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NO. ~~762660-9-I~~
726609

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

STATE OF WASHINGTON,

Respondent,

v.

BILL DWAYNE WHEELER, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable David A. Kurtz, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS – cont'd

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES:

TABLE OF AUTHORITIES – cont'd

Page

FEDERAL CASES:

TABLE OF AUTHORITIES – cont'd

Page

TABLE OF AUTHORITIES – cont'd

Page

OTHER STATE CASES:

STATUTES, RULES AND OTHER AUTHORITY:

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the defense motion to dismiss for outrageous governmental conduct.

2. The trial court erred in entering judgment and sentence against Mr. Wheeler for sexual exploitation of sixteen-year-old M.S.

3. The trial court erred in not giving a unanimity instruction.

4. The trial court erred in admitting, without limitation, evidence that adult baristas who worked for Mr. Wheeler's espresso stands exposed themselves to customers.

5. The trial court erred in denying the defense motion to dismiss for mismanagement.

6. The trial court erred in placing the burden on the defense to assure the state's experts were testifying accurately.

7. The trial court erred in denying the defense motion for mistrial based on the introduction by the prosecution of false evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err and violate Mr. Wheeler's state and federal constitutional rights to due process of law in denying the defense motion to dismiss for outrageous governmental conduct where the only image of a minor engaged in sexually explicit conduct introduced at trial was taken by an undercover officer who paid the minor to expose her breasts?

2. Was there insufficient evidence to convict Mr. Wheeler of sexual exploitation of a minor where the state's theory was that the facts (a) that Mr. Wheeler legally ran a business to earn a profit and (b) legally gave the best shifts to his most successful baristas, forced M.S. to provide shows, where not every barista performed shows and where M.S. only provided shows when customers asked her to, independently of Mr. Wheeler?

3. Did the trial court err in not giving a unanimity instruction where the state did not elect which action it was relying on for conviction, there was evidence of multiple acts, and reasonable jurors could have had a reasonable doubt about whether an act – such as the show that would not have taken place if Detective Nevin had not invited and paid for it -- was committed?

4. Did the trial court err, and violate Mr. Wheeler's state and federal constitutional rights to a jury trial based on the evidence against him, by admitting, without limitation, evidence that adult baristas who worked at the Grab 'n Go espresso stands exposed themselves to customers?

5. Did the trial court err in denying the defense motion to dismiss for mismanagement where the state's technology experts' testimony was based on their inaccurate understanding of the evidence?

6. Did the trial court err in placing the burden on the defense to correct the state's experts' mismanagement of the state's evidence?

7. Did the trial court err in denying the defense motion for mistrial where the state's technology experts erroneously testified that they examined eight days of video tape from the espresso stand surveillance footage and that erroneous understanding of what they were examining formed the basis of their extensive testimony?

8. Must Mr. Wheeler's conviction be reversed where the jury was allowed to deliberate based on false testimony?

C. STATEMENT OF THE CASE

1. Procedural history

The Snohomish County Prosecutor's Office charged appellant Bill Wheeler, Jr. with sexually exploiting sixteen-year-old M.S. CP 440-441.

A jury convicted Mr. Wheeler of the charge after a trial before the Honorable David A. Kurtz. CP 136. Judge Kurtz imposed Judgment and Sentence on September 26, 2014, sentencing Mr. Wheeler to a term at the mid-point of the standard range. CP 18-33. Mr. Wheeler subsequently filed a timely Notice of Appeal. CP 18-33.

2. Trial facts

In January 2013, the Everett Police began an undercover investigation of the two Everett Grab 'n Go bikini espresso stands, one on Everett Mall Way owned by Mr. Wheeler and one on Broadway owned by him and a partner James Wiley. RP(7/23) 115, 120-123; RP(7/24) 43;

RP(7/25) 85-86.[1] Posing as a customer, Detective Jeffrey Nevin observed several of the baristas giving shows -- exposing their genitals and breasts to drive-through customers -- and secretly videotaped them when they gave shows at his request. RP(7/23) 124-130, 146-156, 158-175; RP(7/24) 29-34. When the baristas he recorded giving the shows were arrested on February 20, 2013, for violation of cabaret laws, the police learned that one of them, M.S., was sixteen years old. RP(7/24) 33-37.

It was undisputed at trial that Mr. Wheeler never asked any of the baristas, including M.S., to give these shows.[2] RP(7/25) 108-109; RP(7/25) 108; RP(7/28) 16, 25-26. Some of the baristas signed documents acknowledging to Mr. Wheeler that they would be terminated if they did shows (RP(7/25) 114-116)); others said that Mr. Wheeler told them not to do shows. RP(7/25) 167. One of the baristas testified explicitly that Mr. Wheeler never pressured her to do shows; she did them because it was a way for her to make more money. RP(7/28) 26.

It was also undisputed that the only photograph or video of M.S. giving a show was the one taken by Detective Nevin exposing her breasts

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[1] The verbatim report of proceedings is designated by date of the hearing or trial, e.g. RP(7/24) is the report of proceedings for July 24th. The verbatim report of proceeding of closing arguments is designated RP(sup).

[2] The state conceded prior to trial that there was no evidence that Mr. Wheeler told the baristas to do shows (RP(7/23) 26); and conceded in closing argument to the jury, that Mr. Wheeler never said that M.S. needed to do shows. RP(8/4) 4.

for him after he placed tip money in her underwear, and that he received a grant of immunity from prosecution from the City of Everett and State of Washington for his actions in encouraging her to expose herself and recording her. RP(7/24) 42, 69; CP 170-171. There were no images of M.S. exposing her breasts on the surveillance video from either espresso stand introduced at trial. RP(7/24) 71. The state's theory was that Mr. Wheeler was guilty because the baristas were motivated to give shows to make more money in tips and to get scheduled for better shifts because they sold more coffee. The prosecutor argued in closing that "[t]his was all part of his making money. This was all part of increasing his sales. And he hired [M.S.] knowing that's exactly what she would be doing. He put standards in place that forced her to be competitive with the others working at the stand." RP(8/1) 12. M.S, however, was clear that it was the other girls and not Mr. Wheeler who set the standard; when asked why she did it, M.S. replied "the other girls giving shows, the customer's expect them. So that's how they have the most customers. . . he [Mr. Wheeler] never said you need to do shows." RP(7/25) 68. Moreover, not all of the baristas performed shows: Detective Nevin testified that one of the baristas he encountered while trying to capture violations of the law on videotape "absolutely" would not perform shows. RP(7/24) 103. M.S. herself testified that she only flashed her breasts to a couple of the

approximately sixty customers who came through the stand on an average shift. RP(7/24) 141.

