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NO. 64549-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONGFANG LI,

APPELLANT.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE CATHERINE SCHAFER
JUDGE

REPLY BRIEF OF APPELLANT

TOM P. CONOM
The Conom Law Firm
Attorney for Appellant
20016 Cedar Valley Rd
Suite 201
Lynnwood, Washington 98036
(425) 774-6747

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ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO REQUIRE SUBSTANTIAL EVIDENCE ON EACH MEANS SUBMITTED TO THE JURY, FAILING TO REQUIRE THE JURY TO UNANIMOUSLY AGREE ON THE MEANS AND IN FAILING TO INSTRUCT IN ACCORDANCE WITH 4.23 OR 4.25

A. BECAUSE THE TRIAL COURT ERRONEOUSLY PERMITTED THE JURY TO CONSIDER THE UNCHARGED MEANS OF “PROFITS FROM PROSTITUTION,” IT WAS INCUMBENT TO INSTRUCT IN ACCORDANCE WITH WPIC 4.23

The state acknowledges that the promoting prostitution statute, R.C.W. 9A.88.080, contains two alternative means of committing the offense, “profits from prostitution” and “advances prostitution.” Brief of Respondent at 10. *State v. Doogan*, 82 Wn.App. 185, 188, 917 P.2d 155 (Div. I 1996). The state implicitly acknowledges that Ms. Li was charged with only *one* of the statutory means, “advances prostitution.” CP 10. The state further acknowledges that as instructed by the trial court (no. 7), the jury was permitted to consider the uncharged alternative means of “profits from ... prostitution.” Brief of Resp. at 13, 27. And the state also acknowledges that no *Petrich*-type unanimity instruction was given. *Id* at 15-16. The state seeks to excuse these instructional errors on the theory that the to-convict instructions eliminate any possible error.

The state, however, *fails* to cite, let alone distinguish, the holdings of the Washington Supreme Court and this Court on point and to the contrary. *See State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942)

(“We seriously doubt that, where an instruction” [allows jury to] “consider other ways or means by which the act charged might have been committed” ... “the error can be corrected by a subsequent instruction”); *State v. Bray*, 52 Wn.App. 30, 35, 756 P.2d 1332 (Div. I 1988)(reversal required, rejecting state’s argument that because to-convict instruction “set forth only the elements of the charged means” error was harmless). *See also*, *State v. Doogan, supra*, 82 Wn.App. at 188-89 (“It is reversible error to try a defendant under an uncharged statutory alternative ... if it is *possible* that the jury *might have convicted* the defendant under the uncharged alternative.”)(emph.ad.).

The critical factor for the courts in *Severns* and *Bray* was whether the definitions of the crime provided to the jury allowed *consideration* of the uncharged means, and if so, allowed *conviction* on the uncharged means. This Court in *Bray* recognized:

“The faulty instruction in *Severns* informed the jury that the alternative definitions were ‘ ... *for your consideration* ... ’ (Emphasis in original.) *Severns*, 13 Wn.2d at 546.”

State v. Bray, supra, 52 Wn. App. at 34. Because the records in both *Severns* and *Bray* did not provide assurance that the respective juries, having been told they could *consider* the uncharged means, did *not* in fact *convict* on the uncharged means, reversal was mandated. The same is true here.

Had the trial judge complied with the governing law of *Severns* and *Bray*, the unanimity principle of *State v. Petrich*, 101 Wn.2d 566, 683

P.2d 173 (1984), and the Comment by the pattern jury instructions committee that “*only* those alternative means that are set forth in the charging document” can be *considered* by the jury, the error could have been avoided. WPIC 4.23 Comment (2005 supp., emph. ad.) at p. 105. Since the trial court did not comply with *Severns*, *Bray* and *Petrich* and the guidance provided by the committee, it did not remove the uncharged means from the jury’s consideration. Thus, it was incumbent on the court to instruct in accordance with WPIC 4.23 so as to insure unanimity.

