Supreme Court No. 99875-2
COA No. 79348-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES PETERS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. Charles Peters was the appellant in COA No. 79348-9-I, and is the Petitioner herein.

B. COURT OF APPEALS DECISION

Mr. Peters seeks review of the decision of the Court of Appeals as made final on re-issuance on May 10, 2021, following Mr. Peters' motion to reconsider. Appendix A (State v. Peters, 16 Wn. App.2d 454 (2021)).

C. ISSUES PRESENTED ON REVIEW

1. An offense is not properly charged unless the information sets forth every essential element of the crime. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); CONST. Art. 1 sec. 22 (amend. 10). Here, the charging document, even under a liberal reading, fails to include the elements of knowingly not "acting . . . as a customer of a prostitute." Is prejudice presumed and reversal required, where one, or more of these elements was entirely missing from the information?

2. Did the prosecutor commit reversible misconduct in presentation of closing argument by misstating the law of knowledge orally and in powerpoint form, a crucial issue where the criminal

conduct is aiding prostitution while knowingly not acting as a prostitute or customer thereof, and the evidence on the elements was weak?

3. An ordinary person of average intelligence could not anticipate that the offense of advancing prostitution, which states that it is conduct engaged in by a person who is not acting as a customer of a prostitute, could apply to Mr. Peters' acts of review-writing about prostitution experiences and referrals to prostitution services as a customer to other customers. In addition, the statute's vague language leaves the issue of arrest and guilt to the unfettered discretion of law enforcement and the court system, including lay juries who may morally disapprove of activity that relates in any way to prostitution.

Is the advancing prostitution statutory scheme vague as applied under the Due Process Clause of the Fourteenth Amendment[1] to the United States Constitution, and alternatively, under Due Process vagueness also implicating the First Amendment[2] to the United States Constitution?

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[1] The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state shall deprive any person of life or liberty "without due process of law." U.S. CONST. amend. XIV.

[2] The First Amendment to the United States Constitution provides, in pertinent part, that the government "shall make no law . . . abridging the freedom of speech[.]" U.S. CONST. amend. I.

D. STATEMENT OF THE CASE

(1). The prosecutor's office takes the unprecedented step of charging "johns" as promoters of prostitution.

Charles Peters patronized prostitution workers in the Bellevue and King County area, between 2013 to 2016. RP 1912-13. Mr. Peters, a former U.S. Army lab technician working as a clinical trials research assistant, visited the internet sites of prostitution agencies, and the sites of individual sex workers. RP 1916-18, 1924. Mr. Peters, who was experiencing problems in his marriage, sought out women who offered "the girlfriend experience," a simulation of a genuine romantic relationship between a woman and a man. RP 703, 726-28, 1924, 1122, 2221.

Mr. Peters wrote about his sexual experiences, posting these writings as reviews on "The Review Board," (TRB), a website where prostitution customers can review the sex workers they have patronized. RP 1924, 1929. These reviews naturally served as recommendations of particular sex workers to other "johns" or patrons and customers who joined the website to look for prostitution services. RP 1923-34.

Mr. Peters was also part of a smaller review group of customers, also internet-based, called "The League of Extraordinary

Gentlemen." RP 1370, 1373. Members of the League styled themselves, not as mere "johns," but instead as "hobbyists"- aficionados with a high level of taste and discretion as prostitution patrons. RP 726.

Mr. Peters' stated purpose as a local writer for these review groups was to artfuly describe the best experiences he had, and thereby improve the availability of sex workers in the area who met sophisticated customer expectations. RP 1923-24. Mr. Peters also used the website KGirlsDelights, which allowed customer reviews to be accompanied by images from agency and sex worker advertisements, copied by the customer to show who they were reviewing. RP 2207-09.

Mr. Peters boasted of the influence that he and his fellow hobbyists' reviews had on the growing quality of the prostitution market in the area. RP 1235; CP 1814-1821 (Sub # 124 (State's exhibit 99)). Mr. Peters also tried to be a "white knight" customer who cared about the interests and safety of sex workers, who were involved in a risky, and illegal profession. RP 1820.

Beginning in 2012, faced with the movement of prostitution services from easily detectable street activity to the underground world

of the internet, local prosecutors became engaged in a strategy based on aggressive threat of prosecution against the "consumers" of prostitution. CP 107-07; 872, 875; see CP 122-25. Beginning in 2014, the King County Prosecutor's Office was given $50,000 grants from "Demand Abolition," an anti-prostitution advocacy group that conditioned the money on the prosecutor's office agreeing to focus on "demand reduction tactics" that would hold customers accountable for their conduct, which Demand Abolition deemed ungodly and immoral. CP 873-74.

After the intervention of the Demand Abolition advocacy group, the prosecutor's office commenced what it itself knew was an "unprecedented" turn in its legal strategy. RP 57-58. Authorities now determined that they would begin prosecuting customer reviewers on websites such as TRB under the statute entitled "promoting prostitution." CP 875; RP 57-58.

Detective Luke Hillman of the King County Sheriff's Office infiltrated TRB and other sites in an undercover capacity and, at a private dinner involving a select group of connoisseur customers held at a Bellevue Restaurant, arrested Mr. Peters for "his involvement with the League, voluminous reviews on TRB, and emails regarding various

sex workers that were allegedly designed to allow buyers to more easily patronize sex workers." CP 875.

(2). Charges, trial and sentencing.

The State charged Mr. Peters with nine counts of promoting prostitution in the second degree, based on allegations that his reviews constituted knowing advancement of prostitution including via the "KGirlsDelights" website. See CP 1281-83 (amended information); see, e.g., CP 1281 (count 1) (alleging that the defendant "did knowingly advance prostitution through the website 'K-girl Delights' ").

According to the affidavit of probable cause, the defendant's acts on the various websites "allow[ed] buyers of sex to share information about how to access specific prostituted persons and to review their sexual encounters with the prostituted people," and "directly affect[ed] the popularity and amount of business for an individual prostituted person and her 'agency.' " CP 3-4.

The State argued that the community of TRB and other website members who used the websites "to access the underground world of illegal commercial sex" did, thereby, "broadly advance the illegal commercial sexual industry in the region." CP 4.

The statute employed in this unprecedented manner provides that a person is guilty of promoting prostitution in the second degree if he or she "knowingly . . . [a]dvances prostitution" while "acting other than as a prostitute or as a customer thereof[.]" RCW 9A.88.080(1)(a); RCW 9A.080.060(2). CP 1281-83. As the jury would later be instructed, a person "knowingly advances prostitution" if he,

> *acting other than as a prostitute or as a customer of a prostitute,* aided a person to commit or engage in prostitution or procured or solicited customers for prostitution or engaged in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

(Emphasis added.) CP 1352; see RCW 9A.88.060(1).

