

62968-9

62968-9

REC'D

JUL 29 2009

King County Prosecutor
Appellate Unit

NO. 62968-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

LINKON C. BROWN

Appellant.

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

The Honorable Deborah D. Fleck, Judge

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL 29 PM 3:51

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
B. <u>STATEMENT OF THE CASE</u>	3
1. <u>Summary of Background Evidence at Trial</u>	3
2. <u>Summary of Trial Evidence Regarding Charged Offense</u>	8
3. <u>Procedural Facts</u>	11
D. <u>ARGUMENT</u>	12
1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT BROWN "PROFITED" FROM PROSTITUTION.....	12
2. THE TRIAL COURT ERRED BY ADMITTING PREJUDICIAL HEARSAY IN THE FORM OF ASSERTIVE NONVERBAL CONDUCT.	19
3. THE COURT ERRED WHEN IT FAILED TO CONSIDER WHETHER TO IMPOSE THE DNA COLLECTION FEE UNDER THE APPLICABLE STATUTE AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.	25
a. <u>The Court's Failure to Exercise Discretion Under the Applicable Statute Requires Reversal and Remand.</u>	25
b. <u>Assuming For Argument the Legislature Intended to Subvert the Savings Statute, the Amended Statute Alters the Standard of Punishment Without Notice and Therefore Violates the Prohibition on Ex Post Facto Laws.</u>	29

TABLE OF CONTENTS (CONT'D)

	Page
c. <i><u>Counsel was Ineffective for Failing to Object to Sentencing Under the Incorrect Statute</u></i>	30
4. THE TRIAL COURT’S FAILURE TO FOLLOW CrR 3.5(c) and CrR 3.6(b) WARRANTS A REMAND FOR ENTRY OF PROPER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.....	31
D. <u>CONCLUSION</u>	33

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>City of Yakima v. Emmons</u> 25 Wn. App. 798, 609 P.2d 973 <u>review denied</u> , 94 Wn.2d 1002 (1980).....	23
<u>In re Dependency of Penelope B.</u> 104 Wn.2d 643, 709 P.2d 1185 (1985).....	19, 20, 21
<u>In re Personal Restraint of Powell</u> 117 Wn.2d 175, 814 P.2d 635 (1991).....	29
<u>State v. Aaron</u> 57 Wn. App. 277, 787 P.2d 949 (1990).....	22
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	30
<u>State v. B.J.S.</u> 140 Wn. App. 91, 169 P.3d 34 (2007).....	31
<u>State v. Bland</u> 71 Wn. App. 345, 860 P.2d 1046 (1993).....	13, 18
<u>State v. Broadaway</u> 133 Wn.2d 118, 942 P.2d 363 (1997).....	31
<u>State v. Buchanan</u> 78 Wn. App. 648, 898 P.2d 862 (1995).....	27
<u>State v. C.G.</u> 150 Wn.2d 604, 80 P.3d 594 (2003).....	13
<u>State v. Cannon</u> 130 Wn.2d 313, 922 P.2d 1293 (1996).....	32

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Carter</u> 56 Wn. App. 217, 783 P.2d 589 (1989).....	31
<u>State v. Columbus</u> 74 Wash. 290, 133 P. 455 (1913)	16
<u>State v. Cunningham</u> 116 Wn. App. 219, 65 P.3d 325 (2003).....	32
<u>State v. Curry</u> 118 Wn.2d 911, 829 P.2d 166 (1992).....	26, 27, 28
<u>State v. Doogan</u> 82 Wn. App. 185, 917 P.2d 155 (1996).....	12
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	26
<u>State v. Grant</u> 89 Wn.2d 678, 575 P.2d 210 (1978).....	28
<u>State v. Grayson</u> 154 Wn.2d 333, 111 P.3d 1183 (2005).....	25, 28
<u>State v. Head</u> 136 Wn.2d 619, 964 P.2d 1187 (1998).....	33
<u>State v. Hescoek</u> 98 Wn. App. 600, 989 P.2d 1251 (1999).....	33
<u>State v. Kitchen</u> 110 Wn.2d 403, 756 P.2d 105 (1988).....	13
<u>State v. Lobe</u> 140 Wn. App. 897, 167 P.3d 627 (2007).....	17, 18

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Luther</u> 157 Wn.2d 63, 134 P.3d 205 (2006) <u>cert denied</u> , 549 U.S. 978 (2006)	25
<u>State v. Mallory</u> 69 Wn.2d 532, 419 P.2d 324 (1966).....	33
<u>State v. McFarland</u> 127 Wn.2d 322, 899 P.2d 1251 (1995)	30
<u>State v. McGill</u> 112 Wn. App. 95, 47 P.3d 173 (2002).....	28
<u>State v. Modest</u> 88 Wn. App. 239, 944 P.2d 417 (1997) <u>review denied</u> , 134 Wn.2d 1017 (1998).....	19
<u>State v. Ortega-Martinez</u> 124 Wn.2d 702, 881 P.2d 231 (1994).....	13
<u>State v. Savaria</u> 82 Wn. App. 832, 919 P.2d 1263 (1996).....	13
<u>State v. Schmidt</u> 143 Wn.2d 658, 23 P.3d 462 (2001).....	29
<u>State v. Simon</u> 64 Wn. App. 948, 831 P.2d 139 (1991) <u>aff'd. in part and rev'd. in part</u> , 120 Wn.2d 196 (1992).....	18
<u>State v. Smith</u> 159 Wn.2d 778, 154 P.3d 873 (2007).....	13
<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997) <u>cert. denied</u> , 523 U.S. 1008 (1998).....	30

