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OCT 30 2013

King County Prosecutor  
Appellate Unit

NO. 70034-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM JONES,

Appellant.

*[Handwritten signature]*  
OCT 30 2013 11:20

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

The Honorable Timothy Bradshaw, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The charging documents violated appellant's constitutional rights because they misstated an essential element of promoting prostitution.

2. The evidence is insufficient to sustain appellant's conviction for promoting prostitution.

3. Appellant was denied his Sixth Amendment right to effective representation when his attorney failed to object to lengthy and emotional testimony concerning the rewards of being a Vice Detective.

4. Appellant was denied his Sixth Amendment right to effective representation when defense counsel opened the door to otherwise inadmissible gang evidence.

5. The trial court erred when it admitted evidence under a theory of "res gestae" suggesting appellant had fled the Seattle area.

6. Cumulative trial error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Appellant was charged with Promoting Prostitution in the Second Degree. An essential element of that crime is that the defendant "advanced prostitution." The charging documents in

appellant's case, however, informed him that he was guilty of the crime if he merely "attempted to advance prostitution." In light of this affirmative misstatement, is reversal of appellant's conviction required?

2. Is reversal also required where the State's trial evidence fell short of establishing beyond a reasonable doubt that appellant advanced prostitution?

3. During the testimony of the Vice Detective who investigated the case, the prosecutor asked him to describe the most rewarding part of his work. Defense counsel did not object to this improper and irrelevant question, permitting the detective to provide a long and emotional answer concerning the difference he makes in victims' lives, the profound impact he has on their families, and the help he provides in separating the girls from the "bad people." Was appellant denied his right to effective representation and a fair trial?

4. The trial judge excluded evidence that appellant had ties to a member of the Crips gang. On cross-examination of a prosecution witness, however, defense counsel opened the door to this evidence, which jurors heard. Did this also deny appellant his right to effective representation and a fair trial?

5. Over defense objection, the trial court admitted evidence that law enforcement located appellant in Los Angeles. Although the court recognized jurors might use this as evidence of flight, it admitted the evidence as “res gestae.” Where the evidence was not admissible as res gestae, and the foundation for evidence of flight had not been established, does this also require reversal?

6. If none of the trial errors, by themselves, warrant a new trial, does their combined effect require that result?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor’s Office charged William Jones with (count 1) Human trafficking in the Second Degree and (count 2) Promoting Prostitution in the Second Degree. CP 10-11. Count 1 was based on an allegation Jones used force, fraud, or coercion to cause Emily Johnson to engage in a commercial sex act. CP 10. Count 2 was based on an allegation Jones attempted to advance the prostitution of Tara Makepeace. CP 10-11.

A jury acquitted Jones on count 1 and convicted him on count 2. CP 25-26. The Honorable Timothy Bradshaw imposed a

standard-range sentence of 55.5 months, and Jones timely filed a Notice of Appeal. CP 64, 69.

2. Substantive Facts

a. Count 1

Eighteen-year-old Emily Johnson met William Jones in the summer of 2012. RP 255-256, 335. Jones was attractive and kind, and Johnson quickly became infatuated. RP 256, 265. Jones told Johnson he managed escorts, dancers, and strippers. RP 268-269. The two went on dates, and Johnson met Jones' mother and friends, one of whom Jones said was a pimp. RP 274-275. Johnson thought Jones was perfect and fell in love. RP 265, 268-269.

At the time, Johnson still lived with her parents and brother in the Seward Park area. RP 253. Johnson worked at a small décor shop, owned and operated by her mother, and also worked as a nanny. RP 253-254, 446. At one point, Jones asked Johnson if she would consider working for him as a stripper and she made it clear she would not. RP 351-352. In a text message Johnson sent to Jones while under the influence of alcohol, however, Johnson indicated she would be willing to work for him as a stripper. RP 270; exhibit 7, at 5.

On the weekend of July 28, 2012, Johnson told her parents she was traveling with a friend to Lake Chelan. RP 277. Johnson actually had plans to travel with Jones to Portland for several days. RP 277-278, 339. After Jones picked up Johnson, he told her that he was a pimp and explained what pimps do. RP 279-280. According to Johnson, Jones told her that a pimp could improve her life. RP 280. He also told her that if she ever snitched, he would hurt her family. RP 280.