WPIC 4.23 would have informed the jury as follows (emph. ad.):

“To return a verdict of guilty, the jury need not be unanimous as to which of alternatives ... has been proved beyond a reasonable doubt, *as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.*”

On appellate review, the court must determine whether there was “sufficient evidence for a rational juror” to find guilt beyond a reasonable doubt on *each* alternative means authorized for the jury’s *consideration* by the trial judge. *E.g.*, *State v. Koch*, 157 Wn. App. 20, 29-31, ___ P.3d ___ (2010)(Court of Appeals analyzes each alternative means for sufficiency). Such review is required because “in order to safeguard the defendant’s constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the *relied-on* alternative means must be presented.” *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010), quoting *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007)(emphasis in text), citing *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105

(1988). In this context, and consistent with the Comment to WPIC 4.23, the *relied-on* alternative means are all means submitted to the jury for its *consideration*.¹

The state omits any analysis of the *Peterson/Smith/Kitchen* sufficiency test. The state simply assumes – erroneously – that a reviewing court is excused from conducting the sufficiency test for alternative means so long as the uncharged alternative means is omitted from the to-convict instruction. The state cites no authority for this novel approach and it is contradicted by the decisions in *Severns* and *Bray*. Compare *State v. Koch, supra*. Given the state’s complete failure to discuss the sufficiency of evidence on the uncharged alternative means of “profits from ... prostitution,” it is clear the state has conceded insufficient evidence was presented to establish such means. Accordingly, the giving of Instruction 7 allowing the jury to *consider* the uncharged alternative means in combination with the failure to give WPIC 4.23 requiring that each juror find that “at least one alternative has been proved beyond a reasonable doubt” requires reversal. *State v. Kitchen, supra*. The trial judge failed to “safeguard the

¹ Should the state choose *not* to rely on a particular alternative means, there is a simple method to decline. The state need only elect under *Petrich* to remove any means it does not wish to rely on. *State v. Petrich*, 101 Wn.2d at 572. In this case, the state could simply have objected to the court’s instructing the jury on any uncharged means. It did not. See, e.g., *State v. Doogan*, 82 Wn.App. 185, 189, 917 P.2d 155 (Div. I 1996) (“the State had the opportunity to review the court’s proposed instructions and could have pointed out the error before the instructions went to the jury.”).

defendant's constitutional right to a unanimous verdict.”²

B. THE TRIAL JUDGE'S FAILURE TO DELETE FROM THE INSTRUCTIONS THE ALTERNATIVE "CAUSED OR AIDED A PERSON TO COMMIT OR ENGAGE IN PROSTITUTION" WHERE THE STATE CONCEDED INSUFFICIENT EVIDENCE IS ALSO REVERSIBLE ERROR

Washington trial judges are admonished to exert special care when instructing jurors on crimes involving alternative means and means or methods within such means. Comment to WPIC 4.23, *supra*. Regardless of whether each method of committing promoting prostitution by way of “advances prostitution” is an alternative means or an alternate method, there must be sufficient evidence to allow the means or method to be considered by the jury. “[J]udges must make sure that the instruction lists *only* those alternative elements that are supported by sufficient evidence.” Comment, *supra* (emph. ad.).

At a bare minimum, this imposes a duty on the trial court to remove from the jury's consideration any alternative means or methods which a) the state *concedes* it is no longer pursuing, or b) for which there is a complete failure of proof. In this case, one alternative means or methods approved by the court for the jury's consideration was that Appellant allegedly advanced prostitution in that she “caused or aided a

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The alternative means allowed in this case to be considered by the jury must be distinguished from cases which, “under appropriate facts,” may be charged as a continuing course of conduct under either means. In such cases, the course of conduct may be “exempt from the rule of *Petrich*.” *State v. Doogan, supra*, 82 Wn.App. at 191. Ms. Li's case, however, was neither charged nor prosecuted under a continuing course of conduct theory. *See* Brief of Resp. at 17 (“in this case [each] (*sic*) count related to a single day and involved a single event”).

person to commit or engage in prostitution.” Instruction no. 11; CP 52.

