

62144-1

62144-1

NO. 62144-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH OLIVE AND
TUROMNE WASHINGTON,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHARLES MERTEL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly denied appellants Joseph Olive and Turomne Washington's motion for a new trial based on ineffective assistance of counsel.

a. Whether Olive and Washington failed to show that they suffered prejudice due to their trial counsels' erroneous advice about the standard range on the charges, given that the State never offered to reduce the charges and neither defendant expressed a willingness to plead guilty rather than go to trial.

b. Whether Olive and Washington have failed to show that they suffered any prejudice due to their trial counsels' failure to propose an instruction for a lesser included offense when, had they requested this instruction, the trial court would properly have declined to give it.

2. Whether a unanimity instruction was unnecessary because Olive and Washington were engaged in a continuing course of conduct when they pressured two teenage girls into making money for them by working as prostitutes.

B. STATEMENT OF THE CASE

Olive and Washington convinced two 17-year-old girls, visiting Seattle over a weekend, to work for them as prostitutes. After the first night, one of the girls became separated from them, and she then reported to the police what had happened. A week later, the police tracked down the second girl, who had been out on the street working as a prostitute. The State charged Olive and Washington with two counts of promoting commercial sexual abuse of a minor, and a jury convicted them as charged.

1. SUBSTANTIVE FACTS

a. Pressuring The Girls Into Prostitution

In January of 2008, 17-year-old C.W. lived with her mother in the Bellingham area. RP 153-57.¹ C.W.'s best friend, C.J., was also 17 years old and lived with them. RP 321, 395, 669-71.

On Friday, January 4, 2008, C.W., C.J., and C.W.'s mother came to Seattle for a weekend visit. RP 159-60, 398, 672-73. They stayed at a motel in Seattle's Georgetown area. RP 160, 398.

¹ There are two sets of the report of proceedings in this case because, with the exception of voir dire, the trial was recorded, and Olive and Washington retained different transcriptionists. The State's citations are to the transcripts prepared by Allred-e Transcription for appellant Olive.

The first night, the two girls left C.W.'s mother at the motel and headed towards the Delridge Community Center. RP 162, 400, 675-77. On the way, they encountered Joseph Olive, whom C.W. already knew as "Ren," and another man.² RP 163-72, 677-78. Olive invited the girls "to kick it" with them, and they went to a nearby park. RP 169-75, 679-80. C.W. liked Olive and thought he wanted her to be his girlfriend. RP 176. At the park, Olive asked C.W. to perform oral sex on him, and she complied. RP 176-77. After about an hour in the park, they split up and Olive told C.W. that he would call her the next morning. RP 180, 185, 681.

The next day, Saturday, the two girls were at the downtown Seattle library when Olive called and asked C.W. for her shoe size. RP 187, 682-84. He explained that he wanted her to look good and that he planned to buy her shoes. RP 187.

Later that day, Olive picked up C.W. and C.J. RP 189, 687. Turomne Washington was a passenger in the car.³ RP 687. Olive

² At trial, C.W. disclosed that, several years earlier when she was 15 year old, she had sex with Olive. RP 166-67.

³ C.W. had met Washington several years earlier and knew him as "Andrew." RP 182-83, 189, 331, 687.

drove the girls to a look-out spot in West Seattle. RP 191-92. After he and C.W. exited the car, he told her that he wanted her to work for him. RP 191-92, 332. He talked about travelling the world with her if they made money. RP 192-93. He urged her to work her hardest and be on "her game." RP 193. During the course of the conversation, C.W. realized that Olive was asking her to work as a prostitute and she started to cry.⁴ RP 193-94. When she stated that she did not want to do it, he became mad. RP 196. Olive told her that he wanted her to "pull some tricks"⁵ and make money. RP 194-96.

Meanwhile, in the car, Washington had a similar conversation with C.J. He told her that if she wanted to do things in life, she needed money and that she could make money by working as a prostitute.⁶ RP 690-91, 717. C.J. told Washington that she was not going to do that, and Washington acted surprised. RP 691.

⁴ Several years earlier, C.W. had run away from home, worked as a prostitute and did not like it. RP 195, 317, 392-94.

⁵ A "trick" is an act of prostitution. RP 626.

⁶ Washington claims that he spoke only in vague terms and simply told C.J. that she needed to make money. Brief of Appellant Washington at 8. In fact, C.J. testified that Washington told her she could make money "by selling myself." RP 717.

Both men knew that the girls were 17 years old. RP 275-76, 688.

Olive drove to Southcenter Mall, and the two men went inside, leaving the girls in the car. RP 204-05, 689. C.W. told C.J. that Olive wanted her to work as a prostitute. RP 205, 695.

After the men returned, they drove around, bought some alcohol, went to another look-out spot and had sex with the two girls. RP 206-07.

