

69742-1

69742-1

NO. 69742-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BERNARD WATKINS,

Appellant.

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COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A trial court should grant a defendant's request for a mistrial when an irregularity so prejudices the defendant that only a new trial can ensure that the defendant will receive a fair trial. Here, in order to prove that a particular iPhone belonged to Watkins, the prosecutor elicited testimony from a State's witness that the phone contained videos of her performing oral sex on Watkins. The State had alerted the court the day before that it intended to elicit the testimony, Watkins did not move to exclude it, nor did he object during the witness's testimony. At the end of the trial day, the court indicated that it would have excluded the testimony pursuant to ER 403; Watkins still remained silent, although he moved for a mistrial on this basis the next court day. Instead, the trial court struck the testimony and instructed the jury not to consider it. Where no irregularity occurred, the evidence before the jury was highly probative of a contested issue and only marginally prejudicial, and the jury was instructed to disregard the evidence, did the trial court act within its discretion in denying Watkins's motion for a mistrial?

2. Where numerous errors infect a trial to the detriment of the defendant's right to a fair trial, a conviction may be overturned for cumulative error. Watkins has failed to show any error. The evidence

against him was overwhelming. Should Watkins's claim that prejudicial error affected the outcome of the trial be rejected?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

On July 11, 2012, Kent Police Department Detective Brian Lewis was assigned to an investigation into prostitution and gun crimes. 6RP 20-21; 7RP 43-48.¹ He interviewed a woman named Kayla McCoy, who showed him some photographs, including a photograph of a firearm. 7RP 48-49; Ex. 12, at 2. He also researched some Backpage.com advertisements.² 7RP 49-52. The ads he located depicted girls later identified as A.G. and M.S.; he also saw ads showing a juvenile girl that he knew from previous investigations to be T.R. 7RP 50-58; Ex. 25. The ads included the phone number (206) 304-1888 as a contact number. 7RP 49-57; Ex. 25.

Based on this investigation, Lewis sought a search warrant for an apartment in the Indigo Springs apartment complex. 7RP 59-60. The warrant specified two phones with the numbers (206) 304-1888 and (219)

¹ The 16 volumes of the Verbatim Report of Proceedings are referred to herein as follows: 1RP is September 14, 26, and 27, 2012; 2RP is October 8, 9, and 17, 2012; 3RP is October 22, 23, and 25, 2012; 4RP is November 7, 2012; 5RP is November 8, 2012; 6RP is November 13, 2012; 7RP is November 14, 2012; 8RP is November 15, 2012; 9RP is November 19, 2012; 10RP is November 20, 2012; 11RP is November 21, 2012; 12RP is November 26, 2012; 13RP is November 27, 2012; 14RP is November 28, 2012; 15RP is November 29, 2012; and 16RP is November 30, and December 3 and 28, 2012.

² Backpage.com is a website used by prostitutes to advertise their services. 7RP 47.

292-1224, particular items of clothing and home décor that were depicted in the Backpage.com advertisements, and other items.³ 6RP 22-23; 7RP 59-63. The warrant was executed on the Indigo Springs apartment on July 12, 2012, at about 7:00 a.m. 5RP 99-100; 6RP 21-22, 77-78.

While searching the apartment, detectives located an iPhone, an LG smartphone, a prepaid VISA card and related statement, numerous items of lingerie that were depicted in certain Backpage.com advertisements, a floral-patterned couch, a shower curtain, and other home décor that appeared in the background of those ads, a Greyhound bus ticket and itinerary in the name of Bernard Watkins, and mail addressed to Watkins. 6RP 23-39, 81-84; 7RP 66-69, 86-97; Ex. 25, 26, 41. The two phones recovered were the ones listed in the search warrant. 6RP 38, 59-60; 7RP 66-67, 93. The detectives also recovered a loaded 12-gauge Mossberg pump-action shotgun from behind a washer and dryer, as well as related ammunition. 5RP 110-12; 6RP 25, 71, 84-87; 9RP 126; Ex. 26. The shotgun was fully functional. 6RP 66-72.

