69123-6 69123-6

No. 691236-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTONIAL M. MONROE,

Appellant.

2013 SEP -3 AM 10:29

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

The Honorable Barbara L. Linde

OPENING BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Antonial Monroe met Jessica Wolfe ("Wolfe") when she was leaving Tia Lou's, a nightclub in downtown Seattle, Washington. Wolfe and her friend Victoria Burden ("Burden") had just engaged in a fist fight with other women in the nightclub. When Monroe came in contact with Wolfe, she was bleeding and he asked her if she was doing okay. Wolfe initially cussed at Monroe and then apologized while Monroe attempted to help her. Monroe provided Wolfe his number and Wolfe provided Monroe with her friend Burden's number because she did not have a phone..

After a few exchanges, Wolfe and Monroe began dating and frequently engaged in consensual sex. For two days, Wolfe lived with Monroe at his mother's house in Kirkland.. They left the home and went to live at the Golden West Motel in Edmonds, Washington.. Wolfe had been a prostitute for years prior to meeting Monroe. She had worked for a "pimp" named Quinton Jones.

One evening at the Golden West Motel, Wolfe had her friend Shayla Bennett ("Bennett") over. When Monroe arrived at the motel, Wolfe told the other woman to give Monroe oral sex. RP 633. Instead, Monroe and the Bennett started having sexual intercourse without a condom. RP 633. This upset Wolfe. RP 466. Wolfe was admittedly

jealous. RP 468. Wolfe was angry that Monroe was having sex with Bennett without a condom. RP 637. Soon after, Wolfe contacted Kyla Conlee ("Conlee") at the Dream Center. RP 432. The Dream Center is a church in Los Angeles that helps house homeless families, helps people recover from addiction and rescues people from human trafficking. RP 175. Upon the call, Conlee contacted the Genesis Project, a nonprofit organization that works with local law enforcement to assist woman in getting out of trafficking. RP 186, 192. Meanwhile, Monroe was driving the girls home and they stopped at the McDonalds closest to the Motel. RP 640. While in the drive through, Monroe received a phone call from Wolfe asking where he was. RP 640. She then sent him a text message stating not to return to the motel because the police were at the motel. RP 643. Monroe was concerned that Wolfe may have harmed herself and did not know why the police were at the motel. He drove back to the motel as fast as he could. RP 644.

Upon Monroe's arrival at the Golden Coast Motel, there were a number of Edmonds Police Officers yelling for Monroe to get down on the ground as soon as he exited his vehicle. RP 648. Monroe was ordered to lie face down in a puddle while the Officer put an assault rifle to his back and he was arrested based on the statements of Jessica Wolfe that Monroe was her "pimp."

Monroe was charged with Promoting Prostitution in the First Degree. The trial court ruled that only Monroe's crimes of dishonesty could be admitted into evidence if Monroe took the stand.

During direct examination, Monroe's trial attorney asked Monroe to explain why he made "obscene" comments when he was being arrested. She asked him if he was just acting up because he didn't know why he was being arrested. Monroe responded that he did not understand why he was being arrested because he was not promoting prostitution and proceeded to say "I don't do nothing." "I don't commit crimes" as it pertained to this particular arrest.

Monroe's trial counsel argued that the trial court needed to look at the context of Monroe's statement. Trial counsel argued that Monroe was stating that he was not committing a crime at that time and did not understand why he was being arrested in such a dramatic fashion. Monroe's trial counsel also argued that Monroe had already admitted to his Identity Theft conviction in his testimony and thus the jury would not interpret his statement to mean he has never committed a crime in the past. The trial court ruled that Monroe's statement opened the door and allowed the Prosecutor to ask Monroe about all of his prior adult misdemeanor and felony convictions during cross-examination. The prosecutor proceeded to ask Monroe the following prior convictions: unlawful possession of a

firearm, bail jumping, his assaults, arson, malicious mischief, reckless endangerment, trespass, resisting and obstructing arrest, and harassment.

After determining that Monroe opened the door to his prior adult felonies and misdemeanors, the trial court explicitly ruled and repeated on multiple occasions for clarity that the prosecutor could not ask Monroe about any prior juvenile convictions.

Despite the trial court's clear ruling that the prosecutor could not make reference to any of Monroe's juvenile convictions, the prosecutor asked Monroe about the following six juvenile convictions: assault, malicious mischief, reckless endangerment, trespass, resisting and obstructing, and harassment.

Although the trial court ruled that the prosecutor could not admit any of Monroe's juvenile convictions because they were too remote in time, the prosecutor asked specifically about six of them, including harassment. The prosecutor also asked Monroe if harassment means making threats. Promoting prostitution by threat or force is an element of Promoting Prostitution in the First Degree and thus evidence that Monroe made threats in the past is severely prejudicial.

After the prosecutor asked Monroe about six of his prior juvenile convictions, the trial court recognized that the juvenile convictions were improperly put before the jury. The prosecutor stated he had a

misunderstanding despite the record reflecting that he clarified with the trial court that he could not ask about Monroe's juvenile convictions. Mornoe's trial counsel argued that the court should strike any reference that was made regarding Monroe's juvenile criminal history.

The trial court heard argument from both sides and initially was inclined to rule that the trial court intended on striking the prosecutor's reference to Monroe's juvenile matters because she recognized this evidence would prejudice Monroe. However, the trial court instead decided to remedy the situation by simply reading pattern jury instruction 5.05 that the trial court had already anticipated reading prior to the Prosecutor's disregard of the ruling.

Thus, the trial court's remedy for six of Monroe's juvenile convictions improperly coming in before the jury was to instruct the jury the pattern jury instruction 5.05, which the trial court had already intended on reading to the jury before the prosecutor violated the court's ruling and asked about the juvenile convictions. Jury instruction 5.05 states the following:

"You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony and for no other purpose."

The trial court's remedy of reading this jury instruction did not undo the prejudice to Monroe of six juvenile convictions that should not have been admitted. Specifically, the harassment charge and the follow-up

question about Monroe making threats was severly prejudicial and should result in a new trial for Monroe. To do otherwise would set a dangerous precedent that the State can strategically disregard Court exclusion rulings with no ramifications.

Furthermore, a juror was sleeping during Monroe's trial. The juror was specifically sleeping during the testimony of Wolfe, the alleged victim and only witness to the alleged crime who testified in the trial. As Wolfe testified, an audience member at the trial brought to trial counsel's attention that one of the jurors was sleeping for awhile during the testimony. The trial court chose not to make any further inquiry and instead commented that a juror sleeping "is something that we have to battle against in the afternoons." The risk of the juror not hearing all of the evidence to make a verdict decision is too dire for the court to glaze over this issue and not inquire with the juror as to whether or not the juror was sleeping.

Thus, Monroe's conviction should be reversed and he should be granted a new trial due to the reversible error of the trial court.

Next, Monroe's trial counsel never challenged the venue, nor did she propose that the State prove venue in the "to convict" portion of the jury instructions. All of the alleged criminal acts that constituted Promoting Prostitution in the First Degree occurred

in Snohomish County, Washington. None of the alleged criminal acts occurred in King County, Washington where Monroe was being tried.

During the alleged victim, Wolfe's testimony, she testified that she was walking on the "99" She later clarified that she was walking on "the 99" by the motel. The motel she referred to was the Golden West Motel located on "the 99" in Edmonds, Washington. During Wolfe's testimony, she only testified to "walking for the defendant" or prostituting for him at "the 99" by the Golden West Motel, where they were staying. She never testified that any prostitution occurred in King County, Washington. Detective Vienneau in his direct testimony testified that the Golden West Motel was in Snohomish, Washington and this is where Monroe was arrested and where the alleged activities took place. Monroe was investigated by Edmonds Police Officers because this is where the alleged acts took place.

