

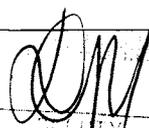
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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY 

STATE OF WASHINGTON, RESPONDENT

v.

LELAND JERMAINE JOHNSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Bryan E. Chushcoff

No. 05-1-02265-7

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant fail to show that the court introduced testimonial hearsay when no hearsay was adduced at trial?
2. If the trial court did introduce testimonial hearsay, was the error harmless because the overwhelming weight of the untainted evidence supported the jury's finding of guilt?
3. Did the trial court act within its discretion when it allowed Sergeant Cassio to testify as an expert witness regarding the relationship between prostitutes and pimps?
4. Did the State present sufficient evidence to convince a rational fact finder that defendant was guilty of promotion of prostitution and identity theft?
5. Has defendant failed to prove prosecutorial misconduct?
6. Has defendant failed to prove that he was prejudiced by cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

On May 10, 2005, the State charged LELAND JERMAINE JOHNSON, hereinafter "defendant," with one count of unlawful possession of a firearm in the second degree and one count of promoting

prostitution in the second degree. CP<sup>1</sup> 1-4. The State filed an amended information on August 22, 2005, to include one count of identity theft in the first degree. CP 13-15.

On August 17, 2005, the court held CrR 3.5 and CrR 3.6 hearings to determine whether the officers had a reasonable and articulable suspicion to justify a Terry<sup>2</sup> stop and whether defendant's statements to Sergeant Cassio regarding his identity were admissible. RPP 1-6. The Court heard testimony from deputies David Shaffer and Kory Shaffer and Sergeant William Cassio regarding their investigation and their contacts with Bridget Williamson and defendant. RPP 8, 42, 69. Neither Ms. Williamson nor defendant testified at the hearing. RPP 157. The court held that, based on their conversation with Ms. Williamson, the officers had a reasonable and articulable suspicion to stop defendant, probable cause to arrest defendant, and defendant's statements to the officers were admissible. RPP 173-74. The court entered findings of fact and conclusions of law for both hearings. CP 17-21.

On February 8, 2006, the court heard pretrial motions. RPT 4. Defendant agreed to stipulate to a prior felony for purposes of proving the unlawful possession of a firearm charge. RPT 11-12. The State made a motion to exclude self-serving hearsay statements. RPT 17. The court

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<sup>1</sup> Citations to Clerk's Papers will be to "CP." Citations to the verbatim report of proceedings for the pretrial hearings will be to "RPP," and for trial will be to "RPT."

<sup>2</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)

preliminarily sustained the State's motion, but agreed to reconsider the statements for the purpose of showing prior consistent statements if defendant testifies on his own behalf. RPT 25.

Defendant then made a motion to exclude any statements made by Wayne King. RPT 26. The court granted the motion and excluded any statements made by Wayne King under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). RPT 34. Defendant also motioned to exclude statements by Ms. Williamson and Mr. King's mother. RPT 35-36. The court granted both motions. RPT 36-37.

On February 9, 2006, defendant made a motion to limit the officers' testimony regarding all potential uses of the photographs found in defendant's car. RPT 45. The court preliminarily granted the motion as to all uses, but agreed to reconsider as to a specific use after hearing the testimony. RPT 48-49. Defendant then made a motion to exclude mention of the defense witnesses' criminal history. RPT 49. The State agreed that it would not mention any criminal history in its opening and the court would readdress the issue at the appropriate time during trial. RPT 51.

On February 13, 2006, defendant argued that Sergeant Cassio should not be allowed to testify as an expert as to how prostitutes act and their relationship with their pimps. RPT 70-71. Defendant claimed that such testimony would be profiling, business practices, or habit; and also not outside common understanding as to require an expert. RPT 71, 76.

The court declined to make an initial ruling, but stated it would allow at least some of the expert testimony. RPT 77-78.

The jury trial commenced immediately after the court heard defendant's motion. RPT 81. The jury began deliberations on February 16, 2006, and returned guilty verdicts for all counts. CP 95-97; RPT 493, 499-500. Defendant was sentenced to a high end, standard range sentence of 43 months for the identity theft charge and 29 months for each of the other charges, together with the standard fees. CP 101-12, RPT 529. The court also imposed a no contact order for Ms. Williamson and required defendant to forfeit the firearm. CP 101-12; RPT 529.

Defendant filed a timely appeal. CP 113-23.

## 2. Facts

On May 9, 2005, Pierce County Sheriff Sergeant William Cassio and Deputies Dave Shaffer and Kory Shaffer<sup>3</sup> were working for Pierce Transit in off-duty capacities. RPT 92-94. Pierce Transit had received complaints from drivers about prostitutes using the bus shelters and the officers were working undercover to address the problem. RPT 92-94. Deputy D. Shaffer was working as the undercover close contact officer<sup>4</sup>, so he was not in uniform and was driving a rental car. RPT 95. Deputy K.

