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Court of Appeals No. 70808-2-I
King County Superior Court No. 12-1-06209-5 KNT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

FILED
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STATE OF WASHINGTON
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State of Washington,

Plaintiff/Respondent,

v.

Gildardo Zaldivar Guillen,

Defendant/Appellant.

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

The Honorable Mary Roberts, Judge

APPELLANT'S OPENING BRIEF

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2. Mr. Zaldivar's Sixth Amendment right to effective assistance of counsel was violated when trial counsel failed to file a motion to suppress evidence obtained pursuant to Mr. Zaldivar's seizure on the ground that the seizure was unconstitutional.

3. The trial court committed manifest error when it admitted incriminating statements and evidence obtained as a result of Mr. Zaldivar's unconstitutional seizure.

4. The evidenced produced at trial was insufficient to sustain a conviction for commercial sexual abuse of a minor in violation of RCW 9.68A.100.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a Spanish-speaking defendant's incriminating statements to police officers are admissible at trial where the defendant was not advised of his Miranda rights in the Spanish language?

2. Whether trial counsel's failure to move to suppress incriminating statements and evidence on Fourth Amendment grounds constituted ineffective assistance of counsel where appellate precedent clearly indicated that the defendant's seizure was unconstitutional?

3. Whether the trial court commits manifest error requiring reversal when it admits incriminating statements and evidence obtained as a result of a defendant's unconstitutional seizure where evidence in the record establishes that the seizure was unconstitutional in light of appellate precedent?

4. Whether any reasonable trier of fact could find beyond a reasonable doubt that a defendant committed commercial sexual abuse of a minor where there was no evidence that the defendant offered to pay or paid a fee to engage in sexual conduct with the alleged minor victim?

III. STATEMENT OF THE CASE

A. Procedural History

On September 25, 2012, Appellant, Gildardo Zaldivar Guillen was charged with one count of commercial sexual abuse of a minor in violation of RCW 9.68A.100. Clerk's Papers ("CP") 1. On July 1, 2013, the State issued an amended information, adding a second count of attempted

commercial sexual abuse of a minor to the original charge. CP 8. A pre-trial motions hearing was held on July 1, 2013. Record of Proceedings Part I ("RP I") 4. The court granted the State's CrR 3.5 motion to admit incriminating statements made by Mr. Zaldivar to police officers at the time of his arrest. RP 72. Mr. Zaldivar's trial attorney failed to file a CrR 3.6 motion to suppress evidence, despite the existence of case law establishing that the facts in the possession of the arresting officers at the time they seized Mr. Zaldivar were insufficient to support an investigatory stop. RP 19. Mr. Zaldivar's trial commenced on July 2, 2013. RP II at 15. On July 3, 2013, the jury found Mr. Zaldivar guilty on both counts. CP 113-14. On July 26, 2013, Mr. Zaldivar was sentenced to 21 months in prison on count one. CP 118. The court dismissed count two. CP 116. Mr. Zaldivar, through undersigned counsel, timely filed a notice of appeal on August 22, 2013. CP 128. Mr. Zaldivar has been released on bond pending appeal.

B. Facts

On August 3, 2012, at around 10:00 p.m., Detective Donyelle Frazier, Detective Joel Banks, and Sergeant Richard McMartin of the King County Sheriff's Office ("KCSO") were conducting surveillance in the 2330 Block of Pacific Highway South. RP II 28. One of the subjects of their surveillance was a young woman whom they later discovered was

Z.B. RP II 28-30. At the time the officers were surveilling Z.B. her identity was unknown to them. RP II 30, 36, 42. At some point after they began surveillance the officers observed Mr. Zaldivar pick up Z.B. from a bus station. RP II 30. When Mr. Zaldivar stopped at the bus station where Z.B. was standing, Z.B. got into his truck without any conversation or hesitation. RP II 35. At this point, the officers had not yet identified either Mr. Zaldivar or Z.B. See RP II 30, 36, 42.