During Monroe's testimony, the prosecutor revealed that he believed the Golden West Motel was on the Aurora Strip in Seattle, not on the 99 in Edmonds, as Monroe explained to him during cross-examination. RP 725.

Monroe's trial counsel made no motion that venue was improper and did not motion for "King County" to be included as an element in the jury

instructions for the prosecutor to prove beyond a reasonable doubt. The prosecutor's burden for proving venue was relieved, as the prosecutor only had to prove that the crime occurred in the State of Washington. Trial counsel's failure to raise the venue argument or motion to include them in the "to convict" instructions was ineffective. It was highly probable that the State would not have been able to prove the acts occurred in King County beyond a reasonable doubt and it is highly probable that the verdict would have been different.

Therefore, the court should reverse and remand for a new trial on this issue alone.

Monroe's trial counsel was also ineffective by not admitting testimony as to an e-mail written by Detective Steven Veienneau stating his opinion that Monroe was not a threat to Wolfe. Instead of asking Detective Vienneau, the sender, about the content of the e-mail, Monroe's trial counsel instead asked Detective Jaycin Diaz, the recipient. The State objected on hearsay grounds and the trial court sustained the State's objection. As a result, the content of the e-mail that would assist in Monroe's defense stating that he was not a threat to Wolfe was not heard by the jury. Monroe's trial counsel made no effort to call Detective Vienneau back to the stand to have the crucial testimony in the e-mail properly admitted. To that end, the jury did not hear this opinion of the

detective simply due to trial counsel's misuse of the evidence rules and lack of preparation.

Trial counsel was also ineffective by not calling witness, Victoria Burden ("Burden") to the stand. Burden spent a great deal of time with the alleged victim, Jessica Wolfe during the time she was associating with Monroe and lived with her for a period of time. The State conducted an interview with Burden who stated that she never witnessed Monroe threaten or use violence against her and never witnessed Monroe promoting prostitution. Monroe's trial counsel had Burden under subpoena and intended on calling her as a witness. However, she did not end up calling her as a witness in trial and thus called no witnesses for the defense other than Monroe himself because she was unprepared.

Finally, Monroe's trial counsel appeared on the motion calendar only four days prior to the trial to substitute in as attorney of record. Monroe was under the impression that John Henry Browne ("Browne") would be trying the case. Rather, Browne's associate, Colleen Hartl appeared for the trial. Per the record, it appears Monroe's trial counsel did not interview the witnesses personally, nor would they have time to conduct an investigation in a four day span of time.

The trial court should reverse and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it ruled that Appellant opened the door to evidence of all his prior adult misdemeanor and felony convictions.

2. The trial court erred when it took no remedy to strike or offer a limiting instruction when the Prosecutor referenced Monroe's juvenile criminal history after the trial court clearly ruled that his juvenile convictions were not admissible.

3. The trial court erred when it failed to adequately inquire into whether a juror was sleeping through testimony.

4. Monroe was denied his right to effective assistance of counsel as guaranteed under the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution, when his trial counsel failed to object to venue when it was a clear issue.

5. Appellant was denied his right to effective assistance of counsel when his trial attorney failed to admit evidence of Detective Vienneau's observation he wrote in an e-mail that Monroe was not a threat.

6. Appellant was denied his right to effective assistance of counsel when his trial attorney did not call Victoria Burden to the stand.

7. Appellant was denied his right to effective assistance of counsel when his trial attorney was admittedly unprepared for trial.

C. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>

1. Did the trial court abuse its discretion when it ruled that Appellant opened the door to otherwise inadmissible evidence of all prior adult and misdemeanor convictions?

2. Did the trial court abuse its discretion when the prosecuting attorney made reference to Monroe's juvenile convictions despite the trial court's ruling to the contrary and the trial court did not instruct the jury to strike the testimony or offer a limiting instruction to the jury?

3. Defense counsel informed the trial court of an audience member's observations of a sleeping juror. Sleeping is a form of juror misconduct. Did the trial court deny Appellant a fair jury trial by not conducting appropriate inquiry, thereby failing to ensure the juror was able to render a verdict after having heard all the evidence?

4. Where both the Washington Constitution and Court Rules require that a defendant be tried in the county where the crimes were alleged to have been committed, and where the State's evidence clearly established that the alleged crimes were committed in Snohomish County, was Appellant denied effective assistance of counsel when his trial counsel failed to move to dismiss based on improper venue, or to request the inclusion of the element of venue in the jury instructions?

5. Was the Appellant deprived of his right to ineffective assistance of counsel when his trial attorney failed to admit evidence of detective Vienneau's observation that Appellant was not a threat to the alleged victim.

6. Was the Appellant denied his right to effective assistance of counsel when his trial attorney did not call Victoria Burden to the stand.

7. Was the Appellant deprived of his right to ineffective assistance of counsel when his trial attorney was admittedly unprepared for trial after only four days of preparation?

D. STATEMENT OF THE CASE

1. Background

Antonial Monroe ("Monroe") met Jessica Wolfe ("Wolfe") when she was leaving Tia Lou's, a nightclub in downtown Seattle, Washington. Wolfe and her friend Victoria Burden ("Burden") had just engaged in a fist fight with other women in the nightclub. RP 394. When Monroe came in contact with Wolfe, she was bleeding and he asked her if she was okay. RP 396. Wolfe initially cussed at Monroe and then apologized while Monroe attempted to help her. RP 536. Monroe provided Wolfe his number and Wolfe provided Monroe with Burden's number because Wolfe did not have a phone. RP 396.

After a few social exchanges, Wolfe and Monroe began dating and frequently engaged in consensual sex. RP 429. For two days, Wolfe lived with Monroe at his mother's house in Kirkland. RP 416. They left the home and went to live at the Golden West Motel in Edmonds, Washington. RP 424. Wolfe had been a prostitute for years prior to meeting Monroe. She had worked for a "pimp" named Quinton Jones. RP 442.

One evening at the Golden West Motel, Wolfe had her friend Shayla Bennett ("Bennett") over. When Monroe arrived at the motel, Wolfe told the other woman to give Monroe oral sex. RP 633. Instead, Monroe and Bennett started having sexual intercourse without a condom. RP 633. This upset Wolfe. RP 466. Wolfe was admittedly jealous. RP 468. Wolfe was angry that Monroe was having sex with Bennett without a condom. RP 637. Soon after, Wolfe contacted Kyla Conlee ("Conlee") at the Dream Center. RP 432. The Dream Center is a church in Los Angeles that houses homeless families, helps people recover from addiction and rescues people from human trafficking. RP 175. Upon the call, Conlee contacted the Genesis Project, a nonprofit organization that works with local law enforcement to assist woman in getting out of trafficking. RP 186, 192. Meanwhile, Monroe was driving the girls home and they stopped at the McDonalds closest to the Motel. RP 640. While in the

vehicle at the McDonalds drive through, Monroe received a phone call from Wolfe asking where he was. RP 640. She then sent him a text message stating not to return to the motel because the police were at the motel. RP 643. Monroe was concerned that Wolfe may have harmed herself and did not know why the police were at the Motel. RP 644. He drove back to the Motel at a rapid pace. RP 644.

Upon Monroe's arrival at the Golden Coast Motel, there were a number of Edmonds and Seattle Police Officers yelling for Monroe to get down on the ground as soon as he exited his vehicle. RP 648. Monroe was ordered to lie face down in a puddle while one of the Officers put an assault rifle to his back and he was arrested based on the statements of Jessica Wolfe that Monroe was her "pimp." RP 648.

2. **The Trial Court Ruled That Monroe's Direct Testimony Opened the Door to All of Monroe's Adult Misdemeanor and Felony Convictions.**

During direct examination, Monroe's trial attorney asked Monroe to explain why he made "obscene" comments when he was being arrested. RP 652. She asked him if he was just acting up because he didn't know why he was being arrested. RP 652. The dialogue that the court ruled opened the door to all of Monroe's prior adult felonies and misdemeanors even beyond his prior crimes of dishonesty is the following:

HARTLE: You were just explaining?

