in the second degree involving Dessert Sather, a woman who came to Mr. Spears' house with Mr. Myers and Mr. Rose. *Id.* The second trial resulted in a mistrial for all defendants based upon a deadlocked jury.

12/19/07RP 2.

After a third trial was conducted, Mr. Spears and Mr. DuBose were convicted as charged and Mr. Myers and Mr. Rose were acquitted. CP 126-28.

#### D. ARGUMENT

1. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO AMEND THE INFORMATION TO ADD CHARGES IN VIOLATION OF THE MANDATORY JOINDER RULE

In the first Information, Mr. Spears was charged with robbery in the second degree, rape in the second degree, and kidnapping in the first degree, all involving Ms. Muhanji. CP 11-12. Prior to the commencement of the first trial, the State moved to amend the information to add second count of rape in the second degree involving another woman, Dessert Sather. 11/14/05RP 6. Agreeing with Mr. Spears's objection, the trial court denied the

State's motion as untimely. 11/14/05RP 32. Following the first trial, Mr. Spears was convicted of the kidnapping count but a mistrial was declared on the remaining counts due to a deadlocked jury. CP 57; 12/20/05RP 14-19.

Prior to the commencement of the second trial, and over defense objections on mandatory joinder and double jeopardy grounds, the trial court granted the State's motion to amend to the information to add the rape count involving Ms. Sather. 5/16/07RP 14-30. The court ruled mandatory joinder was not offended because the State had tried and failed to join the rape count prior to the first trial. 12/22/07RP 5. Mr. Spears renewed his motion to dismiss the fourth amended information based mandatory joinder at the beginning of the second trial, which the trial court denied. 12/20/07RP 80-82.

a. CrR 4.3.1 requires all related offenses be joined.

Under the mandatory joinder rule, the State must charge an accused with all related offenses at the same time. CrR 4.3.1(b)(3).<sup>1</sup> Two or more offenses must be joined if they are

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<sup>1</sup> CrR.4.3.1, the mandatory joinder rule, states in relevant part:

b) Failure to join related offenses

related and based on the same conduct. *Id.* Offenses are based on the “same conduct” if they are based on “a single criminal incident or episode” or “the same physical act or omission or same series of physical acts,” *State v. Lee*, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997), or if they occur “in close proximity of time and place, where proof of one offense necessarily involves proof of the other.” *State v. Kindsvogel*, 149 Wn.2d 477, 483, 69 P.3d 870 (2003).

The mandatory joinder rule is founded on Article I, Section 22 of the Washington State Constitution, which provides: “In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him . . . .” Under this provision, “an accused must be informed of the charge he or she is to meet at trial, and cannot be tried for an offense not

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(1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

charged.” *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987), citing *State v. Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); *State v. Rhinehart*, 92 Wn.2d 923, 602 P.2d 1188 (1979). “Mandatory joinder is required for related offenses to ensure “a single disposition of all charges arising from one incident.” *State v. Harris*, 130 Wn.2d 35, 921 P.2d 1052 (1996).

Joinder principles are designed to protect defendants from “successive prosecutions based upon essentially the same conduct.” *State v. Lee*, 132 Wn.2d 498, 501-04, 939 P.2d 1223 (1997) (discussing this rule formerly designated as CrR 4.3(c)), quoting *State v. McNeil*, 20 Wn.App. 527, 532, 582 P.2d 524 (1978). Whether the prosecutor intended to harass the defendant or the prosecutor is simply negligent in failing to join offenses is irrelevant in determining whether offenses must be joined:

Thus, CrR 4.3(c)<sup>2</sup> was intended as a limit on the prosecutor. As such, it does not differentiate based upon the prosecutor's intent. Whether the prosecutor intends to harass or is simply negligent in charging the wrong crime, CrR 4.3(c) applies to require a dismissal of the second prosecution.

*State v. Dallas*, 126 Wn.2d 324, 332, 892 P.2d 1082, 1086 (1995).

The remedy when the mandatory joinder rule has been violated is

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<sup>2</sup> Former CrR 4.3(c)(1) (1995) defined “related offenses” as “Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.”

dismissal of the additional charges with prejudice. CrR 4.3.1(b)(1); *Dallas*, 126 Wn.2d at 329.

Here, the State failed to join the related rape offense prior to the first trial, thus the objection to the amended information and timely motion to dismiss should have been granted.

b. The rape count relating to Ms. Sather was a related offense of the other counts charged in the amended information filed prior to the first trial and was required to be joined with those offenses under CrR 4.3.1. *State v. Lee, supra*, is instructive on the issue of what constitutes a related offense. In *Lee*, the defendant was charged with criminal trespass and second degree theft of rent after he fixed up a house and collected rent from prospective tenants, when he did not own the house and did not have the permission of the house's owner. 132 Wn.2d at 500. The defendant was subsequently charged with theft for collecting the rent and deposits but failing to provide promised housing to different victims. *Id.* He moved successfully to dismiss the second case under the mandatory joinder rule. *Id.* at 501. The Supreme Court reversed, explaining that “same conduct” for purposes of deciding which offenses are “related offenses,” and therefore

subject to mandatory joinder, is conduct involving “a single criminal incident or episode.” *Lee*, 132 Wn.2d at 503.

“[S]ame conduct” for purposes of deciding what offenses are “related offenses” and, therefore, subject to mandatory joinder is conduct involving a single criminal incident or episode. We do not attempt to describe the exact boundaries of ‘same conduct,’ but it would include, for example, offenses based upon the same physical act or omission or same series of physical acts. Close temporal or geographic proximity of the offenses will often be present; however, a series of acts constituting the same criminal episode could span a period of time and involve more than one place, such as one continuous criminal episode involving a robbery, kidnapping, and assault on one victim occurring over many hours or even days.

*Lee*, 132 Wn.2d at 503 (footnote omitted) (emphasis added). The Court held though, that *Lee*'s conduct did not qualify, explaining that the fact a series of crimes is part of a common plan does not necessarily mean that joinder is mandatory; instead, “ *permissive joinder* is authorized where offenses are based upon a series of acts constituting a single scheme or plan.” *Lee*, 132 Wn.2d at 504.