Later that night, Olive gave C.W. high-heeled shoes and asked her to walk in them so he could see how she looked. RP 209. Olive again asked C.W. to work as a prostitute, and she agreed. RP 210-11.

The men took the girls to Pacific Highway South, and Olive gave C.W. an energy drink and instructed her to call Washington from a pay phone after she was finished with a customer. RP 211-14. C.W. then engaged in a number of acts of prostitution. Her first customer claimed not to have money and paid her with a cell phone and charger. RP 214-19, 283-84. C.W. then called Washington and met with the two men in their car. RP 220-22. When she gave the cell phone to Olive, he told her that next time

he wanted her to get money. RP 220. He told her that C.J. was also out working as a prostitute. RP 220.

In fact, when C.W. had gone out on the street to work as a prostitute, C.J. asked the men where she was going. RP 701. Olive and Washington told her to leave C.W. alone and that C.W. had to go to work. RP 702. C.J. then attempted to get out of the car, and Olive blocked her from leaving; he told her if she got out of the car, she would not get a ride home unless she also worked as a prostitute. RP 702-04. Washington then instructed C.J. to call him when she made some money and gave her his phone number and some change for a pay phone. RP 743-44.

C.J. went out on the street, and had sex with two men, making a total of \$50. RP 703-07. As instructed, she called Washington, and he asked how much money she had made. RP 708. When she told him, he responded that C.W. had made more. RP 708. Though Washington promised to come and pick C.J. up, he never did. RP 708. By the next day, C.J. made her way back to the motel and told C.W.'s mother what had happened. RP 712-13.

In the meantime, C.W. turned two more tricks that night, earning \$40 each time. RP 221-22. After her second trick, she

again called Washington's cell phone to let them know that she was done. RP 222. She turned over the money that she earned to Olive. RP 222. Olive, in turn, gave some of the money to Washington. RP 226.

Olive and Washington took C.W. to a Motel 6 in SeaTac. RP 223-25, 446. Washington rented a room, and C.W. and a third man stayed there the night. RP 226-27, 359, 448-51.

The next day, Olive brought C.W. some new clothes and food. RP 240. He took her to Pacific Highway South, and, in order to make sure she stayed awake, gave her an energy drink and some candy. RP 241. C.W. turned three or four tricks. After each trick, she called Olive and gave him the money she earned. RP 241-44. After the last trick, she could not reach Olive or Washington and spent the night with another man that she met on Pacific Highway South. RP 248-53.

The next day, C.W. met up with Olive, and he had her work as a prostitute on Pacific Highway South. RP 256-61. C.W. was having her period, and Olive told her to do what she could. RP 364-65. That night, she slept in Olive's car while Olive stayed at his aunt's house. RP 259-60.

Over the next few days, C.W. lost contact with Olive and began working as a prostitute for another man. RP 264-67. After this man was arrested, C.W. called Olive and apologized for leaving him. RP 267-70. Olive was mad, but he agreed to meet her. RP 271. However, before they could meet, the police located C.W. and arrested Olive and Washington.

b. The Search For C.W.

When C.W. and C.J. did not return to the motel, C.W.'s mother Felicia Briggs became very worried. RP 401. After C.J. returned to the motel the next morning, Briggs called the police and reported that her daughter was missing. RP 403-05, 457-60, 712-13.

Over the next few days, Briggs and C.J. attempted to call C.W. on separate occasions, and, instead, reached Washington. RP 409, 711-14. Both times, Washington claimed that he did not know who they were calling about. RP 409-10, 714.

Seattle Police Community Services Officer Charles Sampson called Olive's phone number and asked to speak to C.W. RP 480-81. A man, identifying himself as "Ren," stated that she was not there and that she would call him back. RP 480-81. C.W.

subsequently called Sampson back and, apparently assuming that he was a customer, asked if he had the money. RP 482. "Ren" then got back on the phone, demanded to know what Sampson wanted, and stated C.W. was "his girl." RP 482-83. After Sampson was unsuccessful in arranging a meeting with C.W., he turned the case over to the Seattle Police Vice Unit. RP 483-85.

On the evening of January 11, 2008, the police learned that C.W. had recently made a call from a pay phone near a 7-11 store in Des Moines. RP 558-63, 637. When they arrived at that location, they contacted C.W., who was out on the street. RP 562-63. C.W. initially gave a false name, and then admitted her true identity when confronted with a photograph. RP 271, 276, 563-64. After she was detained, C.W. saw Olive and Washington drive by and tried to wave them off. RP 277, 367. The police noticed her reaction, and she admitted that she knew the men in the car. RP 568-69, 641-62.

The police contacted Olive and Washington, who both denied knowing C.W. RP 571, 642. The police arrested them. RP 646.

After being read his Miranda⁷ rights, Olive told the police that he did not know C.W. and that he had been in the area to get food. RP 521-23. Similarly, Washington also denied knowing C.W. and claimed that he was there to get food and hang out with friends. RP 525.