MONROE: I was just explaining that I don't know what I was being investigated for, so my only hints – I just left the room with females, so I don't know what I was being arrested for, so I just said, man, I don't do nothing. I was just saying I don't do nothing. I don't commit crimes. I just – I'm just a fuck boy. I fuck bitches. What am I being arrested for?

RP 652.

The State argued that Monroe's statement, "I don't commit crimes" during his direct testimony opened the door to the introduction of all of Monroe's prior convictions. RP 658. Monroe's trial counsel argued that the trial court needed to look at the context of Monroe's statement. She argued that Monroe was stating that he was not committing a crime at that time and did not understand why he was being arrested in such a dramatic fashion. RP 663. Monroe's trial counsel also argued that Monroe had already admitted to his identity theft conviction in his testimony and thus the jury would know he did not mean he has never committed a crime. RP 663.

The trial court ruled that Monroe's statement opened the door and allowed the prosecutor to ask Monroe about all of his prior adult misdemeanor and felony convictions during cross-examination. RP 701.

However, he could not ask about juvenile convictions. RP 701. Nonetheless, the State proceeded to ask Monroe during cross-examination about the following prior juvenile and adult convictions: unlawful possession of a firearm, bail jumping, his assaults, arson, malicious mischief, reckless endangerment, trespass, resisting and obstructing arrest, and harassment. RP 712-714.

3. **The Trial Court Ruled That the State Was Not Allowed to Reference Monroe's Juvenile Convictions and the State Asked About The Convictions Regardless During Cross-Examination of Monroe.**

After determining that Monroe opened the door to his prior adult felonies and misdemeanors, the trial court ruled that the prosecutor could not ask Monroe about any prior juvenile convictions. RP 701, 702.

The trial court's ruling is comprised of the following dialogue outside the presence of the jury during trial:

> THE COURT: Okay. Counsel, I'm going to grant you that leave to inquire with this exception. I'm going to rule that just I think as a bright line it makes sense in putting some boundaries upon this so the jury does not use the information improperly **to drop off the juvenile felonies** (emphasis added).
>
> MR. BARBER: Drop off what?
>
> THE COURT: **The juvenile – the reference to the juvenile**

(emphasis added). And I think when you said robbery and taking a motor vehicle, I think those only occurred as a juvenile. So the court's ruling is that because the door was opened by Mr. Monroe's statement, the State may inquire into and if there's a denial may prove the existence of each of the adult felonies and may reference the adult misdemeanors as well but not going into the number of assaults or bail jumpings but simply list them as you've indicated you would.

MS. HARTL: But judge to be clear – Mr. Barber, the crimes that you listed, the convictions are what you will be inquiring about except for the robbery and taking a motor vehicle?

THE COURT: **BECAUSE THOSE ARE JUVENILE** (emphasis added).

THE COURT: **NO JUVENILE CONVICTIONS** (emphasis added).

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

THE COURT: With respect to the adult felonies, no, I was

> going off of your last, as you called it the most anesthetized version, your words. I'm satisfied that that's the appropriate boundaries to put on it that you've put on yourself with the exception that I also want to have you **MAKE NO REFERENCE TO THE JUVENILE MATTERS.** (emphasis added)
>
> RP 701, 702.

Despite the Court's clear ruling that the State could not make reference to any of Monroe's juvenile convictions because they were too remote in time, the State asked Monroe about the following juvenile convictions: assault, malicious mischief, reckless endangerment, trespass, resisting and obstructing, and harassment. RP 712-714.

The prosecutor asked specifically about six of Monroe's juvenile convictions, including harassment. RP 712-714. The prosecutor also asked Monroe if harassment means making threats. RP 712-713. Threat or force is an element of promoting prostitution in the first degree. RP 766.

After the Prosecutor asked Monroe about six of his prior juvenile convictions, the trial court recognized that the juvenile convictions were improperly put before the jury. RP 739. The Prosecutor stated he had a misunderstanding. RP 741. Mornoe's trial counsel argued that the court

should strike any references that were made regarding Monroe's juvenile criminal history. RP 743.

The trial court heard argument from both sides and initially was included to rule that the trial court intended on striking the prosecutor's reference to Monroe's juvenile matters because the trial court recognized this evidence would prejudice Monroe. RP 744. However, the trial court instead decided to remedy the situation by simply reading the jury the pattern jury instruction 5.05 that would have been read regardless:

> THE COURT: Just briefly I'm going to indicate that having given more consideration to the issue of the juvenile convictions, I am going to make no changes to the limiting instruction that the pattern instruction committee has devised. That's instruction 5.05. I would leave it....so with that I think the instructions have been finalized. I'm not making any changes to those. RP 755.

Thus, the trial court's remedy for six of Monroe's juvenile convictions improperly coming in before the jury was to instruct the jury the pattern jury instruction 5.05, which the trial court had already intended on reading to the jury before the prosecutor violated the court's ruling and asked about the juvenile convictions. Jury instruction 5.05 states the following:

"You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony and for no other purpose." RP 765

This aforementioned jury instruction was the only remedy for the improper reference by the State of six of Monroe's juvenile convictions. Monroe was thirty five years old at the time of trial and the juvenile crimes referenced were committed before he was 18 years old. RP 701.

4. **The Trial Court Did Not Inquire With the Sleeping Juror.**

During the alleged victim, Wolfe's testimony, an audience member at the trial brought to Monroe's trial counsel's attention that one of the juror's was sleeping. RP 477. The trial court chose not to make any further inquiry and instead commented that a juror sleeping is, "something that we have to battle against in the afternoons." RP 477.

5. **Monroe's Trial Counsel Did Not Argue Venue and Did Not Make a Motion to Include Venue as Part of the "to Convict" Jury Instructions.**

During the alleged victim, Wolfe's testimony, she testified that she was walking on the "99." RP 416. She later clarified that she was walking on "the 99" by the Motel. RP 416. The Motel she referred to was the Golden West Motel located on "the 99" in Edmonds, Washington. RP 424. During Wolfe's testimony, she only testified to "walking for the defendant" or prostituting for him

at "the 99" by the Golden West Motel, where her and Monroe were staying. RP 416. She never testified that any prostitution occurred in King County, Washington. RP 416 – 424. Detective Vienneau in his direct testimony testified that the Golden West Motel was in Snohomish County. RP 212, 213.

During Monroe's testimony, the Prosecutor revealed that he thought the Golden West Motel was on the Aurora Strip in Seattle. However, Monroe explained to the State during cross-examination that the Golden West Motel was in Edmonds, in Snohomish County. RP 725. Trial counsel did not notice the State's error or at least was not paying attention to the venue issue because she did not make any motions regarding venue.

Hence, Monroe's trial counsel made no motion that venue was improper and did not motion for "King County" to be included as an element in the jury instructions for the Prosecutor to prove beyond a reasonable doubt. The prosecutor's burden for proving venue was relieved, as the prosecutor only had to prove that the crime occurred anywhere in the State of Washington. RP 766.

6. Monroe's Trial Counsel Did Not Admit Content of an Exculpatory E-mail Because She Asked the Wrong Detective About the Contents and She Improperly Interpreted the Evidence Rules.

Detective Veienneau wrote an e-mail to Detective Diaz stating that he did not believe Monroe was a threat. It was the last line of the first paragraph of the e-mail. *See Defense Exhibit 2.* RP 229. [1] Instead of asking Detective Steven Vienneau, the sender, about the content of the e-mail, Monroe's trial counsel instead asked Detective Jaycin Diaz, the recipient. RP 229. The State objected on hearsay grounds and the trial court sustained the State's objection. As a result, the content of the e-mail that would assist in Monroe's defense stating that the detective did not think he was a threat to Wolfe was not heard by the jury. RP 229. Monroe's trial counsel made no effort to call Detective Vienneau back to the stand to have the e-mail properly admitted.

