

62144-1

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NO. 62144-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

TUROMNE WASHINGTON

Appellant.

REC'D
MAR 10 2010
King County Prosecutor
Appellate Unit

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

The Honorable Charles Mertel, Judge

2010 MAR 10 PM 3:44
FILED
CLERK

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. WASHINGTON HAS ESTABLISHED HE WAS PREJUDICED BY HIS COUNSEL’S DEFICIENT PERFORMANCE.....	1
2. THE FAILURE TO GIVE A PETRICH INSTRUCTION DEPRIVED WASHINGTON OF HIS RIGHT TO A UNANIMOUS JURY.....	5
B. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Barrington

52 Wn. App. 478, 761 P.2d 632 (1988)
review denied, 111 Wn.2d 1033 (1989) 5, 6, 7

State v. Cox

109 Wn. App. 937, 38 P.3d 371 (2002)..... 2

State v. Doogan

82 Wn. App. 185, 917 P.2d 155 (1996)..... 7

State v. Elliott

114 Wn.2d 6, 785 P.2d 440
cert. denied, 498 U.S. 838 (1990) 7

State v. Gooden

51 Wn. App. 615, 754 P.2d 1000
review denied, 111 Wn.2d 1012 (1988) 5, 6, 7

State v. McFarland

127 Wn.2d 322, 899 P.2d 1251 (1995)..... 4

State v. Petrich

101 Wn.2d 566, 683 P.2d 173 (1984)..... 5, 7, 8

State v. Song

50 Wn. App. 325, 748 P.2d 273 (1988)..... 7, 8

State v. Vander Houwen

163 Wn.2d 25, 177 P.3d 93 (2008)..... 8

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.88.060 6

A. ARGUMENT IN REPLY

1. WASHINGTON HAS ESTABLISHED HE WAS PREJUDICED BY HIS COUNSEL'S DEFICIENT PERFORMANCE.

The State concedes counsel for Washington and Olive acted deficiently when they affirmatively misadvised their clients about their peril. Brief of Respondent (BOR) at 11, 16-17. The State only asserts that the appellants have failed to prove prejudice. BOR at 11. This claim belies both common sense and the facts in this case.

The attorneys for both Washington and Olive indicated that, had they known their clients' peril, they would have negotiated further in the case. 1CP 105; 2CP 96-97; 11RP 16, 19-20, 33-34. This is common sense. Olive has explicitly declared that he would have accepted a plea deal, had he understood the danger. 1CP 113-14.

The State has averred that no offer was made. 2CP 121-22. What the State could have averred – but did not – was that this case was inappropriate for plea bargaining. For example, the State could have offered a one-for-one deal, as Washington's attorney apparently discussed with the prosecutor initially assigned to Washington and Olive's cases. 2CP 96. The State has not asserted that this case was so extraordinary that additional offers would not have been made had they been requested. Both Washington and Olive had little criminal record – Washington's only

prior conviction was a misdemeanor marijuana possession. 2CP 72. Moreover, Washington's misbehavior was much shorter in duration and less egregious than Olive's, so his case was particularly suited for plea bargaining. 13RP 12 (trial court agrees Washington's behavior was "less than" Olive's). These are facts are completely ignored in the State's response.

The State claims Olive's declaration was self-serving and that under State v. Cox,¹ it cannot be accepted without corroboration. BOR at 24-25. But Cox presents a very different circumstance – there the Court found Cox unconvincing because Cox had already served his entire prison sentence. 109 Wn. App. at 940-42. All that was left was his community placement period, and Cox was claiming that, had he been properly advised, he would have taken a plea deal that would have avoided community placement. Id. The Cox Court correctly pointed out that if Cox were permitted to make this late claim, then many defendants who had completed their prison sentences might escape community placement by belatedly making similar claims. Id. at 941-42. Here, of course, Olive and Washington's claims are not made after serving their sentences, so the suspicions expressed in Cox are not applicable.

¹ 109 Wn. App. 937, 38 P.3d 371 (2002).

