

NO. 63476-3-I

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

REC'D  
OCT 30 2009  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

STEVEN LEONARD,

Appellant.

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

The Honorable Michael C. Hayden, Judge

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 OCT 30 11:45

BRIEF OF APPELLANT

JENNIFER M. WIKLER  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issue Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Charge, Conviction, and Sentence</u> .....	2
2. <u>Pretrial Motion to Exclude Evidence of Leonard's Reputation as a Promoter of Prostitution or "Pimp"</u> .....	3
3. <u>Opening Statements and Aftermath</u> .....	3
4. <u>Trial Testimony</u> .....	6
a. <u>Testimony of State's Witnesses</u> .....	6
b. <u>Leonard's Testimony</u> .....	15
C. <u>ARGUMENT</u> .....	19
1. THE DENIAL OF CONFLICT-FREE COUNSEL DURING A CRITICAL STAGE OF PROCEEDINGS VIOLATED LEONARD'S RIGHT TO COUNSEL AND TO DUE PROCESS.....	19
a. <u>The Trial Court Denied Leonard the Right to Conflict-Free Assistance of Counsel</u> .....	20
b. <u>Leonard Can Demonstrate an "Actual Conflict" Warranting a Presumption of Prejudice</u> .....	24
c. <u>Leonard Made no Knowing, Voluntary, and Intelligent Waiver of Counsel</u> .....	27
d. <u>The Remedy is a New Trial on All Counts</u> .....	29

**TABLE OF CONTENTS (CONT'D)**

	Page
2. COUNSEL’S ACQUIESCENCE TO THE COURT’S IMPROPER ASSIGNMENT OF DECISION-MAKING DENIED LEONARD EFFECTIVE ASSISTANCE OF COUNSEL .....	29
a. <u>The Trial Court and Counsel Denied Leonard Effective Assistance of Counsel</u> .....	30
b. <u>Leonard has Shown Prejudice Because the Trial Court Stated it would have Granted a Mistrial after Defense Counsel Opened the Door to the Damaging Evidence</u> .....	31
c. <u>Leonard Has Also Shown Prejudice Because the Evidence Likely Altered the Jury’s Verdict on All Counts</u> .....	33
D. <u>CONCLUSION</u> .....	35

**TABLE OF AUTHORITIES**

	Page
<u>WASHINGTON CASES</u>	
<u>Bellevue v. Acrey</u> 103 Wn.2d 203, 691 P.2d 957 (1984).....	27, 28
<u>Heinemann v. Whitman County</u> 105 Wn.2d 796, 718 P.2d 789 (1986).....	20
<u>In re Pers. Restraint of Stenson</u> 142 Wn.2d 710, 16 P.3d 1 (2001).....	26, 30
<u>In re Personal Restraint of Jeffries</u> 110 Wn.2d 326, 752 P.2d 1338 cert. denied, 488 U.S. 948 (1988).....	26
<u>In re Richardson</u> 100 Wn.2d 669, 675 P.2d 209 (1983).....	21
<u>State v. Agtuca</u> 12 Wn. App. 402, 529 P.2d 1159 (1974).....	20
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	30
<u>State v. Bacotgarcia</u> 59 Wn. App. 815, 801 P.2d 993 (1990).....	33
<u>State v. Cross</u> 156 Wn.2d 580, 132 P.3d 80 (2006).....	25, 30
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	31
<u>State v. DeWeese</u> 117 Wn.2d 369, 816 P.2d 1 (1991).....	27
<u>State v. Dhaliwal</u> 150 Wn.2d 559, 79 P.3d 432 (2003).....	22

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Dickerson</u> 69 Wn. App. 744, 850 P.2d 1366 <u>review denied</u> , 122 Wn.2d 1013 (1993) .....	26, 30
<u>State v. Escalona</u> 49 Wn. App. 251, 742 P.2d 190 (1987).....	31
<u>State v. Harell</u> 80 Wn. App. 802, 911 P.2d 1034 (1996).....	20
<u>State v. Hernandez</u> 99 Wn. App. 312, 997 P.2d 923 (1999).....	32, 33
<u>State v. Jensen</u> 125 Wn. App. 319, 104 P.3d 717 (2005).....	21, 24
<u>State v. Johnson</u> 124 Wn.2d 57, 873 P.2d 514 (1994).....	31
<u>State v. Kylo</u> __ Wn.2d __, 215 P.3d 177 (2009).....	26, 33
<u>State v. Ra</u> 144 Wn. App. 688, 175 P.3d 609 <u>review denied</u> , 164 Wn.2d 1016 (2008) .....	31, 33
<u>State v. Robinson</u> 79 Wn. App. 386, 902 P.2d 652 (1995) .....	20, 24
<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997).....	28
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	30
<u>State v. Trickler</u> 106 Wn. App. 727, 25 P.3d 445 (2001).....	32

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Vermillion</u> 66 Wn. App. 332, 832 P.2d 95 (1992) <u>review denied</u> , 120 Wn.2d 1030 (1993) .....	27
<u>State v. Wade</u> 98 Wn. App. 326, 989 P.2d 576 (1999).....	32, 33
 <u>FEDERAL CASES</u>	
<u>Argersinger v. Hamlin</u> 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).....	27
<u>Chapman v. California</u> 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	20
<u>Cuyler v. Sullivan</u> 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).....	21-23, 29, 35
<u>Douglas v. United States</u> 488 A.2d 121 (D.C.App.1985) .....	23, 25, 28
<u>Faretta v. California</u> 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).....	27
<u>Frazer v. United States</u> 18 F.3d 778 (9th Cir.1994) .....	24
<u>Glasser v. United States</u> 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942).....	29
<u>Johnson v. Zerbst</u> 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).....	21
<u>McConico v. Alabama</u> 919 F.2d 1543 (11 <sup>th</sup> Cir. 1990) .....	29
<u>Mickens v. Taylor</u> 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).....	21

