70808-2

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NO. 70808-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ZALDIVAR GUILLEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY E. ROBERTS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A custodial statement is admissible if police advised the defendant of his constitutional rights and the defendant knowingly, voluntarily, and intelligently waived those rights. As long as the defendant actually understands his rights, language difficulties do not preclude a valid waiver. Here, the record establishes that Gildardo Zaldivar Guillen[1] understood English, was advised of his rights in English, and stated in English that he understood and wished to waive these rights. Did the trial court properly conclude that his subsequent statements to police were admissible?

2. To prevail on a claim of ineffective assistance of counsel based upon counsel's failure to move to suppress evidence, the appellant must demonstrate that the motion probably would have been granted. Here, the record establishes that officers on a special emphasis team focusing on prostitution had reasonable articulable suspicion to believe that Zaldivar, who picked up a known juvenile prostitute, drove her to a dark, secluded area, turned off his truck and extinguished its lights, and remained

[1] Although the parties referred to the defendant as "Zaldivar-Guillen" at trial, Appellant's brief refers to him by the name "Zaldivar" alone. Brief of Appellant at 1. The State adopts this convention.

inside the truck with the girl, was engaged in or about to be engaged in illegal activity. Where the evidence thus establishes a valid investigatory stop, has Zaldivar failed to show ineffective assistance of counsel for failing to challenge the stop?

3. To obtain review of an issue raised for the first time on appeal, the appellant must identify a constitutional error that had practical and identifiable consequences at trial. Here, the record discloses no constitutional error with respect to an investigatory stop supported by reasonable articulable suspicion. Has Zaldivar failed to demonstrate a manifest error of constitutional magnitude entitling him to challenge the investigatory stop for the first time on appeal outside of the ineffective assistance of counsel context?

4. Evidence is sufficient to support a conviction when, viewed in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. To prove Commercial Sexual Abuse of a Minor, the State must prove that a defendant solicited, offered, or requested to engage in sexual conduct with a minor in return for a fee. The record in this case establishes that Zaldivar picked up a juvenile prostitute knowing that she was a prostitute, took her to a dark, secluded parking lot known for prostitution activity, discussed

sex with her, placed money on his dashboard and/or ashtray, and was visibly aroused when contacted by the police. The evidence also established that the young woman's testimony at trial that Zaldivar did not offer her money for sex was contrary to the statements she made to police on the night of the incident. Was the evidence sufficient to support Zaldivar's conviction for Commercial Sexual Abuse of a Minor?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By amended information, the State charged Zaldivar with one count of Commercial Sexual Abuse of a Minor and one count of Attempted Commercial Sexual Abuse of a Minor. CP 8-9. Following a CrR 3.5 hearing, the trial court granted the State's motion to admit Zaldivar's custodial statements to police. 1RP 71-72.[2] A jury later convicted Zaldivar as charged. 3RP 61.

[2] The Verbatim Report of Proceedings consists of three separately-paginated volumes. The State refers to the record by volume and page number as follows: 1RP – 7/1/2013; 2RP – 7/2/2013; 3RP – 7/3/2013.

2. SUBSTANTIVE FACTS

At around 10:00 p.m. on August 3, 2012, King County Sheriff's Deputy Conner spotted a known juvenile prostitute, later identified as Z.B., loitering around 23300 Pacific Highway South. CP 3; 1RP 37; 2RP 28. That area is a designated "Stay Out of Areas of Prostitution" ("SOAP") zone, known for high rates of prostitution. CP 3; 1RP 59; 2RP 69. Z.B. was "a younger gal that [officers] had had previous contact with as a prostitute." 1RP 37. Conner alerted other members of a SeaTac special emphasis team (SET) that focuses on prostitution and moved his marked patrol car out of the area. 1RP 49-50.

SET members moved into the area in unmarked cars and watched Z.B. for at least ten minutes. 1RP 50; 2RP 28, 34. Z.B. was sitting at a bus stop hen the SET members arrived, but as soon as the marked patrol car left the area, she began walking back and forth along the highway and looking into cars to make eye contact with passing motorists. 2RP 28-29, 100-04. She was wearing revealing clothing. 2RP 29. After about ten minutes, a red pickup truck pulled up next to Z.B. and she immediately got inside. 1RP 50; 2RP 30, 34, 105.