Jones drove Johnson to Bellevue, where he provided her with a book on achieving success in business and printed materials for escorts covering such topics as identifying undercover police officers, how to avoid arrest, and what to do if arrested. RP 281-282; exhibits 1-2. Jones supplemented these materials with his own advice and rules. RP 282, 287.

Jones rented a room at the Bellevue Silver Cloud Motel, where he took photos of Johnson in suggestive poses. Johnson also took photos of herself. RP 279, 283, 360; exhibit 3. An ad was then posted offering her services as an escort. Exhibit 3. Jones set the hourly rates and collected the money after each customer left. RP 284. Johnson had sex with approximately 30 men. RP 292.

In the meantime, Johnson's parents discovered she had lied regarding her whereabouts. RP 447-448. One of Johnson's friends provided information that Johnson was at the Silver Cloud Motel, and Johnson's parents contacted Bellevue Police. RP 448. Bellevue Police Officers went to the motel and ran into Johnson in the lobby, purchasing a soda. She informed officers that she was 18 and, despite their demand that she leave with them, told them she was not going anywhere. RP 291. Police had no grounds to detain or remove her and left. RP 491. Johnson's parents also went to the motel, but did not find her there. RP 449, 489-494.

Johnson's friends and family tried to convince her to come home through text messages, but she remained with Jones. RP 295, 298, 314-316, 450-457, 475-476. On the morning of Tuesday, July 31, Johnson telephoned her mother and then put Jones on the line. RP 457. The call did not go well. Jones told Johnson's mother she should calm down about the situation, to which she responded she knew he was a pimp, she would not calm down, and she would continue her efforts to return her daughter home. RP 458.

Later that same day, one of Johnson's high school friends texted Johnson and asked to meet her that afternoon at a mall. RP

316-318, 362-363; exhibit 7, at 58-63. With Jones' approval, Johnson agreed and the two met there. RP 318, 320-321, 363-367. Working with Seattle Police, Johnson's friend eventually led Johnson to a restaurant, where officers were waiting to speak with her. RP 221, 323-325, 367-369. After speaking with detectives, Johnson agreed to go with them to the police station, after which she went home with her parents. RP 222-227, 325-326.

Johnson never claimed Jones forced her to engage in acts of prostitution. In fact, she denied that she was forced to do so and denied that Jones ever held against her will. RP 243-246, 510.

In an attempt to bolster its case, under a theory of "common scheme or plan," prosecutors were permitted to introduce evidence that Jones had acted as a pimp for a woman named Erika Hill. RP 99-101. Hill, a dancer at the Déjà Vu, testified she previously considered Jones her boyfriend. RP 129-130. In May 2012, she and Jones traveled to Las Vegas intending that she obtain a license permitting her to perform there. RP 131. She was unsuccessful in obtaining that license, however, and Jones told her she would have to make money in another way, which she understood to mean prostitution. RP 132-133.

According to Hill, Jones provided her with the same book on achievement and same printed documents that Jones had provided Johnson. RP 133-135. Jones then made an on-line advertisement and Hill had dates with about 20 men. RP 136-137. Although she had been under the impression she and Jones would share the proceeds, she ended up giving all of the money to Jones. RP 137.

Hill also testified to a subsequent incident, after returning to Washington, involving Jones and money. RP 138. According to Hill, Jones wrote two checks to Hill totaling \$2,500.00. He deposited them in Hill's account, but immediately withdrew the funds, depriving Hill of all the money. RP 138-139. Hill sought help from her best friend, Tara Makepeace, who contacted Jones by text message and arranged a meeting at Southcenter Mall to discuss the situation. RP 139-140. Jones arrived with a male friend, said he did not have the money, and denied knowing anything about the matter. RP 140, 143-144. Hill testified she did not go to police because she felt threatened based on some of Jones' text messages. RP 144-145.

Hill conceded it had not been Jones' idea to go to Las Vegas. Moreover, at no time had he ever threatened Hill to make

her stay in Vegas or to make her engage in acts of prostitution. RP 149-150.

b. Count 2

Count 2 pertained to Hill's best friend, Tara Makepeace, who also works as an adult entertainer at the Déjà Vu. RP 410.