At trial, the jury convicted Mr. Peters of all nine counts. CP 1374-82, 1435. On appeal, the Court of Appeals held, *inter alia*, that knowingly acting other than as a prostitute or customer thereof are not essential elements of the crime of promoting prostitution, and were therefore not required to be set forth in the charging document. Appendix A.

In addition, during closing, the prosecutor stated in initial argument, and in rebuttal, that "a reasonable person doing this stuff would know that they're promoting." RP 2383 (rebuttal); see RP 2324-25 (opening, arguing that the question was "would a reasonable person

think they are, indeed, promoting prostitution?"). The Court of Appeals deemed this to be prosecutorial misconduct - but held that it caused no prejudice to the defendant, despite the fact that the evidence that Mr. Peters was knowingly not acting as a customer was abysmally weak. Appendix A.

E. ARGUMENT

1. IT IS AN ESSENTIAL ELEMENT THAT THE DEFENDANT ACCUSED OF ADVANCING WAS, KNOWINGLY, NOT ACTING AS A CUSTOMER, AND IF EITHER ELEMENT WAS ENTIRELY MISSING FROM THE CHARGING DOCUMENT, REVERSAL IS REQUIRED UNDER KJORSVIK.

(a). Review is warranted under RAP 13.4(b)(1) and (3) where the Court of Appeals misread the promoting statutory scheme, failed to follow this Court's doctrine for determining what the elements of the offense *are*, where the Court of Appeals failed to follow a functional rather than a formalistic analysis, and the issue is constitutional.

The constitutional right of notice demands that an accused be properly informed of all of the elements of the crime charged. The constitution requires the State to provide an accused person with notice of the offense. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); CONST. Art. 1 sec. 22 (amend. 10). An offense is not properly charged unless the information sets forth every essential element of the

crime, both statutory and nonstatutory. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

Washington follows a functional rather than formalistic determination of the elements of a criminal offense. The Court of Appeals failed to follow the case law of this Court which approved the intermediate court's ruling in State v. Pry, No. 77930-3-I, 2018 WL 5984146, at *19 (Wash. Ct. App. Nov. 13, 2018), where the Court of Appeals stated that "provisions of definitional statutes that explain what an essential element of a crime *means* may be excluded from an information, [but] provisions of definitional statutes that explain what the essential elements of a crime *are* must be included") (emphasis in original) (unpublished, cited only for persuasive purposes pursuant to GR 14.1), affirmed, State v. Pry, 194 Wn.2d 745, 452 P.3d 536 (2019).

Here, the Court of Appeals failed to follow Pry, 194 Wn.2d 745, employed a formalistic analysis by relying on a conclusory, non-substantive determination that this case was unlike Pry because no Washington case has previously determined the elements of promoting prostitution, and issued a decision on the elements that also wrongly

decided a significant constitutional issue. Review by this Court is warranted. RAP 13.4(b)(1),(3).

(b). The language of the information does not contain all the elements of knowingly not acting as a customer, and where one or more of the elements is missing, reversal is required.

Under the standard of review set forth in Kjorsvik a reviewing court asks: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced?

If an element is entirely absent, even when giving the charging language a liberal reading, prejudice is irrebuttably presumed and reversal is automatically required in either instance. State v. Johnson, 119 Wn. 2d 143, 149-50, 829 P.2d 1078, 1081 (1992); Kjorsvik, 117 Wn.2d at 105-06.

Mr. Peters was charged with promoting prostitution by the advancing prostitution means, within RCW 9A.88.080 and .060. CP 1281 *et seq*. Elements are those facts the prosecution must prove beyond a reasonable doubt to establish that the defendant committed the offense. State v. Johnstone, 96 Wn. App. 839, 844, 982 P.2d 119

(1999). Under the means charged, a defendant must knowingly advance prostitution:

> (1) "Advances prostitution." A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, he or she causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

RCW 9A.88.060(1). None of the nine counts as set out in the information included the elements of knowingly not acting as a customer. See, e.g., CP 1281 (count 1) (alleging that the defendant "did knowingly advance prostitution through the website 'K-girl Delights' ") . . . [c]ontrary to RCW 9A.88.080(1)(b)."); (count 9) (alleging that defendant "did knowingly advance the prostitution of an unidentified individual known as 'Luna' "). Johnson, at 149-50.

Below, the Court of Appeals held that knowingly "acting other than as a ... customer" merely defines and limits the scope of the essential element, "advances prostitution." State v. Peters, 16 Wn. App.2d at 465. But the nominally definitional statute where this language is found in fact excludes an entire class of individuals' conduct – conduct that one would assume is the essence of a crime so

titled - as simply non-criminal, and thus sets forth essential elements, not definitions. Contrary to the Court of Appeals, these are indeed elements under the statutory scheme that are essential to proof of advancing prostitution. See State v. Budik, 173 Wn.2d 727, 733-34, 272 P.3d 816 (2012) (determining essential elements of an offense by looking to the elements that must be proved to secure guilt); see, e.g., State v. Witherspoon, 171 Wn. App. 271, 294-95, 286 P.3d 996 (2012), aff'd, 180 Wn.2d 875 (2014) (determining the essential elements of the crime of second degree robbery by looking to the statutory scheme, including the definition of robbery at RCW 9A.56.190); see also State v. Pry, No. 77930-3-I, 2018 WL 5984146, at *19 (Wash. Ct. App. Nov. 13, 2018) ("provisions of definitional statutes that explain what an essential element of a crime *means* may be excluded from an information, [but] provisions of definitional statutes that explain what the essential elements of a crime *are* must be included") (emphasis in original) (unpublished, cited only for persuasive purposes pursuant to GR 14.1), review granted sub nom. State v. Davis, 192 Wn. 2d 1022, 435 P.3d 288 (2019), reversed, State v. Pry, 194 Wn.2d at 748.

In Pry, the offense was rendering criminal assistance, under the statute RCW 9A.76.070(1). The statute provides in part,

> (1) A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense.

RCW 9A.76.070(1) [Laws 2010 c 255 § 1, eff. June 10, 2010]. This Supreme Court in Pry, affirming the Court of Appeals, recognized that it was only another -- putatively definitional -- statute, section .050, that in fact contained the description of the very offense itself. In Pry, the core of the crime was found in another statute:

> **RCW 9A.76.050. Rendering criminal assistance-- Definition of term**
> As used in RCW 9A.76.070, 9A.76.080, and 9A.76.090, a person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he or she knows has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility, he or she:
> (1) Harbors or conceals such person; or
> (2) Warns such person of impending discovery or apprehension; or
> (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or
> (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or
> (5) Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or
> (6) Provides such person with a weapon.

RCW 9A.76.050.