It was the state's theory that Mr. Wheeler was aware of the shows from reviewing the security surveillance videos which captured baristas performing them. RP(7/25) 131; RP(7/28) 79. At most, however, M.S. and two other baristas said that Mr. Wheeler reviewed some of the video footage for a shift in which they had performed shows; but none said they saw themselves giving a show in the footage. RP(7/4) 81-83, RP(7/25) 111, 154-55. One of the baristas who testified had never seen Mr. Wheeler review the footage. RP(7/28) 79. And, although a number of deleted images were recovered from Mr. Wheeler's phone, none of them showed any of the baristas giving a show. RP(7/29&30) 80-81

The baristas worked for tips. RP(7/24) 126; RP(7/25) 103, 152. There were quotas for how much money from the sale of coffee was to be in the till at the end of a shift -- $150 on weekends and $300 for weekdays. RP(7/24) 133-134; RP(7/25) 105. But although there was testimony that the baristas had to make up any shortfall, none of the baristas recalled ever having to do this except in one or two extraordinary circumstances. RP(7/24) 137-138; RP(7/24) 152. M.S. described one occasion when she had worked on a holiday and things were slow at the stand, and Mr. Wheeler told her she needed to pay. RP(7/24) 136-138. Her response

was "screw you, I'm quitting," and Mr. Wheeler called later and "almost apologized." RP(7/24) 136-138. The baristas who testified perceived that those who were more successful got the better shifts to work, but there were no requirements beyond meeting the standard goals for the tills. RP(7/24) 140; RP(7/25) 106-108; RP(7/28) 78-79.

All of the baristas agreed that they received $20 tips from appreciative customers without having performed a show and that not all customers requested shows. RP(7/24) 8; RP(7/250 65. Estimates of how much a barista earned in a shift varied from $400-$500 to $300-$400 – with the estimate, by some, that they made $50 to $100 more a shift for doing shows. RP(7/25) 69. A show could mean the difference, according to the baristas, between getting a tip of a few dollars and getting a tip of $20 (RP(7/25) 120), or the difference between a $2-$5 tip and a $10-$20 tip. RP(7/28) 27. M.S. flashed her breasts only a couple of times in a shift. RP(7/24) 124.

Notwithstanding that M.S. was the only alleged victim, most of the trial evidence related to the shows performed by the other, adult baristas: Detective Nevin's detailed descriptions of adult baristas performing shows and the circumstances surrounding each encounter with them (RP(9/23) 124-184; RP(7/24) 29-33); the video clips actually showing performances by each barista and narrated in detail by Nevin (RP(7/23) 166-184;

RP(7/24) 13-14); testimony by four of the adult baristas which included their admission that they performed shows (RP(7/25) 107-108, 155, 162; RP(7/28) 14-16); and testimony about the surveillance systems at the stands and clips of footage recorded there after the charging period involving the adult baristas. Prior to trial, the court denied the defense motion in limine to exclude evidence of the adult baristas giving shows. RP(723) 6-7, 18-37. Although the court indicated at that time that there might be limits placed on this evidence (RP(7/23) 36-37), the only instance in which the court limited it was to exclude, toward the very end of the state's case, a clip of a barista from the after-the-charging-period recordings who had never been previously been mentioned during the trial. RP(7/29&30) 115.

M.S. testified that she first left her parents' home when she was fourteen and the again shortly before her sixteenth birthday. RP(7/24) 121-122; RP(7/25) 61, 119-120. She took her resume to the Grab 'n Go coffee stand because she heard she could make more money there than at her office job; she applied at the bikini barista stand because she did not have the experience necessary to work at what she described as a "family-friendly" stand. RP(7/24) 123. Melina Alvarado was working on that day and asked M.S. to return the following day for training. RP(7/24) 124. During the two days that Ms. Alvarado trained her, M.S. recalled that

Alvarado would "shake her butt," and "flashed her breasts" and "dropped her panties" a couple of times.[3] RP(7/24) 125. M.S. met Mr. Wheeler on the first day of work and he was aware of her age. RP(7/24) 127-130; RP(7/25) 63. According to M.S., while she worked at the stand, Mr. Wheeler came by to deliver supplies and to review the till at closing. RP(7/24) 134. Sometimes he stood on a stool to review the surveillance video. RP(7/24) 134. M.S. said that Mr. Wheeler showed her his phone and said he could check the surveillance system from his phone. RP(7/24) 145-146.

M.S. was clear that Mr. Wheeler never asked her to do shows. RP(7/25) 68. It was to make more money that M.S. exposed her breasts to a couple of the approximately sixty customers who came through the stand on a typical shift. RP(7/24) 141. She did not believe that she ever offered to do a show to a customer. RP(7/24) 141. The text messages between M.S. and Mr. Wheeler had to do with keeping the customer line moving at the stand, the need for supplies for the stand, his response to her request for help after her arrest, and one text saying "[M]y policy is that if

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[3] Detective Nevin testified that M.S. told him that she only exposed her breasts because she "had morals." RP(7/23) 163. There was no evidence or testimony that she exposed her genitals as other baristas did. One of the baristas, who did not get along well with M.S., said that Mr. Wheeler told her that M.S. let customers "touch up on her." RP(7/25) 111.

you break the law, I will not let you continue. Unless I see proof, I don't care." RP(725) 54.

