70808-2

70808-2

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

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

State of Washington,

Plaintiff/Respondent,

v.

Gildardo Zaldivar Guillen,

Defendant/Appellant.

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

The Honorable Mary Roberts, Judge

APPELLANT'S REPLY BRIEF

By:
Christopher Black
Teymur Askerov
Attorneys for Appellant
Law Office of Christopher Black, PLLC
705 Second Avenue, Suite 1111
Seattle, WA 98104
(206) 623-1604

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAY -5 AM 9:10

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

A. THE ADMISSION OF MR. ZALDIVAR'S INCRIMINATING STATEMENTS AT TRIAL VIOLATED HIS RIGHT AGAINST SELF-INCRIMINATION 1

B. MR. ZALDIVAR HAS ESTABLISHED THAT COUNSEL'S FAILURE TO FILE A MOTION TO SUPPRESS AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL 7

1. The Record Reflects that the Arresting Officers did Not Identify Z.B. Until After Mr. Zaldivar was Seized 9

2. The Arresting Officers' Experience and their Observations of Z.B. do Not Distinguish Mr. Zaldivar's Case from *Diluzio* 14

C. MR. ZALDIVAR HAS ESTABLISHED MANIFEST ERROR 16

D. MR. ZALDIVAR HAS ESTABLISHED THAT THE EVIDENCE PRODUCED BY THE STATE WAS INSUFFICIENT TO SUSTAIN A CONVICTION FOR COMMERCIAL SEXUAL ABUSE OF A MINOR 17

III. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)..........2

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

State v. Bencivenga, 137 Wn.2d 703 (1999)..........17, 19

State v. Bonds, 174 Wn. App. 553 (2013)..........16

State v. Contreras, 92 Wn. App. 307 (1998)..........16

State v. Diluzio, 62 Wn. App. 585 (2011)..........*passim*

State v. Doughty, 170 Wn.2d 57 (2010)..........13, 14

State v. Green, 94 Wn.2d 216 (1980)..........17

State v. Groth, 163 Wn. App. 548 (2011)..........12

State v. Kennedy, 107 Wn.2d 1 (1986)..........8

State v. Kinzy, 141 Wn.2d 373 (2000)..........13, 14

State v. Klinger, 96 Wn. App. 619 (1999)..........8

State v. Morales, 173 Wn.2d 560 (2012)..........4, 6

State v. Prok, 107 Wn.2d 153, 157 (1986)..........5, 6

State v. Prok, 42 Wn. App. 166 (1985)..........5, 6

State v. Rainey, 107 Wn. App. 129 (2001)..........7

State v. Richardson, 64 Wn. App. 693 (1992)..........12, 13, 14, 15

State v. Sandoval, 171 Wn.2d 163, 168 (2011)..........7

State v. Stewart, 113 Wn.2d 462, 469 (1989) ……………………...........2

State v. Teran, 71 Wn. App. 668 (1993)…………..……....………..1, 3, 6

State v. Terrovona, 105 Wn.2d 632 (1986).……………….……………...1

State v. Trevino, 127 Wn.2d 735 (1995)…………………..……………..7

Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)……………………….…………………………..………………7

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)………………………………….………………………*passim*

United States v. Bernard, 795 F.2d 749 (9th Cir. 1986)..………………3, 4

United States v. Crews, 502 F.3d 1130 (9th Cir. 2007)………………...…4

United States v. Garibay, 143 F.3d 534 (9th Cir. 1998)……………….….4

Statutes

RCW 9.68A.100……………………………………………………….17

RCW 46.61.667……………………………………………………….13

RCW 46.61.668……………………………………………………….13

Court Rules

CrR 3.1(c)(1)…………………………………………………...….5, 6

CrR 3.5…………………………………………………………............5

I. INTRODUCTION

Comes now Appellant, Gildardo Zaldivar-Guillen ("Mr. Zaldivar"), by and through undersigned counsel, and submits to this Court the following reply to the State's response to his opening brief.