The problem with this is not only was there a complete failure of proof on this prong but the state conceded the point at trial *and* also affirmatively represented that it was “not alleging that Ms. Li caused another person to engage in prostitution.” RP III 70. While the state asserted that it was not “alleging” Appellant violated this prong, the jury instruction announced the exact contrary – it told the jury it was free to *consider* whether she “caused or aided a person to commit or engage in prostitution.” The error is exacerbated because this prong (as was the “profits” alternative means) to a reasonable juror remained in the catch-all portion of the definition: “any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.” The catch-all provision is so broadly worded that the trial court’s failure to delete the causing or aiding a person prong (and the profits means) allowed the jury to convict without any limitation whatever.

On appeal, the state refuses to acknowledge that as instructed the jury was permitted to convict regardless of whether a means was charged or not, regardless of whether the state was alleging a particular means or method in fact and regardless of whether there was sufficient evidence on a particular means or method. Indeed, on appeal the state expressly relies on the catch-all provision of Instruction 11 for the proposition that “any one of these possibilities constituted the crime of promoting prostitution.” Brief of Resp. at 17.

In order to avoid such a draconian and unlimited view of the promoting law, the trial court must be directed to strictly limit the means and methods allowed to be considered by a jury in a particular case. As the jury instructions committee aptly noted “it is easy to mistakenly use a pattern instruction that covers more situations than those involved in a particular case.” Comment to WPIC 4.23. It is for this very reason that the trial court must scrupulously limit the elements, means and methods to those *charged, alleged and sufficiently proven* in the case before it.

Here, unquestionably there was insufficient evidence to permit the jury to consider whether Appellant advanced prostitution by causing or aiding a person to commit or engage in prostitution. Because a reviewing court cannot look behind a general verdict to determine which means or methods the jury found convincing and which it rejected, the failure here of the trial judge to scrupulously craft the instructions is prejudicial. A reviewing court cannot be assured in this case that the jury did not convict on a means or method not charged, not prosecuted or for which there was insufficient evidence as a matter of law.

II. THE EVIDENCE ON COUNT I WAS SUFFICIENT ONLY TO SHOW AN *ATTEMPT* TO PROMOTE PROSTITUTION AND NOT THE CRIME CHARGED, THUS REQUIRING DISMISSAL FOR INSUFFICIENT EVIDENCE

The state acknowledges there was no evidence whatever presented at trial of even a single act of prostitution. The state suggests this is “a

classic ‘straw man’ argument” while simultaneously acknowledging that “an actual act of prostitution ... may be evidence of the commission of the crime[!]” Brief of Resp. at 20, 22-23. It would seem rather elementary that if one is charged with promoting *prostitution*, the best evidence of such a charge would be proof that *prostitution* has in fact taken place. As noted, the state presented no such evidence. Nor can the state respond to the fact that no physical evidence was presented to suggest that prostitution services were available at any time.

The state is reduced to arguing in essence that because massage services admittedly occurred on the premises, therefore sexual services for money must also have been available. Brief of Resp. at 21-22. The state thus substitutes speculation for proof. But such speculation fails in the face of the uncontradicted record that the masseuses on the premises in count I never so much as uttered a word, let alone agreed to, or did, perform any sexual services for money.

The state is left with only a hand gesture. While in the light most favorable to the state such slight evidence might tend to show a propensity to *attempt* to promote an illegal act, that is all it tends to show –an attempt. As instructed, an *attempt* is insufficient as a matter of law to sustain the conviction and so count I must be reversed and dismissed. *State v. Charley*, 48 Wn.2d 126, 291 P.2d 673 (1955); *State v. Swane*, 21 Wn.2d 772, 153 P.2d 311 (1944); *State v. Hundley*, 126 Wn.2d 418, 895 P.2d 403 (1995).

III. THE EVIDENCE ON COUNT II WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION

A. THE ONLY ALLEGED “PROSTITUTE” ON THE PREMISES WAS APPELLANT AND THE STATUTE REQUIRES A PERSON WHO “ADVANCES PROSTITUTION” TO BE SOME- ONE ACTING “OTHER THAN AS A PROSTITUTE” RECEIVING COMPENSATION FOR PERSONALLY RENDERED PROSTITU- TION SERVICES

The state does not deny that under the promoting law, a showing that a person is acting as a prostitute constitutes a defense to the crime. Brief of Resp. at 24. The statute, R.C.W. 9A.88.060(1), could hardly be clearer in permitting prosecution only of persons “acting other than as a prostitute.” The courts have recognized this defense. *See, e.g., State v. Mason*, 34 Wn.App. 680, 687, 644 P.2d 710 (1982); *cf. State v. Doogan, supra*, 82 Wn.App. at 191 (“The essence of the crime is that the defendant has made money from prostitution activity, *without actually being a prostitute.*”)(emph.ad.).

