

65737-2

65737-2

NO. 65737-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM A.,

Appellant.



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

Juvenile Division

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

Sixteen year-old William A. was charged with promoting commercial sexual abuse of a minor. The arrest for this charge was based on two hours of surveillance on Pacific Highway South, where officers watched William and his sixteen year-old girlfriend, M.K., walking and standing on the sidewalk. During those two hours, M.K. contacted the drivers of three vehicles and entered two vehicles for a few minutes, but there is no evidence that any money exchanged hands or that she performed or offered or agreed to perform any sexual act. When William and M.K. were arrested, neither one had cash, cell phones, or condoms. After the arrest, William told police M.K. was “doing this stuff” before he met her and did it “for someone else;” he also stated they were trying to “hustle up some dollars” that evening. Although M.K. was found not guilty, after a trial, of prostitution loitering, the juvenile court found William guilty as charged.

William argues the police lacked probable cause for the arrest, requiring suppression of his statements and dismissal of the charge; the State failed to provide sufficient evidence to prove he instituted, aided, caused, assisted, or facilitated an act or enterprise of commercial sexual abuse of a minor; and the State should not

have been permitted to base its case on M.K.'s alleged prostitution loitering, when she had already been tried and acquitted of that offense.

B. ASSIGNMENTS OF ERROR

1. The juvenile court erred when it found the police had probable cause to arrest William. CP 64 (CL 4-5).

2. The juvenile court erred in admitting William's statements, made as a result of the unlawful arrest. CP 64 (CL 2-3).

3. Because the State failed to prove William instituted, aided, caused, assisted, or facilitated an act or enterprise of commercial sexual abuse of a minor, the evidence was insufficient to convict him.

4. Because the minor in question was acquitted of prostitution loitering, the juvenile court erred in allowing the State to argue William instituted, aided, caused, assisted, or facilitated commercial sexual abuse of a minor.

5. The juvenile court erred in finding "the respondent and [M.K.] were engaged in some kind of joint enterprise." CP 63 (FF 38); CP 68 (FF 30).

6. The juvenile court erred in finding “any doubt about what the respondent and [M.K.] were doing was resolved by the respondent’s own statements.” CP 69 (FF 31).

7. The juvenile court erred in finding M.K. “was acting as a prostitute and [William] was engaging in conduct designed to institute, aid, cause, assist and facilitate [M.K.] prostituting herself as part of an enterprise of commercial sexual abuse of a minor.” CP 69 (FF 32).

8. The juvenile court erred in entering Conclusion of Law II (as to the verdict), finding the State proved all the elements of promoting commercial sexual abuse of a minor beyond a reasonable doubt. CP 69.

9. The juvenile court erred in entering Conclusion of Law III (as to the verdict), finding William guilty of promoting commercial sexual abuse of a minor. CP 69.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution, individuals have the right to be free from police intrusion unless there is probable cause based on objective and individualized facts that the person is committing a crime. William A. was arrested

based on officers' observations of ambiguous conduct, mostly on the part of his girlfriend, not himself, and officers' knowledge and generalizations about the area. Did the juvenile court err in finding probable cause to arrest and admitting the statements which resulted from the unlawful arrest?

2. To support a juvenile adjudication for promoting commercial sexual abuse of a minor, the State had to prove beyond a reasonable doubt that he "engaged in conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor." RCW 9.68A.101(3)(a). The juvenile court noted the ambiguity of the State's evidence and stated that "but for William's statements it would have been a not guilty verdict." 2RP 54. William's statements were ambiguous themselves, and no other evidence strengthened the State's case. Where the State failed to prove either the underlying act or enterprise or that William engaged in such conduct, did the resulting adjudication violate due process, requiring reversal?

