

64549-8

64549-8

NO. 64549-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONGFANG LI,

APPELLANT.

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE CATHERINE SCHAFFER  
JUDGE

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BRIEF OF APPELLANT

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COURT OF APPEALS  
DIVISION I

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**ISSUES**

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**II. As to count I, was the evidence sufficient to show only an *attempt* to promote prostitution and not the crime charged, thus requiring dismissal for insufficient evidence?**

**III. As to count II, was the evidence insufficient as a matter of law to support a conviction where:**

**A. The only alleged “prostitute” on the premises was Appellant and the statute requires a person who “advances prostitution” to be someone acting “other than as a prostitute” receiving compensation for personally rendered prostitution services?**

**B. The only money received by Appellant was for legal massage services personally performed and the statute requires a “promoter” to “cause[] or aid[] a person to commit or engage in prostitution?”**

**C. The evidence, viewed in the light most favorable to the state, shows only a substantial step to “advance prostitution,” that is, only an *attempt* to promote prostitution and not the crime charged, thus requiring dismissal for insufficient evidence?**

**IV. Where Appellant was not charged with the alternative means of “profits from prostitution,” is it reversible error for the trial judge to instruct the jury in instruction no. 7 that it could nevertheless convict on such means?**

**V. Did the trial court commit reversible error by failing to instruct the jury that it could convict of an *attempt* to commit promoting prostitution in the second degree contrary to R.C.W. 10.61.003 and 10.61.010?**

**VI. Did the trial court commit reversible error by failing to instruct the jury that it could convict of the lesser included offense as charged of *permitting* prostitution contrary to R.C.W. 10.61.006?**

**VII. Did Appellant’s trial counsel deny effective assistance of counsel to Appellant under the Sixth Amendment and Article I, section 22 where he:**

**A. Failed to except to the trial court’s erroneous giving of instruction no. 7?**

**B. Failed to propose a *Petrich*-type instruction?**

**C. Failed to propose an *attempt* instruction as authorized by R.C.W. 10.61.003 and 10.61.010?**

**D. Failed to propose a lesser included instruction for *permitting prostitution* as authorized by R.C.W. 10.61.006?**

**E. Failed to prepare, submit and argue motions for dismissal, arrest of judgment and new trial?**

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## ASSIGNMENTS OF ERROR

1. The trial court committed reversible error in failing to require substantial evidence on each means submitted to the jury, failing to require the jury to unanimously agree on the means and in failing to instruct in accordance with WPIC 4.23 or 4.25.
2. As to Count I, the evidence was sufficient to show only an *attempt* to promote prostitution and not the crime charged, thus requiring dismissal for insufficient evidence.
3. As to Count II, the evidence was insufficient as a matter of law to support a conviction.
4. Where Appellant was not charged with the alternative means of “profits from prostitution,” the trial court committed reversible error by instructing the jury in Instruction No. 7 that it could nevertheless convict on such means.
5. The trial court committed reversible error by failing to instruct the jury that it could convict of an *attempt* to commit promoting prostitution in the second degree, contrary to R.C.W. 10.61.003 and 10.61.010.
6. The trial court committed reversible error by failing to instruct the jury that it could convict of the lesser included offense as charged of *permitting prostitution*, contrary to R.C.W. 10.61.006.
7. Appellant’s trial counsel denied effective assistance of counsel to Appellant under the Sixth Amendment and Article I, section 22.

## ISSUES

**I. Did the trial court commit reversible error in failing to require substantial evidence on each means submitted to the jury, failing to require the jury to unanimously agree on the means, and in failing to instruct in accordance with WPIC 4.23 or 4.25?**

**II. As to count I, was the evidence sufficient to show only an *attempt* to promote prostitution and not the crime charged, thus requiring dismissal for insufficient evidence?**

**III. As to count II, was the evidence insufficient as a matter of law to support a conviction where:**

**A. The only alleged “prostitute” on the premises was Appellant and the statute requires a person who “advances prostitution” to be someone acting “other than as a prostitute” receiving compensation for personally rendered prostitution services?**

**B. The only money received by Appellant was for legal massage services personally performed and the statute requires a “promoter” to “cause[] or aid[] a person to commit or engage in prostitution?”**

**C. The evidence, viewed in the light most favorable to the state, shows only a substantial step to “advance prostitution,” that is, only an *attempt* to promote prostitution and not the crime charged, thus requiring dismissal for insufficient evidence?**

