IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY JOHNSON, JR., Appellant.	No. 41141-5-II UNPUBLISHED OPINION

Hunt, J. — Anthony Johnson, Jr. appeals his jury convictions and sentences for two counts of first degree child molestation, two counts of first degree rape of a child, and one count of tampering with a witness. He argues that (1) the State committed prosecutorial misconduct in closing argument by commenting on his right to remain silent, commenting on witnesses' credibility, shifting the burden of proof, and appealing to the passions and prejudices of the jury; (2) the trial court abused its discretion in denying his motion to sever his witness tampering charge from his child molestation and child rape charges; (3) the trial court abused its discretion in denying his motion for a mistrial after a State witness violated an order in limine by inadvertently mentioning a polygraph test; and (4) the trial court committed cumulative error. In his statement of additional grounds (SAG), Johnson asserts that (1) the trial court's granting four

continuances violated his right to a speedy trial under the Sixth Amendment[1] and CrR 3.3; (2) he received ineffective assistance when his trial counsel objected to the State's polygraph testimony but did not immediately request a limiting instruction or that the trial court strike the answer; and (3) the trial court sentenced him improperly. We affirm.

FACTS

I. Child Molestation and Rape

Johnson met MA[2] in 2001, when her daughter, LA, was six months old. Johnson and MA began a romantic relationship, and he moved into her one-bedroom apartment. They had three more children together. Although Johnson was not LA's biological father, he considered her his "daughter," and LA referred to him as her "dad." 3 Verbatim Report of Proceedings (VRP) at 198; 6 VRP at 607. Johnson watched LA and his and MA's three other children while MA worked as the sole provider for the family.

Johnson frequently brought his other girlfriends into MA's apartment while the children were present. When LA once told her mother about Johnson's infidelities, Johnson threw LA across the room by her shirt and choked her until her mother intervened. According to LA, Johnson started touching her "private" and her "behind" when she was six or seven years old. 3 VRP at 200. He often told her to take off her pants and to lie on the bed with her face down while he got on top of her and touched her "down on bottom" "where he goes to the bathroom"

[1] U.S. Const. amend. VI.

[2] It is appropriate to provide some confidentiality in this case. Accordingly, it is hereby ordered that initials will be used in the body of the opinion to identify juveniles and other parties involved.

(with his penis), occasionally putting baby gel on her bottom when he did this. 3 VRP at 201-203. He made LA give him oral sex until "white stuff" came out, which made LA feel "nasty" and "like [she] wanted to throw up." 3 VRP at 206. Johnson also touched LA's "private" where she "[goes] to the bathroom" (vagina), which hurt and made her feel "bad." 3 VRP at 200-01, 208. Johnson may have touched LA more than ten times.

At some point, MA began suspecting that Johnson was touching LA in a sexual manner and asked LA, "Does your dad touch you in your private area?" 3 VRP at 258. LA responded, "Yes, he does." 3 VRP at 258. MA apologized to LA and told her it was "not going to happen again." Approximately one month later, in February 2008, MA and the children moved into a two-bedroom apartment, and Johnson did not live with them for several months. In May 2009, however, Johnson moved back in with the family.

MA continued to have suspicions about Johnson touching LA. One night, MA pretended to fall asleep in her bedroom while Johnson played a DVD[3] in the living room. He put the DVD on repeat and went into the bedroom where the children were sleeping. Approximately twenty minutes later, MA checked on Johnson and she found Johnson in the children's bedroom in his boxer shorts, "like laying [sic] on top of [LA]" with his penis exposed. 3 VRP at 262. Johnson apologized and said he did not know any better. MA agreed to give him one more chance but said she would leave him if he touched LA again.

On August 31, 2009, LA told MA that Johnson "did it again." 3 VRP at 266. MA took the children to stay with her aunt, who called the police. MA gave the police a handwritten

[3] The term "DVD" is an acronym for a digital video disc.

statement, moved with the children to a shelter, and on September 2 took LA to Saint Peter's Hospital Sexual Assault Clinic for a trauma examination.

Doctor Deborah Hall interviewed LA. During the audio recorded interview, LA pointed to a diagram of a man's penis, told Doctor Hall that Johnson had touched her with his "peanuts," described the "white stuff" that had come out of Johnson's penis, and explained that he had touched her vagina and it hurt. 4 VRP at 387. Doctor Hall performed two medical examinations of LA; she noticed that LA had an irregularly narrow hymen rim[4] and less hymen tissue than normal for an eight-year-old girl. Part of her vaginal tissue appeared "raw," and there were dark spots, suggesting bleeding under the skin. 4 VRP at 394. Doctor Hall also found two "healed scars"[5] in LA's vaginal area: According to Doctor Hall, the scarring in the "midline"[6] area of LA's vagina could have been congenital; but the scarring on the "sides" of her vagina was not congenital and was consistent with "penetrating trauma." 4 VRP at 395.

The police discovered fluid stains on the underwear and skirt that LA had worn on August 31. The skirt tested positive for semen and spermatozoa, which matched Johnson's DNA profile. No such test was performed on LA's underwear. On September 16, Kimberly Brune, a child interviewer for the Pierce County Prosecuting Attorney's Office, conducted a forensic interview of LA, which she video and audio recorded. LA again discussed Johnson's sexual abuse. On November 4, the State charged Johnson with two counts of first degree child molestation and two

[4] Doctor Hall explained, "[T]he hymen is a thin tissue that every little girl is born with . . . and it partially covers the vaginal opening." 4 VRP at 392.

[5] 4 VRP at 394.

[6] 4 VRP at 395.

counts of first degree child rape.

II. Witness Tampering

After his arrest, Johnson periodically called MA from jail, and MA began having "second thoughts" about proceeding with criminal charges against him. 2 VRP at 123. MA called Grant Blinn of the Pierce County Prosecuting Attorney's Office and asked him to dismiss the charges. When Blinn refused, she told him that LA had lied about the sexual abuse. MA then contacted Johnson's attorney and agreed to have defense investigator Nancy Austring interview LA. MA instructed LA to tell Austring that she (LA) had made up the allegations about Johnson, which LA did.