3. The juvenile court correctly noted that William could only be convicted of violating RCW 9.68A.101(3)(a) under the means that he "engaged in conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse

of a minor.” The only possible evidence of such an act or enterprise was M.K.’s conduct on Pacific Highway South – in other words, the loitering for which she was tried and acquitted. Since that court could not find beyond a reasonable doubt that M.K. was guilty of loitering, the State could not then turn to another court and ask it to find that fact in order to adjudicate William guilty beyond a reasonable doubt. Did the court err in permitting this practice?

D. STATEMENT OF THE CASE

William A. and his girlfriend M.K. are both 16 years old. On April 23, 2010, M.K.’s mother reported to Seattle police that she had seen M.K., who had run away from home, on Pacific Highway South in Tukwila. CP 59 (FF 1). This information was relayed to Sergeant Richard McMartin of the King County Sheriff’s Department Street Crimes Unit. CP 59-60 (FF 1). Sergeant McMartin was unable to locate M.K. but contacted her mother and obtained descriptions of M.K. and her boyfriend William A. who, M.K.’s mother told him, was usually with M.K. CP 60 (FF 3).

On April 26, 2010, around 6:30 p.m., Sergeant McMartin saw a person fitting M.K.’s description, and later identified as her, standing on the corner of South 260th Street and Pacific Highway South. CP 60 (FF 5). Sergeant McMartin testified this is a

designated "Stay Out of Areas of Prostitution" area for the city of Des Moines. CP 60 (FF 6).

Sergeant McMartin testified M.K. stayed on the corner through four or five traffic light cycles and appeared to be watching cars with lone male occupants. CP 60 (5, 7). He testified another person, later identified as William A., walked over to M.K. and spoke with her briefly. CP 60 (FF 7). Around 7:00 p.m., M.K. crossed the highway, walked about half a mile, and then crossed the street again and began walking back. CP 60 (FF 8, 10).

Sergeant McMartin testified he saw William A. motion to M.K. to come towards him, M.K. run back to him, and William A. point towards a pickup truck in a nearby parking lot. CP 60-61 (FF 10-11). M.K. started to walk towards the truck, but the driver exited, walked to a DVD kiosk, and then drove away, without paying attention to M.K. CP 61 (FF 11). M.K. then returned to William. Id.

Around 7:15 p.m., the couple went to a nearby bus stop, moving away from it when buses approached. CP 61 (FF 12). William sat nearby while M.K. walked away. Id. Sergeant McMartin testified a Toyota Rav4 with a lone male driver pulled into a motel parking lot, M.K. got in the passenger seat, sat there for a few minutes, and then exited and continued walking along the highway.

CP 61 (FF 13). Sergeant McMartin testified a few minutes later a silver Lexus with a lone male driver pulled into another parking lot, M.K. began walking towards the car but it pulled away from her three times and then circled her as she headed back towards the highway. CP 61 (FF 14).

King County Sheriff's Detective Joel Banks testified he was working undercover in the same surveillance operation. CP 61 (FF 15). In his unmarked car, he pulled into a parking lot near M.K. Id. He testified M.K. approached, looked inside his passenger side window, stared at him, said she thought he was someone else, and walked away. Id. William then crossed to her side of the highway, they spoke briefly, and then returned to the bus stop. Id.

Sergeant McMartin testified M.K. walked along the highway while William stayed at the bus stop. CP 61 (FF 16). He saw a black pickup truck with a lone male driver pull into another parking lot and M.K. enter the passenger side. Id. The truck drove southbound on Pacific Highway, made a u-turn, and then dropped M.K. off at a check cashing business. Id. M.K. had been in the truck for about five to ten minutes. Id.; 1RP 103. King County Sheriff's Detective Donyelle Frazier testified he followed the truck in his unmarked vehicle but did not believe there was enough evidence to

arrest M.K. at that time. 1RP 157. M.K. and William met up, spoke briefly, and returned to the bus stop. Id. M.K. walked along the highway again while William walked to a 7-11 store and briefly spoke to some people there. CP 61-62 (FF 17-18).