**IV. Where Appellant was not charged with the alternative means of “profits from prostitution,” is it reversible error for the trial judge to instruct the jury in instruction no. 7 that it could nevertheless convict on such means?**

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**VII. Did Appellant’s trial counsel deny effective assistance of counsel to Appellant under the Sixth Amendment and Article I, section 22 where he:**

**A. Failed to except to the trial court’s erroneous giving of instruction no. 7?**

**B. Failed to propose a *Petrich*-type instruction?**

**C. Failed to propose an *attempt* instruction as authorized by R.C.W. 10.61.003 and 10.61.010?**

**D. Failed to propose a lesser included instruction for *permitting prostitution* as authorized by R.C.W. 10.61.006?**

**E. Failed to prepare, submit and argue motions for dismissal, arrest of judgment and new trial?**

**STATEMENT OF THE CASE**

**1. Nature of Action**

Appellant Dongfang Li appeals her conviction by a jury of two counts of promoting prostitution in the second degree in King County Superior Court No. 09-1-00804-0 SEA, Judge Catherine Schaffer, presiding. Ms. Li's co-defendant, Haoran Pu, was acquitted. RP IV 4.

Ms. Li was charged by amended Information with two counts of promoting prostitution under R.C.W. 9A.88.080(1)(b) which prohibits "knowingly advances prostitution" as defined in R.C.W. 9A.88.060(1). Clerk's Papers (CP) 10-11. The trial judge, however, with the consent of the state and without defense objection, instructed on *both* means of promoting prostitution, the one charged ("advances prostitution," R.C.W. 9A.88.060 (1); 9A.88.080(1)(b)) and the one *not* charged ("profits from prostitution," R.C.W.9A.88.060(2); 9A.88.080(1)(a)). CP 37-57 (Instruction no. 7). The trial judge did not require jury unanimity as to means.

The case proceeded to trial commencing on October 12, 2009. Ms. Li appeared with a Chinese language interpreter (Mandarin). At the 3.5 hearing, the trial judge concluded that "Ms. Li does not appear very familiar with English." RP III 31-32; CP 57-60. The judge determined that Ms. Li had not understood her *Miranda* rights. *Id.*

Ms. Li was represented at trial by defense counsel Daniel Felker. The defense proposed neither *attempt* instructions on both counts nor

lesser included instructions for *permitting* prostitution. The trial court did not instruct the jury on either *attempt* to promote prostitution or on the lesser included charge of *permitting* prostitution.

The jury returned verdicts of guilty on both counts as charged on October 19, 2009. RP IV 4; CP 36. Defense counsel did not file motions for arrest of judgment or for new trial. Judgment and sentence entered December 4, 2009. CP 61-67. Ms. Li was sentenced under a first time offender waiver to 30 days custody concurrent converted to community service, 12 months community custody and \$600 in financial obligations. Notice of appeal was timely filed. CP 68.

## **2. Statement of Facts**

Appellant Dongfang Li and her husband [a retired university professor] opened a health and beauty business in north Seattle called Global Healing [aka Health Protection] Center (hereafter Global). RP III 37-38. Ms. Li was the owner of the establishment and was listed as president on the Seattle business license. RP III 44; RP II 62-63. Ms. Li was also listed on the lease agreement for the building. *Id.* However, because of personal health issues, including injuries sustained in an auto accident, Ms. Li was seldom on the premises of the business. RP III 45.

**Count I.** On August 18, 2008, Seattle Police Officer Dale Williams who was assigned to “street vice” visited Global in an undercover capacity. RP II 21-26. Three persons were present in the lobby of the

business at the time: Ms. Li, a masseuse named Cui and a third person named Jen. RP II 27-29. Officer Williams was unable to communicate his request for a massage to Ms. Cui because of language difficulties. *Id.* Williams understood from Ms. Li, speaking in broken English, that he could be provided a massage of 30, 60 or 90 minutes at a cost each of \$30, \$60 or \$100 (later corrected by Williams to \$90). RP II 27, 33, 37.

Williams opted for the 60 minute massage and tendered \$100 to Ms. Li who held the balance in the event he decided to extend the massage to 90 minutes. RP 27-28. Ms. Cui provided a routine massage to Williams. Williams was unable to communicate verbally with Ms. Cui and at the end of the 60 minute massage “there was no offer for any extra activity.” *Id.* Williams declined an additional 30 minute massage and received his change back. At Ms. Li’s suggestion, Williams tipped Ms. Cui \$10 for the 60 minute massage. RP II 31-32.