Officers followed the truck as it drove up the highway and pulled into a very dark parking lot between an abandoned tavern and a business that was closed for the night. 1RP 37, 50; 2RP 36, 80, 107, 109. The SET officers recognized the parking lot as "a common area for Johns and prostitutes to go[.]" 2RP 80. The truck's lights turned off, but no one exited the truck. 1RP 37.

Although officers usually wait to give suspected prostitutes and their patrons "more time to get into an act or something," the officers waited only a few minutes before approaching the truck because "we were aware of [Z.B.'s] age[.]" 1RP 37; 2RP 36-37, 109. Detective Frazier asked the driver, later identified as Zaldivar, to exit the vehicle. 1RP 50. Upon exiting, Frazier noticed that Zaldivar had an erection and immediately advised him of his Miranda[3] rights. 1RP 51; 2RP 39-40. Frazier "asked [Zaldivar] if he understood English first, and he said that he did." 1RP 51, 52. Zaldivar stated in English that he understood his rights and waived them. 1RP 53. He did not express any confusion about his rights or say that he did not understand. 1RP 53.

Detective Frazier and Zaldivar conversed in English for 10-15 minutes. 1RP 54, 66-67. At no point did Zaldivar express

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

confusion over the words Frazier used or appear not to understand the questions asked. 1RP 54; 2RP 50-51. Zaldivar responded appropriately to the questions, and Frazier had no trouble understanding Zaldivar's English. 1RP 58, 66-67. Frazier never had any concern that Zaldivar did not speak English. 1RP 57. Accordingly, he did not undertake procedures for communicating with non-English speakers. 1RP 47, 55, 64; 2RP 51. Although his English was not perfect, Zaldivar was able to engage in a back-and-forth conversation, appeared to understand completely, and gave coherent answers to the officers' questions. 2RP 112, 117-18.

Zaldivar initially claimed that Z.B. was a friend of his, whom he had known for two months, and that he was giving her a ride home. 1RP 56, 58; 2RP 41. Detective Frazier told Zaldivar that he did not believe that story because he knew Z.B. from recent prostitution arrests and because Zaldivar had not driven Z.B. home, but rather parked in a dark lot, turned off the lights, and remained inside the truck with Z.B.. 1RP 56, 59-60; 2RP 42. Zaldivar then admitted that he picked Z.B. up knowing that she was a prostitute, that he touched her breasts to prove that he was not a cop, that he had been arrested for patronizing prostitutes in the same area, and

that he and Z.B. had discussed sex but had not had enough time to discuss the price. 1RP 57; 2RP 42-44, 112. Zaldivar admitted that the officers would find money on the dash, but claimed that he had not offered the money to Z.B. for sex. 2RP 43-45, 112.

Detective Frazier, Sergeant McMartin, and Deputy Banks spoke with Z.B.. 1RP 39, 58, 65. Z.B. provided identification showing a birth date of 12/6/1994, which made her 17 years old. 2RP 84. She initially claimed that Zaldivar was just giving her a ride. 1RP 65-66. Z.B. also said that she had told Zaldivar that she was "dating" or "working," common euphemisms for prostitution. 1RP 57. Z.B. indicated that she was able to engage in conversation with Zaldivar and Zaldivar was able to respond appropriately. 1RP 42-43.

Z.B. testified reluctantly at trial. 2RP 140. She stated that she was waiting for the bus when Zaldivar picked her up, that Zaldivar did not try to touch her or ask her to do anything, and that she did not recall him talking about money. 2RP 133. The State impeached Z.B. with her recorded statement to police, in which she stated that Zaldivar exposed himself and offered her $10 for sex, that he denied being a cop and touched her breast to prove it, and that she told him that $10 was not enough. 2RP 142, 145-46.

Z.B. conceded that her memory was fresher at the time of the statement than at trial, that she knew she was making a statement to police, and that she thought it was important to be truthful when she gave the statement. 2RP 137-38, 142. She also indicated that Zaldivar appeared to speak English. 2RP 141.

Zaldivar's defense theory was general denial. His counsel argued that the jury should believe Z.B.'s trial testimony rather than the officers, who he said "seemed to be auditioning for an episode of Keystone Cops." 3RP 49-50.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED ZALDIVAR'S CUSTODIAL STATEMENTS FOLLOWING A VALID WAIVER OF CONSTITUTIONAL RIGHTS.