On June 7, 2010, Johnson again called MA from jail. During this audio recorded conversation, Johnson told MA that she and LA needed to continue saying that the sexual abuse allegations were untrue or Child Protective Services would take MA's children away from her. Specifically, he said:

> [JOHNSON]: You want to listen to me. You don't want to tell nobody that you, that you talked to me.
> [MA]: I know.
> [. . .]
> [JOHNSON]: So my attorney [sic] supposed to come interview you again. *You need to tell her that [the allegations against me are false]. If you do that, I could turn around and sue this place, I'll give you all that, and you know what I mean*?
> [MA]: Yeah.
> [JOHNSON]: Or why don't you go to Mom's? You know where that is.
> [MA]: Yeah.
> [. . .]
> [JOHNSON]: I know, but you have to stay straight with the [story] you gave my attorney. You have to or *they are going to take those kids away from you for life.*
> [. . .]
> [JOHNSON]: Don't trust these people—they're—they're—it's a tactic

> they use. I know it's hard to believe me but trust me on this. *You have to stay consistent on what you told my—my peoples. Understand?*

3 VRP at 301, 303-05 (emphasis added). Johnson then told MA that law enforcement knew where she was and that she needed to "shake that spot," which, according to MA, meant she needed to leave the shelter so she would not have to testify. 3 VRP at 316. Johnson also told MA that he had seen her uncle's picture in the newspaper and that he was "one of them, too."[7] 3 VRP at 311. Before hanging up, Johnson asked MA, "Can I count on you to help me out? . . . Can I count on the little one to help me out?" 3 VRP at 323. Based on this phone call, the State amended its information to add one count of tampering with a witness.

III. Procedure

A. Pretrial Motions

Johnson moved to sever the witness tampering charge from his child molestation and child rape charges, arguing that the offenses were not properly joined and that joinder could prejudice his trial by inviting the jury to draw an "adverse inference"[8] from his difficult relationship with his trial attorney, whom he had called "that b*tch" and "[my] so-called lawyer" during his June 7 phone conversation with MA. 1 VRP at 40. The State responded that (1) the witness tampering evidence was "cross admissible" to prove the child molestation and child rape charges, and (2) Johnson's statements during the conversation with MA to "shake that spot" (leave the shelter) and to "stay consistent" (testify falsely) were efforts to manipulate MA, which helped explain why MA had instructed LA to recant her sexual abuse allegations against Johnson. 1 VRP at 43-44.

[7] According to MA, her uncle was a sex offender.

[8] 1 VRP at 40.

Noting that some of the subject matter in the phone call was "incredibly prejudicial,"[9] the trial court denied Johnson's motion to sever, but it did not allow the State to play the audio taped phone call for the jury. Instead, the trial court and counsel agreed to a redacted transcript of the phone call, which the State and MA read in court.

The State moved to exclude any evidence relating to a polygraph that Johnson had taken and passed before trial. Johnson did not object, stating, "I believe that's the status of the law." 1 VRP at 74. The trial court granted the State's motion and excluded the polygraph evidence.

B. Trial

1. Motion for mistrial

At trial, MA testified that she had lied to Blinn when she said LA had made up her sexual abuse allegations against Johnson and then referred to a polygraph test:

> [STATE]: Did [LA] make these things up to you?
> [MA]: No. I mean, she didn't say none of that.
> [STATE]: Did Mr. Blinn do anything after you put that into email and left him voice messages?
> [MA]: Actually, he said, he told me that [Johnson] *could take a lie detector test* or something.
> [JOHNSON]: Your Honor—
> [COURT]: I want [the State] to ask another question.
> [STATE]: Sure.
> [STATE]: Did he agree to dismiss the charges?
> [MA]: No.

3 VRP at 273 (emphasis added). Johnson argued that MA's mentioning the polygraph possibility (1) created an "adverse inference" that he could have taken a polygraph test but he chose not to, or that he failed; and (2) violated his right to remain silent. 3 VRP at 278. The trial court

[9] 1 VRP at 45-46.

disagreed:

> No. What [MA] said was Mr. Blinn said something about a lie detector, and that's all, then it stopped. That's all we got. We don't have anything else.

3 VRP at 278.

The trial court offered to give a limiting instruction, which Johnson did not pursue. Johnson moved for a mistrial based on the same argument, emphasizing, "[W]e can't unring the bell." 3 VRP at 285. The trial court denied Johnson's mistrial motion but again offered to give a limiting instruction, which Johnson did not pursue. Later, however, the trial court gave the following instruction, which both the State and Johnson had requested:

> You heard testimony referencing a polygraph or lie detector test. Such tests are not admissible in the State of Washington because they are not reliable and *you are not to consider this testimony for any purpose*.

CP at 108 (Jury Instruction 5) (emphasis added).

2. Johnson's testimony

On direct examination, repeatedly using foul language, Johnson admitted (1) having numerous affairs with women; (2) having physically abused MA in the children's presence; (3) having hit LA when she told MA about his affairs; (4) having lied to the police about his birth date; and (5) using drugs and watching pornography in the children's presence. But Johnson denied having had sex with LA and trying to alter MA's testimony. He did, however, stipulate that LA's skirt had tested positive for semen and spermatozoa that matched his DNA profile, which, he claimed, had gotten onto LA's skirt when he and MA had "had sex" on top of a pile of dirty clothes the morning of August 31. 6 VRP at 670.

3. Closing argument

Johnson objected several times during the State's closing argument. The State informed the jury about the elements of the crimes, summarized the witnesses' testimony at trial, and compared Doctor Hall's and Brune's forensic interview techniques with Austring's defense interview techniques, during which LA had falsely recanted her testimony:

> You saw the words that . . . Austring used and you heard her, by her own admission, say a forensic interview is to find out what happened. It's to get details. "I [Austring] didn't do a forensic interview. I did a defense interview and the purpose of a defense interview is to help the defendant." *So you might as well take the truth and toss it out the window.*

7 VRP at 729-30 (second emphasis added). Johnson objected that this argument was a "misstatement and mischaracterization" of Austring's testimony. The trial court sustained the objection and struck the last sentence from the record. 7 VRP at 730. No curative instruction was requested or given.

