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SUPREME COURT NO. ________

NO. 85336-8-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AEURLIOUS DRAYTON,

Petitioner.

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

The Honorable David Keenan, Judge

PETITION FOR REVIEW

DAVID B. KOCH
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
2200 6TH Ave., Suite 1250
Seattle, WA 98121
(206) 623-2373

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A. IDENTITY OF PETITIONER

Aeurlious Drayton, appellant below, asks this Court to review his case.

B. COURT OF APPEALS DECISION

Drayton requests review of the Court of Appeals decision in State v. Drayton, COA No. 85336-8-I, filed April 14, 2025.

C. ISSUES PRESENTED FOR REVIEW

1. Was defense counsel ineffective under the Sixth Amendment for prematurely promising jurors that petitioner would testify to what actually happened, subsequently convincing petitioner not to testify, and then failing to acknowledge or explain this broken promise during closing arguments?

2. Is review appropriate where the Court of Appeals decision conflicts with In re Pers. Restraint of

Benn,[1] and the issue presents a significant question of constitutional law?

3. Did the trial court violate petitioner's Sixth Amendment rights by instructing jurors on an affirmative defense he did not raise and to which he objected?

4. Is review of this issue appropriate where the Court of Appeals decision conflicts with this Court's prior decisions?

5. Did the trial court violate petitioner's Sixth Amendment rights by denying an affirmative defense instruction supported by the evidence?

6. Is review of this issue appropriate where the Court of Appeals decision conflicts with this Court's prior decisions?

D. STATEMENT OF THE CASE

A jury convicted Aeurlious Drayton of attempted human trafficking in the second degree, rape of a child in

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[1] 134 Wn.2d 868, 952 P.2d 116 (1998).

the second degree, and promoting commercial sexual abuse of a minor. CP 117-120.

Drayton's Court of Appeals briefing discusses in detail the evidence leading to his convictions. See AOB, at 3-15.

In summary, the complaining witness was thirteen-year-old J.M., physically mature for her age, often mistaken for someone older, and running away from home. RP 1337-1338, 1431-1432, 1453, 1456-1457, 1634. J.M. accused Drayton of having intercourse with her and then encouraging her to engage in acts of prostitution by providing her with clothing, instructing her what to do, and driving her to Seattle. RP 1461-1462, 1473-1474, 1494-1496, 1507-1514, 1529-1531, 1539-1547.

The defense focused on J.M.'s established lack of credibility – casting doubt on her claims she told Drayton

she was 13 or that he had encouraged her to engage in prostitution – and the absence of any evidence that Drayton had ever previously engaged in prostitution activities. RP 1573-1576, 1602-1607, 1945-1948, 2189-2204.

As discussed below, Drayton made three claims on appeal relevant to this petition. See AOB, at 15-46; RBF, at 1-12. The Court of Appeals denied all three. See Slip Op., at 3-14. Drayton now seeks this Court's review.

E. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR PREMATURELY PROMISING EVIDENCE HE FAILED TO PRODUCE.

The Sixth Amendment to the United States Constitution guarantees the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Prior to trial, whether Mr. Drayton would testify in his own defense was an open question. See RP 180 ("should my client testify, we may allege a reasonable belief as to misrepresentation of the victim's age."); RP 183 ("should my client take the stand"); RP 189 ("if my client ultimately testifies"). This remained an open question during trial. See RP 1201 (discussing Mr. Drayton "potentially testifying in this case and what he might testify to"); RP 1201 ("there may be testimony from my client should he testify"); RP 1244 ("if my client testifies)"; RP 1398 ("I expect Mr. Drayton, should he testify, to not testify about . . . .").

After the State rested, Mr. Drayton indicated he had decided to testify, to which defense counsel responded, "I'll talk to my client during the lunch hour . . . ." RP 2021-2022. Following that discussion, Mr. Drayton decided not to take the stand, later complaining that his attorney had talked him out of testifying. RP 2026-2027, 2237-2238.

Despite Mr. Drayton's persistent uncertainty and ultimate decision not to testify, during opening statements, defense counsel unequivocally and repeatedly promised jurors Drayton would take the stand and provide compelling testimony requiring acquittals.

Regarding all three charges, defense counsel told jurors, "the only evidence presented in this case is going to be that of the alleged victim and the Defendant about what actually happened." RP 1054 (emphasis added).

Regarding the rape charge specifically, defense counsel told jurors:

> The State has to prove rape here by the statutory definition because the victim allegedly is unable to consent. But you'll also hear testimony in this case from Mr. Drayton that when he picked up the victim, she said she wanted to party, she represented that she was 18 years old, she had her own marijuana with her, and she was down for a ride to Seattle or whatever else was going to happen. Just like I don't got any place to go, let's go hang out. And so, off they went.

And this wasn't a drive into the unknown dark night as the State wants to characterize it. This was a joyride away from her problems. And she has duped my client unwittingly into harboring a minor and off he goes. And along the way she makes representations to him that would make most people blush concerning her interest in sex, what she wanted to do with him that night. And by all accounts-well, at least by Mr. Drayton's account, they continue in this sexually charged conversation . . . .

And you can see that I'm focusing on the testimony you're likely to hear from the two individuals because the officers don't know anything about the truth of what actually happened. . . . She may maintain that [she told Mr. Drayton she was 13 years old] on the stand, we don't know. But what we do know is that Mr. Drayton is going to tell you that, no, that's not the way it went down. I met this girl under circumstances that I would not have expected it to be a young person. They were out late at night. She looked old-old to me, she told me she was old, she was down to party, and she talked a good game about her experience with sex and drugs and with [inaudible].

. . . .

What I want to talk about is what she said that night to my client, ladies and gentlemen, and what he believed based on

> her representations. And that's what I want you to lean into in this trial, is that evidence.
>
> . . . .
>
> At its core, this case for you will come down to essentially a he said/she said situation. . . .

RP 1056-1058 (emphasis added).

Continuing to rely on favorable evidence only Mr. Drayton himself could provide, defense counsel said:

> Now, there's going to be evidence that there was sexual contact. That's a fact. But we don't know from that evidence anything about context. It doesn't tell us how it happened; it doesn't tell us what was said; it doesn't tell us who did what. . . . But again, ladies and gentlemen, that doesn't speak to what was said between the parties that evening, what information my client relied on. . . . Legally speaking, he was misled, he reasonably relied on her representations, and under the circumstances it was reasonable for him to do so. . . .

RP 1060 (emphasis added).

Defense counsel's promise and failure to deliver the very testimony he claimed would establish innocence

denied Mr. Drayton his rights to effective representation and a fair trial. In refusing to recognize this constitutional violation, however, the Court of Appeals cited this Court's opinion in Benn as "directly on point" and dispositive. Slip Op., at 5. It is neither.

