

70235-1

70235-1

NO. 70235-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY THOMPSON,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

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**BRIEF OF RESPONDENT**

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A. ISSUE PRESENTED

In a criminal case, a hearsay statement against penal interest is admissible if (1) the declarant is unavailable to testify; (2) the statement tends to expose the declarant to criminal liability; and (3) corroborating circumstances clearly indicate the statement's trustworthiness. Here, Thompson did not make a showing of a good faith effort to locate Morrow. Thompson sought to admit three hearsay statements to rebut the claims of promoting prostitution: that Thompson did not set up any dates for Morrow; that she did not give Thompson any money; and that Morrow charged \$150 or \$200 per hour for prostitution. Where only the latter statement was against penal interest, and there was not even a scintilla of evidence to corroborate Morrow's statements regarding Thompson's lack of involvement in her prostitution activities, did the trial court act within its discretion by denying the admission of Morrow's statements?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Anthony Thompson by amended information with first degree unlawful possession of a firearm in

count I; second degree promoting prostitution in count II; and animal fighting in counts III through VI. CP 16-18. A jury trial was held before the Honorable Monica Benton. At the commencement of trial, before a jury was impaneled, Thompson pled guilty as charged to the four counts of animal fighting. CP 356-68; 5RP 3-16.<sup>1</sup> At the conclusion of the trial, a jury convicted Thompson of the remaining counts of first degree unlawful possession of a firearm and second degree promoting prostitution as charged. CP 119-20; 16RP 30. The trial court imposed a standard range sentence. CP 438-47; 16RP 37, 47-49. Thompson now appeals.

## 2. SUBSTANTIVE FACTS

On July 23, 2011, at about 2:58 a.m., Melinda Brown heard noises coming from a vacant apartment located at 10611 Aqua Way South; ("10611") in Seattle. 11RP 9, 16-17. Brown, who lived in the unit below, looked to the balcony of 10611 and saw

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<sup>1</sup> The Verbatim Report of this jury trial consists of 16 volumes referred to in this brief as: 1RP (December 5, 2012); 2RP (December 12, 2012); 3RP (December 13, 2012); 4RP (January 3, 2013); 5RP (January 7, 2013); 6RP (January 8, 2013); 7RP (January 9, 2013); 8RP (January 10, 2013); 9RP (January 16, 2013); 10RP (January 17, 2013); 11RP (January 22, 2013); 12RP (January 23, 2013); 13RP (January 24, 2013); 14RP (January 29, 2013); 15RP (January 30, 2013); and 16RP (November 30, 2012; January 31, 2013; and March 21, 2013).

Thompson, who lived at 10605 Aqua Way South ("10605").

11RP 6-9, 16-17. Brown knew Thompson because she had seen him around with his dog and a woman named "Sunny."

11RP 15-16. Brown asked Thompson what he was doing, and when he told her to mind her own business, Brown called 911 to report the noise disturbance. 11RP 17.

Several King County Sheriff's Deputies responded to the scene. 11RP 21-22, 41-42; 14RP 12. Deputies Broderick and Azevedo, who were some of the first to respond, saw Thompson coming down the stairs, ducking behind a Chevy Malibu that was parked in front of 10605, and then running back upstairs. 11RP 22, 30-31; 14RP 12-13, 72.

The officers went to check the apartment at 10611 and saw a large amount of blood spatter on the walls and the floor, as well as pieces of animal hair and flesh. CP 4. Although the apartment was vacant, there was a mattress in the living room next to a bag full of used condoms and condom wrappers. CP 4; 12RP 82, 84; 14RP 40; 15RP 17.

The deputies followed a blood trail that led them to 10605 (Thompson's apartment) and found a bleeding pit bull on the porch. CP 4. The 10605 apartment was a two-bedroom apartment with

the primary renter being Ronald Wallace. 14RP 23; CP 5. Officers found two additional pit bulls inside 10605, at least one of which showed signs of recent injuries. CP 5. Wallace informed the deputies that Thompson had arranged a fight between the two pit bulls at 10611 earlier in the day. CP 5. Wallace also told the deputies that Thompson was hiding inside the closet in the apartment and was armed with .22 caliber semi-automatic pistol. CP 5.

Thompson did not come out of the apartment when the officers knocked on the door. 11RP 27, 42-43; Ex. 231 (July 23, 2011). Given the information provided by Wallace, that Thompson was armed and hiding, the SWAT team responded. CP 5.