During the warrant execution, Detective Rick Gilcrist contacted Watkins to interview him. 5RP 102-04. Watkins told Gilcrist that he was staying at the apartment, which belonged to Altesa Turner. 5RP 106-07. He said that he was in a dating relationship with her, and spent the night at

³ The warrant was not admitted into evidence, but is in the record at CP 95-96. The affidavit in support of the warrant can be found at CP 97-104.

her home approximately every other night. 5RP 107. He described his property that was in the apartment, which he claimed included a gray Sidekick cell phone with a phone number of (219) 292-1224. 5RP 107.

Later, Gilcrist asked Watkins about the shotgun ammunition in the apartment. 5RP 110. Watkins said that Turner's boyfriend had brought a firearm to the apartment and taken it away again; he denied knowing the type of firearm or anything about the ammunition other than that it was red. 5RP 110-11. After the shotgun was located in the apartment, Gilcrist asked him about it; Watkins admitted that he had handled the gun and discussed purchasing it from Turner's boyfriend. 5RP 112-13. He also said his fingerprints would not be on the shotgun because he had wiped it down. 5RP 113. Gilcrist viewed three photographs found on the iPhone recovered during the warrant execution: two of Watkins holding a shotgun, and a third of the shotgun alone. 5RP 144-48; Ex. 12, at 14-16. The shotgun depicted in those photos appeared to be the same as the Mossberg shotgun recovered from Turner's apartment during the service of the search warrant. 5RP 144-48; Ex. 12.

Kent Police Department Detective Eric Moore forensically examined the iPhone. 5RP 45-46, 55-62. Its phone number was (219) 292-1224. 5RP 59. He was able to extract the contents of the phone and copy it to a DVD. 5RP 57-62. Thousands of text messages from the

iPhone were admitted into evidence, along with a number of photos found on the iPhone. Ex. 37, 45, 74. The text messages demonstrated that Watkins repeatedly used that phone to arrange, or attempt to arrange, acts of prostitution for A.G., M.S., and T.R., and to direct Turner to post ads for them. E.g., Ex. 74, at 1349-52.

Consistent with a plea agreement she entered into, Turner testified against Watkins. 8RP 34. She explained that she had been in a dating relationship with him, and that he often stayed at her home for long periods of time. 8RP 35-37. She met the three victims, T.R., A.G., and M.S., through him. 8RP 39-41. At Watkins's direction, she arranged for McCoy to photograph A.G. and M.S. in lingerie, and posted ads for all three of the girls on Backpage.com for purposes of prostitution. 8RP 41-55, 93-99. She posted two ads each for A.G. and M.S., and one for T.R. 8RP 91.

Turner used her own phone number in the ads, and paid for them with a prepaid credit card that Watkins gave her money to buy. 8RP 45-47. He did not want the ads to feature the girls' phone numbers, because he wanted to be in charge. 8RP 87-88; 9RP 41. When Turner received a phone call in response to a Backpage.com ad, she would provide the relevant information to Watkins. 8RP 47-55, 100-02; 9RP 110. He would use her car to facilitate the "dates." 8RP 138.

Watkins would keep the money the girls earned, and would pay them with pills of Percocet. 8RP 102-05, 124-25; 9RP 41, 70, 80-81.

Turner explained that the iPhone recovered by the police belonged to Watkins. 8RP 69-70. She went with Watkins to buy the phone, and he used a number from Indiana—he is from Gary—for the iPhone. 8RP 35, 69-72. She also identified the Mossberg shotgun recovered from her apartment as belonging to Watkins. 8RP 106-09, 144-48; Ex. 25.

McCoy also testified against Watkins. 10RP 14. She confirmed that Turner and Watkins were in a relationship, and that she met Watkins, T.R., A.G., and M.S. through Turner, her best friend's godmother. 10RP 15-21. She reported that Watkins directed Turner to post ads for the girls on Backpage.com, and explained how to do it. 10RP 23-27. Although Watkins was not physically present when the photos of M.S. and A.G. were taken, he explained to them via speakerphone how he wanted the photos to look, and rejected one that McCoy took. 10RP 28-30. She also corroborated that Watkins provided Percocet to the girls as payment, that Watkins wanted all the money from the prostitution, and that Turner posted ads for M.S. and A.G. on Backpage.com twice each. 10RP 31, 41-42, 57-64. McCoy reported that Watkins's phone number was (219) 292-1224, that he always had that phone on him, and that she saw him use the phone. 10RP 43-44. She acknowledged that she would

sometimes answer that phone for him. 10RP 44. With respect to the shotgun, McCoy testified that she had seen Watkins with it on a number of occasions, and had seen him fire it on July 4. 10RP 75-77.