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>Powell v. Alabama</u> 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).....	25
<u>Stoia v. United States</u> 22 F.3d 766 (7 <sup>th</sup> Cir. 1994) .....	25
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) .....	21, 25, 29, 30, 34, 35
<u>United States v. Ash</u> 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973).....	21
<u>United States v. Ellison</u> 798 F.2d 1102 (7 <sup>th</sup> Cir. 1986) <u>cert. denied</u> , 479 U.S. 1038 (1987).....	22, 23, 25, 27, 28
<u>United States v. Hurt</u> 543 F.2d 162 (D.C. Cir. 1976).....	22
<u>United States v. Miskinis</u> 966 F.2d 1263 (9 <sup>th</sup> Cir. 1992) .....	22
<u>United States v. Sanchez-Barreto</u> 93 F.3d 17 (1 <sup>st</sup> Cir. 1996).....	22, 23, 25, 28
<u>United States v. Soldevila-Lopez</u> 17 F.3d 480 (1 <sup>st</sup> Cir. 1994).....	22
<u>Wood v. Georgia</u> 450 U.S. 262, 90 S. Ct. 1097, 25 L. Ed. 2d 763, (1981).....	21

**RULES, STATUTES AND OTHER AUTHORITITES**

ER 404 .....	3, 31, 32, 33
RPC 1.2.....	26, 30

**TABLE OF AUTHORITIES (COTN'D)**

	Page
U.S. Const. Amend. VI.....	20, 28, 30
Wash. Const. art. 1, § 22.....	20, 30
Washington Practice: Evidence § 404.31 5 Karl B. Tegland (5 <sup>th</sup> Ed. 2007) .....	32

A. ASSIGNMENTS OF ERROR

1. Ineffective assistance of counsel denied appellant a fair trial.
2. The trial court erred in denying appellant the conflict-free assistance of counsel.
3. The trial court erred in assigning to appellant the tactical decision whether to seek a mistrial.

Issue Pertaining to Assignments of Error

The state and federal constitutions guaranty an accused the right to conflict-free counsel at all critical stages of criminal prosecution. In opening statements, defense counsel inadvertently opened the door to damaging propensity evidence the court previously ruled it would exclude. Apparently realizing defense counsel was no longer in a position to advise the appellant, the trial court required the appellant to decide pro se whether to move for a mistrial, given the fact the door was now open to the propensity evidence. Appellant decided to proceed with trial.

- a. Did the denial of conflict-free counsel during a critical stage of proceedings deny appellant his right to a fair trial and to due process?
- b. Was counsel's improper acquiescence to the trial court's erroneous assignment of decision-making authority ineffective assistance denying appellant a fair trial?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Charge, Conviction, and Sentence

The State charged Steven Leonard with two counts of second degree child rape and one count of promoting commercial sexual abuse of a minor. CP 1-7. The crimes were alleged to have occurred January 9 through January 17, 2008. The complainant was C.V., a 12-year-old who ran away from her family on January 9. CP 6-7.

At trial, the State was unable to present DNA evidence conclusively establishing Leonard and C.V. had sexual intercourse. 6RP 19-25, 27-29, 177-78. However, C.V. testified the two repeatedly did so over the five-day period she was away from home. She also said she engaged in an act of prostitution after Leonard explained how to do so. 4RP 66, 81, 99, 103-10. In contrast, Leonard admitted he and C.V. spent a number of days together, but he denied they had sex and that he encouraged her to engage in prostitution. 7RP 190-91, 193. He also testified he was never aware of C.V.'s true age and believed she was 16 until shortly before C.V. returned to her family. 7RP 184-85, 188.

---

<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – 3/12/09; 2RP – 3/30/09; 3RP – 3/31/09; 4RP – 4/1/09; 5RP – 4/2/09; 6RP – 4/6/09; 7RP – 4/7/09; 8RP – 4/8/09; 9RP – 5/1/09; and 10RP – opening statements (3/30/09).

A jury convicted Leonard as charged. CP 30-32. The court sentenced him to 280 months to life on counts 1 and 2 and to 120 months on count 3. CP 68-78.

2. Pretrial Motion to Exclude Evidence of Leonard's Reputation as a Promoter of Prostitution or "Pimp."

Leonard moved to exclude testimony he was a known pimp or had a reputation as a pimp. CP 12. After hearing argument, the court reserved ruling on the matter but indicated it would likely admit such evidence, whether from Leonard or another, only if limited they addressed the charging period. CP 21; 1RP 16-21; 2RP 2-4. The testimony was otherwise inadmissible propensity evidence under ER 404(b). 1RP 21.

3. Opening Statements and Aftermath

Defense counsel argued in opening that Leonard was not a pimp by trade but instead made his living as a marijuana dealer. 2RP 19; 10RP 34, 37-38.

In an unrecorded in-chambers conference and a later on-record discussion, the parties discussed whether defense counsel thereby opened the door to statements characterizing Leonard as a pimp. 2RP 19-20, 24. Defense counsel insisted her argument was intended only as denial of the current charges. 2RP 18-19. But the court disagreed, stating, "I now find the door has been opened and the evidence can come in. The question is

does the State intend to introduce it.” 2RP 20. The State indicated it would indeed take advantage of counsel’s claims to introduce the evidence. 2RP 20.

The court then commented, “I think [that evidence] is very damaging, given the way the way the case has been presented.” 2RP 21. The court indicated it was worried about potential appellate consequences of the opening statement because such evidence undermined the defense theory that C.V. was the one who decided to perform an act of prostitution. 2RP 21; see also 10RP 39 (opening statement).

The court asked defense counsel to find out if Leonard wished to go forward with the door open and whether he was satisfied with the direction of the case. 2RP 21, 24.

Leonard and counsel conferred off the record. 2RP 22-23. Defense counsel then notified the court Leonard wished to go forward with trial. 2RP 24. Counsel stated she explained Leonard could request a mistrial and, if granted, the case would start again with jury selection. 2RP 24. Counsel also explained Leonard’s decision was against her advice because he might be waiving potential appellate issues. 2RP 24.

The court remarked,

I’ve given [Leonard] the option of starting over with a new jury pool that would not have heard this comment, and would not necessarily hear the evidence that the State

wants to get in, which is him or other people saying his reputation is a pimp.

2RP 24. The court said it would likely admit at least Leonard's self-characterization as a pimp, and reiterated such evidence would be quite damaging to the defense theory. 2RP 25-26.