Thompson was eventually removed hours later and arrested. CP 5. At the time of the arrest, officers recovered a black HTC cell phone from Thompson's person. CP 5. Thompson admitted this phone belonged to him, although he said it did not work and it was only used to play music. 12RP 76.

Areanna Morrow, who also lived at 10605, was present and arrested on outstanding warrants. CP 5, 306. Thompson later admitted knowing Morrow, and said her nickname was "Sunny." 12RP 77.

Detective Pavlovich obtained several search warrants, initially to investigate the crimes of animal fighting and unlawful possession of a firearm.<sup>2</sup> As part of his investigation, Detective Pavlovich searched apartments 10605, 10611, the Chevy Malibu, and Thompson's HTC cell phone. CP 5, 7-8. During the execution of the search warrant at 10605, Detective Pavlovich located an Apple computer tower, covered with clothing, inside the closet where Thompson had been hiding. 12RP 78; 14RP 38-39, 64; Ex. 231 (July 23, 2011). The closest room to this closet was the northwest bedroom. 14RP 64; 15RP 11. Subsequently, Detective Pavlovich obtained a warrant for the search of the Apple computer to investigate the crime of promoting prostitution. CP 9.

During the search of the northwest bedroom at 10605, the detectives recovered items that belonged to Thompson and Morrow. 14RP 23-24. Specifically, detectives recovered a box with letters addressed to Thompson at two different addresses, Thompson's personal photos with writings on the back such as "Anthony Thompson" and "Ant Groove," Thompson's identification

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<sup>2</sup> Thompson stipulated that he had been convicted of a serious offense for purposes of first degree unlawful possession of a firearm. 15RP 83.

card, an envelope addressed to Thompson, and a credit card.<sup>3</sup>

14RP 23-24, 34-35, 84; 15RP 9-12.

A search of the Chevy Malibu revealed a day trip permit with one of the addresses imprinted on a document with Thompson's name, which had been recovered from the northwest bedroom at 10605. 14RP 118-19.

A search of Thompson's HTC cell phone revealed Morrow's Gmail account, over 1600 images, many of which were photos of Morrow, and several text message exchanges with "Sunny." 12RP 90; 15RP 15-16. A forensic examination of Thompson's phone revealed that the adult entertainment advertisement on the website BackPage.com had been accessed at least 11 times between May 11 and July 20, 2011. 12RP 144-46, 149-58. The cookies, or sites stored in the phone's website history, included pages that allow a person to manage the advertisements, to sign up for an account, and to make payment for the various postings. 12RP 149-58. These adult postings contained Morrow's photos and titles such as "fun and Sunny." 12RP 155-58. Many of the photos on the postings were images that Thompson had of Morrow

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<sup>3</sup> Thompson's nickname is Ant Groove. 14RP 96; Ex. 231 (October 12, 2011).

on his cell phone. 12RP 126-33, 135-43, 157, 161-64, 168-72;  
14RP 83-95, 113-14.

Further examination of Thompson's cell phone and the BackPage.com postings that contained Morrow's photos showed that the text message exchanges were between Thompson and the main number associated with the BackPage.com postings. 12RP 174-75; 14RP 115-16, 121, 125-27. These message exchanges were directly related to prostitution. Specifically, the communications were about requesting assistance in the posting of the advertisements, providing updates and the status of customer arrivals, locations, and price, and in some instances requests by the sender to be picked up at the conclusion of the encounter with a customer, and requests for more condoms.<sup>4</sup> 14RP 123-40.

In light of the information discovered by Detective Pavlovich, he obtained a search warrant for the BackPage.com listings associated with Morrow or "Sunny's" advertisements. At the time of the receipt of the records, the oldest posting showed to have been placed on March 27, 2011, while the most recent showed as having been posted on July 21, 2011, which read "Sexy and Right. Sunny

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<sup>4</sup> The content of the e-mail exchanges is discussed more fully in section C.1 of this brief, infra.

day/20.” 14RP 81, 115. Detective Pavlovich also discovered that the address associated with payments for the advertisements was the same address imprinted on documents recovered from the northwest bedroom at 10605. 14RP 89-90. Similarly, the credit card associated with the payment for the advertisement was the same credit card number that was also located in the northwest bedroom. 14RP 83.