Detective Lewis sought a search warrant for Backpage.com, and obtained evidence from that company regarding billing and related information for the advertisements he was investigating. 7RP 102-11; Ex. 42. He learned that the ads were posted by Turner. 7RP 112. Some of the photographs posted in the advertisements were located on the recovered iPhone. 7RP 119-26; Ex. 45. He also located additional ads for each of the three girls on Adultsearch.com, another prostitution website, with Watkins's phone number as the contact number in the ad. Ex. 60-62.

Tomiko Strothers, the mother of M.S., identified her daughter in several Backpage.com ads. 8RP 22-23, 27-32; Ex. 46. M.S. was 16 years old at the time of trial. 8RP 23. Strothers also identified A.G., her best friend's daughter, in other Backpage.com advertisements. 8RP 23-31; Ex. 46. A.G.'s mother, Fraya Sanders, confirmed her daughter was in the Backpage.com ads. 11RP 49-50. A.G. was also 16 years old at the time of trial. 8RP 24; 11RP 48. Detective Lovisa Dvorak identified T.R., a person she had previously investigated, in some Backpage.com ads. 9RP 123-25; Ex. 25. At the time of trial, T.R. was 16 years old. 11RP 63-64; Ex. 64. T.R., M.S., and A.G. did not testify at trial.

Deon Cooper, Watkins's cousin, testified for Watkins.

13RP 18-20. Although he claimed that McCoy usually answered Watkins's phone, he confirmed that Watkins used an iPhone with a 219 area code. 13RP 25, 29-31. He also confirmed that the iPhone was the only phone that Watkins used, and that he always had it with him.

13RP 37.

Watkins also testified. 14RP 77. With respect to the iPhone, he claimed that his cousin Greg Bolden bought the phone for McCoy, but that somehow he ended up with it. 14RP 90-92. He claimed he used a Sidekick phone, but that everyone called him on the iPhone because it had his old phone number from Gary, Indiana, on it. 14RP 92-95.

2. PROCEDURAL FACTS

On July 16, 2012, the State charged Watkins with one count of Promoting Commercial Sexual Abuse of a Minor. CP 1. Turner was charged as a co-defendant. CP 1. On September 26, 2012, Turner pled guilty and agreed to testify against Watkins. 1RP 35-47.

The State later amended the Information to charge Watkins with three counts of Promoting Commercial Sexual Abuse of a Minor, involving three separate victims, one count of Unlawful Possession of a Firearm in the Second Degree, and one count of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the Second Degree.

CP 208-11. The matter was assigned to the Honorable Michael Heavey for trial. Supp. CP __ [sub no. 36A].

During trial, the prosecutor elicited evidence from Turner regarding the contents of an iPhone, including the fact that it contained three videos of Watkins receiving oral sex. 8RP 148-50. Two of the videos depicted Turner performing oral sex on Watkins, and the third showed another woman engaged in the same acts. 8RP 148-50. Watkins took the videos himself. 8RP 148-50. The description of the videos was offered as circumstantial evidence that the iPhone belonged to Watkins. 7RP 33-36. Watkins did not move in limine to exclude the descriptions of the videos, he did not object during the testimony, and the videos themselves were never offered into evidence. Later, the trial court expressed surprise that the prosecutor had elicited testimony about the videos. 8RP 153-54. Watkins again remained silent. 8RP 153-54.

On the next court day, three days later, Watkins sought a mistrial, contending that the evidence that the iPhone contained videos of him receiving oral sex from Turner and another woman was irrelevant and unduly prejudicial. CP 319-21. The written motion contained no argument as to how the evidence was unfairly prejudicial or how its admission violated Watkins's right to a fair trial. CP 319-21. The court

denied the motion. 9RP 10-11. However, over the State's objection, the court struck the testimony and instructed the jury to disregard it. 9RP 21.

