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No. 71820-7  
King County Superior Court No. 13-1-12992-9 SEA

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

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STATE OF WASHINGTON,  
Plaintiff-Appellee,  
v.

CRAIG CHARLES BROWN,  
Defendant-Appellant.

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

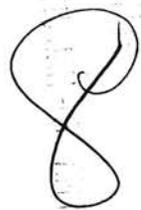
The Honorable Bruce E. Heller, Judge

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APPELLANT'S OPENING BRIEF

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**I.**  
**ASSIGNMENTS OF ERROR**

1. The prosecutor elicited Mr. Brown's prior bad acts of soliciting prostitutes in violation of ER 404(b).
2. The trial court erred in denying a mistrial for that reason.
3. The trial court erred in rejecting Brown's alternative request for relief: showing the jury certain portions of the video-recorded interview of Mr. Baze.
4. The prosecutor committed misconduct by presenting irrelevant and prejudicial evidence and argument about the police crusade against child prostitution.
5. The trial court erred in denying a mistrial on that basis.
6. Defense counsel was ineffective in the following ways:
  - (a) Failing to timely object to the questioning that led to the jury hearing of Mr. Brown's solicitation of prostitutes.
  - (b) Failing to timely object to testimony and argument regarding the police efforts to eradicate child prostitution.
  - (c) Failing to present witnesses to corroborate Mr. Brown's testimony that he was uncommonly inclined to help out strangers in need.

**II.**  
**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the prosecutor violate ER 404(b) when he elicited testimony that Mr. Brown had previously solicited prostitutes, and should the Court have granted a mistrial or alternative relief?
2. Did the prosecutor present improper evidence and argument regarding the general problem of child prostitution, and should the Court had granted a mistrial for that reason?
3. Was Mr. Brown denied effective assistance of counsel for the reasons set out in assignment of error 6?

**III.**  
**STATEMENT OF THE CASE**

At the time of trial, Mr. Brown was 54 years old. 3/13/14 RP 21. He had been married for 26 years and had four children. *Id.* at 22. He worked at the Puget Sound Naval Shipyard for 32 years as a Naval Architect. *Id.* at 22-23.

On September 17, 2013, Seattle Detective Tye Holland placed an advertisement on Craigslist in the category of “casual encounters.” 3/12/14 RP 41. The heading read: “Student looking for older men – w4m (anywhere).” The text included the following: “Just as the title says. Cute young girl interested in NSA sex. Email me. Please don’t be judgmental. I

am fun and sexy and aim to please.” Trial Ex. 1.<sup>1</sup> According to Detective Holland, W4M means “women for men.” 3/12/14 RP 42. “NSA” means “no strings attached.” *Id.* at 43.

Mr. Brown responded to this ad about 40-50 minutes after it was posted. *Id.* at 46. He used the name Brian Jacobs and described himself as a 43-year-old man. *Id.* at 48. Mr. Brown admitted at trial that he was looking for sex but not necessarily for pay. 3/13/14 RP 26- 27. Based on the advertisement, he was expecting a college student. *Id.* Detective Holland agreed that the words “young” and “student” could have referred to someone in her 20’s. 3/12/14 RP 106.

Detective Holland, pretending to be a female named “Jen jen,” responded to Mr. Brown. The complete email and text message string is contained in Trial Ex. 2. When Jen jen mentions being in high school, Mr. Brown responds as follows: “How old are you? If you are under 18 please quit immediately. I will not destroy my life for underage sex. Please tell me your age. I hope you have proof if you are 18.” *Id.* at p. 3. Jen jen responds: “I am not 18. sorry.” *Id.* at p. 3. Mr. Brown replies:

You are capable of really hurting someone who has sex with you. It could totally wreck their life. They will have to be registered as a sexual predator. It will be hard for

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<sup>1</sup> A Supplemental Designation of Clerk’s Papers will be filed with the King County Superior Court today.

them to get a good job, and a girlfriend.

Are you looking for money or just the excitement? I will not have sex with you, but am willing to help you. If you don't mind, tell me a little bit about yourself. Maybe I can help.

*Id.* at 4.

Mr. Brown testified that once he heard that Jen jen was underage, his focus was on convincing her to stop offering sex over the internet. 3/13/14 RP 30. Mr. Brown explained that he would often help out total strangers that came across his path. *Id.* at 30-31. He wanted to find out more about Jen jen and to see whether he could help her. *Id.* at 31-32.

When Jen jen did not respond after about 30 minutes, Mr. Brown sent the following email: "I am hoping we can write to each other knowing we will not meet. Please respond with your e-mail address. thanks!" Ex. 2 at 5. After another half hour of silence, Mr. Brown wrote: "Please don't give up on me, I am hoping you write back again." *Id.* at 6. Jen jen then responded: "I don't need pity. I am consenting and I like doing what I do." *Id.* at 7.