On the court's direction, defense counsel and Leonard conferred again, and counsel again alerted the court Leonard wished to proceed. The court then engaged in a brief colloquy with Leonard:

[The Court]: . . . . Is that your choice, Mr. Leonard?

[Leonard]: Yes, your Honor.

[The Court]: A minute ago you had your hand raised as if you wanted to say something to the Court.

Are you satisfied you don't have any more questions of the Court?

[Leonard]: No, no further questions, your Honor.

. . . .

[The Court]: And you would like to proceed, given the status of the case as it sits right now?

[Leonard]: Yes, your Honor.

[The Court]: You understand that might take away . . . an argument on appeal?

[Leonard]: Yes, your Honor.

[The Court]: All right. And that argument would be that the lawyer shouldn't have said what . . . she said in opening statements.

[Leonard]: Yes, your Honor.

. . . .

[The Court]: All right, we'll proceed. And one more thing, [defense counsel]. I heard you say that is not your advice . . . to proceed forward?

[Defense counsel]: That's correct, your Honor.

[The Court:] All right, he's free to make up his own mind.

2RP 26-28.

The “open door” permitted the State to introduce the following evidence and argument:

- Leonard told one girlfriend, Amanda Pederson, that he promoted prostitution in the past and gave her a “look” that suggested to her that she should engage in an act of prostitution. 5RP 43-44; see also Ex. 71 (Leonard’s letter to Pederson on the subject); 7RP 219 (State’s cross-examination of Leonard on the subject).
- While watching a television program about prostitution, Leonard asked another girlfriend, K.K., if she would engage in an act of prostitution. 4RP 185-89; 7RP 219-20 (State’s cross-examination of Leonard on the subject).
- Leonard told C.V. and Leonard’s mutual acquaintance, J.K., he was a pimp some time before the events in question. 6RP 119-20.
- The State argued in closing one reason the jury should convict Leonard on count 3 was that “we know he is a pimp from his own mouth.” 8RP 72-73.

The above testimony appears in context in the following section.

#### 4. Trial Testimony

##### a. Testimony of State’s Witnesses

C.V. attended middle school in north Seattle. 4RP 47-49. On January 9, C.V. was supposed to go to the Boys and Girls Club after

school, but she decided to take the bus downtown with a friend. 2RP 111; 4RP 52.

Once downtown, C.V. and the friend separated, and C.V. decided to use the bathroom at Westlake Center before returning north. 4RP 54, 141. Leonard approached C.V. and introduced himself. 4RP 55. He asked C.V. if she wanted to hang out with his friends, including J.K., a longtime acquaintance of C.V. 4RP 55. C.V. agreed because she knew J.K. and the group appeared to be having fun. 4RP 55, 57-58. C.V. estimated the young men were 17-20 years old, except for J.K., who was perhaps a year or two older than C.V. 4RP 57-58. C.V. told the group she was older than her true age. 4RP 59-60. She might have told them she was turning 14 or might have said she was older. 4RP 59-60.

C.V. decided to follow when an offshoot of the original group, J.K., Leonard, and another young man, Pierre, boarded a bus bound for Federal Way. 4RP 60. C.V. and J.K. sat together on the bus. 4RP 61-62. J.K. suggested it might be unwise for C.V. to spend time with the group, but C.V. shrugged off the advice because she was having fun. 4RP 62-63. J.K. recalled warning C.V. that Leonard was a pimp, a fact she learned from Leonard some time earlier. 6RP 103, 119-20.

The group departed the bus at the Redondo Heights park-and-ride in Federal Way. 4RP 63. C.V. and Leonard walked away from the other

two to a secluded area. 4RP 65. Leonard suggested C.V. perform oral sex on him, and C.V. agreed. 4RP 65. Afterward, Leonard ran ahead and spoke with J.K. and Pierre. 4RP 67. C.V. did not hear what was discussed, but J.K. ran toward C.V. and told her Leonard wanted C.V. to do to J.K. what she did to Leonard. 4RP 68-69; 6RP 110-11. C.V. agreed. 4RP 70. J.K. and C.V. went to secluded location and had unprotected penile-vaginal intercourse. 4RP 70; 6RP 111-12. Afterward, J.K. ran ahead and Pierre approached C.V. 4RP 70. The two also had sex. 4RP 72; 6RP 113. "Pierre" was later identified as Marlin Holmes. 5RP 131-34.

Afterward, all four boarded a bus bound for downtown Seattle. 4RP 75. C.V. still planned to go to the Boys and Girls Club, but Leonard convinced her to spend more time with him. 4RP 75. C.V. called her grandmother and said she planned to spend the night with a friend and the friend's parents would call to confirm. 4RP 75. When C.V.'s grandmother refused, they argued and the call ended abruptly. 4RP 75. C.V. told Leonard she did not want to return home because her uncle beat her, even though that was not true. 4RP 78-79. Leonard promised to protect C.V. 4RP 78.

On Leonard's suggestion, the two got off the bus and had unprotected sex. According to C.V., Leonard ejaculated in her vagina.

4RP 81. C.V. threw her phone down a drain because she did not want anyone to find her. 4RP 89. The two boarded another bus for the Pike Place Market. 4RP 82. C.V. testified Leonard introduced C.V. to some friends as “Baby.” 4RP 83-84.

Later that night, the two arrived at Amanda Pederson’s apartment in West Seattle. 4RP 85-86, 154. Pederson pulled C.V. aside and asked her age. 4RP 86. C.V. replied she was “turning 13 or 14.” 4RP 86. C.V. and Leonard slept near each other on the floor of Pederson’s room but did not have sex. 4RP 88, 158. Pederson slept on her bed. 4RP 88.

The next day, Leonard took C.V. to the home of his fiancée, K.K.<sup>2</sup> 4RP 92. According to K.K., Leonard introduced C.V. as a “surprise” for K.K., which K.K. did not understand. 3RP 190; 4RP 7. K.K. testified she urged Leonard to take C.V. home, but Leonard explained he was reluctant to do so because C.V. had a bad home life. 4RP 8.

C.V. testified K.K. asked C.V. her age while Leonard was out of the room. 4RP 93-94. C.V. said she was turning 13 or 14. 4RP 93-94. According to C.V., Leonard did not confront C.V. on her age until the following day. 4RP 94, 175. At that point, C.V. lied, saying that she was 13. 4RP 94. Leonard did not seem concerned. 4RP 94-95.

