69123-6

69123-6

NO. 69123-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANTONIAL M. MONROE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court properly exercise its discretion when it determined that Monroe had "opened the door" to evidence of his prior criminal convictions?

2. Has Monroe failed to establish that he is entitled to a new trial when the State introduced evidence of prior juvenile misdemeanor convictions that had been excluded?

3. Has Monroe failed to establish juror misconduct based on an anonymous, unsubstantiated report of an unidentified juror sleeping during testimony?

4. Has Monroe failed to establish ineffective assistance of counsel based on trial counsel's alleged (a) failure to object to venue, (b) failure to admit an email as substantive evidence, (c) failure to call witnesses, and (d) failure to adequately prepare?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On March 19, 2012, appellant Monroe was charged in King County Superior Court with one count of Promoting Prostitution in the First Degree. CP 1. At the time of the offense, Monroe was pending trial on felony domestic violence charges. CP 2-3. In late May 2012, Monroe

proceeded to trial before the Honorable Barbara Linde. RP 4.[1] The jury was instructed on both the charged offense, and the lesser offense of second-degree promoting prostitution. CP 56, 61. The jury found Monroe guilty of first-degree promoting prostitution. CP 67. The trial court sentenced Monroe to a standard-range sentence of 120 months. CP 71.

2. SUBSTANTIVE FACTS

J.W. was one of eight children born to a drug-addicted mother. RP 342-43. Not surprisingly, she grew up in an unstable environment, becoming pregnant for the first time at just fifteen years old. RP 346. J.W. lost that baby after being assaulted by the father. RP 347. She ultimately dropped out of high school in the eleventh grade, after giving birth to her first child. RP 349.

In late 2010, J.W. met a pimp named Quinton Jones, who threatened her, beat her, and forced her to begin prostituting herself for him. RP 355, 368-73. J.W. prostituted herself for Jones until April of 2011, when Jones was arrested for prostituting minors. RP 380-81.

After Jones's arrest, J.W. lived with Jones's cousin, who "managed" her while she continued to prostitute herself for Jones. RP 382-83. Later, she went to work for another pimp named "Royalty,"

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[1] The verbatim report of proceedings includes six sequentially paginated volumes, referred to herein as "RP." Additionally, there is one non-sequentially paginated volume that will be referred to in this brief as "5/24/12 RP."

who she thought would protect her from Jones. RP 385-86. However, after Jones's cousin tried to run her over with his car, J.W. contacted the police and received assistance with housing at the YWCA. RP 386-88. She stayed at the YWCA until September of 2011, when she met a woman named Victoria Burden, who lived in Renton. RP 392-93. J.W. moved into Burden's apartment, and the two of them met appellant Monroe in October of 2011, at a nightclub in Seattle. RP 394.

J.W. spoke to Monroe on the phone several times after they met. RP 397-98. He told her that they could "get money together." Id. Then, shortly after she met Monroe, J.W. moved to Las Vegas, where she again worked as a prostitute. RP 398-99. She maintained contact with Monroe, who made clear that he wanted J.W. to prostitute herself for him. RP 401-02. After J.W. returned to Seattle, she was arrested for prostitution. RP 403. The police took her to the Genesis Project, an agency that assists women who are trying to escape from prostitution. RP 186, 403. The Genesis Project helped J.W. connect with the Dream Center in Los Angeles, a religious organization that assists women transition out of prostitution. RP 176, 404. J.W. lived at the Dream Center for several months. RP 187.

In February of 2012, J.W. left the Dream Center and returned to Washington, where she once again began living with Burden in Renton.

RP 406-07. Within a few weeks however, J.W. and Burden got into an argument, and J.W. contacted Monroe, asking him to pick her up. RP 408-10. Monroe took J.W. to where he was staying in Kirkland. RP 411. While staying in Kirkland, Monroe continued to pressure J.W. to "work," or to prostitute herself, for him. RP 413. She began doing so. RP 415. Monroe would drive J.W. to Highway 99, where she prostituted herself. Id. Monroe would pick her up when she was done. Id. J.W. used Monroe's phone and Monroe's credit card to post advertisements on a website known for prostitution, Backpage.com. RP 416-17, 423.

After a short time in Kirkland, J.W. and Monroe began staying at the Golden West Motel, on Highway 99 in Edmonds. RP 208, 416. During that time, J.W. continued to prostitute herself for Monroe, by walking along the highway, and by responding to the Backpage.com ads. RP 424-27. She gave Monroe all of the money that she made. RP 427. Monroe told her that she was "his girl" and that she was supposed to do what he wanted her to. RP 430-31. Monroe threatened J.W. RP 428. Although he did not beat her as Quinton Jones had, J.W. observed Monroe lose his temper, become angry and loud, and on one occasion, he ripped her jacket. RP 428-29.

After spending a few days at the Golden West Motel, J.W. wanted out of the situation. RP 432. On March 14, 2012, J.W. called Kyla

Conlee from the Dream Center in L.A., crying and asking for help. RP 189-91, 432. She told Conlee that she was with a pimp, and gave her the location. Id. Conlee called the Genesis Project, who contacted FBI Agent Steven Vienneau, a human trafficking task force officer familiar with J.W., having worked on the investigation of Quinton Jones. RP 192, 201. Agent Vienneau went to the Golden West Motel, but no one answered the door to Monroe's room. RP 209. Vienneau emailed other members of the task force, who returned to the Golden West Motel later that night, interviewed J.W., and arrested Monroe upon his return to the motel. RP 210-11, 219, 225-26.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DETERMINED THAT MONROE HAD OPENED THE DOOR TO EVIDENCE OF HIS PRIOR CRIMINAL CONVICTIONS.

Monroe argues that the trial court erred when it determined that his direct testimony opened the door to evidence of his extensive criminal history. However, because Monroe told the jury, "I don't commit crimes," the trial court properly allowed the State to introduce evidence to the contrary.

a. Relevant Facts.

During pretrial motions, the State conceded that most of Monroe's extensive criminal history was not admissible, unless he opened the door to it. RP 27. However, the parties agreed that should he testify, Monroe's prior convictions for second-degree identity theft and giving false information to a police officer were admissible to impeach his credibility pursuant to ER 609. RP 28.

Monroe chose to testify. RP 532. During his direct examination, he told the jury that he had been convicted of a "false identity"[2] charge in 2004. RP 647. Monroe often gave long-winded, nonresponsive answers to his attorney's questions. When directed to the subject of his arrest at the Golden West Motel, Monroe rambled at length about the circumstances. RP 649-51. He claimed that the police were "coming out" of trees and fences, pointing assault rifles at him, forcing him to lie on the ground in a puddle, and refusing to inform him why he was being arrested. Id. Monroe claimed that he "acted up" because he had no idea why he was under arrest, and that he told the arresting officers:

> A: I was just explaining that I don't know what I was being investigated for, so my only hints – I just left the room with females, so I don't know what I was being arrested for, so I just said, man I don't do

[2] Monroe was not convicted of any crime called "false identity." Rather, Monroe has convictions for identity theft (a felony), and giving false information to a police officer (a misdemeanor). RP 28.

> nothing. I was just saying I don't do nothing.
> I don't commit crimes. I just – I'm just a fuck boy.
> I fuck bitches. What am I being arrested for?

RP 652 (emphasis added).

Shortly after this testimony, the court excused the jury for the remainder of the day. RP 657. The prosecutor told the court that he would "never fathom that a defendant with criminal history like this man would lie to the jury to that extreme and say I don't commit crimes[.]" RP 659. The State argued that Monroe had opened the door to discussion of his extensive criminal history. RP 659-61. Monroe responded that what he had really meant was that he was not committing any crimes at the time of his arrest. RP 664.