The *Lee* decision speaks squarely to the circumstances involved in Mr. Spears' opposition to the amendment to the information and subsequent motion to dismiss. The rape counts involving Ms. Muhanji and Ms. Sather involved multiple acts of sexual intercourse any one of which would form the basis for the

rape, including Mr. Spears forcing Ms. Muhanji to perform oral sex on him, Mr. Spears forcing Ms. Muhanji and Ms. Sather to perform oral sex on each other, or Mr. Spears forcing Ms. Sather to perform oral sex on him. 2/20/08RP 65-75. In light of these multiple acts, the trial court gave the jury unanimity instructions based upon *State v. Petrich*.<sup>3</sup> Thus, in applying the “criminal episode” approach to the mandatory joinder, which emphasized the temporal or physical proximity between the two charged offenses, the acts of sexual intercourse involving Mr. Spears, Ms. Sather, and Ms. Muhanji also occurred both physically and temporally close to one another. All of the acts occurred in a very short period of time, and in the same house, and involved the same “criminal episode” of raping these two women. The rape count involving Ms. Sather was a related offense to the other offenses of which Mr. Spears was charged prior to the first trial.

c. The State possessed sufficient evidence prior to the first trial to charge Mr. Spears with the Sather rape count. In addition to being a related offense, the rape of Ms. Sather was supported by sufficient evidence to charge Mr. Spears prior to the

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<sup>3</sup> 101 Wn.2d 566, 571, 683 P.2d 173 (1984).

first trial. This is evidenced by the State's attempt to add this count at the eleventh hour prior to the first trial.

Instructive on this is the decision in *State v. Alexander*. In *Alexander*, the defendant was convicted of first degree murder under the extreme indifference prong. 96 Wn.2d 739, 740, 638 P.2d 1205 (1982) (*Alexander II*). The Court subsequently ruled, based upon a statutory construction analysis, that the charge of extreme indifference was inappropriate because the defendant's actions were directed towards a specific victim, and thus a pretrial motion to dismiss should have been granted. 94 Wn.2d 176, 186-192, 616 P.2d 612 (1980) (*Alexander I*). On remand, the State charged Alexander with premeditated murder for the same incident. This Court reversed Alexander's conviction, ruling the premeditated murder charge should have been joined with the extreme indifference murder charge, and the State's failure to join the two charges required dismissal. 96 Wn.2d at 740-42.

Critical to the Court's analysis in *Alexander II* was the fact that all of the facts necessary to try either means of first degree murder existed at the time of the first trial:

Accordingly, since the petitioner was not originally charged with premeditated murder – a related offense – and, *as the facts existed at the time of the first trial*

*to warrant such a charge*, the State is now precluded from asserting it.

*Alexander II*, 96 Wn.2d at 741-42 (emphasis added). This was true even though the first conviction was reversed based on an interpretation of a statute that had been in existence for several years. *Id.* at 186-192.

Similarly, in Mr. Spears' case, the State had all the facts necessary to charge him with the rape of Ms. Sather. The State chose to charge only Mr. DuBose with fourth degree assault in the first Information despite the fact the State was aware Ms. Sather had alleged she had been raped by both Mr. DuBose and Mr. Sather. CP 10-13.

In a similar vein, in *State v. Russell*, the defendant was originally tried for first degree murder and the jury was also instructed on the lesser included offense of intentional second degree murder. 101 Wn.2d 349, 350, 678 P.2d 332 (1984). Russell was acquitted of first degree murder but the jury was unable to reach a verdict on second degree murder. *Id.* Prior to the retrial, the State was allowed to amend the information to add second degree felony murder as an alternative means of committing second degree murder. *Id.* Russell asserted he could

not be retried for the first time on second degree felony murder as an alternative means of committing second degree murder as it was never joined with the intentional murder count prior to the first trial. *Id.* Following Russell's conviction, he appealed and this Court agreed that such a new charge violated the provisions of former CrR 4.3(c). The *Russell* Court held "intentional second degree murder and second degree felony murder are intimately connected and thus are related offenses within the above [CrR 4.3(c)] definition." *Id.* This Court concluded "[f]ailure to join second degree felony murder in the original information precludes its inclusion for the first time by way of amendment in [a] second trial." *Russell*, 101 Wn.2d at 353.

Here, the State had all the facts necessary to charge both Mr. Spears and Mr. DuBose with rape but chose to initially charge only Mr. DuBose with fourth degree assault. *Russell* plainly dictates that the State should have been precluded from trying Mr. Spears on the rape of Ms. Sather after failing to join this offense in the original information. The trial court erred in denying Mr. Spears' objection to the filing of the amended information and denial of his motion to dismiss. This Court should reverse Mr. Spears' conviction for the rape of Ms. Sather.

2. THE TRIAL COURT VIOLATED MR. SPEARS' RIGHT TO DUE PROCESS AND A FAIR TRIAL IN FAILING TO DECLARE A MISTRIAL FOR WITNESS MISCONDUCT

During Mr. DuBose' counsel's cross-examination of Ms.

Muhanji, the following exchange occurred:

Q: You said that [Mr. Spears] put a façade or a dream in your head; is that right?

A: Yes.

Q: In that façade, that dream, was love, a romantic relationship; is that right?

A: Yes.

Q: That's what you wanted, isn't it?

A: Yes.

Q: That's what you were desperate for, isn't it?

A: Yes.

Q: And you would do anything for that; isn't that right.

A: I guess so, obviously.

Q: And that's why you worked as a prostitute; isn't that right?

A: I didn't hear the question.

Q: And that's why you worked as a prostitute; isn't that right?

A: (Extreme crying and screaming by the witness.)

2/6/08RP 119-20. Since it was near the end of the day, the court decided to excuse the jury for the day and start anew the next day.

2/6/08RP 120-22. The following description of what had just occurred in court before the jurors was described by counsel for Mr.

DuBose:

Your Honor, the only thing I wanted to add was to supplement the record. It may never be an issue, but in response to my last question, and this is not currently reflected in the record, I believe. Ms. Muhanji began crying for a lack of a better term hysterically.

THE COURT: I think hysterically is probably a pretty apt description.

2/6/08RP 122.

The next day all four co-defendants moved for a mistrial based upon Ms. Muhanji's outburst the prior day:

MR. FRANTZ: As to whether or not this was contrived, and that's not an issue I think this Court is particularly inclined to address.

THE COURT: You are correct.

MR. FRANTZ: Thank you. But that's not the issue. The issue was the outburst such that it was so prejudicial that these defendants can now not get a fair trial. And sometimes there are things happen that are not a particular person's fault because it interferes with their right to a fair trial. And that was one of those outbursts. We've all had witnesses who cry on the stand, who get emotional. But there are a couple of things you have to keep in mind, your Honor. One,

it was one of the most extreme outburst [sic] I have seen; and I have been doing trials for about 23 years now; and I know the Court has a long history of trial work also. And I think what is important is the question. It was preliminary. It was background. It was foundation. It was not about any of the charges. It was working up to that. It was not the rape itself. It was simply her relationship with Mr. Spears.

I think with those things in mind your Honor, they have been deprived of the right to a fair trial and a mistrial is appropriate.