Zaldivar contends that his incriminating custodial statements to police should have been suppressed because he was not advised of his constitutional rights in his native language, Spanish. He cites authority for the proposition that a suspect must be advised of his rights in a language he can understand. But the undisputed evidence is that Zaldivar spoke English and that he understood and validly waived his rights before making statements

to the police. Because there is no authority or logical basis for a rule requiring the police to advise an English-speaking suspect in his native language, this Court should reject Zaldivar's argument.

Custodial statements are admissible if made after the defendant is fully advised of his rights and knowingly, voluntarily, and intelligently waives them. Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Aten, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). Whether a waiver is valid "depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." State v. Earls, 116 Wn.2d 354, 379, 805 P.2d 211 (1991) (quoting Edwards v. Arizona, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). Language difficulties are considered in determining whether there has been a valid waiver of Miranda rights. State v. Teran, 71 Wn. App. 668, 672, 862 P.2d 137 (1993). This Court reviews the validity of a Miranda waiver de novo. State v. Johnson, 94 Wn. App. 882, 897, 974 P.2d 855 (2007).

Citing Teran, Zaldivar argues that "[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." Brief of Appellant at 7. Zaldivar's reliance on Teran for this proposition is misplaced. In Teran, the arresting officer provided Teran his Miranda rights in his native language – Spanish – and Teran "answered coherently" in both Spanish and English. 71 Wn. App. at 670. Teran acknowledged that he understood the warnings, agreed to answer the officer's questions, and made incriminating statements. Id. On appeal, Teran argued that his waiver was not knowingly and intelligently made because the officer failed to define the Spanish term "proporcionar," a formal word for "to give or supply" that is less common than the word "dar." Id. at 670-71. The court disagreed because the totality of the circumstances demonstrated that Teran understood his rights and was not confused by the formal Spanish word:

> Here, the court found that "Agent Robinson went through and read each individual right to the defendant and based on habit asked after each one if the defendant understood." The court also found that "[t]he defendant indicated he did understand each one of the individual rights." Agent Robinson testified that Mr. Teran indicated that he understood the Miranda rights he had been read. Three other officers were present during the exchange. Using coherent speech, Mr. Teran responded to the officers in Spanish and sometimes in English. He indicated that he understood the officers and did not demonstrate any confusion with the word "proporcionar."

Id. at 673. Thus, Teran stands for the unremarkable proposition that when a person is advised of his Miranda rights in language that he understands, he may validly waive those rights.

Closer to the facts in this case is United States v. Bernard S., 795 F.2d 749 (9th Cir. 1986). Bernard S. was a juvenile Apache Indian who was questioned about an assault. Id. at 751. Before the questioning, Bernard S. was advised, in English, of his Miranda rights, and he responded, in English, that he understood each of his rights and was willing to answer the officer's questions. Id. During the questioning, Bernard S. responded to questions in English and made inculpatory statements. Id. He later claimed that his waiver was not knowingly and intelligently made because of the officer's failure to explain his rights in Apache, his native language. Id. at 752. The court disagreed because the totality of the circumstances demonstrated that the waiver was knowing and intelligent:

> At appellant's request, and in the presence of his mother, [the officer] read his rights to him and explained each right to him individually. After he was explained each of his rights, appellant stated that he understood that right. He answered ... questions in English and at no time indicated that he did not understand what was being said to him. Finally, appellant signed a written waiver of his Miranda rights.

Id. at 753. Thus, as in Teran, the Bernard S. court confirmed that when a suspect understands the rights read to him in English, his waiver of those rights is not invalid simply because he was not also informed of his rights in his native language.

In this case, the undisputed evidence establishes that Zaldivar readily communicated in English and did not need a Spanish translation. Detective Frazier testified that he asked Zaldivar if he understood English before reading his Miranda rights, and Zaldivar said that he did. 1RP 51. Frazier then read the rights in English. 1RP 52. Zaldivar stated that he understood and waived his rights. 1RP 52-53. Frazier and Zaldivar then had a 10-15 minute long conversation in English, during which Zaldivar never expressed confusion or appeared not to understand English. 1RP 54. Nor was Zaldivar simply responding to yes or no questions; rather, he gave two fairly detailed explanations for his involvement with Z.B.. RP 56-57, 59. Frazier had no trouble understanding Zaldivar's English. 1RP 58.