After overnight consideration, the trial court determined that Monroe's testimony painted a "false impression with the jury[.]" RP 689. The court recognized that its "paramount duty" was to provide the defendant a fair trial, but stated that introduction of Monroe's criminal history would serve to "impeach the false impression that the defendant himself presented when he made that sweeping statement." RP 690. Following extended discussion, the court ruled that the State could question Monroe about his adult criminal convictions. RP 700-02.

b. Monroe Opened The Door To Evidence Of His Prior Criminal Convictions When He Testified That He Did Not Commit Crimes.

A trial court may admit evidence that might otherwise be inadmissible if the defendant "opens the door" to it. State v. Warren, 134 Wn. App. 44, 64-65, 138 P.3d 1081 (2006), aff'd on other grounds, 165 Wn.2d 17, 195 P.3d 940 (2008). Specifically, the State may pursue an otherwise inadmissible subject to clarify a false impression created by the defendant. State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)); State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006). As stated by the court in Gefeller:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn.2d at 455.

A trial court's determination that the defendant has "opened the door" to otherwise-inadmissible evidence is reviewed for abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); Ortega, 134 Wn. App. at 626. The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Contrary to Monroe's claim that the trial court did not consider the context of his statements, the judge believed the context was "extremely important," but simply did not agree with Monroe's version of that context. Indicating that it had "given a lot of thought to this over the course of the evening adjournment," the trial court determined that Monroe had "created a false impression" with the jury when he testified, "I don't do nothing, I don't commit crimes." RP 688-89.

The trial court's interpretation of Monroe's testimony was reasonable. Monroe endeavored to convince the jury that the police were overly aggressive with him and that he had no idea why he was being arrested. Toward that end, Monroe made the statements, "[S]o I don't know what I was being arrested for, so I just said, man I don't do nothing. I was just saying, I don't do nothing. I don't commit crimes. I just – I'm just a fuck boy. I fuck bitches. What am I being arrested for?" RP 652.

Monroe claims that his testimony, in its proper context, could only be taken one way—that he was not committing any crimes at the time of his arrest. He argues that the jury could not have understood him to mean that he did not commit crimes in general. He argues this is especially true given that he had already testified to being convicted of "false identity." Brf. of App. at 26-27.

Monroe's after the fact attempt to qualify his testimony is unpersuasive. He did not say, "I told the police I was not committing any crimes," or "I told the police I had not done anything wrong." Rather, he stated generally, "I don't do nothing. I don't commit crimes." Even though he may have been repeating for the jury what he had told the police at the time of his arrest, Monroe's statements left a demonstrably false impression that he "did not commit crimes." As the trial court put it: "When I heard Mr. Monroe describing this over-the-top arrest process on a person who is, you know, pure as the driven snow but for this identity theft, it struck me that there was an opening of the door." RP 689. The State was entitled to clarify the false impression Monroe caused. Fisher, 165 Wn.2d at 750. The trial court did not abuse its discretion.

2. THE INTRODUCTION OF JUVENILE MISDEMEANOR CONVICTIONS DOES NOT REQUIRE REVERSAL.

The trial court intended to exclude evidence of Monroe's juvenile convictions. RP 739. The prosecutor misunderstood the court's ruling to exclude only Monroe's juvenile felony convictions, which included robbery and taking a motor vehicle. Id. Pursuant to that misunderstanding, the State inquired of Monroe regarding several juvenile misdemeanor convictions.[3] RP 713. The State did not question Monroe regarding his juvenile felony convictions. Monroe now claims that this entitles him to a new trial. However, reversal is unwarranted because there is not a substantial likelihood that admission of Monroe's juvenile misdemeanor convictions affected the jury verdict.

a. Relevant Facts.

After ruling that Monroe's direct testimony opened the door to evidence of his criminal convictions, the court stated that it wanted to

[3] Monroe asserts on appeal that the State introduced evidence regarding six separate juvenile convictions. Brf. of App. at 35. The record on this issue is unclear. During his testimony, Monroe claimed that his arson conviction was a juvenile conviction. RP 713. He later conceded (outside the presence of the jury) that the arson was an adult felony conviction. RP 743-44. Also during his testimony, Monroe stated that he had been convicted as a juvenile of reckless endangerment, trespass, "resisting and obstructing," and harassment. RP 713. Monroe later clarified that the convictions improperly admitted were reckless endangerment, malicious mischief, and harassment. RP 740. However, there was no testimony that the malicious mischief was a juvenile conviction, and Monroe denied the existence of it altogether. The State accepted that denial rather than providing rebuttal evidence. RP 740-41. Thus, it appears that Monroe is contesting, at most, the admission of his reckless endangerment and harassment convictions.

consider whether there was "a category of cases that are so remote in time that would drop off, and that would allow there to be some limiting of it." RP 693. The court asked the State about Monroe's juvenile history, questioning the prosecutor about juvenile felonies specifically, and then mentioning juvenile misdemeanors separately. RP 695-97. The prosecutor listed by names the specific crimes he intended to inquire about during cross-examination. RP 700. The following exchange occurred:

> THE COURT: Okay. Counsel, I'm going to grant you that leave to inquire with this exception. I'm going to rule that just I think as a bright line it makes sense in putting some boundaries upon this so the jury does not use the information improperly to drop off the juvenile felonies.
>
> MR. BARBER: Drop off what?
>
> THE COURT: The juvenile – the reference to the juvenile. And I think when you said robbery and taking a motor vehicle, I think those only occurred as a juvenile. So the Court's ruling is that because the door was opened by Mr. Monroe's statement, the State may inquire into and if there's a denial may prove the existence of each of the adult felonies and may reference the adult misdemeanors as well but not going into the number of assaults or number of bail jumpings but simply list them as you've indicated that you would.
>
> MS. HARTL: So is it my understanding, just to be clear, Your Honor, that what was just indicated by Mr. Barber . . . the crimes that you listed, the convictions are what you will be inquiring about except for the robbery and taking a motor vehicle?
>
> THE COURT: Because those are juvenile.
>
> MS. HARTL: Right. I understand. I'm –

THE COURT: No juvenile convictions.

MS. HARTL: -- clarifying what was laid out.

MR. BARBER: And my apologies. I need clarification too. Was the Court going off my last suggestion and saying that's your ruling with the exception of robbery and TMV, or was the Court saying I can inquire more fully with the exception of the juvenile felonies?

THE COURT: With respect to the adult felonies, no, I was going off of your last, as you called it the most anesthetized version, your words. I'm satisfied that's the appropriate boundaries to put on it that you've put on yourself with the exception that I also want to have you make no reference to the juvenile matters. All right.

RP 701 (emphasis added).

The State later cross-examined Monroe regarding his criminal history as follows:

Q: The statement I don't commit crimes is not a true statement; is it?

A: If you say it like that, no.

Q: In fact you've been convicted of a number of crimes; haven't you?

A: Yes.

Q: Unlawful possession of a firearm?

A: Yes.

Q: Bail Jumping?

A: Yes.

Q: Assaults?

A: Yes.

Q: Both misdemeanor assault, felony assault, and custodial assault, yes?

A: Yes.

Q: As recently as 2011, correct?

A: No.

Q: You've not –

A: A misdemeanor assault in 2011.

Q: Okay. You've been convicted of arson, yes?

A: Yes, as a juvenile.

Q: Malicious mischief?

A: No.

Q: You've not been convicted of malicious mischief ever in your life?

A: No, I've never been convicted of malicious mischief ever in my life.

Q: Reckless endangerment?

A: As a juvenile.

Q: It was a conviction, yes?

A: As – yeah, as a juvenile.

Q: Trespass?

A: As a juvenile.

Q: Resisting and Obstructing?

A: As a juvenile.

Q: And harassment?

A: As a juvenile.