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<sup>3</sup> David Shaffer and Kory Shaffer are not related to each other except through employment. RPT 94. To avoid confusion, the deputies will be referred as D. Shaffer and K. Shaffer.

<sup>4</sup> The close contact officer follows the undercover officer for safety purposes. RPT 96.

Shaffer was working as Deputy D. Shaffer's close cover officer; he was in plain clothes and was driving an unmarked police vehicle. RPT 95-96. Sergeant Cassio was the arrest and custody officer. RPT 96. Sergeant Cassio was in full uniform and had a marked patrol car. RPT 96. Whenever Deputy D. Shaffer had probable cause to arrest, he would bring the prostitute to Sergeant Cassio to process the arrest. RPT 96-97.

During the operation, Deputy D. Shaffer noticed a woman, later identified as Bridget Williamson, walking on Pacific Avenue while she was talking on a Nextel<sup>5</sup>-type cellular phone. RPT 196. He informed the other officers that he had a possible prostitute and waited for Deputy K. Shaffer to get into position to cover him. RPT 198. Deputy D. Shaffer then pulled over and waited for the woman to approach his car. RPT 198.

As she walked in front of his vehicle, she nodded to Deputy K. Shaffer and he nodded his head, affirmatively, in response. RPT 199. The woman walked over to his car and got in the passenger side seat. RPT 199. She initiated a "cop test"<sup>6</sup>, and appeared to be satisfied that Deputy D. Shaffer was not a police officer. RPT 200. Deputy D. Shaffer told her he was in a hurry and they came to an agreement for an act of prostitution.

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<sup>5</sup> Nextel cellular phones have a "walkie-talkie" feature. RPT 197.

<sup>6</sup> The "cop test" consists of verbal questions and checking for electronic surveillance equipment by physically rubbing the officer's genitalia through his clothing. RPP 13-14. There is a misconception among prostitutes that an undercover officer will not allow a prostitute to touch the officer's genitalia and that an undercover officer is not allowed to lie about not being a police officer. RPT 156.

RPT 201. After reaching the agreement, Deputy D. Shaffer drove Ms. Williamson to where Sergeant Cassio was waiting. RPT 201.

Sergeant Cassio arrested Ms. Williamson and issued her a citation for solicitation of prostitution. RPT 113-14. During the arrest, Ms. Williamson's phone rang and Deputy D. Shaffer picked up the phone in time to see that someone identified as "daddy" had called. RPT 203-04. Deputy D. Shaffer scrolled through Ms. Williamson's contacts and used the direct connect feature of the phone to redial "daddy." RPT 204. Deputy D. Shaffer informed the man who answered the phone that Ms. Williamson was being arrested. RPT 204. Sergeant Cassio then released Ms. Williamson and she left the area on foot. RPT 116. After Ms. Williamson left the area, Sergeant Cassio asked the other officers to keep her under surveillance because it was his, "hope that by releasing her there with, basically, a ticket that she would then be contacted by her pimp." RPT 113-14.

Ms. Williamson walked several blocks out of the area. RPT 115. She was talking on her cell phone and watching to see if she was being followed. RPT 115-16. As she was traveling, she ducked into a restaurant so she could look for anyone following her. RPT 116. When she left the restaurant, she continued to walk away from the area where she was arrested and she was still looking around to make sure she was not being followed. RPT 116. Approximately 30 to 45 minutes after Ms.

Williamson started walking, Deputy K. Shaffer saw defendant arrive and saw Ms. Williamson get into defendant's car. RPT 144, 245.

Sergeant Cassio initiated the stop in his marked patrol car. RPT 117. After stopping defendant, he approached the driver's side of the car. RPT 118. Defendant looked over his left shoulder at Sergeant Cassio and got a surprised look on his face. RPT 118. Defendant started to reach inside the center console of the car and Sergeant Cassio ordered him to keep his hands where the officer could see them. RPT 118-19. Defendant complied. RPT 118. When Sergeant Cassio got closer, he saw a folding combat knife near the car's shift lever. RPT 120-23. Sergeant Cassio asked defendant to exit the vehicle. RPT 124.

Sergeant Cassio asked defendant his name, and defendant responded that his name was "Wayne." RPT 124. Defendant also provided an Oregon State identification card and a Washington State driver's license, both in the name of "Wayne King." RPT 124. Defendant also had two debit cards in his wallet issued to "Wayne King." RPT 127-28. Sergeant Cassio recognized defendant from previous contacts and, while he could not remember his name, he did not believe it was "Wayne King." RPT 125. Sergeant Cassio advised defendant of his Miranda warnings and continued to question him about his name. RPT 126. Defendant continued to try to convince Sergeant Cassio that his name was "Wayne King." RPT 127.