As to the search of Thompson’s Apple computer, Detective Pavlovich located at the bottom of the tower a .22 caliber semiautomatic pistol, fully loaded. 12RP 178-81; 14RP 68, 70; Ex. 213 (July 23, 2011). A forensic examination of the computer also produced a history of access to the adult escort page at BackPage.com. 13RP 87. The entries indicated access to sites that allow payment and management of the advertisements. 13RP 87, 93-94, 141-47. Although it is not possible to know when the website was accessed for the first time, the history indicated that the last time a BackPage.com site was accessed from the computer was on June 1, 2011 when a payment was made. 13RP 141-42, 149. Lastly, the e-mail address associated with one of the ads was antgroove@yahoo.com, which was the address

located in Thompson's Apple computer. 14RP 96; Ex. 231 (July 23, 2011).

As part of Detective Pavlovich's investigation, he spoke with Morrow on July 25, 2011, while she was incarcerated for two prostitution charges from March of 2011. CP 305-23; 15RP 9, 29. Morrow stated that she had been dating Thompson for approximately one year. CP 6. Morrow said that for the past five months she had been living at the 10605 apartment, which Thompson's friend rented, and that Thompson spent the night with her at that location. CP 306. Morrow explained that she only paid the electric bill. CP 306. Morrow denied that the pit bulls were used for animal fighting and explained their injuries as "accidents" or "scuffles" or "stress." CP 309, 311, 313, 317. Morrow acknowledged that the northwest bedroom had books on training and fighting pit bulls but claimed these books belonged to Thompson's brother, whose name she did not know. CP 307.

Morrow admitted to Detective Pavlovich that she had been involved in prostitution since she was 16 years old. CP 320. Morrow stated that she turned "tricks" in the living room at the vacant apartment in 10611. CP 320. Morrow said that she charged \$150 or \$200 an hour. CP 6. Morrow admitted that she

used the name "Sunny Day" on the BackPage.com advertisements. CP 321.

Morrow adamantly denied Thompson's involvement in her prostitution activities. Specifically, Morrow said that Thompson did not help her in obtaining dates, and that she did not give Thompson any of the money she obtained from prostitution. CP 320. Morrow also denied knowing that Thompson was in the apartment hiding when the police arrived. CP 321.

Detective Pavlovich listened to several jail calls between Morrow and Thompson while he was in custody. Their conversations directly contradicted Morrow's statement to the detective as to Thompson's involvement in her prostitution. The jail calls revealed that Thompson continued to manage Morrow's prostitution activities by keeping track of the customers she had lined up, the money she was receiving, and her whereabouts.<sup>5</sup> Ex. 231 (October 4, and October 13, 2011). The jail calls also established that Morrow was not an independent prostitute as she claimed to be, by alluding to her frustration at having to "walk the

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<sup>5</sup> The content of the jail calls is discussed more fully in section C.1 of this brief, infra.

streets,” because she did not know how to post photos or manage the online advertisement. Ex. 231 (October 28, 2011).

C. ARGUMENT

THE STATEMENTS THAT MORROW MADE TO THE  
DETECTIVE EXCULPATING THOMPSON LACKED  
CORROBORATION AND TRUSTWORTHINESS.

Thompson challenges only his conviction for promoting prostitution, arguing that the trial court abused its discretion by excluding three statements that Morrow made to Detective Pavlovich in the course of a custodial interrogation. Thompson's argument should be rejected. Only one statement was self-inculpatory, falling within a hearsay exception. Two of the statements were hearsay, and were thus inadmissible. Moreover, Morrow's statements were not trustworthy and lacked corroboration. The trial court properly exercised its discretion in excluding these statements.

The statements Thompson sought to admit are as follows: First, Detective Pavlovich asked Morrow, “Does he ever set dates for you?” and Morrow answered, “No.” 14RP 8; CP 320. Second, “Do you ever give him any of the money that you make?” and Morrow again answered “No.” 14RP 8; CP 320. Lastly, Morrow

told Detective Pavlovich that she charged between \$150 or \$200 an hour.<sup>6</sup> 14RP 8; CP 4, 320.

Thompson erroneously argues that all three statements were against Morrow's penal interest and should have been admitted under ER 804(b)(3). Only Morrow's statement that she charged \$150 or \$200 per hour was against her penal interest. Morrow's answers to the first two questions were not.

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. ER 801(c). A statement is an oral or written assertion. ER 801(a)(1). Thompson sought to admit statements that Morrow made regarding Thompson's lack of involvement in her prostitution during Detective Pavlovich's cross-examination. 14RP 6-7, 9. These statements fall squarely within the hearsay rule.

