

64549-8

64549-8

NO. 64549-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DONGFANG LI,

Appellant.

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COURT OF APPEALS  
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

**BRIEF OF RESPONDENT**

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## I. ISSUES PRESENTED

1. Does the definition of “advances prostitution” create an alternative “means within means” of committing the crime of promoting prostitution?
2. Was a jury unanimity instruction required when the “to convict” instruction established that the defendant was charged with a single means (“advancing prostitution”) of committing the crime of promoting prostitution?
3. Was the evidence sufficient to convict the defendant on two counts of promoting prostitution?
4. Was the jury improperly instructed on “uncharged alternative means” of committing the crime of promoting prostitution when the “to convict” instruction established that the defendant was charged with a single means (“advancing prostitution”) of committing the crime of promoting prostitution?
5. As this case was charged and prosecuted, was the defendant entitled to instructions on attempting to promote prostitution or permitting prostitution?
6. Was defense counsel ineffective for not raising the above issues at trial?

## II. STATEMENT OF THE CASE

### A. PROCEDURAL BACKGROUND.<sup>1</sup>

Dongfang Li was charged by amended information with two counts of promoting prostitution. CP 10-11. Li was convicted by a jury as charged. 4RP 4, CP 36. Li received a sentence pursuant to the first time offender waiver (one day in jail on each count, served concurrently and 29 days of community service). CP 61-67. Li has filed a timely appeal. CP 61-67, 68.

### B. FACTUAL BACKGROUND.<sup>2</sup>

Rosemary Harer, a psychotherapist, works in a building located at 3316 NE 125<sup>th</sup> Street in Seattle, and was concerned that another business in that building, "Global Massage," was actually a prostitution business. 2RP 90-92. On July 29, 2008, Harer called the Seattle Police Department's and expressed her concerns to Detective Bergmann. 2RP 53, 90-94.

Det. Bergmann searched the website [www.craigslist.com](http://www.craigslist.com) and found two advertisements for massage businesses with the

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<sup>1</sup> The Report of Proceedings will be referred to as follows: 1RP (Oct. 13, 2009); 2RP Oct. 14, 2009); 3RP Oct. 15, 2009); and 4RP (Oct. 19, 2009).

<sup>2</sup> While the Statement of Facts in the appellants brief is generally accurate, the State requests that the Court ignore any claims not supported by the record (i.e., that Li's husband was a "retired university professor").

same address, phone number, and business name as provided by Harer. 2RP 54-57. The advertisements were titled, "Looking for the best Asian Massage? You found it!!!!!" and "The #1 Asian Angel Massage." 2RP 56-57. One of the advertisements included a picture of five Asian women wearing lingerie. 2RP 57.

On August 18, 2008, Det. Williams, while working in an undercover capacity, entered the "Global Massage" business. 2RP 26-27. He met with Dongfang Li. 2RP 25. Det. Williams agreed to get a massage, and Li said he could start with a 60 minute massage, and then they could see if he wanted more. 2RP 27-28. Det. Williams gave Li \$100 and received a 60-minute massage from a woman, Ms. Ciu. 2RP 28-29.

After that massage, Det. Williams dressed and walked into the lobby. 2RP 290. Li asked why he didn't want the extra massage. 2RP 29. Det. Williams asked what the difference was. Li explained to him that he could get a massage for \$60, and that for an extra \$30 a woman would masturbate him. 2RP 29-30. Li expressed this by cupping her hand and moving it up and down rapidly as if masturbating a male's sexual organ. 2RP 29-31. Det. Williams understood this to be a reference to a "hand job", the manual manipulation of the penis to orgasm. 2RP 31.

Li described a regular massage as a "hard massage." When Li made the hand gesture described above, she described a "soft massage." 2RP 29. There were two other women present, and Li pointed to one of the women, Ms. Ciu, as the one who performs the "hard massage," and the other woman, Ms. Jin, as the one who performs the "soft massage." 2RP 29.

Once Li had described this, she asked if Det. Williams would like the soft massage for \$30. 2RP 31-32. Det. Williams said that he would, then acted as though he'd changed his mind and said that he would be back later. 2RP 31-32.

Det. Bergmann continued to investigate "Global Massage." He accessed Seattle licensing information system and found a business license under the name of "Global Healing Center of East and West Medicine." The president of the business was listed as Dong Li. 2RP 62-63. Additionally, Det. Bergman obtained a lease agreement for "Global Massage", which listed Dongfang Li as a tenant. 2RP 63.