M.S. told the police initially, after her arrest, that she had only exposed herself one time, and then changed her answer to probably more than once, but not regularly. RP(7/25) 67. She told the police that the other girls were setting the standard; they gave shows so customers came to expect them. RP(7/25) 68. She testified that she did shows because she needed money, because other girls did them and because Mr. Wheeler put the women who made the most money on the schedule at the Everett Mall stand. RP(7/24) 139-140. M.S. had applied at other bikini barista stands since working at Grab 'n Go. RP(7/25) 86, 97.

Two of the entire five days of trial testimony were devoted to technical testimony about examining the cell phones of M.S. and Mr. Wheeler and examining the security video systems at the two Grab 'n Go espresso stands. RP(7/28) 32, 35-45, 49-67, 91-94, 97-135, 141-175; RP(7/29&30) 7-179. None of the material recovered and viewed from these examinations included images of M.S. performing shows. RP(7/29&30) 80-81, 84-94, 119-120. Some of the pictures recovered from Mr. Wheeler's phone "suggested" that they were captured from the surveillance system (RP(7/28) 111-126, 135), although the police technicians never actually turned on Mr. Wheeler's phone to see if it was

capable of remotely viewing tapes from the system.[4] RP(7/28) 127. Of the 480 images recovered from his phone – including images from deleted files -- none depicted any shows and at most two were of M.S. RP(7/29&30) 79-81. The state's expert, Jeffrey Shattuck, dwelt on the slow and difficult process of exporting what he testified were eight days of video taken from the Everett Mall Way stand's Lorex surveillance system and enhancing the sound quality on the videos. RP(7/29&30) 12-23. He testified that when the police unplugged that Lorex system on March 6, 2013, the oldest-recorded footage was of February 26, 2013; he described the possibility that this meant some of the earlier footage was deliberately deleted by Mr. Wheeler. RP(7/28) 38-35, 149-175; RP(7/29&30) 7-11. The expert was unable to export any footage from the Broadway stand and it was reviewed through the system itself. RP(7/29&30) 26. Detective Nevin was recalled to the witness stand to testify that he reviewed the eight days of videotape from the Everett Mall stand and the tapes from the Broadway stand. RP(7/29&30) 102, 117, 129. He testified that he put together eleven clips from this footage, admittedly none of them involving M.S. RP(7/29&30) 90-94. One showed Mr. Wheeler standing on a stool,

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[4] The manual for the Everett Mall stand surveillance system that listed devices which could access the tapes being recorded, did not include an android phone like Mr. Wheeler's. RP(7/29&30) 29-39. There was testimony, as well, that the system could be accessed by phone using the router's IP address. RP(7/29&30) 73-74.

one was of Mr. Wheeler with one of the adult baristas and several were of individual baristas. RP(7/29&30) 90-115. According to Nevin, there were thirty-seven instances of baristas exposing themselves on the tapes, again, none of them involving M.S. or anyone under eighteen RP(7/29&30) 117, 119-120.

3. Misinformation about the surveillance tape

Shortly after the state rested, defense counsel notified the court that counsel had just learned from Mr. Wheeler and his wife that the video from the Everett Mall stand, Exhibit 18, should show them telling each of the baristas not to do shows, Brady material. RP(7/29&30) 165-166. The following day, defense counsel noted that, after spending all night reviewing the video, his office learned that it contained duplications and not eight days of footage: there was no tape from the Everett Mall stand of March 4, 5 and 6, and not thirty-seven shows. RP(731) 6-8. Counsel noted that there were instances of conversations between Mr. Wheeler and the baristas telling them they could not do shows. RP(7/31) 7-8. Counsel asked for dismissal because of the state's mismanagement of the case and discovery or, if not dismissal, a mistrial or striking Detective Nevin's and specialist Shattuck's testimony. RP(7/31) 8-10, 84, 86-90

Over defense objection, the court allowed the state to recall its witnesses, outside the presence of the jury. RP(7/31) 15. Defense counsel

objected to being presented with an eight-page technical document and the inability to consult with an IT expert. RP(7/31) 32, 34-37, 58. After further testimony, it was clear that the video footage did not contain eight days of taping or video from March 4, 5, 6. RP(7/31) 38-53, 76-79. The state's expert testified that he got the eight days by counting backwards from the date of the seizure to the last recorded footage, and did not recall seeing himself seizing the footage. RP(7/31) 57. On further questioning, however, the expert agreed that there was a photograph of the monitor of the surveillance system which established that it was recording him at the time he seized it. RP(7/31) 71-74. It was also clear that the actual Lorex system was dead and could not be revived so that there was no way to check what was recorded on the system. RP(7/31) 38-39. Throughout this questioning outside the presence of the jury, defense counsel objected that he had just received an eight-page technical document, that he was not prepared to question the experts and that he would consult with an IT expert if time were available. RP(7/31) 24, 34, 49, 52, 58, 63, 67-68.

The court denied the defense motions to dismiss based on the state's mismanagement of the evidence or strike testimony. RP(7/31) 84-90, 95-96, 97-104. Instead the court instructed the jury to disregard testimony by Detective Nevin and Detective Shattuck that there were eight days of surveillance video. RP(7/31) 115, 119.

The state and defense rested without further testimony. RP(7/31) 115.

4. Denial of defense motion in limine and of subsequent motion to exclude

Prior to trial, the court denied the defense motion to exclude evidence that adult employees performed shows or engaged in lewd conduct. RP(7/23) 6, 18-21. The trial court ruled that evidence that the adult baristas performed shows was relevant to show a business practice or common scheme or plan, and related to Mr. Wheeler's knowledge. RP(7/23) 38-37. The court further indicated, however, that the evidence might become cumulative and be excluded for that reason. RP(7/23) 36-37.

At the end of the state's case, defense counsel objected to the introduction of clips from the surveillance video of adult baristas, and noted that the defense had a continuing objection throughout the trial to the introduction of the evidence of conduct by the adult baristas. RP(7/29&30) 104. The court responded that counsel needed to preserve its record, but agreed it had ruled that it would possibly limit the scope of the evidence. RP(7/29&30) 100, 115. The court then excluded one of the eleven clips because it was of a barista about whom there had been no

previous testimony. RP(7/29&30) 155. The court refused to limit the other clips involving adult baristas. RP(7/29&30105-115.