Meanwhile, Deputy D. Shaffer, who had approached the passenger side of the car when Sergeant Cassio approached the driver, spoke to Ms. Williamson. RPT 208. Deputy D. Shaffer saw Ms. Williamson's cell phone in the passenger door pocket. RPT 209. The cell phone was already set to "daddy." RPT 209. Deputy D. Shaffer hit the button corresponding to "daddy," and defendant's cell phone, which defendant had placed on the trunk of the car, beeped to indicate an incoming call. RPT 209. Deputy D. Shaffer then went to defendant's phone and pressed the redial, causing Ms. Williamson's phone to beep. RPT 210. Deputy D. Shaffer informed Sergeant Cassio that they had probable cause to arrest defendant for promotion of prostitution. RPT 126.

Deputy D. Shaffer searched defendant's car and found a functional, loaded Ruger semiautomatic pistol in the center console. RPT 136, 211-12. The console was closed, but unlocked. RPT 212. Under the gun, Deputy D. Shaffer found a envelope with approximately 45 nude and lingerie photos of Ms. Williamson and another woman. CP 130-31 (Plaintiff's exhibit 10); RPT 213-15. Both the women in the photos have the words, "daddy's girl," tattooed on their upper left arm. See CP 130-31 (Plaintiff's exhibit 10). Deputy D. Shaffer also found traffic citations issued to "Wayne King." RPT 218.

Sergeant Cassio asked defendant if he had ever been arrested before or if defendant knew him. RPT 126-27. Defendant denied both and continued to identify himself as "Wayne King." RPT 127. After

approximately 10 to 15 minutes, Sergeant Cassio recognized defendant as Leland Johnson. RPT 130. He checked defendant for known tattoos, but noticed defendant's belt buckle had Leland Johnson's gang name written on it. RPT 131. Sergeant Cassio accessed the computer in his patrol car to call up one of defendant's prior booking photographs and confirmed his identity as Leland Johnson. RPT 131.

Sergeant Cassio and Deputy D. Shaffer transported defendant to the jail. RPT 139. While they were in route, Sergeant Cassio asked defendant how he obtained the "Wayne King" identification cards. RPT 140. Defendant explained how he had bought a birth certificate from someone and used that to get the Oregon identification card. RPT 140. Then he used the identification card to get the Washington driver's license. RPT 140. With the driver's license, defendant was able to open a bank account. RPT 140.

Sue Clovis, a fraud investigator with the Washington State Department of Licensing, received information from Pierce County that defendant was using a false driver's license. RPT 170-71. She checked the license against the license issued for Leland Johnson and saw that the photos showed the same person. RPT 171-72. Ms. Clovis cancelled the "Wayne King" driver's license as fraudulent. RPT 177.

Karen Doran, an assistant vice president for Bank of America, testified that a bank account attached to the debit card in defendant's wallet was opened on May 13, 2004, in the name of "Wayne King." RPT

288, 294. The person who opened the account used a social security number and a driver's license for identification. RPT 295. On July 29, 2004, a charge for \$8,802.04 was paid out of the account and, as a result, the account went into overdraft. RPT 302. Bank of America closed the account on October 19, 2004, with an outstanding balance of \$870.85. RPT 298.

Joseph Rogers, a special agent with the Social Security Administration testified that use of another person's social security number to open a bank account is an unauthorized use of the number. RPT 307-08. Agent Rogers also testified that two people could never be issued the same number, and that defendant was not the person to whom the number was issued. RPT 310. The actual recipient of the number resides in the state of New York. RPT 311.

C. ARGUMENT.

1. DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES WAS NOT VIOLATED WHEN NO HEARSAY WAS ADDUCED AT TRIAL.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the matter asserted. ER 801(c). A statement is an "oral or written assertion . . . or nonverbal conduct of a person, if it is intended by the person as an assertion." State v. Lillard, 122 Wn. App. 422, 437, 93 P.3d 969, review

denied, 154 Wn.2d 1002, 113 P.3d 482 (2005). When a statement is offered for reasons other than proving the truth of the matter, it is not hearsay and is not contrary to the Confrontation Clause under Crawford<sup>7</sup>. In Re Theders, 130 Wn. App. 422, 425, 123 P.3d 489 (2005), see also Lillard, 122 Wn. App. at 437. Thus, a police officer's testimony that describes the context and background of a criminal investigation can be admissible. See, e.g., Lillard, 122 Wn. App. at 437 (State offered officer's statements to show how he conducted his investigation, not to prove what the suspect said); State v. Post, 59 Wn. App. 389, 392, 797 P.2d 1160 (1990), affirmed, 118 Wn.2d 596, 826 P.2d 172 (1992) (officer's testimony about a phone call to police was admissible to explain why the police investigation had focused on the defendant).

Defendant contends that the State elicited testimonial hearsay statements from Ms. Williamson through the testimony of Sergeant Cassio. See Appellant's Brief at 20-21. Because the State did not elicit any hearsay from Sergeant Cassio, the defendant's claims are without merit.