On November 1, 2008 detectives observed Li and Haoran Pu (the co-defendant) arrive at "Global Massage." 2RP 64. On this date, Det. Brundage was working in an undercover capacity, and he entered the business. 2RP 64-65; 3RP 12-13.

When he entered "Global Massage," Det. Brundage met Haoran Pu (an Asian male). 3RP 13. Det. Brundage said that a friend had told him to come here for the "king's massage," and he then made the same hand gesture as described above. 3RP 13. Pu laughed and said that that would require two girls, but that they only had one girl available that night. 3RP 13-14. Det. Brundage said he'd have to try again later for the king's massage. In the meantime, he asked for the one-hour massage. 3RP 13-14.

Li began to massage Det. Brundage in a back room. 3RP 15. Det. Brundage said he had come for the "king's massage." 3RP 15. Li described the "king's massage" as a soft massage, one in which the customer will be given a "hand release." 3RP 15-16. Det. Brundage inquired if a "hand release" was a "hand job." Li answered, "yes, happy ending." 3RP 15-16. Li asked Pu to find another girl. 3RP 16-17. Pu attempted to find another girl, but was unable to do so. 3RP 17-18. Li told Det. Brundage that there weren't two girls but that he was tense and she would give him a hand release for \$60 (the price of the massage). 3RP 15-16, 18. Det. Brundage agreed, then made up an excuse to leave the

business without having any sexual contact. 3RP 19-20. As he was leaving, Pu said he would try to have two girls for the king's massage next time he showed up. 3RP 20.

Detectives subsequently obtained a search warrant for Global Massage and, when the warrant was executed, arrested Li. 2RP 66-67.

Li testified at trial. 3RP 35-51. Li admitted that she (and her husband) owned Global Massage, which she claimed was for providing cosmetology and beauty treatments. 3RP 28. Li denied ever seeing Det. Williams before the trial. 3RP 39. Li was uncertain whether she had ever seen Det. Brundage. 3RP 39-40. She denied ever using the terms "hand release", "hand job," or "happy ending." 3RP 40. Li denied that any Asian women ever gave massages at Global Massage. 3RP 41. Li offered no explanation for the advertisements for Global Massage that offered "Asian massage" and showed pictures of Asian women wearing lingerie. 3RP 43-44. Li claimed to be at the business only rarely because of her health. 3RP 45. Li asserted that any massages in her business were done on an automatic massage table. 3RP 47.

Li was found guilty by a jury as charged of two counts of promoting prostitution. 4RP 4. The co-defendant, Haoran Pu, was acquitted of one count of the same charge. 4RP 4.

### III. ARGUMENT

#### A. THE DEFINITION OF “ADVANCES PROSTITUTION” DOES NOT CREATE AN ALTERNATIVE MEANS OF COMMITTING THE CRIME OF PROMOTING PROSTITUTION IN THE SECOND DEGREE.

An error that underlies many of Li’s arguments on appeal is the claim that the statutory definition of the term “advances prostitution” creates an alternative means of committing the crime of promoting prostitution in the second degree. This is incorrect.

##### 1. **Legal standard: alternative means crimes.**

An alternative means crime is one “that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.” State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007).<sup>3</sup> The legislature has not statutorily defined alternative means crimes, nor specified which crimes are alternative means crimes. This is left to

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<sup>3</sup> An example of an alternative means crime is theft because it may be committed by: (1) wrongfully obtaining or exerting control over another’s property or (2) obtaining control over another’s property through color or aid of deception. State v. Linehan, 147 Wn.2d 638, 644-45, 647, 56 P.3d 542 (2002).

judicial determination and each case must be evaluated on its own merits. State v. Klimes, 117 Wn. App. 758, 769, 73 P.3d 416 (2003); see also State v. Peterson, 168 Wn.2d 763, 769, 230 P.3d 588 (2010).

The Washington Supreme Court, however, has emphasized that definitional statutes do not create additional alternative means of committing an offense. State v. Linehan, 147 Wn.2d 638, 646, 56 P.3d 542 (2002); see also State v. Laico, 97 Wn. App. 759, 763, 987 P.2d 638 (1999) (citing State v. Strohm, 75 Wn. App. 301, 309, 879 P.2d 962 (1994)); State v. Marko, 107 Wn. App. 215, 220, 27 P.3d 228 (2001) (the definitions of “threat” do not create alternative elements to the crime of intimidating a witness); State v. Garvin, 28 Wn. App. 82, 86, 621 P.2d 215 (1980) (the definitions of “threat,” for purposes of the extortion statute, do not create alternative elements to the crime but merely define an element of the crime).