Q: And harassment means making threats, right?

A: No.

Q: What does harassment mean to your knowledge?

A: Arguing.

Q: You believe your harassment conviction was because you got in an argument with someone?

A: It was over a bike as a juvenile. Yeah, we were arguing over a bike.

Q: Let's talk about some things that you and Jessica agree on. You did meet her outside of a club, correct?

RP 711-14.

Monroe did not object to any of the prosecutor's questions regarding his criminal convictions. Rather, after a later recess, his attorney inquired of the court:

> I'd just add, Mr. Monroe is asking one thing, Your Honor, quickly regarding the criminal history that was brought up, and he wanted to clarify. We believe the Court's ruling was that there wouldn't be any juvenile history brought in. And if so we'd ask for a limiting instruction then if – since that was the case.

RP 738. The court noted that it had intended to limit the State to adult convictions only. RP 739. The prosecutor told the court that his notes reflected the list of crimes he had intended to inquire about, and that he had "crossed out from those robbery and TMV because those were juvenile felonies. And I thought that was the only restriction." Id.

The prosecutor apologized for his misunderstanding of the court's ruling. RP 741.

Although Monroe originally asked for a limiting instruction regarding the juvenile misdemeanors, he did not propose what such an instruction might say. RP 738. During further discussion about the issue, the court indicated that one of the ways that it might handle the matter would be to strike any reference to juvenile convictions. RP 741. The court also suggested the idea of amending the standard pattern instruction regarding consideration of a defendant's prior convictions to include a further limitation about the juvenile convictions. RP 742, 744.

When the court asked Monroe what he proposed, he responded that a limiting instruction would be "awkward," and suggested the jury be told that "any testimony regarding juvenile criminal history should be disregarded." RP 743. In response, the court stated its concern that because Monroe had testified that his arson conviction was a juvenile conviction (when in reality it was an adult conviction) she could not "make a clear striking of that." RP 743-44. The court considered the matter further, and later ruled that it would not alter the pattern limiting instruction:

> While the Court's view was that the juvenile . . . the more remote in time the conviction, the less probative value it had with respect to the credibility, I agree with the State

> that it is – given the fact that the door was opened the way it was opened, it is – it has some probative value. I'm going to leave it to the jury with this limiting instruction, which I think covers it amply. It is complicated by the fact that there was an assertion that the arson was a juvenile offense, the first degree arson, which is probably the most serious of the -- it's the only class A felony that I think was listed, was a juvenile matter. So I'm not going to muddy the waters by calling attention and potentially commenting on the evidence as to what was juvenile and what was adult.

RP 755-56.

b. Monroe Failed To Preserve This Claim For Appeal When He Did Not Object.

When the trial court makes a pretrial ruling admitting evidence, the party objecting to the evidence need not object at trial to preserve the issue on appeal. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984). Sound policy underlies this rule; a party objecting to the evidence should not be required to raise the issue in the presence of the jury, at the risk of making comments prejudicial to his case. Id.

However, a standing objection is allowed only to the party losing the motion to exclude evidence. State v. Weber, 159 Wn.2d 252, 272, 149 P.3d 646 (2006) (citing State v. Sullivan, 69 Wn. App. 167, 171, 847 P.2d 953 (1993)). When the State has introduced evidence notwithstanding the court's prior exclusionary ruling, the defendant is required to object in order to give the trial court the opportunity to cure any potential prejudice.

Weber, 159 Wn.2d at 172. An exception to this rule exists if there are unusual circumstances making it "impossible to avoid the prejudicial impact of evidence that had previously been ruled inadmissible." Weber, 159 Wn.2d at 272 (quoting Sullivan, 69 Wn. App. at 173). Such unusual circumstances can include the situation where the State's questions were "'in deliberate disregard of the trial court's ruling,' or 'an objection by itself would be so damaging as to be immune from any admonition or curative instruction by the trial court.'" Id.

Monroe did not object to the State's questioning regarding his juvenile misdemeanor convictions.[4] RP 713-14. And, there were no unusual circumstances that would have made an objection "so damaging" as to be immune to any curative remedy. First, the prosecutor did not deliberately disregard the trial court's ruling. He misunderstood the ruling to prohibit Monroe's juvenile felony convictions, not his misdemeanor convictions. RP 739, 741. And contrary to Monroe's claim on appeal, the trial court's ruling regarding the juvenile convictions was confusing.

[4] Monroe raised the issue with the court later that morning, following a recess. RP 738. However, he indicated that he wished "to clarify" the court's ruling on the issue, and to propose a limiting instruction if the court had excluded all juvenile convictions. RP 738. This request was untimely. See State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006) (citing State v. Jones, 70 Wn.2d 591, 597, 424 P.2d 665 (1967)) ("To be timely, the party must make the objection at the earliest possible opportunity after the basis for the objection becomes apparent.").

During argument regarding what criminal convictions would be admitted, the prosecutor read the list of convictions he intended to inquire about, one by one. RP 700. The list included Monroe's juvenile convictions, both felony and misdemeanor. Id. The court followed up the State's recitation with its oral ruling, stating that it was going to "drop off the juvenile felonies." RP 701. The court specifically mentioned Monroe's juvenile felonies by name: "[W]hen you said robbery and taking a motor vehicle, I think those only occurred as a juvenile." Id. Monroe himself attempted to clarify by asking the prosecutor, "[T]he crimes that you listed, the convictions are what you will be inquiring about except for the robbery and taking a motor vehicle?" Id. Although the court later uttered the words, "No juvenile convictions" and "make no reference to the juvenile matters[,]" these statements came in the midst of what the record reflects was a confusing discussion between the parties and the court. RP 701-02. In sum, it is clear that the prosecutor's questions concerning Monroe's juvenile misdemeanors were the product of a misunderstanding, not intentional misconduct.

Secondly, the State questioned Monroe about his prior convictions one by one. RP 712-14. Had Monroe objected to the State's first question regarding a juvenile conviction, the court could have sustained the objection, stricken the testimony, and instructed the jurors to disregard it.

The State's misunderstanding of the court's ruling would have been resolved, and the jury would not have heard evidence concerning the remainder of Monroe's juvenile convictions, including his harassment conviction, which the State asked about last. RP 713-14.

Finally, given the context in which the State elicited evidence of Monroe's juvenile convictions, an objection would not have been damaging to Monroe. The jury had just heard about Monroe's adult convictions, which included unlawful possession of a firearm, multiple assaults, bail jumping, and arson. RP 712-13. Monroe could have easily raised an objection to the State's question regarding malicious mischief or reckless endangerment without any—much less significant—damage to his case.

Because there were not unusual circumstances that relieved Monroe of his duty to object to the evidence, he has failed to preserve this issue on appeal. This Court should not consider it.

c. Monroe Has Failed To Establish Any Prejudice From The Introduction Of His Prior Juvenile Misdemeanor Convictions.

To prove that prosecutorial misconduct warrants a new trial, Monroe must prove that the prosecutor's conduct was both improper and prejudicial. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)

(citing State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). In order to prove prejudice, Monroe must prove that there is "a substantial likelihood the misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Monroe has no right to reversal of his conviction "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Monroe has failed to demonstrate that there is a substantial likelihood that the admission of his juvenile misdemeanor convictions affected the jury's verdict. J.W.'s testimony that Monroe prostituted her was compelling, and also demonstrated her lack of bias toward Monroe. J.W. contacted her friend Kyla Conlee at the Dream Center to assist her in leaving Monroe; she did not intend to involve the police and she was surprised when they arrived at the motel. RP 432, 436. She warned Monroe in a text message that the police were on their way, and told him not to return to the motel. RP 469. She later texted Monroe and told him to delete the texts on his phone. RP 478-79. J.W. did not want Monroe to get into trouble and did not want to testify. RP 479.