Hearsay is generally not admissible, except for some narrow exceptions. ER 802. For instance, ER 804(b)(3) governs the

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<sup>6</sup> The taped custodial interrogation does not include any line of questioning as to the amount Morrow charges. The only reference to Morrow receiving \$150 or \$200 an hour is located in Detective Pavlovich's Certification for Determination of Probable Cause. CP 4.

admissibility of hearsay statements against penal interest when the declarant is unavailable:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. *In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.*

(italics added). The rule expressly requires corroboration of statements exculpating the accused. State v. Whelchel, 115 Wn.2d 708, 716, 801 P.2d 948 (1990). While the reach of ER 804(b)(3) is not limited to direct confessions of criminal responsibility, the declarant's statements must, in a real and tangible way, subject him or her to criminal liability. State v. Gee, 52 Wn. App. 357, 362, 760 P.2d 361 (1988), rev. denied, 111 Wn.2d 1031 (1989).

In a criminal case, a hearsay statement against penal interest is admissible if "(1) the declarant is unavailable to testify, (2) the statement [ ] so far tend[s] to expose the declarant to criminal liability that a reasonable person in the same position would not have made the statement unless convinced of its truth, and (3) corroborating circumstances clearly indicate the statement's

trustworthiness.” State v. Anderson, 112 Wn. App. 828, 834, 51 P.3d 179 (2002). This Court reviews the trial court’s decision regarding the admissibility of testimony under ER 804(b)(3) for abuse of discretion. Id.

First, Thompson did not make a showing that Morrow was unavailable. An inability to reach the witness by subpoena power is not sufficient to establish unavailability; the party calling the witness must also establish an inability to reach the witness by “other reasonable means.” Young v. Key Pharm., Inc., 63 Wn. App. 427, 432, 819 P.2d 814 (1991). In fact, if a witness is beyond the legal reach of a subpoena, the party offering the out-of-court statement should at least be required to represent to the court that it made an effort to secure the voluntary attendance of the witness at trial. Rice v. Janovich, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987).

Nothing in the record indicates that Morrow was even issued a subpoena. The only reference to Morrow’s unavailability is defense counsel’s statement on the record that defense had not been able to interview Morrow, and Brian Hodder’s (the defense investigator) declaration regarding his efforts to locate Morrow. 1RP 27, 46; CP 391-93. Hodder indicated he went to two addresses associated with Morrow on May 10, 2012. CP 391-93.

Hodder also indicated that on October 30, 2012, the defense team asked Detective Pavlovich about Morrow's custody status. CP 391-93. Lastly, Hodder mentioned making a few phone calls on January 16, 2013. CP 391-93.

It is hard to believe that Morrow's whereabouts were unknown to Thompson, as the evidence established that Morrow and Thompson maintained communication while he was incarcerated. The jail calls also established that Morrow maintained communication with Thompson's sister. Ex. 231 (July 23 and October 12, 2011).

Nonetheless, it is possible that Morrow, if subpoenaed, would have asserted her privilege against self-incrimination. A witness who refuses to testify in order to preserve his or her privilege against self-incrimination is deemed unavailable. State v. Jordan, 106 Wn. App. 291, 300, 23 P.3d 1100 (2001). Thus, for purposes of this analysis only, the State will assume that Morrow was in fact an unavailable witness.

Second, in determining whether Morrow's "statement" is admissible, the trial court must separate the inculpatory portions from those that are self-serving, and redact the narrative to exclude self-serving statements. Anderson, 112 Wn. App. at 836.

ER 804(b)(3) “does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.” *Id.* at 835-36 (citing State v. Roberts, 142 Wn.2d 471, 492, 14 P.3d 713 (2000) and Williamson v. U.S. 512 U.S. 594, 603, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994)). On appeal, Thompson claims he sought to admit statements where Morrow “detailed” her involvement in prostitution. However, at trial Thompson sought to admit only three questions that Detective Pavlovich asked Morrow, two of which elicited the responses “no” – “Does he ever set up dates for you?” and, “Do you ever give him money?” 14RP 6-7, 9; CP 320. These two statements were not statements against Morrow’s penal interest. Nothing in these two statements implicates Morrow in any illegal activity. Thus, although the trial court mistakenly stated that the rule only applied to statements against the defendant’s interests, rather than Morrow’s interests, this was inconsequential because the statements did not fall within the rule. The only statement that was a statement against Morrow’s interest was her statement that she charged \$150 or \$200 an hour for prostitution. CP 4. This statement was also inconsequential because it was undisputed that Morrow was a prostitute.