For example, in State v. Laico, the defendant argued that the three definitions of “great bodily harm” created three alternative means for committing the offense. Division One of the Court of Appeals disagreed and held that “the definition of ‘great bodily harm’ contained in RCW 9A.04.110(4)(c) is merely definitional and

does not create alternative means of committing the crime of assault in the first degree.” 97 Wn. App. at 760. The Court of Appeals therefore concluded that jury unanimity with respect to the existence of great bodily harm *did not require unanimity as to the type of great bodily harm.* Id.

Similarly, in Linehan, the Washington Supreme Court stated:

Linehan has misconstrued the theft statute by interpreting the general definition statute for the Theft and Robbery chapter of the code, RCW 9A.56.010, as creating additional alternative means of committing theft. Former RCW 9A.56.010(7) defines mere *terms*, while RCW 9A.56.020(1)(a) defines the *crime* of theft in terms of alternative means. . .

. . .

We hold that the definitions provided in RCW 9A.56.010 do not create additional alternative means of theft.

Linehan, 147 Wn.2d at 646 (emphasis in original).

The conclusion that definitional instructions do not create alternative means of committing a crime was recently reiterated by the Washington Supreme Court:

[W]here a disputed instruction involves alternatives that may be characterized as a “means within [a] means,” the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply. In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988)

(refusing to accept defendant's claim that the jury should be additionally instructed on the sub-alternatives of the statutory alternatives at issue).

State v. Smith, 159 Wn.2d 778, 785, 154 P.3d 873 (2007).

**2. Two alternative means of promoting prostitution.**

Contrary to Li's claim on appeal, there are only two alternative means of committing the crime of promoting prostitution in the second degree. The elements of promoting prostitution in the second degree are set forth in RCW 9A.88.080:

**Promoting prostitution in the second degree.**

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

RCW 9A.080. The statutory scheme creates only two alternate means of promoting prostitution: "profiting from prostitution" and "advancing prostitution." Indeed, case law has recognized that these are the two alternative means of committing this crime:

Promotion of prostitution in the second degree 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, 157 (1996);

see also State v. Doogan, 82 Wn. App. 155, 187, 917 P.2d (1996).

These two alternate means are further defined by statute as follows:

**Promoting prostitution — Definitions.**

The following definitions are applicable in RCW 9A.88.070 through 9A.88.090:

(1) "Advances prostitution." A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, 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.

(2) "Profits from prostitution." A person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, 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.060.

Contrary to Li's unexamined suggestion on appeal, these definitions do not create further "means" by which "advancing prostitution" or "profiting from prostitution" may be committed. Just like the definition of "great bodily harm", or the general definition statute for theft and robbery, or the definition of assault, this

definitional statute does not create a “means within means” for committing the crime of promoting prostitution in the second degree.

On appeal, Li – without offering any authority for this position – simply assumes that the definition of “advances prostitution” creates alternative means for committing the crime of Promoting Prostitution. The State respectfully requests that the Court reject this suggestion as being inconsistent with the established case law that has rejected the suggestion that definitional statutes create alternative means of committing a crime.

**B. NO UNANIMITY INSTRUCTION WAS REQUIRED.<sup>4</sup>**

Li asserts that the trial court erred in because it “did not require unanimity of the jury *either* as to the means set forth within the definition of ‘advances prostitution’ *or* as to the alternative means of ‘advances prostitution’ and ‘profits from prostitution’ . . .” BOA, p. 8 (emphasis in original).<sup>5</sup> This argument is without merit.

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<sup>4</sup> This section responds to arguments set forth in Li’s brief on pages 7 to 11.

<sup>5</sup> A trial court’s choice of jury instructions is reviewed for abuse of discretion. State v. Douglas, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005).

**1. Relevant law: unanimity instructions.**

Criminal defendants in Washington have a right to a unanimous jury verdict. State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984); State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); Const. art. I, § 21. Where the State alleges multiple acts and any one of them could constitute the crime charged, the jury must be unanimous as to which act or incident constitutes the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The constitutional requirement of unanimity is assured by either: (1) requiring the prosecution to elect the act upon which it will rely for conviction, or (2) instructing the jury that all 12 jurors must agree that the same criminal act has been proved beyond a reasonable doubt. State v. Barrington, 52 Wn. App. 478, 480, 761 P.2d 632 (1988).

**2. Relevant facts: the jury instructions.**

Instruction 7 provided the general definition of promoting prostitution in the second degree:

A person commits the crime of promoting prostitution in the second degree when he or she knowingly profits from or advances prostitution.

CP 48 (Instruction 7).