Mr. Brown did not believe that a 15-year-old girl could enjoy being a prostitute. 3/13/14 RP 32. "It doesn't make sense to me." *Id.* When Jen jen said she did not want pity, "[s]he just reinforced my idea that she wanted pity . . . And now all of a sudden I'm drawn in . . . I'm

going to help this girl.” But he realized he could not help without finding a way to meet her since he did not know her real name, her address or the school she attended. *Id.* at 33-34.

Mr. Brown’s next email asked if he could meet with Jen jen and what she looked like. Ex. 2 at 7. Jen jen replied by sending a picture purporting to be of her, along with this text: “I only meet for sex. Here I am.” *Id.* at 8.

The conversation continued as follows:

Mr. Brown: Age for consent in Washington is 17, how old are you?

Jen jen: It is 16 actually. I am 15.

Mr. Brown: I am being serious, do you really want to meet up with me? I want to meet you!

Jen jen: I am serious I don’t lie. I only meet for sex.

Mr. Brown: would you like to meet this weekend?

Jen jen: Ya but u said u were not interested.

Mr. Brown: I want to have the experience of being with you. I am getting to know you, and I want more!!!!

*Id.* at 8-10.

Mr. Brown testified that he wrote this, and other similar comments, because he believed Jen jen had low self-worth. “I’m hoping to get her to let [sic] like me enough so she is going to meet with me.” With enough

information about her, “I can go to the authorities to help her.” 3/13/14  
RP 34-35.

Mr. Brown then asked if Jen jen was affiliated with law enforcement and she denied that. Ex. 2 at 11-12. He testified that he did that because “[t]hat is the standard protocol on the internet.” 3/13/14 RP 36.

The conversation continued as follows:

Mr. Brown: do you want to meet this weekend?

Jen jen: I might be available. What do u want sex wise. I do oral sex, regular sex and anal sex. Let me know so I can give u price.

Mr. Brown: Where in Seattle do you live.

Jen jen: Beacon Hill area

Mr. Brown: regular sex to start

Jen jen: OK I do regular sex for \$100

Ex. 2 at 13-14.

Mr. Brown testified that he was not truly interested in sex with Jen jen. “What happens is if I don’t – I can write several emails and she won’t respond to me. It’s only when I infer about sex now that she will respond back to me. So she is [sic] now got me trained.” 3/13/14 RP 36. Mr. Brown noted that several times during their emails Jen jen would stop

responding if he failed to include talk about sex. *See, e.g., Id.* at 42, 58-59.

The conversation focused for a while on how and when the two would meet. Ex. 2 at 16 -20. Then, on September 19, Mr. Brown sent the following email:

You totally intrigue me and it is fascinating reading what you write. You have so much to say . . . I hope you write a diary and save it so you can read what your thoughts were. Are you popular? Do you do sports? or music? or drama? or clubs? Does it bug you that I want to know about you?

*Id.* at 21. Mr. Brown testified that he did not truly find anything Jen jen said to be fascinating or intriguing, but he was “trying to boost her ego up.” 3/13/14 RP 39. He thought writing in a diary would be therapeutic.

*Id.* He asked many questions about her life because he wanted to understand what was going on that would make her turn to prostitution.

*Id.* at 39-40.

Over the next three days, Mr. Brown continued to press Jen jen for details about her life, and suggested that they have some non-sexual interactions, such as attending a football game. On Friday, September 20, he asked her how she would like to spend the weekend and she replied that she would like to stay in bed naked, have lots of sex, and watch TV. Ex. 2 at 23.

What that told me is that she is dwelling on her personal self-destructive behavior, which is having sex. And one of the things when you are depressed, and when you are clinically depressed is you have no energy . . . And that can lead to suicide.

3/13/14 RP 40-41. Mr. Brown knew this from his own battle with depression. *Id.* at 41. Because of that, he kept trying to get Jen jen to open up about her life. *See, e.g.* Ex. 2 at 27 and 3/13/14 RP 44.

On September 22 Mr. Brown asked Jen jen how much money she would need to make him her only customer. Ex. 2 at 33. He also wrote: “I won’t have sex until you are of legal age, but I can start with some money to build up a pot so that once you are legal we can go all out.” *Id.* at 34. Mr. Brown was hoping that if he gave enough money to Jen jen she would give up on prostitution. 3/13/14 RP 50-53. He acknowledged that he was not rich, but noted that it was his habit to give away large sums of money to strangers who appeared to need it. *Id.* at 52.

Instead of accepting the offer of being paid for *not* having sex, Jen jen replied: “OK I am done. I thought u wanted sex. Since u don’t I am done communicating. I don’t have time to waste. I am not a victim. I don’t need charity.” Ex. 2 at 35. This made a strong impression on Mr. Brown.

