72660-9

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NO. 72660-9-I

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

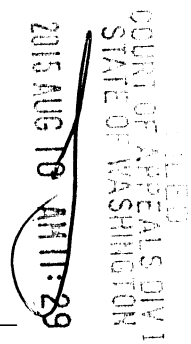
STATE OF WASHINGTON,

Respondent,

v.

BILL DWAYNE WHEELER, JR.,

Appellant.



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

The Honorable David A. Kurtz, Judge

REPLY BRIEF OF APPELLANT

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STATUTES, RULES AND OTHER AUTHORITY:

A. ARGUMENT IN REPLY

1. IN THE "STATEMENT OF THE CASE" PORTION OF ITS BRIEF, RESPONDENT OMITS FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW AND MISSTATES FACTS IT INCLUDED.

Respondent's "Statement of the Case" in this appeal omits facts which are essential to the "fair statement of the facts and procedure relevant to the issues presented for review" required by RAP 10.3(5). See Brief of Respondent (BOR) 2-5.

The state's theory at trial was that Mr. Wheeler was guilty of sexually exploiting sixteen-year-old M.S. because he forced the baristas who worked for his espresso stands to give shows by giving the best shifts to the most successful baristas: "T his was all part of his making money. This was all part of increasing his sales. And he hired [M.S.] knowing that's exactly what she would be doing. He put standards in place that forced her to be competitive with the others working at the stand." RP(8/1) 12. The facts set out in respondent's Statement of the Case are selectively chosen to support this theory. It is not a "fair statement" of the facts relevant to the issues on appeal.

For example, respondent asserted that "[t]he defendant set a quota for baristas to make $300 per shift on the weekdays and $150 per shift on the weekends. A barista who did not make her quota was required to pay

the defendant the difference from her tips." BOR 2-3. What respondent omitted is that M.S. said this happened only in extraordinary circumstances. RP(7/24) 137-138; RP(7/25) 152. The one time Mr. Wheeler asked her to pay for not making her quota, M.S. objected and he relented. RP(7/24) 136-138. The occasions when she said she did have to pay were when she was late and the stand wasn't open for business because of her absence and "when a girl that was working the morning shift had taken some money from the till. . . . I didn't catch that she had taken money. So I had to pay for that." RP(7/25) 106, 152. As respondent implicitly acknowledges, Mr. Wheeler's pressure on M.S. and other baristas was not to do shows, but to keep the stand stocked with supplies and the line moving so that customers could be served. BOR 2-3.

Most importantly, respondent asserts that "[b]aristas who gave shows earned more money during their shifts." BOR 3. The testimony, however, showed only that the baristas who gave shows earned more money in tips for themselves; there was no testimony establishing that the baristas increased the amount of the sales which went to Mr. Wheeler by doing shows. RP(7/25) 69. 120; RP(7/28) 27. Specifically, M.S. testified that she gave only one or two of shows per shift. Performances for two of the sixty or so customers who came through the stand during a shift was unlikely to have noticeably affected Mr. Wheeler's profits. RP(7/24)

124, 141

Respondent asserts that Mr. Wheeler threatened M.S. with less favorable shifts if she did not increase her sales. BOR 4. The relevant testimony at the cited pages involved only Mr. Wheeler's displeasure because M.S. had someone "hanging out" at the stand to talk to her.[1] RP(7/25) 34.

Respondent implies that Mr. Wheeler thoroughly reviewed the footage of the surveillance tapes at the end of every shift. BOR 4. The testimony, however, was that he "would press a fast forward button or a rewind button and go through them" and that he stood on a stool, "playing through the tape and watching what was playing and fast-forwarding through it" to count the cars or watch what the cameras were recording inside the stand." RP(7/24) 126; RP(7/25) 154. M.S. testified that Mr. Wheeler texted her asking "That guy leave?" and that she did not know how he knew whether a customer had been there too long or if she had a line at her window. RP(7/25) 32-33. In one instance, Mr. Wheeler indicated he was across the street watching the stand. RP(7/25) 34. Melinda Alvarado testified that the surveillance system was used to keep people from breaking in. RP(7/25) 110.

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[1] Because respondent cites to the record at the end of long paragraphs, it is difficult to determine which citations are meant to support which particular factual assertion in the paragraph.

Appellant set out a complete set of the relevant facts in his Opening Brief of Appellant (AOB) 3-15.

2. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO DISMISS FOR OUTRAGEOUS GOVERNMENT CONDUCT IN PROSECUTING MR. WHEELER BASED ON EVIDENCE WHICH WAS ILLEGALLY GATHERED BY DETECTIVE NEVIN, WHO WAS GIVEN IMMUNITY FOR HIS PAYING SIXTEEN-YEAR-OLD M.S. TO BARE HER BREASTS AND SURREPTITIOUSLY VIDEOTAPING HER.

The Legislature has charged every person – on penalty of a felony conviction – with making a reasonable bona fide attempt to determine that anyone they aid, invite, or cause to engage in sexually explicit conduct in order to photograph the performance is not a minor. Relying solely on the apparent age of the minor is insufficient.

> (3) In a prosecution under RCW 9.68A.040 . . . , it is not a defense that the defendant did not know the alleged victim's age. It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.

RCW 9.68A.110. The Legislature expressly extended this responsibility to police officers conducting an investigation:

> (1) In a prosecution under RCW 9.68A.040, it is not a

> defense that the defendant was involved in activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses . . . .

RCW 9.98A.110. Given these clear statutes, it was patently untenable and an abuse of discretion for the trial court to excuse the conduct of Detective Nevin on the grounds that it was not "readily apparent" to him that M.S. was a minor, and deny Mr. Wheeler's motions to dismiss for outrageous governmental conduct for that reason. RP(7/29) 159-161; BOR 8. See State v. Athan, 160 Wn.2d 354, 375, 158 P.3d 27 (2007). It was outrageous governmental action to prosecute Mr. Wheeler based on the evidence gathered illegally by and the testimony of Detective Nevin who committed the same crime charged against Mr. Wheeler. It was outrageous misconduct for Detective Nevin to have encouraged M.S. by giving her money to induce her performance without determining her age, and outrageous governmental conduct to prosecute Mr. Wheeler and grant Detective Nevin immunity.

Respondent does not dispute that the only photographic or video image of M.S. exposing her breasts – the only physical evidence and virtually the only evidence that was not testimony given by a witness with a motive to testify favorably to the state -- was the video taken surreptitiously by Detective Nevin. RP(7/24) 69. And, while respondent tries to minimize the extent to which Nevin encouraged M.S.

to give a show (BOR 110), respondent does not really dispute that Nevin made small talk to M.S. to gain her confidence, placed money in her underwear to encourage her, and asked her to expose herself so that he could secretly videotape her. RP(7/23) 161-168 RP(7/23) 163-168. Respondent does not dispute that Nevin did not make any attempt– much less a bona fide effort -- to investigate M.S.'s name or age.[2] And again, although respondent does not explicitly acknowledge that Detective Nevin was guilty of violating RCW 9.68A.040, Nevin clearly "aided, invited, authorized and caused M.S. to engage in sexually explicit conduct knowing" that she would be giving a live performance and that he would photograph it. RP(7/25) 108-109; RP(7/28) 16, 25-26.

Because the state's case was based on the testimony and evidence provided by Detective Nevin, his conduct was prejudicial to Mr. Wheeler and "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (quoting United States v. Russell, 411 U.S. 423, 431-432, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)). Prosecuting Mr. Wheeler based on evidence obtained through

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[2] Respondent excuses this by saying that if Detective Nevin had questioned M.S. it might have been counterproductive to his investigation. BOR 12. The Legislature has not given a police officer the choice to rely solely on apparent age. RCW 9.68A.110. In any event, as a police detective, Nevin had many means at his disposal to investigate M.S.'s age – or simply to forego videotaping her.

Detective Nevin's criminal activity while granting Nevin immunity from prosecution violates "the community's sense of fair play and decency." BOR 6 (citing State v. Cantrell, 111 Wn.2d 385, 389, 758 P.2d 1 (1988)).

Notwithstanding respondent's argument to the contrary, Nevin's conduct meets the factors set out in Lively, 130 Wn.2d at 22; BOR 9-12. Nevin instigated a crime; M.S. did not offer to give him a show and resisted to the extent that she told him that she had morals. RP(7.23) 162-168.. He overcame her reluctance by placing money in her underwear.[3] He controlled the activity and didn't simply allow it to occur; had he not solicited and encouraged her to give a show, M.S. would not have performed for his videotape. M.S. testified that she did not believe that she ever offered to do a show for a customer. RP(7/24) 141. And, while Nevin might claim his actions were to protect the public, they did not protect M.S. in the manner the Legislature charged him with protecting her. Finally, Nevin's conduct amounted to criminal activity. Lively, at 22.