This statute was deemed as not merely one tht served to limit an element's scope, rather, it sets forth the core of the crime, providing the substance of the initial statutory offense whose title and nominal elements in that primary statute fail to explain what conduct is actually deemed criminal. This Court therefore reversed, holding that "because section .050 provides essential elements for rendering criminal assistance and Cruz's information lacked those elements, the information is constitutionally deficient." State v. Pry, 194 Wn.2d at 748.

In Mr. Peters' case, the crime is knowingly advancing prostitution while not acting as a customer. An information stating that it is charging Mr. Peters with promoting prostitution by knowingly advancing prostitution is completely inadequate to give the defendant any notice, in plain and simple terms, of the elements – the substance of what must be proved.

None of the nine counts as set out in the information included the elements of knowingly not acting as a customer. See, e.g., CP 1281 (count 1). The elements of the crime are not in the charging document, and a liberal reading of that language does not save that complete

deficit. As can be seen throughout this case, the question of whether the defendant was not acting as a customer was the very core of the criminal conduct the State was required to prove – and therefore to allege. Under State v. Pry, and Kjorsvik, reversal is required.

2. THE PROSECUTOR COMMITTED REVERSIBLY PREJUDICIAL MISCONDUCT IN CLOSING ARGUMENT.

(a). Review is warranted under RAP 13.4(b)(1) and (2) where the Court of Appeals decision deeming the prosecutor's misconduct harmless is contrary to decisions of this Court and decisions of the Court of Appeals.

During closing, the prosecutor stated in initial argument, and in rebuttal, that "a reasonable person doing this stuff would know that they're promoting." RP 2383 (rebuttal); see RP 2324-25 (opening, arguing that the question was "would a reasonable person think they are, indeed, promoting prostitution?").

The remark in rebuttal was over contemporaneous objection, which also followed the earlier defense motion, before and after the State's initial argument, that the use of a "reasonable person" standard misstated the law and should be precluded. RP 2299-03, 2348-49. The motion also objected to the "reasonable person" standard presented in the State's PowerPoint presentation. CP 1814-1821 (closing argument slide 8).

(b). Reversal is required.

This was misconduct that requires reversal. For a defendant to have knowledge, he must be proved to have actual subjective knowledge of the fact in question. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980). Knowledge may not be redefined as anything less, including, but not limited to, reckless or negligent ignorance. See Shipp, at 516; Allen, at 374. But that is what the prosecutor's argument did, and it was misconduct by misstating the law. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

Even if there had been no objections, the misconduct was flagrant, and it was thus therefore not only appealable, but strongly requiring of reversal. An argument is flagrantly improper and incurable when a Washington court has previously recognized the same argument as improper in a published opinion. State v. Jones, 13 Wn. App.2d 386, 406, 463 P.3d 738 (2020) (citing State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010); State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996); and State v. Allen, 182 Wn.2d 364, supra).

The evidence in this case on the pivotal elements of knowingly not acting as a customer was weak at best. CP 1352; see RCW 9A.88.060(1). The question whether Mr. Peters was not acting as a customer of a prostitute or knew that he was not doing so, was meager, and the verdicts were materially affected. Mr. Peters reviewed his customer experiences, and posted them online. He also referred other customers to sex workers, praising their services. At no point was he acting other than as an enthusiastic customer, with other customers who became associated with each other as self-identified patrons of prostitution, seeking to improve the customer experience. This conduct on the "buyer" or customer side of prostitution activity – regardless of its extent and its influence on the availability of prostitution in the area - is not encompassed by the advancing prostitution statute.

Mr. Peters could certainly not so imagine. He could not predict the unprecedented application of the promoting prostitution statute to his customer conduct. Most crucially, the question whether he was knowingly not acting as a customer was weak, and at the same time conflicting. Mr. Peters was acting as a customer and knew himself to be so doing at all times, a fact which is not changed by the extensiveness or the nature of his conduct. It is highly equivocal, if not

fanciful, to think that Mr. Peters ever believed himself to be acting on the the provision side of prostitution. Prostitution is the "engag[ing] or agree[ing] or offer[ing] to engage in sexual conduct with another person in return for a fee." RCW 9A.88.030; see State v. Zuanich, 92 Wn.2d 61, 593 P.2d 1314 (1979).

3. MR. PETERS' CONVICTIONS MUST BE REVERSED ON GROUNDS OF DUE PROCESS VAGUENESS.

(a). Review is warranted under RAP 13.4(b)(3).

Mr. Peters raised several pre-trial motions to dismiss based on vagueness. CP 910, CP 1042; RP 119-42 (Motion to Dismiss Charges as Violative of the First Amendment and the Due Process Clause, April 17, 2018); see CP 76, CP 572. A statute violates Due Process if it "is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." Giaccio v. Pennsylvania, 382 U.S. 399, 402, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966). The Court of Appeals decision to the contrary regarding the promoting prostitution statute was in error and raises a significant constitutional question under the Fourteenth Amendment's Due Process Clause. Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); City of Spokane v. Neff, 152 Wn.2d 85, 88-90, 93 P.3d 158 (2004); U.S. CONST. amend. XIV. Review is warranted under RAP 13.4(b)(3).

(b). <u>The statute was vague where one must speculate as to whether it applies to the given conduct or where its language leaves enforcement to the unfettered discretion of law enforcement</u>.

At the core of the defense argument was a focus on the unprecedented nature of bringing promoting prostitution charges against a person for conduct that involved patrons, or customers of prostitutes, engaged in a type of conduct quite apparently exempted by the statutory scheme – here, a person who was acting as a customer, in the form of writing reviews, posted online, describing his customer experiences. Notably, the word "unprecedented" was the King County Prosecuting Attorney's Office's <u>own language</u> when describing the commencement of this new strategy of attacking prostitution by targeting its "consumers." CP 910; RP 121, 136-37.

The void-for-vagueness doctrine is based on the Fourteenth Amendment's Due Process clause. <u>State v. Williams</u>, 144 Wn.2d 197, 204, 26 P.3d 890 (2001) (statute criminalizing threats to mental health was unconstitutionally vague); <u>Nunez v. City of San Diego</u>, 114 F.3d 935, 940 (9th Cir. 1997); U.S. CONST. amend. XIV. In general, if one must engage in speculation as to whether a criminal statute's definition would apply to certain conduct, the statute in question is vague. <u>City of Seattle v. Pullman</u>, 82 Wn.2d 794, 798, 514 P.2d 1059 (1973).

To avoid unconstitutional vagueness, a statute must both set forth the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and it must also establish standards that ensure that government enforcement of the law will be applied in a non-arbitrary manner. Kolender v. Lawson, 461 U.S. at 357; City of Spokane v. Neff, 152 Wn.2d at 88-90.