The State then discussed LA's testimony as follows:

> The attention generated by allegations of sexual abuse is not positive, it's not fun. It's negative, it's cold, it's embarrassing. [LA] is not making this up for attention. She's not making this up to get herself out of a lie. *She's telling the truth about what happened to her when she was—*

7 VRP at 732 (emphasis added). Again Johnson objected; the trial court sustained the objection, struck the statement from the record, and instructed the jury to disregard the statement.

The State then discussed Johnson's claim that his semen had gotten onto LA's skirt because he had "had sex"[10] on top of a pile of dirty clothes:

> There is going to be an argument, well, they didn't have the panties tested and there was no semen that was found on the swabs [taken from LA's inner thighs]. Why would you test the panties if there's already semen on the skirt? Even if you . . . test[ed] the panties . . . *wouldn't he just say, "I had sex on the panties, too?"*

[10] 6 VRP at 670.

He's come up with an explanation for everything else.

7 VRP at 736-37 (emphasis added). Johnson objected that this argument "shift[ed] the burden" of proof. 7 VRP at 737. The trial court sustained the objection and struck the last portion of the argument from the record. Again, no curative instruction was requested or given.

The State also quoted United States Supreme Court Justice Benjamin Cardozo as having said, "'Justice that is due the accused is due the accuser, as well.' Justice in this case is justice for [LA]." 7 VRP at 742. Johnson objected, but the trial court overruled the objection. 7 VRP at 742. The State further argued: "[Johnson] talks about seeing [MA's] uncle's face in the newspaper and says, 'He's one of them, too.' And what is [MA's] uncle? A sex offender. *He's identifying himself with [MA's] uncle*." 7 VRP at 785 (emphasis added). Johnson objected; the trial court sustained the objection and asked the State to move on. Johnson did not request a curative instruction.

The State began its rebuttal closing argument by explaining that it alone had the burden of proof and the "responsibility and the obligation [of proving] each and every element [of Johnson's crimes] beyond a reasonable doubt." 7 VRP at 767. Then, the following colloquy ensued:

> [STATE]: I want to start with beyond a reasonable doubt. Do you have an *abiding belief* in the truth of [the] charges?
>
> [JOHNSON]: Objection, Your Honor. That misstates the burden of proof.
>
> [COURT]: That's overruled. The instructions are in your packet of beyond a reasonable doubt.
>
> [STATE]: You are given an instruction about what the burden of proof is. If after such consideration you have an *abiding belief in the truth of the charge, you are then—*
>
> [JOHNSON]: Again, objection. That only modifies what proof beyond a reasonable doubt is. It is not a substitute.
>
> [COURT]: The objection is overruled. I've given [this] instruction as to the law. This is argument.

> [. . .]
>
> [STATE]: It would be wonderful, lovely and amazing if [LA] could be 100 percent consistent all [of] the time, every time she made a statement about what her father did to her. [Y]ou can hold it against her that she is not an adult and that she can't say, "Yes. When I was six on May 3, 2007, it was raining . . . and I was wearing a red shirt and this is exactly what my dad did to me." You can't hold [LA] to that standard. You have to hold—
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> [JOHNSON]: Objection, Your Honor, misstates the law.
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> [COURT]: Overruled.
>
> [STATE]: You can't hold [LA] to that standard. *You have to hold the State to its burden of proof, though*. [. . .] Yes, she is not a hundred percent consistent in absolutely everything, but she doesn't need to be, *as long as you have an abiding belief that [LA] was sexually molested and raped by her father*.
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> [JOHNSON]: Again, objection, Your Honor, the standard is beyond a reasonable doubt.
>
> [COURT]: That's overruled.

7 VRP at 768-71 (emphasis added).

The State also summarized Johnson's statements in his June 7 phone call to MA from jail and then argued:

> Then what does he say after that? "You won't even imagine how evil [I would] be if I did." Those are the words you heard. That's the testimony you heard and those are the words from the defendant. You heard the transcripts, you heard the exact words. *Not once in that entire conversation does he ever deny—*

7 VRP at 786 (emphasis added). Johnson objected that this argument "shift[ed] the burden" of proof. 7 VRP at 786. The trial court sustained the objection, struck the statement from the record, and instructed the jury to disregard the statement.

C. Sentencing

The jury found Johnson guilty of two counts of first degree child molestation, two counts of first degree child rape, and one count of tampering with a witness, as charged. The trial court imposed standard range sentences: 198 months of confinement on each child molestation charge,

318 months on each child rape charge, and 16 months on the witness tampering charge, all to run concurrently. Johnson did not object to these sentences.

Johnson appeals his convictions and sentences.

ANALYSIS

I. Speedy Trial Rights

In his SAG, Johnson contends that the trial court violated his right to speedy trial under CrR 3.3 and the Sixth Amendment[11] when it granted four continuances in his trial. He is incorrect.

"Trial within 60 days is not a constitutional mandate,"[12] and there is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months."[13] A trial court may grant a trial continuance under CrR 3.3(f)(2) when a continuance is "required in the administration of justice," and the "defendant will not be prejudiced" in the presentation of his defense. Similarly, CrR 3.3(e)(8) allows a trial court to extend the time of trial for "[u]navoidable or unforeseen circumstances." Our courts have consistently held that the unavailability of counsel may constitute an unforeseen or unavoidable circumstance, warranting

[11] U.S. Const. amend. VI.

[12] *State v. Terrovona*, 105 Wn.2d 632, 651, 716 P.2d 295 (1986).

[13] *Barker v. Wingo*, 407 U.S. 514, 523, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

a trial extension.[14]

We will not disturb a trial court's grant or denial of a CrR 3.3 continuance or extension absent a showing of manifest abuse of discretion. *State v. Williams*, 104 Wn. App. 516, 520-21, 17 P.3d 648 (2001). The trial court abuses its discretion if it bases its decision on untenable grounds or on untenable reasons. *Williams*, 104 Wn. App. at 521. It is not a manifest abuse of discretion for a trial court to grant a continuance to allow a defense counsel opportunity to prepare for trial, even over the defendant's express objections, in order to ensure effective representation and a fair trial. *Williams*, 104 Wn. App. at 523 (citing *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984)).