II. ARGUMENT

A. The Admission of Mr. Zaldivar's Incriminating Statements at Trial Violated his Right Against Self-Incrimination.

The State contends that Mr. Zaldivar validly waived his Fifth Amendment right against self-incrimination after he was provided with Miranda[1] warnings in English because it appeared to the arresting officer that Mr. Zaldivar understood him and because Mr. Zaldivar stated that he spoke English. See State's Response ("Response") at 12. But these facts are insufficient to establish that Mr. Zaldivar validly waived his rights.

Before the State can introduce a defendant's incriminating statements, it must first establish that the defendant was "fully advised of his rights, understood them, and knowing and intelligently waived them." Teran, 71. Wn. App. 668, 672 (1993) (citing State v. Terrovona, 105 Wn.2d 632, 646 (1986)). The State's burden is a heavy one, as "[c]ourts must indulge every reasonable presumption against waiver of

---

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

constitutional rights." State v. Stewart, 113 Wn.2d 462, 469 (1989) (citing Brewer v. Williams, 430 U.S. 387, 404 (1977)).

The State failed to meet its burden in Mr. Zaldivar's case. The record clearly reflects that Mr. Zaldivar is not a native English speaker and that Detective Frazier, the officer who interrogated Mr. Zaldivar, thought that "there could be some type of language barrier" before he began questioning Mr. Zaldivar. See RP I 52. The record further reflects that despite his knowledge that Mr. Zaldivar's primary language is Spanish, Detective Frazier read Mr. Zaldivar his Miranda warnings in English only. See RP I 52. Detective Frazier could not even rule out the possibility that Mr. Zaldivar did not understand parts of their conversation. See RP I 65. Surely these facts are inconsistent with the trial court's finding that Mr. Zaldivar knowingly and voluntarily waived his rights.

There has been a great deal of scholarship regarding the effect of language barriers upon the validity of a waiver of rights under Miranda. As early as 1978, it was recognized that a limited English speaker is not sufficiently proficient in English to understand Miranda warnings. Eugene J. Briere, "Limited English Speakers and the Miranda Rights," *TESOL Quarterly* 12 (1978) 235 – 45. In recent years, numerous studies done in the United Kingdom, the United States, and Australia have confirmed that non-native English speakers: "are at a considerable disadvantage when

processing police cautions because of the linguistic and conceptual complexity of these texts and their cultural specificity." Aneta Pavlenko, "'I'm Very Not About the Law Part': Nonnative Speakers of English and the *Miranda* Warnings," *TESOL Quarterly* 42 (2008) at 3. The empirical evidence clearly shows that a defendant's basic knowledge of the English language does not equate to an ability to understand the complicated legal warnings required by Miranda.

Recognizing this reality, in Teran, this Court unambiguously held that where language barriers exist, a defendant must be advised of his rights in his native language. Specifically, this Court stated that: "A valid waiver may be effected when a defendant is advised of his *Miranda* rights *in his native tongue* and claims to understand such rights." Teran, 670 F.2d at 73 (emphasis added). Indeed, it appears that the Court found that a valid waiver occurred in Teran specifically because the defendant was advised of his rights in Spanish. Id. at 670.

The State attempts to escape the holding of Teran by relying on United States v. Bernard, 795 F.2d 749 (9th Cir. 1986), but that federal circuit court case is inapposite. Unlike Mr. Zaldivar, the defendant in Bernard lived in the United States his entire life, and studied English through the seventh grade. Id. at 752. During the interrogation, the defendant's mother and an Apache-speaking law enforcement officer were

present to assist the defendant with questions that he did not understand. Id.

Moreover, the analysis in Bernard is outdated. In more recent cases, the Ninth Circuit has, in fact, considered whether the defendant was read the Miranda warnings in his native language when analyzing whether a valid waiver occurred. See United States v. Crews, 502 F.3d 1130, 1140 (9th Cir. 2007) (holding that "whether a defendant was advised in his native tongue or had a translator" is a factor to be considered in determining whether a valid waiver was effected); United States v. Garibay, 143 F.3d 534, 536 (9th Cir. 1998) (same).