2/7/08RP 4-8. The court deferred ruling pending briefing by the parties, then subsequently denied the motion for a mistrial:

I wanted to just clarify. There were a couple of things in your brief that I want to comment on, on the top of page two, after you briefly described Ms. Muhanji's behavior on the stand, you said the defense moves for a mistrial. Defense counsel later noted it was the most extreme outburst he had ever seen. The Court agreed it was unique. That is true. I did say that. It was unique. I had never seen anything like that. . . . I wanted to comment on your argument, you said that you were not able to take the same approach, namely the approach of basically aggressively cross-examining Ms. Muhanji in front of the jury without running the risk with the jury viewing the defense as vicious and attempting to provoke another outburst, and you argued that Ms. Muhanji has removed defense counsel's only tool of effective cross-examination. And because of that it's a significant prejudice. . . And I think her outburst cut both ways [sic] . . . I don't know whether a jury is going to think that she was faking it or not faking it. We all were here. Everybody has their own interpretation of what she did . . . I don't think that there is any thing that's more likely that it was harmful or prejudicial to the defendants as it was to herself. I think that the jury is

going to have to decide how to value her testimony, and I don't share the same sentiment, Mr. Frantz, that you are prohibited from aggressively cross-examining her.

2/11/08RP 4-6.

a. Principles of due process guaranteed Mr. Spears a fair trial. A witness's misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. *State v. Taylor*, 60 Wn.2d 32, 36-37, 371 P.2d 617 (1962) (police witness's deliberate reference to the fact defendant had a parole officer violated due process and required a new trial); *State v. Devlin*, 145 Wash. 44, 51, 258 P. 826 (1927) (due process violated by witness's reference to inflammatory and irrelevant evidence). "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Witness misconduct generally involves a witness providing intentionally inadmissible and unsolicited testimony or engaging in extraordinary conduct likely to prejudice the trier of fact. See *Taylor*, 60 Wn.2d at 33-35 (witness intentionally injected impermissible testimony); *Storey v. Storey*, 21 Wn.App. 370, 373-74, 585 P.2d 183 (1978) (witness purposely injected impermissible testimony to influence the jury), *review denied*, 91 Wn.2d 1017 (1979); *State v. Harstad*, 17 Wn.App. 631, 638, 564 P.2d 824 (1977) (witness cried and embraced one of the defendants), *review denied*, 89 Wn.2d 1013 (1978). It has been recognized that witness' misconduct can require a new trial. *Taylor*, 60 Wn.2d at 37; *Devlin*, 145 Wash. at 51.

b. Ms. Muhanji's outburst constituted witness misconduct which violated Mr. Spears' right to a fair trial. Mr. Spears contends the trial court erred when it refused to declare a mistrial based upon the impact of Ms. Muhanji's outburst.

Emotional outbursts should be prevented at trial and can be so inflammatory as to require a new trial. *State v. Hamilton*, 791 S.W.2d 789, 795 (Mo.App. 1990); *State v. Swindell*, 271 S.W.2d 533, 536 (Mo.1954). In determining whether a witness's conduct was so inflammatory as to require a new trial, the court may

consider the genuineness of the outburst, whether the prosecution was at fault, whether something similar or worse may happen on retrial, and the further conduct of the trial. *Hamilton*, at 795; *State v. Johnson*, 672 S.W.2d 160, 163 (Mo.App.1984).

There are very few published decisions in the United States addressing the remedy for a hysterical witness and the impact of that witness' conduct on the defendant's right to a fair trial. The Missouri courts have addressed this scenario involving a testifying witness' emotional outburst in several decisions where convictions were affirmed over defendants' arguments of reversible error, none of which addresses a witness outburst similar to, or as prejudicial as, Ms. Muhanji's. See *State v. Watson*, 839 S.W.2d 611, 617 (Mo.App. 1992) (victim's mother became tearful during her testimony identifying the victim from a photograph taken at the morgue not prejudicial); *Hamilton*, 791 S.W.2d at 794-95 (victim began sobbing when asked by the prosecutor to describe the events leading up to the offense); *Mead v. State*, 779 S.W.2d 659, 660-61 (1989) (victim with multiple sclerosis and a speech impediment became hysterical when pressed by the prosecutor to look at the defendant in order to make an identification); *Johnson*,

672 S.W.2d at (victim's daughter and eyewitness to victim's murder became hysterical when testifying).

Here, Ms. Muhanji's outburst was described by the court and attorneys as "unique" involving not just sobbing but hysterical wailing. 2/7/08RP 4-6, 9. In addition, unlike the witnesses in the Missouri cases, Ms. Muhanji's outburst was totally unexpected, coming not at the beginning of her testimony or some grueling and embarrassing portion, but during an innocuous portion of Mr. DuBose's cross-examination, the questions merely background and foundational. 2/7/08RP 4-8. Further, Ms. Muhanji had testified in the two previous trials without incident. Finally, although not finding Ms. Muhanji's outburst was not genuine, the court questioned the sincerity of her it. 2/11/08RP 5. As a consequence, the outburst constituted misconduct which violated Mr. Spears' right to a fair trial.

c. Mr. Spears was prejudiced by the witness's outburst necessitating a new trial. Where a defendant can show that he was harmed by the government's improper actions, it is necessary to order a new trial. *United States v. Miller*, 499 F.2d 736, 742 (10<sup>th</sup> Cir. 1974). "Questions concerning the exclusion of witnesses and the violation of that rule are within the broad

discretion of the trial court and will not be disturbed, absent manifest abuse of discretion .” *State v. Schapiro*, 28 Wn.App. 860, 867, 626 P.2d 546 (1981). “[T]he court's decision will not be overturned unless the defendant can show that he has been prejudiced by an abuse of discretion.” *State v. Adams*, 76 Wn.2d 650, 659, 458 P.2d 558 (1969), *reversed on other grounds, Adams v. Washington*, 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971).

An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. *State v. Post*, 59 Wn.App. 389, 395, 797 P.2d 1160 (1990), *aff'd*, 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992). In determining whether a trial irregularity deprived a defendant of a fair trial, the reviewing court should examine the following factors:

(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

*State v. Condon*, 72 Wn.App. 638, 647, 865 P.2d 521 (1993).

Ms. Muhanji’s outburst was so extreme that it created an atmosphere whereby Mr. Spears could not get a fair trial. In light of

this outburst, Ms. Muhanji's credibility was undoubtedly enhanced in the jury's eyes in relation to Mr. Spears, leading to an inference the jury would give her the benefit of the doubt. The only remedy was to declare a mistrial and begin anew. The trial court erred in refusing to declare a mistrial and this Court must reverse Mr. Spears' convictions and remand for a new trial.

3. REPEATED INSTANCES OF  
PROSECUTORIAL MISCONDUCT VIOLATED  
MR. SPEARS' RIGHT TO A FAIR TRIAL

During the prosecutor's questioning of Officer Devlin, the police officer who initially responded to Ms. Muhanji's 911 calls, regarding the officer's protective search of the bedroom in which Mr. DuBose and Ms. Sather were discovered when the officer first arrived at the residence, the prosecutor asked:

Q: Now you saw Ms. Sather in that bed; is that right?

