IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTHONY McWAYNE DuBOSE and KEVIN LAMAR SPEARS, Appellants.	)))))))))	NOS. 61573-4-I 61654-4-I DIVISION ONE UNPUBLISHED OPINION FILED: May 3, 2010

Lau, J. — A jury convicted Kevin Spears and Anthony DuBose of first degree kidnapping, second degree rape involving M.M and D.S., and second degree robbery involving M.M. A jury also convicted DuBose of fourth degree assault involving D.S. and, he pleaded guilty to unlawful possession of a firearm. Spears and DuBose appeal, claiming the trial court erred by denying their motion to dismiss the second degree rape of D.S. conviction based on mandatory joinder and finding the rape and kidnapping convictions involving M.M. did not constitute the same criminal conduct. Spears also claims that the trial court erred by denying his Batson[1] challenge, denying

[1] Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

his mistrial motion, and miscalculating his offender score, and that prosecutorial misconduct deprived him of a fair trial. And DuBose claims that his fourth degree assault and second degree rape convictions involving D.S. violate double jeopardy. We conclude (1) Spears's second degree rapes against separate victims are unrelated offenses and (2) DuBose's fourth degree assault and second degree rape convictions constitute related offenses and the State untimely moved to consolidate offenses. As to Spears's offender score challenge, we accept the State's concession that remand is necessary. We affirm Spears's convictions but remand for resentencing, reverse DuBose's second degree rape conviction involving D.S., and affirm his remaining convictions.

FACTS

The witnesses testified at trial to the following facts: M.M. met Kevin Spears in April 2004 and promptly moved in with him. After a brief romance, Spears convinced her to prostitute herself to make money for him. When M.M. later objected, Spears got her a job as a dancer at Sugar's, a strip club. In late October 2004, after Spears became physically abusive, M.M. refused to return to their shared house in Tukwila.

After arranging to meet with M.M., Spears got a ride to Sugar's with his friend, Anthony DuBose. When they arrived, Spears told M.M. to get in DuBose's car so they could talk in the Sugar's parking lot. But when she did, DuBose drove off and headed for the highway. Spears demanded M.M. give him the money she had earned that night and when she refused, he punched her in the head and took the money. The men refused to let her out of the car and instead drove her to the Tukwila house.

When they arrived, DuBose

ordered M.M. to change into her dancing outfit. M.M. changed in a bedroom and when she came out, three men—Joshua Kidd, Jerry Myers, and Curtis Rose—and a woman, D.S., were in the house. DuBose forced M.M. to dance for them for about 20 minutes. When she finished, M.M. called 911 but had to hang up because she feared being caught.

DuBose then led M.M. into his bedroom and forced her to have oral and vaginal sex with him. Several of the men, including Spears, joined them in the room and also sexually assaulted M.M. This continued for about 45 minutes, after which Spears told M.M. to take a shower. Afterwards, she went into Spears's bedroom to dress and called 911 again.

DuBose then forced D.S. into Spears's bedroom and ordered M.M. and D.S. to perform oral sex on each other. When D.S. resisted, DuBose hit her until she complied. The men next forced D.S. and M.M. to perform oral sex on them. DuBose then took D.S. into his bedroom and again forced her to perform oral sex on him. D.S. did not resist because she saw several guns in his bedroom and she feared for her life.

Responding to M.M.'s second 911 call, police officers arrived around 5:30 a.m. While looking through a window, Officer Devlin saw DuBose holding D.S.'s hands down as she performed oral sex on him. He told another officer what he saw, but when he looked back, DuBose was no longer holding D.S. down. The officers knocked on the front door, and M.M. left the house with them. Under threat from DuBose, D.S. told the officers that nothing was wrong, so they left without making any arrests. When the officers returned later that morning, D.S. told them what had happened and they

discovered a handgun and several rifles.