In Benn, defense counsel promised jurors the defendant would testify because Benn had decided to take the stand. However, Benn unexpectedly changed his mind during the State's case. Benn, 134 Wn.2d at 897. This Court rejected Benn's argument that it is ineffective per se to call a promised witness, holding instead that the issue of deficient performance "'is necessarily fact-based.'" Id. at 897-898 (quoting United States v. McGill, 11 F.3d 223, 227 (1st Cir. 1993)).

Because the defense had decided that Benn would in fact testify, this Court indicated, "'assuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed

change of strategy in the midst of trial is 'virtually unchallengeable.'" Id. at 898 (quoting Turner v. Williams, 35 F.3d 872, 904 (4th Cir. 1994) (quoting Strickland, 466 U.S. at 690)). "Since counsel did not know their client was going to change his mind about testifying and are not responsible for his decision, the defendant cannot challenge their mid-trial change of strategy." Id.

Unlike Benn, whether Drayton would choose to testify *remained uncertain* when defense counsel provided his opening statement. And unlike Benn, once Drayton decided to testify at the close of the State's case, defense counsel *was responsible* for Drayton's change of mind. In declaring Benn dispositive in Drayton's case, the Court of Appeals ignored Benn's requirement of a "fact-based" inquiry in every case.

Rather than Benn, Drayton's case bears a striking resemblance to Ouber v. Guarino, where defense counsel was ineffective for presenting the client's testimony as the

centerpiece of the defense in opening statement and then subsequently advising the client against testifying. Ouber v. Guarino, 293 F.3d 19, 27 (1st Cir. 2002). Reading Ouber, one could easily conclude the court was discussing Drayton's case. Therefore, it is quoted at length here:

> At the heart of this appeal lies a broken promise (or, more precisely put, a series of broken promises): defense counsel's repeated vow that the jurors would hear what happened from the petitioner [him]self. Thus, the error attributed to counsel consists of two inextricably intertwined events: that attorney's initial decision to present the petitioner's testimony as the centerpiece of the defense (and his serial announcement of that fact to the jury in his opening statement) in conjunction with his subsequent decision to advise the petitioner against testifying. Taken alone, each of these decisions may have fallen within the broad universe of acceptable professional judgments. Taken together, however, they are indefensible . . . and we are unable to see the combination as part and parcel of a reasoned strategy. We therefore conclude that, in the absence of unforeseeable events forcing a change in strategy, the sequence constituted an error in professional judgment. . . .

Id. at 27 (citation omitted).

. . . .

> It is apodictic that a defendant cannot be compelled to testify in a criminal case . . . and criminal juries routinely are admonished – as was the jury here – not to draw an adverse inference from a defendant's failure to testify. But the defendant has the right to testify in [his] own defense, and, when such testimony is proffered, the impact on the jury can hardly be overestimated. When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made.
>
> The Commonwealth argues that a defendant's decision about whether to invoke the right to remain silent is a strategic choice, requiring a balancing of risks and benefits. Under ordinary circumstances, this is true. It is easy to imagine that, on the eve of trial, a thoughtful lawyer may remain unsure as to whether to call the defendant as a witness. If such uncertainty exists, however, it is an abecedarian principle that the lawyer must exercise some degree of circumspection. Had the petitioner's counsel temporized – he was under no obligation to make an opening

> statement at all, much less open before the prosecution presented its case, and, even if he chose to open, he most assuredly did not have to commit to calling his client as a witness – this would be a different case. *See* Phoenix v. Matesanz, 233 F.3d 77, 85 (1st Cir. 2000) (finding no ineffectiveness where, in the absence of an express promise, counsel chose not to call a potentially important witness).
>
> Here, however, the circumstances were far from ordinary. The petitioner's counsel elected to make his opening statement at the earliest possible time. He did not hedge his bets, but, rather acted as if he had no doubt about whether his client should testify. In the course of his opening statement, he promised, over and over, that the petitioner would testify and exhorted the jurors to draw their ultimate conclusions based on [his] credibility. In fine, the lawyer structured the entire defense around the prospect of the petitioner's testimony.

Id. at 28 (some citations and footnote omitted).

In cases of unfulfilled promises, "[t]he damage can be particularly acute when it is the defendant himself whose testimony fails to materialize[.]" United States ex rel. Hampton v. Leibach, 347 F.3d 219, 257 (7th Cir.

2003). Not surprisingly, therefore, the Ouber court found reversible prejudice. Ouber, 293 F.3d at 32-36. Describing counsel's failure to present the promised testimony as a "monumental" error, the court recognized that, by reneging on the repeated promise jurors would hear a very different version of events from the defendant himself, counsel had undermined his own credibility and his client's chances of success. Id. at 33-34.

Similarly, Mr. Drayton's attorney repeatedly promised Drayton would take the stand and produce exonerating evidence for the jury, yet failed to produce that evidence. Remarkably, counsel made these promises while it remained unclear whether Drayton would take the stand. Moreover, the record indicates defense counsel ultimately counseled Drayton *against* testifying. See RP 2021-2022, 2026-2027, 2237-2238.

Even supposing defense counsel eventually "had legitimate reasons to conclude that [Drayton] should not

testify, it was unreasonable for him to tell the jury that [Drayton] would take the stand. Nothing was to be gained from making that promise, only to renege upon it later without explanation."[2] Hampton, 347 F.3d at 258. This indefensible approach establishes deficient performance.

Drayton also suffered prejudice. Despite defense counsel's multiple express promises he would testify and explain what *really* happened, creating a "he said/she said situation," jurors only heard and considered what "she said." The unexplained failure to produce a counter narrative "may well have conveyed to the jury the impression that in fact there was no alternate version of the events that took place, and that the inculpatory

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[2] Defense counsel did not seem to fathom the importance of keeping his promises to jurors. Having already pledged Drayton's testimony, and while later discussing an issue outside the jury's presence, counsel said, "there has been reference in my opening statement to my client *potentially* testifying in this case and what he *might* testify to." RP 1201 (emphases added).

testimony of the prosecution's witness[] was essentially correct." Hampton, 347 F.3d at 258.

During the prosecutor's closing argument, he emphasized what jurors were surely already thinking. Contrary to what defense counsel had promised, "This is not a he-said-versus-she-said case." RP 2187.

During defense counsel's closing argument, jurors must have wondered if they were still watching the same attorney. In contrast to promises made during opening statement, defense counsel said, "as I told you at the beginning, we have a situation where we know very little about what happened except for an account provided to you by [J.M.]," "[n]obody here knows anything more or less than what she has provided," "the only evidence that you have to try and make heads or tails of what actually happened is that testimony provided by [J.M.]," "everything comes from [J.M.'s] account. Every material fact . . . here comes from [J.M.'s] statements," "You have

[J.M's] testimony and that's it with respect to what transpired on that evening," and "it all rests on her testimony." RP 2189-2193, 2200.

"Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been adverse to his client and may also question the attorney's credibility. In no sense does it serve the defendant's interests." Hampton, 347 F.3d at 259; see also Harris v. Reed, 894 F.2d 871, 879 (7th Cir. 1990) (reversal required where "counsel's opening primed the jury to hear a different version of the incident" and failure to present exculpatory testimony "left the jury free to believe [the prosecution's witness's] account of the incident as the only account" and to conclude "counsel could not live up to the claims made in opening.").