Here, the trial court granted the State two continuances because the prosecutor was scheduled in other trials. The trial court also granted Johnson two continuances because his trial counsel broke her ankle, was unavailable for trial, needed to re-interview MA and LA after they recanted their sexual abuse allegations, and needed to prepare a defense for the State's new witness tampering charge. These were permissible bases for extending the time of trial under CrR 3.3(e)(8) and for granting a continuance under CrR 3.3(f)(2). Furthermore, Johnson has not demonstrated that these continuances prejudiced him in the presentation of his defense. Therefore, we hold that the trial court did not abuse its discretion in granting these continuances or deny Johnson's rights under CrR 3.3 or the Sixth Amendment.

[14] *State v. Carson*, 128 Wn.2d 805, 814, 912 P.2d 1016 (1996); *State v. Watkins*, 71 Wn. App. 164, 175, 857 P.2d 300 (1993); *State v. Kelley*, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992); *State v. Raper*, 47 Wn. App. 530, 539, 736 P.2d 680, *review denied*, 108 Wn.2d 1023 (1987); *State v. Stock*, 44 Wn. App. 467, 473, 722 P.2d 1330 (1986); *State v. Brown*, 40 Wn. App. 91, 94-95, 697 P.2d 583, *review denied*, 103 Wn.2d 1041 (1985).

II. Motion To Sever

Johnson next argues that the trial court erred in denying his motion to sever for trial his witness tampering charge from his child molestation and child rape charges. We hold that the charges were properly joined and the evidence for each charge was cross-admissible. Thus, Johnson's argument fails.

We review for a manifest abuse of discretion a trial court's denial of a CrR 4.4(b) motion to sever multiple offenses. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). A defendant seeking severance has the burden of demonstrating that a trial involving all counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. *Bythrow*, 114 Wn.2d at 718. Joinder of offenses carries the potential for prejudice if (1) the defendant may have to present separate, possibly conflicting, defenses; (2) the jury may infer guilt on one charge from evidence of another charge; or (3) the cumulative evidence may lead to a guilty verdict on all charges when, if considered separately, the evidence would not support every charge. *Bythrow*, 114 Wn.2d at 718. In determining whether the potential for prejudice requires severance, a trial court must consider the strength of the State's evidence on each count, the clarity of defenses as to each count, the court's instructions to the jury to consider each count separately, and the admissibility of evidence of the other charges even if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995); *State v. Sanders*, 66 Wn. App. 878, 885, 833 P.2d 452 (1992) (such factors may "offset or neutralize the prejudicial effect of joinder").

Contrary to the requirements of RAP 10.3(6), Johnson does not include argument in his

appellate brief detailing *how* joining offenses for trial prejudiced him; instead, he baldly asserts the trial court noted that his telephone conversation from jail was "incredibly prejudicial," which Johnson takes out of context.[15] Br. of Appellant at 26. (quoting 1 VRP at 45). Again, Johnson carries the burden of proof on appeal.

To show that the trial court abused its discretion in denying severance, "the defendant must be able to point to *specific prejudice*." *Bythrow*, 114 Wn.2d at 720 (emphasis added). The trial court's lone statement, taken out of context, is not sufficiently specific to prove that joinder of Johnson's offenses for trial prejudiced him. We hold, therefore, that because Johnson has failed to meet his burden to show prejudice, he has also failed to show that the trial court abused its discretion in denying his motion for severance.[16]

III. Denial of Mistrial

A. Passing Non-specific Reference to a Polygraph

Johnson argues that (1) trial court abused its discretion in denying his motion for mistrial because MA's passing reference to a polygraph test led the jury to infer that he had refused to

[15] It appears the trial court was simply noting that some of the phone call's content was prejudicial. Accordingly, the trial court did not allow the State to play the entire taped phone call for the jury; instead, the trial court assisted the parties in creating a redacted transcript, deleting the prejudicial dialog during Johnson's phone call to MA from jail. *See* 1 VRP at 48-49; 3 VRP at 300-28. Johnson did not object when the State read these redacted portions to the jury.

[16] Although we could end our inquiry here, we further note that Johnson has not demonstrated (1) that presenting separate defenses to the charges caused him to present conflicting defenses, (2) that joinder of his offenses invited the jury to cumulate evidence of guilt or to infer that he had a criminal disposition, or (3) that the evidence for these multiple offenses was not relevant or cross-admissible. *See, e.g.*, *Sanders*, 66 Wn. App. at 885-86. Moreover, the trial court properly instructed the jury to consider each count separately. *See* CP at 109 (Jury Instruction 6).

take a polygraph test or that he had failed such test, thus undermining his presumption of innocence with false evidence; and (2) this taint was too great to guarantee him a fair trial. The State responds that the comment was inadvertent, harmless, and did not prejudice Johnson. We agree with the State.

We review for abuse of discretion a trial court's denial of a mistrial.[17] The trial court should grant a mistrial "'only when the defendant has been so prejudiced that nothing short of a new trial can [e]nsure that [the] defendant will be tried fairly.'"[18] To be prejudicial, the claimed error must have affected the outcome of the trial.[19] In determining the effect of an irregular occurrence during trial, we examine the error's seriousness, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A reviewing court will not consider whether the polygraph reference was deliberate or inadvertent. *State v. Weber*, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983).

In Washington, evidence of polygraph tests is generally inadmissible absent the parties' stipulation. *State v. Rupe*, 101 Wn.2d 664, 690, 683 P.2d 571 (1984). Nevertheless, "'[t]he mere fact [that] a jury is apprised of a lie detector test is not necessarily prejudicial *if no inference as to the result is raised* or if an inference raised as to the result is not prejudicial.'"[20] Thus, a witness's

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[17] *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).

[18] *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (quoting *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)).

[19] *State v. McMurray*, 40 Wn App. 872, 876, 700 P.2d 1203 (1985).