Other officers overheard Frazier and Zaldivar's conversation. Deputy Banks testified that the two seemed to be able to converse with one another and were speaking back and forth. 1RP 40, 44. Banks also testified that Z.B. had indicated that she was able to

engage in conversation with Zaldivar and that Zaldivar was able to respond appropriately. 1RP 42-43.

No evidence admitted during the CrR 3.5 hearing or trial suggested that Zaldivar was unable to readily understand and communicate in English. Accordingly, the trial court made the following findings and conclusions:

> What I do conclude, having heard the evidence, which included no evidence that the defendant did not understand, that in fact the rights were understood; that Mr. Zaldivar-Guillen acknowledged his Miranda rights; that he did not give any evidence that he did not understand them.
>
> I determine that he did understand them, looking at the entire set of circumstances; that he waived those rights; that the waiver was voluntary, knowing and intelligent.
>
> I don't need to determine whether he was in custody or being interrogated, given that he did receive his Miranda warnings.
>
> I conclude that the statements are admissible and so they will be allowed at trial.

1RP 72. The court's findings are supported by the evidence and in turn support the conclusion that Zaldivar's waiver was knowing, intelligent, and voluntary.

Zaldivar also suggests, for the first time on appeal, that his statements should have been suppressed under CrR 3.1(c)(1)[4] and State v. Prok, 107 Wn.2d 153, 157, 727 P.2d 652 (1986), because "a defendant who is not a native English-speaker [must] be advised of his right to counsel in his native tongue." Brief of Appellant at 8. That argument is also without merit. Prok does not address whether police violate CrR 3.1/JCrR 2.11(c)(1)[5] by failing to advise a non-native English-speaker of the right to counsel in his native language. In that case, the State conceded that a violation occurred when the arresting officer failed to ask the Cambodian suspect whether he understood written or spoken English before reading his Miranda and implied consent rights in English. Id. at 155, 156. The only issue was whether dismissal is the appropriate remedy for an admitted JCrR 2.11(c)(1)/CrR 3.1 violation. Id. at 155. The Prok Court held that suppression, not dismissal, was the appropriate remedy because there was credible untainted evidence

[4] CrR 3.1(c)(1) provides, "When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge."

[5] Prok interpreted former JCrR 2.11(c)(1), which has been rescinded and replaced with CrRLJ 3.1, which is identical to CrR 3.1. See State v. Glessner, 50 Wn. App. 397, 400, 748 P.2d 280 (1988).

gathered before the CrR 3.1 violation. Id. at 155-56. Prok provides no support for Zaldivar's argument.

Finally, Zaldivar cites State v. Morales, 173 Wn.2d 560, 269 P.3d 263 (2012), which he argues "recently reaffirmed an individual's right to be advised of his constitutional and statutory rights in his native tongue." Brief of Appellant at 8. Again, Zaldivar's reliance is misplaced. The issue in Morales was whether the defendant's blood test results were admissible in a DUI hit-and-run case where the State failed to prove that the defendant was advised of his right to have additional tests administered by someone of his own choosing ("308 warning"). 173 Wn.2d at 569. There, Morales ran a stop sign, collided with another vehicle, and did not stop until his car became inoperable. Id. at 563-64. A trooper arrested Morales for DUI and hit and run. Id. at 564. Although there was some language difficulty, the trooper gave the Miranda warnings in English and had no problem obtaining the information he needed for his investigation. Id. Morales was then transported to the hospital. Id. Once there, the trooper did not read Morales the mandatory 308 warning in English. Id. at 564-65. Instead, he recruited a hospital interpreter to read the Miranda rights and 308 warning to Morales in Spanish. Id. Because the

officer did not speak Spanish, however, he could not testify that the interpreter actually read the warning. Id. at 573-74. "All that [the officer] could say was that he asked the interpreter to read the 308 warning; he could not say that the interpreter did so." Id. The State thus failed to prove that the 308 warnings were given at all, and the court accordingly held that the blood test results were erroneously admitted. Id. at 576. In so holding, the court quoted a statute evidencing the legislature's intent to protect the rights of non-English speaking persons:

> 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 (emphasis added). Zaldivar also cites this language in his attempt to show some legal authority for his position. Neither Morales nor RCW 2.43.010 is helpful here because it is undisputed that Zaldivar was readily able to understand and communicate in English.

Because the only evidence is that Zaldivar understood English, the argument that he should have been advised of his

rights in his native language must fail. The trial court did not err by admitting the statements Zaldivar made following his knowing, intelligent, and voluntary waiver.