First, in addressing Mr. Peters' constitutional arguments as a whole, the trial court held that this prosecution plainly was based on acts of advancing prostitution that were intended to "increase business to favored prostitutes and agencies, and to facilitate sex buying by customers." CP 1058. The trial court discussed State v. Cann, 92 Wn.2d 193. CP 1055, 1057. There, the Supreme Court stated:

> [A] statute is not rendered unconstitutional by reason of the fact that its application may be uncertain in exceptional cases, as long as the general area of conduct against which it is directed is made plain. Seattle v. Buchanan, 90 Wn.2d 584, 584 P.2d 918 (1978).

Cann, at 195. The trial court and the Court of Appeals also relied on the case of State v. Kees, 48 Wn. App. 76, 79, 737 P.2d 1038 (1987). Appendix A (Peters, 16 Wn. App.2d at 467, 470). There, the Court of Appeals held that nothing precluded prosecution of a prostitute who also promoted the prostitution of others, simply because

she herself was a prostitute. CP 1060. The courts below stated that the rule of Kees made clear to citizens that an ordinary person reading the statute would construe the statute to include a person acting in such a way that promotes prostitution outside the act of simply buying or selling sex. CP 1060-61 (quoting Kees, at 79); Appendix A (Peters, 16 Wn. App.2d at 470).

. But this reasoning fails - where the statutory scheme pointedly exempts conduct by a person acting as a customer of a prostitute, even where the conduct may constitute 'advancing,' application of the statute to these facts could not be anticipated and leaves enforcement without any guiding standards. It could not be anticipated or predicted that the statutory scheme of promoting prostitution could apply to Mr. Peters' review and referral activity. The promoting prostitution statute, and specifically the definition of 'advancing prostitution,' is vague as applied to Mr. Peters' activities, and his convictions must be reversed. See City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

As the Supreme Court stated in Grayned v. City of Rockford, people have free will – thus, because people are

> free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary

> intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298-99, 33 L. Ed. 2d 222 (1972). The Court of Appeals decision therefore sets forth an erroneous, and indeed frighteningly lax vagueness standard by eliminating the fair warning requirement. The Court of Appeals stated, "a statute is not rendered unconstitutional by reason of the fact that its application may be uncertain in exceptional cases, as long as the general area of conduct against which it is directed is made plain." Appendix A (Peters, 16 Wn. App.2d at 471) (citing State v. Cann, 92 Wn.2d 193, 194, 198, 595 P.2d 912 (1979)). But that case's rule is inapplicable here. Under the facts of Cann, an ordinary person would easily predict that the advancing prostitution statute would apply to the act of one asking women to work at one's brothel as prostitutes. Cann, 92 Wn.2d at 195.

In contrast, posting online reviews of one's customer experiences with sex workers, and referring other customers to the sex workers, is not activity that an ordinary person would understand as anything other than acting as a customer - albeit an enthusiastic one - *of prostitution*. Mr. Peters' reviews on TRB, the League, and

KGirlsDelights pertained precisely to the customer experience, and were secondarily intended to improve other customers' access to highly-favored sex workers. To an ordinary person, this extensive activity might be immoral – but no one could possibly predict that it was anything other than customer activity.

Mr. Peters is not raising the complaint – inadequate under the law - that a person could not predict "with complete certainty the exact point at which his actions would be classified as prohibited conduct." State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010). In fact, to the contrary, the application of the definition of 'advancing' prostitution to Mr. Peters' activity is virtually inconceivable – because of the customer language, no ordinary person would remotely imagine that this conduct would fall under the statute's proscription.

Applying the statutory scheme in this case does not meet the constitutional requirement "that citizens have fair warning of proscribed conduct.' " Sanchez Valencia, 169 Wn.2d at 791. Mr. Peters knew that his customer status was prohibited by a misdemeanor statute, namely RCW 9A.88.110 (patronizing prostitution), but ordinary people would not "understand [that review and reference

activity" could be charged under the advancing prostitution felony statute. See City of Spokane v. Douglass, 115 Wn.2d at 178 (applying the standard that ordinary people must understand the conduct is disallowed by the statute charged).

Second, surviving a vagueness challenge also requires that people are protected against arbitrary enforcement. Sanchez Valencia, 169 Wn.2d at 91 (citing Douglass, 115 Wn.2d at 178). Washington courts generally hold that a statute lacks ascertainable standards of guilt if it fails to describe the prohibited conduct with sufficient particularity. See, e.g., State v. Hilt, 99 Wn.2d 452, 455, 662 P.2d 52 (1983) (a bail jumping statute was unconstitutionally vague because no definition of "without lawful excuse" was provided, thus, "predicting its potential application would be a guess, at best").

The statutory scheme of advancing prostitution at RCW 9A.88.080 and 060 fails to make clear what advancing prostitution is, with the specificity necessary to provide an ascertainable standard for determining whether given conduct is innocent, or criminal. On that second, independent basis, it is unconstitutionally vague. Neff, 152 Wn.2d at 87, 91 (ordinance prohibiting loitering with a "known prostitute" provided no standards for locating the line between who was

a known prostitute – was it by dint of a recent conviction for prostitution, or by being a person who is simply loitering, at length, on a street where prostitution occurs?) See Neff, at 91.

Applying the advancing prostitution statute to Mr. Peters' activity allows exactly what occurred – charging and conviction for customer activity as promoting and advancing criminality – and this provides wholly excessive discretion to law enforcement. Police may now prosecute a person for "promoting" if they patronize a street-level prostitute, engage in activity in their car, and then purchase a hotel room for him or her so that she may spend the remainder of the night in safety. Similarly, a soldier on leave who patronizes a prostitute before returning to war – conduct well known to previous generations, who did not decry this conduct as the greatest of all possible sins, as Demand Abolition has now persuaded the prosecutor's office to do – and then telephones a friend to tell of his experience and give him the prostitute's telephone number, is similarly guilty of "promoting" under RCW 9A.88.080 and 060. Because of the Court of Appeals decision below, this conduct is now "promoting prostitution" rather than what is really is, which is the misdemeanor offense it has always been prosecuted under.

Crucially, the Washington courts have also stated that they will be "especially cautious in the interpretation of vague statutes when First Amendment interests are implicated." City of Bellevue v. Lorang, 140 Wn.2d 19, 31, 992 P.2d 496 (2000); U.S. CONST. amend. I. It cannot be gainsaid that Mr. Peters was punished in great part for speech that praised the experiences that he encountered with prostitutes, and for referring others to those same sex workers. But because the court's narrow reading of "customer" is now inherently without standards, punishment of Mr. Peters' writings is an especially vague application of the statutory scheme. See RCW 9A.88.060(1). No person of ordinary intelligence could imagine that such writings -- even where they were intended to refer fellow aficionado-level customers to illegal prostitution services - would be punishable as promoting prostitution.