The Court of Appeals decision conflicts with Benn's fact-based inquiry and presents a significant question of constitutional law under the Sixth Amendment. Review is warranted under RAP 13.4(b)(1) and (b)(3).

2. THE TRIAL COURT VIOLATED DRAYTON'S SIXTH AMENDMENT RIGHTS BY INSTRUCTING THE JURY ON AN AFFIRMATIVE DEFENSE OVER HIS OBJECTION.

"Implicit in the Sixth Amendment is the criminal defendant's right to control his defense." State v. Lynch, 178 Wn.2d 487, 491, 309 P.3d 482 (2013) (citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983); State v. Coristine, 177 Wn.2d 370, 300 P.3d 400 (2013)). Instructing the jury on an affirmative defense over the defendant's objection violates this right. Lynch, 178 Wn.2d at 492 (quoting Coristine, 177 Wn.2d at 375)).

For the charge of promoting commercial sexual abuse of a minor in count 3, the State requested the following non-standard jury instruction:

> A person commits the crime of Promoting Commercial Sexual Abuse of a Minor if he or she knowingly advances the commercial sexual abuse of a minor.
>
> It is not a defense that the defendant did not know the minor's age. It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.
>
> Consent of a minor to the sexual conduct does not constitute a defense.

CP 188.

The first paragraph is based on WPIC 48.22. See 11 Wash. Prac, WPIC 48.22. The second paragraph is

based on RCW 9.68A.110(3). The third paragraph is based on RCW 9.68A.101(4).

The prosecutor indicated he was asking for the instruction because he expected defense counsel would argue Mr. Drayton did not know J.M.'s age and she appeared much older than she is. RP 2058. Defense counsel objected to the additional statutory language, and Judge Keenan initially agreed, indicating he would only give an unmodified WPIC 48.22. RP 2059.

The prosecutor then asked Judge Keenan to either place the added statutory language in a separate instruction or preclude the defense from arguing that Mr. Drayton believed J.M. was older. RP 2059.

Defense counsel responded (correctly) that he had every right to argue that jurors should disbelieve J.M.'s claim that she told Mr. Drayton she was 13, since it was more likely someone in her position, seeking a ride from an adult (as J.M. did), would portray herself as older, not

younger. The argument did not target the elements of this charge; rather, it was part of the effort targeting J.M.'s credibility generally, i.e., "You can't trust anything this witness says." RP 2060-2063.

Judge Keenan told defense counsel he would have difficulty allowing defense counsel's argument without the instruction. He then obtained confirmation that the State would not object to such an argument if the instruction were given. RP 2066.

The prosecutor had just provided defense counsel a working copy of the proposed instruction that morning. RP 2058. Studying it, defense counsel said, he needed to "gather his thoughts." RP 2066. Counsel expressed continued concerns regarding the non-standard language and the danger of curtailing his closing argument. RP 2067. He also specifically noted the second paragraph created an affirmative defense he would have to establish by a preponderance of the evidence. RP 2067.

Defense counsel decided at that point not to object to the first and second paragraphs but maintained his objection to the third. Defense counsel then also relented on the third paragraph after Judge Keenan indicated its inclusion would provide "the latitude that your client should have in making the argument[.]" RP 2068-2069.

Judge Keenan divided the State's proposed instruction into two instructions. The first paragraph – mirroring WPIC 48.22 and defining the crime – became instruction 21. CP 102. The second and third paragraphs – creating the affirmative defense based on age and indicating consent is not a defense – became instruction 28. CP 109.

Days later, after continued reflection, defense counsel changed his mind. When Judge Keenan heard formal objections and exceptions, defense counsel objected to:

> Instruction 28, which is the statutory defense language that the state has asked for in this. And I would just note exception to that based on the fact that it's not in the WPIC. And I understand why it's being offered, but we take exception to it.

CP 2134. Judge Keenan gave the instruction anyway. CP 109; RP 2147-2148.

Instructing jurors on the age-based affirmative defense for promoting commercial sexual abuse of a minor, over defense objection, violated Drayton's Sixth Amendment right to present a defense of his choosing. Lynch, 178 Wn.2d at 492.

Mr. Drayton's defense to promoting commercial sexual abuse of a minor was simple: because J.M. had proved herself unreliable, jurors should not believe her version of events for any of the crimes. RP 2189-2206. Moreover, Drayton had no previous history of similar conduct, and the State had not established that he provided, agreed to provide, or otherwise offered J.M.

anything of value in exchange for sexual conduct. See RP 2198, 2202-2203.

It was *never* Drayton's defense that he made a reasonable and bona fide attempt to ascertain J.M.'s true age by requiring her to produce a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper. Saddling him with such proof created an impossible task and made conviction more likely.

The State's affirmative defense instruction improperly "imposed a burden . . . that was greater than necessary to create reasonable doubt" on an element of the charge. See Lynch, 178 Wn.2d at 494 (citing Martin v. Ohio, 480 U.S. 228, 234, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987)). It risked confusing jurors on an issue not directly addressed with witnesses. Coristine, 177 Wn.2d at 381. It was particularly problematic where, as here, the case rested largely on witness credibility. Id. at 382. And

the fact the prosecutor argued strenuously for the instruction also undermines confidence that it had no impact. Id. at 382-383.

The Court of Appeals avoided reversing Drayton's conviction by incorrectly finding that defense counsel "acquiesced" to instruction 28. Slip Op., at 10.

CrR 6.15(c) requires the trial court to provide counsel with an opportunity to object to the giving of any instruction. "The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused." CrR 6.15(c). Defense counsel complied. He identified instruction 28 and specified "the statutory defense language that the state has asked for" because proof of that defense is not required by any pattern instruction. RP 2134. Judge Keenan was present days earlier for the extended discussion of this very instruction, during which defense counsel expressly noted the non-pattern

language created an affirmative defense that Drayton would have to establish. RP 2067.

"Hypertechnicality is not required. As long as the trial court understands why a party objects to a jury instruction, the objection is preserved for review." Millies v. LandAmerica Transnation, 185 Wn.2d 302, 310, 372 P.3d 111 (2016) (citing Washburn v. City of Federal Way, 178 Wn.2d 732, 747, 310 P.3d 1275 (2013)). And whether an objection is sufficient includes an examination of "extended discussions" concerning that instruction. Id. (citing Crossen v. Skagit County, 100 Wn.2d 355, 359, 669 P.2d 1244 (1983); Washburn, 178 Wn.2d at 747-748).

The Court of Appeals decision conflicts substantively with Coristine and Lynch and procedurally with this Court's decisions on error preservation. Review is appropriate under RAP 13.4(b)(1).

3. DRAYTON WAS DENIED HIS RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT DENIED AN AFFIRMATIVE DEFENSE INSTRUCTION FOR RAPE OF A CHILD.