2. ZALDIVAR HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL.

Zaldivar next contends that his conviction should be reversed because his trial counsel was constitutionally ineffective for failing to challenge the validity of the investigatory stop that led to his arrest. Because the record demonstrates that the officers had reasonable articulable suspicion that Zaldivar was engaged in or was about to engage in criminal activity, a motion to suppress would have been denied. Zaldivar's ineffective assistance of counsel claim therefore fails.

To prevail on a claim of ineffective assistance of counsel, an appellant must establish both deficient representation and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). He must overcome a strong presumption that counsel's performance was not deficient. State v. Nichols, 161 Wn.2d 1, 8, 162 P.2d 1122 (2007). When an ineffective assistance claim is based upon counsel's failure to move for suppression of

evidence, the appellant must show that the trial court likely would have granted the motion if made. McFarland, 127 Wn.2d at 333-34; Nichols, 161 Wn.2d at 15. "[T]here is no ineffectiveness if a challenge to admissibility of evidence would have failed." Nichols, 161 Wn.2d at 14-15.

Zaldivar argues that the trial court likely would have suppressed his incriminating statements if his counsel had challenged the investigatory stop, which he argues was not supported by reasonable suspicion. Based on evidence admitted before and during trial, he is mistaken.[6]

Brief investigatory "Terry" stops are justified when an officer has specific and articulable facts that give rise to a reasonable suspicion that the person stopped has been, or is about to be, involved in a crime. Terry v. Ohio, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Acrey, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003). A reasonable suspicion is the

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[6] Had this challenge been raised before trial, this Court would confine its review to the record of the pretrial hearing. Because Zaldivar did not challenge the stop below, however, the State had no reason to elicit testimony on the basis for the officers' investigatory stop. The State must therefore rely to some degree on the officers' trial testimony. If this Court concludes that such reliance is inappropriate, it should conclude that the record is insufficient to determine whether a motion challenging the Terry stop would have been granted and thus, Zaldivar can make no affirmative showing of prejudice. See McFarland, 127 Wn.2d at 334 & n.2.

"substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991), overruled in part on other grounds by State v. Bailey, 109 Wn. App. 1, 3, 34 P.3d 239 (2000). The totality of the circumstances includes factors such as the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained. Acrey, 148 Wn.2d at 747.

The evidence establishes that Detective Frazier had reasonable suspicion that Zaldivar was, or was about to be, involved in a crime. First, the officers involved in this case have an unusual degree of experience and training in spotting prostitution. Frazier and his fellow officers are part of a Sea-Tac Special Emphasis Team (SET) focusing on prostitution along Pacific Highway South, a designated "Stay Out of Areas of Prostitution" ("SOAP") zone. 1RP 35, 49, 67-69, 96-98. Frazier and Deputy Banks both have special training in prostitution enforcement.

2RP 25, 67. In the five years preceding the trial in this case, Frazier had been involved in "over a thousand" prostitution-related arrests. 2RP 27. Over the course of his 19-year law enforcement career, Deputy Banks had been involved in "[t]housands" of prostitution-related contacts. 2RP 66, 70. Sergeant McMorris testified that the SET is so familiar with prostitution behavior that "we are now called upon as experts in the field of human trafficking[.]" 2RP 99-100.

Second, the SET members recognized Z.B. as a juvenile prostitute and observed behavior consistent with prostitution. Deputy Banks testified that Z.B. was "a younger gal that we had had previous contact with as a prostitute." 1RP 37. The officers "were aware of her age," which was under 18. 1RP 31-32, 37; 2RP 84. The officers observed Z.B. for about ten minutes before Zaldivar picked her up. 2RP 34. Sergeant McMartin noticed that Z.B.'s conduct changed once a marked patrol car left the area. 2RP 103. She got up from the bus stop and "would stand out on the highway and walk past the traffic and make eye contact with the motorists[.]" 2RP 105. She did not stray too far away from the bus stop, which McMartin testified is "common with this type of situation[.]" 2RP 104. In addition to her behavior, which was

consistent with prostitution, Z.B. was wearing a "low-cut top, exposing cleavage." 2RP 29.