PROCEDURAL HISTORY

The State charged Spears with first degree kidnapping, second degree rape, and second degree robbery involving M.M. The State charged DuBose with first degree kidnapping and second degree rape involving M.M., two counts of fourth degree assault involving M.M. and D.S., and four counts of first degree unlawful possession of a firearm. The trial court severed the four counts of first degree unlawful possession of a firearm.

DuBose and Spears were tried jointly over the course of three jury trials. Two weeks before the first trial, the State moved to amend the information to add second degree rape involving D.S. against both defendants. The court denied the motion as untimely. The first trial occurred in November and December of 2005. The jury convicted Spears of first degree kidnapping and convicted DuBose of first degree kidnapping and fourth degree assault involving D.S. but hung on the remaining counts.

Before the second trial, the State amended the information to add second degree rape involving M.M against Myers and Rose. Over defense objections, the State also amended the information to add second degree rape involving D.S. against Spears and DuBose. The jury hung on all charges. The third trial occurred in January and February of 2008. The jury convicted Spears and DuBose of the remaining counts and acquitted Myers and Rose. DuBose later pleaded guilty to one count of first degree unlawful possession of a firearm, and the State dismissed the remaining three counts.

ANALYSIS

Mandatory Joinder

Spears and DuBose first argue that the trial court erred in denying their motion to dismiss the second degree rape charge involving D.S. Specifically, they contend that CrR 4.3.1(b)'s mandatory joinder rule required the State to join all related charges, including the rape charge, in the first trial. The State relies on CrR 4.3.1(b)(3) to argue that the trial court properly denied the dismissal motion because it had previously denied the State's motion to consolidate the rape charge with the other charges. And the rule's "related offense" definition does not encompass the second degree rape involving D.S.

CrR 4.3.1(b) makes joinder of "related offenses" mandatory. State v. Downing, 122 Wn. App. 185, 190, 93 P.3d 900 (2004).

> The mandatory joinder rule is intended as a limit on the prosecutor, and its purposes are to protect defendants from (a) successive prosecutions that can act as a hedge against the risk of an unsympathetic jury at the first trial, (b) a "hold" on the defendant after the defendant has been sentenced, or (c) harassment of the defendant through multiple trials.

State v. Gamble, No. 80131-2, 2010 WL 315024, at *2 (Jan. 28, 2010). If the State attempts to try a defendant for an offense that is related to an earlier offense for which the defendant has already been tried, the court generally must dismiss the new charge upon a timely motion by the defendant.[2]

[2] There are some exceptions to this general rule—dismissal is not required when the court determines that the prosecutor was unaware of facts constituting the related offense, the prosecutor did not have sufficient evidence to warrant trying the related offense at the time, or "for some other reason, the ends of justice would be defeated if the motion were granted." CrR 4.3.1(b)(3). These exceptions are not at issue in this

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

CrR 4.3.1(b)(3). Under the rule, offenses are "related" only if they are "within the jurisdiction and venue of the same court and are based on the same conduct." CrR 4.3.1(b)(1); see also State v. Lee, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997) (purpose of the rule is to protect defendants from multiple prosecutions based upon "'essentially the same conduct'") (quoting State v. Harris, 130 Wn.2d 35, 43, 921 P.2d 1052 (1996)). The "same conduct" for purposes of applying the rule is conduct involving a single criminal episode or incident. Lee, 132 Wn.2d at 503.

In Lee, the court noted that close temporal and geographic proximity of the offenses is generally present and that if the offenses are based on the same physical act or series of physical acts, they are part of the same criminal incident or episode. Lee, 132 Wn.2d at 503. The court also reasoned that the same criminal episode could span a period of hours "or even days" if it involved a continuous series of criminal acts such as a robbery, kidnapping, and assault on one victim. Lee, 132 Wn.2d at 503–04. And subsequent courts have made clear that criminal acts do not involve the same conduct where there are different victims. See State v. Rohrich, 110 Wn. App. 832, 838, 43 P.3d 32 (2002), rev'd on other grounds, 149 Wn.2d 647, 71 P.3d 638 (2003)

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case.