During this interchange, Williams alleged that Ms. Li indicated that Ms. Cui did the “hard massage” and Ms. Jen did the “soft massage.” The latter remark was allegedly accompanied by a hand gesture of “up and down motion around a long object” although this description was omitted in the officer’s written report. Ms. Jen said nothing at all. RP II 29-30, 33, 40. Williams declined an additional 30 minute massage with Ms. Jen. Williams stated he told Ms. Li “that would be nice, but I have to go.” RP II 31. There was no discussion by any of the participants of payment of extra money for any sex acts and no sex acts occurred. RP II 38, 71.

**Count II.** On November 1, 2008, Seattle Police Officer Ronald Brundage entered Global in an undercover capacity. RP III 8, 13. Two persons were on the premises at the time: Ms. Li and her son and co-defendant, Haoran Pu. RP III 8, 13, 36. The undercover officer spoke to Mr. Pu and requested a “King’s massage” and “made a common gesture for masturbation.” Mr. Pu allegedly responded that “the King’s massage takes two girls and they only had one that night.” RP III 13. After being told he could not receive a “King’s massage” but could obtain a regular massage from a single masseuse, the officer agreed.

When asked why he would proceed under these circumstances, Brundage answered, “I believed that I might still be able to get an act of prostitution from a single girl.” RP III 14. According to Brundage, Ms. Li agreed to provide him a regular one hour massage for \$60. RP III 18. In broken English Ms. Li described the “King’s massage” in terms of “hard massage” and “soft massage.” RP III 15, 17. Brundage asserted that at some point during the massage Ms. Li inquired of Mr. Pu whether a second masseuse was available. None was. RP III 17-18.

After learning that a second masseuse was unavailable, Brundage testified that Ms. Li agreed to furnish a “hand release” or “hand job” or “happy ending.” RP III 16-19. However, there was no extra monetary charge or payment for the alleged offer of sexual contact. RP III 15-19, 23. Brundage used a ruse to decline any sexual contact. RP III 18-19. No sexual act occurred. RP III 19.

**Other Evidence and Search Warrant Results.** Seattle Police Officer Trent Bergmann was the lead detective on the months-long investigation of Global. RP II 87. He was asked whether, during the course of the investigation, any non-police customers of Global were contacted or interviewed. He answered “no.” RP II 71. He was asked whether he had obtained any information that any sex acts for money had occurred, or were occurring, at Global. He answered “no.” *Id.* Bergmann admitted on the stand that he had lied to Mr. Pu when he falsely informed him that he “had spoken with customers that had received these illegal acts.” RP II 84-85.

Following the second undercover entry of Global in November of 2008, Bergmann sought and obtained a search warrant for the business. RP II 66. Among other “items of sexual activity,” the warrant authorized the seizure of “condoms, new and used, condom boxes, purchase information on condoms, lubricants, powders, lotions, feather dusters, gloves, sponges ... .” RP II 81. When asked whether, in executing the search warrant, he found any “item of sexual activity” on the premises of Global, Bergmann stated, “No, I did not.” *Id.*

## **ARGUMENT**

### **I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO REQUIRE SUBSTANTIAL EVIDENCE ON EACH MEANS SUBMITTED TO THE JURY, FAILING TO REQUIRE THE JURY TO UNANIMOUSLY AGREE ON THE MEANS AND IN FAILING TO INSTRUCT IN ACCORDANCE WITH WPIC 4.23 OR 4.25**

In order to prove the crime of promoting prostitution in the second degree the state was required to prove Appellant's conduct "knowingly advanced prostitution" beyond a reasonable doubt. Count I and II; Court's Instructions Nos. 8 and 13, CP 10, 37-56. The term "advances prostitution" is defined in R.C.W. 9A.88.060(1) and the jury was instructed in the language of the statute as modified to refer to the past tense:

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

Court's Instruction No. 11. In addition to the multiple means set forth of advancing prostitution, the court also informed the jury of an additional means of promoting prostitution by "knowingly profit[ing] from ... prostitution" as prohibited by R.C.W. 9A.88.080(1)(a) and 9A.88.060(2):

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

Court's Instruction No. 7; WPIC 48.05. The alternative means of "profits from prostitution" was not charged in the amended Information. CP 10. The trial judge did not require unanimity of the jury *either* as to the means set forth within the definition of "advanced prostitution" *or* as to the alternative means of "advances prostitution" and "profits from prostitution" as set forth in Instruction No. 7. The trial judge did not give a