The jury convicted Watkins as charged of three counts of Promoting Commercial Sexual Abuse of a Minor and one count of Unlawful Possession of a Firearm in the Second Degree. CP 453-56. The jury was unable to reach a verdict regarding the charge of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the Second Degree, and the court declared a mistrial as to that count. CP 457; 16RP 58.

The court imposed a standard range sentence of 209 months. CP 467-79. This appeal timely followed. CP 529.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WATKINS'S MOTION FOR A MISTRIAL.

Watkins contends that the trial court should have granted his motion for a mistrial after Turner testified about the contents of three videos on the iPhone, describing them as depicting either herself or another woman performing oral sex on him. But Watkins did not object to the evidence either before or during its presentation. Moreover, the description of the videos constituted admissible evidence. The fact that this particular trial court would have exercised its discretion to exclude it

pursuant to ER 403 had Watkins asked does not constitute an irregularity. Nor was the admission of the descriptions, even if erroneous, a serious irregularity, given that Watkins did not seek to exclude the evidence, it was not particularly inflammatory, and it involved a few moments of testimony during a several week trial. Finally, the trial court instructed the jury to disregard the evidence, and juries are presumed to follow such instructions. In the context of the entire trial, the court did not abuse its discretion when it declined to conclude that the introduction of a description of the iPhone videos deprived Watkins of a fair trial.

A trial court should grant a mistrial only when an irregularity so prejudices the defendant that only a new trial can ensure that the defendant will receive a fair trial. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986), overruled on other grounds by State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994); State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). Only those errors that affect the outcome of the trial will be considered prejudicial. Mak, 105 Wn.2d at 701; Gilcrist, 91 Wn.2d at 612. In evaluating whether an irregularity prejudiced a defendant, the trial court should consider (1) the seriousness of the irregularity, (2) whether the evidence at issue was cumulative, and (3) whether the court instructed the jury to disregard the evidence. Mak, 105 Wn.2d at 701; State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

The trial court has broad authority to conduct a trial and deal with irregularities that arise, and it is in the best position to make observations of the effect of an irregularity on the proceedings. Gilcrist, 91 Wn.2d at 612; Mak, 105 Wn.2d at 701. Accordingly, a trial court's denial of a defendant's motion for mistrial is reviewed for abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). The court abuses its discretion when no reasonable jurist would have reached the same conclusion. Id.

Here, there was no irregularity, let alone a serious one. Further, the trial court struck the evidence at issue, and properly instructed the jury not to consider it. No one referred to the excluded evidence again. Watkins suffered no substantial prejudice. The trial court did not abuse its discretion in denying a mistrial.

- a. Turner's Testimony Describing Three Videos On The iPhone Was Not A Serious Irregularity.

Watkins contends that the admission of evidence regarding three videos on the iPhone "is extremely serious." Brief of Appellant at 9. In fact, as the evidence was neither excluded nor objected to, its introduction was not an irregularity. Moreover, the evidence was admissible. Even if the evidence should not have been admitted, it was not particularly prejudicial.

First, Watkins has failed to show that there was a trial “irregularity.” An “irregularity” is—redundantly— “[s]omething irregular, esp[ecially] an act or practice that varies from the normal conduct of an action.” BLACK’S LAW DICTIONARY 848 (2004). Here, nothing “irregular” occurred. Rather, evidence was routinely introduced without objection.

Before the State questioned Turner about the videos on the iPhone, Watkins made no motion to exclude them.⁴ The day before Turner testified about the videos, the prosecutor made clear his intent to offer a description of them. 7RP 34-36 (“Altesa Turner will testify, ‘You know what? That’s me. The defendant used his iPhone when I was performing oral sex on him.’”). Watkins made no objection. 7RP 34-36. The trial court raised concerns about prejudice if the videos were played, but explicitly said that “a description would be fine.” 7RP 36. Watkins again made no comment. 7RP 36.

During Turner’s testimony the next day, Watkins had ample opportunity to object before the content of the videos was described for the jury. The questioning began:

⁴ Watkins made several motions to exclude all of the evidence on the iPhone, claiming that the phone did not belong to him, but never made any mention of the videos in particular. E.g., 7RP 30; CP 294-96.