Now, all of a sudden it became clear to me. She doesn’t need the money. She doesn’t even care about the money . . . All that matters to her is having sex with as many people as possible. She has a personal destructive behavior, and she

wants to do everything she can to continue with it . . . This person is worse off than I thought.

3/13/14 RP 54. Mr. Brown then realized that the only way to get through to Jen jen would be to give every appearance that he was a legitimate sex customer. *Id.* at 55-56.

On September 23, Jen jen suggested that they go to a motel. Ex. 2 at 39. She claimed she was in foster care and that her parents did not care about her. Ex. 2 at 49. After hearing this Mr. Brown was all the more concerned about the girl.

[H]er parents are not involved. So she can stay all the time in a motel in a weekend . . . And now she trumps it all by saying I'm in foster care. I don't care what anybody says . . . I'm now stuck. This is the most sympathetic character that anybody could have ever come up with.

3/13/14 RP 66. He then offered to adopt her. Ex. 2 at 49. He felt it was his God-given duty to do so. 3/13/14 RP 67.

At Jen jen's direction, Mr. Brown arrived at a McDonald's parking lot near the Seattle stadiums on September 24, 2013. He was promptly arrested. 3/12/14 RP 92. He did not bring with him any condoms, lubricant, or sex toys. *Id.* at 103.

**IV.  
ARGUMENT**

A. THE PROSECUTOR ELICITED PRIOR BAD ACTS OF THE DEFENDANT IN VIOLATION OF ER 404(B)

1. Relevant Facts

In his trial brief, defense counsel moved in limine to exclude any prior bad acts of the defendant. CP 10-12.

The State has not provided notice of ER 404(b) evidence to be presented at trial in response to defendant's discovery request for such notice. Therefore, defense asks that any evidence of defendant's alleged prior crimes, wrongs or acts be excluded.

CP 10. At the hearing on this issue, defense counsel noted that he did not expect that issue to come up. "I think Mr. Richey [the prosecutor] would give me the 404(b). But if there is 404(b), and I haven't gotten it I would like it." 3/12/14 RP 3. The prosecutor did not respond and defense counsel moved on to other issues. *Id.*

As noted above, on direct examination, Mr. Brown's attorney asked why Mr. Brown sent an email asking whether Jen jen was affiliated with law enforcement. 3/12/14 RP 36. Mr. Brown responded that it was "standard protocol" on the internet. Later, on cross-examination, the prosecutor asked why Mr. Brown asked for Jen jen's birthday and he replied that he was "just trying to legitimize myself to show her that I was a legitimate customer." *Id.* at 78-79. The prosecutor then asked if that was

part of the “standard protocol” Mr. Brown mentioned earlier and Mr. Brown responded that it was not. 3/12/14 RP 79. Nevertheless, the prosecutor pressed Mr. Brown on how he knew of internet protocol. Ultimately, the questioning led to Mr. Brown admitting that he had paid for sex with an adult woman he met through the internet. *Id.* at 84.

After the lunch break, defense counsel moved for a mistrial. Counsel noted that he was under the impression that the State would not elicit any bad acts such as prior sex with prostitutes. He argued that there should have been a hearing under ER 404(b) before such matters were brought up. *Id.* at 96-97. He pointed out that the prosecutor knew what answer would be coming because he had reviewed the video-recorded interrogation of Mr. Brown. *Id.* at 101. Further, defense counsel made a point on direct examination to avoid any mention of Mr. Brown’s previous interactions with prostitutes which, according to Mr. Brown’s statement to the detectives, were mainly geared towards helping them steer away from prostitution. *Id.* at 98.

As a “fallback position,” defense counsel asked to bring up certain statements Mr. Brown made during his interrogation. *Id.* at 102. In particular, counsel noted that Mr. Brown told the detectives that he could prove that he was paying prostitutes to stop selling sex. In fact, he showed the detectives phone numbers they could call to confirm that. *Id.* at 97.

The trial court rejected the request because it believed the hearsay rules prohibited any mention of the video by the defense.

Defense counsel recognized that he should have objected sooner.

And I didn't object. I should have. There is no strategic reason for not objecting. That is bad lawyering on my part, and I have, in essence, ineffectively represented Mr. Brown on this topic, which undercuts his testimony so much, and I don't believe any of this should have been admitted at trial.

3/12/14 RP 98.

The Court denied the motion for mistrial with leave to renew the motion after the verdict.<sup>2</sup> The Court also denied the request to present any portion of the interrogation on the ground that the statements were hearsay and that there was no basis to admit them as a prior consistent statement.

*Id.* at 103-14.

2. The Court Should Have Granted a Mistrial

The trial court should have granted the motion for a mistrial. ER 404(b) states:

**Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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<sup>2</sup> Brown did so but the motion was again denied. 3/14/14 RP 67.