The officers followed Mr. Zaldivar and Z.B. to the parking lot of a nearby business, where Mr. Zaldivar parked his truck. RP II 36. After about three minutes, the officers approached Mr. Zaldivar's truck on foot, expecting to observe the two passengers engaged in sexual activity. RP II 37. However, all they observed was Mr. Zaldivar and his passenger sitting inside the vehicle. RP II at 38. Despite the absence of observed suspicious activity, the officers made contact with Mr. Zaldivar and Detective Frazier ordered him out of his truck. RP II 38 – 39. Prior to contacting Mr. Zaldivar, the officers had not seen any sexual activity, touching, or exchange of money. See RP II 38. Nor had they heard any conversation between Mr. Zaldivar and Z.B. See id. Nor had they identified Z.B. See RP II 36, 42. After Mr. Zaldivar exited his truck, Detective Frazier noticed that Mr. Zaldivar had an erection inside his shorts. RP II 39.

Detective Frazier immediately recognized that Mr. Zaldivar spoke Spanish and was not a native English speaker. See RP II 54-55. Nonetheless, Detective Frazier failed to provide Mr. Zaldivar with Miranda[1] warnings in the Spanish language. RP II 52-55. Detective Frazier then proceeded to question Mr. Zaldivar. RP II 41. After realizing that he had previously arrested Z.B. for prostitution, Detective Frazier confronted Mr. Zaldivar with this information. RP II 42. Upon questioning, Mr. Zaldivar admitted that he knew that Z.B. was a prostitute, but told Detective Frazier that he had not offered her money for sex. RP II 45. Mr. Zaldivar further explained that the officers would find $10 in his ashtray, but that the money in the ashtray had not been offered in exchange for sex. RP II 112. Mr. Zaldivar was arrested on suspicion of commercial sexual abuse of a minor because, unbeknownst to Mr. Zaldivar, Z.B. was 17-and-a-half years old. RP II 57, 84.

During trial, there was no evidence or testimony produced by the State tending to show that Mr. Zaldivar offered Z.B. money in exchange for sexual conduct. No witnesses testified that they had either seen or heard Mr. Zaldivar offer money to Z.B. for any reason. To the contrary, both Detective Frazier and Sergeant McMartin, who were present during

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Mr. Zaldivar's interrogation, testified that Mr. Zaldivar stated at the scene that he never offered Z.B. money in exchange for sex. RP II 44 – 45; 112 – 13. Additionally, Z.B. testified at trial that Mr. Zaldivar never offered her money in exchange for sex. RP II 142. The State offered Z.B.'s prior inconsistent statements to police officers in an attempt to impeach Z.B.'s testimony regarding whether Mr. Zaldivar offered to pay her money in exchange for sex. RP II 141. But, a limiting instruction was issued by the trial court prohibiting the jury from considering Z.B.'s prior inconsistent statements as substantive evidence. RP III 31.

IV. ARGUMENT

A. The Trial Court Erred When It Admitted Mr. Zaldivar's Incriminating Statements Despite the Fact that Mr. Zaldivar was not Advised of his *Miranda* Rights in Spanish.

While a trial court's findings of fact entered at a CrR 3.5 hearing are verities on appeal, the Court of Appeals "reviews de novo whether those findings support the trial court's conclusions of law." State v. Armenta, 134 Wn.2d 1, 9 (1997). Further, under the constitutional error standard, prejudice is presumed, unless the State can show beyond a reasonable doubt that the error did not contribute to the verdict. See State v. Stephens, 93 Wn.2d 186, 190 – 91 (1980).

The Court of Appeals found that the incriminating statements that Mr. Zaldivar made to law enforcement officers at the scene and the evidence that was derived from those statements were admissible, notwithstanding the fact that Mr. Zaldivar was not advised of his constitutional rights in Spanish. RP I 72. This holding constitutes reversible error because a defendant whose primary language is not English must be advised of his rights in his native language before a valid waiver of constitutional rights can occur.

The Fifth Amendment to the United States Constitution protects a defendant's privilege against self-incrimination. Before statements made during a custodial interrogation can be admitted, the State must establish that a defendant was advised that: (1) he has the right to remain silent; (2) any statements made can be used against him at trial; (3) he has the right to have an attorney present during questioning; and (4) he has the right to have an attorney appointed to represent him at the state's expense. See Miranda, 384 U.S. at 444. A defendant who is not a native English speaker must be advised of his Miranda rights in his native language before a valid waiver of these rights can take effect. See State v. Teran, 71 Wn. App. 668, 672 (1993). Where a Miranda violation occurs, all incriminating statements obtained as a result of the violation

must be excluded from the criminal proceeding. Miranda, 384 U.S. at 764 (1966).