It is true that the guarantees of free speech do not permit a state to "forbid or proscribe expressive advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Under this rule, the constitution's freedom of expression guarantee forbids criminalization of speech even in

circumstances where it advocates for near-future violations of the law, including even conduct as extreme as non-consensual violence. Hess v. Indiana, 414 U.S. 105, 109-10, 94 S.Ct. 32, 638 L.Ed.2d 303 (1973) (advocates cleared from street by police could not be punished for urging the group to "take the fucking street again," or "take the fucking street later"); see also N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 902, 102 S.Ct. 340, 973 L.Ed.2d 1215 (1982) (speaker's general admonition to crowd to not enter racist stores or "we're gonna break your dam neck" was protected speech). But this case, of course, involved nothing close to advocacy of near-future violence or riot.

Application of the advancing prostitution offense to Mr. Peters' activity shows the absence of legal boundaries of conduct that are "sufficiently distinct for citizens, policemen, juries, and appellate judges." Grayned, 408 U.S. at 114. When a statute is unconstitutionally vague as applied to the defendant's conduct, the remedy is reversal of the convictions and dismissal of the charges. Hilt, 99 Wn.2d at 455-56.

F. CONCLUSION.

Based on the foregoing, this Supreme Court should grant review, and ultimately reverse Mr. Peters' judgment and dismiss the charges with prejudice.

Respectfully submitted this 9th day of June, 2021.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES T. PETERS, Appellant.	No. 79348-9-I ORDER DENYING MOTION FOR RECONSINSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION

Charles Peters has filed a motion for reconsideration of the opinion filed on February 22, 2021. The State of Washington has filed a response. The court has determined that the motion for reconsideration shall be denied, the opinion shall be withdrawn, and a substitute opinion shall be filed. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; and it is further

ORDERED that the opinion filed on February 22, 2021, is withdrawn; and it is further

ORDERED that a substitute opinion shall be filed.

Dwyer, J.

Coburn, J. Mann, C.J.

FILED
5/10/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES T. PETERS, Appellant.	DIVISION ONE No. 79348-9-I PUBLISHED OPINION

DWYER, J. — Charles Peters appeals from his nine convictions of promoting prostitution in the second degree. He raises numerous claims of error, asserting that (1) the charging document was constitutionally inadequate, (2) insufficient evidence supported his conviction, (3) the prosecution violated his rights under the First Amendment to the United States Constitution, (4) the promoting prostitution statute is unconstitutionally vague as applied to him, and (5) prosecutorial misconduct denied him a fair trial. Because none of Peters' contentions are meritorious, we affirm.

I

Charles Peters began purchasing sexual activity regularly in 2010 or 2011. Peters identified himself as a "hobbyist"—a sex buyer who sought an emotional experience as well as a sexual experience. Peters sought out female sex

workers who provided "the girlfriend experience," a short-term simulation of a romantic relationship. He was primarily interested in Korean sex workers. Peters was a frequent sex buyer—he engaged sex workers once or twice a week while trying to "limit" his spending on these episodes to $2,400 per month.

Peters located information concerning which sex workers were available for hire and which services they offered on a review website called "The Review Board." Because he wanted to "give something back," Peters also wrote and posted reviews about his own experiences with various sex workers. Peters' reviews included detailed and graphic narratives describing his encounters with the particular sex worker he was reviewing, as well as booking information and an Internet hyperlink to that sex worker's online advertisement.

Peters was also a founding member of another, smaller group of enthusiasts called "The League of Extraordinary Gentlemen." This group focused its collective attention specifically on Korean sex workers in the greater Seattle area. The League began as an e-mail chain but eventually grew into a private discussion board website. Peters served as a moderator to the online discussion board and was able to invite new members into the group. The members of the League also held occasional, informal, in-person meetings, which were often organized by Peters.

Peters regularly helped to connect various actors within the sex trade to one another. Peters introduced independent sex workers who wanted to work with agencies or bookers to pertinent agency representatives or bookers. He recommended specific sex workers and explained the screening process to

would-be customers. He made appointments for other customers and "vouched" for new customers to help them pass through screening processes.

Peters was also one of several creators of an advertising website for Korean sex workers in the greater Seattle area, KGirlDelights.com. Peters paid the website hosting fee for KGirlDelights.com and also purchased the .net and .org versions of the same domain name. Agency owners and independent sex workers sent Peters advertisements, which he posted on the website.

In the spring of 2015, the King County Sheriff's Office and the Bellevue Police Department began a joint investigation into the Internet sex trade in the greater Seattle-Bellevue area. Detective Luke Hillman, working undercover as "LucasK1973," created an account on The Review Board and noticed that Peters, under the name "Peter Rabbit,"[1] was a frequent poster and appeared to be "kind of a leader." Eventually, Peters invited Detective Hillman to join the League of Extraordinary Gentlemen. This proved unwise.

Peters was ultimately charged with nine counts of promoting prostitution in the second degree. Prior to trial, Peters moved the court to dismiss the charges as unconstitutionally vague and brought in violation of his First Amendment rights. The trial court denied the motion. A jury convicted Peters on all counts. He now appeals.

II

Peters contends that the fourth amended information charging him with promoting prostitution, on which he was tried, was constitutionally deficient

[1] Peters also went by "TomCat007" and "ManTraveling4@gmail.com."

because it did not adequately set forth the essential elements of the crime. But the language Peters avers was necessary is language that explains what an element means, not language that states what an element is. Thus, it is definitional. Because a charging document need not include definitions of essential elements, his contention fails.

Peters was charged with nine counts of promoting prostitution in the second degree. Each count alleged that Peters knowingly advanced prostitution, but did not include the statutory definition of the term "advances prostitution" as set forth in RCW 9A.88.060.[2]

---

[2] The counts were charged as follows:

> Count 1 Promoting Prostitution In The Second Degree
> That the defendant Charles T. Peters in King County, Washington, between August 14, 2014, and January 6, 2016, did knowingly advance prostitution through the website "K-girl Delights" (aka "KCD") and the prostitution of one or more unidentified individuals associated with "K-girl Delights";
> Contrary to RCW 9A.88.080(1)(b), and against the peace and dignity of the State of Washington.
>
> Count 2 Promoting Prostitution In The Second Degree
> That the defendant Charles T. Peters in King County, Washington, between January 7, 2013, and January 6, 2016, did knowingly advance the prostitution enterprise "Asian GFE" (aka "Korean GFE", "Superstar GFE", "Asian Superstar", "Korean Superstar") and the prostitution of one or more unidentified individuals associated with "Asian GFE";
> Contrary to RCW 9A.88.080(1)(b), and against the peace and dignity of the State of Washington.
>
> Count 3 Promoting Prostitution In The Second Degree
> That the defendant Charles T. Peters in King County, Washington, between August 14, 2014, and January 6, 2016, did knowingly advance the prostitution enterprise "Special Dreamwa" and the prostitution of one or more unidentified individuals associated with "Special Dreamwa";
> Contrary to RCW 9A.88.080(1)(b), and against the peace and dignity of the State of Washington.
>
> Count 4 Promoting Prostitution In The Second Degree
> That the defendant Charles T. Peters in King County, Washington, between August 14, 2014, and January 6, 2016, did knowingly advance the prostitution enterprise "Golden Blossom" and the prostitution of one or more unidentified individuals associated with "Golden Blossom";
> Contrary to RCW 9A.88.080(1)(b), and against the peace and dignity of the State of Washington.