---

<sup>2</sup> “K.K.” is the nickname of K.F., who was 17 at the time of trial. 3RP 172-73.

After leaving K.K.'s residence, Leonard and C.V. spent the night on the floor at Pederson's apartment. 4RP 11-14, 42, 97. C.V. testified she and Leonard had unprotected sex quietly because Pederson was in the room. 4RP 97, 99-100, 161-62.

The next morning, Leonard told C.V. he had no more marijuana to sell and they were running out of money. 4RP 103. Leonard claimed it would be easy for C.V. to commit an act of prostitution and mentioned K.K. and Pederson had previously earned money that way. 4RP 104. Leonard advised C.V. what to charge for different acts and how to attract the attention of passing cars. 4RP 106. He promised to look out for C.V. 4RP 107.

C.V. eventually succeeded in signaling to a man in a minivan. 4RP 108-09. C.V. provided the man oral sex in exchange for \$38. 4RP 109. The man drove C.V. to a nearby 7-Eleven, where she bought food and gave the rest of the money to Leonard. 4RP 111.

Back in Seattle, Leonard and C.V. drank alcohol together and spent the night in a shed near Pederson's house because Pederson was unable to provide a place to stay that night. 4RP 112. C.V. and Leonard had unprotected sex again. 4RP 112. C.V. left the pair of red underpants she had been wearing since running away in the shed and later borrowed a pair of black underpants from Pederson. 4RP 114, 127, 164.

After Leonard's arrest, police collected the red underpants and two blankets from the shed. 2RP 75-79; 3RP 145-52; 5RP 50. According to the State's forensic expert, underpants may be a fruitful source of DNA in sex cases because sperm is likely to leak there. 6RP 22-25. Indeed, forensic testing revealed C.V.'s and Marlin Holmes's DNA on the red underpants. 5RP 131-34; 6RP 29-30. C.V.'s DNA and DNA from an unknown male appeared on the black underpants. 6RP 26-27.

The expert excluded Leonard as the DNA donor as to the underpants. 6RP 19-22, 27-29. Testing did reveal Leonard's DNA and the DNA of an unknown female, but not C.V., on a blanket Pederson lent Leonard that police found in the shed. 5RP 50; 6RP 32-42.

The next day C.V. drank alcohol and vaguely recalled spending time with a large group at the SeaTac airport. 4RP 117. C.V. did not recall having sex with a man other than Leonard, but it was possible she did. 4RP 117. Once again, C.V. and Leonard spent the night at Pederson's apartment. The two again had had unprotected intercourse. 4RP 117-18.

The next day, January 13, C.V. went downtown with Pederson and Leonard. While downtown, C.V.'s uncle drove up and escorted her into a waiting car.<sup>3</sup> 4RP 121.

C.V. had a sexual assault examination the following day. 4RP 122; 6RP 150. C.V. told the examining physician and social worker she had sex with Leonard. She did not, however, report any sexual encounters at the park-and-ride or any act of prostitution. 3RP 138; 4RP 122. The examining physician could neither confirm nor deny C.V. had experienced sexual intercourse. 3RP 63-64. No DNA was obtained from the swabs taken from C.V.'s body during the examination. 3RP 62; 6RP 19-22.

On January 17, detectives interviewed C.V. in the presence of her aunt and uncle. 2RP 41, 93-94. C.V. again declined to mention the park-and-ride incident but acknowledged committing an act of prostitution. 4RP 123-25, 166. C.V. told the detective she received \$80, but at trial she admitted that was not true and said so because she found \$80 less embarrassing than \$38. 4RP 169-70, 174-75.

After the interview, C.V. agreed to show police where she had spent the preceding days. 4RP 129. From the police car, C.V. spotted Leonard and Pederson near Pederson's apartment. 4RP 129. Police

---

<sup>3</sup> K.K., who was jealous of C.V., called a phone number she found in C.V.'s belongings and suggested C.V.'s family look for her in downtown Seattle near the Pike Place Market. 4RP 21-24.

arrested Leonard and, shortly thereafter, searched Pederson's apartment and the shed. 2RP 63-67, 74-91.

Pederson testified she was Leonard's fiancée<sup>4</sup> and he lived with her on and off for about a year. 5RP 11-14. C.V. told Pederson she was 17 but later admitted she was only 12. 5RP 32-33, 123. Pederson did not share that information with Leonard. 5RP 32-33

The first two nights C.V. stayed with Pederson, C.V. slept on the floor next to Pederson's bed and Leonard slept on the floor by the door. 5RP 33-34. Pederson was up all night and did not observe any sexual contact between C.V. and Pederson. 5RP 31. 5RP 33-34. Because Pederson's sister stayed with her the following night, Leonard stayed elsewhere. 5RP 35-37. Pederson met up with C.V. and Leonard the following day and they again spent the night. 5RP 37-38.

Pederson testified Leonard told her had been a pimp but was not any longer. 5RP 44; 5RP 72-73 (cross-examination by defense counsel). Leonard once gave Pederson a "look" that she interpreted as a request to commit an act of prostitution. 5RP 43-44; Ex. 71. Pederson said, "No." 5RP 43. Leonard was confused about why she said no, but after Pederson

---

<sup>4</sup> Pederson testified she knew about K.K. and had threatened to leave Leonard unless he broke up with her. 5RP 42. Leonard testified that at the time of the events in question, he was in the process of finding a way to politely break up with K.K. 7RP 84.

explained, Leonard stated he would never ask her to work as a prostitute. 5RP 45.

K.K. also testified she had a conversation with Leonard regarding prostitution. While watching a television program about prostitution, Leonard asked K.K. if she would ever do that. K.K. replied "hell no." 3RP 185-86. Leonard also told K.K. he had friends involved in prostitution and on occasion pointed out pimps to K.K. 3RP 186-89.

Following his arrest, Leonard sent Pederson letters and called her from jail many times. 5RP 52-67; Exs. 47, 67-73. Leonard wanted Pederson to contact, or possibly abduct, C.V. and convince her to retract her allegations. 5RP 69-70. Pederson, however, never entertained the idea. 5RP 68. Leonard was upset when she told him she would not contact C.V., but they eventually reconciled. 5RP 70-71.