Q. Okay. Now did you watch any videos on State's Exhibit 5?⁵

A. Yes.

Q. Now and do you recall how many different videos you looked at?

A. I looked at three?

Q. Okay. And what are the videos of?

A. Two videos are of me and the defendant.

8RP 148-49. Watkins said nothing. 8RP 148-49. Turner then testified regarding the content of the videos.⁶ 8RP 149-50. Again, there was no defense objection. 8RP 149-50.

At the conclusion of testimony for the day and after the jury had been excused, the trial court sua sponte raised concerns about the mentioning of the videos, stating that he thought the evidence was inflammatory. 8RP 153-54. Watkins again remained silent. 8RP 153-54. He made no complaint whatsoever about the iPhone videos until court reconvened the following week, when he made a motion for a mistrial on

⁵ State's Exhibit 5, which was not admitted into evidence, was a DVD containing a copy of the contents of the iPhone. 5RP 61-62.

⁶ Watkins complains that one of the prejudicial aspects of the evidence is that Turner watched as another woman performed oral sex on him. Brief of Appellant at 11. Although Turner's testimony could be read that way, a more natural reading is that Turner later watched the video in order to be able to identify Watkins as appearing in the video:

Q. And you said that there was another video, as well; what is the other video?

A. I saw the defendant getting oral sex—receiving oral sex from another person.

Q. And how are you able to tell that it is the defendant?

A. Because of the black hooded sweatshirt he had on.

8RP 149-50. Turner would not have needed to refer to Watkins's clothing in order to identify him had she been present when the video was made.

the basis of the admission of the description of the videos. 9RP 3-11; CP 319-21.

In short, the State advised the court that it was going to elicit a description of the videos, Watkins did not object, the court appeared to acquiesce, and the State did what it had said it was going to do. The mere fact that the court would have excluded the evidence had Watkins only asked does not convert an ordinary trial occurrence into an “irregularity.” In fact, because Watkins failed to object, the admission of that evidence—even if erroneous—is not reviewable on appeal. See, e.g., State v. Gallo, 20 Wn. App. 717, 728, 582 P.2d 558 (1978) (noting that a failure to make a timely objection precludes appellate review).

Second, even if Watkins had timely objected to Turner’s testimony, her description of the three videos was admissible evidence. All relevant evidence is admissible, unless prohibited by the constitution, statute, or court rule. ER 402. 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 probable or less probable than it would be without the evidence.” ER 401. Here, a primary issue in dispute at trial was whether the iPhone that was used to arrange acts of prostitution belonged to—or was in the control of—Watkins. The fact that the iPhone contained video taken by Watkins of him receiving oral sex from two

different women makes it substantially more probable that the iPhone belonged to him rather than to someone else.

The trial court ultimately excluded the iPhone video evidence—after its admission without objection—pursuant to ER 403. 9RP 10. That rule permits relevant evidence to “be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. A trial court’s decision to admit or exclude evidence is given considerable deference, so its evidentiary rulings are reviewed for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

Here, the trial court concluded that the iPhone video evidence could be unfairly prejudicial because he—the judge—was personally offended that Watkins would videotape himself engaging in sex. 9RP 10. Specifically, the court worried that the jury would view Watkins as he did: as “a jerk.” 9RP 10. Although the State does not contend that the court abused its discretion in excluding the video evidence, not every court would have reached the same conclusion in weighing the probative value of the evidence against the danger of unfair prejudice.

The fact that Watkins used the iPhone to videotape himself engaging in sex was extraordinarily probative on the issue of who was in control of that phone. Moreover, the trial court’s sensibilities about Watkins’s choice to videotape his sexual activity are not universally

shared—witness the abundance of celebrity videos of just this type. Two of the videos featured the State’s key witness; to the extent that the type of sexual activity or the fact that it was recorded reflected poorly on the participants, any prejudice was borne by the State as well. Accordingly, had the court admitted the evidence, its decision would not have been an abuse of discretion. Where evidence could have been properly admitted, its admission cannot be an irregularity. Compare State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (holding that no prejudice could arise from admission of evidence that trial court erroneously excluded).