At trial, Makepeace described how she attempted to intervene on Hill's behalf concerning the money Jones supposedly owed Hill by setting up the meeting at Southcenter Mall. RP 412. She testified that the man accompanying Jones to that meeting was intimidating – cracking his knuckles and staring at Makepeace. RP 415-416. The tone of the meeting was serious. RP 416-417. Afterwards – in text messages between Makepeace and Jones – Makepeace complained about the intimidating nature of Jones' companion, to which Jones responded that he had “killas on the payroll” willing to do whatever he said. RP 416; exhibit 10, at 10.

On August 1, 2013, after Seattle Police had convinced Emily Johnson to leave Jones, Makepeace agreed to work with police in an effort to find Jones. With the assistance of police, Makepeace initiated another conversation with Jones by text message. RP 418-420. Police were responsible for about 25% of the content of Makepeace's messages and, eventually, the intent was to get

Jones to say something consistent with promoting prostitution. RP 435, 444.

As the two chatted, Jones said several things that Makepeace considered attempts to convince her she should work as a prostitute for Jones. Jones asked Makepeace, "Have you put a price on that pussy before or right now?" RP 421; exhibit 10, at 16. Makepeace interpreted this as a question regarding how much she charged for sex. RP 421, 441. Later, Jones said he had previously intended to have Erika Hill tell Makepeace, "to come fucc with me," which Makepeace interpreted to mean prostitute for him. Jones also referred to himself as a pimp. RP 424-425; exhibit 10, at 26. Jones wondered what assurance he would have that Makepeace was "coachable," which Makepeace interpreted to mean willing to take orders. RP 425; exhibit 10, at 27.

At the urging of police, Makepeace continued to send text messages to Jones the following day. RP 426. Jones asked Makepeace if she was "going to put something up for me," which she interpreted to mean give him money up front before they work together. RP 427; exhibit 10, at 31. Jones once again mentioned Makepeace "fuccin with" Jones, to which Makepeace ascribed the same meaning as before. RP 427; exhibit 10, at 32. Jones

mentioned managing money and the fact romance and emotion cause a loss of focus, which Makepeace again interpreted as references to prostitution. RP 427-428; exhibit 10, at 33-34.

Among its witnesses, the prosecution also called Seattle Police Detective William Guyer, who worked with both Johnson and Makepeace to obtain criminal convictions against Jones. RP 222, 231. Guyer reviewed some of the lingo associated with prostitution, including “fucking with” somebody, which means working for somebody, and “coachable,” which means capable of following the rules. RP 160, 173. Detective Guyer also testified concerning a YouTube video, played for jurors, in which Jones appears to discuss prostitution activities. RP 165-173; exhibits 4-6.

c. Trial Errors

As discussed in detail below, there were a number of errors at Jones’ trial. During Detective Guyer’s testimony, he gave a lengthy and emotional speech on the most rewarding part of his work in combating prostitution. RP 155-157. Jurors heard evidence suggesting Jones had fled the Seattle area despite the absence of a sufficient foundation for such evidence. RP 197-198, 230-233, 420. And jurors heard evidence that Jones had connections to the Crips gang. RP 431.

C. ARGUMENT

1. THE INFORMATION CHARGING JONES WITH PROMOTING PROSTITUTION WAS CONSTITUTIONALLY DEFICIENT.

Under both the Federal and Washington Constitutions, a charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art. I, § 22 (amendment 10)<sup>1</sup>; State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

Where a challenge to the constitutional sufficiency of a charging document is raised for the first time on appeal, this Court applies the "liberal construction" test. Under that standard, if the information is missing an essential element, it satisfies constitutional requirements only if the missing element is "fairly implied from language within the charging document." Kjorsvik, 117 Wn.2d at 102, 104. However, "[i]f the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995).

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<sup>1</sup> U.S. Const. amend. VI provides, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." Washington Const. art. I, § 22 provides, "In criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation . . . ."

Jones was charged with Promoting Prostitution in the Second Degree. Under Washington law:

- (1) A person is guilty of promoting prostitution in the second degree if he or she knowingly:
  - (a) Profits from prostitution; or
  - (b) Advances prostitution.

