72660-9

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July 10, 2015
Court of Appeals
Division I
State of Washington

NO. 72660-9-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

BILL DWAYNE WHEELER JR.,

Appellant

BRIEF OF RESPONDENT

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2. When two detectives mistakenly testified about the number of days of recorded video retrieved from the defendant's surveillance system was the trial court's curative instruction adequate to prevent the jury from considering false testimony?

3. May the defendant challenge the extent of evidence introduced under ER 404(b) for the first time on appeal when the trial court did not make a final ruling on that issue?

4. Was it an abuse of discretion to allow most but not all of the State's proffered evidence of shows performed by adult baristas?

5. Did the offense constitute a continuing course of conduct?

6. If the evidence described several distinct acts of sexual exploitation of a minor, was any error in failing to either give a unanimity instruction or making an election as to which act the State relied on harmless?

7. Was the evidence sufficient to support the charge of sexual exploitation of a minor?

II. STATEMENT OF THE CASE

A. FACTS RELATING TO SEXUAL EXPLOITATION OF A MINOR.

M.S., born July 1996, left home just before she turned 16. She continued to go to school and supported herself by working as an office and marketing assistant. Because she did not make enough money in that job she looked for a better paying job. Eventually she was hired to work as a barista at Grab-N-Go Espresso. She worked there from January 2013 to February 20, 2013. 7/24/14 RP 122-124; 7/25/14 RP 52, 55.

Grab-N-Go Espresso had two locations; Everett Mall Way and Broadway in Everett. The defendant, Bill Wheeler Jr., owned the Everett Mall Way stand and co-owed the Broadway stand with James Wiley. 7/23/14 RP 121-122; 7/24/14 RP 140; 7/28/14 RP 38.

Baristas were required to wear bikinis or lingerie while working. Baristas were only paid in tips. The defendant and his partner did not pay their employees a wage. The defendant set a quota for baristas to make $300 per shift on the weekdays and $150 per shift on the weekends. A barista who did not make her

quota was required to pay the defendant the difference from her tips. The defendant pressured M.S. to make more money while she worked for him. He told her to keep the customers moving through the line, and not allow any customer to stay too long at the stand. 7/24/14 RP 126, 132-137; 7/25/14 RP 32, 105, 128.

Baristas who gave shows earned more money during their shifts. Shows involved exposing their breasts and genitals to customers. A barista who performed shows could make between $400 and $500 per shift. Most of the baristas performed shows. Melina Alvarado performed shows when she trained M.S. during M.S.'s first few shifts. Ms. Alvarado told M.S. that she could do shows too if she felt comfortable doing them with regular customers. Thereafter M.S. performed shows for each of the shifts that she worked at the coffee stands. 7/24/14 RP 124-125, 132, 139, 144; 7/25/14 RP 10, 69, 107, 109,121.

The Everett Mall Way stand and weekday morning shifts were busier than the Broadway stand and the afternoon shifts. For that reason the employees preferred working at Everett Mall Way and in the mornings. The defendant was in charge of scheduling; he rewarded employees who made more money by scheduling them with the better shifts and at the preferred location. He

threatened M.S. with less favorable shifts if she did not increase her sales. 7/25/14 RP34; 7/25/14 RP 10, 014, 106.

Each of the espresso stands had a surveillance system. The system video recorded the baristas inside the stand. The system had a monitor inside the stand as well. The defendant came to the stands at the end of each shift to count the till. He also reviewed the monitor each time M.S. worked a shift. The defendant showed M.S. and Ms. Alvarado that he could also view the surveillance recording remotely from his cell phone. On occasion when M.S. was working the defendant sent her texts indicating that he was monitoring her remotely through the surveillance system. 7/24/14 RP 135, 143, 145-146; 7/25/14 RP 32-34, 109-111, 154.

The defendant knew that M.S. was only 16 years old when she worked for him. Ms. Alvarado told the defendant M.S. was underage after the first day that she trained M.S. M.S. also discussed her age with the defendant, and asked him to help her obtain emancipation. 7/24/14 RP 129-130; 7/25/14 RP 119.

B. FACTS RELATING TO THE INVESTIGATION.

In early January 2013 the Everett Police Department received some complaints about the Grab-N-Go espresso stands. Detective Nevin was assigned to investigate. He went to both

stands in an undercover capacity. While there M.S., Ms. Alvarado, Jo Ramos, Aleesa Matteson, and Natalia Siragusa performed shows for him. 7/23/14 RP 121, 130-169, 176-177.

Police arrested several of the baristas for violation of the city's cabaret ordinance. After M.S. was arrested police learned that she was only 16 years old. 7/24/14 RP 33-36.

On March 6, 2013 Detective Shattuck and other officers served a search warrant at each of the Grab-N-Go espresso stands. Detective Shattuck had 14 years of experience as a forensic imaging specialist at the time of the investigation. Police seized a Lorex surveillance system from the Everett Mall Way stand and a Clover system from the Broadway stand. 7/28/14 RP 14143, 149-51, 164; 7/29/14 RP 24-25.

Detective Shattuck experienced difficulty in copying data from the two systems. Ultimately he was able to copy video data from the Lorex system. 7/28/14 RP 156-167. He was unable to copy any data from the Clover system. 7/29/14 RP 24-27.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED EACH OF THE DEFENDANT'S MOTIONS TO DISMISS PURSUANT TO CrR 8.3(B).