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Stubsjoen</u> 48 Wn. App. 139, 738 P.2d 306 (1987) <u>review denied</u> , 108 Wn.2d 1033 (1987).....	22
<u>State v. Tagas</u> 121 Wn. App. 872, 90 P.3d 1088 (2004).....	32
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	30
<u>State v. Toney</u> 103 Wn. App. 862, 14 P.3d 826 (2000).....	28
<u>State v. Tu Nam Song</u> 50 Wn. App. 325, 748 P.2d 273 (1988).....	23
<u>State v. Vailencour</u> 81 Wn. App. 372, 914 P.2d 767 (1996).....	32
<u>State v. Zornes</u> 78 Wn.2d 9, 475 P.2d 109 (1970).....	28
 <u>FEDERAL CASES</u>	
<u>Miller v. Dillard's, Inc.</u> 166 F.Supp.2d 1326 (D.Kan. 2001).....	20
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	30, 31
<u>United States v. Batchelder</u> 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979).....	28
<u>United States v. Katsougrakis</u> 715 F.2d 769 (2d Cir. 1983) <u>cert. denied</u> , 464 U.S. 1040 (1984).....	20

TABLE OF AUTHORITIES (CONT'D)

Page

United States v. Lewis
902 F.2d 1176 (5th Cir. 1990) 19

RULES, STATUTES AND OTHER AUTHORITIES

CrR 3.5 1, 3, 31, 32, 34

CrR 3.6 1, 3, 31, 32, 34

CrR 6.1 32

ER 801 19, 20, 22, 23

Former RCW 10.01.160(3) (2005) 26

Former RCW 43.43.7541 (2002) 27

Laws of 2008, ch. 97, § 3 27

RCW 7.68.035 27

RCW 9.94A 27

RCW 9A.88.030 23

RCW 9A.88.060 15, 24

RCW 9A.88.080 24

RCW 10.01.040 28

RCW 10.61.003 25

RCW 43.43.754 27

RCW 43.43.7541 27, 28

TABLE OF AUTHORITIES (CONT'D)

	Page
U.S. Const. Amend. 6	30
Wash. Const. art. 1, § 21	13
Wash. Const. art. 1, § 22	30
Webster's Ninth New Collegiate Dictionary (1985 ed.).....	20

OTHER JURISDICTIONS

Commonwealth v. Gonzalez

443 Mass. 799, 824 N.E.2d 843 (2005)21

People v. Jardin

154 Misc.2d 172, 584 N.Y.S.2d 732 (N.Y. Sup.,1992).....20

State v. Williams

133 Ariz. 220, 650 P.2d 1202 (1982)21

A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that the appellant committed promoting prostitution by the "profiting" alternative means charged and given to the jury.

2. The trial court improperly admitted prejudicial hearsay over the appellant's specifically grounded pretrial objection.

3. The trial court erred when it imposed a non-mandatory DNA collection fee on the mistaken belief the fee was mandatory.

4. The trial court's retroactive application of the amended DNA collection statute violates the constitutional prohibition on ex post facto laws.

5. The appellant was deprived of effective assistance of counsel at sentencing because counsel failed to object to the court's imposition of the DNA collection fee.

6. The trial court violated CrR 3.5(c) by failing to file written findings of fact and conclusions of law following its decision to admit the appellant's out of court statements to police officers.

7. The trial court violated CrR 3.6(b) by failing to file written findings of fact and conclusions of law following its denial of a motion to suppress after an evidentiary hearing.

Issues Pertaining to Assignments of Error

1. The state charged the appellant with promoting prostitution by the alternative means of (1) advancing prostitution or (2) profiting from prostitution. Did the state fail to prove beyond a reasonable doubt the appellant profited from prostitution? If so, must the appellant's conviction be reversed and the case remanded for retrial because the jury did not receive a unanimity instruction and returned only a general verdict?

2. The state moved for the admission of nonverbal conduct by the purported prostitute, as told through the testimony of a police officer/undercover prostitution customer. The appellant specifically and timely objected on the ground the testimony was hearsay because the conduct was assertive. Did the trial court commit prejudicial error by overruling the objection when the nonverbal conduct conveyed the prostitute's acceptance of the officer's offer to pay money for sexual conduct?

3. The trial court waived all other non-mandatory legal financial obligations based on appellant's indigency, but imposed a non-mandatory DNA collection fee on the mistaken view the fee was "mandatory." Did the court err by failing to exercise its discretion?

4. Did the sentencing court's retrospective application of the amended DNA collection fee statute violate the constitutional prohibition of ex post facto laws?

5. Was trial counsel ineffective for failing to object to the imposition of an inapplicable "mandatory" DNA collection fee?

6. The trial court failed to enter written findings of fact and conclusions of law after a hearing to determine the admissibility of the defendant's statements to police under CrR 3.5. Should this Court remand for entry of written findings and conclusions sufficient to satisfy the requirement of CrR 3.5(c)?

7. The trial court failed to file written findings of fact and conclusions of law following its denial of a motion to suppress after an evidentiary hearing. Should this Court remand for entry of written findings and conclusions sufficient to satisfy the requirement of CrR 3.6(b).