[20] *State v. Sutherland*, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980) (emphasis added) (quoting

passing reference to polygraph test, or to the mere possibility that a person could have taken a polygraph test, is not necessarily reversible error unless the testimony raises an inference about the test's result. Such was not the case here.

Johnson compares MA's inadvertent remark that he could have taken a polygraph test to *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987), in which Division One of our court reversed a defendant's conviction because the victim had testified that, on the day of his being stabbed, he was nervous because he knew that the defendant "'already ha[d] a record'" and that he "'had stabbed someone'" else. Br. of Appellant at 30-32 (quoting *Escalona*, 49 Wn. App. at 253). In holding that the trial court abused its discretion in denying a mistrial, Division One emphasized that this testimony was "extremely serious" because it implied the defendant's guilt based on propensity evidence, which Washington's evidentiary rules specifically prohibit, and because the State's evidence was otherwise weak. *Escalona*, 49 Wn. App. at 255. In contrast, MA's passing remark that Johnson "could take a lie detector test or something"[21] did not imply Johnson's guilt based on propensity evidence; nor did it imply that Johnson had even taken a polygraph test, that such test had been offered to him, or that there were any test results.

We further note that MA's comment occurred in the context of a seven-day trial and that neither the trial court nor counsel drew further attention to the comment or mentioned a polygraph. In addition, unlike the facts in *Escalona*, the State's evidence against Johnson was

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State v. Descoteaux, 94 Wn.2d 31, 38, 614 P.2d 179 (1980), *overruled on other grounds by State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982)).

[21] 3 VRP at 273.

strong; thus, it is unlikely that MA's passing remark, which was not "extremely serious,"[22] affected the jury's verdict. But to neutralize any possible prejudice, at *both* counsel's request, the trial court instructed the jury that polygraph evidence is not admissible in Washington and that it should not consider the testimony "for any purpose." CP at 108 (Jury Instruction 5). "'A jury is presumed to follow jury instructions and that presumption will *prevail* until it is overcome by a showing otherwise.'" *Carnation Co., Inc. v. Hill*, 54 Wn. App. 806, 811, 776 P.2d 158 (1989) (quoting *Tennant v. Roys*, 44 Wn. App. 305, 315, 722 P.2d 848 (1986)), *aff'd*, 115 Wn.2d 184, 796 P.2d 416 (1990); *see also State v. Stenson*, 132 Wn.2d 668, 730, 940 P.2d 1239 (1997).

Because MA's passing polygraph comment did not infer the test's results, the testimony was brief, and the trial court instructed the jury to disregard the testimony, we hold that Johnson did not suffer any prejudice and that the trial court did not abuse its discretion in denying his mistrial motion.

B. Ineffective Assistance of Counsel

In his SAG, Johnson contends that his trial counsel's failure to ask the trial court to strike MA's polygraph comment from the record, or contemporaneously to instruct the jury to disregard the statement, constituted ineffective assistance of counsel.[23] This claim fails.

We review ineffective assistance of counsel claims de novo. *State v. White*, 80 Wn. App.

[22] *Escalona*, 49 Wn. App. at 255.

[23] Johnson also asserts that counsel's failure to move to strike and to request a curative instruction violated his privilege against self-incrimination and his right to be presumed innocent. He does not attempt to explain how or why this might be the case. And based on the record before us, we see no evidence of any such violations. Accordingly, we do not further consider these assertions.

406, 410, 907 P.2d 310 (1995). To prevail on such a claim, a defendant must show (1) deficient representation by trial counsel and (2) resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) (adopting the test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Our scrutiny of a trial counsel's performance is highly deferential; it presumes that counsel provided reasonable assistance. *Thomas*, 109 Wn.2d at 226. "[T]he defendant must show in the record the absence of legitimate strategic or tactical reasons" for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). If counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); *State v. Breitung*, ___ Wn.2d ___, 267 P.3d 1012, 1015 (2011). To show prejudice, the defendant must demonstrate that, but for his counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *Grier*, 171 Wn.2d at 34. A defendant must meet both prongs; failure to show either prong will end our inquiry. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

Johnson does not show that his trial counsel provided deficient representation or resulting prejudice. The record indicates that Johnson's trial counsel did not request a limiting instruction immediately after MA mentioned a polygraph test because counsel did not want to draw attention to the evidence after the trial court ruled it inadmissible: The trial court twice asked whether it should give the jury a curative instruction; both times Johnson's counsel refused, adding, "[W]e are in a rock and a hard place now, you know, highlighting it, you can't unring that bell." 3 VRP at 285. Counsel's failure to request a contemporaneous limiting instruction was, therefore, a

legitimate, strategic or tactical decision, which does not amount to deficient performance. Having found no deficient performance, we need not address the prejudice prong; nevertheless, we note that the trial court's later jury instructions required the jury to disregard any evidence that they had heard about a polygraph test. Because a jury is presumed to follow the trial court's instructions, Johnson does not demonstrate prejudice. *Carnation Co., Inc.*, 54 Wn. App. at 811. Accordingly, Johnson's ineffective assistance of counsel claim fails.

IV. Prosecutorial Misconduct

Johnson's main argument is that the prosecutor made numerous statements in closing argument that amounted to prosecutorial misconduct and denied him a fair trial. Specifically, he argues that the prosecutor (1) commented on his right to remain silent, (2) commented on witnesses' credibility, (3) shifted the burden of proof, and (4) appealed to the passions and prejudices of the jury. These arguments fail.

A. Standard of Review

We review for abuse of discretion trial court rulings based on allegations of prosecutorial misconduct. *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29 (1995). To prove prosecutorial misconduct, the defendant must demonstrate that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Prejudice exists where there is a "substantial likelihood the misconduct affected the jury's verdict." *Brown*, 132 Wn.2d at 561. Where a defendant objected at trial on the basis of prosecutorial misconduct, we give deference to the trial court's ruling because "'[t]he trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced [the] defendant's right to a fair

trial.'" *Stenson*, 132 Wn.2d at 719 (internal quotation marks omitted) (quoting *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)).