Here, the prosecutor had no valid reason to question how Mr. Brown knew that asking whether the other party was affiliated with law enforcement was standard protocol on the internet. After all, there was no dispute that Mr. Brown was correct on that point. Detective Holland said that he gets that question “[a]lmost all the time.” 3/12/14 RP 29.

As defense counsel correctly noted, the both lawyers were thoroughly familiar with the video-recorded interview. For one thing, it was the sole exhibit at the pretrial suppression hearing on March 10, 2014. *See* Supp. CP \_\_\_\_, Dkt. 44 (Pretrial Exhibit List). At 4:39-8:01 in Pretrial Ex. 1, Mr. Brown discussed his prior experience paying for sex. Clearly, the prosecutor knew his questioning would lead to that information. Further, the State’s only conceivable purpose for bringing up the prior misconduct was to raise the inference that Mr. Brown was acting in conformity during his emails with Jen jen.

Even if there were some plausible argument for admissibility under ER 404(b), the evidence should have been excluded because the prejudice far outweighed any probative value.

The admission of evidence under ER 404(b) is also subject to the limitations of ER 402 and ER 403 as to relevance and prejudice. Thus, even if evidence of prior crimes falls under one of the exceptions recognized in ER 404(b), it should not be admitted if the prejudice clearly outweighs the probative value. *State v. Goebel*, 40 Wn.2d 18, 23, 240 P.2d 251 (1952) (*Goebel II*); *State v. Bacotgarcia*, 59 Wn.

App. 815, 819, 801 P.2d 993 (1990), *review denied*, 116 Wn.2d 1020, 811 P.2d 219 (1991). The purpose of ER 404(b) is to prohibit the introduction of evidence which could lead a jury to determine that a defendant committed the crime with which he or she is charged simply because he or she committed a similar crime in the past.

*State v. Lough*, 70 Wn. App. 302, 312-13, 853 P.2d 920, 925 (1993), *aff'd*, 125 Wn.2d 847, 889 P.2d 487 (1995). Here, even if there was some slight probative value to the reason Mr. Brown knew internet procedures, it was far outweighed by the prejudice caused by revealing that he had previously arranged for sex on the internet.

Further, as defense counsel pointed out, the Court did not follow proper procedures.

In determining whether evidence of other crimes may be admitted under ER 404(b), a trial court must conduct the following analysis on the record: (1) identify the purpose for which the evidence is to be admitted; (2) determine that the evidence is relevant and of consequence to the outcome; and (3) balance the probative value of the evidence against its potential prejudicial effect. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

*Lough*, 70 Wn. App. at 313. Here, the trial court held no hearing before the evidence was admitted.

3. In the Alternative, the Court Should at Least Have Permitted the Defense to Admit Portions of the Video Interrogation

Even if the Court were not required to grant the motion for a mistrial, it should at least have granted defense counsel's alternative

request to admit portions of the video interrogation. First, Mr. Brown gave the detectives names and phone numbers of prostitutes that Mr. Brown had tried to help. As the video clearly shows, the detectives declined to follow up on those leads. *See* Pretrial Ex. 1 at 7:39-8:38; 22:50-23:08; 27:45-28:14; 28:54-29:06.

“A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.” *State v. Rafay*, 168 Wn. App. 734, 794-95, 285 P.3d 83, 115 (2012), *review denied*, 176 Wn.2d 1023, 299 P.3d 1171, *and review denied sub nom. State v. Burns*, 299 P.3d 1171 (Wash.), *and cert. denied*, 134 S.Ct. 170, 187 L.Ed.2d 117 (2013) (quoting *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993)). This right is guaranteed by the Fourteenth Amendment Due Process Clause and the Sixth Amendment right to compulsory process. *See Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Absent a compelling justification, excluding exculpatory evidence deprives a defendant of the fundamental right to put the prosecutor’s case to “the crucible of meaningful adversarial testing.” *Crane v. Kentucky*,

476 U.S. 683, 689- 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)).

The right to present a defense includes evidence that the police investigation was biased, sloppy or inadequate. For example, “[e]vidence of sloppy police work in gathering physical evidence, such as fingerprints and DNA samples, or in establishing chain of custody generally is relevant and admissible.” *Rafay*, 168 Wn. App. at 803. *See also, United States v. Crosby*, 75 F.3d 1343, 1347 (9th Cir. 1996) (trial court erroneously excluded evidence of adequacy of police investigation regarding an alternate suspect); *Kyles v. Whitley*, 514 U.S. 419, 446, 115 S.Ct. 1555, 1572, 131 L.Ed.2d 490 (1995) (“A common trial tactic of defense lawyers is to discredit the caliber of the investigation”), quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10<sup>th</sup> Cir.), *cert. denied*, 479 U.S. 962, 107 S.Ct. 458, 93 L.Ed.2d 404 (1986).