The trial court abused its discretion in denying the defense motion to dismiss based on outrageous misconduct by the government, and this

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[3] Respondent argues that the "only encouragement it took for her to perform was a simple request for a show." BOR 10. This assertion is contradicted by Nevin's testimony that he put money in her underwear and that M.S. told him she had morals. RP(7/23) 162-168.

Court should now reverse and dismiss Mr. Wheeler's conviction. The judicial process should not be invoked to use evidence collected by sexually exploiting a minor to gain a conviction.

3. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN MR. WHEELER'S CONVICTION FOR SEXUAL EXPLOITATION OF A MINOR.

Respondent's argument that there was sufficient evidence to convict Mr. Wheeler of inviting or causing M.S. to engage in sexually explicit conduct knowing that the conduct would be photographed or part of a live performance rests on a premise that was unproven at trial – that his "business model that rewarded baristas for exposing themselves with better conditions and better income . . . offer[ed] an incentive or inducement for the baristas to do so." BOR at 40. Specifically, respondent argues (1) that the fact that baristas were paid in tips and made more in tips by giving shows sets up "a reasonable inference" that baristas who gave shows had more customers" BOR 37; (2) that Mr. Wheeler knew that "the baristas would give shows as a way to increase sales," BOR 38; (3) that he required baristas to wear costumes, BOR 38; (4) that he knew the baristas were giving shows, BOR 38; and (5) that he deleted images from his cell phone and perhaps his surveillance system after the arrests of several of the baristas. BOR 39.

The facts that the baristas worked exclusively for tips, that they were required to wear scanty costumes, and even that Mr. Wheeler knew they were giving shows or that he deleted footage from his cell phone and surveillance systems are not illegal activity and do not establish criminal conduct or the kind of affirmative act by Mr. Wheeler required by the statute.[4] State v. Chester, 133 Wn.2d 15, 22-23, 940 2d 1374 (1997); AOB 23-24.

The inference that Mr. Wheeler affirmatively invited or caused M.S. to give shows because he knew she would give shows to increase her sales is unsupported by the record. First, the consistent testimony of the baristas who were asked is that Mr. Wheeler did not invite or pressure them to give shows (RP(7/28) 26); the testimony was that, to the contrary, he discouraged them from giving shows. RP(7/24) 68; RP(7/25) 114-116. 167. Second, not all of the baristas gave shows; there was nothing inevitable about a barista giving shows arising from the business. RP(7/23) 103. On the specific point of increasing sales, none of the baristas were asked if doing shows increased their sales; they were asked if it increased their tips. RP(7/25) 69. M.S. personally testified that she gave shows to one or two of the sixty customers who came through the stand on her shift – a number unlikely to show as a sales increase.

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[4] Assuming without conceding that these facts were proven at trial.

RP(7/24) 141. The testimony indicated that Mr. Wheeler's communications with M.S. were to make sure she had the supplies she needed on hand and to keep the line of customers moving efficiently. She was discouraged from being late and having men hang around the stand during her shifts. RP(7/25) 54.

The evidence was insufficient to establish more than that working at the Grab 'n Go expresso stand provided M.S. with the opportunity to engage in sexually explicit conduct at the request of individual customers. The record is devoid of evidence that Mr. Wheeler invited her to do shows or did any affirmative act which caused her to do them. Mr. Wheeler's conviction should be reversed and dismissed.

4. MR. WHEELER'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO GIVE A UNANIMITY INSTRUCTION AND THERE WAS INSUFFICIENT PROOF TO ESTABLISH SOME OF THE ACTS PRESENTED BY THE STATE.

As set out in the Opening Brief of Appellant, since rational jurors could certainly have had a reasonable doubt that Mr. Wheeler was guilty of inviting or causing M.S. to perform the show that Detective Nevin encouraged and paid her to perform, the failure to give a unanimity instruction was not harmless error. AOB 25-27.

Respondent argues in its responding brief, citing State v. Handran, 113 Wn.2d 11, 775 P.2d 453 (1989); State v. Knutz, 161 Wn. App. 395, 253 P.3d 437 (2011), and State v. Barrington, 52 Wn. App. 478, 716 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989), that a unanimity instruction was not necessary because the shows were a part of a continuing course of action. These cited cases do not support this conclusion.