A: Right.

Q: Were you looking around the room at all?

A: No, sir.

Q: Let me show you what's been marked for identification purposes as State's Exhibit 81. You see that, well, you probably won't recognize that photo do you?

A: No, sir.

Q: Do you see a blue bag there?

A: Yes, sir.

Q: Did you see that blue bag in the room where Ms. Sather was?

A: I don't recall seeing one, no sir.

Q: I am going to show you what's been marked as State's 46. Did you see this?

A: No, sir.

Q: Did you see this –

MR. FRANTZ: Your Honor, I am going to object. This is inflammatory. This witness didn't see the gun.

THE COURT: Counsel?

MR. O'DONNELL: I'll ask another question.

MR. FRANTZ: I would ask that the gun be put away, your Honor. Move to strike those responses. And counsel ---

THE COURT: Counsel, the motion to strike the response is denied. If it had been the opposite response, he did see the gun, it would not be in the record. Counsel is going to ask if he saw the gun, and he can show the gun to the officer in the box and go from there. The motion to strike is denied. Your motion to put the gun in the box is granted.

2/7/08RP 160-61.

The defense thereafter collectively moved for a mistrial:

MR. MCCOY: First he showed a photograph of the firearm to the officer who did not know what that was,

didn't recognize it. Then he showed the actual firearm to the officer. He did not recognize that. He pulled the firearm out and deliberately attempted to inflame the jury – totally inappropriate the way he did that.

MR. FRANTZ: Counsel cannot explain questioning other than for the purpose of inflaming the jury, he could have shown him the gun in the box. He chose not to do that. Let's keep in mind this is the third trial. He knows what that officer saw. He knows the officer did not see that gun.

MR. FRANTZ: Your Honor, we already had one problem here. Cumulative effect can cause a mistrial. That was a deliberate attempt to inflame the jury, your Honor. And I would renew the motion for a mistrial.

2/7/08RP 167-68. The court again deferred ruling, but admonished the prosecutor:

THE COURT: I will warn you that I think that that conduct was excessive . . . Without this officer being able to identify the gun, he doesn't remember. He didn't see it. Then showing it to the jury is improper. I believe it could have easily been handled by showing him the gun while still in the box, and without taking the gun out of the box in front of the jury. Because I think most people can be – there's a potential to be somewhat intimidated by the presence of guns. I would, however, indicate for all parties that I don't believe it rises to the level of an egregious enough action for a mistrial.

2/7/08RP 169-70.

Finally, in the closing stages of the trial during the prosecutor's cross-examination of Mr. Myers, the following exchanged occurred:

Q: All right. Well, Mr. Myers, tell me exactly what Defendant Spears said about deciding to be a pimp.

...

A: He said that he was a pimp.

Q: Well, what words did he use?

A: Exactly those words. Said he is a pimp.

...

Q: He could do something better. When you say that you thought he could do something better, did you mean that he could do [sic] make more money doing something else?

A: I don't know exactly. I just thought – I just meant that he could do something better. I don't know if that means that he could make more money or less money. But in my mind I thought he could do something better.

Q: Well, did you mean something where *he wasn't exposing women to being raped?*

2/27/08RP 6-7 (italics added). The defense immediately objected and moved for a mistrial. 2/27/08RP 7-8. The court sustained the objection but denied the mistrial, finding the question by the prosecutor was an inappropriate question. 2/27/08RP 7-8, 28-29.

a. A prosecutor must not act in a manner designed to undercut the defendant's right to a fair trial. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Phillips*, 455 U.S. at 219. Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether

the impropriety violated the defendant's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1996). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." *Id.* A mistrial should be granted when a defendant has been so prejudiced that nothing short of a new trial will ensure the defendant a fair trial. *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986).

b. The prosecutor's cross-examination of Mr. Myers and his act of showing the jury the gun while examining Officer Devlin were improper pleas to the passions and prejudice of the jury. Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *State v. Echevarria*, 71 Wn.App. 595, 598, 860 P.2d 420 (1993). Mere appeals to a jury's passion and prejudice are inappropriate. *Belgarde*, 110 Wn.2d at 507. A prosecutor's and constitute prosecutorial misconduct. *Id.* at 507-08.

Accordingly, a prosecutor engages in misconduct when making a "deliberate appeal to the jury's passion and prejudice" or invokes racial, ethnic, or religious prejudice as a reason to convict. *Id.* at 504. Likewise, inflammatory remarks, incitements to vengeance, exhortations to join a war against crime or drugs, or appeals to prejudice or patriotism are forbidden. *State v. Neidigh*, 78 Wn.App. 71, 79, 895 P.2d 423 (1995); *State v. Clafin*, 38 Wn.App. 847, 849-50, 690 P.2d 1186 (1984) (prosecutor's reading of a poem describing emotional effect of rape on victims and containing many prejudicial allusions to matters outside the evidence against defendant was nothing but an appeal to jury's passion and prejudice).

In *Belgarde*, unobjected-to remarks made by prosecutor in closing argument that the defendant was “strong in” the American Indian Movement (AIM) and that its members were “a deadly group of madmen” and “butchers that kill indiscriminately,” were highly prejudicial, introduced facts not in evidence, and had a substantial likelihood of affecting the verdict. *Belgarde*, 110 Wn.2d at 507. In reversing the defendant’s conviction, the Supreme Court reasoned:

These inflammatory comments were a deliberate appeal to the jury's passion and prejudice and encouraged it to render a verdict based on Belgarde’s associations with AIM rather than properly admitted evidence. The remarks were flagrant, highly prejudicial and introduced “facts” not in evidence.

*Belgrade*, 110 Wn.2d at 507-08.

The prosecutor’s cross-examination of Mr. Spears’ friend and co-defendant, Mr. Myers, regarding Mr. Spears’ decision to become a pimp and, according to the prosecutor, expose women to rape, was similarly designed to inflame the jury and prejudice Mr. Spears. In *State v. Copeland*, the Washington Supreme Court found similar conduct by a prosecutor to be misconduct. 130 Wn.2d 244, 284-85, 922 P.2d 1304 (1996).

In *Copeland*, the defendant was charged with premeditated murder. In impeaching a defense witness with his prior conviction

under ER 609, the prosecutor asked: "You beat her [the victim, the witness's wife] black and blue and you burned her abdomen with a cigar, didn't you?" *Copeland*, 130 Wn.2d at 284. The defense objected and moved for a mistrial, maintaining that the prosecutor asked the question to suggest the witness was a gratuitous violent wife beater and to arouse the passions of the jury so that they would disregard the witness's testimony. *Id.* at, 285. The Supreme Court agreed, finding the prosecutor's question was a deliberate attempt to influence the jury's perception of the witness and his testimony, and constituted prosecutorial misconduct. *Id.* at 285.