*Petrich*-type alternative means instruction (WPIC 4.23; 4.25). *See*

*Comment* to WPIC 4.23:

“[J]udges must make sure that the instruction lists *only* those alternative elements that are supported by sufficient evidence – it is easy to mistakenly use a pattern instruction that covers more situations than those involved in the particular case. *Moreover, the judge should include only those alternative means that are set forth in the charging document.*”

11 Washington Practice (2005 supp.) at p. 105 (emph.ad.).

The committee on jury instructions relied on *State v. Kitchen*, 110 403, 756 P.2d 105 (1988) which held that even if unanimity in alternative means cases is only required as to the overall offense rather than for each of the alternative means, this is permissible “as long as sufficient evidence supports each of the alternatives.” *Comment* to WPIC 4.23, *supra*.

As the *Comment* indicates, it is the court’s obligation to insure jury unanimity as this is a fundamental requirement under the Washington Constitution. *See State v. Depaz*, 165 Wn.2d 842, 204 P.3d 217 (2009) (Washington Constitution guarantees right to unanimous verdict in criminal cases under Art. I, sections 3, 21, and 22); *State v. Ortega-Martinez*, 124 Wn.2d 702, 881 P.2d 1231 (1994)(same).<sup>1</sup>

In this case, the trial judge neglected to follow the cautionary instructions of the pattern jury committee and as a result committed reversible error. First, the judge failed to “include only those alternative

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<sup>1</sup> Because the failure to give a *Petrich*-type instruction is an error of constitutional magnitude, it may be raised for the first time on appeal. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); *State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991).

means that are set forth in the charging document.” Instruction No. 7 set forth the alternative means of “profits from prostitution” which was *not* charged in the amended Information. *See State v. Bray*, 52 Wn.App. 30, 756 P.2d 1332 (1988)(instruction on alternative means of committing crime not charged in information is reversible error). Second, the judge failed to delete from Instruction No. 11 the alternative means of “caused or aided a person to commit or engage in prostitution” for which there was insufficient evidence as a matter of law. The state *conceded* this point:

“[W]e don’t have an actual act of prostitution, so the State is not alleging that Ms. Li caused another person to engage in prostitution.” RP III 70.

Therefore, the alternative means of “advancing prostitution” by causing or aiding another person to commit or engage in prostitution completely fails for lack of proof and the trial judge was duty-bound to remove from Instruction 11 this alternative means of committing the crime. The failure to do so is reversible error. *State v. Kitchen, supra*; *State v. Green*, 94 Wn.2d 216, 232-33, 616 P.2d 628 (1980).

As to the remaining means of advancing prostitution (procuring or soliciting customers for prostitution; providing persons or premises for prostitution; operating or assisting in the operation of a house of prostitution or enterprise; or other conduct instituting, aiding or facilitating prostitution), in the absence of a *Petrich*-type instruction that the jury “unanimously agree as to which act has been proved” [WPIC 4.25] there can be no assurance that the jury unanimously agreed as to *any* means thus

undermining the constitutional command. *See State v. Ortega-Martinez, supra*, 124 Wn.2d at 717, note 2 (“We strongly urge counsel and trial courts to heed our notice that an instruction regarding jury unanimity on the alternative method is preferable.”).

Even if in an alternative means case jury unanimity is required only as to the overall offense, a *Petrich*-type instruction such as WPIC 4.23<sup>2</sup> is still essential and there still must be sufficient evidence to support *each* of the alternative means sent to the jury.

“[I]n order to safeguard the defendant’s constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the *relied-on* alternative means must be presented.”

*State v. Peterson*, 168 Wn.2d 763, 769 (2010)(Court’s emphasis) quoting *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) citing *State v. Kitchen*, 110 Wn.2d at 410-411. In this case, the trial judge failed to require the jury to unanimously agree on a single act of “advancing prostitution” [WPIC 4.25], failed to insure there was substantial evidence on *each* alternative submitted to the jury and failed to require each individual juror to find that “at least one alternative” means had been proved beyond a reasonable doubt [WPIC 4.23]. Since no rational trier of fact “*could* have found each means of committing the crime proved beyond a reasonable doubt,” reversal is required. *State v. Kitchen, id.* (Court’s emph.).