B. STATEMENT OF THE CASE

1. Summary of Background Evidence at Trial

In September 2006, King County Sheriff's detective Mullinax found on internet web site "Craigslist" what he suspected were about 30 or 40 advertisements for prostitution services offered by "Rhonda,"

"Samantha," and "Kitty." 1RP 511-521.¹ Common to each ad were the telephone number and provocative photographs of the women posing on a distinctive, tiger-print bedspread. 1RP 514.

Mullinax called the number and arranged a "date" with "Rhonda," who was the co-defendant, Debra Bowers. 1RP 512-13, 519. Bowers met the appellant, Linkon C. Brown, in 2006. 1RP 889. Bowers testified the women took turns answering the phones and "doing dates" inside a Maple Valley-area home. 1RP 890, 904-06. Brown rented and lived in the home. 1RP 751-54, 794, 816-17. Among other residents were Bowers, "Samantha," and "Kitty." 1RP 815-16, 822.

Brown operated his business out of the home and placed ads for the women who lived there. 1RP 817-21, 890-91. The common phone number appearing in the ads belonged to an account Brown gave to the women hired by LPBB for their personal use. 1RP 774-77, 821-22, 848, 904. The women paid the phone bill themselves, and each paid a share of the rent and utility bills. 1RP 776, 812, 861.

For safety reasons, a woman other than the on-duty prostitute typically collected the money from the customer and gave it to Brown.

¹ "1RP" refers to the first nine volumes of the 11-volume verbatim report of proceedings. The other two volumes, cited as "2RP and "3RP," cover proceedings occurring August 1, 2008 and September 21, 2009.

1RP 891-92, 905-06. Bowers received no pay for her part in the business. She instead received shelter and drugs from Brown. 1RP 892, 905.

In response to Detective Mullinax's call, Bowers provided directions to the Maple Valley-area home. 1RP 519-20, 537. Mullinax drove there and knocked on the door. Brown answered the door. 1RP 520-21.

This information led other officers to obtain a search warrant for the home. 1RP 537. When officers served the warrant in October 2006 and went into the home, they saw Bowers and Brown, as well as women known as Samantha and Kitty. 1RP 537, 543-44, 549, 594. 603-07. The officers found papers for Brown as well as the same striped bedspread depicted in the Craigslist ads. 1RP 550-54. Among other papers officers seized were a business license and application for renewal of the license. The license was for LPBB Enterprises. Brown was named as the president of the business and its address was the same one as that of the home being searched. 1RP 551-53. The application said the business was involved in adult entertainment, dancing, escorting, marketing and videos. 1RP 554. An officer testified it was customary for most escort services to be fronts for prostitution. 1RP 589.

Officers also found written documents authorizing Brown and LPBB Enterprises to promote, market and advertise photos for four individuals, including Bowers, Samantha and Kitty. 1RP 607-08. Also found were agreements between Brown and other women. 1RP 600-01. A notebook police seized included entries for what appeared to be appointments with Bowers, Samantha and Kitty for sex acts. 1RP 557-61. The officers also seized a credit card machine and receipts, photos and a large number of condoms. 1RP 561-62, 566-67.

One of the officers, Detective Draper, spoke with Brown at the home. 1RP 562. Brown told Draper his activities were legal and he would continue running his escort business in the future. 1RP 563.

Brown called Draper about a week after the search and asked for release of his original business license. 1RP 567-68. Brown also told Draper he posted the ads for the women, who were independent contractors and used their earnings to pay for rent, food and bills for the home. 1RP 568.

Brown testified to the workings of LPBB Enterprises. The business provided escort services, adult entertainment, dancing, and marketing. By "escort services," Brown said he meant providing companionship such as going to dinner or dancing. 1RP 840. The

business also taped and produced adult movies featuring consenting adults.
1RP 755-60.

Brown entered into written agreements with various individuals, including Bowers, that authorized him to take and post photos in weekly newspapers and Craigslist for purposes of advertising his business under the heading of "erotic services." 1RP 761-62, 767-71, 845-46. Providing sex was strictly forbidden and was included in a list of rules given to each escort. 1RP 840-43.

Another witness, Hannah Beasley, testified to LPBB operations and activities when she worked for Brown for a two-month period in spring 2008. Beasley entered into a contract with Brown and worked as an escort. 1RP 702-04. By then, Brown was renting a house in Puyallup that Beasley lived in with Bowers and Samantha, who continued to work for Brown. 1RP 705-07, 714, 837-39, 856-60.

As he had done before, Brown took photos of Beasley for ads he designed and placed on Craigslist. 1RP 704-08. Customers called the Puyallup house, made appointments, came to the house, and paid money for sex. 1RP 706-10, 714, 718-21, 734. The money went to Brown and was used for shelter, clothes, and food. 1RP 708-12, 722-23, 728, 733-36.

2. Summary of Trial Evidence Regarding Charged Offense

For the next year, Draper and detectives Hayden and Klokow checked Craigslist. 1RP 569, 643-44, 665-66. Meanwhile, a few days before the charged crime purportedly occurred, Denise Bowers (Denise) came from Snohomish County to visit her mother, co-defendant Debra Bowers. 1RP 777-78, 822-23. Denise did not work for LPBB. 1RP 777-78, 801-04, 814-15.

By then Draper, Hayden and Klokow had observed many postings on Craigslist with the same phone number and women. 1RP 569-73, 588, 643-44, 665-66. This prompted them to organize an undercover operation in October 2007 that targeted Brown. 1RP 573-74, 644-46. Klokow was the designated undercover "customer" in the plan. 1RP 573-74, 644-46. He called the number contained in the ads and arranged a "date" with "the Secretary" at a Tukwila Red Lion Hotel. 1RP 574-75, 666-68.