Specifically, defendant asserts that Sergeant Cassio's statement, "it was my hope that by releasing her there with, basically, a ticket that she would then be contacted by her pimp," could only mean that Ms. Williamson told Sergeant Cassio that she was working with a pimp. See

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<sup>7</sup> Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Appellant's Brief at 14, RPT 114. However, Sergeant Cassio's statement indicated that he believed that Ms. Williamson had a pimp and in no way suggested that Ms. Williamson told him anything about a pimp during the interview. RPT 114. In fact, Sergeant Cassio had just explained to the jury that, in his experience, many prostitutes do not believe they are working for a pimp because they have been manipulated into thinking that their pimp is actually a boyfriend. RPT 87-90. If Ms. Williamson had told Sergeant Cassio that she was working with a pimp, he would have known for certain that she would be picked up at a specific place and time. Instead, Sergeant Cassio released her in the *hope* that she would be picked up, indicating that he did not know for certain that she was working with a pimp. Because Sergeant Cassio did not testify as to any specific statement made by Ms. Williamson, his belief that she was working with a pimp was not hearsay.

Defendant also claims that Sergeant Cassio's description of defendant and the car defendant was driving, based on information he got from Ms. Williamson, was testimonial hearsay. See Appellant's Brief at 20. Defendant asserts that the description of the vehicle and defendant were given to prove that, "the investigating officers stopped the car that matched the description given by Ms. Williamson of her pimp's car, and that the car was being driven by the man that matched Ms. Williamson's description of her pimp." Appellant's Brief at 20. Defendant's claim is

without merit. The record shows that the description was actually adduced to show how the officers conducted their investigation. See RPT 108-111.

Before Sergeant Cassio testified regarding his conversation with Ms. Williamson, defendant objected to the admission of out of court statements by Ms. Williamson. RPT 102. The prosecutor stated that she did not anticipate eliciting the content of the statements, but to show that based on the answers Ms. Williamson gave him, Sergeant Cassio conducted his investigation in a specific manner. RPT 103. The court agreed, stating, "If it is limited to that, it is not a problem. The problem starts if he starts saying, she told me she had a pimp. She told me what the guy looked like. That becomes a problem." RPT 103-04. After continued discussion, the court ruled that:

The Court: Right. When they say, it is consistent - - what they saw is consistent with it, that's always the problem here. It's always a fine line. How their attention came to Mr. Johnson is, in fact, an issue here.

\* \* \*

It is, in fact, an issue here. Although it's not necessarily directly part of the crime charged, it is how they have this - - it is at least set up why they are having a conversation with Mr. Johnson later at all. To that extent, their actions are reasonable. I will permit them to say "consistent."

Mr. Cain: Consistent . . .

The Court: With the information they had developed. This is why they continued to investigate it. It doesn't mean it was the same information. Merely, that it was consistent with the information that they developed from Ms. Williamson.

RPT 108. When defendant continued to object, the court stated:

. . . I understand your point. That is why I'm limiting what they are going to do. I do think that, obviously, the officers got some information. They continued to investigate to confirm up that investigation to see whether there was anything to it or whether it will check out in any way. We are not letting him go into the details of the information because of the hearsay rules and because of - -

\* \* \*

Whatever the other case is - - the case name escapes me, the other case name - - because of the Crawford and the constitutional implications of that, I do think there is an issue here as to why the officers had contact with Mr. Johnson, and it seems to me that he is to say, at least generally, that talking to Mr. Johnson was consistent with other information that they had without necessarily saying that it was the same or was it or - - you know, and so on. I'm going to let it be as generic as that, but no more specific than that.

RPT 111.

In accordance with the court's ruling, Sergeant Cassio testified that he pulled over a maroon Chrysler Sebring convertible with a black top, driven by defendant. RPT 117-18. Sergeant Cassio agreed that the car and driver were consistent with information that he developed based on his conversation with Ms. Williamson. RPT 118. Sergeant Cassio

informed Deputy Kory Shaffer that they were looking for a car and driver, and instructed him to follow Ms. Williamson to see if this car came to pick her up. RPT 243. Sergeant Cassio's statement was not offered to prove the truth of the matter asserted, but to show why the officers felt they had probable cause to pull over the car that picked up Ms. Williamson. Because the description was not offered to prove the matter asserted, it was not hearsay and did not violate the Confrontation Clause of the Sixth Amendment.

2. IF THE COURT DOES FIND THAT SERGEANT CASSIO'S STATEMENTS VIOLATED THE CONFRONTATION CLAUSE, SUCH ERROR WAS HARMLESS.

A violation of the confrontation clause is also subject to harmless error analysis where the error was harmless beyond a reasonable doubt. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844, affirmed, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2266; 165 L. Ed. 2d 224 (2006) (citations omitted). To determine whether error is harmless, this court utilizes "the 'overwhelming untainted evidence' test." Davis at 305 (citing State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. Id.