Since Ms. Li was the *only* worker on the premises in count II and since the state’s theory is that *only* she personally offered prostitution services and since her co-defendant was *acquitted* on count II, it should be clear that Ms. Li has a complete defense. But in order to sustain the unsustainable in count II, the state makes the Alice-in-Wonderland argument that Appellant was acting as a prostitute except when she wasn’t. Brief of Resp. at 25-26. This nonsensical argument flies in the face of the statutory scheme which carefully distinguishes between persons acting in the capacity of a prostitute, R.C.W. 9A.88.030, and persons seeking to

benefit from the prostitution activities of others, R.C.W. 9A.88.080; 9A.88.060. It can hardly be rationally contended that the statutory scheme allows the state to choose to prosecute a *single person simultaneously* for committing prostitution *and* promoting prostitution by her own prostitution activities. This is an absurd reading of the statutory scheme.

For example, how would a jury be instructed to parse out when the defendant is acting as a prostitute – and possesses a complete statutory defense – and when the defendant is no longer acting as a prostitute but is acting solely as a promoter? What does a jury do if it believes that a defendant is simultaneously acting in both capacities? Or if it believes that a majority of the activities are personal prostitution activities (for which there is a full defense) but a minority of activities relate partially to promotion?

On appeal, as at trial, the state is oblivious to the statutory boundary lines that govern prostitution. The state could have elected to charge Ms. Li in count II under the prostitution statute, R.C.W. 9A.88.030. But given its theory and the proof at trial that Ms. Li was the sole worker on the premises allegedly acting in the capacity of prostitute, the state was patently barred from charging and prosecuting her for *promoting* her own prostitution, R.C.W. 9A.88.080. The conviction must be set aside.

D. THE ACQUITTAL OF THE CO-DEFENDANT IS FATAL TO THE VERDICT AGAINST APPELLANT

The state fails to take into account the *acquittal* of Ms. Li's codef-

endant on the same evidence in count II on which the jury convicted her. The state relies entirely on the alleged conversations between Ms. Li and the co-defendant Haoran Pu to argue there was sufficient proof of promoting. Brief of Resp. at 25-26. The problem is the jury *acquitted* Mr. Pu on the very same conversations the state now relies on to sustain the verdict against Ms. Li. Even in the absence of a complete statutory defense, part A. *supra*, the inconsistent verdicts on identical evidence cannot stand. *State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1983); *State v. Pacheco*, 125 Wn.2d 150, 882 P.2d 183 (1994); *cf. State v. Grier*, 150 Wn.App. 619, 208 P.3d 1221 (2009).

Under the state's theory, the conversations between Ms. Li and Mr. Pu were necessary to prove the method of advancing prostitution by "caus[ing] or aid[ing] a person to commit or engage in prostitution," that is, by procuring another person.³ Instruction no. 11; R.C.W. 9A.88.060(1). But the acquittal of Mr. Pu means that Ms. Li could not have jointly "caused or aided a person to commit or engage in prostitution" when the jury determined that Mr. Pu did *not* so act. Without Mr. Pu, it was impossible for Ms. Li to cause or aid anyone. Moreover, the state conceded at trial that Ms. Li did *not* in fact cause or aid anyone to engage in prostitution. RP III 70.

On appeal, the state fails to recognize that the only acts by Ms. Li

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"Li asked Pu to find another girl. Pu sought to find another girl, but was unable to do so." Brief of Resp. at 5 and 25. RP III at 16-18.

arguably not within the bar of acting as a prostitute were the communications with Mr. Pu. But the acquittal of Mr. Pu means such communications were not proved to have occurred beyond a reasonable doubt. In the absence of such proof, there is nothing Ms. Li did which violates any of the other methods of committing the crime.