1. Standard For Motion To Dismiss Pursuant to CrR 8.3(b).

The court may, in furtherance of justice, dismiss a criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. CrR 8.3(b). Dismissal under CrR 8.3(b) is an extraordinary remedy. State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). It is improper to dismiss a criminal prosecution unless there is material prejudice to the rights of the defendant. Id. It may be justified when the State's misconduct violates the defendant's right to due process. Id., State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). A court may dismiss a prosecution in that circumstance if the action complained of violates "'fundamental conceptions of justice which lie at the base of our civil and political institutions,...and which define 'the community's sense of fair play and decency'" State v. Cantrell, 111 Wn.2d 385, 389, 758 P.2d 1 (1988) quoting, United States v. Lovasco, 431 U.S. 783, 790 (1977).

The defendant alleges the trial court erred when it denied both of his motions to dismiss the charge pursuant to that rule. A trial court's decision on a motion to dismiss pursuant to CrR 8.3(b) is reviewed for an abuse of discretion. State v. Athan, 160 Wn.2d 354, 375, 158 P.3d 27 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Id. at 376. Since the trial court did not abuse its discretion when it denied the defendant's motions the court should reject that claim.

2. The Detective's Investigation Did Not Amount To Outrageous Government Misconduct Justifying Dismissal.

It is not a defense to a charge of sexual exploitation of a minor statute that the individual was involved in law enforcement activities in the investigation of criminal offenses. RCW 9.68A.110(1). Nor is it a defense that the person did not know the alleged victim's age. RCW 9.68A.040(3). Before trial it was established that Detective Nevin was given immunity from any such prosecution by the county and city prosecutor's office. Federal prosecutors did not believe that Detective Nevin's conduct violated any federal statute. Detective Nevin stated that he was not

asserting his Fifth Amendment privilege before he testified. 7/23/14 RP 72-72, 117-118.

At trial evidence was produced showing that when M.S. performed a show for Detective Nevin, he had been investigating a violation of the city's cabaret law, EMC 5.120.070[1] M.S. gave Detective Nevin a show on January 31, 2013. M.S. had been working for the defendant for several days at the time that the detective saw M.S. He did not know that M.S. was a minor until he arrested her weeks after she gave him a show. M.S. continued to work for the defendant for about three weeks after seeing the detective. She gave a show at least once a shift. 7/23/14 RP 123, 157-163; 7/24/14 RP 36, 141; 7-25 RP 32, 95-97; Ex. 8[2].

At the end of the State's case the defendant brought a motion to dismiss the charge of sexual exploitation of a minor pursuant to CrR 8.3(b). He argued that Detective Nevin committed the same crime that the defendant was being charged with, and therefore his investigation constituted "outrageous" police conduct. 7/29/14 RP 147-150.

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[1] A copy of the municipal ordinance is attached as Appendix A.

[2] Ex. 8 is a copy of the text messages found on Ms. Starr's phone between Ms. Starr and the defendant. They were introduced on January 25. She began working on the following day.

The court denied the motion to dismiss on that basis. The court reasoned that although it was a strict liability offense, whether the officer knew that Ms. Starr was a minor at the time she gave him a show was relevant to whether the officer's conduct amounted outrageous conduct justifying dismissal of the charge. The court observed that Ms. Starr's age would not be readily apparent to someone, as opposed to a very young child whose age would be fairly obvious. 7/29/14 RP 159-160.

The defendant argues that the trial court erred when it denied his motion to dismiss, relying on the court's reasoning in Lively. In Lively the court identified several factors bearing on whether police conduct is so outrageous that it violates due process principles. They include whether the police instigated a crime or merely infiltrated ongoing criminal activity, whether the defendant's reluctance to commit the crime was overcome by pleas of sympathy or persistent solicitation, whether the government controlled the criminal activity or simply allowed it to occur, whether the police motive was to protect the public or prevent crime, and whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice." Lively, 130 Wn.2d at 22. An evaluation of these factors demonstrates the trial court did

not abuse its discretion when it denied the defendant's motion to dismiss on the basis of outrageous governmental misconduct.

M.S. was trained to wear revealing clothing and give shows before she was contacted by Detective Nevin. The defendant was aware that she was underage at the time and that she was giving shows. He reviewed the surveillance video inside the stand at the end of every one of M.S.'s shifts, and he was able to watch her remotely from his cell phone. Knowing this he continued to let her work at the stand. The detective knew that she was performing shows because he witnessed her giving one to the customer in front of him. The only encouragement it took for her to perform was a simple request for a show, and he did not press her to do more than she was willing to do. 7/23/14 RP 161-63; 7/24/14 RP 127-32, 135, 145, 151-52; 7/25/14 RP 111, 119-20.

Given these facts the detective's conduct is far different from the informant's conduct In Lively. There the informant was "trolling" for targets to sell drugs when he befriended the defendant, an emotionally vulnerable woman who had been working toward sobriety when she was enticed to obtain cocaine to sell to an undercover officer. Lively, 130 Wn.2d at 23. Unlike Ms. Lively, M.S. was already engaged in illegal cabaret activity when Detective

Nevin contacted her. Detective Nevin did not know anything about her when he contacted her except she was employed as a barista and was willing to give shows. In Lively the defendant was contacted at an AA/NA meeting, a place designed to help those with addiction. Here the detective met M.S. at the defendant's coffee stand, a place of business designed to generate income through the sale of coffee and sexually explicit shows. In Lively the trial court found the informant had pressured the defendant into selling cocaine. Lively, 130 Wn.2d at 25. Here the detective made a single request for a show.