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WPIC 4.23 provides that “to return a verdict of guilty, the jury need not be unanimous as to which of alternatives ... has been proved beyond a reasonable doubt, *as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.*” (emph.ad.)

**II. THE EVIDENCE ON COUNT I WAS SUFFICIENT ONLY TO SHOW AN *ATTEMPT* TO PROMOTE PROSTITUTION AND NOT THE CRIME CHARGED, THUS REQUIRING DISMISSAL FOR INSUFFICIENT EVIDENCE**

Other than a gesture that was so insignificant the undercover officer didn't bother to record it in his contemporaneous report, there was not a scintilla of evidence that on August 18, 2008 Global was a front for a "house of prostitution." On that date Officer Williams received a routine massage and nothing else. He could not even communicate with his masseuse, Ms. Cui, let alone discuss sexual favors for money. The masseuse never disrobed, never touched him inappropriately, never offered or agreed to engage or engaged in any sexual activity and did not ask for or receive any monies beyond the massage services. There were no items in the massage room or on the premises that even suggested sexual activity for money was available.

As to the second person on the premises, Ms. Jen, she neither agreed or offered to engage in sexual conduct nor engaged in any such conduct. She did not speak a word to the undercover officer.

As to Ms. Li's conversation in broken English with the officer about hard and soft massage, those terms are perfectly consistent with different types of massage techniques. The only suggestion of a sexual connotation is the officer's belated reference to what he believed was a sexual gesture. Ms. Li never requested any additional money from the officer for a sexual act and returned his change to him. Since the officer

declined to obtain further massage services, it is pure speculation whether any sexual activity would occur. Further investigation produced no evidence that *any* non-police customers of the business had at any time engaged in prostitution activities with *any* employees of the business.

Even in a light most favorable to the state, the *most* that can be said about this evidence is that it might tend to show an *attempt* to promote prostitution. But no rational jury could subjectively believe with “near certitude” that this evidence established proof beyond a reasonable doubt of promoting prostitution. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *State v. Hundley*, 126 Wn.2d 418, 422, 895 P.2d 403 (1995).

Evidence which only establishes an *attempt* to commit the charged crime but not the charged crime itself is insufficient as a matter of law to sustain the conviction and requires dismissal. *State v. Charley*, 48 Wn.2d 126, 291 P.2d 673 (1955); *State v. Swane*, 21 Wn.2d 772, 153 P.2d 311 (1944).

The test set forth in *State v. Charley* to determine if there is sufficient evidence to establish only an attempt rather than the completed crime is whether “the evidence relied upon for conviction of a crime is reasonably susceptible of construction that only an attempt was made.” 48 Wn.2d at 127. Where the evidence only meets the test for an attempt and not for the completed crime, the remedy is dismissal.

“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.”

*State v. Charley*, 48 Wn.2d at 127 (reversing and dismissing); *State v. Swane*, 21 Wn.2d at 774 (reversing and dismissing); *State v. Hundley*, 126 Wn.2d at 422 (reversing and dismissing) (“No reasonable trier of fact could reach subjective certitude on the fact at issue here.”).

What the Washington Supreme Court said in *State v. Swane*, *supra* 21 Wn.2d at 774, is equally true here:

“It was, therefore, clearly impossible for the jury to find, beyond a reasonable doubt, that the appellant committed the crime charged.”

### **III. THE EVIDENCE ON COUNT II WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION**

The promoting prostitution statute is broadly worded but it does contain specific limitations. One of the most obvious is that to be prohibited, conduct must relate to *prostitution* as defined in R.C.W. 9A.88.030 (1) and (2). Another limitation which applies here is that a person who acts only as an alleged prostitute or customer is excluded from the class of persons to whom the promoting statute applies. R.C.W. 9A.88.060(1) and (2). A third limitation is that to be a “promoter,” a person must be shown to cause or aid *another* person to engage in prostitution. R.C.W. 9A.88.060(1).

#### **A. THE ONLY ALLEGED “PROSTITUTE” ON THE PREMISES WAS APPELLANT AND THE STATUTE REQUIRES A PERSON WHO “ADVANCES PROSTITUTION” TO BE SOMEONE ACTING “OTHER THAN AS A PROSTITUTE” RECEIVING COMPENSATION FOR PERSONALLY RENDERED PROSTITUTION SERVICES**

Count II contains a key factual distinction from Count I in that the

only masseuse on the premises on November 1, 2008 was Appellant. Ms. Li was the only person who interacted with the undercover officer in the massage room and the only person who had physical contact with him. And, significantly, Ms. Li was the only person, according to the officer, who offered to perform a sex act on that date.<sup>3</sup> Indeed, the whole point of Officer Brundage agreeing to receive a massage from Ms. Li was his belief “that I might still be able to get an *act of prostitution* from a *single girl*” -- that is, Ms. Li! RP III 14 (emph.ad.)