State v. Pacheco and *State v. Valladares, supra*, provide the framework for analysis where, as here, it is necessary to show that two persons committed an act together which constituted an essential element of the crime. In *Valladares* as described by the Supreme Court in *Pacheco*:

“...two codefendants were charged with conspiracy to deliver cocaine. In a joint trial, one defendant was acquitted and the other, Valladares was found guilty. *Valladares*, 99 Wn.2d at 670, 664 P.2d 508.

“On appeal, the court held acquittal of Valladares’ only alleged coconspirator mandated reversal of Valladares’ conviction because the two outcomes were logically inconsistent. The inconsistent verdicts to the charge of conspiracy in the same trial nullified the possibility that the two coconspirators reached an agreement, a necessary element of the conspiracy.”

State v. Pacheco, supra, 125 Wn.2d at 155-56 (reaffirming *Valladares*).

In *Pacheco*, the Supreme Court applied this principle to a case where the sole coconspirator was an undercover police officer. 125 Wn.2d at 159.

By charging Ms. Li and Mr. Pu as co-defendants in count II, the state necessarily had to show they engaged in the *same act* of “caus[ing] or aid[ing another] person to commit or engage in prostitution.” Evidence of their conversations was indispensable to show they acted together in an effort to procure another person. But the *acquittal* of Mr. Pu on the same

facts as Ms. Li's guilty verdict results in "incongruous," "anomalous" and "contradictory" verdicts. *State v. Grier*, 150 Wn.App. at 633, 645. They were "inconsistent verdicts" in the same trial which "nullified the possibility" that *either* co-defendant caused or aided another person to commit prostitution. Under such circumstances, the conviction on count II must be reversed and the judgment and sentence vacated. *State v. Valladares*.

IV. WHERE APPELLANT WAS NOT CHARGED WITH THE ALTERNATIVE MEANS OF "PROFITS FROM PROSTITUTION," IT IS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO INSTRUCT THE JURY (INSTRUCTION NO. 7) THAT IT COULD NEVERTHELESS CONVICT ON SUCH MEANS

Because the state's theory at trial and on appeal is that the amount of money charged for a massage in both counts was actually the cost for an act of prostitution, Brief of Resp. at pp. 3, 5, there was arguably some evidence for the jury to convict on the alternative means of "profits from prostitution" if it accepted the state's theory. Moreover, the trial court erroneously allowed the state to argue that Appellant profited from her *personal* prostitution activity ("Ms. Li, in addition to offering prostitution services herself ... ," RP III 74). And, as instructed by the court in Instruction no. 7, the jury was permitted to *consider* the evidence and inferences on this theory.

The opposite scenario was presented to this Court in *State v. Doogan, supra*. There, the trial court erroneously permitted the jury to consider the uncharged alternative means of "advances prostitution." 82

Wn.App. at 188. As this Court noted, “The jury heard evidence of numerous things that Doogan did that would satisfy the *definition* of advancing prostitution *even if it did not consider or believe* the evidence that she financially participated in the proceeds received by [the prostitution activity].” 82 Wn.App. at 190. In finding prejudicial error, this Court said:

“In these circumstances we cannot have confidence that the error did not affect the outcome of the trial.”

State v. Doogan, id (emph.ad.), relying on *State v. Severns* and *State v. Bray, supra*, 82 Wn.App. at 190-91, notes 9 and 11.

For the remainder of the argument on this issue, Appellant incorporates by reference herein the argument on issue I, *supra* at pp. 1-7.