In Washington, a defendant who is taken into custody must be advised of his right to counsel "immediately" and "in words easily understood." CrR 3.1(c)(1). If a defendant is not timely advised of his right to counsel subsequent to arrest, all evidence obtained after the arrest must be suppressed. See State v. Prok, 107 Wn.2d 153, 157 (1986). The Washington State Supreme Court has construed CrR 3.1 to require that a defendant who is not a native English-speaker be advised of his right to counsel in his native tongue. See id. at 156. The protections of CrR 3.1 are broader than those of the Fifth Amendment, as a violation of CrR 3.1 requires suppression of physical evidence as well as testimonial statements. See State v. Trevino, 127 Wn.2d 735, 746 (1995).

The Washington State Supreme Court recently reaffirmed an individual's right to be advised of his constitutional and statutory rights in his native tongue. See State v. Morales, 173 Wn.2d 560 (2012). In that case, the Supreme Court acknowledged our State's policy of ensuring that people whose primary language is a language other than English receive equal protection in legal proceedings, and concluded that a defendant has a right to receive implied consent warnings under RCW

46.20.308 in his native language. Id. The Court quoted RCW 2.43.010, which provides:

> It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise of persons who, because of a non-English-Speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

RCW 2.43.010.

In Mr. Zaldivar's case the incriminating statements that he made to Officer Frazier at the time of his arrest, as well as the incriminating evidence derived therefrom, should have been suppressed because Mr. Zaldivar was not advised of his Miranda rights in Spanish. See Teran, 71 Wn. App. at 672; Prok, 107 Wn.2d at 157. Officer Frazier admitted on the record during Mr. Zaldivar's CrR 3.5 hearing that although he knew that Mr. Zaldivar was not a native English-speaker, he made absolutely no attempt to advise Mr. Zaldivar of his constitutional rights in the Spanish language. RP I 64. Detective Frazier did not even try to call the language line or contact a Spanish-speaking officer who could advise Mr. Zaldivar of his constitutional rights in Spanish, when both of these options were available. RP I 64.

Because Mr. Zaldivar could not waive his Fifth Amendment rights without first being advised of his rights in Spanish, no valid waiver of Mr.

Zaldivar's Fifth Amendment rights occurred. See Teran, 71 Wn. App. at 672. The trial court erred by admitting Mr. Zaldivar's incriminating statements and the evidence derived from those statements when Mr. Zaldivar was not advised of his constitutional rights in Spanish, and Mr. Zaldivar's conviction should therefore be reversed. See id; Prok, 107 Wn.2d at 157.

B. Mr. Zaldivar's Conviction Should be Reversed Because He was Denied Effective Assistance of Counsel in Violation of the Sixth Amendment.

Mr. Zaldivar's conviction should be reversed because defense counsel failed to move to suppress incriminating statements and evidence obtained by law enforcement subsequent to Mr. Zaldivar's unlawful seizure despite the existence of case law establishing that Mr. Zaldivar's seizure violated the Fourth Amendment to the United States Constitution and Article I, Section 7, of the Washington Constitution. As noted above, questions of constitutional law are reviewed de novo. State v. Sieyes, 168 Wn.2d 276, 281 (2010).

The Sixth Amendment protects a defendant's right to effective assistance of counsel. To establish ineffective assistance of counsel a defendant must satisfy the two-prong test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See State v. Sandoval, 171 Wn.2d

163, 168 (2011). Specifically, the defendant must show that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. Id.

Failure to bring a plausible motion to suppress can constitute ineffective assistance of counsel. See State v. Rainey, 107 Wn. App. 129, 135 (2001). The defendant must show that there were no "legitimate strategic or tactical reasons" for counsel's decision not to file the motion. Id. Additionally, to establish prejudice as a result of counsel's performance, the defendant must show that a motion to suppress would have likely been granted and that the outcome of the trial would have been different as a result. Id. In other words, the defendant must establish that there is a "reasonable probability that a motion to suppress would have been granted." State v. Klinger, 96 Wn. App. 619, 629 (1999).