The State introduced 16 recordings of telephone calls between Pederson and Leonard and one recording of a three-way conversation between Leonard, K.K., and Pederson. 5RP 143-47; 6RP 164-71; Ex. 47.<sup>5</sup>

The State also introduced expert testimony from Detective Harry James on common characteristics of pimp-prostitute relationships. 3RP

---

<sup>5</sup> Detective William Guyer opined that during one of the calls (which are in part difficult to decipher) Leonard mentions "Marcus" putting someone to work on the "track." In Guyer's opinion, "the track" indicated the high-prostitution-activity areas of King County. 6RP 164-65; Ex. 47 (CD 1, file 7).

88-97. James acknowledged he had no personal knowledge of what occurred between C.V. and Leonard. 3RP 88, 102-04.

b. Leonard's Testimony

Leonard acknowledged he spent many days with C.V. But he denied having sexual contact with her and denied that he encouraged her to have sex with anyone else. 7RP 6-7.

The day Leonard met C.V., he and some friends, including Holmes and J.K., were hanging out downtown. 7RP 11. J.K. mentioned he saw his "home girl," C.V., walking down the street, and they decided to approach her. 7RP 10-12. Leonard estimated C.V. was between 16 and 18 years old, which C.V. later confirmed. 7RP 11, 32. C.V. introduced herself as "Baby," and J.K. and C.V. chatted while Leonard and others engaged in freestyle rap at a bus shelter. 7RP 14-15.

C.V., J.K., Leonard and Holmes eventually split off from the larger group after J.K. requested an escort home to Tukwila because he believed a rival faction wished him harm. 7RP 21-23. The four boarded the bus and C.V. and J.K. remained deep in conversation during the ride. 7RP 25-26.

The four departed the bus at the Redondo Heights park-and-ride and planned to take the local bus north through Tukwila and back to Seattle. 7RP 29. While waiting for the bus, Leonard briefly chatted with

C.V., but she left with J.K. and Leonard lost track of them for about 15 minutes while he chatted with Holmes. 7RP 38. After C.V. and J.K. returned, C.V. left with Holmes, but they returned in time to catch the bus that arrived 10 minutes later.<sup>6</sup> 7RP 44. Holmes and J.K. got off the bus in Tukwila so Holmes could see J.K. home safely. 7RP 50.

While Leonard and C.V. were chatting, C.V.'s phone rang and he heard her argue with a family member. 7RP 53, 57. C.V. complained about her family, but Leonard suggested the best course was to "tough it out." 7RP 60-62. His opinion changed when C.V. explained her uncle beat her and she showed him the bruises. 7RP 60-62. Leonard suggested C.V. stay with K.K., whom he planned to introduce to C.V. the next morning. 7RP 65-68, 83. Leonard and C.V. eventually went to Pederson's apartment and Leonard testified consistently with Pederson as to the sleeping arrangements. 7RP 82-90.

The next day, Leonard and C.V. went downtown so Leonard could sell marijuana and later went to K.K.'s house. 7RP 94-96. Leonard introduced C.V. as a "surprise" for K.K. because he believed the two would enjoy hanging out together. 7RP 97. Leonard and K.K. had sex that evening. 7RP 107. Later, Leonard was surprised to find K.K. and

---

<sup>6</sup> Although he did not know it at the time, C.V. told him later that night she had "fooled around" with both J.K. and Holmes. 7RP 192.

C.V. partially undressed and kissing in K.K.'s bedroom. 7RP 109, 269. For some reason, K.K. then retracted her offer to let C.V. stay with her, and Leonard felt compelled to leave with C.V. because he did not want to abandon her. 7RP 114. The two eventually returned to Pederson's and the sleeping arrangements were the same as the previous night. 7RP 125-26.

The next day, Leonard, Pederson, and C.V. attended a barbecue in SeaTac and eventually returned to Pederson's apartment and Leonard fell asleep almost immediately. 7RP 128-33, 146. When he drifted off, Pederson and C.V. were on Pederson's bed applying nail polish. 7RP 145-46.

Leonard and C.V. went downtown the next day and unexpectedly encountered K.K. 7RP 149. K.K. was irate and accused Leonard of sleeping with C.V., which Leonard denied. 7RP 154-56. To smooth things over, Leonard spent time with K.K. discussing their relationship, but he left her after a few hours because he had plans to sell a large amount of marijuana. 7RP 159. K.K., still jealous, accused him of leaving to spend time with C.V. 7RP 160.

Downtown again, Leonard met C.V. and Pederson, but Pederson told Leonard they could not spend the night at her house. 7RP 164-65. Leonard borrowed a blanket from Pederson and took C.V. to his brother-

in-law's residence. But because no one was home, Leonard and C.V. spent an uncomfortable night in a shed, where no sexual contact occurred. 7RP 167-68, 173. Leonard recalled C.V. left her underpants in the shed, but he did not know why she removed them in the first place. 7RP 176.

After Leonard and C.V. took showers at Pederson's residence, the three took the bus downtown. 7RP 177-82. Later that day, Leonard confronted C.V. about her age because he discovered her knowledge of popular music was lacking. 7RP 184. C.V. admitted she was not 16 but instead would soon turn 15. 7RP 184, 246.

As the three walked down Pine Street, an SUV pulled up and a large man, C.V.'s uncle, jumped out and grabbed C.V. 7RP 188. Leonard was shocked when the man accused him of "pimping" C.V. 7RP 188. Leonard came to understand the reason for the man's anger after he learned C.V. was only 12 years old. 7RP 190.

Leonard testified he never had sexual contact with C.V. 7RP 190-91. He denied encouraging C.V. to engage in prostitution and denied promoting prostitution in the past, although he knew some people, including family members, who were involved in the trade. 7RP 193, 225, 231-35, 237, 260; 8RP 14. He also denied telling Pederson, K.K., or J.K. he was a pimp. 7RP 218-25, 230-34, 242.