While the detective's conduct technically was a crime, there is no evidence that had Detective Nevin known that M.S. was underage, he would have asked her for a show. He did not know that any juveniles were working at the stands when he began the investigation. 7/24/13 RP 33. As the trial court observed she was not obviously a minor, as would be the case if she had been a very young child. His conduct during the investigation is therefore not "repugnant to a sense of justice" so as to justify dismissing the charge against the defendant.

The defendant however faults the detective for not asking M.S. how old she was. His failure to do so should not be a

controlling factor in the analysis because that kind of question would have likely been counterproductive to the investigation. Courts have recognized that police may engage in deceitful conduct during the course of undercover investigations without violating due process. Lively, 130 Wn.2d at 20, Athan, 160 Wn.2d at 377. Asking a question that a typical customer may not ask could arouse suspicion, and therefore thwart the investigation.

In addition, M.S. may not have been truthful had she been asked. She was a teenager on her own, working at the defendant's stand because it paid better than other jobs she could get. She therefore had incentive to not do anything that might jeopardize her employment. In addition, when first confronted by police, she minimized how many shows she actually did; initially stating she only exposed her breasts one time. 7/24/14 RP 122-123; 7/25/14 RP 67.

Finally, the defendant illustrates his argument by citation to United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978) and Greene v. United States, 454 F.2d 783 (9th Cir. 1971). These cases do not support his position because they are completely different from his case. In each case a government agent created a criminal enterprise where one did not exist already, and then supplied the

means and encouragement for the defendants to engage in that enterprise. Twigg, 588 F.2d at 381, Greene, 454 F.2d at 786-87. Here the criminal activity had been ongoing before Detective Nevin arrived at the stand. The detective provided neither encouragement nor the means for the defendant to commit the crime of sexual exploitation of a minor.

3. The Trial Court's Remedy for the Detective's Erroneous Testimony Was a Proper Exercise of Discretion. The Jury Did Not Consider False Testimony.

At trial Detective Shattuck testified that the earliest recorded data on the Lorex system was from February 26, 2013. He figured that there was eight days of video on that system by calculating the number of days from February 26 to the date the system was recovered on March 6. The system typically held up to 35 days of video before overwriting the data. Detective Shattuck testified that the reason the Lorex system only had eight days of recording on it could be the result of installing a new system eight days before it was seized, or the system had failed for some reason, or that the user had deleted some data from the system. Detective Shattuck saw no gaps in the recordings suggesting that the system had failed. The system was covered with dust when it was seized, suggesting that it had not been recently installed. He could not say

from his review of the footage that any video had been deleted. 7/28/14 RP 169; 7/29/14 RP 9-11.

Detective Nevin reviewed the video extracted from the Lorex system. He testified that although he saw 37 violations of the city's cabaret ordinance over 8 days of video, M.S. was not identified as one of the baristas depicted. He had video clips made from data copied from the Lorex system which was introduced as exhibit 18. 7/29/14 RP 91-117.

After Detectives Shattuck and Nevin testified the State rested. 7/29/14 RP 143. The next day defense counsel represented to the court that the defendant just told him that there were conversations on the video recorded on the Lorex system that showed him and his wife instructing baristas not to do shows. The detective did not remember seeing such conversation on the video. Neither the prosecutor nor the defense attorney had reviewed the entire video. The court granted the defense request to recess for one day to do so.7/30/14 RP 165-171, 178-182; 7/31/14 RP 22, 80, 83-84.

The next day defense counsel notified the court that upon reviewing the video the State had provided he discovered that there was no footage from March 4, 5, or 6. The defense moved for an

order dismissing the charge on the basis of governmental mismanagement. Alternatively the defense moved for a mistrial, or to strike Detective Nevin's testimony. 7/31/14 RP 5-11, 15.

The court recessed to allow the parties' time to review the hard drive held in evidence at the police station. Afterwards, in a hearing outside the presence of the jury, Detective Shattuck testified that he had downloaded all of the video from the Lorex system that was available on the system. He did not review each day of the video but he believed that there was no video for March 4, 5, and 6. He acknowledged that a photo taken at the time the search warrant was served showed the system was in recording mode. He did not know why video from those days was not on the system, but thought it possibly could have been the result of reformatting the hard drive. It was also discovered during the recess that the Lorex system no longer operated. Detective Shattuck did not know why it would no longer operate, but he knew that this kind of system did occasionally malfunction. He stated that it was less likely that the system would have malfunctioned if it had remained plugged in. 7/31/14 RP 14, 28-31, 50-66.

Detective Nevin testified that he reviewed the entire video from the Lorex system. The last date of recorded video that he

reviewed from that system was March 3, 2013. He did not review any video from March 4, 5, or 6. He compared the evidence from the system downloaded onto the police department's evidence hard drive, to the hard drive provided to the State and defense. They contained the same information. He stated that he miscounted when he previously testified that there had been eight days of video on that system. 7/31/14 RP 76-78.

The defendant made a motion to dismiss on the basis that the detectives had mismanaged the case by erroneously testifying to the number of days of recorded video on the Lorex system and by unplugging the system. The defendant argued that he was prejudiced because if he rested the jury would be left with inaccurate information. 7/31/14 RP 87-89.

The court denied the defendant's motion to dismiss the charge. It noted that both parties had the video for more than one year before trial, and the error could have been discovered well before trial. It also found that whether there was any material evidence from March 4, 5, or 6 was speculative. The court found that there was an error in the testimony that could be corrected by either recalling the detectives or by instructing the jury to disregard their testimony that there had been eight days of video. 7/31/14 RP

98-104. The defense objected to the court instructing the jury, and to allowing the State to reopen its case. 7/31/14 RP 105, 109. Thereafter the court instructed the jury:

> You are hereby instructed to disregard the testimony of Detective Nevin and Detective Shattuck that there was a total of eight days of video surveillance footage from the Everett Mall stand.