Sergeant McMartin, also in plain clothes and an unmarked car, pulled into the parking lot near the check cashing business just after M.K. walked past it and honked his horn. CP 62 (FF 26). He testified M.K. turned and walked back towards his car. Id. Sergeant McMartin then arrested M.K. CP 62 (FF 27). About ten minutes later, Des Moines police arrested William. CP 62 (FF 28). Detective Frazier advised him of his Miranda¹ rights and juvenile warnings. Id.

When both William and M.K. were searched incident to arrest, the officers found no money, condoms, cell phones, or drugs on either of them. CP 62-63 (FF 30-31). All three officers testified M.K. was not provocatively dressed, but wore a black North Face jacket, gray sweats, and tennis shoes. 1RP 59, 117, 172.

At the police station, Detective Banks told William why he and M.K. had been arrested. William responded M.K. “doesn’t do it for me,” “does it for someone else,” and “was doing this stuff before I even met her.” CP 63 (FF 36). Detective Banks testified he asked

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

William why M.K. would meet up with him after her contacts with the drivers of the vehicles and William replied, "Truthfully, man, we was out here, hustlin' up some dollars." Id.

Detective Frazier testified that at the police station, William asked him to tell M.K. he loved her. CP 63 (FF 37). Detective Frazier asked if he loved her so much why did he let her get in cars with men; William replied, "she was doing that before I met her." Id.

The foregoing testimony was admitted for the purposes of the CrR 3.5 and 3.6 hearing. The court found Sergeant McMartin, Detective Banks and Detective Frazier had probable cause to arrest M.K. for loitering for purposes of prostitution and "to believe that the respondent was aiding and abetting [M.K.] in loitering for the purposes of prostitution." CP 64 (CL 4-5). M.K., however, had been acquitted of that charge in a separate fact-finding. The court also found William's statements at the police station were made post-Miranda and were voluntary and therefore were admissible in the case-in-chief. CP 64 (FF 2-3).

The State offered no additional evidence for its case-in-chief, and the court did not consider any hearsay evidence introduced for purposes of the CrR 3.5 and 3.6 hearing. William stipulated that M.K. was a minor. CP 69 (CL II.b). The court found William and

M.K. were “engaged in some kind of joint enterprise,” with M.K. “acting as a prostitute” and William “engaging in conduct designed to institute, aid, cause, assist and facilitate [M.K.] prostituting herself as part of an enterprise of commercial sexual abuse of a minor.” CP 68-69 (FF 30, 32). On June 21, 2010, the juvenile court adjudicated William guilty of promoting commercial sexual abuse of a minor. CP 69 (CL III).

On June 25, 2010, William filed a motion to reconsider the judgment based on insufficient evidence. CP 40-45. The court denied the motion and imposed a standard range disposition of 15-36 weeks. 2RP 54; CP 54.

E. ARGUMENT

1. THE TRIAL COURT ERRED IN FINDING THE POLICE HAD PROBABLE CAUSE TO ARREST WILLIAM.

a. Individuals have the right to be free from police intrusion unless there is probable cause based on objective individualized facts that the person is committing a crime. The probable cause requirement is derived from the language of the Fourth Amendment to the United States Constitution, which provides, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures, shall not be violated, and no Warrants shall issue, but upon probable cause” U.S. Const. amend. IV. Our state constitution similarly protects our right to privacy: “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7.

Warrantless searches and seizures are presumed invalid unless an exception applies. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008) (citing State v. Rankin, 151 Wn.2d 689, 699, 92 P.3d 202 (2004)). The burden is on the State to show one of those exceptions applies, such as probable cause that a crime is being committed. Grande, 164 Wn.2d at 141. Probable cause must be individualized before an officer can infringe upon a person’s constitutional rights. Id. at 146.