"The Secretary" was Denise. 1RP 580-81, 892. In exchange for sex, Brown agreed to rent two hotel rooms for Denise with his credit card because Denise had a possible date. 1RP 779, 802-04, 823-24. Bowers said Brown rented the rooms so she and the other women could provide prostitution services as well. 1RP 897. Brown knew the women took

money for sex; Bowers once spoke with him about the practice. 1RP 899-900.

Brown's credit card account was devoid of funds. 1RP 779, 802-03. Indeed, Red Lion personnel "declined" the card when it was presented. 1RP 656, 815, Exs. 22-23 (10/11/2007 receipts for rooms 102 and 108). Brown explained to a hotel manager his account lacked money. The manager agreed to hold the rooms and not "run" Brown's credit card until Denise raised the money to pay for the rooms. 1RP 815, 876-77. According to Brown's agreement with Denise, any money remaining from Denise's earnings after payment of the rooms was to be returned to her. 1RP 803. The rent for the two rooms was \$155. 1RP 646-48, Exs. 22-23.

On the morning of the Red Lion incident, Brown posted ads on Craigslist for "the Secretary" as well as for Bowers, with whom he did work. 1RP 569-73, 804-09, 824-26, 828-29. He waited in room 108 for money to pay for the hotel room. 1RP 875-78. Bowers was with Brown in room 108. 1RP 828.

Draper, Klokov and other officers deployed to various parts of the Red Lion. 1RP 574-78. When Klokov arrived, he called and spoke with Bowers, who left room 108, met Klokov outside the hotel, and escorted him into room 102. 1RP 668-69. Bowers asked Klokov for \$200, so he

gave her two \$100 bills that had earlier been photocopied for evidence purposes. 1RP 669-70. Bowers left the room, returned to room 108, and handed the money to Brown. 1RP 828. Bowers said she gave the money to Brown because he "needed the money for the hotel." 1RP 894, 901-03.

Klokow noticed one condom had been placed on each of the two beds in the room, and saw more condoms in a bag on the floor. 1RP 673-74. "The Secretary," aka Denise, then emerged from the bathroom. 1RP 670-72. Klokow began to remove some of his clothing and Denise did the same. 1RP 672.

After removing her shorts, Denise pulled at a hole in her pantyhose, exposed her genitalia, and began unwrapping a condom. Upon witnessing that conduct, Klokow gave his colleagues a signal that meant he had received an offer for a sex act. 1RP 578-79, 651-52, 672-73. Draper and other officers entered room 102 and arrested Denise. 1RP 579-81, 672-73. Denise did not testify at trial.

Meanwhile, Detective Hayden had stationed himself down the hall from rooms 102 and 108. 1RP 646. Before the incident, Hayden had checked with hotel management and learned Brown rented rooms 102 and 108. 1RP 647-49, 660. Hayden saw Bowers emerge from room 102, walk

down the hall, and enter room 108. 1RP 650-51. He suspected Bowers took the money from Klokow into room 108. 1RP 653.

Once Denise was arrested, Hayden knocked on the door of room 108. Brown answered the door. 1RP 653-54. There were other individuals in room 108, including Bowers and the woman known as "Samantha." 1RP 544, 596, 655 One of the officers who accompanied Hayden to room 108 observed Brown with two \$100 bills in his hand. 1RP 743-45. The officer snatched what turned out to be the prerecorded bills from Brown, who was promptly arrested. 1RP 582-83, 653-55, 743-44.

3. Procedural Facts

The state charged Brown and Bowers with second degree promoting prostitution. CP 74, 1RP 6-7. A King County jury found Brown guilty as charged. CP 60.

Between the verdict and his original sentencing date, Brown sent the trial judge several letters in which he requested appointment of new counsel and expressed a desire to file a new trial motion. Supp. CP __ (sub. no. 89, miscellaneous letters to court, 9/8/2008); 2RP 3-8. The court appointed new counsel and eventually denied counsel's new trial motion as

well as Brown's pro se arguments. Supp. CP __ (sub. no. 87, order on criminal motion, 9/5/2008), CP 94-100; 3RP 3-6, 3-14, 24-27.

The court imposed a standard range sentence. CP 132-39, RP3 50-51. The court ordered court costs of \$250 and waived other non-mandatory fees. CP 134, 3RP 51. The trial court also imposed the \$500 Victim Penalty Assessment and \$100 DNA collection fee because they were "mandatory." CP 134, 3RP 51. Counsel did not object to the DNA collection fee.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT BROWN "PROFITED" FROM PROSTITUTION.

Second degree promoting prostitution is a crime that may be committed by two alternative means: profiting from prostitution, or advancing prostitution. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). The state charged Brown with committing the offense by both alternatives. Despite charging as it did, the state proved only that Brown advanced prostitution. Because this Court cannot conclude with assurance the jury relied solely on the proven "advancing" method, Brown's conviction should be reversed.

Washington criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). To protect this right, a jury must be instructed it must unanimously agree on the specific means used to commit the crime unless there is sufficient evidence to sustain a conviction as to every alternative means charged. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988); State v. Savaria, 82 Wn. App. 832, 840, 919 P.2d 1263 (1996), overruled on other grounds, State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003).