2. PROCEDURAL FACTS AND THE TRIAL

On January 16, 2008, the State charged Olive and Washington with two counts of promoting commercial sexual abuse of a minor. CP(Olive) 1-2; CP(Washington) 1-2. Count I related to C.J., and count II related to C.W. CP(Olive) 1-2; CP(Washington) 1-2.

The case went to trial before the Honorable Charles Mertel in May of 2008. The jury convicted Olive and Washington as charged. RP 933-34; CP(Olive) 44-45; CP(Washington) 36-37.

Prior to sentencing, both defendants moved for a new trial, claiming they received ineffective assistance of counsel, discussed more fully below. CP(Olive) 89-115; CP(Washington) 55-59. The court denied the motion and imposed standard range sentences for

⁷ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

both defendants. RP 994; CP(Olive) 125; CP(Washington) 74.

This appeal follows.

C. ARGUMENT

1. OLIVE AND WASHINGTON ARE NOT ENTITLED TO REVERSAL OF THEIR CONVICTIONS BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL.

Olive and Washington claim that they received ineffective assistance of counsel because their trial attorneys misadvised them as to the standard range they faced on the two counts of promoting commercial sexual abuse of a minor. This Court should reject this claim. While defense counsel acted deficiently in failing to determine the correct standard range for the charges, Olive and Washington have not shown prejudice, i.e., that but for this error, the results of the proceeding would have been different. They claim that this error prevented them from resolving the case with guilty pleas to lesser charges, yet the evidence below did not establish that, had the parties been aware of the correct standard range, the State would have been willing to reduce the charges as part of a plea agreement. Moreover, there is scant evidence, other than an after-the-fact, self-serving declaration from Olive, that either defendant was even willing to plead guilty.

Olive and Washington also claim that they were prejudiced because, due to their misunderstanding about the standard range, their attorneys did not propose a lesser included instruction for *attempted* promoting commercial sexual abuse of a minor. This claim of prejudice fails because, had Olive or Washington requested such an instruction, the trial court would properly have declined to give it.

a. Relevant Facts

Both defendants faced a standard range of 36 to 48 months on the two counts of promoting commercial sexual abuse of a minor. CP(Olive) 123; CP(Washington) 72.

Approximately one week after the jury returned the guilty verdicts, the trial attorneys for Olive and Washington moved to withdraw and asked the court to appoint new counsel. RP 940-53. Both attorneys explained that they had misadvised their clients as to the standard range for the crimes charged. Id. After the court appointed new counsel, both defendants moved for a new trial based on a claim of ineffective assistance of counsel. CP(Olive) 89-114; CP(Washington) 55-59.

As part of the motion for a new trial, Washington's trial attorney, Justin Wolfe, submitted a declaration in which he stated that, based upon a sentencing scoring sheet he received from the State, he believed that the crimes charged were level III offenses. CP(Washington) 96. He stated that he told Washington that he was facing a non-prison sentence. Id. He stated that he had discussed potential plea resolutions with deputy prosecutor Zach Wagnild, but that no formal offers had been made. Id. A few weeks before trial, he made a plea offer to the trial prosecutor Sean O'Donnell and invited a counteroffer. CP(Washington) 97. Attorney Wolfe did not identify what the offer was, and he acknowledged that the prosecutor never replied. Id. Wolfe also stated that he had declined to request a lesser included instruction for attempted promoting commercial sexual abuse of a minor "based in part on a misunderstanding of the accurate sentencing range for the offense." Id.

Washington did not submit a declaration.

Olive's trial attorney, Stacey MacDonald, also submitted a declaration stating that she had incorrectly believed that the crime of promoting commercial sexual abuse of a minor was a level III offense and had incorrectly told Olive that he was facing a standard

range of 4 to 12 months. CP(Olive) 105. She stated that she contacted the trial prosecutor, Sean O'Donnell, to request that Olive be permitted to plead guilty to the crime of second-degree promoting prostitution. Id. She stated that the prosecutor "conveyed" that he "would not offer a deal unless both co-defendants plead guilty." Id. She did not state whether Olive was willing to plead guilty or whether she made any further efforts to pursue a possible plea deal, such as inquiring whether co-defendant Washington was willing to plead guilty. Finally, she stated that she had made a strategic decision not to offer a lesser included instruction for attempted promoting commercial sexual abuse of a minor. Id.

Olive submitted a declaration claiming that attorney MacDonald told him of two plea deals that the prosecutor had offered: (1) plead guilty as charged and face a 20-month sentence and (2) plead guilty to one count and the prosecutor would recommend "a sentence of 9 to 12 months." CP(Olive) 113. Olive claimed that he turned down these offers based upon his belief that his standard range was 4 to 12 months. Id. He further claimed that he was misadvised as to whether he would have to register as a

sex offender.⁸ CP(Olive) 114. Olive asserted that had he been aware of the actual standard range for the crime, he would have taken one of the plea offers made by the State. Id.