The Sixth Amendment guarantees every defendant the right to present a defense, including use of jury instructions supported by the evidence. State v. Butler, 200 Wn.2d 695, 713, 521 P.3d 931 (2022) (citing, among other cases, Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

"A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1).

While "it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the

victim to be older . . . it is a defense which the defense must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim." RCW 9A.44.030(2). For child rape in the second degree, that age is "at least fourteen." RCW 9A.44.030(3)(b).

Mr. Drayton's attorney requested the pattern jury instruction for this defense. See RP 2074-2076, 2124-2126. The State objected, and Judge Keenan refused the instruction, finding no evidence K.M. affirmatively asserted she was at least 14 years old. RP 2076-2081, 2125-2126. This was error.

"Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case." State v.

Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003) (citing State v. Mark, 94 Wn.2d 520, 618 P.2d 73 (1980)). A party is entitled to any instruction supported by substantial evidence. State v. Griffith, 91 Wn.2d 572, 574-575, 589 P.2d 799 (1979). And when assessing evidentiary sufficiency, the evidence is viewed in the light most favorable to the defendant. State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005), review denied, 157 Wn.2d 1010, 139 P.3d 349 (2006).

In denying Mr. Drayton's request for WPIC 19.04, Judge Keenan relied on State v. Bennett, 36 Wn. App. 176, 672 P.2d 772 (1983), and State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015). RP 2076-2080. So did the Court of Appeals. Slip Op., at 11-13. Both cases are distinguishable.

In Bennett, the trial court properly denied the instruction because neither of the defendant's victims mentioned age. 36 Wn. App. at 181. The Bennett court

rejected the argument that a victim's "declarations" as to age "can consist of her behavior, appearance and general demeanor." Id. Because "there was no explicit assertion from either victim; the statutory defense was not available to Bennett." Id. a 182.

In O'Dell, the only conversation between the defendant and victim concerning age consisted of O'Dell telling the victim she appeared too young to be drinking alcohol, to which the victim replied, "I get that a lot." O'Dell, 183 Wn.2d at 688. This Court affirmed the trial court's rejection of the affirmative defense instruction, agreeing with that court's observation that the victim's comment "'doesn't say anything . . . about any specific ages.'" Id. (quoting trial judge).

Whereas Bennett was not entitled to the instruction in the absence of "some kind of explicit assertion from the victim" and O'Dell was not entitled because the victim didn't "say anything . . . about any specific ages," that

missing evidence was present in Mr. Drayton's case. K.M. testified that she told Mr. Drayton she was 13 years old and that Mr. Drayton expressed skepticism. RP 1453, 1456.

When weighing sufficiency of evidence supporting an affirmative defense, the evidence is interpreted "most strongly in favor of the defendant" and "'must be considered in light of all the evidence presented at trial, without regard to which party presented it.'" State v. George, 146 Wn. App. 906, 915, 193 P.3d 693 (2008) (quoting State v. Olinger, 130 Wn. App. 22, 26, 121 P.3d 724 (2005)).

Not only did J.M. testify that she provided a specific age, she admitted that she had lied about other aspects of her time with Mr. Drayton – initially claiming and later recanting allegations that Mr. Drayton pressured her to get in his vehicle, that he falsely promised to take her

home, and that she never wanted to go to Seattle. RP 1573-1576, 1602-1607.

Because J.M. admitted lying about her interactions with Mr. Drayton, and admitted telling Mr. Drayton she was a specific age, in the light most favorable to Mr. Drayton, the evidence supported an argument that J.M. also lied when testifying that the age she provided was 13.

Judge Keenan erred when he refused to instruct jurors on the affirmative defense in WPIC 19.04. The failure to permit instructions on a party's theory of the case, where there is evidence to support it, is reversible error. State v. Williams, 132 Wn.2d 248, 259-260, 937 P.2d 1052 (1997) (citing State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)).

The Court of Appeals decision conflicts with Butler, Redmond, Griffith, and Williams, which guarantee the

right to jury instructions necessary to present a defense. Review is appropriate under RAP 13.4(b)(1).

F. CONCLUSION

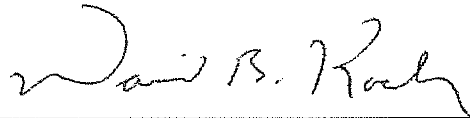
Mr. Drayton respectfully asks this Court to grant review.

I certify that this petition contains 4,994 words excluding those portions exempt under RAP 18.17.

DATED this 13th day of May, 2025.

Respectfully Submitted,

NIELSEN KOCH & GRANNIS, PLLC



DAVID B. KOCH, WSBA No. 23789
Attorneys for Petitioner

APPENDIX

FILED
4/14/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. AEURLIOUS E. DRAYTON, Appellant.	No. 85336-8-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Aeurlious Drayton appeals from the judgment and sentence entered on a jury's verdict convicting him of attempted human trafficking in the second degree, rape of a child in the second degree, and promoting commercial sexual abuse of a minor. We remand to strike the victim penalty assessment (VPA) and affirm in all other respects.

I

On the evening of January 19, 2022, 33-year-old Drayton encountered 13-year-old J.M. outside a restaurant in Tacoma, Washington. Drayton drove his vehicle into the parking lot, rolled down a window, and asked J.M. if she needed a ride. J.M. said yes and got into Drayton's car. When Drayton asked J.M. her age and whether she was in school, J.M. said she was 13 years old and attended a middle school.

Drayton began driving toward Seattle. During the drive, Drayton asked J.M. if she was "interested in getting money" through a "side hustle" and told her "it's legal for 13-year-olds to prostitute in California." Drayton then drove to his house to retrieve more revealing clothing for J.M., including a tank top, basketball shorts, and a thin robe. After retrieving this clothing, Drayton parked the vehicle on a secluded street and smoked cannabis with J.M. While they were parked, Drayton instructed J.M. to take off her clothes, which she did. Drayton then penetrated J.M.'s vagina with his finger, performed oral sex on her, told her to perform oral sex on him, which she did, and penetrated her vagina with his penis.

Afterwards, Drayton drove J.M. to an area near Aurora Avenue North in Seattle and explained various "rules" to J.M. for "getting him money by performing sexual acts," including which sexual acts to perform, what prices to charge for certain sexual acts, how to avoid other "pimps," which types of customers to solicit, and how to evade law enforcement. Drayton also gave J.M. items to assist her in performing the sexual acts, including the revealing clothing he obtained from his house, cash, brass knuckles, an umbrella, a condom, and a phone containing his contact information saved as the "Great Father." Lastly, Drayton instructed J.M. to tell customers that her name was Brianna and she was 21 years old. Drayton eventually dropped off J.M. on a street near Aurora Avenue North and told her to meet him at a nearby restaurant within an hour to give him the money she earned from performing sexual acts.

