

NO. 67229-1-I

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

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAY -4 PM 4:00

REC'D
MAY 04 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MALCOLM R. HOLLINGSWORTH,

Appellant.

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

The Honorable Regina S. Cahan, Judge

REPLY BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THE PROMOTING PROSTITUTION AND HARASSMENT CONVICTIONS ENCOMPASSED THE SAME CRIMINAL CONDUCT.....	1
1. <u>Hollingsworth may raise this issue on appeal.</u>	1
2. <u>The promoting prostitution and harassment occurred at the same time and place</u>	2
3. <u>The crimes shared the same intent</u>	4
B. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Adame</u> 56 Wn. App. 803, 785 P.2d 1144 <u>review denied</u> , 114 Wn.2d 1030 (1990)	5
<u>State v. Allen</u> 150 Wn. App. 300, 207 P.3d 483 (2009) <u>review denied</u> , 170 Wn.2d 1014 (2010)	2
<u>State v. Barrington</u> 52 Wn. App. 478, 761 P.2d 632 (1988) <u>review denied</u> , 111 Wn.2d 1033 (1989)	5
<u>State v. Brown</u> 159 Wn. App. 1, 248 P.3d 518 (2010) <u>review denied</u> , 171 Wn.2d 1015 (2011)	1
<u>State v. Burns</u> 114 Wn.2d 314, 788 P.2d 531 (1990).....	6
<u>State v. Gooden</u> 51 Wn. App. 615, 754 P.2d 1000 <u>review denied</u> , 111 Wn.2d 1012 (1988)	5
<u>State v. Jackson</u> 150 Wash.App. 877, 209 P.3d 553 (2009).....	1
<u>State v. Kyllo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	2
<u>State v. Lewis</u> 115 Wn.2d 294, 797 P.2d 1141 (1990).....	4, 6
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9A.46.010	6
RCW 9A.88.070	6

A. ARGUMENT IN REPLY

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THE PROMOTING PROSTITUTION AND HARASSMENT CONVICTIONS ENCOMPASSED THE SAME CRIMINAL CONDUCT.

1. Hollingsworth may raise this issue on appeal.

Malcolm R. Hollingsworth argues on appeal defense counsel rendered ineffective assistance by failing to argue the convictions for first degree promoting prostitution and felony harassment involved the same criminal conduct. Brief of Appellant (BOA) at 8-16. The State in response contends, "The defendant should not be able to raise a waived issue merely by recasting the single issue under the pretext of a claim of ineffective assistance of counsel." Brief of Respondent (BOR) at 13-14.

The State's contention clashes with recognized appellate practice. In State v. Brown,¹ this court recognized the failure to argue same criminal conduct at sentencing could be addressed for the first time on appeal. This Court observed:

Because Brown's trial counsel did not argue same criminal conduct at sentencing, that argument is waived. State v. Jackson, 150 Wash.App. 877, 892, 209 P.3d 553 (2009). To avoid waiver, Brown asserts ineffective assistance of counsel. A party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5.

¹ 159 Wn. App. 1, 16-17, 248 P.3d 518 (2010), review denied, 171 Wn.2d 1015 (2011).

Id.; see also State v. Allen, 150 Wn. App. 300, 316, 207 P.3d 483 (2009) ("[B]ecause [Allen] argues in the alternative that he received ineffective assistance of counsel when his attorney failed to raise the same criminal conduct issue during sentencing, we address the relevant law."), review denied, 170 Wn.2d 1014 (2010). This is consistent with the well-established rule that a claim of ineffective assistance may be raised for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

This Court should reject the State's waiver claim and determine the ineffective assistance question on the merits.

2. The promoting prostitution and harassment occurred at the same time and place.

In response to Hollingsworth's argument the promoting prostitution and harassment occurred at the same time and place, the State writes, "There is absolutely no evidence that on November 22 when DL was staying at her grandmother's house, she prostituted herself for the defendant or the defendant attempted to compel her to do so." BOR at 12-13.

But the State presented evidence through Officer Nishimura that when he responded to DL's grandmother's house on November 22, 2010, a frightened DL called Hollingsworth "a known pimp," admitted she is a

prostitute, and revealed Hollingsworth forces her into prostitution. 3RP 48. According to Nishimura, DL said Hollingsworth "forced her to prostitute even while she was still six months pregnant," which is how many months pregnant she was when she gave the statement. 3RP 44, 48, 63-64.