Third, even if this Court were to find that all three statements were against Morrow's penal interest, just because a statement is against the declarant's interest, it does not mean it will be automatically admissible. Roberts, 142 Wn.2d at 496. In Washington, admissibility under ER 804(b)(3) has turned "on whether the disserving or self-serving considerations predominated in the mind of the declarant at the time the statement was made." Id. at 493. As a consequence, the reliability prong of the rule *must* be satisfied. Whelchel, 115 Wn.2d at 725. In other words the court must rely on the nine factors reiterated and applied in Roberts, supra. Anderson, 112 Wn. App. at 839. Those factors are:

- (1) Was there an apparent motive for the declarant to lie?
- (2) What was the declarant's general character?
- (3) Did more than one witness hear the declarant's statement?
- (4) Was the statement made spontaneously?
- (5) Did the timing of the statements and the relationship between the declarant and witness suggest trustworthiness?
- (6) Does the statement contain an express assertion of past facts?

(7) Did the declarant have personal knowledge of the identity and role of the crime's other participants?

(8) Was the declarant's statement based upon faulty recollection? and

(9) Was the statement made under circumstances that provide reason to believe the declarant misrepresented defendant's involvement in the crime?

Roberts, 142 Wn.2d at 497-98.

Although the trial court did not evaluate each factor on the record, an analysis of the factors here indicates the trial court's ruling was not erroneous. With respect to the first factor – apparent motive to lie – Morrow's close relationship with Thompson gave her a strong motive to lie to protect her boyfriend from being charged and convicted of a crime. Morrow's statement to Detective Pavlovich confirmed that Thompson was her boyfriend. CP 305-23. On October 12, 2011, Morrow and Thompson had an argument because Thompson did not feel Morrow was respecting him. Ex. 231. An apologetic Morrow told Thompson, "I don't want to make you mad no more...I don't want no friends. You're the only friend I need. You and our money and my baby." Ex. 231. Subsequently, after Morrow and Thompson patched things up,

Morrow asked, "Okay, can I call you daddy now?" to which Thompson responded "My name is Ant," and Morrow pleaded, "Oh my God but you are my daddy." Ex. 231.<sup>7</sup> Morrow told Thompson later in the call, "I love you." Ex. 231.

In addition to her desire to protect Thompson because she loved him, Morrow also had a palpable financial interest. Morrow stated that she had been living at Thompson's friend's house for about five months and she did not pay any rent; all she paid was the electric bill. CP 306. Similarly, most of the jail calls between Thompson and Morrow strongly evidence her financial motive to lie. It is obvious from the calls and the text messages that Morrow depended on Thompson in order to get customers for her prostitution activities. On October 28, 2011, the following exchange took place:

Morrow: I'm really frustrated right now because I've been up since 6:25 this morning, I've been out since seven and I still got the same amount of money that I had yesterday...

Thompson: Damn. Nothin' line up?

Morrow: Uh, no, I'm getting a few things from T&A, people been callin'me, but nothing

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<sup>7</sup> "Daddy" is a term used by prostitutes to refer to their pimp when there is a mutual relationship going on. 12RP 69.

is for sure yet. I don't know how to put pictures onto my thing...<sup>8</sup>  
Thompson: Hold on hold on, don't talk too much about that, it said my name when I called, right?  
Morrow: Yeah  
Thompson: Oh, I forgot damn  
Morrow: But yeah, nothing yet  
Thompson: Damn

Ex. 231.

Morrow's dependence on Thompson is also evident from text messages recovered from Thompson's cell phone. In one instance the sender, whose number was associated with the contact "Sunny," inquired if an ad had been posted because "I don't want to walk the highway," while another text requested that the ad be moved towards the top of the listings. 14RP 127, 133, 134. The responses from Thompson's phone indicated that an ad would be posted for outcalls, and that the ad had been posted.<sup>9</sup> 14RP 127, 134. Likewise, despite Morrow telling the detective that Thompson never picked her up after she finished with a customer, there were incoming messages such as "received \$80, come and pick me up." 14RP 139. Thus, Morrow's dependence on Thompson gave her a

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<sup>8</sup> T&A board is another website to advertise used by prostitutes. 12RP 70.

<sup>9</sup> An outcall is when the prostitute goes to the customer's location, either a motel room or the residence. 12RP 71.

great incentive to lie. Contrary to Thompson's assertion, this factor weighs against admissibility.

The second factor is whether Morrow's general character suggests trustworthiness. The fact that Morrow denied Thompson's involvement in dog fighting during the interview with Detective Pavlovich demonstrates that she would lie to protect him. The evidence regarding dog fighting was not only overwhelming, but Thompson pled guilty to those charges. Nonetheless, Morrow stated that the book about training and fighting pit bulls, which was recovered in their room, belonged to "my boyfriend's brother." CP 307.