Defense counsel did not initially seek to attack the investigation in this way because he wished to avoid reference to other prostitutes altogether. But once the State brought that up, the defense had every right to change tack. The jury was left with the impression that Mr. Brown solicited prostitutes solely for the purpose of sex when in fact he had proof

that he paid some of them to not have sex. Exclusion of this evidence violated the constitutional right to present a defense.

Similarly, Mr. Brown had a right to point out that he offered to take a lie detector test to prove that he did not intend to have sex with Jen jen. *See* Pretrial Ex. 1 at 35:22 -35:50. Of course, the results of such a test would not be admissible at trial. But it is doubtful that Mr. Brown knew that. That he would offer to take the test demonstrated consciousness of innocence. Further, that the detectives would turn down his offer once again goes to the adequacy of the investigation. Detectives often use polygraph tests during their investigations even though the results are inadmissible. In some cases, a favorable test results in a dismissal prior to trial.

In addition, the video clearly shows Mr. Brown wearing a shirt with the “Foster Parents Association of Washington State” logo on it. He pointed out that if Jen jen was a foster child, she would be familiar with the organization and therefore be more likely to trust Mr. Brown. Pretrial Ex. 1 at 22:12-22:33. This physical evidence further corroborated his account.

These portions of the video were not barred by the hearsay rules. A statement can be hearsay only if it is an “assertion” and it is offered for the truth of the matter. ER 801(a) and (c). That the detectives declined to

follow up on leads is not an assertion by the defendant. That he gave the police those leads would not be offered for the truth of the matter, but rather to show what leads were available. The shirt with the foster parent's logo is simply a physical piece of evidence, entirely outside of the hearsay rules.

**B. THE STATE PRESENTED IRRELEVANT AND PREJUDICIAL TESTIMONY AND ARGUMENT ABOUT THE POLICE CRUSADE AGAINST CHILD PROSTITUTION**

Detective Tye Holland started off his testimony by noting that he worked in the "High Risk Victim's Unit." 3/12/14 RP 15. After several pages of testimony about the various work he had done to stop commercial sexual abuse of minors, he noted that his unit has narrowed its focus to "rescuing the children involved." *Id.* at 21. He stated that he uses Craigslist "[b]ecause that's where the people are that want to victimize children." *Id.* at 27.

Officer Patricia McDonald played no role in this case other than to watch for Mr. Brown's car to appear in the parking lot and to retrieve his cell phone. Nevertheless, she spent six transcript pages describing her work in the High Risk Unit. 3/13/14 RP 8-13. At the prosecutor's request, she explained what it means to promote prostitution (a charge not at issue in this case): "Usually when a person is actively putting someone in the life of prostitution or benefiting from it." *Id.* at 8. She explained the role

of a “pimp” or “trafficker.” *Id.* at 9. She explained her work as a decoy in which she would pretend to be a prostitute. *Id.* In some cases she would pretend to be a juvenile. *Id.*

The prosecutor then asked her to explain her “approach for dealing with persons engaged in prostitution.” She replied:

Typically we try and do a little more victim center [sic] approach. We offer services. We try and do different programs and things to try and get them out of it to break the cycle. Sometimes it’s really hard to break them from getting out of that kind of lifestyle, and into what they have ended up getting into.

3/13/14 RP 10-11. She explained at length how this new approach helped to get young prostitutes off the streets while also helping to get information about their pimps. *Id.* at 11.

She then explained how prostitutes use the internet and the various web sites they use. *Id.* at 12. Then she set out some of the other types of crimes her squad deals with, including strip club violations and liquor violations, and the various roles she would play. *Id.* at 12-13.

After all that, she finally got to her work in this case, which was simply to watch for Mr. Brown’s car and then to retrieve his cell phone at Detective Holland’s request. *Id.* at 14-17.

In closing argument, the prosecutor commented:

Well, Tye Holland is the gate. Okay. He goes online and posts these ads, and then waits for this swarm to respond.

80 responses in under an hour. 80 responses. Okay. So Tye is standing there online waiting for these guys to come in. And they do en mass. If you didn't know about this issue before, you probably learned something during the course of this trial about what's going on. And now you have a sense of why. Maybe wondering where the police would do a sting. Well, now you know. Why Detective Holland is out there.

3/13/14 RP 135.

After the closing arguments, Mr. Swaby recognized the impropriety of the trial testimony set out above.

I must have seemed completely inept now as I look back at this when I didn't object to counsel for the State eliciting testimony from Detective Holland about these operations, and what they are about, and what they are trying to do. But when – but it seems clear, ties it back in, and I didn't get it until Mr. Richey argued that these people would have learned something that they didn't know before about these operations. I think that's a call to community action. I think that's a call to do the right thing. To protect the community. And I think that that's an improper argument, your Honor. And again I'm going to renew my motion for a mistrial.