("But because the charges involved separate victims, he would not have been entitled to mandatory joinder."). But offenses involving distinct incidents are not the "same conduct." Lee, 132 Wn.2d at 504; see also Downing, 122 Wn. App. at 191 (holding mandatory joinder not implicated where "the charges involved different [fraudulent] checks issued on different dates and [where] one crime was completed before the next began").

We conclude that second degree rape involving D.S. did not involve the same conduct as the earlier offenses for which Spears had already been tried. In the first trial, Spears was tried on first degree kidnapping, second degree robbery, and second degree rape, all involving M.M. Because these offenses and the second degree rape offense involved different victims, the offenses do not involve the same conduct. See Lee, 132 Wn.2d at 503–04; Rohrich, 110 Wn. App. 832.

In the first trial, however, DuBose was charged with fourth degree assault of D.S. —an offense that is related to the second degree rape charge because the two offenses involved "one continuous criminal episode involving . . . one victim." Lee, 132 Wn.2d at 504. The fourth degree assault conviction was based on M.M.'s testimony that DuBose struck D.S. across the face several times in Spears's bedroom, and the second degree rape conviction was based on D.S.'s and Devlin's testimony that DuBose forced D.S. to perform oral sex on him after he took her into his bedroom.[3] This rape occurred shortly after leaving Spears's bedroom, where the fourth degree

[3] The jury was instructed to consider only acts of rape that occurred in DuBose's bedroom.

assault occurred. This "continuous criminal episode" in close temporal and physical proximity establishes

that the assault and rape charges were based on the same conduct for purposes of CrR 4.3.1(b)(3). Lee, 132 Wn.2d at 503–04. As such, the mandatory joinder rule applies to the assault and rape charges.

The State argues, however, that because it moved to join the rape charge with the other charges prior to the first trial, mandatory joinder does not apply. Under CrR 4.3.1(b)(3), a defendant may move to dismiss an offense related to a previously tried offense, "unless a motion for consolidation of these offenses was previously denied" (the "previous motion provision"). DuBose maintains that this rule is inapplicable because the State's motion to join was untimely. Here, 2 weeks before the scheduled trial date and 23 days before the expiration of the speedy trial clock, the State informed the defense it intended to amend the information to add the second degree rape. DuBose and Spears successfully opposed the motion, asserting insufficient time to prepare for trial. The State does not appeal that decision.

The State contends the express reference to "a timely motion to consolidate" in other subsections of CrR 4.3.1(b) and the exclusion of that term in CrR 4.3.1(b)(3) indicates the legislature did not intend a timeliness requirement. But as we have recognized, "If the State fails to timely charge a related offense, the mandatory joinder rule precludes it from later charging that defendant with the related offense arising out of the same conduct . . . ." State v. Gamble, 137 Wn. App. 892, 902, 155 P.3d 962 (2007), aff'd, 168 Wn.2d 161, 225 P.3d 973 (2010). And adopting the State's approach would frustrate the rule's purpose—to

protect defendants from multiple prosecutions. To conclude otherwise would allow the State to "hedge against the risk of an unsympathetic jury at the first trial" by simply moving to amend the information on the eve of trial expecting the court to deny the motion. Gamble, 168 Wn.2d at 168. Once denied, and upon conclusion of the first trial, the State could then refile the second charge confident that mandatory joinder would not apply since "a motion for consolidation of these offenses was previously denied." CrR 4.3.1(b)(3). Defendants would thus be forced to move for a continuance or waive any objection to joinder, necessitating a choice between their speedy trial right and their right to adequately prepare a defense. See State v. Michielli, 132 Wn.2d 229, 240, 246, 937 P.2d 587 (1997); State v. Price, 94 Wn.2d 810, 620 P.2d 994 (1980) (recognizing that untimely motion to amend necessitates choice between right to a speedy trial and right to adequately prepare a defense).