In contrast, Monroe's denial of the charges lacked all credibility. On direct examination, Monroe testified that J.W. never told him about her pimp Quinton Jones:

> No, she's never told me. That was – that was the first time I've heard these stories with all these pimps. She didn't never say – she said she got in trouble. She got blackballed from all the casinos. She never said she was beaten by pimps or that she was with other pimps. I never known none of that. I thought she was just prostituting for herself.

RP 566-67 (emphasis added). The State impeached this testimony with a jail phone call that Monroe had made prior to trial wherein he discussed how J.W. "kept telling me about this dude named Quinton. . . . She told me but he was beating on her and doing this shit." RP 736.

Moreover, Monroe's explanations for the evidence bordered on the absurd. He testified that at the time of his arrest he was taking two girls to the motel in Edmonds to make a porn video. RP 601-03. He told the jury of his dream to make it "big" in the porn industry. RP 605. His attempt to explain away the damaging text messages retrieved from his phone was equally unbelievable. He claimed that his texts to "Cousin Mike," wherein he stated that he was "sitting a ho down," and that it was "good $," meant only that he was "getting ready for a video" and that he could make anywhere from $1000 to $1500 dollars per video. RP 513-14, 620. When pressed for specifics on how much money he had actually made

selling porn videos, Monroe admitted that he had not earned any money. RP 621-22. Similarly, Monroe incredibly claimed that his text message to "Joe in Wenatchee" stating, "I've got some females now for you," meant only that Joe should come to Seattle to "party" at the strip clubs with Monroe. RP 617-18.

Monroe's testimony was extremely damaging to him in other ways. He routinely referred to women in derogatory terms. RP 539-40, 623, 628. He inundated the jury with irrelevant information that undoubtedly harmed his credibility, such as bragging about his sexual proclivities. See RP 541 (testifying that he had engaged in "hundreds" of one-night stands), RP 555 (informing the jury of his love for strip clubs). He demeaned the victim, testifying to unnecessary details about her and her body. See RP 559 (telling the jury that J.W. wanted to enter a "butt-shaking" contest because "she knows how to dance provocative"); RP 600 (going into detail about the size of J.W.'s bottom); RP 628 (again remarking on the size of J.W.'s bottom).

Finally, Monroe's version of his arrest unquestionably destroyed his credibility. He testified that he was arrested with much commotion and that he had no idea why he was being arrested, because he was "just a fuck boy" and was only at the motel to "fuck some bitches." RP 649-52. Whatever credibility might have remained at that point was lost when

Monroe claimed that he "did not commit crimes." RP 652. The State successfully impeached Monroe with evidence of his adult convictions for felony assault, misdemeanor assault, custodial assault, unlawful possession of a firearm, arson, and bail jumping. RP 712-13.

Given all of the evidence, it is clear that the jury's consideration of Monroe's misdemeanor convictions played no role in its verdict.[5] Monroe essentially conceded as much in the trial court: "I think what [the jury's] understanding probably was[,] was most of these were adult. And whether they separate it out at the end juvenile I don't know." RP 743. Monroe has failed to carry his burden to show that the prosecutor's questioning regarding misdemeanor juvenile convictions prejudiced him.[6]

Monroe has also failed to demonstrate that the trial court abused its discretion when it did not strike the juvenile convictions or provide a special limiting instruction regarding them. A trial court's refusal to strike testimony, and a trial court's ruling on the propriety of a limiting

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[5] On appeal, Monroe focuses almost exclusively on the alleged prejudicial effect of his harassment conviction. However, Monroe told the jury that the conviction stemmed from "arguing over a bike," and the State introduced no evidence to the contrary. RP 714. It is highly improbable that this testimony affected the verdict.

[6] Monroe claims that even if he has not demonstrated prejudice, this Court should reverse his conviction to avoid setting a "dangerous precedent" that the prosecutor "could then strategically ignore a trial court's rulings to exclude certain evidence" so long as there is no prejudice to the defendant. Brf. of App. at 34-35. He cites to no authority that would authorize a new trial in the absence of prejudice, and he ignores the fact that here, the record is clear that the prosecutor did not intentionally ignore the court's ruling. Rather, a dangerous precedent is set by a rule that allows a defendant to sit back, not object, wait for a favorable verdict, and then appeal if unsuccessful. State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994).

instruction are both reviewed for abuse of discretion. State v. Studebaker, 67 Wn.2d 980, 983, 410 P.2d 913 (1966) (motion to strike); State v. Ramirez, 62 Wn. App. 301, 305, 814 P.2d 227 (1991) (propriety of limiting instruction). Given Monroe's claim that he "did not commit crimes," it would have been a proper exercise of the trial court's discretion to admit evidence of Monroe's juvenile misdemeanor convictions in the first instance. Thus, refusing to strike such testimony could not constitute an abuse of discretion. The trial court recognized this, and stated its belief that the juvenile misdemeanors had probative value in light of Monroe's direct testimony. RP 755.

Second, the trial court's primary concern with striking the testimony, or providing a limiting instruction regarding it, centered on the defendant's false testimony that his past arson was a juvenile conviction, when it was actually an adult conviction. RP 741-44, 755-56. The court was unsure that it could craft a proper instruction striking or limiting the testimony without simultaneously commenting on the evidence regarding what was a juvenile conviction and what was not. Id. Nor did Monroe propose any proper instruction. Finally, the court did not want to call further attention to the juvenile convictions. RP 756.

Ultimately, the trial court felt that the instruction it gave was sufficient to appropriately limit the jury's consideration of the evidence:

"You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose." CP 51. This decision was reasonable. The court did not abuse its discretion.

3. MONROE HAS FAILED TO ESTABLISH REVERSIBLE ERROR BASED ON AN UNSUBSTANTIATED ANONYMOUS ALLEGATION THAT AN UNIDENTIFIED JUROR WAS SLEEPING.

Monroe claims that the trial court failed to conduct an adequate inquiry into whether a juror was sleeping during a portion of the trial. He claims that this alleged error entitles him to a new trial. He is wrong.

First, Monroe has not adequately preserved a claim of alleged juror misconduct and this Court should refuse to consider it. Second, the trial court is not required to conduct a factual hearing every time a claim is made that a juror was inattentive. Here, an unidentified audience member apparently communicated to Monroe's attorney that one of the jurors "might've been sleeping." After Monroe's counsel repeated the vague, after the fact allegation on the record, the trial court indicated that it would carefully monitor the situation, asked counsel to do the same, and the issue was never again raised. There was no requirement that any particular juror be questioned. The court did not abuse its discretion.

a. Relevant Facts.

After J.W. completed her testimony, the court excused the jury for its afternoon recess. RP 475. After the recess, Monroe's counsel indicated that she had one additional question of J.W. that she felt was important. RP 476. The court asked the prosecutor if he would check to see if J.W. was still in the courthouse. Id. Another brief recess was taken for that purpose. RP 477. After the second recess, Monroe's counsel stated:

> MS. HARTL: Yeah, I think we got one thing, Your Honor. We can sit down. I think – somebody in the audience said that there – a juror might've been sleeping for a while, and another juror next to them are nudging them awake, so –
>
> THE COURT: I did not notice that. But it is something that we have to battle against from time to time in the afternoons. Mr. Barber, did you notice that?
>
> MR. BARBER: I didn't, no.
>
> THE COURT: Okay. Well, I would appreciate counsel's assisting in watching for that, and –
>
> MS. HARTL: Okay.
>
> THE COURT: -- we can take a – I can take a stretch break whenever I see that. So –
>
> FEMALE SPEAKER: I'll go like this.
>
> THE COURT: Oh. I'll keep that –
>
> MS. HARTL: Okay.
>
> THE COURT: -- keep that in mind. Okay?