The same conduct was evident here in the prosecutor's question to Mr. Myers. The prosecutor was seeking to improperly tarnish Mr. Spears and inflame the jury regarding Mr. Spears' conduct. This constituted prosecutorial misconduct.

Similarly, the prosecutor's act of showing Officer Devlin the gun found in Mr. DuBose's room was misconduct. The prosecutor was questioning Devlin about his initial entry into the residence and his contact with Mr. DuBose and Ms. Sather. The prosecutor knew full well that at this point the gun had not been discovered and Devlin knew nothing about it. As the trial court so aptly stated it, the prosecutor could have shown Devlin the gun while it was still in

the box, thereby shielding it from the jury's view. Instead, the prosecutor displayed the gun for the jury to plainly see, thus reinforcing the theory that Mr. Spears and Mr. DuBose were dangerous people and playing on the fears and concerns of the jury, thus improperly playing to their passion and prejudice. This Court must look unfavorably on this behavior of the prosecutor and find this inflammatory conduct to be prosecutorial misconduct.

c. The prosecutor's misconduct was prejudicial.

Prosecutorial misconduct requires reversal unless the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error.

*State v. Fiallo-Lopez*, 78 Wn.App. 717, 729, 899 P.2d 1294 (1995).

The State cannot meet this standard by speculating that a hypothetical reasonable juror who did not hear the improper argument could have reached the same verdict, but rather must prove this specific jury would have reached the same verdict. *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003).

Here the State cannot meet this burden. The sole issue at trial was Ms. Muhanji's credibility and her claims that Mr. Spears had coerced her into prostituting herself, and as a result, had

committed the charged offenses in retaliation for her refusing to continue. The prosecutor's conduct bolstered Ms. Muhanji's account of the events by denigrating Mr. Spears and painting him as a dangerous person, thus vouching for Ms. Muhanji's credibility.

Finally, "if misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." *State v. Case*, 49 Wn.2d 66, 74, 298 P.2d 500 (1956). Thus, the prosecutor's conduct cannot merely be forgotten or ignored by the jury during its deliberations, even in light of a curative instruction. "[A] bell once rung cannot be unring." *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). *See also Dunn v. United States*, 307 F.2d 883, 887 (5<sup>th</sup> Cir. 1962) ("if you throw a skunk into the jury box, you can't instruct the jury not to smell it."). This Court must reverse Mr. Spears' convictions and remand for a new and fair trial which comports with due process.

d. Cumulatively, the prosecutor's misconduct must result in reversal. "The cumulative effect of repetitive [prosecutorial] error may be so flagrant that no instruction can erase the error." *State v. Henderson*, 100 Wn.App. 794, 805, 998 P.2d 907 (2000), *citing Case*, 49 Wn.2d at 73; *State v. Torres*, 16 Wn.App. 254, 263, 554 P.2d 1069 (1976).

'Fair trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office, information from its records, and the expression of his own belief of guilt into the scales against the accused.

(citation omitted.) *Case*, 49 Wn.2d at 71. See also *State v. Gonzales*, 111 Wn.App. 276, 283-84, 45 P.3d 205 (2002) (improper argument by prosecutor not corrected by jury instruction).

Should this Court conclude the prosecutor's actions were misconduct but individually the acts did not rise to the level of reversible error, the cumulative effect of these instances of misconduct compel the conclusion that Mr. Spears' was so prejudiced that only a new trial would remedy the taint. Mr. Spears is entitled to reversal of his convictions.

4. THE TRIAL COURT ERRED IN RULING THAT MR. SPEARS' CALIFORNIA BURGLARY CONVICTION WAS COMPARABLE TO A WASHINGTON BURGLARY OFFENSE

a. The State is required to prove the prior out-of-state burglary conviction was comparable to a current felony offense.

To properly calculate a defendant's offender score, the SRA requires that sentencing courts determine a defendant's criminal history based on his prior convictions and level of seriousness of the current offense. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d

1225 (2004). The criminal sentence is based upon the defendant's offender score and seriousness level of the crime. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). "The offender score measures a defendant's criminal history and is calculated by totaling the defendant's prior convictions for felonies and certain juvenile offenses." *Id.*

When a defendant's criminal history includes out-of-state or federal convictions, the SRA requires classification "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). With respect to prior federal convictions, "[i]f there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute." RCW 9.94A.525(3). The State must prove the existence and comparability of a defendant's prior out-of-state conviction by a preponderance of the evidence. *Ross*, 152 Wn.2d at 230. This Court reviews de novo the classification of an out-of-state or federal conviction. *State v. Jackson*, 129 Wn.App. 95, 106, 117 P.3d 1182 (2005), *review denied*, 156 Wn.2d 1029 (2006).

Generally, the sentencing court must compare the elements of the prior offense with the elements of the potentially comparable current Washington offenses. *In re the Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the crimes are comparable, a sentencing court must treat a defendant's out-of-state conviction the same as a Washington conviction. *Lavery*, 154 Wn.2d at 254. If, on the other hand, the comparison reveals that the prior offense did not contain one or more elements of the current crime as of the date of the offense (legal comparability), it also reveals that the prior court did not necessarily find each fact essential to liability for the proposed Washington counterpart crime; without more then, the federal conviction counts as a Class C Washington crime. RCW 9.94A.525(3); *Ford*, 137 Wn.2d at 479-80. If the comparison reveals that the out-of-state crime contained all elements of the proposed Washington counterpart crime, but that one or more of those elements might not have been proved because the out-of-state crime also contained alternative elements or the comparison did not reveal whether the out-of-state court found each fact necessary to liability for the Washington crime, it is then necessary to determine from the out-of-state record whether

the out-of-state court found each fact necessary to liability for the Washington crime (factual comparability). *Morley*, 134 Wn.2d at 605-06.

This Court has previously ruled that California's burglary statute is *not* legally comparable to Washington's burglary statute. See *Thomas*, 135 Wn.App. at 486 (unlawful entry required under Washington burglary statute but is not an element of California burglary statute). Thus, the trial court erred in ruling Mr. Spears's California burglary conviction was legally comparable to a Washington burglary.

b. The California conviction was not factually comparable to Washington second degree burglary. If the elements of the foreign offense are broader than the Washington definition of a particular offense, the court must look to the defendant's conduct to determine whether that conduct would have violated a comparable Washington statute. *Morley*, 134 Wn.2d at 606. In so doing, the court may look to any facts in the record either admitted or stipulated to, or found by the trier of fact beyond a reasonable doubt.

Mr. Spears pleaded guilty to California Penal Code § 459, which states in relevant part:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, ... floating home, . . . railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, . . . any house car, . . . inhabited camper, . . . vehicle . . . when the doors are locked, aircraft, . . . or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

“Unlike Washington's burglary statute, the California crime of burglary encompasses a broader range of property and does not require proof that the defendant entered or remained unlawfully. California's law only requires the defendant enter with intent to commit larceny or any felony.” *State v. Thomas*, 135 Wn.App. 474, 487, 144 P.3d 1178 (2006).