The “to convict” instruction established that the State was proceeding only under the “advances prostitution” means of committing this crime. Here is the “to convict” instruction on Count I in its entirety:

To convict the defendant Dongfang Li of the crime of promoting prostitution in the second degree as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 18, 2008, *the defendant knowingly advanced prostitution*; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty on count I.

On the other hand, if, after weighing the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty on count I.

CP 49 (Instruction 8) (emphasis added). The two convict instruction on Count II was identical, except that the date of the crime was changed. CP 54 (Instruction 13).

Finally, Jury Instruction 11 only defined the term “advances prostitution”; significantly a definition of the term “profits from prostitution” was not included in this instruction.

Prostitution means that a person engaged or agreed or offered to engage in sexual contact with another person in return for a fee.

The term "advanced prostitution" means that a person acting other than as a prostitute or as a customer thereof, caused or aided a person to commit or engage in prostitution or procured or solicited customers for prostitution or provided persons or premises for prostitution purposes or operated or assisted in the operation of a house of prostitution or a prostitution enterprise or engaged in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

CP 52 (Instruction 11).

**3. No unanimity instruction was required.**

First, as discussed above, the *definition* of "advances prostitution" does not create an alternative means of committing the crime of promoting prostitution. Supra, § III A & B. Thus, there was no basis for the trial court to offer a unanimity instruction premised on the definition of "advancing prostitution."

Second, Li's argument on appeal is premised on the fact that the general definition instruction stated the crime of promoting prostitution may be committed by either "profiting from prostitution" or "advancing prostitution. CP 48. But Li ignores the fact the "to convict" instruction stated that the State was *only* seeking to convict her under the "advances prostitution" alternative. CP 54.

It is well established that the “to convict” instruction provides the “yardstick by which the elements of the crime are measured. See, e.g., State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); State v. Lorenz, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). There was no basis to give a unanimity instruction because Li was charged with promoting prostitution under the “advances prostitution” means of committing that crime. Most significantly, the “to convict” instruction was limited to the “advances prostitution” means of committing the crime and did not include the “profits from prostitution” alternative. In addition, Jury Instruction 11 only defined the term “advances prostitution” and did not define the term “profits from prostitution” – additional evidence, if any is needed, that the State was not proceeding under the “profits from prostitution” prong.<sup>6</sup>

Thus, there was no need for a unanimity instruction because Li was charged, and the jury instructed, on a single means of committing the crime of promoting prostitution. The single act that

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<sup>6</sup> Additionally, in closing argument the State never argued that Li was guilty under the “profits from prostitution means. Nor did defense counsel seek to defend against a “profits from prostitution” charge.

the jury was required to be unanimous on was the act of “advancing prostitution.” So long as all the jurors agreed beyond a reasonable doubt that Li had “advanced prostitution” it made no difference if some of them believed she had done so because she “solicited customers for prostitution” or provided “premises for prostitution purposes” or “assisted in the operation of a house of prostitution or a prostitution enterprise” or “engaged in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.” Any one of these possibilities constituted the crime of promoting prostitution.

Li may also be arguing that the jury should have been instructed been given a unanimity instruction requiring the jury to agree a single act of “advancing prostitution” for each count. As a practical matter, in this case count each related to a single day and involved a single event (i.e., one undercover officer entering the massage business and being offered a “hand job”). Li has failed to identify what multiple acts of advancing prostitution might have been present for each count.

In any event, Li’s claim is without merit because the Petrich rule applies “only where the State presents evidence of ‘several

distinct acts.” State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (internal quotation marks omitted) (quoting Petrich, 101 Wn.2d at 571). It does not apply where the evidence indicates a “continuing course of conduct.” Id.

Washington courts have recognized that acts of promoting prostitution may constitute a continuing course of conduct. See, e.g., State v. Gooden, 51 Wn. App. 615, 754 P.2d 1000 (1988) (two girls working as prostitutes for a 10-day period a continuous course of conduct); State v. Barrington, 52 Wn. App. 478, 761 P.2d 632 (1988) (no unanimity instruction was required where there was evidence that Barrington promoted prostitution over a three-month period of time). Thus, to the extent that there were multiple acts of promoting prostitution committed by Li that the jury might have used to found Li guilty on each separate count, the acts constituted a continuing course of conduct, not separate distinct acts occurring in a separate time frame and identifying place as in Petrich. A unanimity instruction was not necessary.

**C. THE EVIDENCE WAS SUFFICIENT TO CONVICT ON BOTH COUNTS OF PROMOTING PROSTITUTION IN THE SECOND DEGREE.<sup>7</sup>**

Li asserts that there was insufficient evidence to convict her on either count of promoting prostitution in the second degree.