7. **Monroe's Trial Counsel Did Not Call Witness Victoria Burden to the Stand.**

Burden spent a great deal of time with the alleged victim, Wolfe during the time she was associating with Monroe and lived with her for a period of time. RP 397. The prosecuting attorney conducted an interview with Burden who stated that she never witnessed Monroe threaten or use violence against her and never witnessed Monroe promoting prostitution. Monroe's trial counsel had Burden under subpoena and intended on

[1] Appellate Counsel has not been provided the Clerk's Papers by trial counsel or prior appellate counsel, but the e-mail was identified in the trial court as Defense Exhibit 2.

calling her as a witness. RP 275. However, she did not end up calling her as a witness in trial and thus called no witnesses for the defense other than Monroe himself. RP 169.

8. **Monroe's Trial Counsel Appeared For Trial After Four Days of Preparation Whilst Monroe was Facing 120 Months in Prison.**

Monroe's trial counsel was retained only four days before the trial and did not seek a continuance. RP 6. Monroe's trial counsel did not interview all of the witnesses and a different attorney than anticipated tried the case. RP 8.

E. ARGUMENT

1. MONROE'S DIRECT TESTIMONY STATING, "I DON'T COMMIT CRIMES" WAS TAKEN OUT OF CONTEXT BY THE TRIAL COURT AND THE COURT ERRED BY RULING THAT THIS STATEMENT OPENED THE DOOR TO EVIDENCE OF ALL OF MONROE'S PRIOR ADULT MISDEMEANOR AND FELONY CONVICTIONS.

.

During direct examination, Monroe's trial attorney asked Monroe to explain why he made "obscene" comments when he was being arrested. RP 652. She asked him if he was just acting up because he didn't know why he was being arrested. RP 652. The dialogue that the court ruled opened the door to all of Monroe's prior adult felonies and misdemeanors even beyond his prior crimes of dishonesty is the following:

HARTLE: You were just explaining?

MONROE: I was just explaining that I don't know what I was being investigated for, so my only hints – I just left the room with females, so I don't know what I was being arrested for, so I just said, man, I don't do nothing. I was just saying I don't do nothing. I don't commit crimes. I just – I'm just a fuck boy. I fuck bitches. What am I being arrested for? RP 652.

The State contends Monroe's comments opened the door to the introduction of Monroe's prior convictions. The trial court agreed. The trial court's ruling was incorrect. Mornoe's prior convictions were neither necessary to compete the subject addressed by Mornoe nor relevant to Monroe's testimony.

The State likely relies on the proposition that a party who opens a subject of inquiry on direct or cross-examination runs the risk the other party will be permitted to follow up with related evidence within the scope of the examination in which the subject was introduced. *State v. Gefeller,* 76 Wn.2d 449, 458 P.2d 17 (1969); *State v. King,* 58 Wn.2d 77, 360 P.2d 757 (1961). For several reasons reliance on this rule is misplaced.

Most fundamentally, the intent of the rule would not be promoted by applying it here. The purpose of the "open door" rule is to permit the responding party to complete the picture begun by the party who introduces the subject:

To close the door after receiving only part of the evidence not only leaves the matter suspended in the air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

State v. Gefeller, 76 Wn.2d at 455. *Gefeller* illustrates the need for the rule and highlights its inapplicability in Monroe's case.

In *Gefeller,* defendant elicited during the cross-examination of a police officer that defendant had taken a lie detector test which resulted in an inconclusive result. On redirect, the court permitted the state to present an explanation of what was meant by inconclusive results. 76 Wn.2d at 454. The Supreme Court upheld the introduction of this explanation, finding defendant had opened the door to such an inqury. 76 Wn.2d at 455.

This holding is reasonable and comports with the rationale behind the rule. Had the State not been permitted to offer an explanation of the technical and vague term "inconclusive," the jury would have been left to speculate about the effect of the result on defendant's guilt. The State needed to offer an explanation of the term to complete the picture that defendant had begun to paint. *See also State v. King, supra,* 58 Wn.2d at 78 (by asking the alleged rape victim what she had told the examining doctor, defendants opened the door to the doctor's testimony that the victim told him a story which suggested that intercourse had taken place);

Short v. Hoge, 58 Wn.2d 50, 54, 360 P.2d 565 (1961) (by offering a certified copy of the original building permit, plaintiff opened the door to defendants' evidence that the original plans and specifications for the building had been approved).

Contrary to the aforementioned factual scenarios, Monroe's statements during his direct examination did not create a misleading or incomplete picture. The picture was complete and required no additional explanation for the following reasons:

First, the prosecuting attorney took Monroe's testimony "I don't commit crimes," out of context. As an isolated statement, perhaps the State would have an argument Monroe opened the door. However, Monroe clearly testified that he did not know why he was being investigated on this particular occasion. RP 652. He explained in his testimony that he did not know what he was being arrested for and accordingly he told the arresting officer, "I don't do nothing. I don't commit crimes." RP 684. With all the surrounding context of Monroe explaining he did not know why he was being arrested, the jury would not have interpreted that Monroe never committed crimes.

Secondly, Monroe already admitted during direct examination that he was convicted of a crime of dishonesty; specifically false identity. After admitting that he had a prior conviction, the jury certainly would not

have believed he was stating he had never been convicted of any past crimes. Rather, it was clear that Monroe was stating that he did not understand why he was being investigated or arrested in this particular circumstance. RP 652.

Monroe's trial attorney made both of the aforementioned arguments in trial. RP 684. The trial court ruled that none of Monroe's prior crimes would invoke an emotional response because he did not have any priors for promoting prostitution or patronizing a prostitute or for any sexual misconduct. RP 690. However, Monroe's assault convictions and harassment conviction that came into evidence went directly to the threat and force element of Promoting Prostitution in the First Degree. Therefore, the trial court's assessment that Monroe's prior convictions were not related and would not incite an emotional response with the jury is inaccurate. Monroe was prejudiced by these convictions coming into evidence and thus this Court should reverse and remand for a new trial.

2. THE TRIAL COURT VIOLATED MONROE'S RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR BLATANLY DISREGARDED THE TRIAL COURT'S CLEAR RULING THAT ALL PRIOR JUVENILE CONVICTIONS WERE NOT ADMISSIBLE AND THE TRIAL COURT DID NOTHING TO REMEDY THE PROSECUTOR'S VIOLATION.

After the trial judge determined that Monroe "opened the door" by stating he does not commit crimes, she stated clearly on multiple occasions that his juvenile convictions were not admissible.

The following dialogue from the trial explicitly reveals the trial court's ruling that Monroe's Juvenile convictions were not admissible:

> THE COURT: Okay. Counsel, I'm going to grant you that leave to inquire with this exception. I'm going to rule that just I think as a bright line it makes sense in putting some boundaries upon this so the jury does not use the information improperly **to drop off the juvenile felonies** (emphasis added).
>
> MR. BARBER: Drop off what?
>
> THE COURT: **The juvenile – the reference to the juvenile** (emphasis added). And I think when you said robbery and taking a motor vehicle, I think those only occurred as a juvenile. So the court's ruling is that because the door was opened by Mr. Monroe's statement, the State may inquire into and if there's a denial may prove the existence of each of the adult felonies and may reference the adult misdemeanors as well but not going into the number of assaults or bail jumpings but simply list them as you've indicated you would.

MS. HARTL: But judge to be clear – Mr. Barber, the crimes that you listed, the convictions are what you will be inquiring about except for the robbery and taking a motor vehicle?

THE COURT: **BECAUSE THOSE ARE JUVENILE** (emphasis added).

THE COURT: **NO JUVENILE CONVICTIONS** (emphasis added).