The State submitted copies of a criminal minute order from San Bernardino County Superior Court indicating Mr. Spears' change of plea to guilty, a copy of a minute order indicating the sentence imposed, a copy of a “Declaration of Defendant” showing Mr. Spears' plea, and a copy of the Information. CP Supp \_\_, Sub. No. 171 at 9-10. In none of these documents is there proof of facts either admitted or stipulated to by Mr. Spears.

Instructive on this issue is this Court's decision in *Thomas*, *supra*, which involved an almost identical factual scenario to the

one presented here. In *Thomas*, the defendant was charged in California with entering a retail store unlawfully with the intent to commit a theft under California Penal Code § 459. 135 Wn.App. at 483-84. The trial court relied upon the Information and the jury's verdict to determine the California prior conviction was both legally and factually comparable to a Washington offense. *Id.* at 484-85. This Court reversed and found the State had not provided sufficient proof of the factual comparability. *Id.* at 487. This Court noted that the State conceded the California burglary statute was broader than the Washington statute and thus, not legally comparable. This Court further found the State had not provided sufficient proof of the unlawfulness of the defendant's entry. *Id.* The Court noted there was nothing provided that established the defendant adopted the allegations in the Information, or provided jury instructions or other records showing that unlawful entry was proven beyond a reasonable doubt. *Id.*

The same scenario is presented here. The "Declaration of Defendant" is a form with boxes checked but no statement from Mr. Spears stating that he unlawfully entered the store. CP Supp \_\_\_, Sub No. 171 at 9-10. There is also nothing in this declaration that states that Mr. Spears adopted the allegations

contained in the Information, specifically, whether he unlawfully entered the business. *Id.* Thus, under the analysis stated in *Thomas*, the State failed to provide sufficient proof Mr. Spears entered the business unlawfully. The trial court erred in finding Mr. Spears 1997 California burglary conviction comparable and including it in his offender score.

c. Remand for resentencing without the foreign prior conviction is the remedy for the trial court's error. In *Ford, supra*, the Washington Supreme Court found that where "the evidence is insufficient to support the conclusion that the disputed convictions would be classified as felonies under Washington law" resentencing was required. 137 Wn.2d at 485. The Court stated, "In the normal case, where the disputed issues have been fully argued to the sentencing court, we would hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced." *Id.*

The Court reiterated the *Ford* holding in *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002), where the court held that "a remand for an evidentiary hearing is appropriate only when the defendant has failed to specifically object to the State's evidence of

the existence or classification of a prior conviction.” 147 Wn.2d at 520.

Here, Mr. Spears raised the issue of the comparability of his California prior conviction during sentencing. The State possessed the burden of proving this prior conviction. *Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). Because the issues have been fully argued to the sentencing court, the State should be held to the existing record. This Court must vacate the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be presented. *Ford*, 137 Wn.2d at 485.

5. THE COURT ABUSED ITS DISCRETION IN FAILING TO FIND THE KIDNAPPING AND RAPE OF MS. MUHANJI CONSTITUTED THE SAME CRIMINAL CONDUCT

At sentencing, Mr. Spears contended the rape and kidnapping counts involving Ms. Muhanji constituted the same criminal conduct and counted as a single point since the kidnapping was used to facilitate the rape. 4/18/08RP 17. The trial court disagreed and counted the two offenses as separate offenses. 4/18/08RP 17-18.

a. Where multiple current offenses constitute the same criminal conduct the trial court must count them as a single offense. The trial court calculates the offender score by adding together the defendant's prior convictions for all felonies and current offenses. RCW 9.94A.589 (1)(a); *State v. Haddock*, 141 Wn.2d 103, 108, 3 P.3d 733 (2000); *Ford*, 137 Wn.2d at 479. This Court reviews a sentencing court's calculation of an offender score *de novo*. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007), citing *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

Whenever a person is to be sentenced for two or more current offenses, the court determines the sentence range for each current offense by counting all other current and prior convictions as if they were prior convictions for the purpose of the offender score. RCW 9.94A.589 (1)(a). Where concurrent offenses encompass the same criminal conduct, the crimes are treated as one offense for sentencing purposes. RCW 9.94A.589 (1)(a);<sup>4</sup> *State v. Deharo*, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

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<sup>4</sup> RCW 9.94A.589 (1)(a) states in relevant part:

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if

A court should find that two or more crimes constitute the same criminal conduct if the crimes (1) required the same criminal intent, (2) were committed at the same time and place, and (3) involved the same victim. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

Here, there can be no dispute that the offenses involved the same victim, Ms. Muhanji. Thus, the only issue presented is whether the trial court erred when it ruled the offenses did not occur at the same time and place.

b. The offenses occurred at the same time and place.

i. The offenses occurred at the same time.

Regarding same time, the Washington Supreme Court has expressly disavowed the requirement that the crimes occur simultaneously to be considered the “same criminal conduct” and broadened the requirements regarding the time element. *State v. Porter*, 133 Wn.2d 177, 182, 942 P.2d 974 (1997), *citing Vike*, 125 Wn.2d at 412. Separate incidents may satisfy the same time element of the test when they occur as part of a continuous

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they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

transaction or in a single, uninterrupted criminal episode over a short period of time. *State v. Young*, 97 Wn.App. 235, 240, 984 P.2d 1050 (1999). The crimes do not need to be committed simultaneously to be committed at the same time, but they must at least be closely sequential in time. *Porter*, 133 Wn.2d at 183. In *Porter*, the Supreme Court found that sequential narcotics sales “were part of a continuous, uninterrupted sequence of conduct over a very short period of time.” (Emphasis added.) *Id.* at 182.

Here, the kidnapping was an on-going offense that started at when Mr. DuBose and Mr. Spears picked up Ms. Muhanji at her place of employment, and ended when Ms. Muhanji left the residence and was taken to the Tukwila Police Department by Officer Herritt. See *State v. Dove*, 52 Wn.App. 81, 88, 757 P.2d 990 (1988) (because kidnapping involves the element of unlawful detention, it is a continuing crime, committed as long as the unlawful detention of the kidnapped person lasts).

Ms. Muhanji was prevented from leaving the house, ultimately being raped, thus emblematic of a continuing kidnapping. Thus, the two offenses occurred at the same time because when Ms. Muhanji was sexually assaulted, she was still held against her will.

ii. The offenses occurred at the same place.

The two offenses both occurred at the house Mr. Spears and Mr. DuBose shared, thus occurring at the same place. As argued *supra*, the kidnapping was a continuing offense, beginning when Ms. Muhanji entered Mr. DuBose's car at Sugar's and continuing at the house and ending only when Ms. Muhanji was taken from the house by the police.

c. The offenses shared the same intent. Contrary to the trial court's conclusion, the offenses also shared the same intent.