5. Defense motions to dismiss or grant a mistrial

Defense counsel also moved to dismiss under CrR 8.3 for Detective Nevin's outrageous conduct in committing the crime Mr. Wheeler was accused of committing -- by encouraging M.S. to perform sexually explicit conduct and paying her to do it. RP(7/29&30) 148 -150. The trial court denied the motion. RP(7/29&30) 161.

Defense counsel moved for a dismissal or a mistrial after discovering that the footage taken from surveillance tape from the Everett Mall stand did not include March 4, 5, and 6 as the state's witnesses testified. RP(7/31) 84. Counsel noted that the problem was caused by the state's mismanagement in failing to accurately testify about the video from the surveillance system and in failing to maintain the system and keep it plugged in. RP(7/31) 85-89. The defense requested that the court strike the testimony about the surveillance video if the mistrial was denied. RP(7/31/) 90. The court denied these motions, ruling that the defense had had a copy of the video tape for over a year, that the testimony of the state's witnesses was "mistaken," that if there was an issue with the missing days it should have been raised months ago, and that it was speculative whether the mistake was significant. RP(7/31) 98-103. The

court found that either reopening the state's case or the defense calling the state's witnesses in the defense case were adequate remedies. RP(7/31) 101-102. Ultimately, the court instructed the jury to disregard only the specific testimony that there were eight days of tape. RP(7/31) 115.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR OUTRAGEOUS GOVERNMENT CONDUCT FOR PAYING SIXTEEN-YEAR-OLD M.S. TO BARE HER BREASTS TO BE SURREPTITIOUSLY VIDEOTAPED.

Detective Nevin went through the Everett Mall Way Grab 'n Go stand in an undercover car with a false license plate, address and cover story. RP(7/23) 122-125; RP(7/24) 65. Nevin drove through the espresso stand, made small talk to gain the confidence of sixteen-year-old M.S, and asked her if he could "get what the customer in front of her had [a show]." RP(7/23) 161-162. Before M.S. showed him her breasts, he placed money in her underwear; his objective was to video tape her exposing herself. RP(7/23) 163-168. Even after she told him that she had morals and only exposed her breasts (RP(7/23) 162), he never asked her how old she was or made any attempt to investigate M.S.'s name or age. After her arrest, he sought and was given immunity from prosecution by the City of Everett

and the State of Washington because of his actions. RP(7/24) 35-43, 45, 91.

The only photographic or video image of M.S. exposing her breasts was the video taken surreptitiously by Detective Nevin. RP(7/24) 69. And, unlike Mr. Wheeler, Detective Nevin expressly and unambiguously "aided, invited, authorized and caused M.S. to engage in sexually explicit conduct knowing" that she would be giving a live performance and that he would photograph it. RCW 9.68A.040; RP(7/25) 108-109; RP(7/28) 16, 25-26.

Because this is one of the rare cases in which police conduct shocks the conscience to such a degree that it violates the state and federal due process requirements, the trial court erred in not granting the defense motion for dismissal based on Detective Nevin's outrageous conduct.

"[O]utrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be 'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (quoting United States v. Russell, 411 U.S. 423, 431-432, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)).

Unlike entrapment which depends on showing that the defendant would not have committed the crime absent trickery by the state, the focus

of the outrageous conduct inquiry remains on the conduct of the state. Lively, 130 Wn.2d at 10, 19; United States v. Luttrell, 889 F.2d 806, 811 (9th Cir, 1989. While deceitful conduct and violations of the law alone are not sufficient to establish the due process violation, instances in which the government controls the criminal activity rather than simply allowing it to occur, instigates the activity or financially encourages it may be sufficient. Lively, at 22 (citing United States . Harris, 997 F.2d 812, 816 (10th Cir. 1993); United States v. Corcionne, 592 F.2d 111, 115 (2d Cir.), cert. denied. 440 U.S. 975 and 440 U.S. 985 (1979)). Also relevant is whether the conduct was itself criminal or "repugnant to a sense of justice." Lively, at 22 (quoting People v. Isaacson, 44 N.Y.2d 511, 506 N.Y.S.2d 714, 376 N.E.2d 78, 83 (1978) and citing United States v. Jensen, 69 F.2d 906, 910-911 (8th Cir 1995), cert. denied, 116 S. Ct. 1571 (1986)). The issue is a matter of law, not a question for the jury. United States v. Dudden, 65 F.3d 1461, 1466-1467 (9th Cir. 1995).

Although each case should be decided on its facts, under a totality of the circumstances standard, Lively, at 21, two cases are illustrative. In United State v. Twigg, 588 F.2d 373 (3rd Cir. 1978), the federal Court of Appeals reversed where the police involvement was so extensive that it barred prosecution: the police supplied the chemicals and a rented farmhouse for the manufacturing of methamphetamine. In Greene v.

United States, 454 F.2d 783 (9th Cir. 1971), the Court of Appeals reversed where the government agents contacted bootleggers after their arrest and offered to supply equipment and an operator for a new still.

Here, Detective Nevin did not simply allow activity to go on, he solicited it knowing he would capture it on videotape. He paid for it. His involvement was extensive – he made up a false story, acted to gain M.S.'s confidence, and gave her a financial incentive to perform a sexually explicit show. Detective Nevin's conduct was itself criminal and "repugnant to a sense of justice." It was his criminal conduct which provided the direct evidence used to prosecute Mr. Wheeler, and he received immunity to avoid prosecution himself.

While Detective Nevin testified that he did not know M.S, was a minor, she was only sixteen. RP(7/24) 36. He had made no effort to find out her name and age prior to asking her to give a show for him. M.S. had been candid about her age and there is every reason to believe that if Detective Nevin had simply taken the precaution of asking her, he would have known for sure she was a minor. And certainly a police officer who knows he would be trying to obtain and photograph a live performance should take care to determine the age of an obviously young person he will be soliciting.