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

THE COURT: With respect to the adult felonies, no, I was going off of your last, as you called it the most anesthetized version, your words. I'm satisfied that that's the appropriate boundaries to put on it that you've put on yourself with the exception that I also what to have you **MAKE NO REFERENCE TO THE JUVENILE MATTERS.**

RP 701.

The trial court explicitly and unequivocally ruled that the State could not inquire or make reference to Monroe's juvenile matters. The State asked for clarification and acknowledged that he could make no reference to juvenile matters. Contrary to the Court's ruling, the State asked Monroe about his juvenile matters, namely harassment:

After the trial court clearly established on multiple occasions that Monroe's juvenile convictions could not be referenced, the Prosecutor blatantly disregarded the trial court's ruling. The Prosecutor not only asked about Mornoe's juvenile harassment conviction, but he also asked him if harassment means making threats. The following dialogue on cross-examination should illustrate the Prosecutor's blatant violation and prejudice to Monroe:

> MR. BARBER: In fact, you've been convicted of a number of crimes; haven't you?
>
> MONROE: Yes.
>
> MR. BARBER: And harassment?
>
> MONROE: As a juvenile.
>
> MR. BARBER: And harassment means making threats, right?
>
> RP 712, 713.

After the Prosecutor explicitly asked Monroe about his prior juvenile convictions, the trial court recognized that the juvenile matters were improperly put before the jury. The Prosecutor stated he had a misunderstanding, which could not be possible based on his prior "clarification" and the trial court's numerous statements that Monroe's juvenile convictions could not be referenced.

THE COURT: And so I can handle this a couple of ways. I can indicate to the jury that they – that any reference to those – those juvenile matters should be stricken and that they're not [sic] to disregard them. That was my intention. I apologize that the Court wasn't clear enough to get that message across.

MR. BARBER: I would object. I mean apologize. I had a bonafide misunderstanding…I misunderstood the Court's instructions.

RP 740, 741.

Here, the State could not have had a misunderstanding because the trial court could not have been clearer about the State not referencing any of Monroe's juvenile history. Accordingly, the State intentionally or at least negligently violated the Court's ruling and Monroe's juvenile history was presented in front of the jury. Accordingly, Monroe's conviction should be reversed and remanded for a new trial. .

Initially, the trial court intended on striking the prosecutor's reference to Monroe's juvenile matters because she recognized this evidence would prejudice Monroe. RP 744. However, the trial court instead decided to remedy the situation by simply reading the jury the pattern jury instruction 5.05 that would have been read regardless:

THE COURT: Just briefly I'm going to indicate that having given more consideration to the issue of the juvenile convictions, I am going to make

no changes to the limiting instruction that the pattern instruction committee has devised. That's instruction 5.05. I would leave it....so with that I think the instructions have been finalized. I'm not making any changes to those. RP 755.

a. Prejudicial Effect Here.

"[P]rior conviction evidence is inherently prejudicial when the defendant is the witness because it tends to shift the jury focus from the merits of the charge to the defendant's general propensity for criminality." *State v. Hardy,* 133 Wn.2d 701, 710, 946 P.2d 1175 (1997) (quoting *State v. Jones,* 101 Wn.2d at 120, 120, 677 P.2d 131 (1984). The *Hardy* court recognized that when the jury learns that a defendant previously has been convicted of a crime, the probability of conviction increases dramatically. *Hardy*, 133 Wn.2d at 710-11(citing D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction,* 42 Vill. L. Rev. 1 (1997)). The Court also cited Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making,* 19 Law & Human Behavior 67, 76 (1995) (in controlled mock trial study "jurors who learned that the defendant had been previously convicted were significantly more likely to convict him of a subsequent offense than were jurors without this information."); and Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 161 (1996) (acquittal of defendant is

far less likely when jury knows about prior criminal convictions than when no record of prior crimes is revealed). *Hardy,* 133 Wn.2d at 710 n. 12.

Here, Monroe was unfairly prejudiced by the admission of his juvenile convictions. The most unfairly prejudicial conviction admitted was Mornoe's juvenile harassment conviction. To prove Promoting Prostitution in the First Degree, the prosecution was required to prove that Monroe compelled the alleged victim to engage in prostitution by threat or force. RP 766. The jury heard testimony from both sides regarding the threat or force element. When asked whether she was ever afraid of Monroe, the alleged victim answered, "in a way, yeah, but in a way no." RP 429. Monroe testified that he never threatened or harmed the alleged victim. RP 630. Therefore, the verdict depended heavily upon the jury's credibility determinations, and Monroe's credibility was a particularly decisive factor.

Monroe's credibility was unfairly degraded as a result of the admission of excessive prior conviction evidence. The prejudicial effect was compounded when the court, over defense counsel's objection allowed the evidence of the prior convictions into cross-examination. The trial did nothing to remedy the situation other than to read jury instruction 5.05 that the trial court was already intending on reading notwithstanding

the improperly admitted evidence. Jury instruction 5.05 states the following:

> "You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony and for no other purpose." RP 765

It is highly probable that this unfair disparagement of Monroe's credibility was enough to persuade the jury that Monroe should not be believed or, even if Monroe was believable, his perceived general propensity to commit harassment and his other five juvenile convictions warranted convicting him on the present charges.

We anticipate the State will acknowledge the Prosecutor's mistake in asking about Monroe's juvenile convictions. The record is very clear. However, the State may argue that there was no prejudice to Monroe and that pattern jury instruction 5.05 would suffice as a proper remedy. Appellant strongly disagrees with this assertion. Assuming arguendo if no prejudice resulted toward Monroe, allowing the Prosecutor to blatantly disregard the trial court's ruling here creates a dangerous precedent that a Prosecutor can disregard a court's ruling with no ramifications as long as there is no prejudice to the defendant. The State could then strategically ignore a trial court's rulings to exclude certain evidence if they believed

that nothing would come of the violation. It also establishes a dangerous precedent that a trial court can simply read the pattern jury instructions to remedy a Prosecutor's blatant violation of a court's ruling. The State violated the ruling not once, but six times with six separate juvenile convictions.

It is highly probable that a different result would have been reached by the jury if Monroe's juvenile harassment conviction, among his other five juvenile convictions were excluded. Therefore, this court should reverse Monroe's conviction and remand if not solely for the reason that there is a clear record that the prosecutor violated the trial court's ruling on six separate occasions then because Monroe was clearly prejudiced by the State's blatant violations.

3. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO ADEQUATELY INQUIRE INTO WHETHER A JUROR WAS SLEEPING DURING TRIAL.

Monroe's constitutional right to a fair jury trial required each juror to consider all the evidence before reaching a verdict. Trial counsel alerted the trial court to an audience member's observation of a juror sleeping through Wolfe's testimony. Wolfe was the alleged victim and primary witness of the State.

Rather than voir dire the juror to determine whether he or she was in fact sleeping, the court held fast to the position that a sleeping juror "is something that we have to battle against in the afternoons." RP 477.

Monroe's trial counsel brought the sleeping juror to the court's attention and the trial court did nothing to inquire. The following exchange regarding the sleeping juror occurred in trial:

> MS. HARTL: I think – somebody in the audience said that there – a juror might've been sleeping for a while, and another juror next to them are nudging them awake, so –
>
> THE COURT: I did not notice that. But it is something that we have to battle against from time to time in the afternoons.
>
> RP 477.

The trial court glazed over the issue by stating that sleeping is something that has to be "battled against in the afternoons". Essentially the trial court accepted that sleeping was a day to day occurrence in the afternoons of a trial and did nothing to inquire whether the sleeping juror would have an impact on Monroe's right to a fair trial.