7/31/14 RP 119.

The defendant argues that the trial court abused its discretion when it denied his motion to dismiss for governmental mismanagement. He argues the trial court erroneously placed the blame on the defense for the errors identified and for failing to more timely notify the State of those errors. He argues that he was prejudiced because the error affected the credibility of all of the testimony, not just the testimony the court struck.

The defendant misstates the basis for the court's ruling. The court's comment about the amount of time the parties had the evidence before trial was an expression of frustration that the issue had not been raised before the ninth day of trial. It was not the basis for the court's decision. The court's decision was mainly based on the conclusion that whether there was any significant evidence on the missing video was speculative. For that reason it

believed that any prejudice from the incorrect testimony could be cured by either additional testimony or a curative instruction. 7/31/14 RP 99-101. This decision was not manifestly unreasonable under the circumstances of the case.

M.S. was the victim of the charged offense. 1 CP 440. She was not employed by the defendant after her February 20 arrest, and was not depicted in any of the video in question. The evidence from the clips extracted from that video was offered to show the defendant's business model, which in turn was circumstantial evidence the defendant knew M.S. was giving shows.

Detective Shattuck's testimony was limited to the technical details of the search warrant and how he extracted data from the surveillance system. 7/28/14 RP 149-175; 7/29/14 RP 14-23. Detective Nevin's testimony regarding the video system was even more limited. He testified to reviewing what he received from Detective Shattuck and having it edited into exhibit 18. 7/29/14 RP 91-110, 117. The detective's error in calculating the number of days of video extracted from the Lorex system at worst led to an inference that they were careless investigators, and therefore their testimony was suspect. Whether they were careless investigators or not had no effect on the credibility of the video Detective Nevin

recorded in his capacity as an undercover investigator or the credibility of any of the civilian witnesses who testified to giving shows and the defendant's conduct that induced them to perform those shows. 7/24/14 RP 145; 7/25/14 RP 111.

In addition, the detective's error had nothing to do with the credibility of the physical evidence introduced. Ex. 8 showed text messages between the defendant and M.S. Messages asking M.S. "that guy leave?" and telling her "You have a line slow poke" showed the defendant was monitoring her through the surveillance system. The jury saw ten clips extracted from the system showing the baristas giving shows while working at the stand in Ex. 18. The jury also saw photos on the defendant's phone that had been deleted and then forensically recovered. They showed photos of the baristas in the coffee stand which was also circumstantial evidence corroborating M.S. and Ms. Alvardo's testimony that the defendant could monitor them. Under these circumstances erroneous testimony about the number of days of video taken from the Lorex system was a minor piece of evidence.

The defendant states that the State has the obligation to correct erroneous testimony, citing Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Unlike the prosecutor in that

case the prosecutor here did try to correct the record by re-opening his case and recalling the witnesses. The court did not permit the State to re-open because the defense "vigorously opposes to the State reopening." 7/31/14 RP 113. The court recognized the jury was left with mistaken testimony. 7/31/14 RP 107. Because it was not allowing the State to correct the record, it adopted a remedy that would be the least prejudicial to both sides. As the court stated, the defendant was free to argue that the nonexistent footage from March 4, 5, and 6 was a reason to doubt the State's case. 7/31/14 RP 102. Given these circumstances the court's decision to deny the motion to dismiss was not manifestly unreasonable.

4. The Court Acted Within Its Discretion When It Denied The Defendant's Motion For Mistrial.

When the missing video footage was discovered the defendant alternatively moved for a mistrial. A trial court's decision denying a motion for mistrial is reviewed for an abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A motion for mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Mak, 105 Wn.2d 692, 701,

718 P.2d 407, cert denied, 479 U.S. 995 (1986). Three factors are relevant to determine whether a trial irregularity warrants a mistrial: (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, (3) and whether the court properly instructed the jury to disregard it. State v. Garcia, 177 Wn. App. 769, 776, 313 P.3d 422 (2013), review denied, 179 Wn.2d 1026 (2014). The decision to deny a mistrial motion will be overturned only when there is a "substantial likelihood" that the error complained of affected the jury's verdict. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert denied, 514 U.S. 1129 (1995).

The court found the first factor was met when the prosecutor asked a defense witness an inflammatory question on cross examination in Russell, 125 Wn.2d at 84. The court found the trial court did not abuse its discretion in denying a motion for mistrial based on that error because the error was a single isolated question in a lengthy trial, and the trial court had immediately struck the question from the record, and it instructed the jury to disregard the question. Id.

Here the error was not serious when examined in light of all the other evidence. A mistake in the number of days of video retrieved from the system did not change the content of the video

reviewed and testified to by Detective Nevin or the portion of the video shown to the jury. Finally the court gave an instruction striking the erroneous evidence. Jurors are presumed to follow the court's instructions. State v. Emery, 174 Wn.2d 741, 754, 278 P.3d 653 (2012). In these circumstances the trial court did not abuse its discretion when it denied the defendant's mistrial motion.

5. The Defendant Is Not Entitled To A New Trial Because The Jury Did Not Consider False Testimony In Reaching Its Verdict.

The defendant argues that he is entitled to a new trial because the court's curative instruction did not advise the jury that the footage contained some duplication or that the footage from March 4, 5, and 6 was on the system when the police took it and it was lost and could not be recovered. The court should reject this argument for two reasons.