These claims are without merit.

**1. Standard of review: sufficient evidence to convict.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 936 P.3d 1358 (2006); State v. O'Neal, 126 Wn. App. 395, 424, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 500 (2007). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. State v. Sanchez, 60 Wn. App. 687, 693, 806 P.2d 782 (1991). Circumstantial evidence is considered as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are

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<sup>7</sup> This section responds to arguments set forth in Li's brief on pages 12-16.

not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) abrogated in part on other grounds, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

To affirm a defendant's conviction, an appellate court need not be convinced of guilt beyond a reasonable doubt; instead, it must be satisfied only that substantial evidence supports the conviction. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." Vickers, 148 Wn.2d at 116 (quoting Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993)).

**2. Count I: Sufficient evidence to convict.**

Count I concerns the events that occurred on August 18, 2008. CP 49 (Instruction 8). Li begins her argument by emphasizing that other individuals (Ms. Cui and Ms. Jen) did not actually commit an act of prostitution on this date. This is a classic "straw man" argument because the crime with which Li was charged was *promoting* prostitution, not *committing* prostitution. This crime does not require that an act of prostitution actually

occur, only that the defendant “. . . 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.60.

A review of the evidence demonstrates that there was substantial evidence to support Count I. On August 18, 2008, Det. Williams, while working in an undercover capacity, entered the “Global Massage” business and paid \$100 for a 60-minute massage: \$60 for the massage and the balance if he wanted the massage to continue. After that massage, Det. Williams spoke with Li who asked why he didn’t want the extra massage. Det. Williams asked what the difference was and Li indicated that for an extra \$30 a woman would masturbate him. Li expressed this by cupping her hand and moving it up and down rapidly as if masturbating a male’s sexual organ. Det. Williams understood this to be a reference to a “hand job”, the manual manipulation of the penis to orgasm. Li described a regular massage as a “hard massage.” When Li made the hand gesture described above, she described a “soft massage.”

Further, the jury was entitled to evaluate Li's credibility – specifically her denial that she had ever met Det. Williams prior to trial and her claim that no Asian women gave massages at her business – with the detective's testimony to the contrary. The jury's determination that Li's denials were not credible is not subject to review. In addition, one of the advertisements for Li's business displayed images of five Asian women in lingerie. In her testimony, Li offered no explanation for these advertisements, which contradicted her testimony that no Asian women gave massages at her business.

This evidence is more than sufficient to persuade a fair-minded, rational person of the truth of the finding that Li was, at a minimum, soliciting customers for prostitution, providing premises for prostitution purposes, and operating or assisting in the operation of a prostitution enterprise.

Li also argues that the evidence only supports a claim of attempting to promote prostitution in the second degree. Again, this argument misinterprets the nature of the charged crime and the "advances prostitution" means of committing this crime. RCW 9A.88.080(1)(b) does not necessarily require an actual act of prostitution (although that may be evidence of the commission of

the crime). Rather, the statute is aimed at individuals who solicit or promote prostitution, provide premises for prostitution or assist in the operation of a prostitution enterprise. Indeed, the definition of advancing prostitution is very broad and includes: “any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.” RCW 9A.88.060. In other words, promoting prostitution is an inchoate crime – like the crimes of solicitation or conspiracy – that targets preparatory conduct without requiring that the contemplated crime actually occur.<sup>8</sup> Here Li committed the crime of promoting prostitution – and not an attempt to promote prostitution – when she solicited customers for prostitution, provided premises for prostitution purposes, and operates (or assists in the operation of) a house of prostitution or a prostitution enterprise.<sup>9</sup>

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<sup>8</sup> See, e.g., State v. Doogen, 82 Wn. App. 185, 917 P.2d 155 (1996) (discussing inchoate nature of profiting from prostitution alternative means of committing Promoting Prostitution).

<sup>9</sup> The cases cited by Li in this section of her brief on appeal stand for the legal position – with which the State agrees – that a finding of guilty cannot be sustained where the evidence relied upon for conviction of a crime is reasonably susceptible of construction that *only* an attempt was made. These cases do not discuss the crime of promoting prostitution and are no substitute for the analysis of the evidence and crime charged.

**3. Count II: Sufficient evidence to convict.**

Li argument that the evidence was insufficient to convict on Count II is twofold: (1) that as matter of law Li cannot be found guilty of promoting prostitution when she was acting as the prostitute herself, and (2) that the evidence only supported a finding of an attempting to promote prostitution. Both arguments are without merit.