An accused has a right under both the state and federal constitutions to be informed of each criminal charge alleged so that the accused may adequately prepare a defense for trial. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22 (amend. 10). The State must provide a charging document that sets forth every material element of each charge made, along with essential supporting facts. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

> Count 5 Promoting Prostitution In The Second Degree
> That the defendant Charles T. Peters in King County, Washington, between August 14, 2014, and January 6, 2016, did knowingly advance the prostitution enterprise "Fantasy K" (aka "K Studio") and the prostitution of one or more unidentified individuals associated with "Fantasy K";
> Contrary to RCW 9A.88.080(1)(b), and against the peace and dignity of the State of Washington.
>
> Count 6 Promoting Prostitution In The Second Degree
> That the defendant Charles T. Peters in King County, Washington, between January 25, 2013, and January 6, 2016, did knowingly advance the prostitution enterprise "Asian Fantasy" (aka "Sultry K") and the prostitution of one or more unidentified individuals associated with "Asian Fantasy";
> Contrary to RCW 9A.88.080(1)(b), and against the peace and dignity of the State of Washington.
>
> Count 7 Promoting Prostitution In The Second Degree
> That the defendant Charles T. Peters in King County, Washington, between January 25, 2013, and January 6, 2016, did knowingly advance the prostitution enterprise "Asian Haven" (aka "Asian Candy" and "House of Asia") and the prostitution of one or more unidentified individuals associated with "Asian Haven";
> Contrary to RCW 9A.88.080(1)(b), and against the peace and dignity of the State of Washington.
>
> Count 8 Promoting Prostitution In The Second Degree
> That the defendant Charles T. Peters in King County, Washington, between August 14, 2014, and January 6, 2016, did knowingly advance the prostitution of an unidentified individual known as "Serena";
> Contrary to RCW 9A.88.080(1)(b), and against the peace and dignity of the State of Washington.
>
> Count 9 Promoting Prostitution In The Second Degree
> That the defendant Charles T. Peters in King County, Washington, between August 14, 2014, and January 6, 2016, did knowingly advance the prostitution of an unidentified individual known as "Luna";
> Contrary to RCW 9A.88.080(1)(b), and against the peace and dignity of the State of Washington.

"The standard of review for evaluating the sufficiency of a charging document is determined by the time at which the motion challenging its sufficiency is made." State v. Taylor, 140 Wn.2d 229, 237, 996 P.2d 571 (2000). When a defendant challenges the sufficiency of the charging document prior to a verdict, the charging language is strictly construed. Taylor, 140 Wn.2d at 237. If, however, the defendant challenges the sufficiency of the charging document following a verdict, then the charging language must be construed liberally in favor of validity. Taylor, 140 Wn.2d at 237.

Because a challenge to the sufficiency of a charging document involves a question of constitutional due process (notice), it may be raised for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). When an appellant raises such a challenge, the proper standard of review is the two-pronged test set forth in Kjorsvik: "(1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so, (2) can the defendant show he or she was actually prejudiced by the inartful language." McCarty, 140 Wn.2d at 425 (citing Kjorsvik, 117 Wn.2d at 105-06).

The first prong of this test is satisfied when a charging document sets forth all of the essential elements of the crime charged. McCarty, 140 Wn.2d at 425. If the required elements are set forth, even if only in vague terms, then the charging document also satisfies the second prong of the test if the terms used did not result in any actual prejudice to the defendant. McCarty, 140 Wn.2d at 425.

However, if the required elements cannot be found, or even fairly implied, in the charging document, we do not reach the second prong of the test. Instead, when the charging document fails to meet the requisites of the first prong of the test, prejudice to the defendant is presumed and we must declare the charging document constitutionally deficient. McCarty, 140 Wn.2d at 425. The remedy for a constitutionally deficient charging document is reversal and dismissal of the charge without prejudice to the State's ability to refile the charge. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Here, Peters asserts that the information charging him with promoting prostitution in the second degree omitted essential elements of the crime set forth in RCW 9A.88.060. The State responds by asserting that RCW 9A.88.060 merely furnishes a definition of an element of the crime of "promoting prostitution in the second degree" as set forth in RCW 9A.88.080(1)(b), and that such definitional terms need not be alleged.

Because Peters raises his challenge for the first time on appeal, we apply the standard of review announced in Kjorsvik. Hence, to properly resolve the claim of error, we must first identify the essential elements of the crime of promoting prostitution in the second degree.

RCW 9A.88.080(1)(b) provides that "[a] person is guilty of promoting prostitution in the second degree if he or she knowingly . . . [a]dvances prostitution."[3]

"Advances prostitution" is defined by RCW 9A.88.060(1):

[3] The alternative means of promoting prostitution occurs if a person knowingly "[p]rofits from prostitution." RCW 9A.88.080(1)(a).

> A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, he or she causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

Peters asserts that (1) "aiding"[4] and (2) while not acting as a customer are essential elements because they must be proved in order to obtain a conviction. Furthermore, he avers, the State was required to inform Peters that he was being charged with "knowingly not acting as a customer." In other words, Peters claims that the State was required to allege that Peters knew that he was not acting as a customer.

However, definitions of essential elements—which define and limit the scope of essential elements—are not additional essential elements that must be alleged in the charging document. State v. Porter, 186 Wn.2d 85, 91, 375 P.3d 664 (2016); State v. Johnson, 180 Wn.2d 295, 302, 325 P.3d 135 (2014); State v. Rattana Keo Phuong, 174 Wn. App. 494, 545, 299 P.3d 37 (2013). Definitions are not transformed into essential elements even if they must ultimately be proved at trial to obtain a conviction. See, e.g., State v. Allen, 176 Wn.2d 611, 626-30, 294 P.3d 679 (2013) (plurality opinion) (information charging felony harassment was

[4] Peters' briefing uses "aiding" to refer to "causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution."

adequate without articulation that only true threats may be charged, although proof of true threat constitutionally required for conviction).

"Aiding" and "acting other than as a . . . customer" merely define and limit the scope of the essential element, "advances prostitution." Accordingly, "aiding" and "acting other than as a . . .customer" are not essential elements of promoting prostitution in the second degree and therefore, the charging document was not required to include them.