RCW 9A.88.080(1).

The information first filed in Jones' case properly contained the essential elements of the offense. It alleged:

That the defendant WILLIAM BRUCE JONES in King County, Washington, during a period of time intervening between July 28, 2012 through July 31, 2012, did knowingly advance and profit from the prostitution of Emily Johnson.

CP 1.

In an amended information filed two months later, the State increased the severity of the charge involving Johnson to Promoting Prostitution in the First Degree and added a second count charging Promoting Prostitution in the Second Degree concerning Makepeace. CP 7-9. Regarding Makepeace, count 2 alleged:

That the defendant WILLIAM BRUCE JONES in King County, Washington, during a period of time intervening between July 31 through August 3, 2012, did knowingly attempt to advance the prostitution of Tara Makepeace.

CP 8 (emphasis added). The language “knowingly attempt to advance prostitution” is contrary to RCW 9A.88.080(1), which requires that the defendant “knowingly advances prostitution.”

Two months later, the State amended the information again to reflect the charges for which Jones was eventually tried. This time, with regard to Johnson, the State charged Jones in count 1 with Human Trafficking in the Second Degree. CP 10. The language in count 2, charging Jones with Promoting Prostitution in the Second Degree, remained the same. Thus, it alleged Jones “did knowingly attempt to advance the prostitution of Tara Makepeace.” CP 11 (emphasis added).

Both the first and the second amended information were constitutionally deficient because, instead of informing Jones of all essential elements of Promoting Prostitution in the Second Degree, they affirmatively misadvised him of the elements. According to both documents, Jones was guilty even if he failed to advance the prostitution of Makepeace, so long as he merely *attempted* to advance her prostitution.<sup>2</sup>

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<sup>2</sup> Certain attempted activities satisfy the “advancing prostitution” element of the crime. See State v. Cann, 92 Wn.2d 193, 198, 595 P.2d 912 (1979). But it is incorrect to allege, as was

While it is not necessary to use the precise words of a statute in the charging document, the words chosen must convey the same meaning and import. State v. Moavenzadeh, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998); Kjorsvik, 117 Wn.2d at 108. The amended documents in Jones' case fail to do so. Even under the most liberal of readings, they affirmatively misrepresent an essential element of the offense.

Finally, the fact that the information cites to the relevant statute does not save it. "The primary goal of a charging document is to give notice to the accused so that he or she can prepare an adequate defense, without having to search for the violated rule or regulations." State v. Armstrong, 69 Wn. App. 430, 433, 848 P.2d 1322 (citing Kjorsvik, 117 Wn.2d at 101-02), review denied, 122 Wn.2d 1005, 859 P.2d 602 (1993). Merely citing to the pertinent statute and naming the offense is insufficient unless that name informs the defendant of each of the essential elements. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

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alleged in Jones' case, that one commits promoting prostitution by attempting to advance prostitution.

Jones' conviction for Promoting Prostitution in the Second Degree must be reversed. See State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992) (proper remedy is reversal without prejudice to the State refiling the information).

2. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN JONES' CONVICTION FOR PROMOTING PROSTITUTION.

In criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt 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, 220-21, 616 P.2d 628 (1980).

Unlike the charging documents in Jones' case, the instructions pertaining to promoting prostitution in count 2 correctly set out the State's elements of proof. These instructions required proof that "on or about July 31, 2012 through August 3, 2012, the

defendant knowingly advanced prostitution regarding Tara Makepeace.” CP 47. Instruction 16 provides:

The term “advanced prostitution” means that a person, acting other than as a prostitute or as a customer of a prostitute, engaged in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

CP 49; see also RCW 9A.88.060(1) (consistent statutory definition of “advances prostitution”).

At the close of the State’s evidence, and again following the jury’s guilty verdict, defense counsel argued the evidence was insufficient to prove beyond a reasonable doubt that Jones had advanced prostitution. Specifically, counsel argued that Jones’ text message discussion with Makepeace fell short of conduct designed to institute, aid, or facilitate an act or enterprise of prostitution because Jones’ inquiries were too general. Instead, Jones was simply measuring Makepeace’s level of interest. RP 518, 521-522, 525-526; CP 53-59. The defense motions were denied. RP 530-532, 562-565, 610-612.