*Id.* at 159.

Defense counsel was correct that the closing argument was an improper call to community action. *See State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2011). But perhaps even worse was the endless trial testimony about the horrors of child prostitution and the efforts of the police to eradicate it. This testimony had little probative value because the defense did not dispute that underage prostitution was a bad thing.

The defense was that Mr. Brown did not intend to engage in such conduct. The testimony and argument focused the jury on the systemic problem rather than on the guilt or innocence of this particular defendant.

It is true, as defense counsel admitted, that he did not timely object. But his second motion for a mistrial did preserve the issue for review. In the alternative, the Court should review the issue because the prosecutor's actions were flagrant and ill-intentioned.

C. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO TIMELY OBJECT TO THE IMPROPER TESTIMONY DISCUSSED ABOVE, AND IN FAILING TO PRESENT WITNESSES TO TESTIFY REGARDING MR. BROWN'S UNUSUAL TENDENCIES TO HELP STRANGERS

1. Introduction

Typically, claims of ineffective counsel must be raised on collateral review because they require facts outside of the existing record. In this case, however, two aspects of ineffective assistance can be raised on the appellate record. Mr. Brown reserves the right to pursue additional incidents of ineffective assistance, if necessary, in a collateral attack.

A defendant is entitled to a new trial if counsel's performance is deficient, and the defendant was prejudiced by counsel's errors or omissions. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh'g denied*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984). The prejudice from counsel's errors must be considered

cumulatively. *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A defendant need only show that it is “reasonably likely” that counsel’s errors affected the result. *Strickland*, 466 U.S. at 696. Fully informed strategic decisions are entitled to great deference. *Id.* at 681.

2. Counsel was Ineffective in Failing to Object to the Improper Testimony Discussed in Sections A and B Above

Defense counsel admitted that he failed to timely object to the testimony and argument which led to his motions for a mistrial. He conceded that his actions were not strategic. If the Court finds that the late objections would otherwise waive appellate review, the Court should nevertheless consider the issue of ineffective assistance of counsel.

3. Counsel was Ineffective in Failing to Present Testimony from Numerous Witnesses Who Could Confirm that Mr. Brown was Unusually Inclined to Help Strangers

Counsel’s only defense in this case was that Mr. Brown was merely pretending to be interested in sex with an underage girl because he wanted to help her. That required the jury to believe Mr. Brown was unusually inclined to help out a total stranger, yet counsel presented no evidence of that beyond Mr. Brown’s own testimony. This allowed the prosecutor to ridicule Mr. Brown’s “rescue mission.” *See, e.g.*, 3/13/14 RP

95, 155. Defense counsel noted that the prosecutor used a mocking tone of voice. *Id.* at 102.

In fact, numerous witnesses were available to corroborate Mr. Brown's testimony. This is clear from the defense sentencing memorandum and the letters attached to it. *See* Supp CP \_\_\_\_, Dkt. 62 filed 12/30/14. Defense counsel pointed out that Mr. Brown's attempts to save "Jen jen" were "characteristic." "Even the quickest glance of the many letters of support submitted on Mr. Brown's behalf show that he is a loyal man committed to helping even the strangers he encounters." Supp. CP \_\_\_\_, Dkt. 62 at 2.

Mr. Brown's wife, Diana Brown, explained:

Throughout our marriage, he [Mr. Brown] has given complete strangers money, rides or an understanding ear when he thought they needed help. It was not unusual for him to give people rides, often going miles out of his way. I would often become frustrated with his generosity but knew he was doing it because he believes it's his duty as a Christian and a human being.

Supp. CP \_\_\_\_, Dkt. 62 at 13.

Mr. Brown's daughter, Sarah Brown, wrote: "All my life, my dad has been there to always give a helping hand to someone in need." As just one example, she recounted an incident where Mr. Brown met two men at a grocery store who mentioned that they did not have a car or money for a

cab to get home. Mr. Brown immediately offered them a ride. Supp. CP \_\_\_\_, Dkt. 62 at 14.

Mr. Brown's daughter Megan Brown explained wrote: "I have countless memories growing up where my dad always kept his heart open to help others no matter what the situation was." As one example, when Mr. Brown learned that Megan's prom date did not have the money for formal attire, he took the boy shopping and later picked him up to go to the prom. "The way I describe my dad best is how he helps others in need." Supp. CP \_\_\_\_, Dkt. 62 at 17.

The letter from Mr. Brown's son Kevin includes the following:

As a child, every time we went to Seattle he encouraged me to bring money and food to give to any and all homeless we met. This became a habit with every trip, because he was so dedicated to teaching me how to live a selfless, caring, and compassionate life.