Because the State failed to timely move to join the second degree rape charge and because that charge is related to the assault conviction, the trial court erred in denying DuBose's motion to dismiss the second degree rape conviction involving D.S.[4]

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[4] We note that DuBose argued below that the language of CrR 4.3.1(b)(2) and (3) indicates that the previous motion provision is available only where a defendant moves to consolidate charges.

"The motion to consolidate refers not to a motion to amend by the state but to a defendant's motion. . . . The reference is to the defendant's rights and obligations. The defendant can make the motion to consolidate or the defendant can waive the right. This is clear from the language of CrR 4.3.1(b)(2):

> "(2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation

Given this conclusion, we do not address DuBose's double jeopardy claim.

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as to related offenses with which the defendant knew he or she was charged." "CrR 4.3.1(b)(2).

"The language of the rule makes it clear that a defendant is required to move to consolidate. The prosecutor would not move to consolidate cases which it cannot yet try. Additionally, the rule refers to the defendant's waiver of the right to consolidate. There is no mention in the rule of the state's motion to consolidate. The right to consolidate is the defendant's and the motion referenced in the rule must be made by the defendant. A [state's] motion to amend does not satisfy the requirements of the rule." Clerk's Papers (DuBose) at 174–75. But because neither party raised these arguments on appeal, we do not address them.

Same Criminal Conduct

Spears and DuBose both argue the trial court abused its discretion by finding that the rape and kidnapping of M.M. convictions did not encompass the same criminal conduct. The State replies the trial court properly found that the crimes involved different objective criminal intents and did not occur at the same time and place.

RCW 9.94A.589(1)(a) treats all "current and prior convictions as if they were prior convictions for the purpose of the offender score." That section, however, recognizes an exception

> if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . 'Same criminal conduct' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

RCW 9.94A.589(1)(a). If any of these elements are lacking, a finding of same criminal conduct is inappropriate. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). In deciding whether crimes involve the same intent, we focus on whether the defendant's intent, objectively viewed, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). This is determined, in part, by whether one crime furthered the other. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

We narrowly construe the same criminal conduct analysis. Porter, 133 Wn.2d at 181; State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004). And a trial court's determination on the issue of same criminal conduct is reviewed for an abuse of discretion or misapplication of the law. Haddock, 141 Wn.2d at 110; State v. Tili, 139 Wn.2d 107, 122–23, 985 P.2d 365

(1999), aff'd, 148 Wn.2d 350, 60 P.3d 1192 (2003).

Spears and DuBose argue that because kidnapping is a continuing offense that was ongoing at the time of the rape, the crimes occurred at the same time and place. We disagree. The rape occurred at one location, the Tukwila house, and during a finite time period. In contrast, the kidnapping occurred over several hours and several locations—it began around 2 a.m. in the Sugar's parking lot and continued until 5:30 a.m. when the police arrived at the Tukwila house. The rape and kidnapping convictions did not involve the same time or place. See, e.g., State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992) (holding burglary and subsequent kidnapping did not involve the same time and place because "[t]he burglary occurred in Seattle, in the [victim's] home, while the first degree kidnapping was carried out over several hours' time in Seattle, Maple Valley, North Bend, and White Center"); State v. Larry, 108 Wn. App. 894, 916, 34 P.3d 241 (2001) (no same criminal conduct where "the kidnapping occurred over a period of time and in several locations, whereas the robbery occurred at a single time and place, not the same as that involved in the kidnapping").