Third, Zaldivar's conduct was also consistent with patronizing a prostitute. Zaldivar pulled up right next to Z.B., who walked over and got into the truck within a few seconds. 2RP 30. He then drove up the highway and turned into a very dark parking lot between an abandoned tavern and a closed business. 2RP 107, 109. The SET officers knew that that particular location "is also a common area for Johns and prostitutes to go[.]" 2RP 80. Zaldivar parked the truck and turned off its lights. 1RP 37; 2RP 36, 80. No one exited the truck. 1RP 37.

The officers waited a few minutes to approach the car, but "in this case, because of her age, and we were aware of her age, we didn't wait very long[.]" 1RP 37. Detective Frazier approached on foot and asked Zaldivar to get out. 1RP 50. When Zaldivar complied, Frazier immediately noticed Zaldivar's erection. 1RP 52. At that point, Zaldivar was in custody and was advised of his Miranda rights. 1RP 51.

Zaldivar argues that this case is factually indistinguishable from State v. Diluzio, 162 Wn. App. 585, 254 P.3d 218 (2011), where a divided panel of Division Three held there was inadequate

justification for a Terry stop. There, an officer observed Diluzio stop his vehicle in the driving lane of a notorious Spokane prostitution area and briefly speak through the window to a woman, who then got into his passenger seat. Id. at 588-89. It was late at night, and there were no open businesses or residences in the area. Id. at 588-89, 593. The officer did not see money change hands, did not overhear any conversations, and neither individual was known to have been involved in prostitution or solicitation activities. Id. at 593. The officer nonetheless suspected that solicitation of prostitution was afoot and stopped the car, eventually seizing drugs from Diluzio. Id. at 588. Diluzio appealed from his conviction on two counts of possession of a controlled substance. Id. Division Three concluded that the officer lacked reasonable suspicion to stop Diluzio, and reversed his convictions. Id. at 593.

While there are similarities between this case and Diluzio, there are several important distinctions. First, at least one member of the SET knew that Z.B. was a prostitute.[7] 1RP 37. Second, unlike in Diluzio, the officers observed Z.B. engaging in conduct

[7] Zaldivar points out that that Detective Frazier's trial testimony suggests that he did not recognize Z.B. as a known prostitute until after the investigatory stop was initiated. Brief of Appellant at 14. However, Deputy Banks testified that "we had had previous contact with [Z.B.] as a prostitute." 1RP 37. Had a challenge to reasonable suspicion been raised below, the State would have had an opportunity to more fully explore the officers' familiarity with Z.B..

consistent with prostitution. Third, unlike in Diluzio, the officers did not stop Zaldivar as soon as he picked Z.B. up. Rather, they followed until he parked his truck in a dark and secluded area known for prostitution activity, turned off the truck lights, and remained in the truck with Z.B.. Because the officers in this case had more evidence suggesting criminal activity than those in Diluzio, that case is inapposite.

Zaldivar also cites State v. Richardson, 64 Wn. App. 693, 825 P.2d 754 (1992), for the proposition that mere association with a person suspected of illegal activity is insufficient to establish reasonable suspicion for an investigatory stop. Richardson is unhelpful as well. In Richardson, the officer articulated no basis for stopping Richardson except for his presence in a high crime area and proximity to someone suspected of running drugs. Id. at 697. Like Richardson, Zaldivar was in a high crime area. Like Richardson, Zaldivar was with someone suspected of illegal activity. But unlike Richardson, Zaldivar did more than simply walk beside that person. Rather, he picked up a known prostitute and took her to a secluded location where prostitutes and their patrons frequent, then remained in a parked car with her. "The mere fact that Mr. Zaldivar was observed sitting in his truck with a person

known to be a prostitute" (Brief of Appellant at 15) may not be sufficient to raise a reasonable suspicion, but this fact combined with all of the other circumstances is more than adequate.

Given the totality of the circumstances, it is highly unlikely that the court would have granted a motion to suppress based upon an unlawful Terry stop. "[T]here is no ineffectiveness if a challenge to admissibility of evidence would have failed." Nichols, 161 Wn.2d at 14-15. Zaldivar's ineffective assistance claim must be rejected.

3. ZALDIVAR CANNOT ESTABLISH MANIFEST CONSTITUTIONAL ERROR JUSTIFYING REVIEW OF THE TERRY STOP ISSUE FOR THE FIRST TIME ON APPEAL.

In addition to his ineffective assistance claim based on the failure to challenge the Terry stop, Zaldivar attempts to challenge the stop for the first time on appeal under RAP 2.5. For the same reason that his ineffectiveness claim fails, the Court should reject this argument.