Supp. CP \_\_\_\_, Dkt. 62 at 18.

Mr. Brown's son Eric noted that his father's generosity "has been known to get the best of him." For example, when Mr. Brown encountered a navy sailor who had no place to stay during a layover, he immediately invited the sailor to his house, much to Mrs. Brown's displeasure. Supp. CP \_\_\_\_, Dkt. 62 at 19.

Amy Flock, Mr. Brown's sister, explained that her brother would "give his shirt off his back for someone in need." Mr. Brown's "greatest

and most dominating trait is to help people.” For example, he recently gave a man his sweater and the last \$30 in his wallet because the man was upset about losing his girlfriend. Also, “[f]or years he would take his family to visit an elderly person in his old neighborhood because he knew the importance of older people having visitors.” Supp. CP \_\_\_\_, Dkt. 62 at 20.

Mr. Brown’s brother Mark Brown described Craig as “the most selfless individual that I have ever met.” “Craig has helped more people than anyone else I can imagine. He never considers his time as he has a calling that knows no bounds.” As one example, Craig was at the Tokyo airport when it was evacuated during the 2011 earthquake. “People were pushed out into the cold so Craig opened up his suitcase and passed out his sweaters and sweatshirts.” Supp. CP \_\_\_\_, Dkt. 62 at 24.

Mr. Brown’s sister-in-law Karen Brown noted that Craig “has always values [sic] the needs and lives of others before even considering what his needs are.” Supp. CP \_\_\_\_, Dkt. 62 at 25.

His brother-in-law Benjamin Flock described Mr. Brown as “providing random acts of kindness in a world that desperately needs it.” Mr. Flock’s first experience with this took place 27 years ago when he visited Seattle to look for work. The first thing Mr. Brown did was to hand over the keys to his only car. Other examples included:

Consoling a neighbor after her husband committed suicide, offering emotional and financial support through troubling times. Buying a younger sister a car and driving it 3,000 miles cross country to deliver it to her in Syracuse. Stopping to provide a homeless person food on a Seattle street corner. Volunteering time to coach youth athletics, church education groups, and homeless shelters. Helping friends and family with math. Giving money to others even when you can't afford it.

Supp. CP \_\_\_\_, Dkt. 62 at 25-26.

Mr. Brown's niece Jackie Flock wrote that "Uncle Craig is the most generous person alive, even though he doesn't have much." She recalled him giving oranges and money to a poor mother he met in Japan so that she could feed her children. Supp. CP \_\_\_\_, Dkt. 62 at 29.

Veronica Kelley, the Pastoral Associate at Mr. Brown's church confirmed his efforts to help others in that setting. Supp. CP \_\_\_\_, Dkt. 62 at 34. Friends Mel and Colleen Jones noted that "for 30 years . . . we have always been able to count on [Mr. Brown's] help with whatever we needed." Supp. CP \_\_\_\_, Dkt. 62 at 35.

Mr. Brown's long-time supervisor at work, Darren Lutovsky, confirmed Mr. Brown's penchant for helping others in the work setting. Mr. Brown "routinely looks out for the welfare of his co-workers." Among other things, Mr. Brown would generously donate for flowers or a memorial whenever a co-worker had a death in the family; set up "fitness challenges" to improve employee's health; go "to the extreme" to help a

widow of a co-worker deal with all her financial difficulties, including assistance with insurance claims and with selling off unneeded possessions; and help Mr. Lutovsky's son pursue an athletic career. Supp. CP \_\_\_\_, Dkt. 62 at 37-38.

David Litaker, the Branch Manager, stressed Mr. Brown's selflessness. For example, he would take on unpleasant tasks at work to spare his co-workers. One time, Mr. Brown attended a funeral for an acquaintance he knew only casually. When he saw that one of the speakers was too busy to eat, he prepared a plate of food and brought it to him. Mr. Brown is "the type of guy . . . who would help out someone making a wrong decision." Supp. CP \_\_\_\_, Dkt. 62 at 43.

Another co-worker, Alan Orr, wrote: "I can honestly say that Craig has a nature/gift to help others." He "provided great comfort, strength" to a neighbor whose husband died suddenly, taking time off from work to help her settle the estate. When Mr. Orr was staining his porch, "Craig went out of his way . . . to bring me a respirator at 7:00 AM on a Saturday morning." Supp. CP \_\_\_\_, Dkt. 62 at 46.

Mark Ward, the technical group leader of the engineering department, worked with Mr. Brown for over eight years and confirmed the acts of kindness discussed above. He also recalled a time when Mr.

Brown stopped to help a distressed young man who was sitting in a puddle of water in the parking garage. Supp. CP \_\_\_\_, Dkt. 62 at 47.