Both the Washington and United States constitutions guarantee the right to a fair and impartial jury trial. U.S. Const amend V, VI; Wash. Const art I §§ 3, 22. The failure to provide defendant with a fair trial violates minimal standards of due process. *State v. Jackson,* 75 Wn. App. 547, 543, 879 P.2d 307 (1994); *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amends. V, XIV; Wash. Const. art I. §3. A constitutionally valid jury trial must be free of disqualifying jury misconduct. *State v. Tigano,* 63 Wn. App. 366, 341, 818 P.2d 1369 (1991).

Sleeping during trial is a form of juror misconduct warranting removal. *State v. Jordan,* 103 Wn. App. 211, 226, 230, 11 P.3d 866 (2000); *People v. Valerio,* 141 A.D. 2d 585, 586, 529 N.Y.S.2d 350 (N.Y. App. Div. 1988). To serve, a juror must take an oath that in substance promises to "well, and truly try, the matter in issue…and a true verdict give, *according to* the law and *evidence as given them on the trial."* RCW 4.44.260 (emphasis added). The jury in Monroe's case was accordingly instructed to render a verdict after consideration of *all* of the evidence. RP (Instruction 1). A sleeping juror cannot listen to all of the evidence

and fulfill his oath of basing his verdict on all the evidence. "A juror who has not heard all the evidence in the case…is grossly unqualified to render a verdict." *Valerio,* 141 A.D.2d at 586.

Under RCW 2.36.110, the jury has a duty "to excuse from further jury service any juror, who in the opinion of the jury, has manifested unfitness as a juror by reason of…*inattention*…or by reason of conduct or practices incompatible with proper and efficient jury service. (emphasis added). CrR 6.5 states that: [i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged." RCW 2.36.110 and CrR 6.5 place a "continuous obligation" to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit. *State v. Elmore,* 155 Wn.2d 758, 773, 123 P.3d 72 (2005).

The trial judge is afforded discretion in its investigation of jury problems. *Elmore,* 155 Wn.2d at 773-74. Discretion does not mean immunity from accountability. *Carson v. Fine,* 123 Wn.2d 206, 226, 867 P.2d. 610 (1994). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is

based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. "*In re Marriage of Littlefield.* 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). At some point, the judge makes a decision outside the range of acceptable discretionary choices and thereby abuses discretion. *State v. Williamson,* 100 Wn. App. 248, 257, 996 P.2d 1097 (2000). The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." *State v. Neal,* 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

The trial judge abused its discretion in the manner in which it resolved the disputed fact of whether the juror was sleeping. [I]f there is a sufficient showing of juror inattentiveness, the appropriate remedy is to engage in a fact finding process to establish a basis for the exercise of discretion. *State v. Hampton,* 201 Wis. 2d 662, 672-73, 549 N.W.2d 756 (Wis. 1996). That is, inquiry should be conducted if there is a real basis for concluding a juror was sleeping. *Commonwealth v. Braun,* 74 Mass. App. Ct. 904, 905, N.E. 2d 124. (Mass. App. Ct. 2009). A judge's receipt of "reliable information" that a juror is asleep "requires prompt judicial intervention to protect the rights of the defendant and the

rights of the public, which for intrinsic and instrumental reasons also has a right to decisions made by alert and attentive jurors. *Commonwealth v. Dancy,* 75 Mass. App. Ct. 175, 181, 912 N.E. 2d 525 (Mass. App. Ct. 2009).

Defense counsel's report that an audience member reported that she observed a juror sleeping during the alleged victim's testimony should be deemed a reliable source of information necessitating further inquiry beyond what was done here. The alleged victim's testimony was crucial evidence to be considered by the jurors and the trial court should not have minimized the audience member's observation that this juror was sleeping.

Under these circumstances, it could not fairly be determined whether the juror was in fact sleeping without asking the juror. The trial court simply made a broad statement that jurors tend to sleep in the afternoon from time to time. The trial court preferred to rest in conjecture rather than get to the bottom of the matter.

Because sleeping juror cases are highly fact specific, there is no case factually identified with Monroe's case. Comparison with similar cases, however, reveals the trial court here failed in its

obligation to conduct proper investigation into whether the juror was sleeping.

In *People v. Smith,* the trial court committed reversible error in failing to conduct proper inquiry after defense counsel informed the court a juror was sleeping, even though the court only acknowledged the juro had closed his eyes for short periods of time. *People v. South,* 177 A.D. 2d 607, 607-608, 576 N.Y.S.2d 314 (N.Y. App. Div. 1991). Under these circumstances, the trial court should have conducted "a probing and tactful inquiry to determine whether the juror was unqualified to render a verdict based upon her sleeping episodes." *South,* 177 A.D. 2d at 608.

In *Valerio,* the trial court committed reversible error in failing to make inquiry of two jurors, where the court noted they were dozing during a readback of testimony and defense counsel suggested the court conduct an in camera inquiry of one juror whose eyes were closed and seemed asleep. *People v. Valerio,* 141 A.D. 2d at 586 (1988). *Valerio* recognized a defendant is deprived of his constitutional right to a jury trial and entitled to a new one when the court unjustifiable fails to make inquiry of an allegedly sleeping juror and allows that juror to deliberate on the defendant's guilt. *Id.* "It is incumbest upon the trial court to conduct a probing

and tactful inquiry to determine whether a sworn juror is unqualified. The court may not speculate upon the juror's qualifications but must ascertain the juror's state of mind and must place its reason for excusing or retaining the juror on the record." *Id.* Uncertainty that a juror is asleep is not the equivalent of a finding that the juror is awake. *Id.*

By not conducting a voir dire, the judge in Monroe's case "prevented herself from obtaining the information necessary to a proper exercise of discretion." *Braun,* 74 Mass. App. Ct. at 905; *see also State v. Reevey,* 159 N.J. Super, 130 133-34, 387 A.2d 381 (N.J. Super. Ct. App. Div. 1978) (where defense counsel informed court juror was sleeping; trial judge should have conducted a hearing and questioned this juror as to whether she was in fact dozing or sleeping, or whether she was listening to the summations and the charge but merely had her eyes closed); *cf. People v. Buel,* 53 A.D. 3d 930, 931, 861 N.Y.S.2d 535 (N.Y. App. Div. 2008).

The trial court's impression of whether the juror was sleeping is not an adequate substitute for an explanation from the only person who could have demystified the situation, the juror. On this record, whether the juror was sleeping is a question that can only be answered by resorting to speculation. The court's

preference for willfull blindness rather than simply questioning the juror may have been because confirmation from the juror that he had been sleeping could have resulted in a mistrial if the alternate juror were to become unavailable. Regardless of the motive, the trial court did not fulfill its duty to investigate juror inattentiveness by choosing to remain ignorant of whether the juror's sleeping or sleepiness undermined its ability to participate in the case and deliberate upon the evidence. The solution is tactful inquiry, not dispensing with inquiry altogether.

Where inquiry into whether the juror actually fell asleep is inadequate, there is no way for the reviewing court to fairly determine whether proper grounds existed to justify discharge of that juror. On the facts of this case, the Court should hold the trial court had a duty to investigate the potential sleeping juror by asking the juror whether he had fallen asleep.

Juror misconduct that causes prejudice warrants a new trial. *State v. Lemieux,* 75 Wn. 2d 89, 91, 448 P.2d 943 (1968). The defendant bears the burden of showing that the alleged misconduct occurred. *State v. Kell,* 101 Wn. App. 619, 621, 5 P.3d 47 (2000). Prejudice is presumed once juror misconduct is established and the State bears the burden of overcoming the presumption beyond a

reasonable doubt. *State v. Boling,* 131 Wn. App. 329, 333, 127 P.3d. 740 (2006); *Kell,* 101 Wn. App at 621. If the juror was in fact sleeping for any period of time; that juror's conduct prejudiced Monroe's right to a fair trial because he was convicted by a jury that included one member who had not heard all the evidence. *Jordan,* 103 Wn. App. at 228.