After being dropped off, J.M. walked to an apartment complex where she encountered police officers responding to an unrelated matter. J.M. handed

officers the items Drayton gave her and provided a description of Drayton and his vehicle. Shortly thereafter, police located and arrested Drayton several blocks away from the apartment complex, and they subsequently discovered J.M.'s belongings inside Drayton's vehicle. Meanwhile, J.M. was transported to a hospital where a sexual assault nurse examiner collected a vaginal swab from her. A DNA analyst later determined that semen recovered on this swab matched Drayton's DNA profile.

The State charged Drayton with three counts: (1) attempted human trafficking in the second degree, (2) rape of a child in the second degree, and (3) promoting commercial sexual abuse of a minor. A jury found him guilty as charged. Drayton was sentenced to a determinate sentence of 120 months on count 1, an indeterminate sentence of 280 months to life on count 2, and a determinate sentence of 318 months on count 3, all to run concurrently. Drayton appeals.

II

A. Ineffective assistance of counsel

Drayton first argues his trial counsel rendered ineffective assistance of counsel by telling jurors during his opening statement that Drayton would testify. We disagree.

A defendant alleging ineffective assistance of counsel must satisfy the two-prong *Strickland* test by showing that (a) "counsel's performance was deficient" and (b) "the defendant was prejudiced by the deficient performance." *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To

satisfy the deficiency prong, the defendant must establish that "counsel's performance fell below an objective standard of reasonableness in light of all the circumstances." *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 538, 397 P.3d 90 (2017). To overcome the strong presumption that counsel's performance was reasonable, the defendant must show that no legitimate trial tactic can explain counsel's performance. *Id.* at 539. Additionally, on direct appeal, we determine counsel's competency "based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Our Supreme Court's opinion in *In re Personal Restraint of Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998), is instructive on this issue. In that case, Benn's trial counsel conceded during opening statements in a murder trial that Benn had killed the victims and told the jury to instead focus on whether Benn acted with premeditation. *Id.* at 879, 897. Although Benn initially planned to testify, he subsequently "change[d] his mind" and chose not to testify after the State presented its case. *Id.* at 895, 898. Following his convictions, Benn filed a personal restraint petition alleging his counsel was ineffective because "it is ineffective per se to fail to call a promised witness, such as himself." *Id.* at 897. Our Supreme Court rejected Benn's argument and stated, "'[A]ssuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is 'virtually unchallengeable.'" *Id.* at 898 (quoting *Turner v. Williams*, 35 F.3d 872, 904 (4th Cir. 1994) (quoting *Strickland*, 466 U.S. at 690)). The court concluded, "Since counsel did not know their client was going to change his mind about testifying and

are not responsible for his decision, the defendant cannot challenge their mid-trial change of strategy." *Id.*

Benn is directly on point and disposes of Drayton's argument. The record indicates that at the time Drayton's counsel told jurors during his opening statement that Drayton would testify, Drayton indeed planned on testifying. When the trial court asked defense counsel after the State had rested whether Drayton would testify, Drayton himself responded, "Oh, I'm going to testify." And during a hearing on a post-trial motion filed by Drayton, he reiterated to the court that he "wanted to testify" at trial but changed his mind after conferring with defense counsel. Under *Benn*, Drayton cannot establish ineffective assistance of counsel merely because he subsequently chose not to testify. Although defense counsel's statements may appear unwise given Drayton's subsequent decision, we may not rely on hindsight in assessing the reasonableness of defense counsel's performance. *See State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) ("'[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'") (quoting *Strickland*, 466 U.S. at 689). On this record, defense counsel's performance did not fall below an objective standard of reasonableness in light of all the circumstances.

The federal authorities upon which Drayton relies in support of his ineffective assistance of counsel argument are not persuasive. In *Anderson v. Butler*, 858 F.2d 16, 18-19 (1st Cir. 1988), the First Circuit held that defense

counsel was ineffective for failing to produce expert testimony after promising to do so in his opening statement. Later, in *Ouber v. Guarino*, 293 F.3d 19, 28-29 (1st Cir. 2002), the First Circuit followed *Anderson* and held that defense counsel was ineffective for promising during his opening statement that the defendant would testify but not calling her as a witness later in the trial. Drayton's reliance on these cases is misplaced because our Supreme Court's opinion in *Benn*—which is binding on our court—expressly declined to follow *Anderson* and instead held, consistent with other federal cases, that counsel's failure to present promised evidence does not necessarily constitute defective performance. *See Benn*, 134 Wn.2d at 898 (citing *United States v. McGill*, 11 F.3d 223, 227 (1st Cir. 1993); *Turner*, 35 F.3d at 904).

Anderson and *Ouber* are also factually distinguishable. In *Anderson*, the promised witness was an expert witness whom defense counsel could compel to testify. 858 F.2d at 18-19. In Drayton's case, the promised witness was the defendant, who ultimately makes the decision whether to testify and can elect not to do so. *See Benn*, 134 Wn.2d at 898. And in *Ouber*, counsel knew the defendant's testimony would likely have been persuasive to jurors given the defendant had previously testified in two trials on the same charge that both resulted in hung juries. 293 F.3d at 29. In contrast, Drayton's counsel did not have the benefit of knowing how the jury would react to Drayton's testimony.

In sum, we conclude Drayton has not established deficient performance under the first *Strickland* prong. Because Drayton fails to demonstrate deficient performance, we need not address whether he has shown prejudice under the

second *Strickland* prong. *See State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) ("If either part of the test is not satisfied, the inquiry need go no further.").

B. <u>Right to present a defense</u>

Drayton claims the trial court violated his right to present a defense to the charge of promoting commercial sexual abuse of a minor by "instructing jurors on an affirmative defense over [his] objection." We disagree.

"Implicit in the Sixth Amendment is the criminal defendant's right to control his defense." *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013). "'Instructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense.'" *Id.* at 492 (quoting *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013)). But as controlling precedent makes clear, a defendant's right to present a defense is not violated where the defendant acquiesces to the instruction. *See Coristine*, 177 Wn.2d at 377 ("*[U]nless the accused has acquiesced* . . . , the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.'") (quoting *Faretta v. California*, 422 U.S. 806, 821, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)) (emphasis added). "Whether a Sixth Amendment right has been abridged presents a legal question that is reviewed de novo." *State v. Arndt*, 194 Wn.2d 784, 797, 453 P.3d 696 (2019).

During the discussion of proposed jury instructions prior to closing arguments, the prosecutor proposed the following instruction:

> A person commits the crime of Promoting Commercial Sexual Abuse of a Minor if he or she knowingly advances the commercial sexual abuse of a minor.
>
> It is not a defense that the defendant did not know the minor's age. It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.
>
> Consent of a minor to the sexual conduct does not constitute a defense.

The prosecutor also stated that if the trial court rejected the proposed instruction then he would move to "preclude [defense] Counsel from making any argument that the Defendant did not know the minor's age or believed her to be older than she was, because . . . those types of arguments are in direct violation of the law" and "the jury won't know that unless they are instructed . . . of the law."