The trial prosecutor, Sean O'Donnell, submitted a declaration stating that he had never extended a plea offer to either defendant. CP(Washington) 121-22. He further stated that he had confirmed with his supervisors that, prior to the case being assigned to him, no plea offers had been made to either defendant. CP(Washington) 121. He stated that he did not have the authority to reduce charges in the case and that he never sought or requested permission to reduce charges from his supervisors. CP(Washington) 122.

At the hearing on the motion for a new trial, the defendants did not present any further evidence other than their declarations. RP 958-77. In his motion and at the hearing, Washington never claimed that he would have been willing to plead guilty to some lesser charge had he been aware of the standard range for the offense. CP(Washington) 55-59; RP 961-63. The prosecutor again confirmed to the court that "there was no offer to these defendants

⁸ On appeal, Olive does not argue that he was misadvised as to sex offender registration requirements.

to plead guilty" and that "there was never any promise to reduce the charges they faced." RP 978. After hearing argument, the court denied the motion for a new trial. RP 994.

b. Standards Governing Olive and Washington's Ineffective Assistance Of Counsel Claims.

To prevail on a claim of ineffective assistance of counsel, Olive and Washington must show that "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances, and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either element of the test is not satisfied, the inquiry ends. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The State agrees that Olive and Washington's trial attorneys performed deficiently by failing to advise them as to the correct standard range for the charges. In 2007, the legislature revised the

promotion of prostitution statutes and created the crime of promoting commercial sexual abuse of a minor. Laws 2007, ch. 368. At that time, the legislature revised the Sentencing Reform Act to provide that promoting commercial sexual abuse of a minor was a level VIII offense. Laws 2007, ch. 368, § 14. Had the defense attorneys reviewed a current version of the relevant statutes, the standard range for the charges would have been readily apparent.

However, deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Strickland, 466 U.S. at 691. A defendant must affirmatively prove prejudice, not simply show that the errors had some conceivable effect on the outcome. Id. at 693. Washington and Olive argue that they suffered prejudice because had they been aware of the correct standard range, (1) they could have pled guilty to lesser charges, and (2) their attorneys would have proposed an instruction for lesser included offenses. As discussed below, neither claim has merit.

- c. Washington And Olive Failed To Show A Reasonable Probability That They Could Have Resolved The Case With A Guilty Plea To Lesser Charges.

Washington argues that his attorney's failure to appreciate the correct standard range "deprived Washington of the opportunity to pursue a beneficial plea bargain." Brief of Appellant Washington at 17. Similarly, Olive claims that his attorney's error "prevented Olive from making an informed decision regarding whether to go to trial." Brief of Appellant Joseph Olive at 10. However, in order to establish prejudice, Washington and Olive have the burden of showing that the results of the proceeding would have been different but for their attorneys' erroneous advice. Here, the results of the proceeding would have been different only if (1) the State had been willing to reduce the charges as part of a plea agreement, and (2) Washington and Olive were willing to enter into plea agreements and plead guilty. However, the evidence proffered by Olive and Washington at the motion for a new trial did not support a reasonable probability that the parties would have reached a plea agreement had they been aware of the correct standard range for the charges.

Recently, in State v. Crawford, 159 Wn.2d 86, 147 P.3d 1288 (2006), the Washington Supreme Court rejected a similar ineffective assistance of counsel claim. Crawford was charged with first-degree robbery and second-degree assault. Prior to trial, the State offered to recommend a sentence at the low end of the standard range if Crawford pled guilty, but he declined the offer. Id. at 91. The defense counsel and the prosecutor subsequently learned that Crawford had a prior Kentucky conviction for first-degree sex abuse, but they did not investigate the conviction to determine whether it qualified as a strike offense. Id. Several weeks after trial, the prosecutor determined that Crawford's Kentucky conviction qualified as a strike offense, and that he was subject to a life sentence as a persistent offender. Id.

In a post-trial motion, Crawford argued that he had received ineffective assistance of counsel. He testified that if he had known that he faced a potential life sentence, he would have accepted the State's earlier plea offer. Id. The trial court denied the motion and imposed a life sentence. Id. at 92.

On appeal, the Washington Supreme Court affirmed Crawford's convictions and sentence, rejecting his ineffective assistance of counsel claim. The court held that Crawford's trial

attorney had performed deficiently by not determining that Crawford faced sentencing as a persistent offender. Id. at 98-99. However, the court concluded that Crawford had failed to establish that he suffered prejudice. Id. at 99-102.

Even though Crawford testified that he would have pleaded guilty to a lengthy sentence rather than proceed to trial had he known that he faced a possible third strike, he does not establish a "reasonable probability that, but for" his counsel's deficient performance, he would have avoided a life sentence....