Spears and DuBose point to several cases to support their arguments. Spears argues that Porter and State v. Young, 97 Wn. App. 235, 984 P.2d 1050 (1999) establish that "[s]eparate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single uninterrupted criminal episode over a short period of time." Br. of Spears at 43–44. Those cases are inapposite. Porter involved "immediately sequential drug sales," not several criminal acts occurring over the course of hours and miles apart. Porter, 133 Wn.2d at 183. And the Young court found that same

criminal conduct was inappropriate where forgery offenses were committed on separate days and therefore did not occur at the same time. Young, 97 Wn. App. at 240–41. Spears's reliance on State v. Dove, 52 Wn. App. 81, 757 P.2d 990 (1988) is similarly unconvincing. While that case did note that kidnapping is a continuing offense, it involved a sufficiency of the evidence challenge, not same criminal conduct. Dove, 52 Wn. App. at 87–88. Finally, DuBose cites joinder language in the information as evidence that the convictions occurred at the same time and place. See Br. of Appellant (DuBose) at 35. Joinder language, however, is insufficient to show that crimes comprise the same criminal conduct. See Dunaway, 109 Wn.2d at 214 n.4.

Because we conclude that the offenses do not constitute the same time or place, we do not address the remaining requirements because all three requirements must be satisfied for a finding of same criminal conduct. See Haddock, 141 Wn.2d at 110.

Witness Misconduct

Spears next argues that the trial court denied his right to a fair trial by denying his mistrial motion after M.M. began crying and screaming during cross-examination. We review the trial court's denial of a mistrial for an abuse of discretion. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). A "court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The defendant bears the burden of showing that the conduct complained of

was both improper and prejudicial. State v. Borg, 145 Wn.2d 329, 335, 36 P.3d 546 (2001).

We have long recognized that a witness's outburst is not automatic grounds warranting a mistrial and the trial court is in the best position to determine the effect of any outburst. In State v. Wilder, 4 Wn. App 850, 851, 486 P.2d 319 (1971), the victim in a carnal knowledge prosecution "at times sobbed uncontrollably while testifying on direct examination." The defendant unsuccessfully moved for a mistrial. In light of the fact that "the trial court had the distinct advantage of observing the behavior of the complaining witness, and the visible reaction, if any, of the jurors," we held that the trial court did not abuse its discretion. Wilder, 4 Wn. App at 851–52.

Here, during cross-examination by DuBose's counsel about her relationship with Spears, M.M. broke down.

> Q. You said that he put a facade or a dream in your head; is that right?
> A. Yes.
> Q. In that facade, that dream, was love, a romantic relationship; is that right?
> A. Yes.
> Q. That's what you wanted; isn't it?
> A. Yes.
> Q. That's what you were desperate for, isn't it?
> A. Yes.
> Q. And you would do anything for that; isn't that right.
> A. I guess so, obviously.
> Q. And that's why you worked as a prostitute; isn't that right?
> A. I didn't hear the question.
> Q. And that's why you worked as a prostitute; isn't that right?
> A. (Extreme crying and screaming by the witness.)[5]

VRP (Feb. 6, 2008) at 119–20. We conclude that this outburst did not deprive Spears

[5] The next day all four defendants moved for a mistrial, citing the witness's extreme outburst.

a fair trial and the trial court acted well within its discretion. In denying the motion for mistrial, the trial court recognized that the case hinged on M.M.'s credibility but noted that the outburst was just as likely to impugn her credibility as bolster it.

> And I think that her outburst can cut both wa[y]s. . . . So, I think her credibility will be critically examined by the jury; and I think one of the factors that they are going to use to examine her credibility is her behavior on the stand. . . .
>
> And I do think there [are] two sides to determining whether or not her credibility is prejudicial, whether it was prejudicial to her credibility—I'm sorry, whether or not her behavior was prejudicial. I don't think that there is any thing that's more likely that it was harmful or prejudicial to the defendants as it was to herself.

VRP (Feb. 11, 2008) at 5–6.