The State, moreover, appears to concede that if Washington's counsel should have obtained a lesser-included offense instruction (as the attorney himself declared), then the attorney provided ineffective assistance. BOR at 27. The State argues, however, that Washington was not entitled to the lesser-included offense of attempted promotion of commercial sexual abuse of a minor because the facts did not support such a charge. BOR at 27-30. This is incorrect.

The defense case, particularly Olive's, largely rested on the assertion that C.W. and C.J. had gone into the prostitution trade by choice. C.W. had prior prostitution experience in Seattle. 4RP 38-40, 192-93; 5RP 12-14, 86-89. C.J. was a good friend of C.W. and knew her history. 6RP 180-81. C.J. nonetheless accompanied C.W. on these increasingly unpleasant adventures. The presumption of the defense case was that these girls chose to try prostitution, C.W. knowingly, and C.J. without realizing the difficulties involved. C.W.'s prior history as a prostitute, and C.J.'s knowledge of it, both affirmatively supported this theory.

If the jury believed that Washington intended to promote C.J. as a prostitute, but the decision was in fact her own, then the jury could have found Washington did not promote prostitution, but did attempt to do so. Similarly, if the jury believed Washington allowed his cell phone to be used by Olive to promote C.W., but that C.W. actually committed the

prostitution on her own initiative, then Washington was entitled to the lesser included offense.²

Washington's trial counsel also noted a juror had expressed frustration that there was no "lesser" crime to convict Washington of, as Washington's behavior was less egregious than Olive's. 2CP 97. There is, therefore, a reasonable probability that, given the opportunity to convict Washington of only attempted promoting commercial sexual abuse of a minor, the jury would have done so.

To prove prejudice, an appellant need only show "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). This standard is met by Washington's attorney's utter failure to negotiate with the State, which in turn was premised on the attorney's misapprehension of Washington's peril. The standard is also met by the attorney's failure to request the lesser included offense instruction. For both these reasons, Washington's case must be reversed.

² This is in addition to the arguments proposed in the BOA: that the jury might have found Washington attempted to help Olive with his cell phone, but because Olive had already acquired C.W.'s cell phone himself, Washington's "assistance" was illusory. Or the jury might have found Washington's extremely vague pronouncements to C.J. did not constitute promotion, although they did constitute attempted promotion. See 6RP 149-50, 175.

2. THE FAILURE TO GIVE A PETRICH INSTRUCTION DEPRIVED WASHINGTON OF HIS RIGHT TO A UNANIMOUS JURY.

The State appears to concede that no unanimity instruction was given, and moreover that no single act by either Washington or Olive was elected by the prosecutor either in the charging documents or in closing argument. BOR at 31-32. The State nonetheless argues against reversal, claiming this matter falls into the “continuing course of conduct” exception to the Petrich³ rule. BOR at 31-37. This argument should be rejected because the “continuing course of conduct” exception has only been used in cases where the type of charging plainly supports the “continuing course of conduct” exception. The State steadfastly ignores this argument from the BOA.

For example, the State relies heavily on the “promoting prostitution” cases of both State v. Barrington, 52 Wn. App. 478, 761 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989), and State v. Gooden, 51 Wn. App. 615, 754 P.2d 1000, review denied, 111 Wn.2d 1012 (1988). BOR at 33-34. As noted in the BOA, although these cases appear nominally comparable to this one, they are distinguishable, as both were cases where the promotion of prostitution was treated as “an enterprise.”

³ State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), held that a defendant may only be convicted when a unanimous jury concludes that that act charged has been committed.

Barrington, 52 Wn. App. at 482; Gooden, 51 Wn. App. at 619. This Court, in making its decision, heavily emphasized the “enterprise” portion of the “promoting prostitution” law:

A person “advances prostitution” if ...”he causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.”

Gooden, 51 Wn. App. at 619 (quoting RCW 9A.88.060(1), emphasis by the Court). Barrington similarly discusses the nature of a “prostitution enterprise,” quotes the same section of the law without the emphases, and then states that the case is indistinguishable from Gooden. Barrington, 52 Wn. App. at 481-82.