Third, even if the admission of the description of the iPhone videos constituted an irregularity, it was not a significant one. Indeed, had the evidence been seriously damaging, Watkins surely would have moved in limine to exclude it, or would have objected as the prosecutor began to ask questions about the topic.⁷ Neither occurred. Further, the testimony that Watkins videotaped himself receiving oral sex took up perhaps two minutes of testimony in a trial that extended over 12 days. The videos themselves were never shown, nor was their existence ever referenced again.

⁷ Watkins’s lawyer made hundreds of objections during the course of the trial, including more than 30 during Turner’s testimony on that day alone. 8RP 34-152. He made numerous motions in limine, as well as dozens of motions to suppress evidence and dismiss the case. In fact, he even objected to the prosecutor’s questioning of the defendant as “leading.” 15RP 37. Even if meritless, the objection was savvy; the trial court sustained it. Compare ER 611(c) with 15RP 37.

Additionally, the evidence was not particularly prejudicial. Watkins's suggestion that the jury might be swayed by evidence of "the defendant's general propensity for criminality" ignores the fact that there was no suggestion whatsoever that the videos depicted criminal acts.⁸ Brief of Appellant at 10. Nor were the acts occurring in the video substantially similar to the acts with which Watkins was charged. The videos apparently depicted Watkins having consensual sexual relations with two women on separate occasions. 8RP 148-50. He was charged with promoting the prostitution of three minors, and the primary evidence against him was that he directed others via text and phone call to advertise A.G., M.S., and T.R. on Backpage.com. Thus, even if there was an "irregularity" in allowing the jury to hear about the iPhone videos, that irregularity was not serious.

b. The Court Instructed The Jury To Disregard The Evidence.

Not only was there no serious irregularity, the trial court properly instructed the jury to disregard the evidence describing the iPhone videos.

⁸ Watkins speculates that the jury was "likely left with the impression that the female [in one of the videos] was underage and perhaps one of the alleged victims in the charging document." Brief of Appellant at 14-15. There was no basis for such an impression; Turner herself was 44 years old, and she made no suggestion that the woman depicted in the other videos was a minor. 1RP 37; 8RP 148-50. Further, Watkins's lawyer had knowledge that the woman was an adult, and could have corrected any misimpression through further questioning of Turner. 7RP 35 (identifying the woman as "Ashley"); 8RP 94-95 (Ashley is 20 years old); 9RP 9 (defense counsel advises the court that "this unknown person was in fact not a minor"). He did not seek to do so.

Specifically, after denying Watkins's motion for a mistrial, the trial court offered him the remedy of a corrective instruction. 9RP 11. He accepted. 9RP 11-14. Even though Watkins had made no move to exclude the evidence prior to or during its admission, the trial court struck the testimony in its entirety and told the jury, "Just before we adjourned Thursday afternoon, last Thursday afternoon, there was testimony that the iPhone contained video of Mr. Watkins engaged in sex acts. The jury will disregard that testimony and not consider it in any way." 9RP 21.

A jury is presumed, absent a contrary showing, to follow a court's instructions. State v. Davenport, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984). There is nothing in the record whatsoever to suggest that this jury did not do so. Neither the prosecutor nor any other witness made further reference to the videos or their contents. To the extent there was any irregularity, the trial court's instruction to the jury and the State's scrupulous adherence to it alleviated any prejudice.

c. Watkins Has Failed To Show That He Was Denied A Fair Trial.

In light of all of the above—the lack of a showing that a serious trial irregularity occurred and the court's striking of the testimony and instructing the jury to disregard it—Watkins has failed to demonstrate that the evidence describing the iPhone videos prejudiced him.

First, the evidence against Watkins was overwhelming. As described above, Turner and McCoy both testified that Watkins directed the advertising of M.S., A.G., and T.R. on Backpage.com for purposes of prostitution, provided them with rides to their dates, took the money, and paid them with Percocet. Thousands of text messages and numerous photographs from the iPhone corroborated their testimony. And, although Watkins denied promoting any prostitution, his own testimony and the evidence he offered through his own witnesses closely linked him to the iPhone.