In the light most favorable to the prosecution, several of Jones’ texts can be interpreted to address prostitution activities. For example, Jones asked Makepeace, “Have you put a price on that pussy before or right now?” RP 421; exhibit 10, at 16. Jones

said he had previously intended to have Erika Hill tell Makepeace “to come fucc with me,” and Jones referred to himself as a pimp. RP 424-425; exhibit 10, at 26. Jones wondered what assurance he would have that Makepeace was “coachable.” RP 425; exhibit 10, at 27. Jones also mentioned managing money and the fact romance and emotion cause a loss of focus. RP 427-428; exhibit 10, at 33-34.

While jurors could interpret these as references to prostitution, they could not reasonably conclude Jones had “advanced prostitution,” meaning that Jones had engaged in “conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.” CP 49. Defense counsel’s argument below, that Jones was merely gauging Makepeace’s interest, is correct. Makepeace was not a prostitute and had never been one. RP 432. At no time during these preliminary discussions did Jones institute, aid, or facilitate an act prostitution. Nor were the discussions designed to do so.

Jones conduct falls well short of that which is sufficient to satisfy the statute’s requirements. Compare Cann, 92 Wn.2d at 194, 197-198 (defendant invites women “to establish themselves at a house of prostitution which he said he maintained”); State v.

Dyson, 91 Wn. App. 761, 762, 959 P.2d 1138 (1998) (defendant arranged for undercover officer to have sex with a prostitute in exchange for \$20.00 fee); see also State v. Putnam, 31 Wn. App. 156, 160, 639 P.2d 858, review denied, 97 Wn.2d 1018 (1982) (“Any agreement to engage in or cause the performance of prostitution activity” is “advancing prostitution”).

In Jones’ case, there were no offers, invitations, or persuasions designed to initiate, aid, or facilitate an act of prostitution. Because the State’s evidence established only preliminary discussions that, at most, were a precursor to advancing prostitution, this Court should vacate Jones’ conviction. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice proper remedy for failure of proof).

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO DETECTIVE GUYER’S LENGTHY AND EMOTIONAL ANSWER ABOUT THE REWARDS OF HIS JOB.

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show

(1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

After establishing Detective Guyer's significant experience in the Seattle Police Department's Vice Unit, the prosecutor asked, "What's the most rewarding part of that work?" RP 155. Defense counsel did not object, permitting the following emotional speech:

You know, definitely making a difference in these girls' lives. They hit – it's the lowest point in their life when they're involved in this. And they're at the point, majority of them when we come up to them, that everyone's given up on them, they're throwaways, nobody cares about them. And when you start to see that shift, that – in their eyes they've been told they're nothing but trash and they're throwaways. When you see that shift that they see that people still do care about them and we start to introduce them to advocate groups within the city, to let them know that there's a lot of people in King County, state of Washington, that are ready to come out and help them, to show them that that isn't the final answer, that they're – they can still go on and be the – the things that they dreamed of growing up. So, when I get these letters from girls who have been out of the life for two, three years telling me that – you know, that they have a family now, a good job, and these calls come in probably once every couple of weeks I'll get one from either one of the girls or the family members that I worked with.

I think that's the other part, you know, working in DEA, you know, it was more of a business, go after the product, go after the – the distributor, go after all that stuff. We didn't get calls from families coming

into our office like they do in Vice where the parents are saying, please help us, you have to find our daughter, you know, we don't know where she is, she's with bad people, help us out. And so, I think that's definitely the biggest rewards.

RP 155-157. Counsel's failure to object to this testimony denied Jones his right to effective representation.

A defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). All three requirements are met here.

First, there could be no tactic or strategy behind permitting a police detective, whose job it is to protect women from the type of conduct charged against Jones, to explain the most rewarding part of his work. There could be no defense benefit in permitting Detective Guyer's answer.

Second, an objection would have been sustained. Evidence must be relevant to be admissible. ER 402. It must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence.” ER 401. The most rewarding part of Detective Guyer’s job was not relevant.