In addition, a prosecutor has wide latitude in closing arguments to draw reasonable inferences from the facts in evidence and to express such inferences to the jury. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). We review any allegedly improper statements "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *Dhaliwal*, 150 Wn.2d at 578. Furthermore, an objection and an appropriate jury instruction may also cure any resulting prejudice. *See State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

B. Comment on Right To Remain Silent

Johnson argues that the prosecutor commented on his right to remain silent when she argued: (1) "[W]ouldn't he [Johnson] just say, 'I had sex on the panties, too?' He's come up with an explanation for everything else"[24]; and (2) "[n]ot once in that entire conversation [did] he ever deny—,"[25] inferring that Johnson did not deny that he had abused LA in his June 7 phone call to MA from jail. We disagree.

Both the state and federal constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to remain silent. U.S. Const. amend. V; Wash. Const. art. I, § 9; *see also State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). Although it is

[24] Br. of Appellant at 13 (quoting 7 VRP at 737).

[25] 7 VRP at 786 (emphasis added).

improper for a prosecutor to imply that the defendant has a duty to present evidence or to suggest to the jury that the defendant's silence is an admission of guilt, a prosecutor may properly comment on the strength of its own evidence. *State v. Cleveland*, 58 Wn. App. 634, 647-48, 794 P.2d 546 (1990); *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). For example, a prosecutor may comment that certain testimony is unrefuted as long as there is no reference to who could have denied it. *Brett*, 126 Wn.2d at 176; *see also State v. Ashby*, 77 Wn.2d 33, 38, 459 P.2d 403 (1969). In addition, a prosecutor may comment on the absence of evidence on a particular issue if persons other than the accused could have testified as to that issue. *Brett*, 126 Wn.2d at 176.

Johnson argues that the prosecutor's statements here were similar to those in *State v. Reed*, in which Division Three of our court held that a prosecutor committed prosecutorial misconduct when he argued in closing, "Nobody has said, 'Yes, I was paid.' . . . But the evidence in this case has to be that [the defendant] was not paid, because there is nothing to rebut that." Br. of Appellant at 14 (quoting *State v. Reed*, 25 Wn. App. 46, 49, 604 P.2d 1330 (1979)). The court held that these statements were a direct reference to the defendant's failure to testify because he was the only person who could have testified that he had been paid. *Reed*, 25 Wn. App. at 49. In contrast, because Johnson did not exercise his right to remain silent but instead testified at trial, it is unlikely that the jury interpreted the prosecutor's statements as a comment on Johnson's failure to testify or his right to remain silent. Furthermore, Johnson expressly admitted that it was his semen on LA's skirt and then went on to explain how it had come to be there accidentally.

When read in the context of the prosecutor's entire argument and the issues in the case, the prosecutor's closing argument merely anticipated Johnson's closing argument that the State had not proven his guilt beyond a reasonable doubt because it did not perform a DNA analysis on LA's underwear and that, unlike the semen on LA's skirt, the cotton swabs from her inner thighs did not reveal any of his DNA. The prosecutor's closing argument statement, thus, reminded the jury that the State had presented clear evidence of Johnson's semen on LA's skirt and that, if it had also tested LA's underwear, Johnson likely would have come up with an excuse for its presence there, too. The record shows that the prosecutor did *not* comment on any failure of Johnson to testify or any failure to present specific rebuttal evidence. The prosecutor merely argued reasonable inferences that the jury should draw from the evidence at trial, which was permissible closing argument.

Even assuming, without deciding, that the prosecutor's second challenged statement—that "[n]ot once . . . [did] [Johnson] ever deny"[26] sexually abusing LA in his phone call to MA from jail—was improper, Johnson fails to show that it prejudiced him. The trial court sustained Johnson's objections, struck this part of the prosecutor's argument from the record, and instructed the jury that it needed to "disregard" the prosecutor's statements. 7 VRP at 786. And, although, Johnson did not seek a more specific curative instruction, the trial court also instructed the jury that the attorney's statements were "not evidence," that it must "disregard any remark, statement, or argument that [was] not supported by the evidence or the law,"[27] and that

> [i]f evidence was not admitted or was stricken from the record, then you are not to

[26] 7 VRP at 786.

[27] CP at 103 (Jury Instruction 1).

> consider it in reaching your verdict. [I]f I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

CP at 102 (Jury Instruction 1). Washington courts have held that virtually identical jury instructions "substantially mitigated" any prejudice resulting from a prosecutor's improper closing argument. *See e.g.*, *State v. Papadopoulos*, 34 Wn. App. 397, 401, 662 P.2d 59 (1983), *overruled on other grounds by State v. Davis*, 101 Wn.2d. 654, 658-59, 682 P.2d 883 (1984). Furthermore, we presume that the jury followed the trial court's instructions. *Stenson*, 132 Wn.2d at 730. Given the strength of the State's evidence against Johnson and the trial court's jury instructions, we hold that Johnson has failed to prove that there was a "substantial likelihood the misconduct affected the jury's verdict" and his prosecutorial misconduct argument fails. *Brown*, 132 Wn.2d at 561.

C. Comment on Witnesses' Credibility

Next, Johnson argues that the prosecutor impermissibly commented on witnesses' credibility when she (1) mocked Austring as having testified, "'I did a defense interview and the purpose of a defense interview is to help the defendant.' So you might as well take the truth and toss it out the window"[28]; and (2) discussed LA's testimony, stating, "She's not making this up to get herself out of a lie. She's . . . telling the truth about what happened to her when she was—." Br. of Appellant at 16 (quoting 7 VRP at 732). This argument also fails.

It is improper for a prosecutor to state a personal belief about the credibility of a witness or to vouch for a witness's credibility. *Warren*, 165 Wn.2d at 30; *State v. Jackson*, 150 Wn. App.

[28] Br. of Appellant at 16 (quoting 7 VRP at 729-30).