Second, to the extent Watkins is concerned that the video evidence would paint him as an immoral person that the jury would believe deserve to be punished, Watkins's own evidence was far more damaging in that regard than any evidence offered by the State. For instance, Watkins testified that he was a drug dealer. 14RP 102, 127; 15RP 42. Similarly, a defense witness testified on direct examination that she and Watkins effectively defrauded a welfare organization; Wellspring Family Services provided her with a motel room because she was homeless, and she allowed Watkins to stay there for a month or two while she was no longer homeless. 14RP 6-12. The fact that the jury briefly heard that there were videos of Watkins receiving oral sex from two different women was relatively insignificant in comparison.

Third, the fact of the videos was most likely to be prejudicial to Watkins with respect to the sole count of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the Second Degree. That count was based on a particular photo that Watkins had on his iPhone of one of the three girls with her breasts bared. Ex. 45, at 40. That photo is most similar in nature to the videos, rather than the conduct that supported the three counts of Promoting Commercial Sexual Abuse of a Minor. Yet, the jury hung on the Possession of Depictions count. CP 457; 16RP 58. Thus, there is no evidence that the jury used the stricken evidence of the iPhone videos to prejudice Watkins. The scant evidence is to the contrary.

In short, the trial court did not abuse its discretion in denying Watkins's motion for a mistrial. The court was in the best position to understand the effect of the evidence on the jury, and it concluded that a mistrial was unwarranted.⁹ This conclusion should not be disturbed.

⁹ Watkins contends that the trial court erred by applying the wrong standard to its decision to deny a mistrial. Specifically, he argues that the court improperly "focused on whether the prosecutor had engaged in misconduct." Brief of Appellant at 14. But the trial court articulated the correct standard before ruling:

THE COURT: Let me say I disagree with you [the prosecutor] on the issue of whether—I don't think you did anything inappropriate, and I don't think that is the issue. The issue for me is, is there too much prejudice to the defendant that he can't have a fair trial. That's the issue to me.

9RP 7-8 (emphasis added).

2. CUMULATIVE ERROR DID NOT DEPRIVE WATKINS OF A FAIR TRIAL.

Watkins contends that cumulative error deprived him of a fair trial. But Watkins fails to identify any error at all, let alone prejudicial error that likely affected the outcome of the trial. Moreover, the evidence against him was overwhelming. Watkins's convictions should be affirmed.

Under the cumulative error doctrine, this Court may overturn a conviction where the combined effect of errors, each harmless in its own right, worked to deny the defendant a fair trial. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813, rev. denied, 170 Wn.2d 1003 (2010). "The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome." Id.

Here, there was no error. Indeed, Watkins failed even to assign error to any of the "errors" he claims cumulatively deprived him of a fair trial. RAP 10.3(a)(4). Moreover, the evidence led inexorably to the conclusion that Watkins was guilty of Promoting Commercial Sexual Abuse of a Minor and Unlawful Possession of a Firearm in the Second Degree.

Watkins first argues that the trial court erred in permitting evidence regarding "the July 4th gun incident." Brief of Appellant at 16. Specifically, the State elicited testimony from McCoy that she observed

Watkins fire a gun on July 4. 10RP 75-76. Although Watkins objected, the trial court overruled the objection. 10RP 75-76. This was not error. McCoy's testimony established both that Watkins possessed the firearm at issue and that it was operational. Accordingly, the evidence was relevant and admissible pursuant to ER 403. Further, Watkins utterly fails to explain how the firing of a gun—absent evidence that the gun was aimed at a person or discharged in an unsafe manner—is prejudicial, let alone unfairly so. Thus, although the trial court later felt that he should have excluded the evidence pursuant to ER 403, this second-guessing was incorrect. 11RP 3-4. Moreover, Watkins later effectively conceded his guilt on the count of Unlawful Possession of a Firearm during his own testimony, when he admitted handling and possessing the shotgun. 15RP 20-21.

Second, Watkins claims that the jury committed misconduct by discussing the case before deliberations. Brief of Appellant at 16. He does not develop this argument, does not cite the record in support of it, and does not provide any legal authority for his position. Under such circumstances, this Court should decline to review the issue. State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010) (“We do not review assigned errors where arguments for them are not adequately developed in the briefs.”).