As to the dog's injuries, Morrow told Detective Pavlovich that the injuries the dog "Mistress" had were the result of "accidents." CP 309. Morrow also indicated that the injuries to a dog named "Lolo" were the result of a "scuffle" with "Mistress." CP 310. When Detective Pavlovich asked if "Mistress" and another dog named "Boss" had ever been in a fight, Morrow said "Um, they sniffed at each other, but they've never been in a full-out brawl." CP 311. And when asked about yet another injured pit bull that had been removed from the house, "Handsome," Morrow said she did not know how he got to the apartment: "He was left in the apartment,

and he walked over to my house, so I took him and cleaned him up and put him in the bathroom.” CP 311-12. Lastly, when the detective asked Morrow about the dog fighting that had prompted the call to 911, Morrow said, “It was more people than dogs. Just people were yelling and my dog was barking and wagging her tail and pretty antsy...” CP 312-14.

In sum, Morrow's misleading statements regarding dog fighting show a lack of trustworthiness. Moreover, Morrow's prior conviction for providing a false statement is also indicative that she was not trustworthy. This factor also weighs against admissibility.

The third factor is whether more than one person had heard the statements. Morrow's statements were recorded by the detective. Thus, Morrow was committed to the statements she made at the time. This factor weighs in favor of admissibility.

The fourth factor is whether the statement was spontaneous. Morrow's remarks lacked spontaneity. Morrow was careful with her words. She made the statements at issue during custodial interrogation after having been arrested for warrants on her prostitution charges and for investigation of dog fighting. This factor also weighs against admissibility.

As to the fifth factor, the timing of the statements and Morrow's relationship to the detective did not suggest trustworthiness. As already stated, Morrow was in police custody at the time she made the statements, and consciously choosing her words. Statements to the police in an adversarial situation typically do not have the trustworthiness associated with remarks made to friends. Anderson, 112 Wn. App. at 840. Thus, this factor also weighs against admissibility.

As to the sixth factor, Morrow's statement contained express assertions of past facts. As to the prostitution, Morrow indicated that she had been prostituting herself since the age of 16 and has continued to engage in the activity. CP 320. There is no real dispute as to her assertions of engaging in prostitution. This factor is irrelevant.

With respect to the seventh factor, the declarant's personal knowledge of Thompson and his role in the crimes, Morrow knew Thompson, as they were involved in a relationship. As such, this factor would weigh in favor of admissibility. However, despite the overwhelming evidence, Morrow denied Thompson's involvement in promoting prostitution and animal fighting.

As for the eighth factor, some of Morrow's statements seem to indicate that her recollection was faulty. For instance, Morrow did not know Thompson's brother's name, the supposed owner of the dogfighting books. CP 307. Similarly, she could not remember if there were other books in the house that had to do with dogs. CP 307. And Morrow contradicted herself as to the location of two of the dogs on the day of the animal fighting incident. CP 313-14. Lastly, Morrow appeared to be "confused" as to whether or not Thompson was in the apartment when the police arrived. Morrow claimed that Thompson was not in the apartment, while the evidence established that he was in fact in the apartment and hiding in the closet from the police. CP 321; Ex. 231 (July 23, 2011). Morrow's recollection as it pertained to dog fighting and the day of the arrest was faulty, likely, because she was trying to protect Thompson. Thus, this factor also weighs against admissibility.

Finally, Morrow's extremely close relationship with Thompson suggests that she misrepresented Thompson's involvement in the crimes in an attempt to keep police suspicion away from him, both because she loved him and because she depended on him. The statements Morrow made to Detective

Pavlovich as to both promoting prostitution and dog fighting were directly contradicted by the overwhelming evidence of both crimes. Specifically as to the charge of promoting prostitution, when Detective Pavlovich asked Morrow if Thompson helped her set up dates, she answered "no." CP 320. However, even while incarcerated, Thompson was still assisting in setting up dates for Morrow. On October 28, 2011, Thompson said the following to Morrow:

Thompson: Ah every mother f\*\* that come in here I'm sending 'em out with your phone number

Morrow: okay

Thompson: There's one that just came in here today and he was looking at the pictures like ohhh yeah. I'm like you like? He's like yeah...

Morrow: He like?