In response to the proposed instruction and the prosecutor's argument, defense counsel contended he should be allowed to argue, without this proposed instruction, that J.M.'s testimony that she told Drayton she was 13 years old was "very unreliable" and that "[i]t's more likely than not that [J.M] told [Drayton] that she was, in fact, 18 years old and wanted to go for a ride and have some fun." Defense counsel also noted the second paragraph in the proposed instruction, which contains the affirmative defense language at issue, deviated from the pattern jury instructions. The prosecutor replied he would not object to defense counsel's argument if the court gave the proposed instruction, but would object if the court did not give it. Defense counsel then stated, "I understand logically the State's

position and . . . am concerned about cutting whole cloth and creating an instruction that does not exist in the WPICs in its entirety."

Following this exchange, the trial court told defense counsel it would "really have trouble letting you make that argument" without the proposed instruction because "the jury would hear you arguing that the Defendant didn't know how old [J.M.] was or believed her to be not a minor, but wouldn't be instructed that under RCW [9.68A.110(3)] it is not a defense that the Defendant did not know the alleged victim's age," which "would be confusing to the jury." Defense counsel then acquiesced to the State's proposed instruction, stating, "I think on balance the State can have their instruction. We keep the WPIC. They can have . . . the knowledge component with age . . . in a separate instruction." As to the third paragraph, defense counsel similarly agreed, "[I]f they [the State] want to keep the instruction in and it gives me more range to argue my theory of the case, then that's fine."

The next day, the trial court finalized the jury instructions and separated the prosecutor's proposed instruction into two final instructions, with the first paragraph becoming instruction 21 and the second and third paragraphs becoming instruction 28. When the trial court asked if the parties took exception to any of the instructions, defense counsel replied "we would adopt these instructions pursuant to our prior discussions and negotiations on the formation of them" and "we accept the instructions." After the parties agreed to these instructions, defense counsel stated he "would just note exception" to instruction 28 "based on the fact that it's

not in the WPIC," but added, "I understand why it's being offered." Instruction 28 was then given to the jury without further objection.

On this record, the trial court did not violate Drayton's right to a defense by giving the affirmative defense instruction as stated in instruction 28 over Drayton's objection because Drayton acquiesced to its substantive language. Drayton was presented with a choice between (a) proceeding without the instruction and urging the jury not to believe J.M.'s testimony that she told Drayton she was only 13 years old, to which the State would object, and (b) agreeing to the instruction and making this argument to the jury without objection from the State. Drayton chose the latter and proceeded to argue, without objection from the State, that the jury should acquit Drayton because it is "implausible" that J.M. told him she was 13 years old. Having acquiesced to the inclusion of the affirmative defense instruction, Drayton cannot show, as he must, that the trial court instructed the jury over his objection.

Given Drayton's acquiescence to instruction 28, the cases upon which he relies are inapposite because they involved defendants who clearly objected to an affirmative defense instruction on substantive grounds. *See Lynch*, 178 Wn.2d at 490 (defendant in an indecent liberties and second degree rape trial "objected to the consent instruction" because "he did not want to bear the burden of proving consent"); *Coristine*, 177 Wn.2d at 374 (defendant in second degree rape trial objected to instruction regarding whether he reasonably believed the victim was mentally incapacitated or physically helpless because his argument was "simply that the State failed to prove [the victim] was incapacitated"); *State v. McSorley*, 128 Wn. App. 598, 603, 116 P.3d 431 (2005) (defendant in child luring trial "most

strenuously" objected to affirmative defense instruction regarding the reasonableness of his actions and his intent because it would "impos[e] on him the burden of proving facts not in issue"); *see also State v. Jones*, 99 Wn.2d 735, 737-38, 664 P.2d 1216 (1983) (trial court erroneously entered a plea of not guilty by reason of insanity for the defendant "over [his counsel's] strenuous objections"). Unlike these defendants, Drayton acquiesced to instruction 28 so that he could argue his theory of the case to the jury without objection from the State.

Although Drayton subsequently took exception to instruction 28 after agreeing to its inclusion, this exception was solely "based on the fact that it's not in the WPIC," rather than based on the substantive language in the instruction. Drayton does not explain how his objection to the *form* of instruction 28 was sufficient to revive his earlier objection to its *substance*, which he had abandoned. Nor does he argue on appeal that a trial court deprives a defendant of their right to present a defense by giving a non-pattern jury instruction.[1] Accordingly, the trial court did not violate Drayton's right to present a defense by giving instruction 28.

C. Affirmative defense instruction

Drayton also contends the trial court erred in refusing to give his proposed affirmative defense instruction to the charge of rape of a child in the second degree. We disagree.

"A defendant is entitled to a jury instruction that is supported by substantial evidence in the record." *State v. O'Dell*, 183 Wn.2d 680, 687, 358 P.3d 359 (2015).

[1] To the contrary, we have recognized that "deviation from the language of the Washington Pattern Jury Instructions does not necessarily constitute error." *Humes v. Fritz Cos.*, 125 Wn. App. 477, 499, 105 P.3d 1000 (2005). That is especially true here because instruction 28 recites the language of RCW 9.68A.101(4) and .110(3).

In making this evidentiary determination, "the court must view the evidence in the light most favorable to the defendant." *Id.* at 687-88. We review a trial court's ruling that an affirmative defense instruction is unsupported by evidence for an abuse of discretion. *State v. Butler*, 200 Wn.2d 695, 713, 521 P.3d 931 (2022). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *State v. Ferguson*, 25 Wn. App. 2d 727, 735, 524 P.3d 1080 (2023).

The State prosecuted Drayton under RCW 9A.44.076(1), which states, "[a] person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and the perpetrator is at least thirty-six months older than the victim." In such prosecutions, RCW 9A.44.030(2) provides that "it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be." The statute creates one exception to the prohibition on this argument, namely that "it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim" was at least fourteen years old or was less than thirty-six months younger than the defendant "based upon declarations as to age by the alleged victim." *Id.*; RCW 9A.44.030(3)(b). A "declaration" for purposes of RCW 9A.44.030(2) refers to "some kind of explicit assertion from the victim," as opposed to the victim's "generalized, nonassertive manifestations of appearance, behavior and demeanor." *State v. Bennett*, 36 Wn. App. 176, 181-82, 672 P.2d 772 (1983); *see also O'Dell*, 183 Wn.2d at 688 (victim

did not make a declaration by stating, in response to defendant's comment that she appeared too young to be drinking, "I get that a lot").

Applying this statutory framework, the trial court did not abuse its discretion in rejecting Drayton's proposed affirmative defense instruction based on RCW 9A.44.030(2) because there is no evidence J.M. made a declaration that she was at least 14 years old or less than 36 months younger than Drayton. J.M. testified that she told Drayton she was 13 years old shortly after he picked her up in his vehicle. Drayton, who was 33 years old at the time, acknowledged J.M.'s age by telling her "it's legal for 13-year-olds to prostitute in California." There is no evidence in the record that J.M. told anyone she was at least 14 years old during the events in question. Viewing this evidence in the light most favorable to Drayton, there is insufficient evidence to support the affirmative defense contained in RCW 9A.44.030(2).