Probable cause requires the existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe the accused is guilty of the indicated crime. State v. Clark, 143 Wn.2d 731, 748, 24 P.2d 1006 (2001) (quoting State v. Seagull, 95 Wn.2d 898, 906-07, 632 P.3d 44 (1981)). Probable cause requires more than “mere suspicion or personal belief that evidence of a crime will be found” if the police conduct a search. State v. Neth, 165 Wn.2d 177, 183

P.3d 658 (2008). Probable cause is distinguished from the less stringent standard of “reasonable suspicion” by its requirement that the officer not only reasonably believe criminal activity may be occurring, but that belief is grounded in circumstances showing the probability that the person has in fact committed a crime. State v. Lee, 147 Wn.App. 912, 916, 199 P.3d 455 (2008).

b. The ambiguous actions of William and M.K. in a high prostitution area provided insufficient facts to establish probable cause to arrest William. In Neth, the Supreme Court reviewed a search warrant for a vehicle based on a number of odd and suspicious circumstances, including the presence of plastic baggies typically used to sell drugs, the driver’s extreme nervousness, thousands of dollars in cash in the car, no proof of car ownership, no driver’s license or identification, and three “hits” by a K-9 dog trained in detecting illegal narcotics. 165 Wn.2d at 184. The driver also had a prior heroin conviction. Id. Despite these suspicious circumstances, the Supreme Court ruled there was insufficient evidence of specific illicit activity to support a finding of probable cause. Id. at 185. The police did not see narcotics residue in the plastic baggies or witness transactions involving the baggies, and without such concrete evidence of drug

activity, the suspicious but potentially innocuous circumstances did not amount to probable cause. Id. at 185 n.3.

Here, the evidence leading up to the arrest of William and M.K. was much more tenuous than that in Neth. The juvenile court itself acknowledged, “but for William’s [post-arrest] statements, it would have been a finding of not guilty because the other conduct in some sense was ambiguous[.]” 2RP 54.

At the time of the arrests, the officers had the following particularized information: M.K. and William spent about two hours on Pacific Highway South. During that time, they spent a total of about half an hour together, mostly at a bus stop, but did not board any bus. The rest of the time M.K. walked on the sidewalk while William sat or stood nearby. Neither M.K. nor William used a cell phone at any time. M.K. was not dressed provocatively or in any way that would draw attention to her. She did not gesture or speak to any drivers or pedestrians. Once, William pointed in the direction of a parked vehicle and M.K. began to approach it, but did not make contact with the driver. William did not gesture or speak to any other drivers or pedestrians. On one occasion, M.K. appeared to approach another parked car but did not make contact with the driver, and on another occasion, M.K. approached an undercover

detective in his vehicle, but then said she thought he was someone else. On two other occasions, M.K. got into a car and sat with the driver for a few minutes before leaving. The detectives did not believe she performed a sex act during those few minutes.

This conduct could be consistent with innocent, legal activities. For example, two teenagers with no money, unable to take the bus home, awkwardly look for a ride. Knowing that a young woman will be more successful than a young man in convincing strangers to help them, M.K. tries to obtain a ride while William waits. When strangers do pull over, they decide not to offer M.K. a ride after all – perhaps they are looking for a prostitute and have no interest in helping out; perhaps they are not willing to let William in the car – so she gets out and resumes her search. The conduct observed by the officers was far too ambiguous to support a finding of probable cause.

However, the officers – and the court – relied to a great extent on testimony about the conduct of prostitutes and pimps in general and the characterization of Pacific Highway South as a high prostitution area. This is not the individualized evidence that probable cause requires. Even with that evidence, much of the couple's conduct contradicts the officers' testimony about the

general conduct of prostitutes and pimps. For example, Detective Frazier testified that when looking for suspected prostitutes, he looks for the following factors: location, "how they are walking," if they are paying attention to males more than females, if they do not appear to have a destination, if they are using their cell phones a great deal, if they are dressed provocatively or inappropriately for the weather. 1RP 145. M.K. was dressed normally and did not use a cell phone at all. Although she did not appear to have a destination and did not contact any female, there was no testimony as to her manner of walking.