Leonard acknowledged writing a letter to K.K. suggesting that if asked, K.K. should explain she could have transferred Leonard's DNA to C.V. the night Leonard had sex with K.K. and he later caught C.V. and K.K. kissing and fondling each other. 4RP 33-35; 7RP 198-99; Ex. 46; see also 7RP 266-70 (cross-examination regarding phone call to K.K.). Leonard assumed police somehow found his DNA on C.V. because the State charged him with having sex with her. 7RP 198-99. Leonard explained his calls and letters to Pederson regarding C.V. were motivated by his desires to (1) have C.V. come clean about what happened, (2) get out of jail at any cost, considering the harassment he faced as an inmate charged with rape, and (3) plead to a lesser charge such as "indecent exposure." 7RP 201, 271-72; 8RP 3-5, 8; Ex. 47.

C. ARGUMENT

1. THE DENIAL OF CONFLICT-FREE COUNSEL DURING A CRITICAL STAGE OF PROCEEDINGS VIOLATED LEONARD'S RIGHT TO COUNSEL AND TO DUE PROCESS.

Leonard was denied the right to counsel after his attorney provided ineffective assistance by inadvertently opening the door to damaging propensity evidence. At that point counsel's interest in mitigating further damage to herself diverged with Leonard's interest in defending himself to the fullest extent. Instead of offering Leonard new counsel to determine

how best to address counsel's error, the trial court forced Leonard to make a tactical trial decision on his own and absent a valid waiver of the right to counsel. Because Leonard can demonstrate the conflict may have affected his counsel's advocacy, prejudice is presumed. And because the conflict affected the decision to seek a motion for a mistrial on all counts, the remedy is a new trial on all counts.

a. The Trial Court Denied Leonard the Right to Conflict-Free Assistance of Counsel.

The Sixth Amendment and Const. art. 1, § 22 guaranty criminal defendants the assistance of counsel at all critical stages of prosecution. Heinemann v. Whitman County, 105 Wn.2d 796, 800, 718 P.2d 789 (1986). This right is so basic that its denial is never harmless error. State v. Robinson, 79 Wn. App. 386, 393, 902 P.2d 652 (1995) (citing Chapman v. California, 386 U.S. 18, 23 & n. 8, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

The right to counsel extends to those stages in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected. State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974); see also State v. Harell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996) (“A stage is critical if it presents a possibility of prejudice to the defendant.”). The right to

counsel “embodies a realistic recognition . . . that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty.” United States v. Ash, 413 U.S. 300, 309-10, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973) (quoting Johnson v. Zerbst, 304 U.S. 458, 462-463, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)).

The right to counsel includes a right to counsel's undivided loyalty. Wood v. Georgia, 450 U.S. 262, 272, 90 S. Ct. 1097, 25 L. Ed. 2d 763, (1981). To establish a violation of the right to counsel based on a conflict of interest, an accused must show (1) counsel represented conflicting interests, and (2) an actual conflict of interest adversely affected counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). An “actual conflict” is by definition a conflict that adversely affects counsel's performance. State v. Jensen, 125 Wn. App. 319, 330, 104 P.3d 717 (2005) (citing Mickens v. Taylor, 535 U.S. 162, 172 n. 5, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)).

If the two Cuyler elements are established, prejudice need not be shown as required in a claim based upon incompetent representation under Strickland v. Washington.<sup>7</sup> In re Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983), abrogated on other grounds, State v. Dhaliwal, 150

---

<sup>7</sup> 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).

Wn.2d 559, 79 P.3d 432 (2003); United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992). Indeed, the reviewing court must presume prejudice because the effect of a true conflict of interest “is difficult if not impossible to measure.” United States v. Ellison, 798 F.2d 1102, 1107 (7<sup>th</sup> Cir. 1986), cert. denied, 479 U.S. 1038 (1987).

An actual conflict may exist where the interests of the client conflict with those of the attorney himself. United States v. Sanchez-Barreto, 93 F.3d 17, 20 (1st Cir. 1996); Ellison, 798 F.2d at 1107; see also United States v. Soldevila-Lopez, 17 F.3d 480, 486 (1<sup>st</sup> Cir. 1994) (although Cuyler standard first developed in cases involving counsel's joint representation of criminal defendants, it has since been applied to alleged conflicts between counsel and his or her client). “Conflict corrupts the relationship when counsel's duty to his client calls for a course of action which concern for himself suggests that he avoid.” United States v. Hurt, 543 F.2d 162, 166 (D.C. Cir. 1976).

In Sanchez-Barreto and Ellison, defendants moved to withdraw guilty pleas before sentencing on the grounds that their attorneys improperly pressured them to plead guilty. In essence, they alleged their attorneys engaged in malpractice. Sanchez-Barreto, 93 F.3d at 21; Ellison, 798 F.2d at 1106.

In Ellison, the court found an actual conflict of interest because defense counsel could not pursue his client's interests free from concern about incriminating himself in malpractice. 798 F.2d at 1107. In addition, counsel argued against his client at the hearing on Ellison's motion to withdraw his guilty plea. Thus Ellison was not only without conflict-free representation at the hearing, he was "in effect without the assistance of counsel at all." Id. at 1108. Reversal was required because Cuyler's presumption of prejudice applied. Id. The Court reached the same result on similar facts in Sanchez-Barreto and held the trial court should have appointed replacement counsel at the hearing. Sanchez-Barreto, 93 F.3d at 22.

In Douglas v. United States, 488 A.2d 121, 136 (D.C.App.1985), Douglas filed a complaint against retained counsel and the trial court declared a mistrial. In affirming the trial court's decision, the appellate court explained the attorney would have an "inordinate interest" in trying the case "in a manner calculated to minimize any opportunity for post hoc criticism of his efforts." Id. at 137. This could compromise the attorney's judgment about the best way to defend the case and encourage an inappropriately conservative trial strategy. In addition, concern about the pending investigation might chill client-attorney communications, resulting in a weakened defense. Id.

While these cases are not identical to the present one, they demonstrate a conflict may arise where the interests of client and counsel diverge based on the specter of a bar complaint or lawsuit based on counsel's deficient performance. Here, a conflict arose between Leonard and his attorney after counsel acted unreasonably by opening the door to damaging evidence inconsistent with the defense theory of the case. Rather than a trifling mistake, the breach was so serious a mistrial was warranted. At that point, counsel was exposed to a claim of ineffective assistance or even malpractice. In other words, counsel's interests diverged from her client's. Leonard was entitled to, but did not receive, conflict-free counsel to help him determine the proper course of action.

b. Leonard Can Demonstrate an "Actual Conflict" Warranting a Presumption of Prejudice.