Peters avers that State v. Pry, 194 Wn.2d 745, 452 P.3d 536 (2019), which held that essential elements set out in RCW 9A.76.050 must be included in a document charging rendering criminal assistance, compels a different outcome. However, the Pry court relied on its prior determination that the contents of the statutory provision at issue were essential elements. Pry, 194 Wn.2d at 755 ("Fortunately, we have already opined on this issue. In State v. Budik, we reviewed the sufficiency of the evidence supporting a conviction for rendering criminal assistance. 173 Wn.2d 727, 736-37, 272 P.3d 816 (2012)."). There is no comparable case indicating that "aiding" and "acting other than as a . . .customer" are essential elements of promoting prostitution in the second degree.
We hold that "aiding" and "acting other than as a . . .customer" are not essential elements of promoting prostitution in the second degree but, rather, define the element of "advances prostitution." Thus, the charging document included all of the essential elements of promoting prostitution

in the second degree and, accordingly, adequately informed Peters of the charges against him.[5]

III

Next, Peters contends that a constitutionally insufficient quantum of evidence was adduced at trial to support his convictions for promoting prostitution in the second degree. This is so, he claims, because the State failed to prove that Peters was not acting as a customer. Because a rational trier of fact could have found that Peters' actions were beyond those of a customer, sufficient evidence supports Peters' convictions.

The due process clauses of the federal and state constitutions require that the government prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (citing U.S. CONST. amend. XIV, § 1); State v. Johnson, 188 Wn.2d 742, 750, 399 P.3d 507 (2017) (citing WASH. CONST. art. I, § 3). After a verdict, the relevant question when reviewing a challenge to the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll

[5] Peters' derivative assertion that the State was required to allege that he knew that he was not acting as a customer necessarily fails as a result of this analysis.

reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201.

As we have previously determined, the essential elements of promoting prostitution in the second degree, by the means charged in this case, are set forth in RCW 9A.88.080(1)(b):

> A person is guilty of promoting prostitution in the second degree if he or she knowingly . . . [a]dvances prostitution.

"Advances prostitution" is defined by statute:

> A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, he or she causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

RCW 9A.88.060(1).

Thus, to prove that Peters was guilty of promoting prostitution, the State was required to establish that Peters knowingly advanced prostitution, meaning that he engaged in some conduct designed to institute, aid, or facilitate an act or enterprise of prostitution, other than his conduct as a customer.

Peters claims that the proffered evidence shows only that he acted as a customer. However, the fact that Peters was a customer does not immunize his noncustomer conduct. Indeed, several decades ago we rejected a contention similar to that advanced by Peters.

> The statute was drafted so that one acting as a prostitute would not, by virtue of that activity alone, be guilty of advancing prostitution. A reasonable construction consistent with the legislative intent is that one acting as a prostitute can also be guilty

> of advancing prostitution based on evidence of activities other than her own act of prostitution

State v. Kees, 48 Wn. App. 76, 79, 737 P.2d 1038 (1987). That which applies to the prostitute also applies to the customer.

At trial, evidence was presented that Peters referred sex buyers to specific sex workers and agencies, scheduled appointments for sex buyers, vouched for would-be customers, and gave them detailed instructions about how to get through screening processes. Peters also advised enterprise owners with regard to specific apartment complexes to use and connected individual sex workers with bookers and agencies. In addition, Peters created and ran a website on which agencies and individual sex workers could post advertisements.

From this evidence, a reasonable finder of fact could determine that Peters knowingly advanced prostitution, regardless of his personal sex-purchasing behaviors. These acts could be determined by a rational finder of fact to advance prostitution even if Peters had never personally purchased sexual activity, and they are not immunized under the law merely because he was also a customer.

Accordingly, sufficient evidence supports the jury's determinations that Peters advanced prostitution.

IV

Peters next contends that his prosecution violated the First Amendment by punishing him for protected speech. He is wrong.

The First Amendment prevents the government from restricting speech based on its content. Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573,

122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002). However, this limitation is not absolute. Am. Civil Liberties Union, 535 U.S. at 573-74. Speech that is intended to "incit[e] or produc[e] imminent lawless action and is likely to incite or produce such action" is not protected by the First Amendment. Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). Our Supreme Court has determined that "the only kind of speech punished" by the prohibition of advancing prostitution, as defined by RCW 9A.88.060, is "[s]peech directed toward the persuasion of another to enter into an illegal arrangement." State v. Cann, 92 Wn.2d 193, 195-96, 595 P.2d 912 (1979). Because such speech is intended to incite imminent lawless action (i.e., engaging in prostitution) and is likely to do so, it is not protected by the First Amendment. See Brandenburg, 395 U.S. at 447.

Peters asserts that his case is factually distinguishable from Cann because the speech for which he was prosecuted was not an offer to enter into an illegal arrangement but, rather, "the fact that he wrote detailed positive reviews describing his experiences with prostitutes, and referred others to sex workers upon his recommendation." In support, Peters cites to Hess v. Indiana, 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973). In Hess, the Supreme Court determined that a remark by an antiwar protestor could not be punished as disorderly conduct because, as the protestor's words were not directed to anyone in particular, there was no evidence that the protestor's words were intended and likely to produce "imminent disorder." Hess, 414 U.S. at 108-09. That holding does not aid Peters. Here, by contrast to Hess, Peters' speech—detailed

reviews meant to serve as advertisements and referrals to specific sex workers—was intended to and was likely to produce imminent violation of prostitution laws.

Because Peters' speech was both intended to produce and likely to produce unlawful activity, prosecution based on this speech does not violate the First Amendment.[6]

V

Peters next postulates that RCW 9A.88.060 and RCW 9A.88.080, which, respectively, define "advances prostitution" and prohibit promoting prostitution in the second degree are unconstitutionally vague as applied to him. This is so, he argues, because ordinary people would not understand that his conduct was prohibited. We disagree.

"The due process clause of the Fourteenth Amendment requires that citizens be afforded fair warning of proscribed conduct." City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990) (citing Rose v. Locke, 423

[6] In a motion for reconsideration brought after we initially filed this opinion, Peters cited a blog post authored by UCLA Law Professor Eugene Volokh. Given that a blog post is neither subject to peer review nor to any other review processes akin to those applicable to scholarly work published in a law review or journal, it strikes us that Professor Volokh's blog post is entitled to similar weight as would have been assigned to a letter to the editor submitted by a learned individual in days gone by. Nevertheless, Peters is certainly entitled to cite to it.

In his blog post, Professor Volokh avers that the unlawful activity that Peters encouraged was not sufficiently imminent to fall within this First Amendment exception. Eugene Volokh, Conviction for Praising Prostitutes (as "Promoting Prostitution") Upheld, REASON: VOLOKH CONSPIRACY (Feb. 24, 2021, 8:01 AM), https://reason.com/volokh/2021/02/24/conviction-for-praising-prostitutes-as-promoting-prostitution-upheld/ [https://perma.cc/FX5M-E2Y].