**VII. APPELLANT’S TRIAL COUNSEL DENIED
EFFECTIVE ASSISTANCE OF COUNSEL UNDER
THE SIXTH AMENDMENT AND ART I., SEC. 22**

A. DEFENSE COUNSEL FAILED TO EXCEPT TO INSTR. NO. 7⁴

The Court addressed the effect on the fairness of a defendant’s trial for promoting prostitution where defense counsel fails to object to the court allowing the jury to consider an uncharged alternative means in *State v. Doogan, supra*. In *Doogan*, this Court considered the obverse of

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The state mistakenly urges that this argument should not be considered on appeal because counsel “has failed to pursue or support it on appeal.” Brief of Resp. at 33. Appellant’s argument on this point was clearly subsumed under the *subheadings* part VII. A. and B. *See* Brief of Appellant at 32: “trial counsel for Ms. Li failed to object to the court’s giving of Instruction No. 7 which prejudicially permitted the jury to consider, and convict, on alternative means *not* set forth in the amended Information. This omission was aggravated by counsel’s further failure to propose a *Petrich*-type instruction which would have ameliorated the first error” The state’s position is less than candid.

Ms. Li's case. Ms. Doogan was charged only with the alternative means of "profits from prostitution," but her counsel proposed that the trial court allow the jury to consider *both* statutory means. 82 Wn.App. at 188. Inexplicably, as in Ms. Li's case, neither the prosecutor nor the trial judge corrected the error, and as in Ms. Li's case, the jury did consider both alternative means. The question presented on appeal was whether Ms. Doogan's counsel had rendered effective assistance by allowing the jury to consider both the charged and uncharged means of committing the offense. 82 Wn.App. at 188-190. The Court held this was ineffective assistance of counsel and reversed.

The Court observed:

"The error of offering an uncharged means as a basis for conviction is prejudicial if it is possible that the jury might have convicted the defendant under the uncharged alternative."

State v. Doogan, supra, at 189 citing *Severns* and *Bray, supra*.

Because the jury in *Doogan* had heard evidence which supported conviction on the uncharged alternative means of promoting prostitution, the Court had little difficulty in concluding:

"Here, there is a *reasonable possibility* that the jury convicted Doogan on the uncharged means of advancing prostitution without ever considering whether, as charged, she profited from prostitution."

State v. Doogan, id (emph. ad.).

Therefore, the Court held:

"In these circumstances we cannot have confidence that the error did not affect the outcome of the trial."

State v. Doogan, supra, 82 Wn.App. at 190.

For the reasons previously stated, in Ms. Li's case, as in Ms. Doogan's, there is at least a "reasonable possibility" that the jury convicted on the uncharged alternative means. The likelihood of prejudicial error was increased in this case by the trial judge's allowing the jury to consider the catch-all definitions of Instruction no. 11 without the required deletions of alternative means and methods. As in *Doogan*, there can be no assurance that the "error did not affect the outcome of the trial."

**C. DEFENSE COUNSEL FAILED TO PROPOSE AN
ATTEMPT INSTRUCTION**

**D. DEFENSE COUNSEL FAILED TO PROPOSE A
LESSER INCLUDED INSTRUCTION FOR
*PERMITTING PROSTITUTION***

For the sake of continuity and ease of understanding, as well as avoiding repetition, Appellant addresses the lesser included ineffective assistance of counsel issues together as in the opening Brief at 32-35.⁵

The state suggests that defense counsel's failure to propose lesser included instructions was the result of a deliberate "all or nothing" choice and thus "tactical in nature." Brief of Resp. at 35. There is nothing in the record, and none is cited by the state, to suggest there was a conscious

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Again, the state's objection that an argument should be denied review because it does not technically fit under a particular *subheading* is not well taken. Brief of Resp. at 34. The legal authorities and argument provided clearly relate to both lesser included issues. Brief of Appellant at p. 35: "As charged and prosecuted, *attempt* to promote prostitution in the second degree and *permitting* prostitution were lesser included offenses on which Appellant was entitled to have her jury instructed. Defense counsel's failure to propose *either* lesser included offense instruction was not a legitimate defense strategy – it was a denial of Appellant's constitutional right to effective assistance of counsel."

decision to consider and reject lesser included instructions as opposed to simply poor lawyering. *Compare: State v. Grier*, 150 Wn.App. 619, 630, 208 P.3d 1221 (2009)(defense counsel originally proposed but then withdrew lesser included instructions).