In this case, Ms. Williamson had been arrested for solicitation of prostitution. RPT 114. Defendant was driving the car that picked Ms.

Williamson up, and he had 45 photos of Ms. Williamson and another woman in various states of undress in the center console of the car. RPT 207, 213-14. Deputy D. Shaffer testified that he had seen similar types of photos when investigating escort services, which are essentially organized prostitution. RPT 214-15.

Additionally, Ms. Williamson had defendant's phone number in her cell phone under the label, "daddy." RPT 204, 209. Defendant claimed that the cell phone on his person at the time of his arrest belonged to Ms. Jackson and that Ms. Jackson had his number identified as "baby's dad". RPT 376. However, Ms. Jackson testified that she did not know Ms. Williamson; therefore, there would have been no reason to have her number in Ms. Williamson's phone as "daddy." RPT 392. Ms. Williamson's designation of defendant as "daddy," coupled with her tattoo of "daddy's girl" indicated a relationship other than mere friendship. Thus, the untainted evidence was overwhelming, and any error in admitting testimonial statements from Ms. Williamson's conversation with Sergeant Cassio was harmless beyond a reasonable doubt.

3. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ALLOWING EXPERT TESTIMONY REGARDING THE RELATIONSHIP BETWEEN PROSTITUTES AND PIMPS.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. The decision to admit expert testimony rests within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004) (citing State v. Swan, 114 Wn.2d 613, 655, 790 P.2d 610 (1990)). A trial court abuses its discretion if its ruling is manifestly unreasonable or based upon untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). “If the reasons for admitting or excluding the opinion evidence are ‘fairly debatable,’ the trial court’s exercise of discretion will not be reversed on appeal.” Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979).

The court applies a two-part test under ER 702: (1) does the witness qualify as an expert, and (2) would the expert testimony be helpful to the trier of fact? State v. Cauthron, 120 Wn.2d 879, 890, 846 P.2d 502 (1993). An expert witness may testify regarding criminal behavior that is not ordinarily familiar to the average layperson, as in the case of the

modus operandi of persons involved in prostitution. U.S. v. Long, 328 F.3d 655 (D.C. Cir. 2003), cert. denied, 540 U.S. 1075 (2003).

While an expert cannot testify to a matter of common knowledge, there are many matters about which the triers of fact may have a general knowledge, but the testimony of experts would still aid in their understanding of the issues. Gerberg v. Crosby, 52 Wn.2d 792, 795, 329 P.2d 184 (1958).

Defendant does not contest Sergeant Cassio's qualifications to testify as an expert, but argues instead that the testimony was not helpful to the jury. Defendant contends that the relationship between prostitutes and pimps is the subject of common knowledge, and that the expert testimony merely resulted in profiling defendant as a pimp. See Appellant's Brief at 26-30.

"Profile" testimony identifies a group as more likely to commit a crime and is generally "inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice." State v. Avendano-Lopez, 79 Wn. App. 706, 710-11, 904 P.2d 324 (1995) (citing State v. Braham, 67 Wn. App. 930, 936, 841 P.2d 785 (1992)). In the present case, however, Sergeant Cassio did not profile a pimp. He discussed the nature of the relationship between pimps and prostitutes.

The present case is similar to State v. Simon, 64 Wn. App. 948, 831 P.2d 139 (1991), reversed on other grounds, 120 Wn.2d 196 (1992). In Simon, the Court of Appeals upheld the trial court's admission under

ER 702 of testimony from a police detective regarding the relationships between pimps and prostitutes in a prosecution for promoting prostitution. The detective testified regarding the psychological force employed by pimps, how prostitutes generally have very little or no self-esteem, and how pimps maintain their control or access to women who become prostitutes. Simon, 64 Wn. App. at 954-55. The detective had over six years of experience and had investigated over 400 prostitution related crimes. Simon, 64 Wn. App. at 963.

Here, the court carefully considered the question of whether or not Sergeant Cassio could testify as an expert. The court ruled that at least some expert testimony was necessary to assist the jury. RPT 78. The court reasoned:

I guess I'm going to have to simply wait and see what happens here. I think it's not uncommon for police officers to give some information with respect to criminal activity that they see. They can't opine on the guilt of the defendant by any means. They are certainly entitled, it seems to me, to provide information with respect to methods and operations by which these kinds of crimes are conducted.

It is not uncommon, for instance, for people to use lookouts in a burglary as an example, but I'm not necessarily sure that all jurors understand that. In a relationship between - - in prostitution, I think that there is [sic] some people who wonder, why are there pimps at all? What do they bring to the enterprise? As [the State] points out, they provide at least potentially some business connections and some protection and some assistance, so that information is, of course, useful to the jurors so that they understand why someone might have - - someone who is a prostitute might have someone assisting them at all to make more probable

the issue as to whether or not the woman involved there had a pimp or not, first of all. Whether or not it is Mr. Johnson is something else. As I understand it, that may be consistent with what the officers believed with respect to what was going on here because of the name and information that the woman in question provided to them. Now, whether or not that would directly get into evidence or not, I don't know, but it at least explains their conduct, why there were where they were at and why they were doing what they were doing. That is some relevance here figuring out why their interest came to be with Mr. Johnson.