The threshold test is whether sufficient evidence exists to support each alternative. Ortega-Martinez, 124 Wn.2d at 707. If the evidence is insufficient to support all charged means, and there is only a general verdict, the conviction cannot stand unless it is clear a unanimous jury relied only on the means for which there was substantial evidence. State v. Bland, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993), overruled on other grounds, State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007).

In Brown's case, the state failed to prove beyond a reasonable doubt Brown "knowingly profited from" the act of prostitution offered by Denise to Detective Klokow at the Red Lion. Both Bowers and Brown testified the buy money was delivered to Brown only to pay for the hotel

rooms Brown agreed to hold on his credit card for Denise. 1RP 779, 802-03, 875-76, 883-84, 907. Whatever Denise earned in excess of the rental fee for the rooms was hers to keep. 1RP 802-03. In other words, the \$200 went for Denise's benefit.

The state presented no evidence to rebut this testimony. A Red Lion employee corroborated the testimony of Brown and Bowers by testifying hotel records reflected Brown rented rooms 102 and 108 for the night of October 11, 2007. 1RP 658-60. Hotel records, which showed Brown's credit card was "declined" for use as payment, corroborated Brown's testimony he had no money in the credit card account and therefore planned to use the money to pay for the room rental. Exs. 22-23.

In addition, Denise came to visit her mother, Bowers, a day or two before the Red Lion incident and did not move into the Puyallup communal home Brown rented until after the incident. 1RP 778, 812-13, 823. Bowers did not testify to the contrary. At most, Denise was a temporary guest for a few days visiting Bowers. She therefore was not obligated to contribute a share of the \$200 for home costs, as were Bowers and other contracted LPBB employees.

In their earlier search of the Maple Valley-area home, officers found agreements between Brown and other women. 1RP 600-01. They found no agreement between Brown and Denise. 1RP 600-01.

In addition, the only Craigslist ad for Denise, aka "the Secretary," that the state offered into evidence was posted on the morning of the day of the Red Lion incident. 1RP 572-73. Draper referred to Denise as "new." 1RP 569. This is further evidence corroborating Brown's testimony Denise did not work for LPBB on October 11 and was not part of the communal network contributing to its sustenance.

Brown was very candid about what he obtained in exchange for helping Denise. He obtained sex. 1RP 801-02, 885-86. Receiving sex from a prostitute is not "profiting" from prostitution under the promoting prostitution statute. An individual other than a prostitute "profits from prostitution" if, "he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity." RCW 9A.88.060(2); see CP 54 (instruction 9).

Under this definition, Brown did not "profit" from Denise's agreement with Detective Klokow because he received neither money for himself nor other property. The evidence might support an inference

Brown may have profited from acts of prostitution committed by other women; there is no evidence, however, to directly prove or to support a reasonable inference he profited from Denise's agreement with Klokow on October 11, 2007 at the Red Lion.

State v. Columbus,² a case that discussed the former charge of accepting the earnings of a prostitute, illustrated Brown did not "profit" from Denise's agreement with Klokow. Columbus rented rooms at his rooming house to prostitutes for a flat fee. In addition to this fee, Columbus was paid an agreed-upon sum for each customer the prostitutes served. Columbus, 74 Wash. at 291-92. The court noted that accepting the flat fee as rent for the rooms did not violate the statute. Columbus accepted the earnings of a prostitute however, when he accepted the per-customer fee over and above the room rent: "The extra payment . . . was pay in a specific sum for the privilege of each specific act of prostitution committed by the prostitute on the premises" Columbus, 74 Wash. at 296-97.

Although Columbus involved a former statute, its reasoning applies to "profiting from prostitution" with equal force in Brown's case. Had Brown charged a customer fee over and above the rental fee, or in

² 74 Wash. 290, 133 P. 455 (1913).

some other way received a personal benefit from Denise's agreement, he would have "profited." But he did not do that; the \$200 was strictly to pay for Denise's room and for her personal profit. Brown therefore did not "profit" from Denise's prostitution.

The state nevertheless persisted in arguing Brown and Bowers profited from the Red Lion incident:

They all profited from this enterprise. You don't have to get rich to profit from prostitution. These individuals had an agreement with each other, and they pooled their services and their skills. . . . But it wasn't just Linkon Brown's room rent, he wasn't the only person staying at the hotel, it was all of the people there who were staying together.

1RP 915.

In this sense, Brown's case is similar to State v. Lobe.³ There the state presented sufficient evidence to prove only that the defendant committed witness tampering by one of the three alternative means given to the jury. Lobe, 140 Wn. App. at 905-06. The prosecutor nevertheless briefly argued Lobe committed one of the counts by a second means. The court observed the prosecutor's argument "may have been what some jurors relied on when convicting Lobe on count IV. Without a limiting instruction, we cannot be sure of jury unanimity, and we must reverse." Lobe, 140 Wn. App. at 906-07

This Court should proceed with the same caution here. Jurors may have relied on the prosecutor's closing argument to conclude Brown was guilty because he "profited" from Denise's prostitution. The likelihood of such a conclusion is made greater because of the plethora of background evidence jurors heard about LPBB business practices, the communal living arrangements, and Brown's exchange of services to Denise for sex with her.