Drayton argues J.M. made a declaration for purposes of RCW 9A.44.030(2) because she "recant[ed] allegations that Mr. Drayton pressured her to get in his vehicle, that he falsely promised to take her home, and that she never wanted to go to Seattle." These discrepancies in J.M.'s story, Drayton argues, "supported an argument that J.M. also lied when testifying that the age she provided him was thirteen." This argument erroneously conflates J.M.'s statement to Drayton with her recanted statements to law enforcement. The affirmative defense is only available where the alleged victim's declaration relates "to age" and causes the defendant to "reasonably believe" the alleged victim is older than their true age before the defendant commits the offense. RCW 9A.44.030(2). But none of J.M.'s

statements to law enforcement that she would later recant related to her age. Nor could these statements have caused Drayton to reasonably believe J.M. was at least 14 years old before he committed the offense, given that J.M. made these statements outside of Drayton's presence after he already had sexual intercourse with her. Accordingly, the trial court did not abuse its discretion in denying Drayton's proposed affirmative defense instruction regarding rape of a child in the second degree.

D. Sufficiency of the evidence

In his statement of additional grounds (SAG),[2] Drayton argues the State presented insufficient evidence to support his conviction for attempted human trafficking in the second degree because "there was no force, fraud or coercion." Similarly, Drayton contends the State presented insufficient evidence to support his conviction for promoting commercial sexual abuse of a minor because J.M. "was free to walk away at any time." To determine whether sufficient evidence supports a jury's verdict, we must assess "whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014).

Both of Drayton's arguments fail because force, fraud, or coercion and lack of consent are not elements of the respective crimes. The trafficking statute provides, "If the victim of any offense identified in this section is a minor, force, fraud, or coercion are not necessary elements of an offense and consent to the . . .

[2] Drayton also filed a pro se personal restraint petition (PRP) concurrently with his SAG. Drayton subsequently filed a motion to withdraw his PRP, and a commissioner of this court granted that motion. Therefore, we do not address Drayton's PRP.

commercial sex act does not constitute a defense." RCW 9A.40.100(5). Likewise, the promoting commercial sexual abuse of a minor statute omits the victim's lack of consent as an element of the crime. *See* RCW 9.68A.101. Instead, the statute states, "Consent of a minor to the . . . sexual conduct does not constitute a defense to any offense listed in this section." RCW 9.68A.101(4). Accordingly, sufficient evidence supports Drayton's convictions on counts 1 and 3.

E. Double jeopardy

Drayton further argues his convictions for attempted human trafficking in the second degree and promoting commercial sexual abuse of a minor violate double jeopardy. We disagree.

The double jeopardy provisions of our federal and state constitutions bar multiple punishments for the same offense. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010) (citing U.S. Const. amend. V; Wash. Const. art. I, sec. 9). We review double jeopardy claims de novo. *Arndt*, 194 Wn.2d at 815. Where, as here, a defendant's act supports charges under two criminal statutes, we "must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *State v. Nysta*, 168 Wn. App. 30, 44, 275 P.3d 1162 (2012). "If the legislature intended that cumulative punishments can be imposed for the crimes, double jeopardy is not offended." *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007).

To determine whether the legislature intended to impose cumulative punishments, we follow four analytical steps: "(1) consideration of any express or implicit legislative intent, (2) application of the *Blockburger*, or 'same evidence,'

test, (3) application of the 'merger doctrine,' and (4) consideration of any independent purpose or effect that would allow punishment as a separate offense." *Arndt*, 194 Wn.2d at 816 (citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). "If legislative intent to allow separate punishments can be found in any of the four steps of the analysis, then there is no double jeopardy violation." *State v. Heng*, 22 Wn. App. 2d 717, 732, 512 P.3d 942 (2022), *aff'd*, 2 Wn.3d 384, 539 P.3d 13 (2023).

Drayton addresses only the second analytical step. Under the controlling *Blockburger* test, "double jeopardy principles are violated if the defendant is convicted of offenses that are identical in fact and in law." *Borrero*, 161 Wn.2d at 537. We consider the elements of the crimes "as charged and proved, not merely as the level of an abstract articulation of the elements." *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In other words, we determine "'whether the *evidence required* to support the conviction for [one offense] would have been sufficient to warrant a conviction upon the other.'" *State v. Lee*, 12 Wn. App. 2d 378, 398-99, 460 P.3d 701 (2020) (quoting *Nysta*, 168 Wn. App. at 47).

Drayton's double jeopardy argument is similar to the argument that the court rejected in *State v. Clark*, 170 Wn. App. 166, 189, 283 P.3d 1116 (2012). There, Clark was convicted of human trafficking in the second degree where the State alleged he "recruited, harbored, transported, provided, or obtained by any means" an adult victim "knowing that force, fraud, or coercion would be used to cause [the victim] to engage in forced labor or involuntary servitude." *Id.*[3] Clark was also

[3] The relevant statute for this offense provided that a person is guilty of trafficking in the second degree when such person "[r]ecruits, harbors, transports, provides, or obtains by any means

convicted of promoting prostitution in the first degree where the State alleged he "knowingly advanced prostitution by compelling [the victim] by threat or force to engage in prostitution." *Id.* at 190.[4]

On appeal, we concluded these offenses were not the same in law because the promoting prostitution statute required "proof that the defendant actually used force to compel a person to engage in prostitution," whereas the human trafficking statute required proof "the defendant knew that force, fraud, or coercion '*will be used*' in the future to cause another person to engage in forced labor or involuntary servitude by engaging in prostitution." *Id.* at 190-91 (citing former RCW 9A.88.070(1); quoting former RCW 9A.40.100(2)(a)(i)). We also noted that proof that the defendant recruited, harbored, transported, provided, or obtained by any means the victim was required to convict the defendant of human trafficking but not promoting prostitution. *Id.* at 191 n.12. We concluded the offenses were not the same in fact because the prosecutor was required to prove a different mens rea for each offense. As the prosecutor in *Clark* explained in closing argument, the jury had to find Clark knew that force was "going to be used" to convict him of human trafficking, whereas it had to find he knowingly used such force to convict him of promoting prostitution. *Id.* at 191. Therefore, Clark's convictions did not violate double jeopardy. *Id.* at 191-92.

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another person knowing that force, fraud, or coercion as defined in RCW 9A.36.070 will be used to cause the person to engage in forced labor or involuntary servitude." *Clark,* 170 Wn. App. at 189 (quoting former RCW 9A.40.100(2)(a)(i)).

[4] The relevant statute for this offense provided, "A person is guilty of promoting prostitution in the first degree if he or she knowingly advances prostitution by compelling a person by threat or force to engage in prostitution or profits from prostitution which results from such threat or force." *Id.*at 190 (quoting former RCW 9A.88.070(1)). The *Clark* court also noted, "Under RCW 9A.88.060(1), a person 'advances prostitution' if he causes a person to commit or engage in prostitution." *Id.* at 190 n.7.