The record does show that a juror asked the bailiff, in front of other jurors, whether “all trials go at this pace.” 12RP 26. The bailiff responded that all trials are different. 12RP 26. A juror also asked, in the presence of the rest of the jury, “if counsel for the defense could move more rapidly.” 12RP 26. When these exchanges were reported to the court, it promptly instructed the jury not to talk about the case, even innocuous facts like the tie he was wearing. 11RP 7-9.¹⁰ These questions were wholly immaterial to the outcome of the case, and Watkins does not even attempt to demonstrate otherwise.

Third, Watkins contends that the testimony of the victims’ mothers was highly prejudicial. Brief of Appellant at 18. In fact, the testimony of the victims’ mothers was extremely limited. Tomiko Strothers, the mother of M.S., merely identified her daughter and another girl she knew, A.G., in Backpage.com ads, and provided their ages. 8RP 22-32. Fraya Sanders, A.G.’s mother, also identified her daughter in Backpage.com advertisements, and provided A.G.’s date of birth. 11RP 47-50. Each woman’s testimony was brief and uncontested.

¹⁰ The bailiff brought the jurors’ comments to the court’s attention on November 21, 2012, and the court instructed the jury at that time. 11RP 7-9. The next day, the State asked the bailiff some clarifying questions about exactly what the jurors had said. 12RP 25-27.

Nothing in the record demonstrates that either woman “broke down in tears when shown pictures of her daughter baring her breasts and buttocks,” and Watkins provides no citation to the record to support this claim. Brief of Appellant at 18-19. Nor does he cite any authority for the proposition that a witness having strong emotions when faced with evidence that her minor child was engaging in prostitution somehow constitutes error.¹¹ It was not. Even if it were, however, the jury was instructed that it must reach its decision based on the facts and the law, “not on sympathy, prejudice, or personal preference.” CP 397. It is presumed to have followed this instruction. Davenport, 100 Wn.2d at 763-64. Watkins cannot possibly show that he was prejudiced.

Fourth, Watkins claims that McCoy’s pregnancy, and her discomfort while testifying, prejudiced him. Brief of Appellant at 19. The only evidence in the record that McCoy expressed discomfort while testifying was Watkins’s assertion that she did, in support of yet another motion for a mistrial. 12RP 23-24. Neither the State nor the court expressed agreement with his self-serving description of what occurred. Nothing supports his current claim that McCoy was in “constant pain.” Brief of Appellant at 19. Even if McCoy was physically expressing

¹¹ Again, in the absence of citation to the record or legal authority, this Court should decline to review this purported “error.” Corbett, 158 Wn. App. at 597.

discomfort, however, Watkins has failed to cite any authority in support of the proposition that this was error.¹² Nor can he demonstrate prejudice. The jury was instructed that it was the sole judge of credibility, and that it could consider a witness's manner while testifying in evaluating her testimony. CP 396. Thus, to the extent that Watkins perceived that McCoy was manipulating the jury by expressing physical discomfort during cross-examination, but not during direct examination, he was free to make that argument to the jury in closing. He did not.

None of the bases that Watkins asserts merit a new trial constitute error, let alone prejudicial error. He received a fair trial. His convictions should be affirmed.

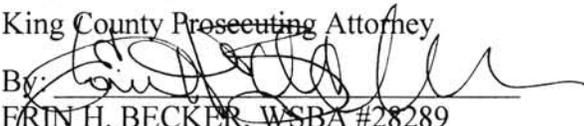
D. CONCLUSION

For all of the foregoing reasons, Watkins's convictions should be affirmed.

DATED this 25th day of October, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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¹² Yet again, this Court should refuse to consider this alleged error, as it is unsupported by citation to either the record or legal authority. Corbett, 158 Wn. App. at 597.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher H. Gibson and Cynthia Jones, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. BERNARD WATKINS, Cause No. 69742-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 28 day of October, 2013

A handwritten signature in black ink, appearing to be "O. S.", written over a horizontal line.

Name
Done in Seattle, Washington