It is therefore not clear the verdict rested solely on the "advanced prostitution" alternative means given to the jury. Without a special verdict form or unanimity instruction, this Court should reverse. Bland, 71 Wn. App. at 354; see State v. Simon, 64 Wn. App. 948, 962, 831 P.2d 139 (1991) ("[B]ecause it is impossible to determine from the single verdict of guilt whether the jury was unanimous that Simon promoted prostitution by use of threat or force beyond a reasonable doubt, we must remand for a new trial."), aff'd. in pertinent part and rev'd. in non-pertinent part, 120 Wn.2d 196 (1992)).

³ 140 Wn. App. 897, 906-907, 167 P.3d 627 (2007).

2. THE TRIAL COURT ERRED BY ADMITTING PREJUDICIAL HEARSAY IN THE FORM OF ASSERTIVE NONVERBAL CONDUCT.

Hearsay may be an out of court statement or nonverbal conduct intended to be an assertion, so long as it is admitted to prove the truth of the matter asserted. ER 801(a), (c). Denise's provocative conduct in room 102 of the Red Lion was offered by the state to prove acceptance of Klokow's offer to pay \$200 for sex. The evidence was introduced to prove the truth of the conduct, because without the evidence, the state could not prove Denise engaged in prostitution or, in turn, that Brown promoted her prostitution. The trial court's admission of the hearsay over Brown's specific and timely objection was reversible error.

A "statement" for hearsay purposes includes nonverbal conduct designed to be an assertion. ER 801(a); State v. Modest, 88 Wn. App. 239, 249, 944 P.2d 417 (1997), review denied, 134 Wn.2d 1017 (1998). The test is whether the conduct was intended as an assertion. In re Dependency of Penelope B., 104 Wn.2d 643, 652, 709 P.2d 1185 (1985). Although the rule does not define "assertion," the term "has the connotation of a positive declaration." United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990) (citing Webster's Ninth New Collegiate

Dictionary 109 (1985 ed.)).⁴ "Simply put, a determination must be made as to whether the non-verbal act is offered to establish a fact." People v. Jardin, 154 Misc.2d 172, 175, 584 N.Y.S.2d 732, 734 (N.Y. Sup.,1992).

As the concept of nonverbal hearsay proves elusive in practice, a few examples may help prove Brown's point. Nonverbal conduct meant as a greeting or pleasantry or to express happiness, fright or annoyance, are not hearsay when they are not "intentional expressions of fact or opinion." Penelope B., 104 Wn.2d at 652 (citing cases).

In contrast, a decedent's nods in response to a friend's questions at the hospital after a failed arson-for-hire attempt were hearsay because they were assertive statements introduced to prove the truth of the matter asserted. United States v. Katsougrakis, 715 F.2d 769, 774 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1984). Similarly, a store security guard's act of showing his badge to suspected shoplifters was "just another way of asserting that he was regularly employed as a law enforcement officer" and constituted inadmissible hearsay. Miller v. Dillard's, Inc., 166 F.Supp.2d 1326, 1333 (D.Kan. 2001). So too was an investigator's testimony recounting the murder defendant's girlfriend's out-of-court acts of pointing

⁴ Federal Rule of Evidence 801 is in pertinent part identical to Washington's corresponding provision.

to places on a mannequin to indicate where the defendant said he stabbed the victim. State v. Williams, 133 Ariz. 220, 224, 650 P.2d 1202, 1207 (1982). The Williams court held the investigator's testimony was inadmissible hearsay because it was merely a repetition of the girlfriend's nonverbal conduct intended by the girlfriend as an assertion of what the defendant told her. Williams, 133 Ariz. at 224.

Klokow's testimony, like the investigator's testimony in Williams, recited Denise's nonverbal conduct. The conduct was designed as an assertion; it clearly communicated to Klokow that Denise accepted his offer to provide sex for money. The state introduced the conduct to prove the truth of Denise's assertion. Indeed, the prosecutor argued, "In this instance, Denise . . . has proposed sex and Detective Klokow was going to pay their room rent that night." IRP 915. Klokow's testimony was inadmissible hearsay.

Another way to look at nonverbal conduct is to determine whether it communicated a message and served as a substitute for words. Penelope B., 104 Wn.2d at 652 ("Nonverbal conduct that is not intentionally being used as a substitute for words to express a fact or opinion is not hearsay."); Commonwealth v. Gonzalez, 443 Mass. 799, 803, 824 N.E.2d 843 (2005).

Under this analytical method, Klokow's testimony also constituted inadmissible hearsay. Denise's conduct substituted for a statement such as, "You have just bought a good time," or "Let's have sex now," or whatever words prostitutes use to indicate acceptance of an offer to provide sex for money.

If the conduct were introduced for a purpose other than to establish this fact, it was not relevant. State v. Aaron 57 Wn. App. 277, 279-80, 787 P.2d 949 (1990) (trial court erred under ER 801(c) by admitting evidence to show the officer's state of mind in explaining why he acted as he did because the officer's state of mind was not relevant); State v. Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d 306 (1987) ("Moreover, Stubsjoen's statements . . . would only be relevant if they were true. Therefore, [the] proffered testimony regarding Stubsjoen's out-of-court declaration was hearsay since it was offered for the truth of the matter asserted."), review denied, 108 Wn.2d 1033 (1987).

The state proffered the evidence to prove Denise committed an act of prostitution that Brown promoted. The evidence was inadmissible hearsay.

Trial counsel objected to the nonverbal hearsay and made the same argument to the trial court. The matter arose pretrial during discussion and

argument on the prosecutor's motions in limine. 1RP 325-28, 376-83. Defense counsel argued Denise's provocative conduct in room 102, after Klokow relinquished \$200, was assertive conduct designed to convey the message to "come have sex with me," thus rendering it inadmissible hearsay under ER 801(a). 1RP 383-84.