The State's attempt to distinguish State v. Morales, 173 Wn.2d 560 (2012), is also unpersuasive. Contrary to the State's assertions, it is not undisputed that Mr. Zaldivar "is readily able to understand and communicate" in English. See Response at 16. Even Detective Frazier apparently had concerns that there could be a "language barrier" between him and Mr. Zaldivar. RP I at 52. And, while the State correctly points out that Morales did not involve Miranda warnings, the Supreme Court's analysis in Morales is nonetheless relevant to the question before this Court. Specifically, the Supreme Court recognized in Morales, that a non-native English speaker's legal rights cannot be fully protected unless he or she is provided with an interpreter. See Morales, 173 Wn.2d at 573.

Certainly then, the Supreme Court's decision in Morales supports the conclusion that Mr. Zaldivar, a non-native speaker of English, could not validly waive his constitutional rights unless he was provided with Miranda warnings in Spanish. In response to the State's argument that Mr. Zaldivar did not timely assert his claim that the admission of his incriminating statements also violated CrR 3.1(c)(1), the defense submits that Mr. Zaldivar's trial counsel preserved Mr. Zaldivar's CrR 3.1(c)(1) claim by arguing at Mr. Zaldivar's CrR 3.5 hearing that Mr. Zaldivar did not understand the cautionary warnings given to him by police. See RP I at 70 – 71; see also State v. Prok, 42 Wn. App. 166, 167 (1985), rev'd on other grounds, 107 Wn.2d 153 (1986), (holding that Miranda warnings "satisfy the requirement of [CrR 3.1(c)(1)]"). Additionally, under the plain language of CrR 3.5(a), the burden is on the State to establish the admissibility of a defendant's incriminating statements.

Finally, the State tries to dodge this Court's holding in State v. Prok by arguing that when the State Supreme Court reversed this Court's decision in that case, it did not consider the question of whether a violation of CrR 3.1(c)(1) occurs when a defendant is not advised of his right to counsel in his native language. See Response at 14. But, the State acknowledges that by the time that Prok came before the Supreme Court, the State conceded that a violation of CrR 3.1(c)(1) had occurred when the

police failed to advise the defendant of his rights in his native language. See Response at 14. More importantly, the Supreme Court did not reverse the portion of this Court's decision in Prok holding that failure to advise a defendant of his right to counsel in his native language constitutes a violation of CrR 3.1, and that portion of this Court's opinion remains binding precedent.[2] See Prok, 42 Wn. App. at 403 ("The district and Superior Courts properly found that Prok's failure to understand the warning constituted a violation of the rule. The rule expressly states that the defendant shall be advised 'in words easily understood.'").

When a non-English speaker is interrogated by the police and the police officer recognizes that a language barrier may exist, the police officer is required to provide the defendant with Miranda warnings in his native language, before a voluntary waiver of rights can take place. See Teran, 670 F.2d at 73; Prok, 42 Wn. App. at 403. This is the only method of ensuring that non-native English speakers' constitutional rights are honored. See Morales, 173 Wn.2d at 573. Because Detective Frazier failed to advise Mr. Zaldivar of his rights in the Spanish language, Mr. Zaldivar's incriminating statements and any evidence obtained as

[2] The State correctly notes that the court rule considered in Prok was former JCrR 2.11(c)(1), but that rule is not distinguishable from CrR 3.1 in any material respect.

consequence of those statements should have been suppressed. See State v. Trevino, 127 Wn.2d 735, 746 (1995).

B. Mr. Zaldivar has Established that Counsel's Failure to File a Motion to Suppress Amounted to Ineffective Assistance.

A defendant claiming ineffective assistance of counsel must make a showing of deficient performance on the part of his criminal defense attorney and establish that prejudice to his case resulted from counsel's deficient performance. See Strickland v. Washington, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Sandoval, 171 Wn.2d 163, 168 (2011). To establish ineffective assistance of counsel on the basis of counsel's failure to file a motion to suppress the fruits of an unlawful seizure, a defendant must demonstrate that: (1) there were no "legitimate strategic or tactical decisions" for not filing a motion to suppress; (2) the trial court would have granted the motion to suppress; and (3) the outcome of the trial would have been different as a result. See State v. Rainey, 107 Wn. App. 129, 135 (2001).