Crawford presents no evidence that the prosecutor would have offered to allow him to plead guilty to a lesser offense had the parties understood the Kentucky conviction to be a strike offense.

Id. at 100.

Here, as in Crawford, neither Olive nor Washington established that the prosecutor was willing to reduce the charges. The prosecutor submitted a declaration stating that neither he nor his supervisors made plea offers to either defendant. CP(Washington) 121-22. The prosecutor noted that he would have been required to seek the approval of his supervisor and the input of the victims before making any offer, and he never did so. CP(Washington) 122.

Washington's attorney acknowledged that the prosecutor never made any plea offers, despite an invitation to do so from the defense. CP(Washington) 95-97. In fact, when he moved for a new trial, Washington did not argue that he suffered prejudice because he might have resolved the case with a plea to reduced charges; instead, he argued only that he suffered prejudice because his attorney did not ask for an instruction on a lesser included offense. CP(Washington) 55-59; RP 961-63. Accordingly, when he moved for a new trial, Washington failed to establish that but for his counsel's erroneous advice, he would have pled guilty to reduced charges.⁹

Olive's trial attorney also acknowledged that the prosecutor had not made any plea offers. Instead, in her declaration, she stated that when she contacted the prosecutor about Olive pleading to a reduced charge, the prosecutor conveyed that "he would not offer a deal unless both co-defendants plead guilty."

⁹ On appeal, Washington, citing to Olive's claim that the State made an offer to dismiss one count, argues that "it is reasonable to assume Washington would have been given plea offers at least equivalent to Olive's...." Brief of Appellant Washington at 21. This claim is inconsistent with the declarations of the prosecutor and Washington's trial attorney, both of whom acknowledged that no plea offers were ever made. Moreover, as discussed below, Olive's claim that the State made a plea offer was contradicted by the representations of his own attorney and the prosecutor.

CP(Olive) 105. Olive's counsel did not claim that the prosecutor ever made an actual offer to reduce or dismiss any of the charges.

Inconsistently, in his declaration, Olive claimed that his attorney told him the State made two plea offers: (1) he could plead guilty as charged and receive a 20-month sentence, or (2) the State would dismiss one count, he could plead guilty to the remaining count, and the prosecutor would recommend 9 to 12 months.

CP(Olive) 113. However, the claim that plea offers were made to Olive was inconsistent with the representations of all of the attorneys involved in the trial.

When he moved for a new trial, Olive's new attorney acknowledged the inconsistency, but made no attempt to reconcile this discrepancy. RP 976. Olive did not testify or seek to present testimony from anyone who could confirm that a plea offer had been made.¹⁰ Given that it was Olive's burden to establish that he suffered prejudice, the inconsistent declarations submitted with his

¹⁰ In fact, the prosecutor subpoenaed both defense attorneys to appear at the hearing on the motion for a new trial, but neither appeared. RP 958-59.

motion were insufficient to establish that the State ever offered to resolve the case with reduced charges.¹¹

Washington and Olive's claim further fails because they did not establish that, but for their attorneys' erroneous advice, they would have pled guilty to reduced charges. The fact that their attorneys discussed possible plea resolutions with the State does not establish that either man was actually willing to plead guilty. See, e.g., Coulter v. Herring, 60 F.3d 1499, 1504 (11th Cir. 1995). In fact, with respect to Washington, he offered no evidence that he was ever willing to plead guilty to any charge. Washington did not submit a declaration or provide any testimony. His trial attorney submitted a declaration, but did not claim that Washington was ever willing to plead guilty. CP(Washington) 95-97. There is no basis to believe that Washington would have been willing to plead guilty had

¹¹ The State further observes that the described plea offers are not consistent with the standard range that Olive would have faced on a level III offense. With respect to the first purported offer to plead guilty as charged, Olive would not have faced 20 months if he pled guilty to two level III offenses. Instead, he would have faced his standard range of 9 to 12 months based upon an offender score of 3. RCW 9.94A.510. With respect to the second purported plea offer to plead guilty to one count and the State would recommend 9 to 12 months, Olive would have faced a standard range of only 1 to 3 months. Id. Similarly, the recommended sentences are not consistent with the standard ranges for level VIII offenses. Id.

the State made a plea offer and had he understood the standard range that he faced on the charges.

In contrast, Olive submitted a declaration in which he claimed that, had he been aware of the standard range on the charges, he would have "taken one of the plea offers made by the State." CP(Olive) 114. In her declaration, Olive's trial attorney did not claim that Olive expressed an interest in pleading guilty. Nor did she provide any information about any plea discussions that she had with Olive. At the motion for a new trial, Olive provided no further evidence indicating that he would have been willing to enter a guilty plea to lesser charges.