Under RAP 2.5(a), an appellant may raise a manifest error affecting a constitutional right for the first time on appeal. To establish manifest constitutional error, Zaldivar must show an error that implicates a constitutional interest and caused actual

prejudice; i.e., had practical and identifiable consequences at trial. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "Where the alleged constitutional error arises from trial counsel's failure to move to suppress, the defendant 'must show the trial court likely would have granted the motion if made. It is not enough that the Defendant allege prejudice – actual prejudice must appear in the record.'" State v. Contreras, 92 Wn. App. 307, 312, 966 P.2d 915 (1998) (quoting McFarland, 127 Wn.2d at 334).

As explained above, the trial record indicates that any motion to suppress evidence obtained following the Terry stop would have been denied. The SET officers had ample facts supporting a reasonable suspicion that Zaldivar was involved in illegal activity. Since the motion would have been properly denied, Zaldivar can establish neither a constitutional error nor actual prejudice. Contreras, 92 Wn. App. at 312. Review of this issue independent of the ineffective assistance claim is inappropriate.

4. SUFFICIENT EVIDENCE SUPPORTS ZALDIVAR'S CONVICTION.

Zaldivar contends that no rational trier of fact could find that he committed Commercial Sexual Abuse of a Minor. Given

Zaldivar's admissions to police, his argument is without merit and must be rejected.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Rose, 175 Wn.2d 10, 15, 282 P.3d 1087 (2012).

To convict Zaldivar of Commercial Sexual Abuse of a Minor, the State had to prove that he solicited, offered, or requested to engage in sexual conduct with a minor in return for a fee in the State of Washington. RCW 9.68A.100(1)(c); CP 55. The parties stipulated to Z.B.'s birthdate, which established that she was a minor at the time of the incident.[8] 2RP 147. That the crime occurred in Washington is not contested.

Zaldivar admitted to police that he picked Z.B. up knowing that she was a prostitute. 2RP 42. The SET officers saw him pick

[8] Z.B.'s date of birth is December 6, 1994. 2RP 147. This incident occurred on August 3, 2012. 2RP 28.

up Z.B. and drive her to a dark parking lot, park, extinguish the lights, and remain in the truck with her for some time. 2RP 30, 36, 80-81, 107, 109. He admitted that he touched her breasts to prove that he was not a cop and that they talked about sex. 2RP 42, 112. Although Zaldivar claimed that he had not yet spoken to Z.B. about the price, he admitted that "he put the money" on the dashboard or ashtray of his truck. 2RP 42, 44, 45, 48, 112-13. Given the evidence that Zaldivar picked up a prostitute, talked with her about sex, and placed money on the dashboard, the jury could reasonably infer that Zaldivar had in fact offered the money to Z.B. for sex.

Z.B. variously testified that Zaldivar had not offered her money for sex or that she did not remember whether that occurred. 2RP 133, 140, 142, 144. Z.B.'s credibility was undermined, however, by evidence of her own inconsistent statements to police. Z.B. acknowledged that she told the officers that Zaldivar had offered her $10 for sex, but that she needed $60 for her phone bill and $10 was not enough. 2RP 141-42, 145-46. Z.B. also conceded that her memory was fresher on the night of the incident and that she thought it was important to be truthful when she made those statements. 2RP 138, 142. Furthermore, Z.B.'s testimony

that Zaldivar did not touch her breast or talk to her about sex is contrary to Zaldivar's own statements to police. Compare 2RP 42-44, 112 to 2RP 143-44. Thus, although the jury was instructed not to consider Z.B.'s statements as substantive evidence, the jury could reasonably infer that Z.B.'s testimony that Zaldivar had not offered her money was untruthful or inaccurate.

Viewed in the light most favorable to the State, the evidence is sufficient to sustain Zaldivar's conviction for Commercial Sexual Abuse of a Minor. This Court should affirm.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Zaldivar's conviction for Commercial Sexual Abuse of a Minor.

DATED this 2nd day of April, 2014.

Respectfully submitted,

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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 Christopher Black and Teymur Askerov, the attorneys for the appellant, at Law Office of Christopher Black, PLLC, 705 Second Avenue, Suite 1111, Seattle, WA 98104, containing a copy of the BRIEF OF RESPONDENT, in STATE V. GUILLEN, Cause No. 70808-2 -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 2nd day of April, 2014

L Brame

Name
Done in Seattle, Washington