In sum, in order for a defendant to establish that he or she received ineffective assistance of counsel with regard to failure to bring a plausible motion to suppress, the defendant must establish three things: 1) that there is a reasonable probability that a motion to suppress would have been granted; 2) that the outcome of the trial would have been different as a result of the suppression of the evidence in question; and 3) that there

were no legitimate strategic or tactical reasons for counsel's decision not to file the motion. As set forth below, Mr. Zaldivar satisfies this standard in this case.

1. It is likely that a motion to suppress evidence obtained pursuant to Mr. Zaldivar's seizure would have been granted.

The Fourth Amendment to the United States Constitution and Article I, Section 7, of the Washington Constitution prohibit unreasonable searches and seizures. State v. Doughty, 170 Wn.2d 57, 61 (2010). A seizure occurs when, in light of all the circumstances, "a reasonable person would not feel free to leave." State v. Diluzio, 62 Wn. App. 585, 590 (2011). An investigatory stop constitutes a seizure and must be supported by reasonable articulable suspicion that a crime is afoot. See Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Tocki, 32 Wn. App. 457, 460 (1982). Reasonable articulable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant [the] intrusion." Terry, 392 U.S. at 21. Articulable suspicion exists if there is "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6 (1986). Evidence obtained as a result of an unconstitutional seizure must be suppressed. State v. Le, 103 Wn. App. 354, 360-61 (2003).

In State v. Diluzio, a case with facts almost identical to Mr. Zaldivar's, this Court held that the arresting officer lacked reasonable articulable suspicion to stop the defendant, whom he suspected of patronizing a prostitute. See Diluzio, 162 Wn. App. at 593. In that case, the police officer observed the defendant's vehicle in an area known for high levels of prostitution at a time when all surrounding businesses were closed. See id. at 589. Subsequently, the police officer observed a woman get into the defendant's vehicle after conversing with him through his car window. Id. There were no bus stops around. Id. The arresting officer did not see any money change hands or hear the conversation between the suspected prostitute and the defendant. Id. The officer subsequently stopped the vehicle on suspicion that solicitation of prostitution was occurring. Id. On these facts, this Court concluded that the police officer lacked reasonable articulable suspicion to support an investigatory stop, notwithstanding the police "officer's 13 years of experience, the location of the stop, and the lack of open businesses or residences" in the area. Id. at 593. The evidence obtained as a result of the unlawful seizure was suppressed. Id.

The facts of Mr. Zaldivar's case are practically indistinguishable from those in Diluzio. Officer Frazier and the other officers on the scene observed Mr. Zaldivar's vehicle in a place that was known as a high

prostitution area. RP II 26. Subsequently, they saw Z.B. get into Mr. Zaldivar's truck when he stopped at a bus stop. RP II 30. They followed Mr. Zaldivar and Z.B. to a parking lot, where Mr. Zaldivar parked. RP II 36. The officers then approached Mr. Zaldivar's vehicle and saw two people simply sitting inside the vehicle. RP II 38. The officers did not see any money change hands or hear the conversation between Z.B. and Mr. Zaldivar. RP II 38. The officers did not see Mr. Zaldivar and Z.B. engaged in sexual conduct. RP II 38. Absent any articulable facts to indicate that a crime was taking place or about to take place, Officer Frazier initiated an investigatory stop of Mr. Zaldivar. RP II 39. Because there is nothing to distinguish Mr. Zaldivar's case from Diluzio, the officers "incomplete observations do not provide the basis for a Terry stop" in Mr. Zaldivar's case. Diluzio, 162 Wn. App. at 593.

The State will likely attempt to distinguish Mr. Zaldivar's case from Diluzio, on the ground that Z.B. was a "known prostitute." See RP II 42. But Officer Frazier's testimony at trial indicated that the arresting officers did not recognize that Z.B. was a known prostitute until after the investigatory stop was initiated. RP II 30, 36, 42. And, an "investigatory stop must be justified at its inception." Diluzio, 162 Wn. App. at 590 (citing State v. Gatewood, 163 Wn.2d 534, 539 (2008)).