Monroe, however, is entitled to a new trial regardless of whether the record shows misconduct occurred. This case presents the question of what should happen when the trial court fails to conduct any inquiry into juror misconduct, thereby preventing the defendant from adequately showing misconduct in fact occurred. Under that circumstance, courts have held the failure to conduct inquiry when needed is reversible error. *Valerio,* 141 A.D. 2d at 586; *South,* 177 A.D. 2d at 607-08; *Dancy,* 75 Mass. App. Ct. at 181; *Braun,* 74 Mass. App. Ct. at 905; *cf People v. McClenton,* 213 A.D. 2d 1, 6, 630 N.Y. S.2d 290 (N.Y. App. Div. 1995) removal of a juror could have proved unnecessary had the court conducted appropriate inquiry into the claimed misconduct, but lack of such inquiry "means that it will never be known whether this defendant was tried by a jury which did not engage in premature deliberation, did not commence deliberations with a predisposition toward a

finding of guilt, or did not operate under a time constraint for reaching its verdict").

Inquiry is needed in other contexts to ensure the protection of important constitutional rights. For example, reversal of defendant's conviction is required if the trial court knows or reasonably should know of a potential attorney-client conflict and the trial court fails to conduct an adequate inquiry after timely objection. *State v. Regan,* 143 Wn. App. 419, 425-426 177 P.3d 783 (2008); *State v. McDonald,* 143 Wn.2d 506, 513-514, 22 P.3d 791 (2001). Due process requires inquiry once reason to doubt competency exists. *In re Pers Restraint of Fleming,* 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

Protection of a defendant's fundamental constitutional right to a fair jury trial is entitled to no less consideration. There was a sufficient basis for the trial court to reasonably know the juror was potentially sleeping. Voir dire of the juror was needed to ensure Monroe's right to a fair trial. This Court should reverse the conviction and remand to trial court.

4 . MONROE'S TRIAL COUNSEL WAS INEFFECTIVE BECAUSE SHE DID NOT RAISE THE ISSUE OF VENUE OR MOTION FOR VENUE TO BE INCLUDED IN THE TO CONVICT INSTRUCTIONS

WHEN THE CASE SHOULD HAVE BEEN IN SHOHOMISH, COUNTY.

The right to be tried in the place where the crimes were alleged to have occurred is guaranteed by both the Federal and state constitutions. The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a…trial, by an impartial jury of the state and district wherein the crime shall have been committed [.]

Article I, Section 22 of the Washington State Constitution also provides, in relevant part:

> In criminal prosecutions, the accused shall have the right…to have a speedy public trial by an impartial jury of the county in which the offenses charged have been committed[.]

In addition, CrR 5.1(a)(1) provides that all actions shall be commenced "[I]n the county where the offense was committed[.]" It is clear from a review of the record in this case that, although the trial was held in King County, all of the acts that establish the element of the charged crime occurred in Edmonds, which is in Snohomish County.

During Wolfe's testimony, she testified that she was walking on the "99" RP 416. She later clarified that she was

walking on "the 99" by the hotel. RP 416. The hotel she referred to was the Golden West Motel located on "the 99" in Edmonds, Washington. RP 424. During Wolfe's testimony, she only testified to "walking for the defendant" or prostituting for him at "the 99" by the Golden West Motel, where they were staying. RP 416. She never testified that any prostitution occurred in King County, Washington.

Furthermore, during Monroe's testimony, the prosecutor clearly revealed his misconception that the Golden West Motel and "the 99" was located on the Aurora strip. On the contrary, Monroe's testimony indicated otherwise:

> BARBER: Okay. You went to the Golden West Motel on the Aurora strip, right?
>
> MONROE: Yeah.
>
> BARBER: A place that is known for –
>
> MONROE: No, not Aurora strip. Not Aurora strip. It's actually in Edmonds, Snohomish County. You guys keep saying Aurora. It's not Aurora. It's not King County. It's Edmonds, Snohomish County.
>
> BARBER: Is Aurora a street?

MONROE: Yeah, Aurora is a –

BARBER: Is the motel on Aurora?

MONROE: No.

BARBER: It's not?

MONROE: No.

BARBER: All right.

MONROE: It's in Edmonds –

BARBER: In any event –

MONROE: -- on 99.

RP 725.

The Court should take judicial notice that the Golden West Motel is in fact located at 23916 Highway 99, Edmonds, Washington 98026. Both the alleged victim and the defendant testified that all of the alleged activity occurred on Highway 99 by the Golden West Motel in Edmonds as did Detective Vienneau. RP 212, 213. No other witnesses testified to the contrary.

The State did not present any evidence that either of the crimes were committed in whole or in part in the City of Seattle or County of King. The record reflects that the Prosecutor was clearly surprised that the Motel was not located in Aurora. RP 725 and Monroe twice about its location. RP 725. Trial counsel was

ineffective by not listening to the testimony and by not making a motion for Venue to be an issue in the "to convict" instructions. Accordingly, King County was not the proper venue for this trial, and the trial should have been conducted in Snohomish County. When it becomes clear that a case has been filed in the incorrect county, the remedy is to request a change of venue. CrR 5.1(c). If there is a genuine issue of fact regarding venue, "it becomes a matter for resolution by the trier of fact", and the jury should be instructed that the State must prove proper venue by a preponderance of the evidence. *State v. Dent,* 123 Wn.2d 467, 480-81, 869 P.2d 392 (1994).

However, Monroe's trial counsel did not raise the issue of venue below. And failure to object to improper venue is waived if not challenged during the course of the trial. *Dent,* 123 Wn.2d at 479-80. But Monroe has a due process right to be tried in the county where the acts allegedly occurred. U.S. Const, amd VI; Wash. Const art I, §22 and the State has the burden of proving the elements of the charges, *City of Tacoma v. Luvere,* 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) so trial counsel's failure to object to a trial in Pierce County constituted ineffective assistance of counsel.

Effective assistance of counsel is guaranteed by both the Federal and State constitutions. U.S. Const., amd VI; Wash. Const. art I § 22 (amend x); *Strickland v. Washington,* 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz,* 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, I.e., that there is reasonable probability that, but for the attorney's unprofessional errors, the result of the proceedings would have been different. *State v. Early,* 70 Wn. App. 452, 460, 853 P.2d 964 (1993); *State v. Graham,* 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *State v. Leavitt,* 49 Wn. App. 348, 359, 743 P.2d 270 (1987).

Monroe meets both prongs here. First trial court's failure to object to the venue falls below the objective standard of reasonableness. Proper venue is such a basic and fundamental matter, that counsel should have recognized the charges were filed

in the wrong county. At that point, trial counsel should have moved to dismiss the charges. See CrR 5.1(c). If it was unclear to counsel at the start of trial whether any or all of the acts occurred in King County or Snohomish County, counsel should have at least requested that the jury instructions include the element of venue. *Dent,* 123 Wn.2d at 480. Failing to do either of these things amounts to deficient representation.

Second, if a motion to dismiss based on improper venue had been made, it would have been granted because the evidence clearly shows that all the relevant acts occurred in Edmonds, in Snohomish County. Trial counsel's failure to so move impacted Monroe's constitutional right to a fair trial, and his due process right be tried where the alleged acts occurred by a jury pulled from that country.

Finally, Trial counsel did not make a request to include the element of King County, Washington in the "to convict" jury instructions. Rather, the State only had to prove beyond a reasonable doubt that the alleged criminal acts occurred in the State of Washington. RP 766. This was a manifest error by the trial attorney.

A request to include the element of venue in the jury instructions would have been granted, and counsel's failure to do so relieved the State of its burden of proof.

Failing to instruct the jury on an element of the crime is manifest error of constitutional magnitude. *State v. Stein,* 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001). Where this error relieves the State of its constitutional burden to prove every element of criminal liability beyond a reasonable doubt, it is not harmless, and reversal is required. *State v. Brown,* Slip. op at 12. *Cronin,* 142 Wn.2d at 580.