And Spears cites no controlling authority to support a mistrial based on a witness's emotional outburst such as occurred here. In the two cases he points to involving "hysterical" witness conduct, the courts found a mistrial was unwarranted. See, e.g., Meade v. State, 779 S.W.2d 659, 660 (Mo. App. Ct. 1989) (defense counsel not ineffective for failure to move for mistrial after 11-year-old witness-victim "began crying and became hysterical"); State v. Johnson, 672 S.W.2d 160, 163 (Mo. App. Ct. 1984) (denial of mistrial where witness "became hysterical" was not an abuse of discretion). Based on this record and the trial court's "distinct advantage of observing the behavior of the complaining witness, and the visible reaction, if any, of the jurors," we conclude that this outburst did not deprive Spears a fair trial and the trial court acted well within its discretion by denying the mistrial motion. Wilder, 4 Wn. App at 851–52.

Prosecutorial Misconduct

Spears next contends that the prosecutor committed two instances of misconduct. He claims the first instance occurred when he asked defendant Myers about a conversation Myers had with Spears about prostitution and rape. And the second instance occurred when the prosecutor showed DuBose's gun to Officer Devlin during direct examination.

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A prosecutor has a duty to ensure a verdict is free from prejudice and based on reason, not passion. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968)). It is improper for a prosecutor to invite the jury to decide any case based on emotional appeals or their passions and prejudices. In re Det. of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). A defendant establishes prejudice only if he shows a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). And the defendant bears the burden of showing both prongs of prosecutorial misconduct. Hughes, 118 Wn. App. at 727.

To preserve a claim of prosecutorial misconduct, a defendant must timely object or move for a mistrial. See In re Det. of Law, 146 Wn. App. 28, 50–51, 204 P.3d 230 (2008); State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000); State v. Belgarde, 110 Wn.2d 504, 517–18, 755 P.2d 174

(1988). Either course allows the trial court to cure the error through a curative instruction. State v. Stamm, 16 Wn. App. 603, 614, 559 P.2d 1 (1976). Here, Spears moved for a mistrial after both alleged incidents. We review the trial court's denial of a mistrial for an abuse of discretion. Greiff, 141 Wn.2d at 921.

Spears claims the State improperly questioned Myers about a conversation he had with Spears. During cross-examination, the following exchange occurred:

> [Prosecutor]: All right. Well, Mr. Myers, tell me exactly what Defendant Spears said about him deciding to be a pimp.
> . . . .
> [Myers]: He said that he was a pimp.
> Q: Well, what words did he use?
> A: Exactly those words. Said he is a pimp.
> . . . .
> Q: . . . . When you say that you thought he could do something better, did you mean that he could do [sic] make more money doing something else?
> A: I don't know exactly. I just thought—I just meant that he could do something better. I don't know if that means that he could make more money or less money. But in my mind I thought he could do something better.
> Q: Well, did you mean that he could do something where he wasn't exposing women to being raped?

VPR (Feb. 27, 2008) at 7 (emphasis added).

The trial court granted Spears's motion to strike the last question quoted above. Spears fails to establish prejudice from this allegedly improper question. Spears relies on State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996). There, the prosecutor sought to impeach a defense witness by asking, "'You beat her . . . black and blue and you burned her abdomen with a cigar, didn't you?" Copeland, 130 Wn.2d at 284. The court concluded that no prejudice occurred because the jury properly learned about the

witness's criminal history through other means, the misconduct consisted of a single question, and the trial court immediately sustained the defense objection and instructed the jury to disregard the question. Copeland, 130 Wn.2d at 285. The facts here are analogous. The jury heard from multiple witnesses over several days that Spears was M.M.'s pimp, and Spears also admitted that "somebody could have robbed her, beat her, raped her" when working as a prostitute. VRP (Feb. 27, 2008) at 208. Furthermore, the comment consisted of a single question, which the court immediately struck following defense objection. Because Spears fails to demonstrate prejudice, we conclude the trial court did not abuse its discretion in denying the motion for a mistrial.