Thompson: Yeah. He get out next week, and I was like you want her number? He was like yeah

Morrow: You told him what I was

Thompson: Come on man, he already know

Morrow: Well, I'm just making sure...

Ex. 231.

Morrow also denied giving money to Thompson. However, the text messages and the jail calls revealed the contrary. Some of the incoming messages into Thompson's phone included statements such as "already paid and will bring \$20 more,"

a regular customer has arrived which will return a \$75 gain from the transaction, "received \$80," "getting down with the 30," and the customer is cheap but still making money.<sup>10</sup> 14RP 129, 135, 137-40. Thompson's cell phone showed replies to these text messages such as, "Wow," "For how long," "If the customer is too cheap don't do it," and, "Hurry up. We have more customers to get." 14RP 129, 135, 137-40. This behavior continued while Thompson was incarcerated. On October 13, 2011, the following exchange took place:

Morrow: Today this dude is gonna give me like \$45...

Thompson: So, what time is that one at?

Morrow: Ten o'clock

Thomson: Where is it at?

Morrow: At, what is it called, uh, Boulevard Park right like on 112<sup>th</sup> and Des Moines Memorial Drive...

Thompson: How are you getting there?

Morrow: I don't know yet. I got til 10:00 to figure that out. I was hoping you would... I know the 121 goes there... what bus goes there?

Thompson: And how would you get back?

Morrow: Um the bus or I would walk....

Thompson: ...so that would what, about two something?

Morrow: Uh, what do you mean two somethin' I gotta pay my phone bill

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<sup>10</sup> Getting down with the 30 means a short transaction or a "quicky" in the trade. 14RP 138.

Thompson: Okay, look you got about sixty right now...

Morrow: Yeah

Thompson: And then

Morrow: And then I was gonna get that forty five and then the hundred

Thompson: ..two... that's two hundred

Morrow: So yeah you are right two something. So that's enough to get going tomorrow morning... hopefully there'll be some more along the way between now and 9:00 in the morning

Thompson: And then you gotta figure out who can keep uh updating your shit...

Morrow: I'm just gonna be up all night...I'm not going to sleep tonight...I'm tryin' to get a room

Thompson: But if you get a room and don't end up using it then what?

Morrow: It'd be a waste. Look look look, yeah, if I don't pay for the room if someone else pays it, pays for the room I still have enough. I'm not coming out of pocket for nothin' they're payin' for everything

Thompson: But have them give you the money

Morrow: Okay, and then do what, do it in their car?

Thompson: So these friends that can get you rooms for free, why can't you tell them right now to get you a room for free?

Morrow: I can do that... I'll make as many phone calls as I can...

Thompson: ...this is my whole thing. Get the money and get a room if you need it

Morrow: Okay

Thompson: If you get the money that's gonna make it better for tomorrow...

Morrow: I gotta pay my phone bill  
Thompson: I know, look, 200, 50 for the phone bill,  
that leaves you with 150 bucks, and how  
much for the bus there  
Morrow: \$35 or \$34  
Thompson: That leaves you with \$110 to get a room.  
A room is what, 60?  
Morrow: Yeah

Ex. 231. Thus, this last factor strongly weighs against admissibility.

In short, corroborating circumstances do not “clearly indicate the trustworthiness” of Morrow’s statements. To the contrary, the evidence strongly contradicts her statements that Thompson was not involved in setting up dates for her and that she never shared her proceeds with Thompson. In balancing the nine factors, six weigh heavily against admissibility.

Thompson’s analysis of the nine factors focuses only on Morrow’s statements regarding prostitution. However, since the rule expressly requires a finding that the statements are trustworthy, the Court must look at the totality of circumstances and weigh Morrow’s credibility as a whole. In order to do so, the Court must evaluate her entire statement to the police. When evaluating Morrow’s entire statement, the only conclusion is that Morrow’s statements lacked credibility. Thus, the trial court properly concluded that the statements were not trustworthy. 14RP 104.

But even if this Court were to conclude that the statements were admissible, any possible error is harmless. Thompson argues that the exclusion of Morrow's self-inculpatory statements effectively deprived him of his constitutional right to present a defense in violation of the Sixth and Fourteenth Amendments, as well as article I, § 21 of the Washington Constitution. An error of constitutional magnitude is harmless only if the State can prove beyond a reasonable doubt that the jury would have reached the same result in the absence of the error. Chapman v. California, 386 U.S. 18, 21-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (an error of constitutional magnitude cannot be deemed harmless unless it is "harmless beyond a reasonable doubt."); State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996); Anderson, 112 Wn. App. at 837.