Detective Nevin was investigating possible violations of cabaret laws and, rather than protecting the public, victimized M.S. His conduct created the harm that the statute criminalizing sexual exploitation of a minor was enacted to prevent, and it is "repugnant to a sense of justice" to utilize the fruits of this conduct to invoke the criminal process to obtain a conviction with it. Lively, supra and Russell, supra. This passed the boundary of acceptable conduct, whether or not Detective Nevin knew for certain that M.S. was a minor. The trial court erred in denying the defense motion to dismiss based on outrageous misconduct, and this Court should now reverse and dismiss Mr. Wheeler's conviction. The judicial process should not be invoked to use evidence collected by sexually exploiting a minor to gain a conviction.

2. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN MR. WHEELER'S CONVICTION FOR SEXUAL EXPLOITATION OF A MINOR.

Given that Mr. Wheeler never asked or in any way expressly encouraged M.S. to perform shows, the state's theory was that he -- simply through his business practices -- forced M.S. to do them. The prosecutor told the jury,

> All the evidence in this case tells you that Mr. Wheeler had a plan. This was all part of him making money. This was all part of increasing his sales. *And he hired [M.S.] knowing that's exactly what she would be doing [giving shows].* He put standards in place that *forced* her to be competitive . . .

RP(8/1) 12 (emphasis added). Detective Nevin's testimony disproves this.

It was not inevitable that a barista working at the Grab 'n Go espresso stands would give shows, nor were they forced to give them. When asked if there were employees who "absolutely wouldn't perform shows?," Detective Nevin responded, "Yes. One employee." RP(7/24) 103. Employees were not forced to do shows, nor did they inevitably do them.

Detective Nevin's interaction with M.S., and her testimony that she never offered to do shows for customers, (RP(7/24) 141), also negates the prosecutor's argument. Had Nevin not asked M.S. for a show, no show would have been given to him. M.S. gave the show that Nevin taped because he – clearly independently of Mr. Wheeler -- asked her and gave her money to induce her to perform. RP(7/23) 161-164. Similarly, she gave all of her other performances for the same reason -- that someone asked for a show.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven by the state beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). Therefore, as a matter of state and

federal constitutional law, a challenged conviction cannot be affirmed on appeal unless "a rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support the conviction." Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

Mr. Wheeler was charged with violating RCW 9.68A.40, which provides, in pertinent part:

> (1) A person is guilty of sexual exploitation of a minor if the person:
>
> . . . .
>
> (b) aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance.

The trial court found that there was no evidence that Mr. Wheeler aided, employed, or authorized a minor to engage in sexually explicit conduct and instructed that he could be found guilty only if he invited or caused the minor to engage in such conduct. CP 145; RP(8/1) 6. Thus, the state had the burden of proving beyond a reasonable doubt that Mr. Wheeler invited or caused a minor to engage in sexually explicit conduct knowing that the conduct would be photographed or part of a live show.

Since "invites" and "causes," like the other verbs in the statute, are

active verbs; "[e]ach requires some affirmative act of assistance, interaction, influence or communication on the part of the defendant which initiates or results in a child's display of sexually explicit conduct." State v. Chester, 133 Wn.2d 15, 22-23, 940 P.2d 1374 (1997). For this reason, the Court, in Chester, held that the evidence was insufficient to sustain a conviction where the defendant secretly videotaped his stepdaughter while she was dressing for school. See also, State v. Whipple, 144 Wn. App. 654, 183 P.3d 1105 (2008) (insufficient evidence where it did not appear the stepdaughter knew she was being photographed).[5] The Chester Court held that even though the defendant placed the camera hoping to film his stepdaughter in the nude and intending to observe her getting dressed, he did not communicate with or assist her in any way. In contrast, the evidence was sufficient where the defendant photographed a minor in the bathtub over her objection and coaxed her into assuming certain positions; the defendant was held to have actively invited the conduct. State v. Myers, 82 Wn. App. 435, 439, 918 P.2d 182 (1966), aff'd 133 Wn.2d 26, 941 P.2d 1102 (1977).

Here, like in Chester and Whipple and unlike in Myers, the state's evidence failed to show that Mr. Wheeler affirmatively communicated to

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[5] In State v. Stribling, 164 Wn, App. 867, 267 P.3d 423 (2011), the evidence was insufficient because the minor the defendant invited to send him a nude photograph did not do so.

M.S. that she should give shows or that he did any affirmative act which induced her to perform shows. RP(7/24) 68.

At most, the trial evidence showed that Mr. Wheeler tried to run a successful business. He hired women to sell coffee in his espresso stands while scantily dressed. RP(7/24) 123-124, RP(7/25) 102-103, 150; RP(7/25) 9-10, 72-73. This is not illegal. He scheduled the women who were most successful to work the shifts when the stands were busiest. RP(7/24) 140; RP(7/25) 106-108; RP(7/28) 78-79. This too is not illegal. There was evidence from which the jury could have concluded that Mr. Wheeler knew that the adult baristas were giving shows and that he may have known the M.S. gave shows --- just as the defendant in Chester knew that his stepdaughter might be nude when he taped her. (RP(7/24) 135, 81-83, 109-110, 154-155. But like Chester, there was no evidence that Mr. Wheeler invited or caused the shows by M.S. Absent those customers, who acted independently of Mr. Wheeler, M.S. would not have performed any shows.

The evidence showed that the adult baristas chose to do shows as a way of making more money for themselves. M.S. felt that these women set the standard. RP(7/25) 68. Yet, these women uncovered their genitals and rectal areas, and M.S. chose not to do that. RP(7/23) 162; RP(7/24) 141. At least one other barista chose not to give shows at all. RP(7/23)

103.

Working at the Grab 'n Go espresso stands provided M.S. with the opportunity to engage in sexually explicit conduct at the request of customers; she made more money in tips when she did that. Mr. Wheeler, however, never asked her to do that or required or encouraged her to do that. There was insufficient evidence that he invited or caused her to perform live shows. Detective Nevin and a number of unnamed customers did invite and pay her to engage in explicit conduct. They may be guilty of violation of RCW 9.68.040 but Mr. Wheeler was not proven to be. His judgment and sentence should be reversed and dismissed.