RPT 77-78. Clearly the court exercised its discretion when it allowed Sergeant Cassio to testify as an expert and the court's reasoning was not based on unreasonable or untenable grounds.

The information Sergeant Cassio testified to was likely outside the common knowledge of jurors. Sergeant Cassio testified that the relationship between a prostitute and a pimp is unique. RPT 88. He explained how a pimp manages the prostitute, the area, and all the financial aspects of the relationship. RPT 89. Sergeant Cassio also explained how the pimp promotes the prostitution; either by physically forcing the prostitute to engage in sexual activity for money, or by manipulating the prostitute by forming a dependent, emotional relationship with her. RPT 89. Sergeant Cassio testified that many women will insist that she and other girls live with a man who takes her money and who is her boyfriend. RPT 90. The pimps promote prostitution by taking the money the prostitutes make by providing sexual

acts for money and giving them supplies, food, clothing, and sometimes protection. RPT 90.

The expert testimony was limited to the relationship between prostitutes and pimps and did not profile the defendant. This information was important to help the jury understand the unique nature of a relationship in which the average person is not aware. An average person may have a general understanding that a pimp takes money from a prostitute, but is unlikely to understand exactly how a pimp promotes prostitution without the benefit of expert testimony. Therefore, the trial court properly exercised its discretion in allowing Sergeant Cassio to provide expert testimony.

4. THERE IS SUFFICIENT EVIDENCE TO FIND  
DEFENDANT GUILTY OF PROMOTION OF  
PROSTITUTION AND IDENTITY THEFT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478,

484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The court must give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Because the written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility, “great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

a. Promotion of Prostitution

A person is guilty of promoting prostitution in the second degree if he knowingly profits from or advances prostitution. RCW 9A.88.080(1); CP 87 (Jury Instruction No. 15). Here, the jury was instructed that the

“term advances prostitution or advanced prostitution means that a person, acting other than as a prostitute or as a customer of a prostitute, cause or aided a person to commit or engage in prostitution or procured or solicited customers for prostitution or provided persons or premises for prostitution purposes[,] prostitution enterprise or engaged in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution. CP 86 (Jury Instruction No. 15).

The State presented sufficient evidence to convince a rational fact finder that Ms. Williamson was a prostitute and that defendant knowingly engaged in conduct designed to institute, aid, or facilitate her acts of prostitution. Sergeant Cassio testified that he arrested Ms. Williamson for solicitation of prostitution. RPT 113-14. When the officers released her, Ms. Williamson left the area on foot, walking for approximately 45 minutes. RPT 144. As she was walking, Ms. Williamson kept looking around and entering random businesses to make sure she was not being followed. RPT 116. When defendant arrived, Ms. Williamson got into his car without any acknowledgement or hesitation, indicating she knew defendant and expected him to pick her up. RPT 245. Based on Ms. Williamson’s behavior, a jury could reasonably infer that she did not want the officers to see defendant.

After defendant was arrested, the officers found approximately 45 photos of Ms. Williams and another woman in various stages of undress inside the center console of defendant’s car. CP 130-31 (Plaintiff’s exhibit

10); RPT 213, 215. Both the women in the photos have the words, “daddy’s girl,” tattooed on their left arm. See CP 130-31 (Plaintiff’s exhibit 10). Deputy D. Shaffer testified that escort services keep such photos to show prospective clients the type of women who are available. RPT 214. It was reasonable for the jury to infer that defendant kept suggestive photos of women in order to show prospective clients the type of women he had available to perform acts of prostitution.

Finally, defendant had been in contact with Ms. Williamson from the time she had been arrested. Ms. Williamson’s phone rang during her arrest and Deputy D. Shaffer saw that a person identified as “daddy” had called. RPT 203-04. Deputy D. Shaffer called “daddy” and informed him that Ms. Williamson had been arrested. RPT 203. When the officers pulled defendant over, Deputy D. Shaffer called “daddy” from Ms. Williamson’s phone and defendant’s phone beeped, indicating an incoming call. RPT 209. Deputy Shaffer then hit redial on defendant’s phone and Ms. Williamson’s phone beeped. RPT 210. From this testimony, the jury could reasonably infer that defendant had called Ms. Williamson to check up on her after she had contacted Deputy Shaffer to negotiate a sex act. Defendant’s identification in Ms. Williamson’s phone also indicates the nature of their relationship, as friends or acquaintances are not normally referred to as, “daddy.”