877, 883, 209 P.3d 553 (2009). But a prosecutor may argue an inference from the evidence, and we will not find prejudicial error "unless it is 'clear and unmistakable' that counsel [was] expressing a personal opinion." *Brett*, 126 Wn.2d at 175 (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

Johnson argues that the prosecutor's statements here were similar to those in *Sargent*, in which Division One of our court reversed based on the prosecutor's having argued: "*I believe* [the witness]. *I believe him* when he tells us that he talked to the defendant." *Sargent*, 40 Wn. App. at 343, 345. The court held that these statements were both improper and prejudicial because they bolstered the credibility of the only witness directly linking the defendant to the crime, and all other evidence against the defendant was circumstantial. *Sargent*, 40 Wn. App. at 345. Again, even assuming, without deciding, that the prosecutor's statements here were improper, Johnson fails to show prejudice because it is not "clear and unmistakable" that the prosecutor was expressing a personal opinion about the witnesses' credibility. In contrast to *Sargent*, Johnson's prosecutor did not *explicitly* state that she personally "believed" LA or that she "disbelieved" Austring.

Arguably, the prosecutor was asking the jury to infer from the evidence that Austring's aggressive and leading interview techniques[29] and her motivations for conducting LA's interview may have been suspect given her admitted assertion that she did a "defense interview,"[30] the

[29] The State had presented evidence that Austring's interview methods were suggestive in that she had used leading questions and LA's mother, who had told LA to lie, had been present for LA's interview.

[30] 6 VRP at 545.

purpose of which was to gather information "beneficial to the defendant" and "to assist in the defense." 6 VRP at 572. Johnson does not show that the prosecutor exceeded her wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to jury. *Gregory*, 158 Wn.2d at 860.

Similarly, taking the record as a whole, it is not "clear and unmistakable" that the prosecutor's comment that LA was "telling the truth"[31] was a reference to the prosecutor's personal opinion about the child's testimony. In presenting his defense, Johnson focused on LA's having recanted her sexual abuse allegations and having given conflicting testimony about Johnson's sexual abuse. Thus, the prosecutor's statements about LA's age, the stigma and embarrassment associated with sexual abuse, and her lack of motivation to lie were reasonable inferences from the evidence and legitimate responses to Johnson's attack on LA's credibility.[32]

Moreover, Johnson has failed to show prejudice because the trial court sustained his objections, struck the comments from the record, and instructed the jury to "disregard" the prosecutor's comment that LA was "telling the truth." 7 VRP at 732. As we have previously noted, we presume that the jury followed the trial court's instructions. Accordingly, we presume that the trial court's oral admonishments and its instructions to the jury cured any prejudicial effect that the statements may have had.

D. Shifting Burden of Proof

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[31] 7 VRP at 732.

[32] *See Warren*, 165 Wn.2d 24-25 (drawing a distinction between arguing that a child's memory should not be confused with credibility and arguing that a defendant is not entitled to the "benefit of the doubt").

Johnson argues that the prosecutor "misstated the burden of proof" in rebuttal closing argument when she referenced the "'abiding belief'" language in the trial court's jury instructions. Br. of Appellant at 18 (quoting 7 VRP at 768). This argument also fails.

We begin by noting that (1) the prosecutor's statements mirrored the language in the court's jury instruction on reasonable doubt; and (2) Division Three of our court has approved a virtually identical jury instruction that included the "abiding belief" language, holding that, when read as a whole, the instruction adequately informed the jury that the State had the burden of proving each element of an offense beyond a reasonable doubt. *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988); *accord State v. Tanzymore*, 54 Wn.2d 290, 291, 340 P.2d 178 (1959) (referring to the instruction as the "standard instruction on reasonable doubt"). We hold, therefore, the trial court's instruction, as given, was *not* an erroneous statement of the law and that the prosecutor did not commit misconduct in restating it during closing argument.

But Johnson contends that the prosecutor "dissected" the reasonable doubt jury instruction, argued that the jury did not need to consider any other language in the instruction, and suggested that it could infer guilt if it had an "abiding belief" in the charges. Br. of Appellant at 20. Although the prosecutor repeatedly referred to the "abiding belief" language in the instruction, taken in the context of her rebuttal closing argument as a whole, we hold that the prosecutor did not misstate the law or invite the jury to disregard Johnson's presumption of innocence or the State's burden of proving each element of the charged offenses beyond a reasonable doubt.[33]

[33] The prosecutor began her rebuttal closing argument by informing the jury that *the State* alone had the burden of proof: "The reason the State gets to go again is because *it's the State's burden*

E. Appealing to Jury's Passions and Prejudices

Johnson also argues that the prosecutor appealed to the passions and prejudices of the jury when (1) she argued that Justice Benjamin Cardozo once said, "'Justice that is due the accused is due the accuser[,] as well'";[34] and (2) she inferred that Johnson admitted he was a sex offender when he saw a picture of MA's uncle in the newspaper and claimed, "[H]e's one of them, too." Br. of Appellant at 23 (quoting 7 VRP at 785). This argument also fails.

Johnson argues that the prosecutor's statements in his case were similar to those in *State v. Powell*, in which a prosecutor told the jury that a not guilty verdict would "send a message" that children who reported sexual abuse would not be believed and this would essentially declare "'open season on children.'" Br. of Appellant at 24 (quoting *State v. Powell*, 62 Wn. App. 914, 918, 816 P.2d 86 (1991)). Johnson also compares the prosecutor's statements here to those in *State v. Belgarde*, in which a prosecutor appealed to jury passions and prejudices and introduced

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of proof. *We have the responsibility and the obligation to prove each and every elements*[sic] *beyond a reasonable doubt*." 7 VRP at 767 (emphasis added). The prosecutor then drew the jury's attention to jury instruction two, which laid out the reasonable doubt standard in more detail; the instruction also informed the jury that (1) the State had the burden of proof, (2) Johnson was presumed innocent, and (3) he did not have a burden of proving that any reasonable doubt existed.

The prosecutor then referred to the "abiding belief" language while discussing inconsistencies in LA's testimony, in essence arguing that LA was not "100 percent consistent all [of] the time" but that the jury could still find Johnson guilty beyond a reasonable doubt if it had an "abiding belief" that *he* had committed each of the offenses charged, 7 VRP at 769-70. The prosecutor continued to remind the jury that the State carried the ultimate burden of proof when it argued, "You can't hold [LA] to that standard. *You have to hold the State to its burden of proof, though*." 7 VRP at 770 (emphasis added). The prosecutor then directed the jury to other evidence of Johnson's guilt, including MA's testimony, Doctor Hall's medical findings, and the semen on LA's skirt.