The State agrees that to be guilty of promoting prostitution a defendant must be acting other than as a prostitute. RCW 9A.060.

The jury was specifically instructed that this was the law:

The term "advanced prostitution" means that a person *acting other than as a prostitute* or as a customer thereof, caused or aided a person to commit or engage in prostitution or procured or solicited customers for prostitution or provided persons or premises for prostitution purposes or operated or assisted in the operation of a house of prostitution or a prostitution enterprise or engaged in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

CP 52 (Instruction 11) (emphasis added). If the only evidence on Count II was that Li had offered to commit an act of prostitution, then the State would also agree that a conviction for promoting prostitution would be improper. But there was additional evidence introduced at trial which demonstrates both that Li was guilty of

promoting prostitution and that there was no basis to conclude that she has simply engaged in an attempting to promote prostitution.

Count II involves events that occurred on November 1, 2008. On that date Det. Brundage was working in an undercover capacity, and he entered Li's massage business. Det. Brundage met Haoran Pu and said that a friend had told him to come here for the "king's massage," and he then made the hand gesture for a "hand job." Pu laughed and said that that would require two girls, but that they only had one girl available that night. Det. Brundage said he'd have to try again later for the "king's massage." In the meantime, he asked for the one-hour massage.

Li began to massage Det. Brundage in a back room. Det. Brundage said he had come for the "king's massage." Li described the "king's massage" as a soft massage, one in which the customer will be given a "hand release." Det. Brundage inquired if a "hand release" was a "hand job." Li answered, "yes, happy ending." Li asked Pu to find another girl. Pu sought to find another girl, but was unable to do so. Li told Det. Brundage that there weren't two girls but that he was tense and she would give him a hand release for \$60 (the price of the massage). Det. Brundage agreed, then

made up an excuse to leave the business without having any sexual contact. As he was leaving, Pu said he would try to have two girls for the king's massage next time.

This evidence – apart from Li's offer to give the detective a "hand job" – demonstrates that Li was "advancing prostitution." Just as with Count I, the evidence establishes that Li was solicited customers for prostitution, provided premises for prostitution purposes, and operates (or assists in the operation of) a house of prostitution or a prostitution enterprise. The fact that Li ultimately offered to commit an act of prostitution herself does not mean that her other acts were not advancing prostitution. Moreover, the fact that Li was unsuccessful in obtaining a second woman to act as a prostitute also does not mean that Li was not otherwise engaged in advancing prostitution (i.e., by providing a premise for doing so and by soliciting customers).

In sum, on appeal Li focuses on one act (her offer to commit an act of prostitution) and ignores the rest of the testimony that established her intent to "advance prostitution." But a fair-minded, rational person could, on the evidence presented at trial, readily conclude that Li was "advancing prostitution" and convict her as charged.

**D. THE JURY WAS NOT IMPROPERLY INSTRUCTED ON AN “UNCHARGED ALTERNATE MEANS”.<sup>10</sup>**

Li asserts that her conviction should be reversed because the trial court allegedly instructed the jury on the uncharged alternative means of “profiting from prostitution.” This argument is without merit.

The State agrees that that it is improper to instruct the jury on an uncharged alternative means.<sup>11</sup> But, as discussed above, that error did not occur in this case. It is true that the general definition of promoting prostitution included both alternatives for committing this crime. CP 48. But Li has completely ignored the fact that the “to convict” instruction – the yardstick by which the elements are presented to the jury – included only the “advancing prostitution” alternative. CP 49 & 50. Similarly, only the term “advancing prostitution” (an not the term “profiting from prostitution”) was defined for the jury. CP 52.

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<sup>10</sup> This section responds to arguments set forth in Li’s brief on pages 19-23.

<sup>11</sup> The State will not spend time discussing the cases cited by Li which correctly state the law but have ultimately nothing to do with the facts of this case.

Jury instructions are reviewed *de novo*, examining a particular instruction within the context of the jury instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Jury instructions are sufficient when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). In this case, the instructions viewed as a whole correctly informed the jury of the elements of the charged crime, made it clear that Li was only charged under the “advances prostitution alternative”, and allowed her to argue her theory of the case (that she was not engaged in advancing prostitution). There was no error.

**E. THE TRIAL COURT DID NOT ERR IN NOT INSTRUCTING ON LESSER INCLUDED OFFENSES.<sup>12</sup>**

Li asserts that the trial court erred in not giving a lesser included instruction of attempting to promote prostitution and permitting prostitution. These arguments are without merit.<sup>13</sup>

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<sup>12</sup> This section responds to arguments set forth in Li’s brief on pages 23-16.