Defendant claimed that the cell phone on his person at the time of his arrest belonged to Ms. Jackson, who was the mother of his child. RPT

376. He claimed that Ms. Jackson had programmed his number into her cell phone and identified it as “baby’s dad”. RPT 376. However, Ms. Jackson testified that she did not know Ms. Williamson. RPT 392. Defendant’s inference that Deputy D. Shaffer misread “baby’s dad” as “daddy” is unreasonable. That Ms. Williamson would have had Ms. Jackson’s phone number identified in her phone as “daddy” is completely illogical and the jury was free to find defendant’s testimony not credible.

Defendant testified that he knew Ms. Williamson, but he was not her pimp. RPT 368. However, defendant also testified that, when he met Ms. Williamson, he knew she was a prostitute and her pimp was involved in a high profile criminal investigation. RPT 368. The jury could reasonably infer from defendant’s own testimony that when defendant met Ms. Williamson, he knew she was without a pimp and took over her management. Because credibility determinations are for the trier of fact, the jury was free to disbelieve defendant’s description of their relationship.

The State presented sufficient evidence to convince a rational fact finder that Ms. Williamson was working as prostitute and that defendant was actively managing Ms. Williamson by defining their relationship as “daddy” and “daddy’s girl;” keeping tabs on her during her jobs; picking her up after her arrest, but only after the police were gone; and using photos of her to solicit customers. Therefore, there was sufficient

evidence for a rational trier of fact to have found defendant guilty of promoting prostitution in the second degree.

b. Identity Theft

A person commits identity theft in the first degree when he knowingly obtains, possesses, uses, or transfers a means of identification or financial information of any other person, living or dead, with the intent to commit . . . any crime and did obtain credit, money, goods, services, or anything of value in excess of \$1,500. CP 88 (Jury Instruction No. 16), 92 (Jury Instruction No. 20); see also RCW 9.35.020(1), (2). “Financial information” includes social security numbers. RCW 9.35.010(1)(c); see also CP 90 (Jury Instruction No. 18).

The State presented sufficient evidence to convince a rational fact finder that defendant committed identity theft. Agent Rogers testified that the use of another person’s social security number to open a bank account is an unauthorized use of that number. RPT 308. Agent Rogers also testified that two people could never be issued the same social security number and the number defendant had used to open the Bank of America account had not been issued to him by the Social Security Administration. RPT 310. The social security number defendant used had been issued to someone else who resides in New York. RPT 311. Clearly, the State presented sufficient evidence to convince a rational fact finder that defendant used the financial information of another person.

Defendant testified that he bought his new identity from someone who made false identities and that the “more money that you pay, the better your identification is.” RPT 363. Defendant admitted that he had never gotten his name legally changed. RPT 371. Defendant also testified that he changed his identity so he could take a cosmetology test because a prior felony precluded him from being able to work with people older or younger than himself. RPT 358. By defendant’s own testimony, he purchased the identity to commit fraud.

Finally, the State presented sufficient evidence to prove that defendant obtained goods or services in excess of \$1,500. Defendant testified that he opened a Bank of America account under the name of Wayne King, because he thought that, “you are supposed to have a bank account to be a productive citizen in society.” RPT 360. Defendant stated that he rented a car, which he subsequently wrecked, and did not pay the bill. RPT 360-61. Ms. Doran, an assistant vice president with Bank of America, testified that defendant opened the account with a social security number and driver’s license for Wayne King. RPT 295. She also testified that Hertz Rent-a-Car had a withdrawal on the account for \$8,802.04 on July 29, 2004, and the account was closed for overdraft on October 19, 2004. RPT 298, 302-04. The bank wrote off defendant’s \$8,870.85 debt. RPT 298.

Defendant claimed he did not know about the debt until the bank closed his account. RPT 361. Defendant’s testimony suggests that he did

not mean to have this debt and would have taken care of it had he known about it. However, defendant also testified that rental car agency had his address and the bank sent him monthly statements, and he still made no attempt to pay the debt after he had been informed that it was owed. RPT 361, 377. Because credibility determinations are for the trier of fact, the jury was free to find defendant's suggestion that he was unaware of the debt not credible.

The State provided sufficient evidence to convince a reasonable fact finder that defendant obtained the social security number of a person living in New York, with the intent to hide a felony on his record, and defendant obtained \$8,870.85 from the Bank of America to cover his debt to Hertz Rent-a-Car.

5. DEFENDANT HAS FAILED TO PROVE  
PROSECUTORIAL MISCONDUCT.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998).

Defendant argues that the prosecutor committed misconduct warranting reversal when she violated the motion in limine and during her closing argument when she revealed testimonial hearsay, mischaracterized Ms. Doran's testimony, and misstated the law. See Appellant's Brief at 22, 39-42. Defendant's contentions are without merit.

a. Violation of the motion in limine.