The State does not contend that counsel's failure to file a motion to suppress was the result of a tactical or strategic decision, or that a successful motion to suppress would not have changed the outcome of Mr. Zaldivar's case. Rather, the State takes the position that a motion to suppress by Mr. Zaldivar's trial counsel would not have been granted

because the police officers who arrested Mr. Zaldivar had reasonable articulable suspicion to support the investigative stop of Mr. Zaldivar. See Response at 19.

A defendant claiming that counsel's failure to file a motion to suppress on Fourth Amendment grounds resulted in ineffective assistance need not prove that a motion to suppress would have certainly been granted. The defendant simply needs to establish that there is a "reasonable probability that a motion to suppress would have been granted." State v. Klinger, 96 Wn. App. 619, 629 (1999). Mr. Zaldivar has carried his burden in this case.

The question before the court in Mr. Zaldivar's case is whether the arresting officers had reasonable articulable suspicion to initiate a Terry[3] stop of Mr. Zaldivar. Reasonable articulable suspicion sufficient to support a Terry stop exists where the specific facts known to the officer prior to the stop support the conclusion that there is "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6 (1986).

In State v. Diluzio, 162 Wn. App. 585, 589 (2011), the Court of Appeals held that the arresting officer did not have reasonable articulable suspicion to stop the defendant for soliciting a prostitute, despite the

[3] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

following facts: (1) the officer had 13 years of experience, including experience working in special prostitution details; (2) the defendant was in a high prostitution area and the officer had previously made prostitution-related arrests in the area ; (3) all surrounding businesses were closed; (4) there were no bus stops around; and (5) the officer witnessed the defendant pick up a woman off the street after having a brief conversation with her through his passenger window.

Because the facts of Mr. Zaldivar's case are virtually identical to the facts in Diluzio, the Court's decision in Diluzio should dictate the outcome in Mr. Zaldivar's case. Naturally, the State's response brief is primarily devoted to distinguishing Mr. Zaldivar's case from Diluzio. Unfortunately, the State's efforts to distinguish Diluzio are unavailing.

1. *The Record Reflects that the Arresting Officers did Not Identify Z.B. Until After Mr. Zaldivar was Seized.*

First, the State contends that Mr. Zaldivar's case is distinguishable from Diluzio because the arresting officers in Mr. Zaldivar's case recognized Z.B., the alleged victim, to be a juvenile prostitute whom they had previously contacted before the stop was initiated. See Response at 20. But, this claim is unsupported by the record. The State claims that its contention that the arresting officers recognized Z.B. before the stop is

supported by the testimony of Deputy Joel Banks. However, the State reads Deputy Banks's statements out of context.

Deputy Banks did testify that the woman that Mr. Zaldivar picked up "was a younger gal that we had previous contact with as a prostitute," but he did not elaborate as to whether the officers recognized the alleged victim before or after Mr. Zaldivar was seized. RP I 37. Further, it appears that this particular statement was not part of a chronological account, but a summary of the events surrounding Mr. Zaldivar's arrest. The full passage reads:

> The contact with the defendant was after he had initially been seen farther south. We followed to that location and the female that he had picked up when he was farther south was a younger gal that we had had previous contact with.

RP I 37. It cannot be seriously contended that the above passage supports the conclusion that Deputy Banks or any of the other arresting officer recognized Z.B. before Mr. Zaldivar's <u>Terry</u> stop. Rather, it supports the conclusion that at some unknown time during Mr. Zaldivar's arrest the officers recognized Z.B.

The State also contends that Deputy Banks's assertion that his team members were aware of the alleged victim's age before initiating the <u>Terry</u> stop indicates that the officers recognized the alleged victim as a known prostitute prior to the stop. <u>See</u> Response at 20. This contention is

belied by the record. The record reflects that the arresting officers were not aware of Z.B.'s age because they recognized who she was, but because Deputy Conner, the first officer on the scene advised his comrades that he was surveiling a woman who looked like she was a minor. See RP II 28 ("Deputy Connor had noticed a young looking female who he suspected was engaged in prostitution activity."); RP II 36 ("[w]e knew that the female, [Z.B.], she looked young so we didn't give it too long.").