The State responds that the actions that Peters encouraged were sufficiently time-limited to constitute imminent unlawful action. This accords with our view.

We note, however, that Professor Volokh also opines that Peters' speech likely falls into a separate First Amendment exception—speech that constitutes solicitation of a crime. Volokh, supra; see United States v. Williams, 553 U.S. 285, 298-99, 128 S. Ct. 1830, L. Ed. 2d 650 (2008). This argument was not presented to us by the parties, but we agree that it also supports our decision. Therefore, we need not address the matter further to be comfortable that a correct decision was reached. We are, accordingly, convinced that Peters does not establish an entitlement to relief in his motion for reconsideration, which we deny.

U.S. 48, 49, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975)). A defendant challenging a statute as being unconstitutionally vague must show that the statute either (1) does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Douglass, 115 Wn.2d at 178. Due process does not require impossible standards of linguistic certainty because "[s]ome degree of vagueness is inherent in the use of our language." State v. Smith, 130 Wn. App. 721, 726, 123 P.3d 896 (2005). A statute is presumed to be constitutional, and the party challenging its validity must prove that it is unconstitutional beyond a reasonable doubt. Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991).

A statute can be challenged as being facially vague or vague as applied. Smith, 130 Wn. App. at 727. To evaluate a challenge to a statute as being vague as applied, we look at the actual conduct of the party challenging the statute, not to any hypothetical situation at the periphery of the rule's scope. Smith, 130 Wn. App. at 727.

Peters asserts that an ordinary person would not understand that posting online reviews of sex workers and making referrals to sex workers would be prohibited because it falls within customer activity. Not so. An ordinary person would understand "advanc[ing] prostitution," as defined by RCW 9A.88.060, to include all activities that promote prostitution other than the acts of buying or selling sexual activity. See Kees, 48 Wn. App. at 79 ("It is obvious that the

legislative intent in enacting the criminal statute prohibiting the promotion of prostitution is to punish those who assist others to commit prostitution."). Accordingly, an ordinary person would understand that the conduct here at issue—writing detailed reviews including booking information, recommending specific sex workers to customers, making appointments for other customers, advising new customers with regard to agency screening processes, introducing sex workers to agencies, and creating advertising and review platforms—was prohibited.

Peters also contends that the statutory scheme fails to establish standards to ensure that enforcement will be applied in a nonarbitrary manner. His claim in this regard is premised on his assertion that it fails to "provide an ascertainable standard for determining whether given conduct is innocent, or criminal."

Our Supreme Court addressed a similar challenge[7] to the same statute and explained:

> The statute must be given a reasonable construction to avoid absurd consequences. It is plain that the legislature meant this clause to apply only to conduct which is designed and intended to advance prostitution. Furthermore, a statute is not rendered unconstitutional by reason of the fact that its application may be uncertain in exceptional cases, as long as the general area of conduct against which it is directed is made plain.

Cann, 92 Wn.2d at 195.

Accordingly, because only conduct that is designed and intended to advance prostitution is prohibited, sufficient standards to determine whether

[7] The appellant argued that "advances prostitution" could be construed to "forbid innocent conduct which might incidentally advance prostitution. A neighbor gratuitously shoveling snow from the sidewalks of a house of prostitution, or a taxicab driver taking a prostitute to meet a client are cited as examples." Cann, 92 Wn.2d at 195.

given conduct is innocent or criminal exist. RCW 9A.88.060 and RCW 9A.88.080 are not unconstitutionally vague as applied to Peters.

VI

Finally, Peters contends that the State committed misconduct in its closing argument by misstating the law, requiring reversal. We disagree. Although the prosecutor misstated the law during his rebuttal, Peters fails to demonstrate a substantial likelihood that the misstatement impacted the jury's verdict.

Prosecuting attorneys are quasi-judicial officers who have a duty to ensure that defendants receive a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct violates this duty and can constitute reversible error. Boehning, 127 Wn. App. at 518.

For a conviction to be reversed, the defendant must establish both that (1) the State committed misconduct by making inappropriate remarks and (2) those remarks had a prejudicial effect. State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). A prosecuting attorney commits misconduct by misstating the law. Allen, 182 Wn.2d at 373. When the defendant objected at trial, if we determine that the prosecutor's statement was improper, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict in order to obtain appellate relief. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

Here, the prosecutor made the following statement in his closing argument:

> This instruction gives you folks further guidance. "If a person has information that would lead a reasonable person in the same

> situation to believe that a fact exists, the jury is permitted, but not required, to find that he or she acted with knowledge of that fact." And this is a reasonable person, not a reasonable hobbyist, what would a reasonable person think? Would they think that if they are advertising, soliciting, encouraging, directing, finding customers, helping agencies, would a reasonable person think they are, indeed, promoting prostitution? Of course. It's not rocket science.

The defense attorney also addressed the issue in her closing argument and explained that, while the jury could consider what a reasonable person would know, to find Peters guilty the jury must find that Peters himself knew that he was promoting prostitution. The State objected and, after a sidebar discussion, the trial court overruled the objection. Upon the request of defense counsel, the trial court informed the jury that the objection had been overruled. The defense attorney continued:

> Thank you. As I was saying, under the knowing, you can consider what a reasonable person would do. But at the end of the day, you're ultimately going to have to decide unanimously, beyond a reasonable doubt, that Charlie himself knew he was not acting as a customer. It's subjective. It's a subjective standard.

During rebuttal, the prosecutor returned to the subject:

> The question in this case is—and let me talk to you a little bit more about this idea that he didn't know what he was doing. There is a legal disclaimer on the website. When Mr. Emmanuel sends him money, he says, "Burn it." The standard is whether a reasonable person doing this stuff would know that they're promoting, and the answer is yes, this is common sense.

Defense counsel objected to this as a misstatement of the law, and the trial court overruled the objection.

The prosecutor's reference to "the standard" is somewhat unclear. To the extent that it indicates that the jurors could convict Peters, even if they did not believe that he subjectively knew that he was promoting prostitution, because a

reasonable person would have known that fact, it misstated the law. See State v. Shipp, 93 Wn.2d 510, 514-15, 610 P.2d 1322 (1980). In determining Peters' mental state, the jury was allowed to consider what a reasonable person would know under the circumstances but not to the exclusion of determining what the defendant's actual subjective state of mind was proved to be.

Here, however, the prosecutor had already accurately explained the law to the jury, the defense attorney had accurately explained the law to the jury with the explicit approval of the trial court, and the jury instructions accurately stated the law. In this context, there is no substantial likelihood that the misstatement affected the jury's verdict.

As Peters does not show that there is a substantial likelihood that the prosecuting attorney's reference to "the standard" affected the jury's verdict, he fails to establish reversible error.

Affirmed.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79348-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

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June 09, 2021 - 4:35 PM

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