The trial court rejected counsel's argument and adopted the state's reasoning that Denise's conduct was not an assertion, but rather "an actual act that she is engaging in or about to engage in." 1RP 385. Brown's counsel then reiterated his contention. 1RP 386-87. The trial court again rejected it. 1RP 387. The trial court erred.

The trial court's error was not harmless. The crime of prostitution does not require an overt sexual act, but it does require an act of offering to engage in sexual conduct for consideration. RCW 9A.88.030; City of Yakima v. Emmons, 25 Wn. App. 798, 801-802, 609 P.2d 973, review denied, 94 Wn.2d 1002 (1980). Absent an act of prostitution, a "promoter" may be found guilty only of attempted promoting prostitution. See State v. Tu Nam Song, 50 Wn. App. 325, 328-329, 748 P.2d 273 (1988) (appellant attempted to promote prostitution by agreeing to hire what turned out to be a policewoman with the understanding she would

perform acts of prostitution for the appellant and that the appellant would receive part of the prostitution earnings).

The holding in Song comports with the definitions of promoting prostitution. A person commits the crime of promoting prostitution when he either profits from prostitution or advances prostitution. RCW 9A.88.080(1).

A person "advances prostitution" if . . . he causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

RCW 9A.88.060(1).

A person "profits from prostitution" if . . . he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

RCW 9A.88.060(2). Brown's jury was instructed accordingly. CP 54 (instruction nine, attached as appendix).

These definitions require "prostitution." Without Klokow's hearsay testimony, the state would have been unable to prove Denise engaged in "prostitution." Without an act of prostitution, Brown would have been found not guilty or, at most, found guilty of attempted prostitution. State v. Luther, 157 Wn.2d 63, 69-70 n.3, 134 P.3d 205 (2006) (citing RCW

10.61.003 for the proposition a defendant may be convicted of an uncharged attempt to commit the charged crime), cert denied, 549 U.S. 978 (2006). The trial court's error was therefore not harmless. This Court should reverse Brown's conviction and remand for a new trial.

3. THE COURT ERRED WHEN IT FAILED TO CONSIDER WHETHER TO IMPOSE THE DNA COLLECTION FEE UNDER THE APPLICABLE STATUTE AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

The trial court imposed the \$100 DNA fee under the mistaken impression it was “mandatory.” This was error; the fee was not mandatory under the statute in force on the date of the offense. Moreover, any retroactive application of the amended DNA collection statute would violate the constitutional prohibition on ex post facto laws. This Court should therefore remand so the trial court may exercise its discretion in deciding whether to impose the DNA fee based on a correct understanding of pertinent law.

- a. The Court's Failure to Exercise Discretion Under the Applicable Statute Requires Reversal and Remand.*

An offender may challenge the procedure by which a sentence was imposed. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error).

Moreover, a defendant may challenge an illegal sentence for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

In State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992), the Court set out the requirements for imposing monetary obligations at sentencing. Although a sentencing court need not enter "formal, specific findings" regarding the defendant's ability to pay court costs and recoupment fees, the court listed these prerequisites for constitutionally permissible costs:

1. Repayment must not be mandatory;
- ...
3. Repayment may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end.

Curry, 118 Wn.2d at 915-16; see also former RCW 10.01.160(3) (2005) ("The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.").

Notwithstanding this test, Curry upheld the statute establishing a VPA must be imposed regardless of the financial resources of the convicted person. Curry, 118 Wn.2d at 917-18. RCW 7.68.035(1) provides, “Whenever any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment.” The court reasoned that statutory safeguards prevented the incarceration based on inability to pay. Curry, 118 Wn.2d at 918.

Statutes authorizing costs in criminal prosecution are in derogation of the common law and should be strictly construed. State v. Buchanan, 78 Wn. App. 648, 651, 898 P.2d 862 (1995).

The version of RCW 43.43.7541 in effect at the time of sentencing provides, “Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.” Laws of 2008, ch. 97, § 3 (effective June 12, 2008).

But under the version in effect February 21, 2005, the date of Brown’s offenses, the DNA fee was not mandatory. Former RCW 43.43.7541 (2002). That version states the court should impose a fee “unless the court finds that imposing the fee would result in undue hardship on the offender.” Former RCW 43.43.7541.

The former statute controls in Brown's case. When the Legislature amends a criminal or penal statute, its pre-amendment version applies to crimes committed before the amendment's effective date, unless a contrary intention is fairly conveyed in the amendatory action. RCW 10.01.040; State v. Grant, 89 Wn.2d 678, 682, 575 P.2d 210 (1978); State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), overruled on other grounds, United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979); State v. Toney, 103 Wn. App. 862, 864, 14 P.3d 826 (2000). The Legislature gave no indication at the time it amended the DNA fee statute that it had retroactive effect. Absent such intent, the former statute applied to Brown.

That statute directed the court to consider an offender's ability to pay. Former RCW 43.43.7541; Curry, 118 Wn.2d at 916. Failing to so consider ability to pay is an abuse of the trial court's discretion. See Grayson, 154 Wn.2d at 342 (sentencing court's failure to exercise discretion is reversible error); State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (decision to impose a standard range sentence reviewable for abuse of discretion where court has refused to exercise discretion).

b. *Assuming For Argument the Legislature Intended to Subvert the Savings Statute, the Amended Statute Alters the Standard of Punishment Without Notice and Therefore Violates the Prohibition on Ex Post Facto Laws.*

Brown anticipates the State will argue the amended statute, enacted after the events in this case transpired, applied at Brown's sentencing. The State's interpretation of the amendment, however, would violate the prohibition on ex post facto laws.