First, no false testimony was before the jury. Detective Shattuck testified that there was "about eight days" of video on the surveillance system. He explained how he figured that number of days. 7/28/14 RP 169. He did not testify that there was no duplication of days, or even what was on each day of video. Nor did Detective Nevin testify what was on each day of video. His erroneous assumption that Detective Shattuck was correct about

the number of days recorded on the system did not change the substance of what he observed on the video he reviewed. Whatever impression was left by the testimony about the number of days on of footage on the system was cured when the jury was instructed to ignore it.

Second if there was any error in this regard it was invited. Under the invited error doctrine an error is waived when the party asserting such error materially contributed to the error. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). The doctrine is a strict rule that is applied in every situation where the defendant's actions at least in part caused the error. State v. Summers, 107 Wn. App. 373, 381, 28 P.3d 780 (2001), review granted and remanded, 145 Wn.2d 1015 (2002).

The error complained of relates to the remedy adopted by the trial court when the detectives' erroneous testimony was discovered. The defendant vehemently objected to additional testimony to clear up the mistaken testimony. That testimony could have clarified the points he now says constitute "false" testimony. The defendant also objected to any curative instruction. The jury presumably would have followed a more specific curative instruction. Instead the defense made a strategic decision to

attempt to limit the trial court's options to one, i.e. to terminate the trial at that point. If the trial court's resolution of the problem created by the detectives' mistaken testimony was erroneous, the defendant's strategy at least in part contributed to the error. The court should consider the issue was waived.

B. THE DEFENDANT HAS NOT PRESERVED FOR REVIEW WHETHER THE COURT ERRED IN ADMITTING THE SCOPE OF ER 404(B) EVIDENCE. THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED ALL BUT ONE INCIDENT OF ADULT SHOWS INTO EVIDENCE.

The defendant moved in limine to exclude evidence that adult baristas performed shows on the basis that it did not establish a common scheme or plan to employ minors to work at the coffee stands. He argued the evidence was not relevant, and would only confuse the jury and prejudice the defendant. 1 CP 105; 7/23/14 RP 19-20.

Before admitting evidence under ER 404(b) the trial court must (1) identify the purpose for which the evidence is to be admitted (2) determine that the evidence is relevant to prove an element of the crime charged or a defense, and (3) weigh the probative value of the evidence against its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The court did that here. As to the possible prejudice to the defendant the court

found that the evidence was not unfairly prejudicial because it related to the acts third persons, and not the defendant. The court anticipated that some of the evidence may be excluded if it became cumulative. 7/23/14 RP 32-37.

Evidence that adult baristas conducted shows at the stands was admitted through testimony from Detective Nevin, Sgt. Collier, M.S., Ms. Alvarado, Ms. Carlson, Ms. Siragusa, and Ms. Ramos. 7/23/14 RP 130, 148-149, 151-152, 159, 169; 7/24/14 RP 132, 107, 155, 176-177; 7/28/14 RP 14, 81. It was also admitted through video recordings made by Detective Nevin in his undercover operation and from the defendant's surveillance system. 7/23/14 RP 169-187; 7/29/14 RP 93-109. The defendant did not object to this evidence on the basis that it was cumulative and thus prejudiced him.

After the testimony, and after Detective Nevin's undercover video and 6 video clips from the defendant's surveillance system were shown, the court invited argument regarding whether an additional clip from the surveillance system would be cumulative or unfairly prejudicial. 7/29/14 RP 100-101. The defense argued all of the videos were more prejudicial than probative. The court then

excluded one clip but allowed two more clips to be shown. 7/29/14 RP 103-105.

The defendant now argues that the court erred when it allowed all the evidence but one video clip detailing adult shows, rather than limiting evidence in that regard to the testimony of M.S. and the other adult baristas. He argues the additional evidence was unfairly prejudicial, and that it exceeded the bounds of relevance. BOA at 28. He claims that he preserved this issue for review because he raised it in his motions in limine.

"Unless the trial court indicates that further objections at trial are required when making its ruling, the party losing the pretrial motion is deemed to have a standing objection." State v. Koloske, 100 Wn.2d 889, 895, 636 P.2d 456 (1984) overruled on other grounds, State v. Brown, 111 Wn.2d 124 (1988). Here the court indicated that while it ruled some evidence of adult shows was admissible, it had not ruled on the quantity of evidence it would permit. The court specifically said it was prepared to readdress the issue "at some point" and the court "may well limit the full extent of what the State seeks to offer if the State doesn't turn it down on its own." The court then gave some examples of what it might consider cumulative and therefore subject to exclusion. 7/23/14 RP 37-38.

Because the defendant did not thereafter object to the evidence he has not preserved the issue regarding the extent of evidence admitted for review.

The issue has also not been preserved because the defendant did not raise the specific issue he argues now in the trial court. A party may only assign error on appeal on the ground of the evidentiary objection made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert denied, 475 U.S. 1020 (1986). The defendant only objected to admission of adult employee shows generally on the basis that they were unfairly prejudicial. He did not object on the basis that the evidence should have been limited to the testimony of the adult baristas and M.S. as he does now on appeal. Because the issue raised on appeal is different from the one raised in the trial court, it has not been preserved for review.