Even if one of the officers on the scene had recognized Z.B. as a prostitute prior to initiating the investigatory stop, this fact would not lead to a different outcome in Mr. Zaldivar's case. This Court has made clear that associating with a person suspected of being involved in criminal activity is insufficient to establish reasonable articulable suspicion for an investigatory stop under Terry. State v. Richardson, 64 Wn. App. 693, 697 (1992), is instructive on this point. In that case the arresting officer initiated an investigatory stop solely based on the fact the defendant was walking late at night, in a high crime area, with an individual suspected of drug smuggling. Id. at 697. This Court found that the arresting officer lacked reasonable suspicion to support a Terry stop, holding:

> A person's presence in a high crime area does not, by itself, give rise to a reasonable suspicion to detain him. Nor does an individual's mere proximity to other's independently suspected of criminal activity justify an investigative stop; the suspicion must be individualized. . . . At the time of the seizure [the arresting officer] knew only that [the defendant] was in a high crime area, late at night, walking near someone the officer suspected of "running drugs." He had not heard any conversation between the men and had not seen any suspicious activity between them. [The stop] was an unreasonable seizure in violation of [the defendant's] constitutional rights.

Id. (internal citations omitted). Surely, in light of Richardson, the mere fact that Mr. Zaldivar was observed sitting in his truck with a person known to be a prostitute could not distinguish his case from Diluzio. Just as in Richardson, the arresting officers in Mr. Zaldivar's case did not see

any suspicious activity between Z.B. and Mr. Zaldivar or hear any conversation between them. See Richardson, 64 Wn. App. at 697.

2. *The outcome of the trial would have been different had the evidence obtained pursuant to Mr. Zaldivar's seizure been suppressed.*

Because virtually all of the evidence obtained by law enforcement in Mr. Zaldivar's case was obtained as a result of Mr. Zaldivar's unlawful seizure, it is clear that without the illegally obtained evidence the state would not have been able to convict Mr. Zaldivar.

The exclusionary rule requires courts to suppress evidence obtained through violation of a defendant's constitutional rights. Le, 103 Wn.App. at 360-61. Under the "fruit of the poisonous tree" doctrine, the exclusionary rule applies to evidence derived directly and indirectly from the illegal police conduct. Id., at 361. The exclusionary sanction applies to any "fruits" of a constitutional violation--whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention. United States v. Crews, 445 U.S. 463, 470, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980).

In this case nearly all of the evidence obtained by law enforcement was obtained as a result of Mr. Zaldivar's unlawful seizure. This includes

Mr. Zaldivar's incriminating statements, the officers' post-seizure observations of Mr. Zaldivar's erection and the officers' observations of money in Mr. Zaldivar's ashtray. See RP II 42 – 48, 112; Crews, 445 U.S. at 470. Notably, at trial, Z.B. testified favorably to Mr. Zaldivar. In other words, without the evidence collected as a result of Mr. Zaldivar's unlawful seizure, the State would have had no case.

3. There were no legitimate strategic or tactical reasons for counsel's decision not to file a motion to suppress.

Based upon the foregoing it is plainly apparent that counsel's failure to file a CrR 3.6 motion in Mr. Zaldivar's case amounted to deficient performance under Strickland. See Rainey, 107 Wn. App. at 135. Counsel was well aware that the only basis for the officers' investigatory stop of Mr. Zaldivar in this case was their observation of Z.B. getting into Mr. Zaldivar's vehicle, and the two driving into a nearby parking lot. See CP 3. Yet, despite the holdings of Diluzio and Richardson, trial counsel failed to move to suppress the evidence obtained subsequent to Mr. Zaldivar's unconstitutional investigatory stop. There is absolutely no "reasonable basis or strategic reason" for failing to file a motion to suppress in Mr. Zaldivar's case. See Klinger, 96 Wn. App. at 623. As discussed above, virtually all of the State's evidence against Mr. Zaldivar resulted from Mr. Zaldivar's unlawful seizure. Further, once this

evidence was admitted, a conviction in the case was highly likely. Indeed, a motion to suppress on the grounds of an unlawful seizure would have been Mr. Zaldivar's best defense, because, if successful, such a motion would almost certainly have resulted in dismissal of the case against Mr. Zaldivar. Put simply, the defense can "conceive of no reason why such a motion would not have been made." See Rainey, 107 Wn. App. at 136.