As argued above, the prosecutor did not elicit any out of court statements made by Ms. Williamson to Sergeant Cassio. Because she did not elicit any of Ms. Williamson's statements, she did not violate the motion in limine.

b. Closing argument.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. State v. Russell, 125

Wn.2d 24, 85, 882 P.2d 747 (1994); Binkin, 79 Wn. App 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

Defendant failed to object at trial the prosecutors’ statement that, “[i]f you use a social security number that belongs to any person living or dead, you’re guilty of identity theft,” to which he now assigns error. RPT 453. He also failed to object to the prosecutor’s argument that defendant committed theft against Bank of America and Washington Mutual. RPT 453.

Because defendant has also failed to articulate how these statements was so flagrant or ill intentioned that it prejudiced the jury, he has waived the issues on appeal. “[C]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or an appeal.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (quoting Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

Even if defendant did preserve the issues, the record shows that the prosecutor did not misstate the law. A review of the prosecutor’s argument in its entirety shows that when she was discussing the social security number, she was defining the term, “financial information.” RPT 453. As the jury was instructed, “[a] person commits identity theft in the

first degree when he knowingly obtains, possesses, uses, or transfers a means of identification or financial information of any other person, living or dead, with the intent to commit . . . any crime and did obtain credit, money, goods, services, or anything of value in excess of \$1,500. CP 88. Prior to her argument regarding the social security number, the prosecutor stated, “[i]dentity theft, he knowingly obtained, possessed, used, or transferred - - when he got this false identity, maybe he did, maybe he did not, intend to commit a crime. . .” RPT 453. She also indicated that defendant later committed theft against the banks where he used his false identity. RPT 453. Defendant acquired a debt in excess of \$8,800 from Bank of America which he did not make any effort to pay back. RPT 304. His debt to the bank showed that he obtained credit, goods, or services as required by the statute for identity theft. These arguments together with the jury instruction show that the prosecutor did not misstate the law and was merely breaking the elements of the crime down for the jury.

Regarding the arguments defendant failed to object to, he argues that he was prejudiced only by the prosecutor’s referral to Sergeant Cassio’s testimony in closing. Defendant claims on appeal that the prosecutor committed misconduct when she “told the jury that Sergeant Cassio got a description of her pimp and his car from Ms. Williamson that matched Mr. Johnson and the car he was driving.” Appellant’s Brief at 39. Defendant’s argument mischaracterizes the prosecutor’s argument. At closing, the prosecutor stated:

Well, according to the information that Sergeant Cassio got, they thought there might be a pimp in the area, that [Ms. Williamson] was not working alone. What are some of the indicators? Well, she walked into the area. She didn't have a car. She is from someplace else, Seattle, I think. Somebody must be available to take her back to Seattle. What they do is cite and release her, and then they continue to surveil [sic] her to see what happens because they are thinking that somebody's going to show up. In fact, Sergeant Cassio has a description of a red car with a black hood and a description of the driver.

The three of them continue to watch Bridget Williamson after they release her, for nearly an hour, as she wanders around Pacific Avenue. Lo and behold, what happens? Leland Johnson shows up in a red car with a black hood matching the description that Bridget Williamson had given, black male in his mid-30s, I think' and he drives right up to [Ms. Williamson] and [Ms. Williamson] just hops right in that car. Well, gee, the deputies think this must be the pimp; so they pull the car over.

RPT 457. Clearly the argument, in its entirety, indicates that Ms. Williamson gave the description of a car and driver, but it was the *officers* who suspected defendant was Ms. Williamson's pimp. The prosecutor never argued that Williamson stated the driver was her pimp. The prosecutor does not suggest to the jury that Ms. Williamson told Sergeant Cassio that the car belonged to her pimp, but rather suggests that Ms. Williamson indicated that the car belonged to the person who was giving her a ride home to Seattle. This argument was not so flagrant or ill intentioned that it prejudiced the defense.

6. DEFENDANT IS NOT ENTITLED TO RELIEF  
UNDER THE DOCTRINE OF CUMULATIVE  
ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. Id. “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” Neder v. United States, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)(internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” Brown v. United States, 411 U.S. 223, 232, 93 S. Ct. 1565 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. Rose, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves

an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); State v. Coe, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); see also State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal..."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and non-constitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. See, Id. Conversely, non-constitutional errors have a lower harmless error test and weigh less on the scale. Id. Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial.

Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. See, e.g., Johnson, 90 Wn. App.

at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. See, e.g., State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”) (emphasis added).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error) and State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, see, e.g., State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State’s sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to

cumulative error), or because the errors centered around a key issue, see, e.g., State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, see, e.g., State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See Stevens, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that their trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. If the court does find error, defendant has nevertheless failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that the Court affirm defendant's convictions.

DATED: OCTOBER 24, 2006

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney



MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724

BY \_\_\_\_\_

STATE OF WASHINGTON

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COURT OF APPEALS



Kimberley DeMarco  
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/25/06 \_\_\_\_\_  
Date Signature