The combined trial testimony of the officers who arrested Mr. Zaldivar establishes that the arresting officers did not, in fact, identify the alleged victim until after Mr. Zaldivar was seized. Detective Frazier, the officer who initiated the stop of Mr. Zaldivar, testified that it was after the stop, as he was interviewing Z.B. and Mr. Zaldivar, that he "recognized [Z.B.] from other contacts in the area." RP II 42; see also RP II 30, 36. In addition, Sergeant McMartin, who was in charge of the operation, testified as follows:

> Usually we will wait a little longer to give them more time to kind of start getting into an act or something, or finish communicating what they want, *but because of the appearance that she was younger*, we moved in fairly quickly.

RP II at 109 (emphasis added). Because the testimony of the arresting officers makes clear that that Z.B.'s identity was not known until after Mr. Zaldivar was seized and that the only reason that they were aware of

Z.B.'s age was because she looked young, Mr. Zaldivar's case cannot be distinguished from Diluzio on the ground that Z.B. was a known prostitute.[4]

More importantly, the conclusion that the officers lacked reasonable articulable suspicion to stop Mr. Zaldivar would not change even if the arresting officers recognized Z.B. prior to initiating the Terry stop. As explained at length in Mr. Zaldivar's opening brief, a person's presence in a high-crime area while in the company of an individual who is known to be engaged in criminal activity does not give police reasonable suspicion to support an investigative stop. See State v. Richardson, 64 Wn. App. 693, 697 (1992) ("A person's presence in a high crime area does not, by itself, give rise to a reasonable suspicion to detain him. Nor does an individual's mere proximity to others independently suspected of criminal activity justify an investigative stop."). The State argues that Mr. Zaldivar's reliance on Richardson is misplaced because

[4] The State has suggested that Mr. Zaldivar's ineffective assistance of counsel and Fourth Amendment claims should be denied on the ground that the record is insufficient to support his claims. Response at 18 n.6. In the event the Court finds that the record before it is insufficient, Mr. Zaldivar respectfully requests that the Court grant him the opportunity to file a personal restraint petition, so that he can develop a stronger factual basis for his claims. See State v. Groth, 163 Wn. App. 548, 568 (2011) (denying the defendants ineffective assistance of counsel claim on the record before the trial court, but holding that if defendant "wishes a reviewing court to consider matters outside the record, he may bring a personal restraint petition.").

Mr. Zaldivar did more than simply walk next to a known criminal in a high-crime area. See Response at 23. The State's argument is that because Mr. Zaldivar picked Z.B. up from a bus stop and drove her to a parking lot, his behavior was more suspicious than the behavior of the defendant in Richardson. Id. Contrary to the State's claims, nothing about Mr. Zaldivar's behavior was particularly suspect. Mr. Zaldivar's behavior was consistent with the behavior of a person who picks up a friend from a bus stop. Z.B. jumped into Mr. Zaldivar's car without any hesitation, and the officers on the scene did not hear their conversation or see Mr. Zaldivar give Z.B. any money. See RP II 38. Further, the fact that Mr. Zaldivar and Z.B. pulled into a parking lot is not inconsistent with stopping to check directions, take a phone call, or reply to a text message.[5] Notably, when the officers decided to initiate the stop of Mr. Zaldivar, his truck had been stopped for only three to five minutes. See RP II 45.

Certainly, Mr. Zaldivar's behavior was no more suspicious than that of the defendant in State v. Doughty, 170 Wn.2d 57 (2010), who briefly visited a known drug house at 3:20 a.m. and was subsequently stopped by police, or those of the defendant in State v. Kinzy, 141 Wn.2d

[5] RCW 46.61.668 makes it unlawful to send, read, or write a text message while operating a moving noncommercial motor vehicle. Similarly, RCW 46.61.667 makes it unlawful for a person to operate a moving vehicle while holding a wireless "communications device to his or her ear."