Even if this court reviews the defendant's issue, the trial court did not err when it allowed the amount of evidence that adult baristas gave shows. The party offering the evidence bears the burden to prove by a preponderance of the evidence that the acts alleged actually occurred. Id. Evidence is unfairly prejudicial if it is more likely to arouse an emotional response than a rational decision by the jury and that creates an undue tendency to suggest

a decision on an improper basis. State v. Haq, 166 Wn. App. 221, 261, 268 P.3d 997, review denied, 174 Wn.2d 1004 (2012). A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for an abuse of discretion. Lough, 125 Wn.2d at 864-865. A trial court abuses its discretion when it exercised it on untenable grounds or for untenable reasons. State v. Grier, 168 Wn. App. 635, 644, 278 P.3d 225 (2012), cert denied, 135 S.Ct. 153 (2014).

The court found the evidence was relevant to establish the defendant's business practices and his knowledge of those practices. 7/23/14 RP 35-36. The defendant concedes the evidence was relevant. BOA at 28. The court found that the evidence was not unfairly prejudicial in that it did not establish the defendant's own bad conduct, but that of third persons. 7/23/14 RP 36-37. This was an important distinction particularly in light of evidence the defendant never outright told the baristas to do shows. For that reason it was far less likely that verdict would be based on a negative emotional response toward the defendant. The court appropriately drew a distinction between the evidence it allowed and the one video clip that it had excluded. Since the barista depicted in the excluded clip had not testified, and the jury had already seen two video clips of her doing shows, a third clip

was cumulative. The court therefore acted within its discretion when it excluded only the single clip.

C. THE OFFENSE CONSTITUTED A CONTINUING COURSE OF CONDUCT. NO UNANIMITY INSTRUCTION WAS REQUIRED. ALTERNATIVELY IF ERROR OCCURRED IT WAS HARMLESS.

The defendant states that there were several distinct acts which could constitute the crime. He argues that he is entitled to a new trial because his right to a unanimous verdict was denied when the State did not elect which act it was relying on or the court did not give a unanimity instruction. Since the evidence showed a continuing course of conduct no such election or instruction was required.

Where several acts are alleged and any one of those acts could constitute the crime charged the jury must be unanimous as to which act or incident constitutes the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988), abrogation on other grounds recognized, In re Stockwell, 179 Wn.2d 588, 316 P.3d 107 (2014). In that case in order to ensure juror unanimity the prosecution must either elect which act it relies upon to support the charge or the court must instruct the jury that all 12 must agree that the same underlying act was proved beyond a reasonable doubt. State v.

Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds, Kitchen, 110 Wn.2d at 107.

M.S. testified that she gave a show a couple of times per shift. She worked at the Broadway stand twice and the Everett Mall Way stand five to eight times. 7/24/14 RP 140-141. On January 31 Detective Nevin first saw M.S. expose her breasts to the customer in front of him. She then exposed her breasts to Detective Nevin. 7/23/14 RP 160-163.

Neither party proposed a unanimity instruction, nor did they take exception when the court did not include that instruction in the court's instructions to the jury. 1 CP 137-159, 168-169, 180-195, 212-213; 8/1/14 RP 1-33. In closing argument the prosecutor did not specify an act he relied on to constitute the crime. 8/1/14 RP Supp. 3-13, 41-45.

The defendant now assigns error to the court's failure to give a unanimity instruction. He argues that each one of the shows M.S. gave was a distinct act, citing State v. Root, 141 Wn.2d 701, 9 P.3d 214 (2000). There the court considered what constituted a unit of prosecution in a sexual exploitation of a minor case. Id. at 711.

What constitutes a unit of prosecution for the crime does not answer whether either a unanimity instruction or an election by the

prosecutor was required. Neither a unanimity instruction nor an election is necessary when the acts testified to constitute a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Whether the defendant's acts constitute a continuing course of conduct is evaluated in a commonsense manner. Id. To decide whether a defendant's criminal conduct was a continuing course of conduct or a series of distinct acts may be determined by deciding whether the defendant's activity shared a common purpose of promoting a criminal enterprise. State v. Knutz, 161 Wn. App. 395, 408, 253 P.3d 437 (2011).

This court reasoned that no unanimity instruction was required in a first degree promoting prostitution case. State v. Barrington, 52 Wn. App. 478, 716 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989). There the Information alleged that the defendant "during a period of time intervening between June 1, 1986 and August 28, 1986 did knowingly advance and profit from prostitution of Kimberly Lott a person who was less than 18 years old..." Id. at 479. The victim testified that she worked for the defendant every day in that time period by committing acts of prostitution, and then turned over the money she earned for those acts to him. Id. This court found that the evidence showed that the

defendant used the victim to promote an enterprise with a single objective, to make money. Id. at 481. These facts pointed to a single prostitution enterprise conducted over a period of months, not separate and distinct acts occurring in a separate time frame and identifying place. Id. at 482.

The facts presented here are much like those in Barrington. The defendant created a business model in which the young women who he employed were induced to give sexually explicit shows while ostensibly engaging in a legal business of selling coffee. The defendant encouraged the women to make more money, through a system of rewards and threats. The circumstantial evidence showed the defendant was aware that the shows were being performed and that the more shows that the women performed, the higher his profits were. This evidence showed a plan with a single objective – to make money. M.S. was part of that plan. Under the reasoning in Barrington the sexual exploitation of M.S. was a single course of conduct for which no unanimity instruction was required.

Alternatively, if this court believes that either a unanimity instruction or an election by the prosecutor was necessary to preserve the defendant's right to a unanimous verdict under the

facts of this case, then any error in failing to do so was harmless. Error of this nature is harmless if a rational trier of fact could find each incident established the crime beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990).