Carmen Randall identified herself as one of the widows Mr. Brown helped out. “Two years ago, when my husband passed, Craig was instrumental in sorting out the financial mess I was left in. Helping people in need without expecting appreciation or compensation has always come naturally with him.” Supp. CP \_\_\_\_, Dkt. 62 at 49.

Neighbors William and Bobbie Bryan wrote that Mr. Brown “continually offers to help others though it may be a considerable inconvenience to him and his own family . . . “[H]e has offered to go out of his way to help us.” Supp. CP \_\_\_\_, Dkt. 62 at 39.

Mr. Brown’s sister Sue Pawelek stressed how Mr. Brown “gave of himself to strangers” and “thrives on wanting to help people in need.” Among other things, she described an incident when Mr. Brown noticed that a couple in a convenience store failed to bring enough money to pay for their purchases. Mr. Brown promptly covered the rest of the cost. Supp. CP \_\_\_\_, Dkt. 62 at 41.

Rose Flynn, a friend, recounted how Mr. Brown offered “to drive me and my son to Montana when my husband’s father was very sick and my husband was with him, even though Craig would have had to take leave from work.” When their families went to Mariners games together,

Mr. Brown would stop to buy hamburgers to give out to homeless people. “He once brought a homeless person home to their house for dinner. I remember thinking that particular move was not the smartest since he didn’t know anything about this person.” Supp. CP \_\_\_\_, Dkt. 62 at 48.

Others expressing similar sentiments included Ashely Flock, Supp. CP \_\_\_\_, Dkt. 62 at 27; Genevieve Flock, Supp. CP \_\_\_\_, Dkt. 62 at 28; Shannon Flock, Supp. CP \_\_\_\_, Dkt. 62 at 30; Kaleigh Flock, Supp. CP \_\_\_\_, Dkt. 62 at 31; Robert Flynn, Supp. CP \_\_\_\_, Dkt. 62 at 40; Andy Pawelek, Supp. CP \_\_\_\_, Dkt. 62 at 42; Mark and Kathleen Maki, Supp. CP \_\_\_\_, Dkt. 62 at 43-44; Patty Moore, Supp. CP \_\_\_\_, Dkt. 62 at 45; and Brittany Beck, Supp. CP \_\_\_\_, Dkt. 62 at 51.

As these testimonials show, defense counsel could have easily presented numerous witnesses to corroborate Mr. Brown’s unusual tendency to help out others, including complete strangers.

Such testimony would be admissible under at least two evidence provisions. First, ER 404(a)(1) authorizes “[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.” *See, e.g., City of Kennewick v. Day*, 142 Wn.2d 1, 11 P.3d 304 (2000) (defendant’s sobriety and temperance were traits of character; in prosecution for possession of marijuana with intent to use, defendant’s reputation as nonuser of drugs and alcohol was admissible to rebut charge

that he intended to use the marijuana found in his possession). Here, the witnesses discussed above could have testified to Mr. Brown's reputation for selflessly helping others in need.

Second, ER 406 states: "Evidence of the habit of a person . . . whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice."

The letters discussed above clearly show that Mr. Brown's routine practice was to go out of his way to help or save any needy person who came his way.

Thus, substantial testimony was available to give credence to Mr. Brown's unusual actions. Defense counsel could not have been following a reasonable strategy in declining to present these witnesses because his own theory of the case was that Mr. Brown truly was on a rescue mission and was only pretending at times to be interested in sex with Jen jen.

4. When Considered Cumulatively, it is Reasonably Likely that Counsel's Errors Affected The Result.

First, counsel's failure to object to the prosecutor's questioning about "internet protocol" caused the jury to hear that Mr. Brown had previously solicited sex for money. The jurors would likely consider it more likely that his motives were the same when he contacted "Jen jen."

Second, the failure to timely object to the extensive testimony and argument concerning the horrors of child prostitution and the police efforts to fight it likely biased the jury to convict. Third, and perhaps most importantly, defense counsel failed to present corroborating witnesses to Mr. Brown's unusual tendency to help out complete strangers, causing his testimony to seem self-serving and incredible.

At the same time, the evidence of guilt was hardly overwhelming. Mr. Brown initially responded to a posting that did not include the girl's age. During the email exchanges, Mr. Brown made many statements suggesting that he was *not* willing to have sex with an underage girl. His claim that he had to keep talking about sex to keep Jen jen responding to him was true; Detective Holland had no interest in corresponding with someone who just wanted to chat. That Mr. Brown showed up at the McDonald's lot without condoms or other sexual paraphernalia tended to support his defense.

Thus, it is reasonably likely that counsel's errors affected the result, and the conviction must be reversed.

## V. CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Brown's conviction and remand for a new trial.

DATED this 5th day of January, 2015.

Respectfully submitted,



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Attorney for Craig C. Brown

**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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