RP 477-78. Nothing else was ever mentioned regarding a juror allegedly sleeping.

b. Monroe Failed To Preserve His Claim Of Alleged Juror Misconduct.

Unless counsel objects to a juror's inattentiveness during trial, the error is waived on appeal. State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986). Merely calling the court's attention to the matter is insufficient to preserve the claim. Casey v. Williams, 47 Wn.2d 255, 257, 287 P.2d 343 (1955). In Casey, the court stated that the prejudice arising from a sleeping juror:

> is prejudicial when it occurs, and a party with knowledge must seek relief at that time. He cannot gamble on the verdict of the jury and seek relief thereafter in the event the verdict is unfavorable to him. Directing the trial court's attention to the alleged misconduct, without asking for relief of any kind, does not, under the circumstances of this case, preserve the error for one who takes the calculated risk of permitting the case to go to the jury.

47 Wn.2d at 257.

In the present case, Monroe brought up the possibility that one of the jurors might have been sleeping. RP 477. The allegation was not based on Monroe's or his counsel's own observations, but rather the observations of an anonymous audience member. Id. Monroe did not ask the court to inquire of either the audience member or the allegedly inattentive juror, nor did he ask to remove the juror. He did not even

identify the juror. Instead, Monroe's counsel agreed to assist the court in watching for any problem with juror inattention; apparently there was none. RP 477. In sum, Monroe was willing to wait and gamble on a favorable verdict and then claim error for the first time on appeal. He has failed to preserve this claim, and this Court should not consider it.

c. The Trial Court Did Not Abuse Its Discretion When It Did Not Question The Jury.

Even if this Court considers Monroe's claim of juror misconduct, it fails. An unidentified audience member's unsubstantiated observation that contradicted the court's own observations and the observations of the prosecutor did not require the court to question the jury, and does not entitle Monroe to a new trial.

Together, RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit or unable to perform the duties of a juror. State v. Jorden, 103 Wn. App. 221, 226-27, 11 P.3d 866 (2000). A trial court must "excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of ... inattention ... or by reason of conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110. CrR 6.5 requires that, "If at any time before submission of the case to the

jury a juror is found unable to perform the duties the court shall order the juror discharged." CrR 6.5.

If a juror is truly sleeping, he should be dismissed. Jorden, 103 Wn. App. at 226-27. A trial court's decision to excuse or not excuse a juror is reviewed for abuse of discretion. Hughes, 106 Wn.2d at 204; Jorden, 103 Wn. App. at 226-27; State v. Ashcraft, 71 Wn. App. 444, 461, 859 P.2d 60 (1993). To establish that the trial court abused its discretion, Monroe must make a clear showing that the trial court's decision was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. Carroll, 79 Wn.2d at 26.

The relevant question for this Court is whether the record establishes that a juror engaged in misconduct. Jorden, 103 Wn. App. at 226-27. Appellate courts are "unwilling to impose on the trial court a mandatory format for establishing such a record. Instead the trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party." Id. In Jorden, this Court emphasized that when determining whether a juror should be dismissed, the trial court has "fact-finding" discretion and is acting as both an observer and decision-maker. Jorden, 103 Wn. App. at 229.

Contrary to Monroe's argument, a hearing was not required when an anonymous audience member told his attorney that an unidentified juror "might've been sleeping." As observed in Jorden, although "CrR 6.5 contemplates a formal proceeding, which may include brief voir dire[,]" such a hearing is only required when the case has already gone to the jury and the alternates have been temporarily excused. 103 Wn. App. at 226-27 (citations omitted) (emphasis in original). After Monroe brought up the unidentified audience member's concern, the court clarified that neither the court nor the prosecutor had observed any jurors sleeping. RP 477. Nor did Monroe's counsel indicate that she had observed a sleeping juror; instead, she merely agreed to assist the court with monitoring the situation to make sure no such problems arose. Id. Apparently, none did.

Monroe cites to cases from other jurisdictions in support of his claim that that court was required to question "the juror" to determine if "the juror" was sleeping. However, the cases cited by Monroe all conclude that such a hearing is necessary only when there has been a sufficient showing that a juror was sleeping. Such is not the case here. An anonymous audience member's complaint to Monroe's counsel regarding a possibly sleeping juror was not substantiated by any other source. Indeed, the court and the prosecutor both indicated that they had

not observed anyone sleeping. Monroe's contrary assertions aside, he has not made a sufficient showing of jury inattentiveness.[7] No hearing was required.

Finally, Monroe claims that he is entitled to a new trial regardless of whether the record demonstrates that a juror was sleeping, simply because the court did not question the jury regarding such a possibility. Monroe supports this illogical argument with (1) cases where there was a sufficient showing that a juror had been sleeping and (2) inapt cases where some intervening action prevented the court from determining whether prejudice resulted from an entirely different type of error. Plainly, if the jurors were not sleeping, Monroe was not prejudiced, and he is not entitled to a new trial.

4. MONROE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Monroe makes four separate claims that his counsel was ineffective. He claims that his trial counsel should have (1) raised the issue of venue, (2) introduced the content of an email as substantive

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[7] Monroe cites to Commonwealth v. Dancy, 75 Mass. App. Ct. 175, 912 N.E.2d 525 (2009), for the proposition that "[a] judge's receipt of 'reliable information' that a juror is asleep 'requires prompt judicial intervention to protect the rights of the defendant[.]'" Brf. of App. at 39-40. In Dancy, however, the trial judge herself actually observed the sleeping juror. 75 Mass. App. Ct. at 180. Although a trial judge's own observations are not the only source of reliable information, an unidentified person stating that a juror "might've been sleeping" can hardly be considered such, especially when it contradicts the court's own observations. Monroe's strained assertion that such a report "should be deemed a reliable source of information necessitating further inquiry" should be rejected.

evidence, (3) called defense witnesses, and (4) been better prepared. These claims are all meritless.

An ineffective assistance of counsel analysis begins with the strong presumption that counsel's representation was effective and competent. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). For Monroe to overcome this strong presumption, he must prove by a preponderance (1) that his trial counsel's performance was so deficient that it fell outside the wide range of objectively reasonable behavior based on consideration of all the circumstances of the case, and (2) that this deficient performance prejudiced him, i.e., that there is a reasonable probability that but for counsel's objectively unreasonable representation, the results of trial would have been different. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If the defendant fails to prove either prong of this test, the inquiry must end. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Conduct that can be characterized as legitimate strategy is not deficient. Grier, 171 Wn.2d at 33. The presumption of reasonableness can be overcome only by showing that there is no conceivable legitimate tactical reason for counsel's conduct. Id.

a. Trial Counsel Was Not Ineffective When She Did Not Raise The Issue Of Venue Or Move To Include Venue In The Jury Instructions.

Monroe contends that his counsel was deficient for failing to raise the issue of venue and for failing to ask that venue be included as an element of the crime in the jury instructions. However, because venue was proper in King County, Monroe has not proved that his attorney's performance was deficient. Moreover, Monroe has failed to establish any resulting prejudice from the failure to object to venue.

A criminal defendant has the right to a "jury of the county in which the offense is charged to have been committed[.]" Wash. Const. art. I, sec. 22. Venue relates solely to the proper forum before which a criminal defendant is tried. State v. Hardamon, 29 Wn.2d 182, 188, 186 P.2d 634 (1947). It is not an element of the crime. State v. Dent, 123 Wn.2d 467, 479, 869 P.2d 392 (1994). It is not a matter of jurisdiction. State v. Escue, 6 Wn. App. 607, 607-09, 495 P.2d 351 (1972).