3. MR. WHEELER'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO GIVE A UNANIMITY INSTRUCTION AND THERE WAS INSUFFICIENT PROOF TO ESTABLISH SOME OF THE ACTS PRESENTED BY THE STATE.

The state charged Mr. Wheeler with one count of sexual exploitation of a minor allegedly committed during a charging period which extended from January 1, 2013 through February 20, 2013, CP 440-441, and presented evidence of multiple occasions when M.S. said she provided shows. RP(7/24) 141. Each show would be a potential unit of prosecution. State v. Root, 141 Wn.2d 701, 9 P.3d 214 (2000) (unit of prosecution each photographic session).

Because the state never elected which occasion it was relying on for conviction (RP(supp) 3-13, 41-45) and because the jury could have entertained a reasonable doubt that Mr. Wheeler was guilty on the occasion when Detective Nevin solicited and paid for the show, the trial court's failure to give a unanimity instruction requires reversal of Mr. Wheeler's conviction. CP 137-155.

M.S. testified, in essence, that she only gave shows when asked to by customers. RP(7/24) 141. Had Detective Nevin not asked her and paid her to give a show on the occasion he taped her, she would not have given a show then. It certainly could not be said that no reasonable juror could have had a reasonable doubt that Mr. Wheeler was guilty of exploiting M.S. on this occasion.

A jury must unanimously conclude that the defendant committed a charged criminal act. State v. Petrich, 101 Wn.2d 566, 569, 693 P.2d 173 (1984), modified, State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). When the State charges one count of criminal conduct but introduces evidence of multiple distinct acts, (1) the State must specify the particular act on which it relies for each conviction, or (2) the trial court must instruct the jury that it can convict only if it unanimously agrees on at least one criminal act. Petrich, 101 Wn.2d at 572. This requirement guards against the State's using multiple acts to prove one count, thus

obscuring whether the jury unanimously based its conviction on the same act. Petrich, 101 Wn.2d at 572; Kitchen, 110 Wn.2d at 411. Where there is neither an election nor an unanimity instruction, prejudice is presumed. State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). The presumption is overcome only if no rational juror could have had a reasonable doubt as to any of the alleged incidents. Id.; Kitchen, at 411-412.

Because failure to give a unanimity instruction can violate a defendant's state and federal constitutional right to a jury trial, the failure to give the instruction can be raised for the first time on appeal. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990).

Here, a reasonable jury could certainly have entertained a reasonable doubt that *Mr. Wheeler* was guilty of the show invited and paid for by Detective Nevin. Accordingly, Mr. Wheeler's conviction should be reversed and remanded for failure to give a unanimity instruction.

4. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT, WITHOUT LIMITATION, EVIDENCE OF ALLEGED PRIOR BAD ACTS OF THE ADULT BARISTAS.

The court denied the defense motion in limine to exclude evidence that adult employees performed shows or engaged in lewd conduct. RP(7/23) 6, 18-21. In denying the motion, the court ruled that evidence

was relevant to show a business practice or common scheme or plan, and related to Mr. Wheeler's knowledge. RP(7/23) 38-37. The court further indicated, however, that the evidence might become cumulative and be excluded for that reason. RP(7/23) 36-37. The only instance in which the court limited this evidence, however, was to exclude, toward the very end of the state's case, a clip of a barista from the after-the-charging-period recordings who had never been previously been mentioned during the trial. RP(7/29&30) 115. Ten other clips were admitted and shown to the jury. RP(7/29&30) 92.

It was error not to limit the evidence of conduct by the other baristas to their testimony and M.S.'s about their giving shows. The extensive evidence of the conduct of the adult baristas was overwhelmingly and unfairly prejudicial and went far beyond any relevance. Some testimony about the business structure and culture of the espresso stands was relevant to both guilt and innocence of the charged crime. Extensive evidence of the lewd contact of the adult baristas served only to unfairly engender prejudice and implied, in violation of ER 404(b), that Mr. Wheeler was guilty of sexually exploiting a minor because he employed adult baristas who engaged in sexually-explicit conduct.

The most basic rule of evidence is that "[e]vidence which is not relevant is not admissible," ER 402.

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

Even where evidence is relevant, it may be excluded where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. . . ." ER 403.

Specifically, under ER 404(b) "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence may be admissible for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

Evidence of other uncharged, alleged misconduct is never admissible (a) to show that a defendant is the type of person who is likely to have committed the crime charged, (b) to prove the character of a person to show that he or she acted in conformity therewith during the alleged crime, or (c) to show that the accused had the propensity to commit the crime. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487, 489 (1995); ER 404(b). "Once a thief, always a thief, is not a valid basis to admit evidence." State v. Holmes, 43 Wn. App. 397, 400, 7171 P.2d 766 (1986).

Even where evidence is relevant to an essential element of the charged crime, the court must balance its probative value against its potential

for prejudice. Lough, 125 Wn.2d at 853. There is "substantial prejudicial effect. . . *inherent* in ER 404(b) evidence." Lough at 863. "The inevitable tendency of such [ER 404(b)] evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." State v. Reese, 274 S.W.2d 307, 307 (Mo.banc 1954).

Here, the state's theory of the case was that Mr. Wheeler's business model of paying the baristas in tips and providing the best shifts to the baristas who were most successful at selling coffee inevitably resulted in causing M.S. to do shows. But watching the shows and hearing them described repeatedly in detail was not relevant to any trial issue and certainly less probative than prejudicial.

The denial of the motion in limine preserved the error in admitting the evidence. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995); State v. Kelly, 102 Wn.2d 188, 688 P.2d 564 (1984). Moreover, any further objection to the scope of the evidence would have been futile, since the trial court, at the close of the state's case, was unwilling to exclude any evidence but one of eleven clips because it involved a barista about whom there had been no previous evidence. RP(7/29&30) 115.