While appellate courts generally construe the term "same criminal conduct" narrowly to disallow most assertions of same criminal conduct, *State v. Hernandez*, 95 Wn.App. 480, 485, 976 P.2d 165 (1999), there is an exception to this general rule when the defendant commits the same crime against the same victim over a short period of time. *Porter*, 133 Wn.2d at 181. Multiple offenses against the same victim constitute the "same criminal conduct." *Tilli*, 139 Wn.2d at 123. To determine intent, the sentencing court must determine "the extent to which the criminal intent, objectively viewed, changed from one crime to the next." *State v. Williams*,

135 Wn.2d 365, 368, 957 P.2d 216 (1998), *quoting Vike*, 125 Wn.2d at 411.

When determining if two crimes share a criminal intent, we focus on (1) whether the defendant's intent, viewed objectively, changed from one crime to the next and (2) whether commission of one crime furthered the other. *State v. Grantham*, 84 Wn.App. 854, 858, 932 P.2d 657 (1997). When dealing with sequentially committed crimes, this inquiry can be resolved merely by determining whether one crime furthered the other. *Vike*, 125 Wn.2d at 411-12. If a defendant kidnaps a victim for the sole purpose of furthering an additional crime, such as rape, the two crimes are the same criminal conduct. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987); *State v. Longuskie*, 59 Wn.App. 838, 841, 801 P.2d 1004 (1990) (kidnapping and child molestation are the same criminal conduct when defendant abducts victim to molest him and stays in several different motels during the course of the crime).

As argued, *supra*, the kidnapping of Ms. Muhanji was ongoing and did not end until the Tukwila Police arrived at the house. Further, at the time she was raped, Ms. Muhanji was still being restrained as part of the original kidnapping. Finally, it was the

State's theory that Ms. Muhanji was kidnapped from her place of employment for the purpose of teaching her a lesson by raping her. Thus, the kidnapping furthered the rape and the two offenses constituted the same criminal conduct.

d. Remand for resentencing is required. Where the trial court incorrectly concludes a series of crimes which were not the same criminal conduct, the remedy is reversal of the sentence and remand to the trial court for resentencing with a corrected offender score. *Williams*, 135 Wn.2d at 366-67.

In the instant matter, the trial court incorrectly found the kidnapping count was not the same criminal conduct as the rape count. Accordingly, this Court must reverse Mr. Spears' sentence and remand for resentencing.

6. THE PROSECUTOR'S USE OF A  
PEREMPTORY CHALLENGE TO STRIKE  
THE LONE AFRICAN-AMERICAN JUROR  
VIOLATED EQUAL PROTECTION

During jury selection, the prosecutor indicated to the trial court it anticipated a peremptory challenge to Juror 28, the lone African-American member of the *venire*. 1/31/08RP 7-8, 11. In justifying the challenge, the prosecutor stated:

Well, your Honor, I have two reasons, the first is what I perceive to be an incongruous response from the

juror, when I asked him a question, tell me what your concern is about having close connections, meaning the close connections to his mother and sister, and hearing a rape trial, he didn't answer, look, I'm concerned because I'm going to feel sympathetic for the victim. What came out was, I think rape is a terrible crime, but there's a lot of peoples [sic] that say they were raped and they wasn't [sic] raped, you know, they'll say that, they'll lie about it, so it's a two-way street.

So that gives me pause when a juror replies to, frankly, an open-ended question about the difficulty because of their relationship with their mother and the response is there are a lot of victims of rape who lie.

Now, we had other people asked the question, is it possible that victims of rape lie and answered affirmatively; but those were questions I recall that were directly posed by the defense. So that incongruity was one of the reasons.

The second reason, as the Court pointed out, is that he's equivocal in his answer regarding whether he can be impartial. He answers probably, but then as counsel pointed out, he goes back and says, I'll try to be fair, but that's equivocation. And in his belief in what the other jurors may do, that also gives me pause and motivates me to use the peremptory challenge in this instance.

1/31/08RP 15-16.

In response, the court concluded:

I think that [the prosecutor] has the right to exercise a peremptory challenge if he feels a juror can't be fair. I think that on balance, [the juror] has given him, although clearly it does not rise to the level of being excusable on challenge for cause, nevertheless, he certainly has raised some issues in his response to

questions put to him by [the prosecutor], as is indicated in the record that I read of the transcript that I read into the record a few minutes ago.

That, and particularly the question: Would that knowledge or that feeling that you had – about race is part of everything – affect your ability to be impartial? And he said: Uh, probably. And then he goes on to say: I would listen to all the evidence and I will listen to all the testimonies and everything, and I wouldn't go their side because they're black, or on the victim's side, I would be fair, try to be fair as best I can.

I don't think that [the prosecutor's] peremptory challenge is race-based. I think it's based on his perception of whether or not this potential juror could be fair. And I think he has indicated that he brings some baggage to the decision-making process, and I think the State has the right to challenge him, so that will be my ruling.

1/31/08RP 19-20.

The State subsequently used a peremptory challenge to strike Juror 28 from the *venire*. 1/31/08RP 28.

a. The use of race or other protected class status to strike a potential juror violates Equal Protection under the Fourteenth Amendment. Under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), discriminatory peremptory challenges against a member of a protected class are prohibited by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The *Batson* Court noted that “ ‘a

consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause' " and that "[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " 476 U.S at 95, *quoting Arlington Heights v. Metropolitan. Housing Development Corporation*, 429 U.S. 252, 266 n. 14, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). The Court further declared that "[f]or evidentiary requirements to dictate that 'several must suffer discrimination' before one could object would be inconsistent with the promise of equal protection to all." *Id.* at 95-96 (citation omitted).

A *Batson* challenge involves a three-part analysis: (1) the defendant challenging the State's use of a peremptory challenge must first establish a prima facie case of racial discrimination; (2) if a prima facie showing of discrimination is made, the burden shifts to the State to offer a race-neutral reason for its peremptory challenge; and (3) the trial court then decides if the defendant has established that the State's use of the peremptory challenge was purposeful racial discrimination. See *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

The defendant establishes a prima facie case first “by showing that the peremptory challenge was exercised against a member of a constitutionally cognizable group” and second, “demonstrate that this fact ‘and any other relevant circumstances raise an inference’ that the prosecutor's challenge of a venire person was based on group membership.” *Batson*, 476 U.S. at 96.

Relevant circumstances which a court may consider include: striking a group of jurors that share race as their only common characteristic, disproportionate use of strikes against a group, the level of a group's representation in the venire as compared to the jury, race of the defendant and the victim, past conduct of the state's attorney in using peremptory challenges to excuse all African-Americans from the jury venire, type and manner of State's questions and statements during venire, disparate impact (i.e. whether all or most of the challenges used to remove minorities from jury), and similarities between those individuals who remain on the jury and those who have been struck. *State v. Wright*, 78 Wn.App. 93, 99-100, 896 P.2d 713 (1995).