To demonstrate an "actual conflict" giving rise to the presumption of prejudice, an accused must show the conflict may have affected counsel's handling of particular aspects of the trial or counsel's advocacy on his behalf. Jensen, 125 Wn. App. at 333; State v. Robinson, 79 Wn. App. 386, 395, 902 P.2d 652 (1995). An adverse effect occurs, if, but for the attorney's actual conflict of interest, there is "a [reasonable] likelihood that counsel's performance somehow would have been different." Frazer v. United States, 18 F.3d 778, 787 (9th Cir.1994) (Beezer, J., concurring).

It is “significantly easier” to demonstrate an adverse effect than to show prejudice under the Strickland test. Stoia v. United States, 22 F.3d 766, 771 (7<sup>th</sup> Cir. 1994).

As in Ellison, Sanchez-Barreto, and Douglas, Leonard can demonstrate there was a reasonable likelihood the conflict affected counsel’s performance. After the conflict arose, Leonard’s counsel declined to argue her own ineffectiveness in support of a mistrial and improperly ceded to Leonard the decision whether to move for a mistrial. In doing so, she left Leonard “in effect without the assistance of counsel at all”<sup>8</sup> as to a tactical decision firmly within counsel’s purview.

An accused lacks both the skill and knowledge to adequately prepare his defense and therefore needs “the guiding hand of counsel” at every step of the proceeding. Powell v. Alabama, 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). In general, “the client decides the goals of litigation and whether to exercise some specific constitutional rights, and the attorney determines the means.” State v. Cross, 156 Wn.2d 580, 606-07, 132 P.3d 80 (2006). The defendant thus has authority to make certain fundamental decisions, such as whether to plead guilty, waive the right to a jury, or testify at trial. Id.; In re Personal Restraint of Jeffries, 110

---

<sup>8</sup> Ellison, 798 F.2d at 1108.

Wn.2d 326, 333-34, 752 P.2d 1338, cert. denied, 488 U.S. 948 (1988); RPC 1.2 (a).

But while the client decides the goals of litigation and whether to invoke certain constitutional rights, the choice of trial tactics, the action to be taken or avoided, and the methodology to be used are matters within the attorney's judgment. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 735, 16 P.3d 1 (2001). The decision to move for a mistrial is such a tactical decision. E.g., State v. Dickerson, 69 Wn. App. 744, 748, 850 P.2d 1366, review denied, 122 Wn.2d 1013 (1993).

Not surprisingly, counsel declined to argue her own ineffectiveness in support of a motion for a mistrial and improperly deferred to Leonard's decision to proceed. 2RP 23-24, 27-28; see Dickerson, 69 Wn. App. at 748 (citing reasons defense counsel might choose not to move for a mistrial, none of which are applicable here). Yet, as counsel should have been aware, the decision whether to move for a mistrial was one for counsel, not the accused. See State v. Kyllö, \_\_\_ Wn.2d \_\_\_, 215 P.3d 177, 180 (2009) (effective assistance includes knowledge of relevant law). Leonard has demonstrated an "actual conflict" in that there was at least a reasonable likelihood the conflict affected counsel's representation.

c. Leonard Made no Knowing, Voluntary, and Intelligent Waiver of Counsel

This court should likewise reject any contention that Leonard waived his right to counsel by acquiescing to the court's assignment of decision-making responsibility.

"It [is] incumbent upon the trial court to protect defendant's right to . . . the effective assistance of counsel." Ellison, 798 F.2d at 1108. Nonetheless, the same constitutional provisions that safeguard the right to counsel also guaranty a criminal defendant the right to represent himself. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984). These rights are mutually exclusive. State v. Vermillion, 66 Wn. App. 332, 340, 832 P.2d 95 (1992), review denied, 120 Wn.2d 1030 (1993).

To resolve the tension between the two, the trial court must ensure that a pro se defendant has made a valid waiver of his right to counsel. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). The waiver must be knowing, voluntary and intelligent. Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); Acrey, 103 Wn.2d at 208-09. The preferred method of establishing a valid waiver is for the judge to engage in a meaningful colloquy with the accused. Id. at 209-11.

A defendant's request to represent himself must be unequivocal. State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997).

The record establishes trial court knew defense counsel could no longer give conflict-free advice regarding a mistrial. 2RP 20-28. The court therefore laid the decision at Leonard's feet. But the State cannot demonstrate Leonard was aware of the risks of self-representation, which is the bare minimum requirement to validly waive the right to counsel. See Acrey, 103 Wn.2d at 209-11. The court's colloquy with Leonard was not a valid waiver but instead a discussion of tactical trial matters with an essentially unrepresented individual accused of serious crimes.

The waiver of the right to conflict-free counsel must likewise be a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. Douglas, 488 A.2d at 138. The Sanchez-Barreto and Ellison courts summarily rejected the government's claims the defendants waived their rights to conflict-free counsel because they did not expressly ask for the appointment of new attorneys. Ellison, 798 F.2d at 1108-09; see Sanchez-Barreto, 93 F.3d at 20 (right to counsel is not contingent upon request by defendant; no indication in record of knowing and voluntary waiver of Sixth Amendment right). This Court should reject any similar claim by the State in this case.

d. The Remedy is a New Trial on All Counts.

Once an actual conflict established, a reviewing court should not “indulge in nice calculations as to the amount of prejudice” attributable to the conflict; the conflict itself demonstrates a denial of the effective assistance of counsel and requires reversal. Cuyler, 446 U.S. at 349 (quoting Glasser v. United States, 315 U.S. 60, 76, 62 S. Ct. 457, 86 L. Ed. 680 (1942)).

Leonard has demonstrated an actual conflict developed at trial’s outset and likely affected his attorney’s performance. Because Leonard did not waive his right to counsel and the denial of a conflict-free counsel at all critical stages cannot be harmless, this Court should reverse and remand for a new trial at which Leonard is provided the assistance of competent, conflict-free counsel. McConico v. Alabama, 919 F.2d 1543, 1548 (11<sup>th</sup> Cir. 1990).