More importantly, however, Detective Frazier testified that the evidence for a promoting investigation typically comes after the arrest of a suspected prostitute. 1RP 147. He testified he might look for a suspected prostitute to make contact with a suspected pimp and their proximity to each other. Id. But the bulk of the evidence in a promoting investigation comes from interviews with suspected prostitutes and cell phone records. 1RP 147, 170. Sergeant McMartin testified pimps usually monitor from a distance; it is not common to see a pimp sit with a prostitute in the proximity and for the length of time that William and M.K. were seen here. 1RP 63. Detective Banks testified that "without exception," the suspected

prostitute or pimp would have a cell phone. 1RP 112. The generalized testimony actually undercuts the State's case. The individualized evidence of William's conduct is ambiguous and largely inconsistent with that of the "typical" pimp. The State was able to patch together its case for probable cause only by relying on the evidence that the location was a high prostitution area.

It is well-established that presence in a high crime area is not enough to establish the reasonable, articulable suspicion needed for a Terry² stop, much less the probable cause needed for arrest in this case. See e.g. State v. Martinez, 135 Wn.App. 174, 143 P.3d 855 (2006) (suspicious behavior in parking lot known to have been the site of recent vehicle prowls was not sufficient to establish reasonable suspicion); State v. Larson, 93 Wn.2d 638, 641, 611 P.2d 771 (1980) (police lacked reasonable suspicion to justify stop of vehicle which was illegally parked near a closed park in a high crime area at approximately 3 a.m., and which started to pull away as soon as police car approached); State v. Crane, 105 Wn.App. 301, 19 P.3d 1100 (2001) (overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003)) (presence in

² Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

high crime area, without more, does not support reasonable suspicion).

The Supreme Court recently reaffirmed this principle in State v. Doughty, ___ Wn.2d ___, 239 P.3d 573 (2010). In that case, an officer observed the defendant visit, for about two minutes, a house identified by the police as a “drug house” based on neighbor complaints. Id. at 574. The Court held the traffic stop that followed was not supported by reasonable suspicion. Id. (citing State v. Ellwood, 52 Wn.App. 70, 757 P.2d 547 (1988)). Similarly, in State v. Kinzy, police officers saw a teenage girl, who they believed to be 11 to 13 years old, standing on a street corner in a high narcotics area with a number of older adults, including one known by the officers to be involved in drugs. 141 Wn.2d 373, 388-89, 5 P.3d 668 (2000). The Court held, although the officers were justified in contacting the minor by their community caretaking function, they did not have the reasonable suspicion required for the Terry frisk they conducted. Id.

Those cases compel the same result here. William’s ambiguous conduct in a prostitution area did not even rise to the level of reasonable suspicion, much less probable cause.

Nor was William required to offer an innocent explanation for his behavior. In Martinez, an officer was patrolling an apartment building parking lot which had previously been the site of vehicle prowls when he observed the defendant near several parked cars. Id. at 177. The defendant quickly walked away and looked around “nervously;” when the officer called out to him asking if he lived in the apartments, the defendant replied he did not. Id. The Court held the stop-and-frisk, based on these facts, was not supported by reasonable suspicion. Importantly, the Court noted, “Mr. Martinez was not required to articulate a reason not to stop him.” Id. Here, William was not required to produce an innocent explanation for the circumstances; the burden was fully on the State to establish the officers had probable cause to believe he had committed a crime when they arrested him. The State did not carry that burden.

c. Because the officers did not have probable cause to arrest William, the trial court erred in finding probable cause and denying his motion to suppress. The court found the police had probable cause to arrest M.K. for loitering for the purposes of prostitution and to arrest William for aiding and abetting her in loitering for the purposes of prostitution. CP 64 (CL 4-5). The facts do not support that finding.