373 (2000), a minor who was walking in a high narcotics trafficking area late at night with a man known to police from previous drug contacts and who attempted to walk away when police approached her. In both Doughty and Kinzy, the reviewing court concluded that the arresting officers lacked reasonable articulable suspicion to support a Terry stop. See Doughty, 170 Wn.2d at 64; Kinzy, 141 Wn.2d at 385. Because just as in Richardson, Doughty, and Kinzy, the police officers stop of Mr. Zaldivar was based on "incomplete observations" and the police possessed no objective facts to indicate that Mr. Zaldivar was involved in a crime, they lacked reasonable articulable suspcision to stop Mr. Zaldivar even if they were aware that Z.B. was a juvenile prostitute. Doughty, 170 Wn.2d at 64.

2. *The Arresting Officers' Experience and their Observations of Z.B. do Not Distinguish Mr. Zaldivar's Case from Diluzio.*

The State also attempts to distinguish Mr. Zaldivar's case from Diluzio on the grounds that the police officers who arrested Mr. Zaldivar "had an unusual degree of experience" and that they observed Z.B. engage in behavior consistent with prostitution. See Response at 19 – 20. But, the officers who arrested Mr. Zaldivar do not appear to have had any more experience than the officer who initiated the Terry stop in Diluzio. The officer who arrested the defendant in Diluzio had 13 years of experience,

knew the area to be a high prostitution area and had previously made prostitution-related arrests there. See Diluzio, 162 Wn. App. at 595 (Korsmo, J., dissenting). Moreover, the officer had "worked special prostitution details in the past." See id.

Nor can Mr. Zaldivar's case be distinguished from Diluzio on the ground that the officers who arrested him observed Z.B. engage in suspicious activity before Mr. Zaldivar arrived. This Court's holding in Richardson makes clear that even if the officers suspected Z.B. of engaging in criminal behavior, they had no grounds to stop Mr. Zaldivar absent "objective facts warranting a reasonable suspicion" that Mr. Zaldivar himself was engaged in criminal behavior. See Richardson, 64 Wn. App. at 697.

Additionally, it cannot even be said that Z.B.'s behavior was enough to give the officers reasonable articulable suspicion to believe that she was engaged in criminal activity. During the 10 to 15 minutes that the officers surveiled Z.B., all she did was walk from a donut shop to a nearby bus station. RP II 29. And, although the officers made much of the fact that Z.B. was looking at cars passing by while she was at the bus stop, this type of behavior is not unusual for a person who is simply waiting for a ride or hitchhiking. Finally, the fact that Z.B. got into Mr. Zaldivar's car at a bus stop was insufficient to provide reasonable articulable suspicion to

detain her. Just as in Diluzio, the officers did not see any money change hands, did not hear the conversation between Z.B. and Mr. Zaldivar, and did not witness Mr. Zaldivar and Z.B. engage in any physical contact. See Diluzio, 162 Wn. App. at 588. Put simply, neither the arresting officers' experience nor their observations of Z.B.'s behavior can distinguish this case from Diluzio.

C. Mr. Zaldivar has Established Manifest Error.

As discussed above, and in Mr. Zaldivar's opening brief, the arresting officers lacked reasonable articulable suspicion when they initiated the investigatory stop of Mr. Zaldivar. See id. The foregoing discussion establishes that had a motion to suppress evidence on Fourth Amendment grounds been filed, it would have likely been granted. See State v. Contreras, 92. Wn. App. 307, 213 – 14 (1998). The admission of evidence obtained in violation of Mr. Zaldivar's Fourth Amendment right to be free of unreasonable searches and seizures constitutes a manifest constitutional error that had "practical identifiable consequences at trial." See State v. Bonds, 174 Wn. App. 553, 568 – 69 (2013). Because the State has failed to establish that this constitutional error was harmless beyond a reasonable doubt, Mr. Zaldivar's case should be reversed. See Id.

D. Mr. Zaldivar has Established that the Evidence Produced by the State was Insufficient to Sustain a Conviction for Commercial Sexual Abuse of a Minor.

The ultimate question in a challenge to the sufficiency of the evidence is "whether when viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Bencivenga, 137 Wn.2d 703 (1999) (quoting State v. Green, 84 Wn.2d 216, 221 (1980)).