2. COUNSEL’S ACQUIESCENCE TO THE COURT’S IMPROPER ASSIGNMENT OF DECISION-MAKING DENIED LEONARD EFFECTIVE ASSISTANCE OF COUNSEL.

Alternatively, a new trial is warranted because counsel’s ineffective assistance in acquiescing to her client’s judgment on a tactical matter denied Leonard a fair trial. Leonard can establish both deficient performance and prejudice under the Strickland test.

a. The Trial Court and Counsel Denied Leonard Effective Assistance of Counsel.

The federal and state constitutions guaranty an accused the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). An accused receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation prejudices him. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

While the client decides the goals of litigation and whether to invoke certain constitutional rights, the choice of trial tactics, the action to be taken or avoided, and the methodology to be used are matters within the attorney's judgment. Cross, 156 Wn.2d at 606-07; Stenson, 142 Wn.2d at 735; RPC 1.2(a). As discussed above, the decision to move for a mistrial is such a tactical decision. Dickerson, 69 Wn. App. at 748. And even though counsel did so on direction of the court, counsel acted unreasonably in deferring to Leonard's decision to proceed with trial over her own more-informed judgment. In this respect, trial counsel and the trial court, which encouraged counsel to cede her decision to Leonard, failed Leonard.

b. Leonard has Shown Prejudice Because the Trial Court Stated it would have Granted a Mistrial after Defense Counsel Opened the Door to the Damaging Evidence.

Trial courts must grant a mistrial where the evidence at issue may have affected a trial's outcome, thereby denying the defendant his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity caused prejudice, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254.

The trial irregularity in this instance was a serious one: defense counsel inadvertently opened the door to otherwise inadmissible, non-cumulative ER 404(b) evidence.

To support the admission of prior acts under ER 404(b), the proponent must show the evidence (1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) has probative value that outweighs its prejudicial effect. State v. Ra, 144 Wn. App. 688, 701, 175 P.3d 609, review denied, 164 Wn.2d 1016 (2008). Evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." State v. Wade,

98 Wn. App. 326, 333, 989 P.2d 576 (1999). However, such evidence may be admissible for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). The use of other crimes and acts to rebut a claim of accident or “any material assertion by a party” is another well-established exception to ER 404(b). State v. Hernandez, 99 Wn. App. 312, 321, 997 P.2d 923 (1999); 5 Karl B. Tegland, Washington Practice: Evidence § 404.31, at 596 (5<sup>th</sup> Ed. 2007).<sup>9</sup>

As the trial court recognized, the introduction of evidence that Leonard promoted prostitution in the past would have serious consequences for Leonard and thus warranted a mistrial. Evidence that an accused committed acts similar or identical to the one charged is especially prejudicial because it allows the jury to shift its focus from the merits of the charge and merely conclude that the accused acted in conformity with the character he demonstrated in the past. State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001). This is the

---

<sup>9</sup> ER 404(b) must be read in conjunction with ER 402 and 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Irrelevant evidence is not admissible. ER 402; State v. Zwicker, 105 Wn.2d 228, 235, 713 P.2d 1101 (1986). Even relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

"forbidden inference" underlying ER 404(b). Ra, 144 Wn. App. at 702 (citing Wade, 98 Wn. App. at 336).

The trial court correctly held such evidence was inadmissible propensity evidence. 1RP 21. And after correctly recognizing defense counsel had "opened the door" to Leonard's self-characterization as a pimp,<sup>10</sup> the Court ruled it would grant a mistrial if Leonard requested one. 2RP 20-28. But rather than offering Leonard new counsel to assist him, the court instead improperly burdened Leonard with deciding himself whether to move for a mistrial. Counsel's improper, unreasonable acquiescence to Leonard's decision to forgo a mistrial resulted in a trial poisoned by irretrievably damaging propensity evidence. Kyllo, 215 P.3d at 180.

c. Leonard Has Also Shown Prejudice Because the Evidence Likely Altered the Jury's Verdict on All Counts.

ER 404 (b) "is intended to prevent application by jurors of the common assumption that 'since he did it once, he did it again.'" State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990).

The jury likely considered Leonard's claims he promoted prostitution in the past as evidence supporting the current charge for promoting commercial sexual abuse of a minor. As this Court has

---

<sup>10</sup> Hernandez, 99 Wn. App. at 321.

recognized, a jury is naturally inclined to treat evidence of other bad acts in this manner. Id.

There is a reasonable likelihood the evidence affected the outcome at trial. The State's case was not overwhelming. C.V. failed to report the act of prostitution in her initial hospital interview and admitted at trial that she provided inconsistent details surrounding the event. In addition, the jury could easily infer that if C.V. told the truth as to count 3, she was telling the truth as to counts 1 and 2, despite the absence of forensic evidence such as DNA to support her version of events. 6RP 19-25, 27-29, 177-78. There was, therefore, a reasonable likelihood such powerful 404(b) evidence swayed the jury's verdict. Strickland, 466 U.S. at 687. Leonard satisfies both Strickland prongs.

Because defense counsel's performance was both deficient and prejudicial, Leonard was denied his right to effective assistance. This Court should reverse each of his convictions on all charges.

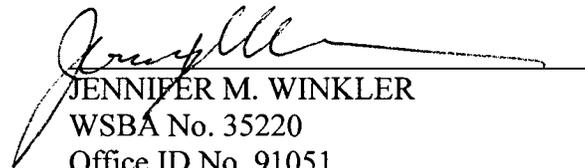
D. CONCLUSION

Whether under a Cuyler or Strickland standard, ineffective assistance of counsel denied Leonard due process, and this Court should grant Leonard a new trial on all charges.

DATED this 30<sup>TH</sup> day of October, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Jennifer M. Winkler", is written over a horizontal line. The signature is cursive and extends to the right of the line.

JENNIFER M. WINKLER

WSBA No. 35220

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 STEVEN LEONARD, )  
 )  
 Appellant. )

COA NO. 63476-3-I

2009 OCT 30 11:45  
COURT CLERK  
STATE OF WASHINGTON  
FILING DIVISION

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEVEN LEONARD  
DOC NO. 846370  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF OCTOBER, 2009.

x Patrick Mayovsky