[34] Br. of Appellant at 23 (quoting 7 VRP at 742).

facts not in evidence by referring to the defendant's American Indian Movement (AIM) affiliations and describing AIM members as "'a deadly group of madmen'" and "'butchers[ ] that kill[ ] indiscriminately.'" Br. of Appellant at 25 (emphasis omitted) (quoting *State v. Belgarde*, 110 Wn.2d 504, 506-08, 510, 755 P.2d 174 (1988)).

As we have already noted, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the facts in evidence and to express such inferences to the jury.[35] In contrast to *Powell* and *Belgarde*, the prosecutor's reference here to Justice Cardozo's quote was relatively minor in the context of her entire argument. Nor did the prosecutor introduce facts not already in evidence or make inflammatory statements designed to elicit an emotional response from the jurors. The trial court expressly recognized the propriety of the prosecutor's argument when it overruled Johnson's objection. Again, we give a trial court's rulings on prosecutorial misconduct considerable deference because the trial court is in the best position to determine whether such comments prejudice a defendant's right to a fair trial; therefore, we reject Johnson's argument that the prosecutor committed misconduct by her isolated reference to Justice Cardozo's quote. *Stenson*, 132 Wn.2d at 719.

Nor did the prosecutor commit misconduct when she inferred that Johnson self-identified as a sex offender when, in response to seeing a picture of MA's sex offender uncle in the newspaper, Johnson said, "He's one of them, too." 7 VRP at 785. The State had already presented evidence that Johnson had told MA in his phone call from jail, "I seen your uncle's face in the newspaper and you know why he was there? He's one of them, too";[36] and MA had

[35] *Gregory*, 158 Wn.2d at 860.

testified that Johnson was referring to her uncle as a sex offender when Johnson made these statements. Furthermore, Johnson did not object when the State introduced this evidence at trial. Given the prosecutor's wide latitude to draw inferences from the evidence and that it was reasonable to infer from Johnson's statements that he was self-identifying as a sex-offender or that his statements showed his consciousness of guilt, we hold that the prosecutor's closing argument comments were not improper.

F. Cumulative Error

Johnson argues that cumulative error denied him a fair trial based on the prosecutor's multiple acts of misconduct in closing argument. The cumulative error doctrine applies only when several trial errors occurred, none of which alone warrants reversal, but the combined errors effectively denied the defendant his right to a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). But "[a]bsent *prejudicial* error, there can be no cumulative error that deprived the defendant of a fair trial." *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004) (emphasis added). Johnson has shown neither prosecutorial misconduct nor prejudice. Therefore, the cumulative error doctrine does not apply.

V. Sentencing

Last, in his SAG, Johnson asserts that the trial court improperly sentenced him because, he claims, (1) although he had "no offender felony points" on his record, the trial court calculated his sentence using "five felony points"; (2) the trial court gave him an "exceptional sentence" when it sentenced him to 318 months of imprisonment; and (3) the trial court improperly sentenced him

[36] 3 VRP at 311, 326.

outside of the jury's presence. SAG at 1. None of these claims have merit.

First, Johnson misunderstands how the trial court calculated his sentence. The trial court calculated Johnson's offender score as nine plus, not five. At the time of sentencing, Johnson had a lengthy criminal history; but the "five felony points" to which he refers were likely his current felony convictions[37]—two counts of first degree child molestation, two counts of first degree child rape, and one count of witness tampering. These current convictions produced an offender score higher than nine after applying the tripling provisions[38] for sex offenses in former RCW 9.94A.525(17) (Laws of Washington, ch. 231 § 3 (eff. June 12, 2008)). With an offender score of nine plus, the trial court sentenced Johnson to standard-range sentences for each of his current convictions.[39] Because the trial court ran these standard-range sentences concurrently

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[37] Former RCW 9.94A.525(1) (Laws of 2008, ch. 231 § 3) was in effect at the time of Johnson's crimes; it provided: "Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589." Although the legislature has since amended other RCW 9.94.525 provisions, it did not amend this subsection (1). RCW 9.94A.589(1)(a) provides, in relevant part:

> [W]henever a person is to be sentenced for two or more current offenses, the *sentence range for each current offense* shall be determined by using all other current and prior convictions *as if they were prior convictions* for the purpose of the offender score.

(Emphasis added).

[38] Former RCW 9.94A.525(17) provided:

> If the present conviction is for a *sex offense*, count priors as in subsections (7) through (11) and (13) through (16) of this section; however *count three points for each adult and juvenile prior sex offense conviction*.

(Emphasis added). Again, although the legislature has since amended other provisions in RCW 9.94.525, it did not amend this subsection (17).

[39] The standard-range sentence for Johnson's first degree child rape convictions was "240-318 months to life." CP at 164. The standard-range sentence for his first degree child molestation convictions was "149-198 months to life." CP at 164. And the standard-range sentence for his witness tampering conviction was "12 [plus] - 16 months." CP at 164.

(instead of consecutively), Johnson did not receive an exceptional sentence.[40] A defendant generally cannot appeal a sentence within the standard range. *State v. Osman*, 157 Wn.2d 474, 481, 139 P.3d 334 (2006).

Last, Johnson cites no authority, nor are we aware of any such authority, requiring the trial court to sentence him in the jury's presence. On the contrary, the long-established practice is for the trial court to thank and to dismiss the jury after it has rendered its verdict. And it would be cumbersome and serve no recognized purpose to try to recall the jury at some later date, sometimes months after the trial's conclusion, when the parties and trial court are ready to proceed to sentencing. Johnson's sentencing challenges fail.

We affirm Johnson's convictions and sentences.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, P.J.

Johanson, J.

[40] RCW 9.94A.589(1)(a) (consecutive sentences may be imposed only under the exceptional sentence provisions of RCW 9.94A.535).