Spears next contends the prosecutor improperly questioned Officer Devlin about a handgun found in DuBose's bedroom. Spears's attorney described the conduct.

> First he showed a photograph of the firearm to the officer who did not know what that was, didn't recognize it. Then he showed the actual firearm to the officer. He did not recognize that. He pulled the firearm out and deliberately attempted to inflame the jury—totally inappropriate the way he did that.

VRP (Feb. 7, 2008) at 167–68. The court admonished the prosecutor and described the conduct.

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

VRP (Feb. 7, 2008) at 167–68. Spears again fails to demonstrate prejudice from this conduct. First, the gun had previously been admitted and shown to the jury.[6] Second, it was found in DuBose's, not Spears's

bedroom and DuBose admitted that he had the gun in his room. Spears asserts, "The prosecutor's conduct bolstered [M.M.'s] account of the events by denigrating [me] and painting [me] as a dangerous person, thus vouching for [M.M.'s] credibility." Br. of Appellant (Spears) at 33. But it is unclear how a gun that was not in his possession could so impugn Spears as to create a substantial likelihood that the conduct affected the jury's verdict. Pirtle, 127 Wn.2d at 672. The trial court did not abuse its discretion in denying the mistrial.

Finally, because Spears fails to demonstrate any prejudice, his claim that cumulative error entitles him to a mistrial fails.

Batson Challenge

Spears next contends the trial court erred in accepting the prosecutor's reasons for exercising a peremptory challenge against the sole African-American member of the jury venire. Spears argues the prosecutor's proffered race-neutral explanation was pre-textual.

A prosecutor's use of a peremptory challenge based on race violates a defendant's right to equal protection. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). If the defendant makes out a prima facie case of racial motivation, the burden shifts to the State to articulate a race-neutral explanation for the peremptory challenge. Luvene, 127 Wn.2d at 699; Miller-El v. Dretke, 545 U.S. 231, 239, 125 S. Ct. 2317, 162

[6] And Spears cites no authority that precludes counsel from questioning a witness at trial about a properly admitted exhibit.

L. Ed. 2d 196 (2005). Here, the State acknowledges that since the prosecutor offered a race-neutral explanation and the trial court ruled on the question of racial motivation, a prima facie case is unnecessary.[7] Luvene, 127 Wn.2d at 699. But the prosecutor must still provide a clear and specific explanation of the reasons for exercising the peremptory challenge. Miller-El, 545 U.S. at 238. To determine "whether a prosecutor's explanation is based on discriminatory intent, [we] consider whether the prosecutor has stated a reasonably specific basis for the challenge, such as specific responses or the demeanor of the juror during voir dire, or a particular identifiable incident in that juror's life." State v. Rhodes, 82 Wn. App. 192, 196, 917 P.2d 149 (1996) (citing State v. Burch, 65 Wn. App. 828, 840, 830 P.2d 357 (1992)). The trial court's determination of a Batson challenge is "'accorded great deference on appeal' and will be upheld unless clearly erroneous." Luvene, 127 Wn.2d at 699 (quoting Hernandez v. New York, 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). "'[T]he best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.'" Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (alteration in original) (quoting Hernandez, 500 U.S. at 365). "And it is axiomatic that assessment of demeanor and credibility is 'peculiarly within a trial judge's province' as a finder of fact." State v. Sadler, 147 Wn.

[7] We note our Supreme Court's recent decision in State v. Rhone, No. 80037-5 2010 WL 1240983 (Apr. 1, 2010) involving the question of whether a prosecutor's preemptory challenge of the only African-American venire member in a trial of an African-American defendant amounts to a prima facie case of discrimination. Here, because the prosecutor offered an explanation for the preemptory challenge, the trial court did not rule on whether the defendants established a prima facie case.

App. 97, 116, 193 P.3d 1108 (2008) (quoting Snyder, 128 S. Ct. at 1208).

Here, the trial court accepted the prosecutor's race-neutral explanation for the challenge.