Here, as noted in the BOA, the State never discussed the “enterprise” prong of prostitution in closing argument. 8RP 61-90, 139-49 (State’s closing and rebuttal arguments). In fact, when the prosecutor reviewed Instruction 9 – the only instruction mentioning the “enterprise” prong for conviction – the prosecutor addressed nearly every other possibility constituting the crime as defined by the instruction, but not that

one. 2CP 21 (Instruction 9); 8RP 73-75. The central rationale of Barrington and Gooden simply does not apply to Washington's case.⁴

Moreover, the Court in Barrington even acknowledged that a promoting prostitution charge might consist of "several distinct transactions occurring as did the sexual abuse incidents in Petrich, 'in a separate time frame and identifying place.'" 52 Wn. App. at 478 (citing Petrich, 101 Wn.2d at 571). In State v. Song, for example, a defendant claimed that she could not be given consecutive sentences for multiple counts for promoting prostitution, where the individual counts referred to various employees or potential employees of a massage parlor. 50 Wn. App. 325, 748 P.2d 273 (1988). Although Song involved different charges for different victims/potential victims, that distinction was not what persuaded this Court:

Whether the incidents are to be charged separately or brought as one charge is a decision within prosecutorial discretion. Many factors are weighed in making that

⁴ The State also requests this Court "see also" the cases of State v. Elliott, 114 Wn.2d 6, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990), and State v. Doogan, 82 Wn. App. 185, 191-92, 917 P.2d 155 (1996). BOR at 34. Neither of these cases, however, is on point. In Elliott, the Supreme Court found the defendant had failed to properly raise the question of jury unanimity, and so it was not reviewed. 114 Wn.2d at 14-15. In Doogan, the defendant was not charged with "promoting prostitution" but rather with "profiting from prostitution," so this Court noted the emphasis was not on individual acts of prostitution, but rather on the "ongoing business enterprise" of taking the money from the prostitutes. 82 Wn. App. at 191-92.

decision, including the victim's ability to testify to specific times and places.

50 Wn. App. at 329.

The Song Court found: “each event constituted a crime for which the appellant could be punished.” 50 Wn. App. at 329. Therefore, under the analysis of State v. Petrich, the different counts did not represent a “continuing course of conduct” such that only one sentence should be imposed. Id. (citing Petrich, 101 Wn.2d at 571-72). Applying the “specific times and places” argument to this case, the State certainly could have alleged additional counts against Washington based on a variety of his different activities over the course of the night out with C.J. and C.W., or even activities on the following days, such as assisting C.W. when she was trying to reach Olive by telephone. Because the State could have charged a number different activities separately, an election or unanimity instruction was required. State v. Vander Houwen, 163 Wn.2d 25, 37-38, 177 P.3d 93 (2008); Petrich, 101 Wn.2d at 572.

Here, particularly because accomplice liability was argued, the prosecutor argued any number of activities by Washington and Olive that might have justified their convictions. 8RP 72, 73, 77-78, 79-80, 80-81, 141. Because it is possible some jurors, in the absence of an election or unanimity instruction, relied on different activities to convict Washington

of each individual charge, his jury cannot be shown to have convicted him unanimously. Reversal is therefore required.

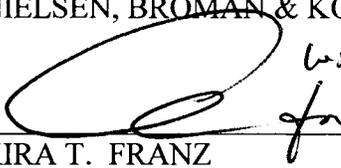
B. CONCLUSION

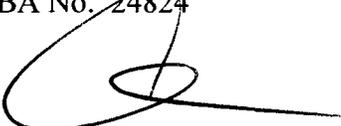
This Court should reverse Washington's convictions and remand for a new trial because Washington was denied his constitutional right to effective assistance of counsel. In the alternative, this Court should reverse and remand Washington's convictions because Washington was denied his constitutional right to a unanimous jury.

DATED this 19th day of March, 2010.

Respectfully Submitted,

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