By court rule, the defendant must be charged in either the county where the offense was committed or in any county where an element of the offense occurred. CrR 5.1(a)(1), (2). When it is unclear where the offense occurred, the case may be filed in any county in which it might have been committed. CrR 5.1(b). In that case, "[T]he defendant shall

have the right to change venue to any other county in which the offense may have been committed." CrR 5.1(c).

Because the right to proper venue is a personal privilege, it may be waived by the defendant. Hardamon, 29 Wn.2d at 188. Generally speaking, a challenge to venue must be brought before trial. Dent, 123 Wn.2d at 480. If there is no confusion as to proper venue, a defendant must object by the omnibus hearing. Dent, 123 Wn.2d at 480 (citing CrR 4.5(d)). When an offense is charged under CrR 5.1(b) due to a reasonable doubt as to where the crime was committed, the defendant must object as soon as he has knowledge upon which to base the objection. CrR 5.1(c); State v. Price, 94 Wn.2d 810, 815-16, 620 P.2d 994 (1980). Failure to timely object under either scenario constitutes a waiver. Dent, 123 Wn.2d at 480.

If the evidence at trial raises a venue question for the first time, the defendant must object at the end of the state's case. Dent, 123 Wn.2d at 480. Absent a showing of actual prejudice by the defendant, the State may then present further evidence as to proper venue. Id. Only when a genuine issue regarding proper venue exists does "it becomes a matter for resolution by the trier of fact." Id. Proof by a preponderance of the evidence is required, not proof beyond a reasonable doubt. Id. at 480-81. Direct evidence is not required; inferences from circumstantial evidence

may be sufficient to establish proper venue. Dent, 123 Wn.2d at 479 (citing State v. Marino, 100 Wn.2d 719, 728, 674 P.2d 171 (1984)).

Here, it was apparent prior to and during the trial that venue was proper in either King or Snohomish Counties. Monroe was charged with first-degree promoting prostitution, which required proof that he knowingly advanced prostitution by compelling J.W. by threat or force to engage in prostitution, or that he knowingly profited from J.W.'s prostitution that resulted from such threat or force. RCW 9A.88.070(1)(a); CP 53. A defendant, among other things, "advances" prostitution when he causes or aids another person to engage in prostitution, or engages in any conduct designed to institute, aid, or facilitate an act or enterprise of prostitution. RCW 9A.88.060(1); CP 57.

If any of the above elements occurred in King County, venue was proper therein. See CrR 5.1(a)(2) (venue proper "[i]n any county wherein an element of the offense was committed or occurred.").

The evidence presented at trial clearly showed that Monroe advanced the prostitution of J.W. in King County. See RP 393, 407 (while J.W. was living with Burden in Renton, Monroe told J.W. he wanted her to "work" for him); RP 411-13 (Monroe continued to ask J.W. to "walk" for him in text messages exchanged between them while she lived in Renton and Monroe lived in Kirkland); RP 415 (J.W. began "walking" for

Monroe while they were living together in Kirkland; Monroe drove J.W. from Kirkland to Highway 99, dropped her off, and then returned to pick her up). This Court may take judicial notice that Renton and Kirkland are both in King County. State v. Kincaid, 69 Wn. 273, 276, 124 P. 684 (1912); see also Dent, 123 Wn.2d at 479 ("Indeed the court may take judicial notice of proper venue.").

Moreover, even if the evidence that was presented at trial was not clear, the trial prosecutor could easily have presented additional facts establishing that venue was proper in King County had Monroe objected. In the absence of such an objection, the State had no incentive to flesh out the details of exactly where along Highway 99 J.W. prostituted herself for Monroe.[8] See RP 415-16 (J.W. testified that she walked on "the 99."). However, the evidence would have showed that Monroe:

> [I]nstructed J.W. to begin walking up and down Highway 99 in the general vicinity of the [Golden West] motel, soliciting paid dates for sex. Monroe drove J.W. to various locations along Highway 99, and as far south as the Fred Meyers in the Gateway Shopping Center at north 185th Street and Aurora Ave North in Shoreline Washington. Monroe ordered J.W. to earn at least $500 per day prostituting, as a quota.

[8] Additionally, because Monroe did not object to venue, the State had no incentive to clarify in which county "Sharon's" house was, where J.W. took the backpage.com photographs with Monroe's camera phone. See RP 417. Perhaps Monroe's trial counsel did not object because she knew that clarifying evidence would not support a claim of improper venue.

CP 4 (emphasis added). This Court may take judicial notice that Shoreline is in King County. Kincaid, 69 Wn. at 276; Dent, 123 Wn.2d at 479.

In sum, because venue was proper in any county where an element of the offense occurred, and because Monroe advanced the prostitution of J.W. in King County, Monroe's trial counsel was not deficient for failing to object to venue.[9]

Monroe alternatively claims that his trial counsel should have requested that King County be placed in the "to-convict" instructions to the jury. Without support or elaboration, he states, "A request to include the element of venue in the jury instructions would have been granted, and counsel's failure to do so relieved the State of its burden." Brf. of App. at 52. However, Monroe's conclusory argument rests on the erroneous premise that venue is an element of the offense. It is not. Dent, 123 Wn.2d at 479. The mention of King County in the charging document[10] was mere surplusage and did not limit the jury's consideration to the acts

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[9] Monroe states that trial counsel should have "moved to dismiss" based on improper venue. He cites to CrR 5.1(c) in support. However, CrR 5.1(c) applies only to the situation where there is a reasonable doubt as to the county where the offense occurred, not to the scenario here, where the crime occurred in more than one county. Moreover, if the court orders a change of venue, it merely directs that all papers and proceedings be certified to the superior court of the proper county, directing the defendant and witnesses to appear there. It does not direct dismissal of the charges. CrR 5.2(c).

[10] CP 1.

that were committed in King County. State v. Hull, 83 Wn. App. 786, 797, 924 P.2d 375 (1996). Because there was no genuine issue regarding proper venue, counsel was not deficient for failing to request that it be included in the jury instructions. See Dent, 123 Wn.2d at 480 (only when a genuine issue regarding proper venue exists does it becomes a matter for resolution by the trier of fact). Monroe does not explain how his trial counsel was deficient for not asking for something to which he was not entitled.

Nor does Monroe explain how he was harmed by the absence of such an instruction, given that the evidence clearly established that at least some, if not all, elements of the offense occurred in King County. Monroe's venue claim must be rejected.

b. Trial Counsel Effectively Impeached SPD Detective-Sergeant Diaz Regarding His Testimony About The Content Of Special Agent Vienneau's Email.

Monroe argues that his "trial counsel was ineffective for failing to admit testimony of Detective Vienneau about a crucial email that stated his belief at the time that Monroe was not a threat to the alleged victim." Brf. of App. at 53. This argument rests on an erroneous reading of the

record and an unsupported version of the facts.[11] Monroe's claim that his trial counsel was ineffective with regards to the email is frivolous.

After speaking to Kyla Conlee of the Dream Center, Special Agent Vienneau unsuccessfully attempted to contact J.W. at the Golden West Motel. RP 207-09. He then sent an email to the rest of the task force and "asked if anyone had the time to go by later that evening to check on the room[.]" RP 210. Vienneau's email said that J.W. had told the Dream Center:

> she was with a guy at the Golden West Motel on the Shoreline/Edmonds border . . . and that she was going to call Bonita when he leaves so she can get out of there. She didn't acknowledge prostituting for him or being held against her will. We believe the "guy" is Antonial Marquett Monroe[.]

Ex. 2. The email was sent to SPD Detective-Sergeant Jaycin Diaz, as well as other members of the task force. RP 210.