Moreover, even if this evidence had been relevant, it would have been excluded because any relevance was substantially outweighed by the danger of unfair prejudice. ER 403. Jurors are instructed not to let emotion overcome rational thought processes and to decide the case based on the law and evidence rather than sympathy, prejudice, or personal preference. CP 33. Yet, Detective Guyer’s answer was filled with emotion and would have garnered sympathy for him and those he assists. Had there been a defense objection to the prosecutor’s question, it would have been sustained.

Third, this evidence made a difference. To show prejudice, Jones need not demonstrate counsel’s performance more likely than not altered the outcome of the proceeding. Thomas, 109 Wn.2d at 226. Rather, he need only show a reasonable probability the outcome would have been different but for counsel’s mistake, *i.e.*, “a probability sufficient to undermine confidence in the reliability of the outcome.” Fleming, 142 Wn.2d at 866 (quoting Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

Jurors acquitted on count 1 because the evidence showed Johnson had voluntarily participated in prostitution activities. Not even Detective Guyer's emotion-laden answer about his work could change that outcome. But jurors obviously found count 2 a closer call on whether Jones had promoted prostitution. And on that count, there is a reasonable probability Guyer's discussion of the difference he makes in girls' lives (assisting in the conversion from self-described "throwaways" to realizing their dreams), the profound impact he has on their families, and the help he provides in separating the girls from "bad people" made a difference.

No reasonable attorney would have sat silently while Detective Guyer discussed the rewards of his job as a Vice Detective. Because Jones was prejudiced, his conviction on count 2 should be reversed.

4. DEFENSE COUNSEL ALSO WAS INEFFECTIVE FOR OPENING THE DOOR TO EVIDENCE JONES WAS ASSOCIATED WITH THE CRIPS GANG.

Defense counsel also violated Jones' right to the assistance of counsel when she opened the door to evidence Jones associated with members of the Crips.

At trial, Judge Bradshaw permitted the prosecution to introduce – over defense objections – most of the text messages

between Jones and Tara Makepeace before and after their meeting at Southcenter Mall regarding the money supposedly owed Erika Hill. RP 400-403; CP 13-15. But some of the evidence was excluded as too prejudicial under ER 403. RP 403. This included Jones' assertion that the individual who had accompanied him to the meeting was "from family mafia crip." RP 403-404; exhibit 10-A. In contrast, Judge Bradshaw allowed admission of Jones' text that he had "killas on the payroll." RP 403; exhibit 10, at 10.

Makepeace believed Jones said these things to intimidate her and Hill and prevent them from snitching about Jones' activities. RP 43-45. In an apparent attempt to meet intimidation with intimidation, Makepeace responded by text that she had a "homie" in the Crips gang and he owed her a favor. RP 43-45; exhibit 10-A. Judge Bradshaw did not exclude this reference to the Crips by Makepeace. RP 403-404; exhibit 10, at 10

Consistent with Judge Bradshaw's rulings, Makepeace did not testify to Jones' Crips reference and the prosecutor edited the original text to exclude the reference. See RP 410-429; compare exhibit 10-A, at 10 with exhibit 10, at 10.

Unfortunately, on cross-examination of Makepeace, defense counsel opened the door to this evidence:

Q: Okay. And so, is – legitimately the first time you guys [Jones and Makepeace] have actually had a conversation was through these texts and at the mall?

A: Yes.

Q: Okay. And then when you're at the mall, he didn't really talk to you?

A: No.

Q: Thank you for answering out loud, yeah?

A: Yeah.

Q: Okay. And – okay. So, the conversation was between the two of them [Jones and Erika Hill] at the mall. And was there – I think you mentioned that there was a threat. You – you were threatening him too, weren't you?

A: I wasn't really threatening him, no.

Q: Did you tell him that you had a friend on the mafia?

A: I said I had a friend who also was into the Crip gang when he was threatening me with his Crip gang.

RP 431 (emphasis added).