Because William's arrest was based only on ambiguous conduct and location not amounting to probable cause, it was unlawful; because his statements were a direct result of the unlawful arrest, they should have been suppressed. Grande, 164 Wn.2d at 147. As the court recognized, without those statements there could be no conviction, and the case should therefore have been dismissed. 2RP 54. The court erred and the conviction should now be reversed and the charge dismissed.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT WILLIAM'S CONVICTION FOR PROMOTING COMMERCIAL SEXUAL ABUSE OF A MINOR.

a. Sufficient evidence must be presented to support each element of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989). On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of second degree theft beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct.

2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

RCW 9.68A.101 provides:

(1) A person is guilty of promoting commercial sexual abuse of a minor if he or she knowingly advances commercial sexual abuse of a minor or profits from a minor engaged in sexual conduct.

(2) Promoting commercial sexual abuse of a minor is a class A felony.

(3) For the purposes of this section:

(a) A person "advances commercial sexual abuse of a minor" if, acting other than as a minor receiving compensation for personally rendered sexual conduct or as a person engaged in commercial sexual abuse of a minor, he or she causes or aids a person to commit or engage in commercial sexual abuse of a minor, procures or solicits customers for commercial sexual abuse of a minor, provides persons or premises for the purposes of engaging in commercial sexual abuse of a minor, operates or assists in the operation of a house or enterprise for the purposes of engaging in commercial sexual abuse of a minor, or engages in any other conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor.

(Emphasis added). The juvenile court in this case found that only the last section (the underlined portion above) could apply to the facts of this case. 2RP 11. Although the court correctly observed that the statute encompasses other conduct besides prostitution, there was no other conduct alleged here. William stipulated to

M.K.'s age. 1RP 86. The only question was whether, on the evening of April 26, 2010, between the hours of 6:30 and 8:30 p.m., William engaged in conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of M.K.

The ambiguity of the evidence prior to the arrests is discussed in depth above. William argues those facts were insufficient to support probable cause to arrest, and certainly insufficient to provide proof beyond a reasonable doubt.

Once the couple was arrested, the evidence against William actually weakened. The police searched both William and M.K. incident to arrest, but found none of the evidence they would expect to find on a suspected prostitute or pimp. Detective Banks testified he finds cell phones on suspected prostitutes and promoters "without exception." 1RP 112. Both Sergeant McMartin and Detective Frazier emphasized cell phone use as something they look for in identifying prostitute use, and cell phone contents and records as critical evidence in investigations of promoting. 1RP 39, 60, 115, 146-47, 170. But neither William nor M.K. had a cell phone. 1RP 62, 80.

Sergeant McMartin testified he would have expected to find money on at least one of them, but neither had any. 1RP 80-81.

Detective Banks testified suspected prostitutes “almost never” have money on them; however, they often give their money to their pimp right away, so the money is more frequently found on the suspected promoter, if he is arrested. 1RP 110-11. But William had none. 1RP 110.

Sergeant McMartin also testified it is common for suspected prostitutes to carry condoms. 1RP 84. Neither youth had condoms. 1RP 130. Nor did either have any drugs. 1RP 161, 167.

Thus, at the time William was transported to the police station, the evidence against him was limited to the ambiguous circumstances described above: his presence in a high prostitution area, his proximity to his girlfriend, and her ambiguous behavior in walking along the street, approaching a handful of cars, getting into two cars for a short period, and periodically speaking with her boyfriend. Nothing from the search corroborated the suspicion that he was promoting prostitution.

The only additional evidence came from William’s statements at the police station. In fact, the juvenile court observed that without these statements, William could not have been convicted. 2RP 54. But the statements do not establish his guilt.

First, William said M.K. “doesn’t do it for me,” “does it for someone else,” and “was doing this stuff before I even met her.” CP 63 (FF 36). These statements could be used to prove he knew M.K. had engaged in prostitution previously. They do not establish that she was trying to prostitute herself on April 26, 2010, that he knew that she was doing so, or most importantly, that he instituted, aided, caused, assisted, or facilitated the prostitution.