The dispute in this case centers on whether the State's evidence at trial was sufficient to establish beyond a reasonable doubt that Mr. Zaldivar offered to pay Z.B. a fee in exchange for sexual conduct. See RCW 9.68A.100(b); RCW 9.68A.100(c). There was no direct testimony that Mr. Zaldivar offered Z.B. money in exchange for sex. The officers present during Mr. Zaldivar's interrogation testified that Mr. Zaldivar told them that he did not discuss an exchange of money for sex with the alleged victim. RP II 42, 44, 45, 112 – 115. Detective Frazier, the officer who was responsible for questioning Mr. Zaldivar, stated that Mr. Zaldivar expressly told him that he and Z.B. did not discuss payment of money for sexual services. RP II 42, 44, 45.

The State argues that the presence of $10 in Mr. Zaldivar's ashtray at the time of his arrest coupled with Z.B.'s testimony was sufficient to

establish beyond a reasonable doubt that Mr. Zaldivar offered to pay a fee to Z.B. See Response at 27 – 28. But, this cannot be the case. Z.B. did not testify at trial that Mr. Zaldivar offered to pay her money for sex. To the contrary, she testified that Mr. Zaldivar did not offer to pay her money for sex. RP II 142. Further, the jury was precluded from relying on the statement that Z.B. made to police on the night of Mr. Zaldivar's arrest for purposes other than impeachment. RP III 31. Thus, the only thing that the jury could conclude based on Z.B.'s testimony is that Z.B. was not a credible witness.

As explained in Mr. Zaldivar's opening brief, standing alone, the $10 found in Mr. Zaldivar's ashtray could not establish beyond a reasonable doubt that he offered to pay Z.B. for sex. This is especially true when Detective Frazier testified that Mr. Zaldivar told him that there was money in his ashtray but that the money was not intended for Z.B. RP II 44.

The only admissible testimony that the jury heard regarding an offer to pay money for sex was Detective Frazier's testimony that Mr. Zaldivar told him that he had money in his ashtray, but that he did *not* offer the money to Z.B. for sex, RP II 44 – 45, and Sergeant McMartin's testimony that Mr. Zaldivar told him that there was a denomination of money in his ashtray, but that he and Z.B. did not discuss money. RP II

112 – 113. Based on this testimony, no rational trier of fact could have concluded that Mr. Zaldivar offered to pay Z.B. a fee in exchange for sexual conduct. See Bencivenga, 137 Wn.2d at 706. Consequently, because the State failed to prove all of the elements of the crime alleged beyond a reasonable doubt Mr. Zaldivar's conviction must be reversed.

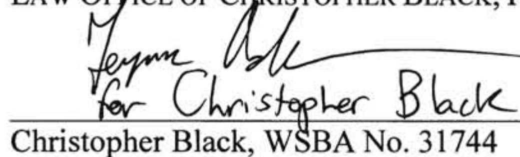
III. CONCLUSION

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

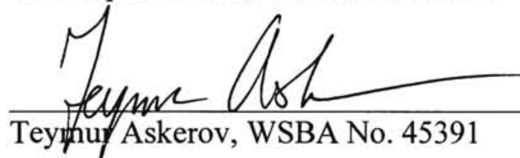
DATED this 2nd day of May, 2014.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



Christopher Black, WSBA No. 31744



Teymur Askerov, WSBA No. 45391

CERTIFICATE OF SERVICE

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

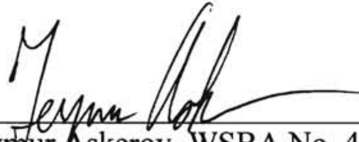
Jennifer P. Joseph
King County Prosecuting Attorney's Office
King County Courthouse
516 Third Avenue, Room W554
Seattle, WA 98104

Gildardo Zaldivar Guillen
1520 Valley Avenue East, Apt. 1
Sumner, WA 98390

DATED this 2nd day of May, 2014.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



Teymur Askerov, WSBA No. 45391
Attorney for Gildardo Zaldivar Guillen
705 Second Avenue, Suite 1111
Seattle, WA 98104