In analogous circumstances, the courts have strongly held that such an all or nothing strategy constitutes ineffective assistance of counsel. *State v. Ward*, 125 Wn.App. 243, 250, 104 P.3d 670 (Div. I 2004); *State v. Pittman*, 134 Wn.App. 376, 390, 166 P.3d 720 (Div. I 2006); *State v. Smith*, 154 Wn.App. 272, 278, 223 P.3d 1262 (2009); *In re Crace*, 157 Wn.App. 81, 109, __P.3d __ (2010); *State v. Grier, supra*, 150 Wn.App. at 640-44.

The state makes the unsupported argument that defense counsel’s “strategy was to make the jury choose between her version of events and that offered by the police.” Brief of Resp. at 35. This is a ludicrous assertion and betrays a profound misunderstanding of defense counsel’s function.⁶ Any competent counsel would have recognized that the defense could not credibly rely on Ms. Li’s apparent memory lapses in denying recall of having prior contact with either undercover officer, denying that employees ever gave massages to customers at a business named Global

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The state claims support for this baseless argument on the fact that Mr. Pu was acquitted by disingenuously ignoring the critical fact that Mr. Pu did *not* take the witness stand and thus did not have his credibility undermined. Brief of Resp. at 35-36. The state refrains from advising the Court of the other crucial difference between the defenses pursued by the co-defendants: Mr. Pu put on no case. RP III at 52.

Massage, denying that the business advertised massage services, etc. Brief of Resp. at 6. In light of these demonstratively false denials, no competent defense counsel would ever *deliberately* rely on a strategy which asked the jury to “choose between her version of events and that offered by the police.” This would be a suicide strategy and grossly incompetent. *See, e.g., State v. Ward, supra*, 125 Wn.App. at 250 (“objectively unreasonable to rely on such a strategy”).

Ms. Li would have been entitled to have the jury instructed on the lesser included offense of attempted promoting prostitution had her trial counsel requested such an instruction. As recently stated in *In re Crace*, “[a]fter satisfying the two *Workman* prongs, the ‘Washington rule’ [citing R.C.W. 10.61], *commands* that a lesser included offense instruction is *required as a matter of right*.” 157 Wn.App. at 106 (emph.ad; cit. omit.). Ms. Li clearly satisfied the *Workman* test and hence would have been entitled “as a matter of right” to a lesser included charge on attempt had her trial counsel timely made the request.

Had there been such an attempt instruction given, the record was adequate for the jury to acquit on the greater charge and convict on the lesser charge. *See, e.g., In re Crace, supra*, 157 Wn.App. at 92 (“The trial court instructed the jury on the charged offenses and the lesser included offense of attempted second degree assault. ... The jury deadlocked on the second degree assault charge, but it found Crace guilty of attempted second degree assault.”); *State v. Pittman, supra*, 134 Wn.App. at 386

(evidence of greater offense “so meager” jury – properly instructed -- could have “reasonably found” guilt on only lesser offense).

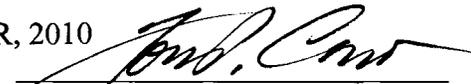
The importance of a lesser included attempt instruction is underscored by the inconsistent verdicts for the co-defendants. In evaluating the necessity of a lesser included instruction, the reviewing court must consider the significance of “contradictory verdicts” and whether such verdicts support the inference that a properly instructed jury would have returned a verdict on the lesser charge. *State v. Grier, supra* (contradictory verdicts supported court’s holding that defense counsel was ineffective in not proposing lesser included instructions).

In this case, as noted in the other decisions cited, there was “no legitimate reason to fail to request a lesser included instruction,” *State v. Ward, supra*, 125 Wn.App. at 250, and the “failure to do so was not legitimate trial strategy under the circumstances,” *State v. Pittman*, 134 Wn.App. at 390. Since the failure was “not a legitimate trial tactic” it “constituted deficient performance.” *State v. Smith*, 154 Wn.App. at 278. Reversal is the remedy for such ineffective assistance of trial counsel. *Ward; Pittman; Smith; Crace; Grier, supra*.

CONCLUSION

For the reasons stated in Appellant’s Briefs, the charges against her should be dismissed, or alternatively, reversed for new trial.

DATED THIS 28th DAY OF OCTOBER, 2010


TOM P. CONOM WSBA# 5581
Attorney for Appellant