There is a high probability that the outcome would have been different if Monroe's trial counsel made a motion to add "King County" to the "to convict" instructions. Had trial counsel made this motion, no evidence in the record supported that any of the acts occurred in King County and the jury would not be able to find Monroe guilty of all of the elements of the crime beyond a reasonable doubt.

5. MONROE'S TRIAL COUNSELWAS INEFFECTIVE BY FAILING TO ADMIT EXCULPATORY EVIDENCE OF AN E-MAIL FROM DETECTIVE VIENNEAU WHO CLAIMED THAT HE DID NOT PERCEIVE MONROE AS A THREAT TO WOLFE

BECAUSE TRIAL COUNSEL DID NOT PROPERLY USE THE RULES OF EVIDENCE.

Monroe's trial counsel was ineffective for failing to admit testimony of Detective Vienneau about a crucial e-mail that stated his belief at the time that Monroe was not a threat to the alleged victim. Trial counsel's error is clearly revealed in the following trial record:

HARTLE: Okay. I'm going to show you what's been marked as Defense Exhibit No.2.

HARTLE: Is that right? Okay. Thanks. And does that – does that look like a printed-out copy of those e-mails?

DIAZ: It does.

MS. HARTL: Okay. And if you turn – so that second page there is actually a continuation of the second e-mail, correct?

DIAZ: Um-hum. It is.

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

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

THE COURT: May I see the exhibit?

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

THE COURT: Well, hold on, Counsel.

MS. HARTL: I'm Sorry.

THE COURT: Sustained as to hearsay.

MS. HARTL: So does that e-mail actually state that Jessica was prostituting?

DIAZ: No, it doesn't.

MR. BARBER: Objection, Your Honor.

THE COURT: Sustained.

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

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

MS. HARTL: Okay.

RP 229

This e-mail clearly stated that Detective Vienneau did not perceive Monroe as a threat. Had Monroe's trial counsel asked the detective who wrote the e-mail in front of the jury whether he stated that Monroe was not a threat to Wolfe, the jury likely would have reached a different verdict.

The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of trial. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22; *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); *Strickland v. Washington*, 466 U.S. 668,

685-87, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984). To obtain relief based on ineffective assistance of counsel, a criminal defendant must establish that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 884, 204 P.3d 916 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland*, 466 U.S. at 687). A defendant shows prejudice where there is a reasonable probability that the outcome would be different but for the attorney's conduct. *State v. Doogan*, 82 Wn.App. 185, 188-89, 917 P.2d 155 (1996) (citing *Strickland,* 466 U.S. at 694.)

Appellate courts review a claim of ineffective assistance of counsel *de novo*. *Sutherby*, 165 Wn.2d at_883 (citing *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001)).

Here, Monroe's trial counsel's performance was deficient and fell below an objective standard of reasonableness because she failed to inquire of Detective Vienneau about a crucial e-mail that Vienneau sent stating he did not perceive Monroe as a threat to Wolfe. Rather, trial counsel inquired about the e-mail to the recipient of the e-mail detective Diaz. Such inquiry was objected to on hearsay grounds by the State and sustained. Counsel did not make any attempt to call detective Vienneau back to the stand to obtain his testimony in front of the jury regarding the

e-mail. Trial counsel should have been aware of the evidence rules as they pertain to hearsay and trial counsel's lack of preparation and understanding of these rules fell below an objective standard of reasonableness. Attorneys are expected to know the evidence rules and use them properly.

If the testimony gathered from Detective Vienneau's e-mail to Detective Diaz had been put before the jury, there is a reasonable probability the outcome of the trial would be different. The jury would have heard evidence from a detective who wrote in an e-mail to a fellow detective that he did not perceive Monroe was a threat to Wolfe. Had Wolfe truly been in danger and had she been engaging in prostitution due to Monroe's threats or force, the detective never would have expressed an opinion that Monroe was not a threat in an e-mail. Thus, this evidence should have been put forth in front of the jury and trial counsel's inability to do so was deficient. There is a reasonable probability the outcome would have been different.

Therefore, Monroe's conviction should be reversed and remanded to trial court.

6. MORNOE'S TRIAL COUNSEL FAILED TO CALL VICTORIA BURDEN, A CRUCIAL WITNESS, TO THE STAND.

The failure to call the witnesses is ineffective if the failure to call the witness resulted in prejudice, or created a reasonable probability that, had the lawyer presented the witness, the outcome of the trial would be different. *See Strickland, supra.*

In the case at hand defense counsel failed to call Burden or any other defense witnesses. Burden was available for trial and was known to defense counsel prior to trial. RP 665. She would likely have testified that she never witnessed Monroe threaten or force Wolfe to do anything. She would have testified that Monroe was not Wolfe's pimp or anyone's pimp. Only the State is in possession of this witness interview and its contents. If Appellant can obtain it from the State, Appellant will provide it to this Court.. There is no record that trial counsel conducted an interview of Burden. This information was significant because it established that Wolfe was fabricating her story about Monroe and corroborated Monroe's story. There is a reasonable probability that the outcome of the Monroe's conviction of Promoting Prostitution in the First Degree may have been different if the evidence had been presented to the jury.

The only witness trial counsel called was the defendant, Monroe himself. Trial counsel did nothing to prepare Monroe to testify and the decision to present him as a witness was a last minute endeavor. RP 527.

Monroe's trial counsel's failure to call Victoria Burden or any other witnesses and failure to prepare the defendant for his testimony was ineffective representation. As a result of the ineffective representation Monroe did not receive his constitutionally given right to a fair trial. The remedy for this constitutional error is to grant Monroe a new trial.

7. MONROE'S TRIAL COUNSEL WAS UNPREPARED FOR TRIAL, HAVING ONLY FOUR DAYS TO PREPARE.

Antonial Monroe was facing a standard range of 108 to 120 months in prison for the charge of promoting prostitution in the First Degree. RP 808. Despite the lengthy sentence if convicted, Monroe's trial counsel decided to proceed to trial after substituting into the case only four days before the trial. RP 5. Monroe was under the impression that John Henry Browne ("Browne") would be trying his case:

THE COURT: And you understand – need to understand, I'm not going to continue this trial when Mr. Browne comes in on Tuesday and says, "Well, I can't try this case. I'm not ready." Because I'll bet even money that's what he says."

THE COURT: And he's actually available to go to trial on Tuesday?

HARTL: Yes, he is.

RP 5.

Monroe had spoken with Browne and Browne had allegedly interviewed the alleged victim. RP 8. Colleen Hartl ("Hartl"), the attorney who tried the case stated the following regarding their preparation:

MS. HARTL: I talked to Mr. Monroe, and I'd asked Mr. Monroe, to make sure he understands that by asking us to be ready in four days, **there might be some things in there that we're not aware of**. (emphasis added).

As stated previously, both prongs of the *Strickland* test were met as Monroe's trial counsel committed many acts or omissions that were ouside the range of reasonably prudent assistance. The compilation of errors made by trial counsel in this case could stem from trying a felony case with only four days of preparation when the client is facing 108 to 120 months in prison. Thus, the four days of preparation coupled with the aforementioned errors resulted in deficient performance by trial counsel. There was a reasonable probability the outcome would have been different had trial counsel had more time to prepare and not made a number of errors.

F. CONCLUSION

For the above reasons, Monroe respectfully requests that this Court reverse his conviction for Promoting Prostitution in the First Degree and remand his case for a new trial.

DATED this 3rd day of September, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 3, 2013, he sent by legal messenger Appellant's Opening Brief on behalf of Antonial Monroe, No. 691236-I to the following parties: King County Prosecutor's Office, Appellate Division 516 3rd Ave, Room W554 Seattle, WA 98104 - 2362.

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