> I don't think it's a race-based issue. I don't think it's a race-based challenge.
>
> I think that [the prosecutor] has the right to exercise a peremptory challenge if he feels a juror can't be fair. I think that on balance, this man has given him, although clearly it does not rise to the level of being excusable on a challenge for cause, nevertheless, he certainly has raised some issues in his response to questions put to him by [the prosecutor], as is indicated in the record that I read of the transcript that I read into the record just a few minutes ago.
>
> That, and particularly the question: Would that knowledge or that feeling that you had -- about race is part of everything -- affect your ability to be impartial? And he said: ["]Uh, probably.["] And then he goes on to say: ["]I would listen to all the evidence and I will listen to all the testimonies and everything, and I wouldn't go their side because they're black, or the victim's side, I would be fair, try to be fair as best I can.["]
>
> I don't think that [the prosecutor's] peremptory challenge is race-based. I think it's based on his perception of whether or not this potential juror could be fair. And I think he has indicated that he brings some baggage to the decision-making process, and I think the State has the right to challenge him, so that will be my ruling.

VRP (Jan. 31, 2008) at 19–20. Spears fails to show that the trial court's ruling was clearly erroneous. The juror gave an equivocal answer when asked if he could be fair, "Uh, probably" but then said, "I would be fair, try to be fair as best I can." VRP (Jan. 31, 2008) at 19. With the opportunity to observe both the prosecutor's and the juror's demeanor, the trial court did not find sufficient indication of purposeful discrimination to justify the Batson challenge. Based on this record, the deferential standard of review, and the trial court's distinct advantage in assessing demeanor and credibility, the court did not clearly err in denying the Batson challenge. See Sadler, 147 Wn. App. at 116 ("[I]t is axiomatic that assessment of demeanor and credibility is 'peculiarly within a trial judge's province' as a finder of fact.")

(quoting Snyder, 128 S. Ct. at 1208).

Spears's Offender Score

Finally, Spears contends the court failed to properly calculate his offender score and standard range before imposing sentence. At the sentencing hearing, the State presented the charging document and other pleadings related to his 1997 California burglary conviction. Spears objected, stating that the State's evidence was insufficient to establish he committed the California burglary or to determine its Washington comparable offense; therefore, the court could not establish his offender score or standard range.

A defendant's offender score is required in order to determine the standard sentence range for the defendant's offense. RCW 9.94A.530. To determine the offender score, the court was required to conduct an analysis to determine if the California burglary conviction was comparable to Washington's burglary offense. RCW 9.94A.525(3). Here, the trial court concluded that the California burglary statute was legally comparable to Washington's burglary statute and included the conviction in Spears's offender score.

The State concedes that the evidence presented at the sentencing hearing was insufficient to determine its comparable Washington offense and remand is necessary. But the State and Spears differ on the proper remedy. Spears contends that remand for resentencing without the California burglary conviction is the remedy because the State "should be held to the existing record." Br. of Appellant at 41. In contrast, the State relies on a 2008 amendment to argue that it is entitled to present to the court on remand for resentencing, "all relevant

evidence regarding criminal history, including criminal history not previously presented." RCW 9.94A.530(2). According to the State, "[T]his court should not restrict the evidence that the trial court can consider at the resentencing hearing." Br. of Respondent at 57. Spears replies that he is entitled to application of the law as it existed in 2004 when he committed the offenses. But whether the State will actually request consideration of new evidence is unknown and so the issue is not ripe for our review. See State v. Eggleston, 164 Wn.2d 61, 77, 187 P.3d 233 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008). We defer the issue of new evidence to the trial court to decide, if necessary, at the remand hearing.

We affirm Spears's convictions but remand for resentencing. We reverse DuBose's second degree rape conviction of D.S. and affirm his remaining convictions.

Ann, J.

WE CONCUR:

Cox, J.

Becker, J.