Olive's after-the-fact, self-serving assertion that he was willing to plead guilty to lesser charges is insufficient to establish prejudice. In State v. Cox, 109 Wn. App. 937, 940-41, 38 P.3d 371 (2002), Cox claimed on appeal that he would have accepted the State's offer to plead guilty to a reduced charge of fourth-degree assault had his attorney advised him that he was facing one year of community placement if he was convicted of third-degree assault. The Court of Appeals held that Cox's after-the-fact, self-serving claims were insufficient to establish that he suffered prejudice.

Mr. Cox invites us to speculate about why he rejected the plea offer. Offering his self-serving statement is too tenuous a basis for us to decide prejudice resulted from the type of deficiency alleged by Mr. Cox. Accepting such an argument could easily "lead to an unchecked flow of easily fabricated claims." In re Alvernaz, 2 Cal.4th 924, 938, 8 Cal.Rptr.2d 713, 830 P.2d 747 (1992). The Alvernaz court considered a claim of ineffective counsel and prejudice in a nearly exact context as here:

In this context, a defendant's self-serving statement-after trial, conviction, and sentence-that with competent advice he or she *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims.

Id. at 941-42; see also Toro v. Fairman, 940 F.2d 1065, 1068 (7th Cir. 1991); Diaz v. United States, 930 F.2d 832, 835 (11th Cir. 1991).

Here, Olive provided nothing more than an after-the fact, self-serving declaration that he would have been willing to plead guilty had the State offered a plea deal. His attorney never suggested that Olive was ever willing to admit guilt. In fact, at sentencing, Olive insisted that he went to trial because "I know in my heart that I'm not guilty." RP 1013. The evidence was insufficient to establish a reasonable probability that Olive would

have pled guilty had he been aware of his proper standard range and had the prosecutor offered a plea deal.

In contrast, in the case cited by Olive and Washington, In re Personal Restraint of McCready, 100 Wn. App. 259, 996 P.2d 658 (2000), the State made a plea offer that the defendant rejected based upon erroneous advice from his attorney. The State had agreed to reduce the first-degree assault charge to second-degree assault. Defense counsel failed to tell McCready that, as charged, he was facing a minimum 10 years in prison, and McCready rejected the offer and was convicted at trial. Id. at 261-62.

A two-judge plurality held that McCready had established ineffective assistance of counsel and was entitled to a new trial. The court found that defense counsel's performance was deficient and that McCready's "rejection of the plea offer was not voluntary because he did not understand the terms of the proffered plea bargain *and the consequences of rejecting it.*" 100 Wn. App. at 263 (emphasis in original). The court further concluded that had McCready been aware of the mandatory minimum sentence that he was facing he might have accepted the plea deal. Id. at 265.

Here, in contrast with McCready, no such plea offer was ever made or rejected. Moreover, the evidence was scant that

even had such an offer been made, either defendant would have accepted it. Accordingly, because Olive and Washington did not establish a reasonable probability that, had they been aware of the correct standard range on the charges, they would have resolved the case with pleas to lesser charges, the trial court properly denied the motion for a new trial.

d. Olive and Washington Were Not Entitled To A Lesser Included Instruction.

Olive and Washington also claim that they suffered prejudice because their attorneys did not propose that the trial court instruct the jury on attempted promoting commercial sexual abuse of a minor as a lesser included offense. However, had the defense attorneys proposed such an instruction, the trial court would properly have declined to give it.

At trial, neither defense counsel proposed a lesser included instruction for attempted promoting commercial sexual abuse of a minor. Instead, Olive's counsel requested that the court instruct the jury on attempted second-degree promoting prostitution as a lesser included offense. RP 822-23; CP(Olive) 36-43. The State opposed the instruction, arguing that the evidence at trial did not support the

giving of the instruction. RP 822-27. The court declined to give it, agreeing that it was not factually supported. RP 829. As part of the motion for new trial, Olive's counsel claimed that based upon "strategic considerations," she did not ask the court to instruct the jury on attempted promoting commercial sexual abuse of a minor as a lesser included offense. CP(Olive) 105. Washington's counsel made a similar claim. CP(Washington) 97.

An ineffective assistance of counsel claim based upon the failure to propose an instruction for a lesser included offense fails if the trial court would properly have declined to give the instruction. State v. Shcherenkov, 146 Wn. App. 619, 629-30, 191 P.3d 99 (2008), rev. denied, 165 Wn.2d 1037 (2009). A defendant has the right to have a lesser included offense presented to the jury if (1) all the elements of the lesser offense are necessary elements of the charged offense (the legal prong) and (2) the evidence supports an inference that only the lesser crime was committed (the factual prong). State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006).

Under the factual prong of this test, "the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." State v.

Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000)

(emphasis in original). The evidence must affirmatively establish the defendant's theory of the case; it is not enough that the jury might disbelieve the evidence pointing to guilt. Id. at 456.

Here the evidence did not raise an inference that Olive and Washington only *attempted* to commit the crime of promoting commercial sexual abuse of a minor. Rather, the evidence established that they committed the completed crime.