The evidence does not have to be overwhelming as to each act in order for the error to be harmless. Rather, the court considers whether there is any basis on which the jury could rationally discriminate between the multiple acts. If the case presents the jury with an "all or nothing" choice, the error is harmless. State v. Bobenhouse, 166 Wn.2d 881, 894-95, 214 P.3d 907 (2009). The harmless error test thus turns on whether there is any reason to believe that a rational jury could have been non-unanimous.

In Bobenhouse the court found the error was harmless where the defendant offered only a general denial to the child's testimony that several incidents of child rape occurred. Under that circumstance the jury had no evidence in which it could rationally differentiate between incidents. The court reasoned that if the jury believed one incident occurred, then it must have believed all incidents had been proved. Id. at 895.

Similarly, the defendant here offered only a general denial to the charge. 8/1/14 RP 30-31, 33-35, 37-38. M.S. testified that she

gave shows for people who asked for them by exposing her breasts, and that she did so at least once per shift. 7/24/14 RP 141; 7/25/14 RP 97. That was consistent with what Detective Nevin observed. 7/23/14 RP 160-163. M.S. also testified that the defendant reviewed the video footage after each of her shifts. 7/24/14 RP 135. There were no distinguishing features between the any of the shows M.S. gave. Thus, if the jury found the evidence supported the charge for the show given the detective, it would have found it supported the charge for any other show. Like Bobenhouse, if it was error to not give a unanimity instruction or for the prosecutor to elect which act constituted the offense, then the error was harmless.

D. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION FOR SEXUAL EXPLOITATION OF A MINOR.

The defendant argues there was insufficient evidence to find him guilty of sexual exploitation of a minor. Evidence is sufficient to sustain a conviction if after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "A claim of insufficiency admits the truth of the State's evidence and all

inferences that reasonably can be drawn therefrom" State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in favor of the verdict, and most strongly against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105, cert denied, 516 U.S. 843 (1995). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In order to convict the defendant of sexual exploitation of a minor the jury had to find beyond a reasonable doubt:

> (1) That on or about the 1st of January, 2013, through the 20th day of February, 2013, the defendant did invite or cause a minor to engage in sexually explicit conduct;
>
> (2) That the defendant did know the conduct would be photographed or would be part of a live performance; and
>
> (3) That these acts occurred in the State of Washington.

1 CP 145.

The jury was instructed that "invite" meant "to offer an incentive or inducement; and requires some affirmative act of that nature on the part of the defendant." 1 CP 146. "Cause" was defined as "to be the cause of, to bring about, or to induce; and requires some affirmative act of that nature on the part of the

defendant." 1 CP 147. Sexually explicit conduct means actual or simulated: depictions of...the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer." RCW 9.68A.011(4)(f); 1 CP 149.

Evidence that M.S. was a minor who engaged in sexually explicit conduct was introduced through M.S., Detective Nevin, and exhibit 2, the video he took of her "show." M.S. testified that her date of birth was July 1996. She was 16 in January and February 2013, the date of violation. M.S. admitted that she flashed her breasts at customer when they asked. Detective Nevin testified that he went to the Everett Mall Way stand on January and saw M.S. flash her breasts at the customer in front of him. When he asked how he could get what the person in front of him got, M.S. explained she only exposed her breasts, and then did so when the detective gave her money. 7/23/14 RP 161-163; 7/24/14 RP 121-122, 141; 7/25/14 RP 52.

Evidence the defendant caused or invited the sexually explicit conduct was introduced through M.S., the other female baristas, and video tapes from the Everett Mall Way coffee stand. Each of these witnesses testified to the defendant's business practices. They also testified to facts from which a jury could find

the defendant knew that those practices induced the women working for him to perform sexually explicit shows.

The defendant set a sales quota for each shift. If the barista did not make her quota, or if she did not work her entire shift, she was required to make up the difference from her own pay. A barista's shifts and work station was dependent on how much money she made for the defendant. The defendant was in charge of scheduling. He rewarded the baristas who were better at making money for him with busier shifts. The defendant pressured M.S. to make more money, warning her that she would not be scheduled for shifts if she did not make more money and get more customers. The defendant threatened to fire M.S. if she continued to allow customers to stay too long at the booth, rather than moving more customers through the line. 7/24/14 RP 133, 137, 139-140; 7/25/14 RP 10, 34, 105-107, 128-129.

Each barista's pay was solely dependent on tips; baristas made far less without giving shows than they made when they gave them. A reasonable inference from this evidence is that baristas who gave shows had more customers, and were more likely to make their daily sales quotas. As M.S. testified "an attractive, flirtatious woman is more likely to sell a crappy cup of coffee than a

woman who is not attractive." 7/24/15 RP 144; 7/25/14 RP 92, 121, 152,155; 7/28/14 RP 13-14, 26-27, 77-78, 82.

Substantial evidence also established that the defendant knew that baristas would give sexually explicit shows as a way to increase sales. The defendant was not only aware of what his employees wore to work, but he required that they wear that kind of costume. The defendant was at each stand on a daily basis and reviewed the surveillance video that recorded what his employees had done that day. The defendant chastised M.S. for wearing shorts instead of lingerie or a bikini. He knew that one of the employees wore a costume that revealed her genitals. He also had pictures on his cell phone of his employees while they were working. He told Ms. Alvarado he had seen M.S allowing customers to touch her. He also was present on several occasions when M.S. talked to his partner about doing shows. Ex. 15 A-15 F; 7/24/14 RP 135, 142, 145; 7/25/14 RP 109-111, 142-143.