For similar reasons, Drayton's convictions for attempted human trafficking in the second degree and promoting commercial sexual abuse of a minor do not violate double jeopardy. The State alleged Drayton committed attempted human trafficking in the second degree by "knowingly attempt[ing] to recruit, harbor, transport, or provide[] by any means another person, to-wit: J.M. . . . who had not attained the age of eighteen years and was caused to engage in a commercial sex act."[5] The State further alleged Drayton committed promoting commercial sexual abuse of a minor by "knowingly advanc[ing] the commercial sexual abuse of a minor to-wit: J.M."[6] As in *Clark*, these offenses are legally distinct. To prove attempted human trafficking the State had to show that Drayton took a substantial step toward recruiting, harboring, transporting, or providing J.M. knowing that J.M. would be caused to engage in a commercial sex act, whereas to prove promoting commercial sexual abuse of a minor the State had to show that Drayton knowingly advanced such abuse by presently instituting, aiding, or facilitating the abuse. Each offense includes an element not included in the other.

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[5] This language from the charging instrument aligns with the statutory language of the trafficking statute, which provides in relevant part that a person is guilty of human trafficking in the second degree when he or she "[r]ecruits, harbors, transports, transfers, provides, obtains, buys, purchases, or receives by any means another person knowing, or in reckless disregard of the fact . . . that the person has not attained the age of eighteen years and is caused to engage in . . . a commercial sex act." RCW 9A.40.100(3)(a). The State charged Drayton with an attempted crime rather than a completed crime because J.M. did not engage in a commercial sex act. Thus, the State had to prove that, with intent to commit human trafficking in the second degree, Drayton took a "substantial step toward commission of that crime." RCW 9A.28.020(1).

[6] This language from the charging instrument aligns with the promoting commercial sexual abuse of a minor statute, which provides that a person is guilty of this crime if they "knowingly advance[] commercial sexual abuse . . . of a minor," which in turn means to "engage[] in any . . . conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor." RCW 9.68A.101(1), (3)(a). A person is guilty of commercial sexual abuse of a minor if he or she "provides anything of value to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her," "provides or agrees to provide anything of value to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her," or "solicits, offers, or requests to engage in sexual conduct with a minor in return for anything of value." RCW 9.68A.100(1).

These offenses also are factually distinguishable based on the facts proven at trial. J.M. testified that Drayton invited her into his vehicle and drove her from Tacoma to Seattle. J.M. also testified that Drayton discussed prostitution during this drive by asking her if she was "interested in getting money" through a "side hustle" and telling her "it's legal for 13-year-olds to prostitute in California." Based on this evidence that Drayton recruited, harbored, transported, and/or provided J.M. for eventual engagement in commercial sex acts, the jury could have found Drayton guilty of attempted human trafficking in the second degree. But this testimony alone was not sufficient for the jury to find Drayton guilty of promoting commercial sexual abuse of J.M. Regarding that offense, J.M. testified that Drayton explained the rules for engaging in commercial sex acts, gave her items to help her engage in such acts, dropped her off in an area described by multiple witnesses as a high prostitution area, and told her when and where to meet him later to give him the money she earned by performing such acts. While this evidence was sufficient for the jury to find that Drayton advanced commercial sexual abuse of J.M. (as defined in footnote 6 above), it would have been insufficient to find that he attempted to traffic J.M. As the prosecutor emphasized in closing argument, the offenses "were committed through different means and at different stages of the timeline." Thus, Drayton's convictions are both legally and factually distinct under the *Blockburger* test.

Notwithstanding the dissimilarities between these offenses, Drayton argues his convictions offend double jeopardy because "[n]othing in the instructions or prosecutor's arguments foreclosed jurors from basing both convictions on the

same act." We previously rejected a similar argument in *Nysta*, where a defendant argued his convictions for second degree rape and felony harassment violated double jeopardy because evidence of the defendant's threat to kill the victim was "available" to prove both counts but the jury was not asked to specify what evidence they relied upon to support each conviction. 168 Wn. App. at 43, 49. We noted, "'If each [element] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Id.* at 45 (internal quotation marks omitted) (quoting *Brown v. Ohio*, 432 U.S. 161, 166, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)). Given evidence that Nysta used other forms of physical force to compel the rape, his convictions did not violate double jeopardy because "[t]he death threat was *available* to support the second degree rape, but it was not *required*." *Id.* Similarly here, despite overlap in the evidence available to establish attempted human trafficking in the second degree and promoting commercial sexual abuse of a minor, each offense ultimately required proof of a fact which the other did not.

The double jeopardy cases upon which Drayton relies are inapposite. In *State v. Kier*, 164 Wn.2d 798, 813-14, 194 P.3d 212 (2008), the court merged a second degree assault conviction into a first degree robbery conviction because it was "unclear from the jury's verdict whether the assault was used to elevate the robbery to first degree." Drayton's reliance on *Kier* is misplaced because his convictions for attempted human trafficking in the second degree and promoting commercial sexual abuse of a minor do not implicate the merger doctrine, which

applies only where "the degree of one offense is elevated by conduct constituting a separate offense." *Id.* at 804. That did not occur here.

Drayton's reliance on *State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998), is similarly misplaced. There, the court held that multiple convictions for cannabis possession violated double jeopardy under the "unit of prosecution" test, which we apply where a defendant is convicted of violating one statute multiple times. *Id.* at 634-35. The *Adel* court noted this test is designed to prevent prosecutors from "arbitrarily . . . divid[ing] up ongoing criminal conduct into separate time periods to support separate charges." *Id.* at 635 (citing *In re Snow*, 120 U.S. 274, 282, 7 S. Ct. 556, 30 L. Ed. 658 (1887)). In contrast, Drayton was convicted of violating several statutes, which, as the *Adel* court recognized, requires us to apply the *Blockburger* test instead of the unit of prosecution test. *See id.* at 633. Thus, the concerns about arbitrary temporal distinctions between charges that were present in *Adel* are not present in Drayton's case. *See Freeman*, 153 Wn.2d at 776 ("the mere fact that the same *conduct* is used to prove each crime is not dispositive" under the *Blockburger* test).

In sum, because Drayton's convictions for attempted human trafficking in the second degree and promoting commercial sexual abuse of a minor are legally and factually distinct under the *Blockburger* test, his double jeopardy argument fails on this basis.

F. VPA

Lastly, Drayton argues remand is necessary to strike the $500 VPA from his judgment and sentence because recent amendments to RCW 7.68.035 prohibit

the imposition of this fee against defendants who, like Drayton, are indigent at the time of sentencing. The State agrees the VPA should be stricken due to Drayton's indigency. We accept the State's concession and remand to the trial court to strike the VPA. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023) ("Although [the] amendment [to RCW 7.68.035] will take effect after Ellis's resentencing, it applies to Ellis because this case is on direct appeal.").

In all other respects, we affirm.

Feldman, J.

WE CONCUR:

Díaz, J.

Mann, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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