A person promotes the commercial sexual abuse of a minor if, among other things, he engages in any conduct designed to institute, aid or facilitate the commercial sexual abuse of the minor. RCW 9.68A.101. Commercial sexual abuse of a minor occurs when a person pays a minor to engage in sexual contact with him. RCW 9.68A.100.

The evidence established that Olive and Washington did not simply attempt to commit the crime; they committed the completed crime. They initiated and facilitated the girls' acts of prostitution. Both men pressured the two girls into acting as prostitutes as a way of making money. The men transported both girls to an area to

work as prostitutes. As instructed, both girls then committed acts of prostitution.

Washington argues that his involvement was so brief and vague that an instruction on the attempted crime was appropriate. However, the evidence established that Washington actively assisted and encouraged the girls to work as prostitutes. Washington told C.J. that she needed to make money and encouraged her to do so by working as a prostitute. RP 690-91, 717. C.W. and C.J. were instructed to report to Washington each time they finished with a trick, and they did so. RP 222, 708. On the first night, Washington received some of the money that C.W. made working as a prostitute, and he rented a room for her to spend the night. RP 226-27.

Because this evidence did not permit a jury to rationally find that the defendants were guilty of only attempting to commit the crime, the trial court would properly have declined to give a lesser included instruction, if requested. Olive and Washington have not shown that they were prejudiced by their attorneys' failure to propose a lesser included instruction for the attempted crime.

2. A UNANIMITY INSTRUCTION WAS UNNECESSARY BECAUSE THE EVIDENCE ESTABLISHED A CONTINUING COURSE OF CONDUCT.

Olive and Washington claim that the trial court should have given a unanimity instruction.¹² However, such an instruction is not required when the defendant's acts constitute a continuing course of conduct. This Court has repeatedly recognized that a defendant's acts of promoting prostitution may qualify as a continuing course of conduct. In this case, a commonsense evaluation of the facts establishes that Olive and Washington were engaged in a continuing course of conduct when they pressured C.W. and C.J. into making money for them by working as prostitutes. A unanimity instruction was not required.

At trial, no party proposed a unanimity instruction, and neither Olive nor Washington took exception to the trial court's failure to instruct the jury with a unanimity instruction. CP(Olive) 70-87; RP 829-36. Instead, after the verdict, Olive and Washington moved for a new trial, claiming, among other things, that the trial

¹² Washington raises this issue directly, while Olive asserts it in the context of an ineffective assistance of counsel claim. The State addresses the issue as if raised directly by both parties; the Washington Supreme Court has held that a defendant can raise the failure to give a unanimity instruction for the first time on appeal. State v. Bobenhouse, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009).

court erred in failing to include a unanimity instruction. CP(Olive) 95-99; CP(Washington) 58-59. The trial court rejected this claim. RP 994.

A defendant has a constitutional right to be convicted by a jury that unanimously agrees that the crime charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When there is evidence that several distinct criminal acts have been committed and the State has not elected the act upon which it relies for conviction, the trial court should provide the jury with a unanimity instruction. 101 Wn.2d at 572.

A unanimity or Petrich instruction is required "only where the State presents evidence of 'several distinct acts.'" State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (quoting Petrich, 101 Wn.2d at 571). However, when the State presents evidence of multiple acts that indicate a "continuing course of conduct," a unanimity instruction is not required. Handran, 113 Wn.2d at 17; State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). The court reviews the facts in a commonsense manner to determine if the criminal conduct constituted one continuing act. Handran, 113 Wn.2d at 17.

As Washington acknowledges, the elements of the crime of promoting prostitution are very similar to the elements of the crime of promoting commercial sexual abuse of a minor.¹³ This Court has repeatedly recognized that a defendant's acts of promoting prostitution may constitute a continuing course of conduct. In State v. Gooden, 51 Wn. App. 615, 754 P.2d 1000 (1988), Gooden pressured two teenage girls into working as prostitutes for a ten-day period. After he was convicted of two counts of first-degree promoting prostitution, he claimed that the court should have given a unanimity instruction. This Court rejected the claim, holding:

Promoting prostitution is a continuing course of conduct which falls within the Petrich exception. In the case sub judice, the State needed only to prove that Gooden advanced or promoted prostitution; the State met that burden. Gooden used W and V to promote an enterprise with a single objective. That objective was to make money. The enterprise or continuing course of conduct occurred over a 10-day period in which Gooden was in constant association with the girls. He took all of W's money, provided shelter for both of the girls, bought them new clothes, told them what to charge for various sex acts and what to say when questioned about their age, drove them to spots known for prostitution or rented them motel rooms,

¹³ A person commits the crime of promoting commercial sexual abuse of a minor when he knowingly advances the commercial sexual abuse of a minor or profits from a minor engaged in sexual conduct. RCW 9.68A.101(A). The terms "advance" and "profit" in this statute are defined virtually identical to the terms in the promotion of prostitution statute. Compare RCW 9.68A.101(3) with RCW 9A.88.060.

and had them report back and give him the money they earned.