Secondly, William stated, “Truthfully, man, we was out here, hustlin’ up some dollars.” CP 63 (FF 36). This is statement is just as consistent with legal activities, like panhandling, or nonsexual illegal activities, like robbery or some kind of scam, as it is with prostitution. Where the evidence preceding this statement was so ambiguous, this statement falls far short of taking the evidence beyond a reasonable doubt.

This Court should reverse the adjudication of William’s guilt and dismiss the charge against him.

3. PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL PREVENT THE STATE FROM PROVING WILLIAM'S GUILT BASED ON ALLEGED LOITERING WHICH IT COULD NOT PROVE IN M.K.'S TRIAL.

Collateral estoppel "stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

Res judicata and collateral estoppel apply in criminal cases and bar relitigation of issues actually determined by a former verdict and judgment. State v. Peele, 75 Wn.2d 28, 30, 448 P.2d 923 (1968). The principles underlying these doctrines are to prevent relitigation of determined causes, curtail multiplicity of actions, prevent harassment in the courts, inconvenience to the litigants and judicial economy. State v. Dupard, 93 Wn.2d 268, 272, 609 P.2d 961 (1980).

State v. Sherwood, 71 Wn.App. 481, 486-87, 860 P.2d 407 (1993), review denied, 123 Wn.2d 1022, 875 P.2d 635 (1994).

Washington's doctrine of collateral estoppel no longer requires privity between the parties, only that "the party against whom preclusion is sought was a party or in privity with a party to the prior litigation and had a full and fair opportunity to litigate the

issue in question.” State v. Mullin-Coston, 152 Wn.2d 107, 113-14, 95 P.3d 321 (2004) (citing Kyreacos v. Smith, 89 Wn.2d 425, 428-30, 572 P.2d 723 (1977); Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 258, 269, 956 P.2d 312 (1998)).

In deciding whether to apply collateral estoppel in a particular case, the inquiry “must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.” State v. Eggleston, 164 Wn.2d 61, 70, 187 P.3d 233, cert. denied, 129 S.Ct. 735, 172 L.Ed.2d 736 (2008) (internal citations omitted).

The party seeking to enforce the rule must show that:

(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of [the] doctrine must not work an injustice.

Mullin-Coston, 152 Wn.2d at 114 (quoting State v. Bryant, 146 Wn.2d 90, 98-99, 42 P.3d 1278 (2002); State v. Williams, 132 Wn.2d 248, 253-54, 937 P.2d 1052 (1997)). All four criteria are met here.

First, the relevant issues are identical. In M.K.’s trial, the State tried to prove that she engaged in prostitution loitering on April 26, 2010 – specifically, that she “remain[ed] in or near any

street, sidewalk, alleyway or other place open to the public with the intent of committing, or inducing, enticing, soliciting or procuring another to commit, an act of prostitution.” King County Code 12.63.010(G). As the court in this case was aware, the State failed to prove the charge against M.K. beyond a reasonable doubt. 2RP 9. In William’s trial, however, the State sought to prove the same fact – that for two hours M.K. walked and stood near Pacific Highway South with the intent of committing an act of prostitution – and failed again. The court, in its oral ruling on the corpus delicti motion, observed:

[T]here were no sexual acts seen or acknowledged by [M.K.]... she was not dressed in a provocative manner. She was dressed perhaps as many other teenagers would be dressed. She had no condoms on her... she made no statements, and so it’s just not prostitution loitering, and indeed I can’t ignore the fact that another judge found her not guilty of prostitution loitering. Having said that, [William] is charged with a different offense.

2RP 9. The court found the verdict in M.K.’s case was “not determinative” in William’s trial. 2RP 11. But as applied to this case, whether M.K. was engaged in prostitution loitering was the central question. Without proving that fact, the State could not prove that William engaged in conduct “designed to institute, aid, cause,

assist, or facilitate an act or enterprise of commercial sexual abuse of a minor” because the only alleged “act or enterprise” was M.K.’s loitering for purposes of prostitution. RCW 9.68A.101(3)(a).