As a result of the court's ruling that jury not only heard the adult baristas' testimony that they were performing show to augment their tips (RP(7/24) 68; RP(7/25) 107-108, 155); RP(7/26) 18, 26, 82) the jury heard:

Detective Nevin's description of complaints received from members of the public about lewd conduct observed at the espresso stands (RP(7/23) 121-122; Detective Nevin's detailed descriptions of the acts he saw the adult baristas perform (RP7/23) 126-130, 146-163; his narration of the graphic video recordings he made of the baristas giving shows RP(7/23) 173-184; RP(7/24) 13-30; other police officers' description of shows given by the adult baristas (RP(7/25) 177-178; M.S.'s description of the shows she observed other baristas performing (RP7/24) 125-126, 132; descriptions of shows by the adult baristas (RP(7/25) 119-120, RP(7/28) 18; and testimony about and video footage of shows performed after M.S.'s arrest. RP(7/29&30) 84-85, 90-102, 122.

In fact, the overwhelming majority of the testimony and evidence introduced at trial had to do with the conduct of the adult baristas. The trial would have been significantly shorter if the trial court had limited or excluded the graphic video and cumulative descriptions of lewd conduct of these baristas. Since it was not limited, the jurors were likely left with the impression that Mr. Wheeler was guilty of sexually exploiting M.S. simply because a great deal of sexual activity occurred at the stand.

The evidence was inherently prejudicial. Lough at 863. It inevitably raised " a legally spurious presumption of guilt in the minds of the jurors." State v. Reese, 274 S.W.2d 307, 307 (Mo.banc 1954). The error in

admitting the evidence, without limitation, denied Mr. Wheeler a fair trial and should result in the reversal of his conviction.

5. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR DISMISSAL OR MISTRIAL BASED ON THE STATE'S MISMANAGEMENT OF THE CASE AND ERRED IN PLACING THE BURDEN ON THE DEFENSE TO CORRECT THE STATE'S MISMANAGEMENT.

The state's experts, with cooperation from the defense, were given ample time to review and make copies of the surveillance footage from the espresso stands. RP(5/23) 2-4; RP(6/28) 2-3; RP(7/11) 2-3; RP(7/29&30) 14. The experts did not find any images of M.S. performing shows after a lengthy review; but, nevertheless, the state presented extensive testimony about the footage from the security video systems. RP(7/28) 141-175; RP(7/29&30) 80-81, 84-94, 119-120. The state then relied on the video evidence in closing argument. RP(supp) 5-7.

In presenting the evidence at trial, the state sought to convey to jury that there was technological evidence of guilt; and that their technical witnesses were experts in their fields, credible in their work and credible in their conclusions. The state elicited from the forensic digital imaging expert, Jeffrey Shattuck, details of the painstaking process of exporting what he testified were eight days of video taken from the Everett Mall

Way stand's Lorex surveillance system.[6] RP(7/29&30) 12-23. First, he was examined about the care he took in documenting how the system was set up, before he unplugged it on March 6, 2013. RP(7/28) 157-162. He was questioned about the oldest-recorded footage noted by the system being February 26, 2013, and how he could recover forty-three additional hours beyond that; he was asked to describe to the jury technical and complicated reasons for concluding that earlier footage had been deliberately deleted by Mr. Wheeler. RP(7/28) 38-35, 149-175; RP(7/29&30) 7-11. He was asked about evidence of "disassociated segments of video" spread throughout the system. RP(7/39&30) 53. Most importantly, forensic expert Shattuck was asked to describe, in technical terms and at length, the difficulties he encountered in exporting the footage from the Lorex to a hard drive for Detective Nevin to review and the software and techniques he used to successfully overcome the difficulties. RP(7/29&30) 13-23. Shattuck did have to admit that he was unable to export any footage from the Broadway stand. RP(7/29&30) 26.

The state then recalled Detective Nevin to the witness stand to testify that he reviewed the eight days of videotape from the Everett Mall stand, given to him by Shattuck, and the tapes from the Broadway stand.

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[6] The state elicited from Mr. Shattuck that he had been a forensic imaging specialist for twenty-seven years, had taught at Quantico for the FBI and at the University of Illinois. RP(7/28) 141-142.

RP(7/29&30) 102, 117, 129. According to Nevin, there were thirty-seven instances of baristas exposing themselves on the tapes; again, none of them M.S. or anyone under eighteen. RP(7/29&30) 117, 119-120.

When the defense reviewed the entire footage shortly after the state rested, however, defense counsel discovered that the footage taken from surveillance tape from the Everett Mall stand did not include eight days as Shattuck and Nevin testified and wrote in their reports; there was no footage from March 4, 5, and 6 on the tape and there were duplications. RP(7/31) 6-8, 84, 88. Counsel reported that there were nowhere near thirty-seven "shows" captured on the tape and there was Brady material of Mr. Wheeler and his wife telling the baristas not to perform shows. RP(7/31) 5-8.

On questioning outside the presence of the jury, Shattuck and Nevin admitted that there were not actually eight days of footage (RP(7/31) 15,38-53, 76-79)), but Shattuck suggested that the mistake lay in counting back the days from seizure to the last recorded footage. RP(7/31) 57. Shattuck said he did not recall seeing himself seizing the system (RP(7/31) 57, but then had to admit that there was a photograph showing that he *did* appear on the monitor at the time unhooking the system. RP(7/31) 57. The questioning also established that the system was no longer operable and could not be revived. RP(7/31) 38-39.

During the questioning, defense counsel repeatedly objected and noted that he needed more time and time to consult with an IT expert in order to effectively question the witnesses then or if trial continued. RP(7/31) 15, 24, 34, 49, 52, 58, 63, 67-68.

The defense moved for dismissal under CrR 8.3(b) because of the state's mismanagement in failing to accurately testify about the video from the surveillance system and in failing to maintain the system by keeping it plugged in. RP(7/31) 8, 85-89. As a result the system no longer worked and could not be examined further. RP(7/31) 86. The defense further requested that if dismissal were not granted, a mistrial should be; if dismissal or a mistrial were not granted, the court should strike Shattuck's and Nevin's testimony about the surveillance video footage. RP(7/31/) 90. The court denied these motions, ruling that the defense had had a copy of the video tape for over a year, that the testimony of the state's witnesses was "mistaken," that if there was an issue with the missing days it should have been raised months ago, and that it was speculative whether the mistake was significant. RP(7/31) 98-103. The court found that either reopening the state's case or the defense calling the state's witnesses in the defense case were adequate remedies. RP(7/31) 101-102. The court erred in placing the fault on the defense for the state's mishandling of the evidence and erroneous testimony. The court erred in placing the burden

on the defense to monitor and correct the state's expert's testimony. The court erred in ruling that the situation could be remedied simply by recalling the witnesses.