Because Mr. Zaldivar has established that there is a reasonable probability that a motion to suppress would have been granted; that the outcome of the trial would have been different as a result of the suppression of the evidence in question; and that there were no legitimate strategic or tactical reasons for counsel's decision not to file the motion, he has established that he received ineffective assistance of counsel under Strickland. See Rainey, 107 Wn. App. at 135; Klinger, 96 Wn. App. at 629. As such, the judgment and sentence should be reversed and Mr. Zaldivar's case should be remanded for a new trial. See Rainey, 107 Wn. App. at 140.

C. The Trial Court Committed Manifest Error When it Admitted Evidence and Statements Obtained as a Result of Mr. Zaldivar's Unlawful Seizure.

As discussed above, Mr. Zaldivar's seizure was unsupported by reasonable articulable suspicion, and the evidence and statements

obtained as a consequence of his unconstitutional seizure should have been suppressed. See Diluzio, 162 Wn. App. at 593. Mr. Zaldivar did not raise this claim in the trial court. However, under RAP 2.5(a), a manifest error affecting a constitutional right may be raised for the first time on appeal.

To establish manifest error the defendant must show that: (1) the error "implicates a constitutional interest" and (2) actual prejudice resulted from the error, i.e., "that the error had practical identifiable consequences at trial." State v. Bonds, 174 Wn. App. 553, 568 – 69 (2013) (internal citation and quotation marks omitted). Actual prejudice is established when the defendant can show from the record that a motion to suppress would have likely been granted by the trial court. See State v. Contreras, 92 Wn. App. 307, 313-14 (1998). Once the defendant meets this initial burden, the Court of Appeals must determine whether the State has proven that the error was harmless beyond a reasonable doubt. See State v. Slert, 169 Wn. App. 766, 779 (2012).

In Mr. Zaldivar's case, there can be no dispute that Mr. Zaldivar's claim implicates a constitutional right. The legality of Mr. Zaldivar's seizure implicates the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington Constitution. See Bonds, 174 Wn. App. at 568.

Further, Mr. Zaldivar has established, based on the record of proceedings below, that his seizure was unsupported by reasonable articulable suspicion. If Mr. Zaldivar had filed a motion to suppress below, in light of Diluzio and Richardson, the trial court would have been required to grant Mr. Zaldivar's motion and exclude the incriminating statements and evidence obtained as a result of Mr. Zaldivar's unconstitutional seizure. See Diluzio, 162 Wn. App. at 593.

Because the State will be unable to establish that the trial court's admission of the statements and evidence obtained as a result of Mr. Zaldivar's unlawful seizure was harmless beyond a reasonable doubt, this Court should reverse Mr. Zaldivar's conviction. See Slert 169 Wn. App. at 779.

D. Mr. Zaldivar's Conviction Should be Reversed Because the Evidence Produced at Trial was Insufficient to Sustain a Conviction for Commercial Sexual Abuse of a Minor.

Mr. Zaldivar's conviction should be reversed because no reasonable trier of fact could find beyond a reasonable doubt that Mr. Zaldivar committed commercial sexual abuse of a minor. The "due process clauses of the state and federal constitutions require the State to prove each element of the crime charged beyond a reasonable doubt." State v. Mau, 178 Wn.2d 308, 312 (2013) (citing State v. Baeza, 100

Wn.2d 487, 488 (1983); Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "A criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal." State v. Sweany, 162 Wn. App. 223, 228 (2011).

When determining whether the evidence produced at trial is sufficient to sustain a conviction, the Court of Appeals must consider "whether when viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Bencivenga, 137 Wn.2d 703, 706 (1999) (quoting State v. Green, 94 Wn.2d 216, 221 (1980) (quoting Jackson, 443 U.S. at 319)).