By opening the door to this excluded evidence, defense counsel performed deficiently. Under the “open door” doctrine, otherwise inadmissible evidence may become relevant and admissible when the opposing party raises the issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803

(2011); see also State v. Brush, 32 Wn. App. 445, 451, 648 P.2d 897 (1982) (open door doctrine trumps evidentiary rules), review denied, 98 Wn.2d 1017 (1983). The doctrine preserves the fairness of proceedings by preventing a party from raising a subject to gain an advantage and then barring the other party from further inquiry. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)), review denied, 129 Wn.2d 1007, 917 P.2d 129 (1996).

Once defense counsel asked Makepeace about her friend in the Crips gang (referred to as a member of the “mafia”), fairness dictated that Makepeace could inform jurors she said this only after Jones had first mentioned the gang. No reasonable attorney would have opened this door having already obtained a ruling excluding the evidence.

Jones can also demonstrate prejudice because there is a reasonable probability this evidence impacted the outcome at trial. Evidence of a defendant’s association with a gang is inherently prejudicial, and trial courts have been warned to be “particularly cautious” when permitting its consideration. State v. Mee, 168 Wn. App. 144, 160-161, 275 P.3d 1192, review denied, 175 Wn.2d 1011, 287 P.3d 594 (2012). Judge Bradshaw excluded Jones’

reference to the Crips under ER 403 because the danger of unfair prejudice substantially outweighed any probative value. RP 403. The evidence also was inadmissible under ER 404(b), which provides, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith.”

Once defense counsel opened the door, jurors nonetheless heard that Jones had ties to the Crips. In fact, the manner in which Makepeace answered – indicating Jones “was threatening me with his Crip gang” – made it sound as if Jones himself (as opposed to Jones’ companion) was a Crips member. In an otherwise close case on the promoting charge, this evidence could have swayed one or more jurors to convict.

5. THE TRIAL COURT ERRED WHEN IT PERMITTED EVIDENCE THAT JONES HAD FLED THE SEATTLE AREA.

Defense counsel moved to exclude evidence that Detective Guyer arrested Jones in Los Angeles. RP 190. Counsel argued the fact of arrest was irrelevant. Moreover, jurors could improperly interpret Jones’ out-of-state location as evidence of his guilt based on a conclusion he fled Seattle to avoid capture. RP 190-191, 193.

The State agreed it was unnecessary to elicit the fact of arrest. RP 191. But the prosecutor argued jurors would learn, from Tara Makepeace's texts with Jones, that Jones was someplace else. RP 192. Moreover, the prosecutor argued the fact Jones "left shortly after Emily got picked up" and that he "chose to be somewhere else thereafter" was relevant as an indicia of guilt. RP 192, 195. Thus, jurors should hear evidence of where he was found as proof of consciousness of guilt. RP 192, 195.

Defense counsel responded that any probative value was far outweighed by unfair prejudice. RP 192-193. She objected not only to Detective Guyer mentioning Los Angeles, but also to jurors learning Jones had left town from Ms. Makepeace's texts. RP 194. Counsel argued the evidence was insufficient to show Jones was somewhere else due to consciousness of guilt, particularly since there was no evidence Jones even knew police were looking for him. RP 196-197.

Judge Bradshaw allowed admission of the evidence under a theory of *res gestae* ("It's a fact of what occurred."). RP 197. He agreed jurors might infer Jones left town in order to flee law enforcement, but found the risk of undue prejudice was not

substantial because the evidence was “to be minimized” by exclusion of the fact of arrest. RP 197-198.

In light of this ruling, Detective Guyer testified that Jones was located in Los Angeles, California on August 9, 2012. RP 230. Guyer explained how he enlisted Tara Makepeace’s assistance in locating Jones. RP 232-233. Jurors were permitted to see the text messages between Makepeace and Jones, which make it clear Jones had left the area and was in L.A. RP 413; exhibit 10, at 15-17, 21, 32.

In addition, during direct examination of Makepeace, the prosecutor raised the topic of why she had assisted Detective Guyer. As part of that discussion, the prosecutor asked, “Any interest in where he was?” RP 420. Makepeace answered, “Well, yeah. We were trying to also see where he fled. . . .” RP 420.