But the exclusion of Morrow's statements to the detective did not prevent Thompson from arguing his theory of the case, which was that the police jumped to conclusions and assumed that Thompson was involved in promoting prostitution when in reality Morrow was an independent prostitute who would not let a pimp manipulate or control her. 15RP 99, 103. The court's refusal to admit Morrow's statements did not preclude Thompson from

presenting his defense. Therefore, the alleged error did not rise to the constitutional level. Anderson, 112 Wn. App. at 837.

The Court must then apply the non-constitutional harmless error standard. Under this standard, an error in the admission of evidence is “not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Anderson, 112 Wn. App. at 837 (citing State v. Bourgeois, 133 Wn.2d 389, 403 945 P.2d 1120 (1997)). In applying this standard, Thompson cannot show that, within reasonable probabilities, the outcome of the trial would have been materially affected had the trial court admitted Morrow’s three statements denying Thompson’s involvement in her prostitution activity and the amount she charged.

The jury had overwhelming evidence that Thompson managed Morrow’s prostitution activities. In addition to the jail calls revealing the fact that Morrow needed Thompson to manage her advertisements, the calls and the text messages also made it clear that Thompson had complete control over Morrow. The various text messages contained updates of customers, payment and location, so that Thompson would be informed of her whereabouts and income. Even during his time in custody he continued to

manage Morrow. For instance, on October 4, 2011, the following exchange took place:

Thompson: You ain't got no jugs lined up?<sup>11</sup>  
Morrow: Not right now, this dude said he's gonna call me in two hours.  
Thompson: Who that?  
Morrow: The Mexican I met, and that was probably 30 minutes ago.  
Thompson: And where is that at?  
Morrow: Out here in the south end – he live out here. I told him you know if he wants me to come over that's cool, but you know I'm gonna have somebody waitin unless he wanna come over to my house and whatever he wants to do. What do you think is better for me to... stay out here or go over there for my... for whatever?  
Thompson: What do you mean for what, right now?  
Morrow: No... For my jug?  
Thompson: I don't... I mean how much is it for?  
Morrow: Like, 80...  
Thompson: Yeah... I mean, if it's over there you might as well do it cause, she's gonna wait for you?... man, you got no other jugs lined up, just the Mexican  
Morrow: No I don't. If I did I would tell you, I wish I did, but I don't

Ex. 231.

Additionally, text messages revealed that Thompson was directing Morrow to recruit other prostitutes. An outgoing message from Thompson's phone was giving instructions for the receiver to

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<sup>11</sup> "Jug" is a term that is typically used by prostitutes to indicate they have a customer on the way or a meeting with a customer. 12RP 69.

try to convince another female to work with them because “we can keep her posted,” “we can keep her happy,” “we can get her a room.” 14RP 131.

Thompson argues that the error was not harmless because the suppression of Morrow’s statements eliminated evidence that he did not influence Morrow or benefit from her prostitution. This argument has no merit because the evidence was overwhelming. It consisted of: (1) conversations between Thompson and Morrow about prostitution; (2) text message exchanges between Thompson’s cell phone and the number associated with Morrow about prostitution; (3) the photos of Morrow recovered in Thompson’s cell phone were the same photos used on the BackPage.com postings; (4) the photos recovered on Thompson’s Apple computer were also found on Morrow’s BackPage.com postings; (5) there were cookies found on Thompson’s cell phone to sites in the BackPage.com webpage to manage Morrow’s advertisements and make payments; (6) the website history located in Thompson’s Apple computer also had access to BackPage.com sites managing Morrow’s advertisement and making payments; (7) documentation that was located in Thompson and Morrow’s bedroom contained the same credit card number associated with

the BackPage.com account; and (8) Thompson's e-mail address associated with his Apple computer was also in the BackPage.com account. The jury would have not disregarded this evidence had they heard Morrow's three answers to Detective Pavlovich's questions. The outcome of the trial would have been the same even if the statements had been admitted.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Thompson's conviction for second degree promoting prostitution.

DATED this 15<sup>th</sup> day of May, 2014.

Respectfully submitted,

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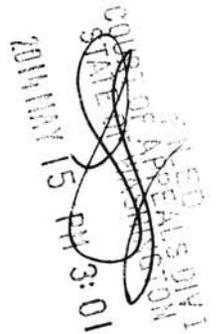
Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared B. Steed, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. ANTHONY THOMPSON, Cause No. 70235-1 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 15 day of May, 2014



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Name  
Done in Seattle, Washington



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