<sup>13</sup> These instructions were not requested below and thus any error has not been preserved. However, as Li also asserts the failure to offer the lesser included instructions constitutes ineffective assistance of counsel, they will be addressed directly here.

A defendant has the right to have a lesser included offense presented to the jury if: (1) all the elements of the lesser offense are necessary elements of the charged offense (the legal prong) and (2) the evidence supports an inference that only the lesser crime was committed (the factual prong). State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006).

Under the factual prong of this test, “the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (emphasis in original). The evidence must affirmatively establish the defendant’s theory of the case; it is not enough that the jury might disbelieve the evidence pointing to guilt. Id. at 456.

In this case (and without repeating all of the arguments made above) the evidence did not raise an inference that Li only *attempted* to commit the crime of promoting prostitution. Rather, the evidence established that she committed the completed crime under the advances prostitution alternative. Li’s actions included soliciting customers for prostitution, providing premises for prostitution purposes, and operating a house of prostitution or a

prostitution enterprise. This evidence establishes the completed (but inchoate) crime of promoting prostitution. It does not establish only an attempt to commit this crime.

Further, Li's claim that the jury should have been instructed on the crime of permitting prostitution, is without merit. Permitting prostitution is not a lesser included offense of promoting prostitution because all of the elements of the lesser offense are not necessary elements of the charged offense.

The permitting prostitution statute states:

A person is guilty of permitting prostitution if, having possession or control of premises which he knows are being used for prostitution purposes, he fails without lawful excuse to make reasonable effort to halt or abate such use.

RCW 9A.88.090.<sup>14</sup> None of the elements of this crime are necessary elements of promoting prostitution.<sup>15</sup> Specifically, to be found guilty of "advancing prostitution" it is not necessary to be in "control of premises which one knows are being used for

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<sup>14</sup> "The gravamen of the offense of permitting prostitution is knowledge that premises are being used for prostitution purposes and the failure to take reasonable steps to abate such use." State v. Johnson, 61 Wn. App. 235, 241, 809 P.2d 764 (1991).

<sup>15</sup> The proper analysis in this context is to compare the elements of the lesser crime (permitting prostitution) to the alternative means of the greater crime as charged (in this case "advancing prostitution").

prostitution” This might be the case, but it is not a *necessary* element of the greater crime. Likewise, failing to make reasonable efforts to halt or abate prostitution is not a necessary element of “advancing “prostitution”. Indeed, the idea of “failing to abate” is not even mentioned in the definition of “advancing prostitution.” As prosecuted in this case, the State never alleged or argued that Li was guilty because she failed to abate known prostitution activity.

Permitting prostitution also fails the factual prong of the lesser included test. As charged and prosecuted, the evidence established that Li was not simply aware of prostitution activity and failed to take steps to abate it, but that she actively participated in advancing prostitution. It is not possible to conclude on the evidence presented at trial that Li *only* committed the lesser crime of permitting prostitution.

**F. TRIAL COUNSEL WAS NOT INEFFECTIVE.<sup>16</sup>**

In this section Li repackages many of her prior arguments under the general heading of ineffective assistance of counsel. In responding to these arguments, the State will endeavor not to repeat its responses made above, but simply supplement them with additional arguments as necessary.

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<sup>16</sup> This section responds to arguments set forth in Li’s brief on pages 31-38.

**1. Legal standard: ineffective assistance claims.**

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate both that counsel's representation was deficient and that the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The test for deficient representation is whether defense counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances. Thomas, 109 Wn.2d at 225. The prejudice prong of the test requires the defendant show a "reasonable probability" that, but for counsel's error, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

Competency of counsel is determined upon a review of the entire record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To overcome this presumption, a defendant must show that counsel had no legitimate strategic or tactical rationale for his or her conduct. McFarland, 127 Wn.2d at 336.

**2. No ineffective assistance of counsel.**

**a. Instruction No. 7.** On appeal Li provides a heading, but no argument, claiming that counsel was ineffective for failing to object to Instruction 7, which stated:

A person commits the crime of promoting prostitution in the second degree when he or she knowingly profits from or advances prostitution.

CP 48 (Instruction 7).

The argument should not be considered because counsel has failed to pursue or support it on appeal. RAP 10.3(a)(6) (requires parties to provide “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record”); State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002) (defendant could not pursue an appeal on a claim for which he failed to provide more than a single sentence in his brief, and that without legal authority. “We are not required to construct an argument on behalf of appellants.”).