In determining whether a statute violates the prohibition, this Court assesses whether the statute (1) is substantive rather than simply procedural; (2) is retrospective in that it applies to events that happened before its enactment); and (3) disadvantages the affected person. *In re Personal Restraint of Powell*, 117 Wn.2d 175, 184-85, 814 P.2d 635 (1991). In the criminal context, "disadvantage" means "the statute changes the standard of punishment that existed under the former law. *State v. Schmidt*, 143 Wn.2d 658, 673, 23 P.3d 462 (2001).

The DNA collection fee amendment meets these criteria. The amendment is a substantive, retrospective change in the law that alters the standard of punishment by removing from the sentencing court any discretion to waive the fine based on hardship. Thus, even assuming the Legislature expressed its intent to subvert the saving statute, the resulting

retrospective amendment runs afoul of the prohibition on ex post facto laws.

c. *Counsel was Ineffective for Failing to Object to Sentencing Under the Incorrect Statute.*

Brown's counsel was ineffective for failing to object to the trial court's imposition of the DNA fee because it was not "mandatory" under the controlling statute.

The Sixth Amendment and article 1, section 22 guarantee the right to effective representation. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation prejudices the defendant. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Counsel is deficient when his performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1995). Prejudice exists where, but for the deficient performance, there is a reasonable

probability the result would have been different. State v. B.J.S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007).

Brown satisfies both prongs of the Strickland test. First, counsel is presumed to know applicable statutes favorable to his or her client. See State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel presumed to know court rules). Second, there was no legitimate tactical reason for counsel to stand mute while the trial judge imposed a \$100 fee without first considering Brown's ability to pay. Moreover, there is a reasonable likelihood counsel's deficient performance affected the outcome because the court waived all other non-mandatory fees.

This Court should remand for resentencing so the court may properly consider Brown's indigence and ability to pay in light of the applicable statute and, if appropriate, amend the judgment and sentence to eliminate the fee. See State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) (on remand, the trial court has the authority to correct a sentence where court was initially mistaken about the controlling law).

4. THE TRIAL COURT'S FAILURE TO FOLLOW CrR 3.5(c) and CrR 3.6(b) WARRANTS A REMAND FOR ENTRY OF PROPER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

After a hearing to determine the admissibility of a defendant's statements, the trial court must enter written findings of undisputed and

disputed facts, conclusions as to the disputed facts, and the conclusion as to whether the statement is admissible along with reasons therefore. CrR 3.5(c). These findings and conclusions are mandatory. State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). The same is true of the court's findings and conclusions after a hearing on a pretrial suppression motion. CrR 3.6(b); State v. Tagas, 121 Wn. App. 872, 875, 90 P.3d 1088 (2004). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1(d), which requires entry of written findings of fact and conclusions of law after bench trial.).

The trial court held a hearing to determine whether to admit Brown's statements to police. 1RP 271-354. The court found admissible most of Brown's statements. 1RP 352-54, 475-78. The trial court also held a hearing on a motion to suppress evidence. 1RP 15-214. The court denied the motion. 1RP 400-05. The court did not enter written findings of fact and conclusions of law. This was error.

The purpose of written findings and conclusions is to promote efficient and precise appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); see State v. Head, 136 Wn.2d 619, 622, 964

P.2d 1187 (1998) (“A prosecuting attorney required to prepare findings and conclusions will necessarily need to focus attention on the evidence supporting each element of the charged crime, as will the trial court. That focus will simplify and expedite appellate review.”).

The absence of written findings and conclusions in Brown’s case prohibits effective appellate review. And although the trial court entered oral findings, those findings are not a suitable substitute. “A court’s oral opinion is not a finding of fact.” State v. Hescoek, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). Rather, a court’s oral opinion is merely an expression of the court’s informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally incorporated in the written findings, conclusions and judgment. Head, 136 Wn.2d at 622 (citing State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)).

A trial court’s failure to enter written findings and conclusions requires remand for entry of the required findings. Head, 136 Wn.2d at 624. Remand is thus the appropriate remedy here.

D. CONCLUSION

The state failed to prove the "profiting" alternative means of promoting prostitution beyond a reasonable doubt. The trial court erred by

admitting prejudicial hearsay in the form of assertive nonverbal conduct. Either or both of these shortcomings require reversal of Brown's convictions and a remand for a new trial.

The trial court also failed to exercise its discretion when it imposed a non-mandatory DNA collection fee based on the mistaken view the fee was "mandatory." Trial counsel rendered ineffective assistance for failing to object to the fee. Further, the state and trial court failed to enter written findings and conclusion as required by CrR 3.5(c) and CrR 3.6(b), thereby frustrating effective appellate review. With respect to these claims, this Court should remand for resentencing and for entry of written findings of fact and conclusions of law.

DATED this 29 day of July, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62968-9-1
)	
LINKON C. BROWN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 29TH DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LINKON C. BROWN
4043 S. WARNER STREET, #B
TACOMA, WA 98409

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JULY, 2009.

x *Patrick Mayovsky*

~~2009 JUL 29 PM 3:51
COURT OF APPEALS
STATE OF WASHINGTON~~