If the defendant makes out a prima facie case of racial motivation, the burden shifts to the State to articulate a race-neutral explanation for the peremptory challenge. *Miller-El v. Dretke*, 545

U.S. 231, 239, 125 S.Ct. 2317, 2324, 162 L.Ed.2d 196 (2005). The prosecutor must provide a clear and specific explanation of the reasons for exercising the peremptory challenge. *Miller-El*, 545 U.S. at 238.

Although there may be “any number of bases on which a prosecutor reasonably [might] believe that it is desirable to strike a juror who is not excusable for cause . . . , the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e].”

*Miller-El*, 545 U.S. at 239, quoting *Batson*, 476 U.S. at 98 n.2.

The trial court's determination of a *Batson* challenge is “ ‘accorded great deference on appeal’ “ and will be upheld unless clearly erroneous. *State v. Luvene*, 127 Wn.2d 690, 699, 803 P.2d 960 (1995), quoting *Hernandez v. New York*, 500 U.S. 352, 364, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

The final step *Batson* requires is that the trial court must weigh the evidence of discrimination against the reasons presented for dismissing the juror to “determine whether the defendant has carried his burden of proving purposeful discrimination.” *Id.* at 359. “ ‘An invidious discriminatory purpose may often be inferred from the totality of the relevant facts....’ ” *Id.*, quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). “A

prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge.”

*McClain v. Prunty*, 217 F.3d 1209, 1220 (9th Cir.2000). See also *Snyder v. Louisiana*, 552 U.S. \_\_\_, 128 S.Ct. 1203, 1211, 170 L.Ed.2d 175 (2008) (“The implausibility of this explanation is reinforced by the prosecutor’s acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as [the excused juror’s].”). Where a proffered reason is shown to be pretextual, it “gives rise to an inference of discriminatory intent.” *Id.* at 1212.

b. The prosecutor’s proffered reason for challenging Juror 28 was pretextual. The use of its peremptory to strike the lone African-American constituted a *prima facie* of racial discrimination on the part of the State, thus requiring the State to proffer a race-neutral reason for exercising the challenge. *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9<sup>th</sup> Cir 1994) (“[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose”); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir.1987) (“[T]he striking of a single black juror for racial reasons violates the equal protection clause, even though other

black jurors are seated, and even when there are valid reasons for the striking of some black jurors.”). Mr. Spears contends the State’s rationale for challenging the juror was not a race-neutral reason.

A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

*Miller-El*, 545 U.S. at 252.

Juror 28 was honest in his answers but took great pains to say that he could view the case from both the defense and prosecution side and be fair. Juror 28 noted that the four men on trial were African-American and that “it’ll be a tough trial, but I’d be fair.” 1/30/08RP 35. The juror noted having a mother and sisters and explained:

I think rape is one of the worst things to do to a person, but there’s a lot of peoples that say they were raped and they wasn’t raped, you know, they’ll say that, lie about it, so it’s a two-way street. And then the victim, you know, these guys here, it’ll be tough on them too.

1/30/08RP 36. Then, in response to the prosecutor’s question about whether the other jurors’ decisions might be race-based, Juror 28 stated:

They'll say not, but race is a part of everything. Uh, when they first walk in here, you could see the look on their face, everybody's. I looked around, you know, so it will be intentionally I wouldn't say, but it's a different environment, people come from a different environment.

1/30/08RP 36. Finally, in response to the prosecutor's inquiry regarding whether the feeling about race-based decision would affect his ability to be impartial, the juror noted:

Uh, probably. I would listen to all the evidence and I will listen to all the testimonies and everything, and I wouldn't go to their side because they're black, or the victim's side. I would be fair, try to be fair as best I can.

1/30/08RP 37.

Juror 28 candidly admitted race would enter into the thought processes and deliberations of himself and the other jurors but stressed his intention to remain unbiased and decide the matter on the facts and law. Given this willingness to candidly admit the impact of race into the equation but the determination to look beyond it, the State's peremptory challenge to the juror was suspect.

The prosecutor's purported rationale for excusing the juror reinforces the fact the strike was pretextual. The prosecutor proffered two reasons for the strike: Juror 28's answer to the open-

ended question regarding what the juror thought about the proceedings and his answer that there are some accusers that lie, coupled with what the prosecutor characterized as the juror's equivocal answers regarding his ability to be impartial. 1/31/08RP 15-16. The court based its decision solely on the last reason, the juror's ability to be impartial. 1/31/08RP 20. Since there was no magic word that a juror could utter that would ensure the juror would remain impartial, Juror 28 was not equivocal in his answer, but honest.

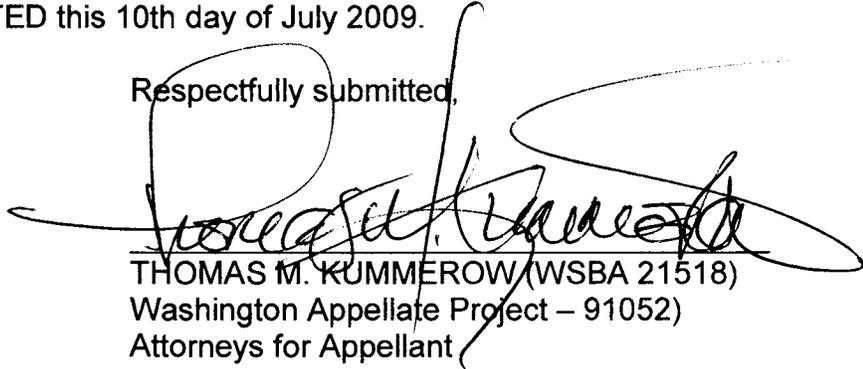
The prosecutor's rationale for excusing Juror 28 was a mere pretense for striking the only African-American juror on the panel. As a result, Mr. Spears submits the challenge was not race-neutral but pretextual to mask a discriminatory purpose. Mr. Spears is entitled to a reversal of his convictions and remand for a new trial.

E. CONCLUSION

For the reasons stated, Mr. Spears submits this Court must reverse his convictions and remand for a new trial. Alternatively, Mr. Spears submits his sentence must be reversed and remanded for resentencing.

DATED this 10th day of July 2009.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 61573-4-I
	)	
KEVIN SPEARS,	)	
	)	
Appellant.	)	

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 JUL 10 PM 4:55

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |                   |                                     |
|--|-------------------|-------------------------------------|
| [X] KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] KEVIN SPEARS<br>317645<br>CLALLAM BAY CORRECTIONS CENTER<br>1830 EAGLE CREST WAY<br>CLALLAM BAY, WA 98326                    | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF JULY, 2009.

X \_\_\_\_\_ *grw*

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