Handran involves a defendant charged with burglary for illegally entering his wife's home and assaulting her; the assault consisted of unwanted kissing and hitting her. The court held that the hitting and kissing during the assault were an on-going course of action, but distinguished these facts from distinct acts which involve conduct that occurs at different places and times. Handran, 113 Wn.2d at 11. The facts of this case took place at different places and times and are not merely parts of a single show.

Knutz and Barrington involved indistinguishable parts of an on-going criminal enterprise -- a continuing theft by deceit of an elderly man and promoting prostitution. In contrast, Mr. Wheeler was conducting a legitimate and legal business; the coffee stands were not managed to obtain money from the giving of shows. The baristas, all of whom but M.S. were adults, received whatever money was given for the shows. The

acts alleged in this case were simply distinct acts committed with different people at different times and places and not an indistinguishable part of an on-going, single-objective criminal enterprise.

Prejudice should be presumed because a rational juror could have certainly had a doubt that the act committed by Detective Nevin, for which he was given immunity, was proven to have been committed by Mr. Wheeler. Had Nevin not solicited and paid for the show, it would not have been given. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990). Mr. Wheeler's conviction, if not reversed and dismissed, should be reversed and remanded for failure to give a unanimity instruction.

5. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT, WITHOUT LIMITATION, EVIDENCE OF ALLEGED PRIOR BAD ACTS OF THE ADULT BARISTAS.

The defense moved in limine to exclude evidence that the adult baristas gave shows to customers. RP(7/23) 6. 18-21. Although respondent asserts that the defense motion did not preserve the issue of unlimited admission of ER 404(b) evidence related to the shows given by adult baristas, respondent also concedes that Mr. Wheeler objected "to admission of adult employee shows generally on the basis that they were unfairly prejudicial." BOR 27. An objection on the basis of prejudice

preserves a ER 404(b) issue for appeal. State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2002).

Respondent asserts further that, given the court's recognition that the evidence of the adult baristas giving shows could become cumulative, the defense waived a challenge to the introduction of the evidence by not asking the trial court to readdress the issue during the course of the trial. BOR 26-27. As set out by appellant, however, defense counsel noted that it had a continuing objection to the introduction of evidence of shows given by adult baristas and challenged the admission of some of the evidence again toward the close of the case. In response, the court admitted all of the challenged evidence except one clip of a barista who had not been previously mentioned during the trial. RP(7/29 & 30) 92. 115; AOB 28. From this ruling it is clear that the trial court would not have excluded any of the video evidence or other evidence of baristas giving shows as cumulative if other specific objections had been made during trial. Because the judge allowed the state to introduce video showing adult baristas giving shows from after the charging period, it is clear that the judge would not have excluded tapes of the baristas from more relevant times. The purpose of the general rule that the trial court must be given an opportunity to rule on an asserted error is to allow the trial court to correct the error. State v. Van Auken, 77 Wn.2d. 136, 143,

460 P.2d 277 (1969). Here, any objection would have been futile. The error is preserved for appeal.

On the merits, respondent asserts that the evidence of adult baristas exposing their breasts and genitals to customers for tips was not likely to arouse an emotional rather than rational decision because it "did not establish the defendant's own bad conduct, but that of third persons." BOR 27-28. This argument must fail. The state's theory was clearly that Mr. Wheeler's business practice compelled the baristas who worked at his espresso stands to do shows in order to earn money; the evidence was introduced to establish his responsibility for the conduct. Moreover, this graphic material is inherently of the type to invoke an emotional response and disapproval – the reason that the police were investigating the Grab 'n Go Espresso stands was complaints from the public about the shows. The extensive video footage of the shows had no real probative value. It established nothing more than the testimony that the adult baristas gave shows. The sole impact of the evidence was unfair prejudice. The failure to exclude the evidence should require reversal of Mr. Wheeler's conviction.

6. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO DISMISS FOR MISMANAGEMENT OF THE CASE AND ERRED IN PLACING THE BURDEN ON THE DEFENSE TO CORRECT THE STATE'S MISMANAGEMENT.

Respondent does not dispute that there were no images of M.S. performing shows on the surveillance systems taken from the Grab 'n Go coffee stands, and, in fact, minimizes the relevance and significance of the technical evidence by the state's experts about the footage found on the systems. BOR 18, 21. As set out in the Opening Brief of Appellant, the state nevertheless presented lengthy and extensive testimony about the surveillance system footage and its experts' efforts in recovering it. This implied to the jury that there was important technological evidence of guilt shown by the state's credible and experienced technical experts. AOB 32-34. As it turned out, however, the experts were wrong about the number of days of footage and in their initial explanations of why they were wrong. RP(7/31) 6-8, 15, 38-53, 57, 76-79, 84. 88. Defense counsel asserted, as well, that the substance of the testimony was wrong too -- that there were not thirty-seven shows by adult baristas on the tape as the experts said and that there was exculpatory evidence of Mr. Wheeler and his wife telling the baristas not to perform shows on the tapes. RP(7/31) 5-8.