The statute contemplates any type of commercial sexual abuse of a minor, not just prostitution, but as applied to this case, no other type of commercial sexual abuse was alleged or could possibly be inferred from the facts. The only “act or enterprise” the State could allege was that M.K. loitered for the purposes of prostitution – the same issue already decided in M.K.’s trial.

Second, M.K.’s acquittal was a final judgment on the merits.

Third, the State was a party to both actions. Under the doctrine of nonmutual collateral estoppel, it makes no difference whether William was a party to both actions.

Fourth, the application of the doctrine would not work an injustice against the State. In M.K.’s trial, the State had the full and fair opportunity to prove beyond a reasonable doubt that on April 26, 2010 she loitered for purposes of prostitution and failed to prove the charge beyond a reasonable doubt. There is no indication that William’s case presented any new or different evidence with regard to M.K.’s conduct. In fact, the State could have called M.K. as a

witness, since she would no longer be able to invoke her Fifth Amendment right against self-incrimination, but chose not to.

In Mullin-Coston, the Court held collateral estoppel did not apply to inconsistent verdicts of two separately tried co-defendants. Mullin-Coston, 152 Wn.2d at 120. However, the Court's reasoning focused on the nature of jury verdicts. The Court "recognized the power of a jury to return a not guilty verdict for impermissible reasons." Id., at 117 (citing Standefer v. United States, 447 U.S. 10, 21-25, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980); State v. Goins, 151 Wn.2d 728, 732, 92 P.3d 181 (2004); State v. Ng, 110 Wn.2d 32, 48, 750 P.2d 632 (1988)). The Court refused to adopt any rule which would require an inquiry into "whether the previous jury's acquittal or conviction of a lesser offense actually resulted from a finding of innocence, a failure of the prosecution to establish proof beyond a reasonable doubt, or from impermissible reasons such as passion or lenity." Mullin-Coston, 152 Wn.2d at 117. The Court also noted "the reality that the same jury can return conflicting verdicts against the same defendant, [and] that our jury system allows two different juries to reach inconsistent answers to the same question posed in the cases of two different defendants." Id. at 118.

However, William and M.K. had bench trials, not jury trials. Mullin-Coston, and the cases cited therein, are distinguishable in this critical regard. Since the reasoning of Mullin-Coston is based on the vagaries of jury decisions, its logic does not apply to this situation. Although juries are generally assumed to follow the instructions, judges are required to uphold the law. The principle that a judge's verdict will be based upon the law and the admissible evidence – not passion or lenity – is not merely assumed, but fundamental. With a bench verdict, it is clear that the State failed to prove M.K.'s guilt beyond a reasonable doubt. It is illogical that the State could then prove the same fact beyond a reasonable doubt in William's case.

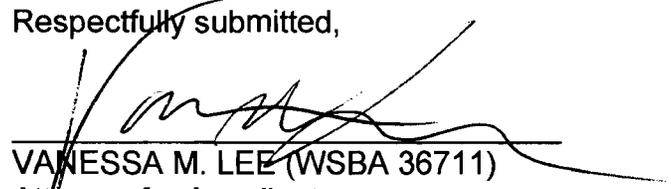
In a situation such as this, where a judge's acquittal in a bench trial provides final judgment on the merits of a question indispensable to the prosecution of another defendant, the State should be precluded from relitigating that question. William was convicted of promoting commercial sexual abuse of a minor even though the State could not prove commercial sexual abuse of a minor in the previous trial. William's adjudication should therefore be reversed.

E. CONCLUSION.

Because the police lacked probable cause to arrest William, the acquittal of M.K. estopped the State from arguing his guilt based on her alleged loitering, and the State produced insufficient evidence to prove his guilt beyond a reasonable doubt, William respectfully requests that his adjudication be reversed and the charge against him dismissed.

DATED this 3rd day of December, 2010

Respectfully submitted,



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