In any event, even assuming that counsel should have objected to this instruction (by requesting that the reference to knowingly profits be removed), Li can not demonstrate any prejudice because the “to convict” instruction correctly stated the

law. CP 49 & 50. Moreover, only the definition of “advancing prostitution” was provided to the jury. CP 52. Considering the instructions as a whole, the jury was correctly informed of the elements of the crimes with which Li was charged.

**b. Unanimity Instruction.** Li asserts that counsel was ineffective for failing to propose a unanimity instruction. As discussed above, a unanimity instruction was not required. Supra, p. § III C. Counsel was not ineffective for choosing not to request an instruction that was not necessary and would not be granted.

**c. Attempted Lesser Included.** Li asserts in a heading, but does not argue, that counsel was ineffective for not proposing an Attempting to Promote Prostitution instruction.

This claim should be dismissed because it has not been supported with argument or citations to authority. RAP 10.3(a)(6)

Further, as outlined above, Li was not entitled to an attempt instruction. Supra, § III D. Counsel was not ineffective for choosing not to request an instruction that was not necessary and would not be granted.

Finally, and for the same reasons discussed in the section immediately following, the decision not to request a lesser-included instruction was clearly tactical and thus not ineffective assistance.

**d. Permitting Prostitution Lesser Included.** Li asserts in a heading that counsel was ineffective for not proposing a lesser included instruction for the crime of permitting prostitution.

As discussed above, Li was not entitled to a lesser included instruction on this crime. Supra, § III D. Counsel was not ineffective for choosing not to request an instruction that was legally permitted.<sup>17</sup>

Further, the decision not to request an instruction was tactical in nature and thus not subject to an ineffective assistance of counsel claim. First, the proposed lesser-included instruction of permitting prostitution was entirely inconsistent with Li's defense. Li took the stand, denied that she had advanced prostitution in any way. Li also denied that she, or anyone else, gave massages on her premises. Li's strategy was to make the jury choose between her version of events and that offered by the police. The wisdom of the "all or nothing" approach was amply demonstrated in this case

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<sup>17</sup> An ineffective assistance of counsel claim based upon the failure to propose an instruction for a lesser included offense fails if the trial court would properly have declined to give the instruction. State v. Shcherenkoy, 146 Wn. App. 619, 629-30, 191 P.3d 99 (2008), rev. denied, 165 Wn.2d 1037 (2009).

by the fact that the same strategy was pursued by co-defendant Pu, who was acquitted. The decision not to seek instruction on lesser included offenses was entirely consistent with this all or nothing strategy” and should not be overturned on appeal.

Finally, this was not simply a case of being aware of prostitution activity and failing to abate it. In light of the evidence presented, Li can not show prejudice given her active involvement in “advancing prostitution”.

**e. Motion for Dismissal.** Li argues it was ineffective for defense counsel not to seek a motion to dismiss at the end of the State’s case. This was not ineffective, it was realistic.

Counsel for co-defendant Pu had just made such a motion for dismissal, which was denied by the trial court. The evidence against Li was far more compelling. Li’s counsel appropriately decided not to pursue an obviously meaningless motion.

In any event, Li can not establish prejudice. The test for a motion to dismiss after the State rests is identical to a sufficiency of the evidence claim on appeal. As discussed above, the evidence was sufficient to convict Li on both counts. This is not a basis to reverse Li’s convictions.

**f. Motion for Arrest of Judgment.** Li asserts that counsel should have moved for a post-trial arrest of judgment on Count II, suggesting that this verdict was somehow inconsistent with the acquittal of co-defendant Pu. The test for post-trial arrest of judgment is essentially identical to that for sufficiency of the evidence. As discussed above, the evidence was sufficient to convict Li on Count II and accordingly Li cannot show any resulting prejudice from the alleged deficiency in failing to bring this motion.

**g. Motion for New Trial.** Li asserts that defense counsel must always file a motion for a new trial after an unfavorable verdict. This Court can take judicial notice of whether such motions are in fact ever pursued except in the most unusual circumstances. Regardless, Li asserts only that counsel should have raised: "the uncharged alternative means issue, the Petrich issue, and the failure to submit the lesser included instructions on attempt and permitting prostitution." As discussed throughout this brief, none of these claims have any merit and Li can not show prejudice from the failure to raise these issues in a post-trial motion below.

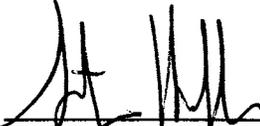
**IV. CONCLUSION**

For the reasons stated above, the State of Washington respectfully requests that the Court affirm Li's two convictions for promoting prostitution in the second degree.

DATED this 27<sup>th</sup> day of September, 2010.

Respectfully submitted,

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