Respondent defends the trial court's denial of the defense motion for dismissal or a mistrial after the problems with the tape and testimony surfaced because "whether there was any significant evidence on the missing video was speculative" and any prejudice could be cured "by other additional testimony or a curative instruction." BOR 17-18. Respondent further responds that "whether they [the experts] were careless investigators or not had no effect on the credibility of the video Detective Nevin recorded . . . or the credibility of any of the civilian witnesses." BOR 18-19.

These arguments overlook that the defense motion was predicated not only on what was missing on the tapes but on what the state's experts had done to manipulate the tape – which had duplications on it as well as omissions– and what was said to be on the tape that was not accurate. RP(7/31) 6-8. These problems could not be cured by a simple instruction and could not be cured by reopening the case, given that the Lorex system was no longer available to review by the defense or defense experts. Neither of these alternatives would correct for the jury the wrong impression given of the state's witnesses' credibility and reliability and would only further emphasize the testimony. RP(7/31)

Respondent's argument that the credibility of the technical witnesses was immaterial overlooks that the credibility of Detective Nevin

and the other baristas was impeached by their motives to testify favorably to the state arising from the charges or potential charges against them. The technical witnesses added an aura of reliability and objectivity to the state's case.

Finally, respondent's argument that the court did not improperly place the burden on the defense is not supported by the record. The court stated:

> But one might note that if this was going to be an issue, arguably it should have been an issue raised and addressed months ago rather than in the midst of trial. . . . As it is, everyone essentially had a mistaken assumption. The State and its agents arguably have responsibility for this. But the defense had largely the same information itself about a year ago as well.
>
> RP(7/31) 100.

Dismissal was warranted because the arbitrary action of the government denied Mr. Wheeler a fair trial. See AOB 36-38. It was entirely the duty of the state and not Mr. Wheeler to not use false evidence. Id. At the least, a mistrial should have been granted because the irregularity was serious, the evidence was not cumulative, the jury was instructed to disregard only part of the testimony, and nothing short of a new trial could cure the prejudice. AOB 38-39.

Mr. Wheeler's conviction should be reversed and dismissed. If not dismissed, a mistrial should be granted.

7. MR. WHEELER'S CONVICTION SHOULD BE REVERSED BECAUSE THE CASE WENT TO THE JURY WITH FALSE TESTIMONY.

Respondent denies that there was false testimony before the jury who heard experts testify that they captured eight days of footage from the surveillance video system. According to respondent, the court's instruction to the jurors to ignore the specific testimony about eight days of tape cured the problem. BOR 22-23. This ignores that there were substantial problems with the footage that was captured and the testimony that thirty-seven shows by baristas were on the footage. The instruction to disregard only the specific testimony could not cure the prejudice and would only put further undue emphasis on the expert testimony. Nor could further testimony cure the problem given that the system was no longer available to examine.

The only cure short of a mistrial or dismissal was striking the entire testimony. The state did not offer this alternative, nor did the court adopt it. The jury had a false impression of the evidence that was not and could not be cured.

B. CONCLUSION

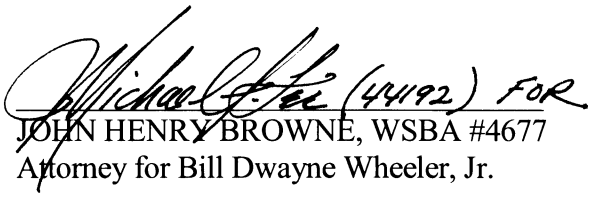
For all of the reasons set forth above and in the Opening Brief of Appellant, Mr. Wheeler respectfully submits that his judgment and sentence should be reversed and dismissed. At the least, the judgment and

sentence should be reversed and remanded for retrial in which cumulative evidence of the actions of adult baristas should be excluded.

DATED this 7th day of August, 2015.

Respectfully submitted,

LAW OFFICES OF JOHN HENRY BROWNE, P.S.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I sent via U.S. first class mail a copy of the "Reply Brief of Appellant" to Counsel for the Respondent:

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NAME DATE at Seattle, WA