Nishimura also testified DL told him that "when [Hollingsworth] picks her up at the house – she lives at 372 – he will make her walk up to 360th on Enchanted and pick up a – she calls it a trick." 3RP 48. From his report, Nishimura testified he responded to "2500 Southwest 370 Street, unit No. 94." 3RP 40. DL's father, who made the 911 call to which Nishimura responded, testified he lived on 370th Street with his mother, DL's grandmother. 3RP 84, 86.

This evidence shows that on November 22, when Hollingsworth committed harassment, he continued to compel her to commit acts of prostitution. It is difficult for the State to deny this, in light of its information, which alleged Hollingsworth promoted prostitution between July 1, 2009 and December 27, 2010. CP 10-13. Similarly, the evidence indicates Hollingsworth compelled DL to commit acts of prostitution from her grandmother's home, which is where the harassment occurred.

"[T]he same time and place analysis applies only when there is a continuing sequence of criminal conduct." State v. Lewis, 115 Wn.2d

294, 302-03, 797 P.2d 1141 (1990). Here, the state's own evidence shows there was a continuing sequence of criminal conduct that included promoting prostitution and felony harassment. Those two crimes occurred at the same time and place, and this Court should reject the State's argument to the contrary.

3. The crimes shared the same intent.

The State contends, "There is no evidence that the defendant's intent in threatening DL on November 22 was to compel her to prostitute herself for the defendant's financial gain." BOR at 12. Instead, according to the State, "the evidence shows that the two were arguing about DL's unborn child[.]" Id.

Nishimura, while summarizing DL's statements to him, said DL and Hollingsworth "had gotten into an argument regarding him not believing that she's pregnant with his child. The argument escalated and at one point he had threatened to kill her[.]" 3RP 44. This changed, however, when Nishimura read from DL's written statement: "I currently am six months pregnant with Malcolm's child, and he has been angry that I got pregnant." 3RP 64. DL then told Nishimura about past incidents where Hollingsworth broke her nose, choked her into unconsciousness, "has dislocated her shoulder, has also carried knives And [*sic*] forces her to prostitute." 3RP 64. Continuing, Nishimura read, "Malcolm also forces

me to prostitute and says I have to in order to 'to [sic] be with him'. Malcolm also has forced me to prostitute while I am pregnant. Tonight Malcolm called me at about 12:30 a.m. and started arguing with me. Malcolm then got angry that I 'disrespected him'. Malcolm said, 'Fuck you and your baby.'" 3RP 64-65.

Contrary to Nishimura's summary, the actual written statement indicates Hollingsworth was angry that DL got pregnant at all, not that she identified him as the father. This is logical; the pregnancy would undoubtedly diminish DL's continued ability to generate income for Hollingsworth through prostitution. And as this Court has recognized, the criminal objective of a promoting prostitution enterprise is to make money. State v. Barrington, 52 Wn. App. 478, 481, 761 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989); State v. Gooden, 51 Wn. App. 615, 620, 754 P.2d 1000, review denied, 111 Wn.2d 1012 (1988).

"Intent," for purposes of determining same criminal conduct, is the offender's objective criminal purpose in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990). Courts consider multiple factors to determine intent, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of a

recognizable scheme or plan. Lewis, 115 Wn.2d at 302; State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

Consideration of these factors indicates the promoting prostitution and felony harassment involved the same criminal conduct in Hollingsworth's case. The objective for threatening DL with death was to coerce her to continue serving as a prostitute for Hollingsworth so he could continue to make money. Indeed, the purpose for the harassment provisions of chapter 9A.46 RCW is to penalize "acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim." RCW 9A.46.010.

The harassment, in turn, was a way Hollingsworth compelled DL "by threat or force to engage in prostitution" as required to establish first degree promoting prostitution under RCW 9A.88.070(1). The harassment and promoting were therefore intimately related, furthered each other, and were part of the same scheme or plan to make money through compelled prostitution.

In short, the two crimes were the same criminal conduct. Reasonably competent trial counsel would have made this argument, which would have resulted in a lower offender score. Hollingsworth's counsel was ineffective for failing to do so. This Court should vacate

Hollingsworth's felony sentences and remand for a new sentencing hearing.

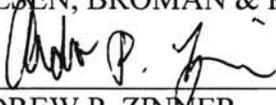
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Hollingsworth asks this Court to find Hollingsworth was deprived of his right to effective representation, vacate the felony sentences, and remand for a new sentencing hearing.

DATED this 4 day of May, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67229-1-1
)	
MALCOLM HOLLINGSWORTH,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 4TH DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MALCOLM HOLLINGSWORTH
NO. 848409
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF MAY 2012.

x Patrick Mayovsky