The jury convicted Mr. Zaldivar of commercial sexual abuse of a minor in violation of RCW 9.68A.100. A person commits commercial sexual abuse of a minor when he "solicits, offers or requests to engage in sexual conduct with a minor in return for a fee." See RP III 32; RCW 9.68A.100. In Mr. Zaldivar's case, the State failed to produce any evidence tending to show that Mr. Zaldivar and Z.B. had any discussions about Z.B. engaging in sexual conduct with Mr. Zaldivar in exchange for a fee. Consequently, no reasonable juror could conclude, beyond a reasonable doubt, that Mr. Zaldivar offered or solicited to give Z.B.

money in exchange for sexual conduct. See Bencivenga, 137 Wn.2d at 706.

Mr. Zaldivar did not testify at trial. Thus, the evidence produced by the State at trial was limited to the testimony of the three law enforcement officers who arrested Mr. Zaldivar, specifically Detective Frazier, Detective Banks and Sergeant McMartin, and the testimony of Z.B. The law enforcement officers at the scene did not witness Mr. Zaldivar and Z.B. engage in unlawful conduct or hear Mr. Zaldivar and Z.B. discuss exchanging money for sex. Rather, the officers' testimony was used by the State to introduce incriminating statements elicited from Mr. Zaldivar at the time of his arrest.

None of the officers testified that Mr. Zaldivar ever offered or admitted offering money to Z.B. in exchange for sexual conduct. To the contrary, the officers uniformly testified that Mr. Zaldivar stated at the scene that although he knew that Z.B. was a prostitute, he and Z.B. never discussed exchanging money for sex.[2] See RP II 42, 44, 45; 112 – 113. Detective Frazier and Sergeant McMartin also testified that Mr. Zaldivar advised them that they would find $10 in his ashtray upon searching his

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[2] Detective Banks testified that he did not hear the specifics of the conversation between Mr. Zaldivar and Detective Frazier, who was responsible for questioning Mr. Zaldivar at the scene. RP II 86.

vehicle, but that he never offered this money to Z.B. in exchange for sexual conduct. RP II 44; 112 – 113.

Z.B. also testified that Mr. Zaldivar had never offered her money in exchange for sexual conduct. RP II 142. In fact, Z.B. testified that Mr. Zaldivar had no intention of paying her for sex on the date of his arrest and that the only reason that he picked her up on the highway was to give her a ride home. RP II 143.

The State introduced Z.B.'s prior inconsistent statements to police tending to show that Mr. Zaldivar had offered her $10 in exchange for sex for the purpose of impeaching Z.B. RP II 42. But the jury was prohibited from considering these statements as substantive evidence by the Court's limiting instruction. RP III 31. The Court instructed the jury that Z.B.'s out-of-court statements could only be considered for purposes of impeachment. RP III 31.

Absent Z.B.'s out-of-court statements, which the jury was prohibited from considering as substantive evidence, the State failed to introduce any evidence during trial tending to establish that Mr. Zaldivar offered money to Z.B. in exchange for engaging in sexual conduct. And, while the jury could have inferred that Mr. Zaldivar intended to use the $10 found in his ashtray to pay Z.B. for sex, this is, at best, a weak inference and is insufficient to support a finding of guilt beyond a

reasonable doubt. It is not unlawful, or uncommon, for a person to keep money in the ashtray of his or her vehicle. Nor is it unlawful to have cash in one's vehicle while driving in the company of a prostitute. It is, of course, unlawful to offer money to a minor prostitute in exchange for sexual conduct. See RCW 9.68A.100. But, the State did not introduce a shred of evidence tending to show that Mr. Zaldivar offered money to Z.B. in exchange for sexual conduct. Without such evidence, the State could not prove all the elements of RCW 9.68A.100 beyond a reasonable doubt.

Because the State failed to introduce any evidence tending to show that Mr. Zaldivar solicited, offered, or requested Z.B. to engage in sexual conduct in exchange for a fee, even when the evidence is viewed in the light most favorable to the State, no rational trier of fact could find that Mr. Zaldivar committed the crime of sexual abuse of a minor beyond a reasonable doubt. See Bencivenga, 137 Wn.2d at 706.

V. CONCLUSION

For the foregoing reasons the Court should reverse the judgment and sentence entered in Mr. Zaldivar's case and remand the case for a new trial.

DATED this 9th day of January, 2013.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing on and one copy of the verbatim report of proceedings upon:

Jason Simmons
King County Prosecuting Attorney's Office
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Respectfully submitted,

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