Detective-Sergeant Diaz testified immediately after Special Agent Vienneau testified. RP 214. Diaz testified on direct examination that he received Vienneau's email, and that it informed him that J.W. was "being prostit—or was being worked, and she wanted out." RP 218-19. He

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[11] Monroe claims that the email in question "clearly stated that Detective Vienneau did not perceive Monroe as a threat." Brf. of App. at 22, 54. It is unclear how Monroe arrives at that conclusion as he offers no support for it. Nor did he designate the email exhibit for this court. Brf. of App. at 22, n.1. In reality, the email says nothing regarding Vienneau's perception of Monroe, nor does it opine in any manner on the level of danger Monroe may have posed to J.W. See Ex. 2 (attached as Appendix A). Rather, the relevant portion of the email states only that J.W. herself did not acknowledge being prostituted or held against her will. Id.

testified that he and the other detectives did not "want to go into an environment where both her and the individual that we believed was working her were in the same room," because "[o]ftentimes, the girl being worked is fearful of that individual, and so we didn't want to go ahead and have him anywhere present while we were making that contact." RP 223.

During cross-examination of Detective-Sergeant Diaz, Monroe's lawyer attempted to impeach his direct testimony that Vienneau's email stated that J.W. was "being worked" and "wanted out." The following exchange occurred:

> Q: So you are – actually referenced a – you got information regarding Jessica from Agent Vienneau through an e-mail; is that correct?
>
> A: I did.
>
> Q. And in that e-mail, did you re- -- did you testify that Jessica –
> Could I get this marked, please.
> -- was involved in a [sic] prostitution and needed help?
>
> A. I did.
>
> . . .
>
> Q. And do you have a copy of those emails?
>
> A. I do not.
>
> Q. Okay. I'm going to show you what's been marked as a Defense Exhibit No. 2.
>
> . . .

Q. And does that – does that look like a printed-out copy of those emails?

A. It does.

Q. Okay. And if you turn – so that the second page there is actually a continuation of the second email, correct?

A. Um-hum. It is.

Q. And – I can take that back.

A. Sure.

Q. Okay. So – and in that e-mail, the last line of the first paragraph, what does that say?

MR. BARBER: Objection. Hearsay. The author of that e-mail was on the stand and could've been asked about it.

THE COURT: May I see the exhibit?

MS. HARTL: Your Honor, in response, I would say this –

THE COURT: Well, hold on, Counsel.

. . .

THE COURT: Sustained as to hearsay.

. . .

Q. So does that e-mail actually state that Jessica was prostituting?

A. No, it doesn't.

MR. BARBER: Objection, Your Honor.

THE WITNESS: Oh.

THE COURT: Sustained.

MS. HARTL: Your Honor, he had testified earlier to what was in the email.

THE COURT: Counsel, don't argue the objection in front of the jury.

MS. HARTL: Okay.

Q. Sergeant, was your testimony correct earlier about the email, that the prosecutor asked?

A. No, it was incorrect.

Q. It was incorrect?

A. Um-hum.

RP 227-30.

Monroe's trial counsel was attempting to impeach Diaz's testimony that Vienneau's email stated J.W. was being prostituted and wanted out. Thus, counsel was not offering Vienneau's email for the truth of the matter, and it was not hearsay. ER 801(c). But even if the trial court erroneously sustained an objection based on hearsay, it did not strike the testimony and it did not instruct the jury to disregard it. RP 230. Furthermore, Diaz admitted that his prior testimony surrounding the email had been incorrect. RP 230. As such, Monroe's trial counsel successfully impeached Diaz's direct testimony that Vienneau's email stated J.W. was being prostituted and wanted out.

Nonetheless, Monroe unfairly characterizes his trial counsel's performance as deficient, claiming that she did not understand the rules of

evidence, and that had she asked the sender of the email about its contents and not the recipient, it would have been admitted. See Brf. of App. at 55-56. But the content of the email, if offered for the truth, was hearsay regardless of whether it was offered through the sender or the recipient. ER 801(c); see also State v. Sua, 115 Wn. App. 29, 40-41, 60 P.3d 1234 (2003) ("[A]n out-of-court statement is hearsay when offered to prove the truth of the matter asserted—even if it was made by someone who is now an in-court witness"). Counsel was not ineffective for not attempting to admit the email as substantive evidence through the sender and this Court's analysis need go no further. Hendrickson, 129 Wn.2d at 78.

Moreover, even if trial counsel could have properly introduced the email as substantive evidence through Vienneau, Monroe cannot show prejudice from the failure to do so. His factual premise (that Vienneau's email stated his belief that Monroe was not a threat to J.W.) is unsupported by the email itself. From false facts come false conclusions. This argument is frivolous.

c. Trial Counsel Was Not Ineffective For Failing To Call Victoria Burden Or Other Witnesses To Testify.

Monroe claims that his trial counsel was ineffective for failing to call Victoria Burden "or any other defense witnesses." Brf. of App. at 57. Again, Monroe has not established deficient performance or prejudice.

Generally, the decision of whether to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816 (1987); State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). Because counsel is presumed to have provided effective assistance, Monroe must affirmatively show that no legitimate strategic or tactical reasons supported the decision not to call a witness. McFarland, 127 Wn.2d at 336.

Shortly before trial, Monroe supplied the State with a list of five potential witnesses. RP 26. However, because it later became clear that the State would not be able to interview those five witnesses by the start of trial, Monroe and his previous counsel, Miguel Duran, decided to strike those witnesses, as Monroe did not want to delay the start of trial. RP 26. Still later, Monroe listed three of those five witnesses, including Victoria Burden, as potential "rebuttal" witnesses in his trial memorandum. CP 88. The State indicated that should Monroe decide to call those three witnesses, the State would "ask for the opportunity to speak briefly with them" and for a summary of their proposed testimony. Id.

During trial, on June 4, Monroe's trial counsel indicated that she had subpoenaed Burden, and that she anticipated her being available the following day. RP 275. Monroe's trial counsel apparently handed the State a copy of an interview that Monroe's previous attorney had conducted of

Burden, which the State had never seen before. RP 277. The State indicated once again that it would need to interview Burden prior to her testimony. Id. On the morning of June 6, Monroe's trial counsel indicated that she had not been able to contact Burden. RP 528. That afternoon, the court asked trial counsel if she still anticipated calling Burden as a witness, and trial counsel stated, "No." RP 665.

Monroe now claims that counsel was ineffective for not calling Burden as a witness. However, he has established neither deficient performance nor prejudice. A reviewing court considers an ineffective assistance claim only in light of those matters included in the trial record. McFarland, 127 Wn.2d at 335. Monroe must support his argument with citations to legal authority and "references to the relevant parts of the record." RAP 10.3(6). The "record on review" consists of the report of proceedings, clerk's papers, and exhibits. RAP 9.1(a).

First, Monroe makes no showing that Burden was available as a witness. His attorney indicated during trial that despite a subpoena, she had not been able to contact Burden. RP 528. Moreover, without any citation to the record, Monroe makes factual assertions about what Burden's testimony would "likely" have been. This Court should ignore

all factual assertions not supported by the record.[12] Here, there is simply nothing in the record regarding what Burden's testimony would have been. Because Monroe has not established that Burden was available to testify or what she would have testified to, he cannot show that the decision not to call her as a witness was deficient or that it prejudiced him. See State v. Weber, 137 Wn. App. 852, 858, 155 P.3d 947 (2007) (the failure to call a witness cannot be considered prejudicial unless the record supports that the witness would have been helpful to the defense). This Court should decline to consider this claim altogether.