In a proper case, evidence of a defendant’s flight is relevant and admissible because “flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to evade arrest and prosecution.” State v. Burton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). The Supreme Court of Washington has warned, however:

the circumstance or inference of flight must be substantial and real. It may not be speculative, conjectural, or fanciful. In other words, the evidence or circumstances introduced and giving rise to the contention of flight must be substantial and sufficient to create a reasonable and substantive inference that the defendant's departure from the scene of difficulty was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. Pyramiding vague inference upon vague inference will not supplant the absence of basic facts or circumstances from which the essential inference of an actual flight must be drawn.

Burton, 66 Wn.2d at 112-113.

In Jones' case, there was an absence of substantial and real evidence suggesting flight. The State presented no evidence, for example, that Jones knew law enforcement was looking for him, that Jones was traveling under an alias, or even that the trip to Los Angeles was not preplanned before events involving Johnson. In fact, Jones was not even secretive about his location, confirming for Makepeace that he was in L.A. Exhibit 10, at 32.

Given the lack of foundation for evidence of flight, Judge Bradshaw erred in permitting jurors to learn that Jones had flown to L.A. Judge Bradshaw found the evidence admissible as *res gestae*. RP 197. But *res gestae* involves evidence that is necessary to complete the story of the crime. State v. Powell, 126

Wn.2d 244, 263, 893 P.2d 615 (1995); State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981). In order to fall within this exception, the act must be a "piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury." Tharp, 96 Wn.2d at 594.

At Jones' trial, it simply was not necessary that jurors learn Jones had flown to L.A. Rather, it was only necessary that jurors understand that Makepeace was assisting Seattle Police in locating Jones through the text messages. Telling jurors that Makepeace and police did not know Jones' precise location would have sufficed.

In any event, even where evidence is relevant as *res gestae*, it still must be excluded where the evidence is unduly prejudicial under ER 403. State v. Lane, 125 Wn.2d 825, 834, 889 P.2d 929 (1995). Informing jurors Jones had flown to L.A. strongly and improperly implied flight, *i.e.* consciousness of guilt, in the absence of a sufficient foundation. Moreover, that implication became express when (permitted under Judge Bradshaw's ruling) Makepeace testified she assisted Seattle Police to determine where Jones had "fled." RP 420.

The improper admission of evidence requires reversal where, within reasonable probabilities, the evidence materially affected the outcome. State v. Briejer, 172 Wn. App. 209, 228, 289 P.3d 698 (2012). Permitting jurors to believe that Jones fled the Seattle area was harmful to the defense. It strongly indicated Jones knew he was in legal jeopardy and had decided to flee law enforcement rather than address the situation in the legal system. In a case where jurors would have struggled with the question of Jones' guilt on count 2, there is a reasonable probability this evidence made a difference.

6. CUMULATIVE ERROR DENIED JONES A FAIR TRIAL.

Cumulative trial error may deprive a defendant of his constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). Assuming this Court concludes that neither ineffective assistance of counsel for failing to object to Detective Guyer's lengthy and emotional answer about the rewards of his job; nor ineffective assistance of counsel for opening the door to evidence Jones associated with members of the Crips; nor the admission of evidence Jones fled to L.A., by itself, warrants a

reversal of Jones' conviction, the combined effect of these errors warrants that result.

In combination, these errors improperly placed Jones in an extremely negative light, thereby easing the State's ability to convince jurors they should convict him on count 2 while simultaneously impeding Jones' ability to establish reasonable doubt. In combination, they denied him his constitutional right to a fair trial.

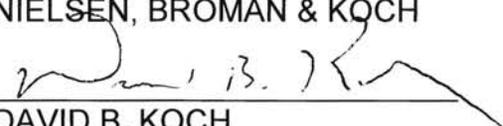
D. CONCLUSION

Because the State's evidence of Promoting Prostitution is insufficient, Jones' conviction must be dismissed with prejudice. Alternatively, his conviction must be reversed because the charging documents were insufficient, defense counsel was ineffective, and the trial court committed reversible error.

DATED this 31<sup>st</sup> day of October, 2013.

Respectfully submitted,

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Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70034-1-I
	)	
WILLIAM JONES,	)	
	)	
Appellant.	)	

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**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 31<sup>ST</sup> DAY OF OCTOBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM JONES  
DOC NO. 888764  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF OCTOBER 2013.

x *Patrick Mayovsky*