After both sides rested without recalling the witnesses, the court instructed the jury to disregard only the specific testimony that there were eight days of tape. RP(7/31) 115.

The trial court erred in denying relief because there was no way to adequately correct the misinformation given to the jury simply by striking the specific testimony that there were eight days of video footage. The fact the witnesses could be mistaken in such a fundamental way undermined the entire credibility, and extensive further testimony would only place further undue importance of video evidence from outside the charging period and not related to M.S. Moreover, defense counsel repeatedly indicated that proper further examination of Shattuck and Nevin would take time and help from a defense forensic IT expert. The fact that the system could no longer be used to check what was actually recorded, made it impossible to determine whether the footage had been manipulated or why three days were missing.

Dismissal of a prosecution in the interests of justice under CrR 8.3(b) should be granted where the defendant shows arbitrary action of governmental misconduct and the prejudice of the government misconduct

affects the defendant's right to a fair trial. State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997); State v. Blackwell. 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). The misconduct does not have to be of an "evil or dishonest nature, simple mismanagement is sufficient." Michielli. At 239 (quoting Blackwell at 831); State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1982); State v. Sulgrove, 10 Wn. App. 860, 578 P.2d 74 (1978).

A trial judge abuses its discretion in denying a CrR 8.3(b) motion where the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Michielli, 132 Wn.2d at 830.

Here, the trial court abused its discretion by basing the decision on the defense's alleged failure to more timely warn the state that its evidence was faulty and its finding that the state's mistaken testimony – which undermined the credibility of its experts – was harmless. Obviously the defense does not have the responsibility of making sure that state's witnesses testify truthfully. Instead, it is well established that due process imposes the duty *on the prosecutor* not to use false evidence.[7] Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957); State v. Finnegan, 6 Wn. App. 612, 616, 495 P.2d 674 (1972). This duty requires the prosecutor to correct erroneous testimony. Napue v. Illinois, 360 U.S.

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[7] The prosecutor had the same evidence that was made available to defense counsel. RP(7/31) 90-92.

246, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); Finnegan, 6 Wn. App. at 616. And just as obviously here, the erroneous testimony and failure to preserve the system, were indicative of problems which undermined the credibility of all of the testimony, not just the number of days on the footage. The state spent a significant portion of its case on this evidence and argued that it proved guilt. The unfair prejudice of having the jury consider it was overwhelming. The error could not be corrected – certainly not timely corrected -- after the close of the state's case, and dismissal should have been granted under Michielli. Since the system was no longer operable and several days of footage was missing, there was no way to determine what was on the portion of the tape that was lost or if and how the footage might have been manipulated or corrupted.

Since dismissal was not granted, a mistrial should have been. A mistrial should be granted where the defendant "is so prejudiced that nothing short of a new trial can insure that the defendant will be fairly tried." State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1996). The relevant factors for making this determination are: (1) the seriousness of the irregularity; (2) whether the irregularity involved cumulative evidence, and (3) whether the jury was instructed to disregard the irregularity. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1986).

Here the irregularity was serious, the evidence was not cumulative and the jury was instructed only to disregard a small portion of the incorrect evidence. Nothing short of a new trial could cure the error At the least, a mistrial should have been granted.

At the least, the entire testimony on the question of the surveillance system should have been stricken. Striking only the specific testimony about the eight days of testimony did not cure the prejudice. Since it is too late to provide that remedy, a mistrial should be granted if the case is not dismissed.

Mr. Wheeler's conviction should be reversed and dismissed. If not dismissed, a new trial should be granted.

6. MR. WHEELER'S CONVICTION SHOULD BE REVERSED BECAUSE THE CASE WENT TO THE JURY WITH FALSE TESTIMONY.

Although the court instructed the jury to disregard testimony by Detective Nevin and forensic expert Jeffrey Shattuck that there were eight days of video footage exported from the surveillance system of the Everett Mall Way espresso stand, this did not correct the false evidence that the jury received. The jury was not told that the footage contained duplication or that footage that was on the system when the police took it was lost and could not be recovered. The error should require reversal of Mr. Wheeler's conviction under Napue, supra; Alcorta, supra; Finnegan,

supra, which require, as a matter of due process of law under the state and federal constitutions, that a defendant not be convicted based on false evidence.

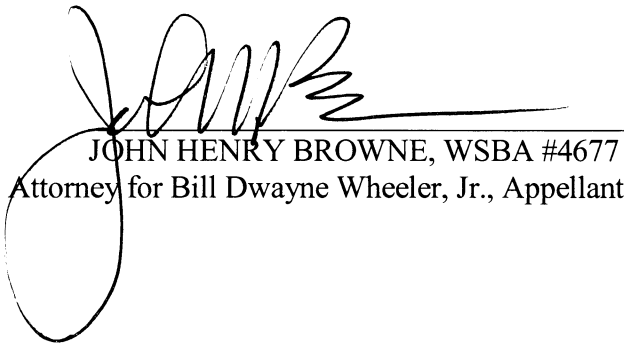
E. CONCLUSION

Appellant respectfully submits that his judgment and sentence should be reversed and dismissed. At the least, the judgment and sentence should be reversed and remanded for retrial in which cumulative evidence of the actions of adult baristas should be excluded.

DATED this 3 day of April, 2015.

Respectfully submitted,

LAW OFFICES OF JOHN HENRY BROWNE, P.S.



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CERTIFICATE OF SERVICE

I certify that on the 3rd day of April, 2015, I caused a true and correct copy of the Opening Brief of Appellant to be served on Respondent via e-file to her office and to Appellant via first class mail.

Counsel for the Appellant:

NAME DATE at Seattle, WA