Monroe also makes conclusory allegations that his trial counsel was ineffective for not presenting the testimony of "any other witness" and "failing to prepare the defendant for his testimony[.]" Brf. of App. at 57-58. Appellate courts "will not review issues for which inadequate argument has been briefed or only passing treatment has been made." State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) and State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995)). Monroe offers no support in the record for his claim that his counsel failed to adequately prepare him for testimony, nor does he explain who the "other witnesses"

[12] Strangely, Monroe also claims that "only the State" has a copy of the transcribed interview that his own counsel conducted. Brf. of App. at 57. He indicates that he "will provide it to this Court" if he obtains a copy. Id. Monroe cites to no authority that would allow him to supplement the record in such a manner.

are that his trial counsel should have called to testify, or how their testimony would have probably changed the outcome of the trial. His claims are frivolous.

d. Monroe Has Failed To Establish That His Trial Counsel Was Unprepared For Trial.

Lastly, Monroe contends that his trial counsel was unprepared for trial. He claims that his previous arguments regarding venue, the email, and the fact that Burden was not called as a witness, coupled with "only four days of preparation," demonstrate that his trial counsel rendered constitutionally deficient performance. However, as outlined above, counsel was not deficient with respect to venue, the email, or for failing to call defense witnesses. And Monroe cites to no authority for the proposition that there is a particular amount of preparation time that is per se unreasonable for a case of this nature. Monroe's claim that his attorney was unprepared is meritless.

On May 24, 2012, Monroe asked the court to allow the substitution of private counsel. 5/24/12 RP 5. When the court balked at the motion to substitute new counsel a few days before trial, Monroe assured the court that he would rather have a "possibly unprepared" new counsel than a "prepared old counsel." 5/24/12 RP 7. Monroe himself pointed out that his newly retained counsel had already interviewed the victim face to face,

and that his prior counsel had not actually interviewed the witnesses himself, but was rather relying on transcripts of interviews conducted by his investigator. 5/24/12 RP 8. With respect to those interviews, Monroe stated that new counsel would be "reading the same things" as old counsel. 5/24/12 RP 8-9. Monroe stated that he was so confident in new counsel that he wished to go forward "however ready" new counsel was. 5/24/12 RP 9.

The trial began on May 30, 2012, six days after new counsel substituted in. RP 1. Other than his meritless arguments regarding venue, Agent Vienneau's email, and Burden, Monroe points to nothing specific that demonstrates his trial counsel was unprepared. To the extent that counsel might have been unprepared based on her recent substitution alone, Monroe affirmatively requested new counsel "however ready" she was. He cannot now be heard to complain.

Finally, even if this Court were to find deficient performance, Monroe must still establish prejudice. He cannot. To prevail, Monroe must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Thomas, 109 Wn.2d at 226; Strickland, 466 U.S. at 694. "The

likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. __, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citing Strickland, at 693).

Monroe makes no persuasive argument that there is a reasonable probability the outcome of the trial would have been different if trial counsel had been given more time to prepare. He cannot establish the prejudice necessary to sustain an ineffective assistance of counsel claim.

D. CONCLUSION

For all of the above reasons, Monroe's conviction and sentence should be affirmed.

DATED this 18th day of November, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
AMY MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

DEFENDANT'S EXHIBIT
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Barber, Hugh

From: Novisedlak, Todd <Todd.Novisedlak@seattle.gov>
Sent: Friday, May 25, 2012 3:23 PM
To: Barber, Hugh
Subject: Fw: Jessica

From: Vienneau, Steven J. [mailto:Steven.Vienneau@ic.fbi.gov]
Sent: Friday, May 25, 2012 03:22 PM
To: Novisedlak, Todd
Subject: FW: Jessica

From: Vienneau, Steven J. 16:31
Sent: Wednesday, March 14, 2012 4:31 PM
To: Metcalf, Donald J.
Cc: Seifert, Christine A.; Ramos, Daniel J.; 'TMorgan@ci.everett.wa.us'; Prewett, Marty D.; 'Andy.Conner@kingcounty.gov'; 'william.guyer@seattle.gov'; 'Breed.D@portseattle.org'; 'brlewis@ci.kent.wa.us'; 'brian.taylor@kingcounty.gov'; 'Ivey.S@portseattle.org'; 'Harry.James@seattle.gov'; 'jaycin.diaz@seattle.gov'; 'joel.banks@kingcounty.gov'; Larsen, Sara; 'LDvorak@kentwa.gov'; 'patricia.macdonald@seattle.gov'; 'richard.mcmartin@kingcounty.gov'; 'stefanie.thomas@seattle.gov'; 'Todd.Novisedlak@seattle.gov'; 'tkraft@bellevuewa.gov'; 'MWilliams@kentwa.gov'; 'darin.chinn@seattle.gov'
Subject: Re: Jessica

All:

Monroe checked into room 46 under his own name, but no one answered when we called the room and knocked at the door. The manager said he was driving a black SUV (probably an Escalade). It wasn't parked at the motel when we were there, so they probably went out together.

If anyone else is in a position to check again tonight, please let me know. (Since we don't have PC for Monroe, we were going to cover Jessica by saying we were there to pick her up on a warrant.)

Steve

From: Vienneau, Steven J.
To: Metcalf, Donald J.
Cc: Seifert, Christine A.; Ramos, Daniel J.; Tim Morgan (tmorgan@ci.everett.wa.us) <tmorgan@ci.everett.wa.us>; Prewett, Marty D.; Andy Conner (Andy.Conner@kingcounty.gov) <Andy.Conner@kingcounty.gov>; Bill Guyer (william.guyer@seattle.gov) <william.guyer@seattle.gov>; Breed, Daniel <Breed.D@portseattle.org>; Brian Lewis (brlewis@ci.kent.wa.us) <brlewis@ci.kent.wa.us>; Brian Taylor (brian.taylor@kingcounty.gov) <brian.taylor@kingcounty.gov>; Ivey, Steven <Ivey.S@portseattle.org>; James, Harry <Harry.James@seattle.gov>; Jaycin Diaz (jaycin.diaz@seattle.gov) <jaycin.diaz@seattle.gov>; Joel Banks (joel.banks@kingcounty.gov) <joel.banks@kingcounty.gov>; Larsen, Sara; Lovisa Dvorak (LDvorak@kentwa.gov) <LDvorak@kentwa.gov>; Patricia MacDonald (patricia.macdonald@seattle.gov) <patricia.macdonald@seattle.gov>; Rich McMartin (richard.mcmartin@kingcounty.gov) <richard.mcmartin@kingcounty.gov>; Stefanie Thomas (stefanie.thomas@seattle.gov) <stefanie.thomas@seattle.gov>; Todd Novisedlak (Todd.Novisedlak@seattle.gov) <Todd.Novisedlak@seattle.gov>; Tor Kraft (tkraft@bellevuewa.gov) <tkraft@bellevuewa.gov>; Williams, Mark <MWilliams@kentwa.gov>
Sent: Wed Mar 14 18:11:01 2012
Subject: Jessica 6:11 pm

Don,

Bonita of Genesis Project just reached out saying Jessica (ILDB profile attached) contacted her grandma and the Dream Center in L.A. saying she was with a guy at the Golden West Motel on the Shoreline/Edmonds border (23916 Washington 99, Edmonds, WA – map attached) and that she was going to call Bonita when he leaves so she can get out of there. She didn't acknowledge prostituting for him or being held against her will. We believe the "guy" is Antonial Marquett Monroe (ILDB profile attached).

I'm going to head up to the hotel with Dan and Sara to see if we can pick Jessica up and take her to Genesis Project. If the situation merits any immediate law enforcement action directed toward Monroe, we'll coordinate with Edmonds PD. I'm hoping for a quick pick up and drop off.

Steve

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Corey Evan Parker, the attorney for the appellant, at Law Office of Corey Evan Parker, 1461 Spectrum, Irvine, CA 92618-3134, containing a copy of the BRIEF OF RESPONDENT, in STATE V. TONY MONROE, Cause No. 69123-6 - I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 18 day of November, 2013

Name
Done in Seattle, Washington