The defendant's conduct after the baristas were arrested on February 20 is also circumstantial evidence the defendant invited or caused his employees, including M.S., to perform sexually explicit shows for customers knowing that those shows were captured on his surveillance system, and were saved in his cell phone photo

gallery. The defendant deleted photos of his employees that had been saved from the surveillance system to his phone. There is also circumstantial evidence the defendant deleted video from the surveillance system. M.S. heard a conversation where the defendant was present in which deleting video was discussed. The system held up to 35 days of video, yet it had only 6 days of video recorded on it. While there were several reasons that could account for that fact, the circumstances suggested the only reason was that the video prior to February 26 had been deleted. Finally, the defendant attempted to change his business model after the baristas had been arrested. He tried to distance himself from control of the stands by proposing a franchise agreement with several of the baristas. 5/25/14 RP 21-22, 160-162, 168; 7/28/14 RP 19-23, 93, 104-107, 111-112, 114, 118.

Evidence the defendant tried to eliminate any physical trace showing that he knew what happened at the stands, and to distance himself from the daily operations of the stands is similar to evidence of flight. Flight is an admission by conduct and is admissible if under the circumstances it creates a reasonable and substantive inference that the defendant's departure resulted from consciousness of guilt or was a deliberate effort to evade arrest and

prosecution. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). Since there was direct evidence the defendant knew M.S. was a minor his conduct after the baristas' arrest created the inference he was trying to avoid being prosecuted for sexual exploitation of a minor. 7/24/14 RP 151-152; 7/25/14 RP 61-62, 119.

By setting up a business model that rewarded baristas for exposing themselves with better conditions and better income the defendant did offer an incentive or inducement for the baristas to do so. The defendant's business model also "caused" baristas to give shows because "that's the way we pretty much made money and made it worthwhile." 7/28/14 RP 26. Since M.S. was also subject to that business model the defendant did "invite or cause" her to engage in sexually explicit conduct. Therefore, there was sufficient evidence from which a rational trier of fact could find the defendant guilty of sexual exploitation of a minor.

IV. CONCLUSION

For the foregoing reasons the State asks the court to affirm the defendant's conviction for sexual exploitation of a minor.

Respectfully submitted on July 10, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
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Deputy Prosecuting Attorney
Attorney for Respondent

5.120.070 Standards of conduct and operations.

The following standards of conduct must be adhered to by employees and entertainers of any public place of adult entertainment which offers, conducts or maintains adult entertainment:

A. No employee or entertainer shall be unclothed or in such costume, attire or clothing as to expose any portion of the male or female pubic region, anus, buttocks, or genitals, any portion of the female breast below the top of the areola, vulva, or male genitals in a discernibly turgid state, even if completely and opaquely covered, except upon a stage at least eighteen inches above the immediate floor level and removed at least six feet from the nearest patron.

B. No employee or entertainer shall wear or use any device or covering exposed to view which simulates the breast of a female below the top of the areola, vulva or genitals, anus, and/or buttocks, or any portion of the pubic hair except upon a stage at least eighteen inches above the immediate floor level and removed at least six feet from the nearest patron.

C. No employee or entertainer shall touch, fondle or caress any patron for the purpose of arousing or exciting the patron's sexual desires; sit on a patron's lap or separate a patron's legs.

D. No employee or entertainer shall allow a patron to touch an employee or entertainer on the breast, in the pubic region, buttocks or anal region. No patron shall touch, fondle or caress an employee or entertainer for the purpose of arousing or exciting the sexual desires of either party.

E. No employee or entertainer mingling with patrons shall conduct any dance, performance or exhibition in or about the nonstage area of the public place of adult entertainment establishment unless that dance, performance or exhibition is performed at a torso-to-torso distance of no less than four feet from the patron or patrons for whom the dance, performance or exhibition is performed.

F. There shall be posted and conspicuously displayed in the common areas of each place offering adult entertainment a list of any and all entertainment provided on the premises. Such list shall further indicate the specific fee or charge in dollar amounts for each entertainment listed.

G. Every place offering adult entertainment shall be physically arranged in such a manner that:

1. The stage on which adult entertainment is provided shall be visible from the common areas of the premises. Visibility shall not be blocked or obscured by doors, curtains, drapes or any other obstruction whatsoever.

2. No adult entertainment occurring on the premises shall be visible at any time from any public place.

H. A sign shall be conspicuously displayed in the common areas of the premises, and shall read as follows:

> THIS ADULT ENTERTAINMENT ESTABLISHMENT IS REGULATED BY THE CITY OF EVERETT;

Entertainers are not permitted to expose any portion of the male or female pubic region, anus, buttocks, or genitals, any portion of the female breast below the top of the areola, vulva, or male genitals in a discernibly turgid state, even if completely and opaquely covered, except upon a stage at least eighteen inches above the immediate floor level and removed at least six feet from the nearest patron. (Ord. 2149-96 § 2, 1996; Ord. 1372-87 § 6, 1987; Ord. 1196-85 § 1 (G), 1985)

5.120.140 Violation a misdemeanor.

Any person knowingly violating any of the provisions of this chapter is guilty of a gross misdemeanor and upon conviction thereof, shall be punishable by a fine not to exceed one thousand dollars or imprisonment in jail not to exceed ninety days, or both imprisonment and fine. Each separate day or any portion thereof, during which any violation of any provision of this chapter occurs or continues, shall be deemed a separate and distinct offense. (Ord. 1240-86 § 6, 1986; Ord. 1196-85 § 1(N), 1985)

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

THE STATE OF WASHINGTON, Respondent, v. BILL DWAYNE WHEELER, Jr., Appellant.	No. 72660-9-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 10th day of July, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and John Henry Browne, johnhenry@jhblawyer.com; I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of July, 2015, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office