Id. at 620.

Similarly, in State v. Barrington, 52 Wn. App. 478, 761 P.2d 632 (1988), this Court held that a unanimity instruction was not required where there was evidence that the defendant promoted prostitution over a 3-month period of time. The court observed that the testimony about various incidents of prostitution was "primarily illustrative of the nature of the enterprise rather than solely descriptive of separate distinct acts or transactions." Id. at 481.

The court further explained:

Here the uncontroverted evidence persuasively pointed to the promotion of a prostitution enterprise conducted over a period of about three months in which Barrington received the profits from Lott's prostitution, not separate distinct acts occurring in a separate time frame and identifying place as in Petrich. Neither a unanimity instruction nor an election was necessary.

Id. at 482; see also State v. Elliott, 114 Wn.2d 6, 14, 785 P.2d 440 (1990) (holding that a commonsense evaluation of the facts established that the promoting prostitution charges were based on continuous courses of conduct); State v. Doogan, 82 Wn. App. 185, 191-92, 917 P.2d 155 (1996) (holding that no unanimity instruction was required for promotion of prostitution charge where evidence

showed that defendant ran an escort service that provided prostitutes).

In this case, the evidence, the charging documents, and jury instructions demonstrated that the charges related to a continuing course of conduct, rather than distinct acts. The testimony established that Olive and Washington encouraged and pressured the girls into working as prostitutes, transported them to an area to work as prostitutes and demanded that the girls turn over any money they made. As in Gooden and Barrington, the defendants used C.J. and C.W. to promote an enterprise with a single objective: to make money for the men through the girls' acts of prostitution.

Consistent with a theory of a continuing course of conduct, the charging period in the information covered a period of time. With respect to C.W., the period charged was from January 4, 2008 through January 12, 2008. CP(Olive) 2; CP(Washington) 2. With respect to C.J., the period charged was from January 4, 2008 through January 5, 2008. CP(Olive) 1; CP(Washington) 2. The to-convict instructions for the charges also instructed the jury to consider those periods of time, not a single date or incident. CP(Olive) 29-31; CP(Washington) 29-31. Because the promoting

commercial sexual abuse of a minor counts related to a continuing course of conduct, no unanimity instruction was necessary.

Olive and Washington attempt to distinguish Barrington and Gooden by arguing (1) that C.J.'s foray into prostitution was too brief to constitute a continuing course of conduct, and (2) C.W.'s work for them was interrupted by a period when she worked for another man.¹⁴ This attempt to distinguish the caselaw by pointing to minor factual differences is unpersuasive. In Gooden and Barrington, the court recognized that there was a continuing course of conduct because the defendant's overall scheme was to make money by promoting the prostitution of women. The same facts are present here. The length of time that the women worked for the defendants is not dispositive.

Finally, Washington argues that Gooden and Barrington were wrongly decided, that they are "outliers" in the continuing course of conduct line of cases, and that other continuing course of

¹⁴ Washington argues that there were two periods where he acted as C.W.'s pimp, interrupted by a period where she worked for another man. Brief of Appellant Washington at 31. In fact, the testimony was that after the initial period working for Olive and Washington, C.W. did not meet up with them again before the police picked her up. RP 269-71.

conduct cases involve much shorter time periods. In fact, the cases are not outliers; the Washington Supreme Court has cited them with approval. Elliott, 114 Wn.2d at 14. In a wide variety of cases, the appellate courts have held that the evidence established a continuing course of conduct where the acts at issue occurred over extended periods of time.¹⁵ While the time period at issue is certainly a factor to consider, it is not determinative. Instead, the court conducts a commonsense evaluation of all the facts to determine whether the evidence established a continuing course of conduct. Because Washington has not shown that Gooden and Barrington were wrongly decided, this Court should reject his claim that a unanimity instruction was required.

¹⁵ See State v. Dingman, 149 Wn. App. 648, 665, 202 P.3d 388, rev. denied, 166 Wn.2d 1037 (2009) (holding that the evidence established a continuing course of conduct in a theft case where the homeowners made separate payments to the defendant over an extended period of time); State v. Simonson, 91 Wn. App. 874, 883-84, 960 P.2d 955 (1998) (holding that no unanimity instruction was required where evidence showed defendant and girlfriend committed a single continuous methamphetamine manufacturing offense during a six-week period); State v. Dyson, 74 Wn. App. 237, 250, 872 P.2d 1115 (1994) (holding that unanimity instruction was not required for telephone harassment charge because defendant was engaged in a continuing course of conduct when he repeatedly called the victim over a one-month period).

D. **CONCLUSION**

For all the foregoing reasons, this Court should affirm Olive's and Washington's convictions.

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Respectfully submitted,

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