The question, then, is whether when the person accused of promoting prostitution is also alleged to be the person personally offering or agreeing to engage in an act of prostitution, such person is excluded as a matter of law under the terms of the statute?

R.C.W. 9A.88.060 explicitly forbids applying the promoting prostitution law under these circumstances to the alleged prostitute. The relevant language in the definition of “advances prostitution” is:

“A person ‘advances prostitution’ if, *acting other than as a prostitute* or as a customer thereof ... .”

R.C.W. 9A.88.060(1)(emph.ad.). This definition must be read in *pari materia* with R.C.W. 9A.88.060(2) which elaborates on the exclusion of the alleged prostitute from the promoting prohibition:

“... if, *acting other than as a prostitute receiving compensation for personally rendered prostitution services* ... .”

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Appellant’s co-defendant, Haoran Pu, who was also present on the premises on November 1, 2008 was *acquitted* by the jury of promoting prostitution. RP IV 4.

R.C.W. 9A.88.060(2)(emph.ad.).

Washington case law construing the statute is consistent with the view that a promoter of prostitution cannot also be the sole provider of prostitution services. *See State v. Mason*, 34 Wn.App. 680, 687, 644 P.2d 710 (1982) holding that R.C.W. 9A.88.080 does not contain “a clear legislative intent to impose multiple punishment upon one person’s promotion of prostitution by *employing two or more persons* simultaneously over a period of weeks in the same location.” (emph.ad.)

The *Mason* court made clear that the statutory scheme mandates a showing that the promoter had at least “one prostitute working for him.”

“The apparent evils the legislature sought to attack were ‘advancing prostitution’ and ‘profiting from prostitution.’ A person is equally guilty of either of those evils whether he *has only one prostitute working for him or several*. *See* definitions in R.C.W. 9A.88.060.”

*State v. Mason, supra*, 31 Wn.App. at 687 (emph.ad.).

R.C.W. 9A.88.060 is dispositive of the question presented. It addresses the precise factual scenario presented in this case. A person cannot simultaneously be the promoter and the prostitute. The statute expressly excludes a person in Appellant’s situation from the reach of the prohibition. Moreover, while the trial judge instructed the jury on this exclusion in Instruction No. 11, the issue should have been decided as a matter of law and Count II dismissed for lack of *prima facie* case, by the judge *sua sponte* if not on defense motion. A timely post-trial motion for arrest of judgment on this basis should have been granted.

**B. THE ONLY MONEY RECEIVED BY APPELLANT WAS FOR LEGAL MASSAGE SERVICES PERSONALLY PERFORMED AND THE STATUTE REQUIRES A “PROMOTER” TO “CAUSE OR AID A[NOTHER] PERSON TO COMMIT OR ENGAGE IN PROSTITUTION”**

The evidence presented on Count II proved only that Appellant was the sole masseuse on the premises and that she received compensation exactly in the amount of the cost of the massage to the undercover officer. But the promoting statute requires far more. It requires that the accused be acting in a capacity *other* than as a prostitute (*see part A, supra*) and that in that non-prostitute capacity the accused “causes or aids a[nother] person to commit or engage in prostitution.” R.C.W. 9A.88.060(1). The state conceded that neither Ms. Li nor any other person on the premises engaged in an act of prostitution and further conceded that “the State is not alleging that Ms. Li caused another person to engage in prostitution.” RP III 70.

However, the prosecutor argued in summation, contrary to the exclusion in R.C.W. 9A.88.060, that Ms. Li had in fact *personally* offered or agreed to an act of prostitution when she purportedly offered a sexual act at the conclusion of the routine massage (*at no extra cost*):

“Ms. Li informed Detective Brundage ..., ‘You know, listen, your [sic] feeling a bit tense, and *I will provide that hand release to you.*’”

RP III 72 (*emph.ad.*); 16, 23.

The prosecutor’s argument that Ms. Li *personally* offered prostitution services and the prosecutor’s concession that Ms. Li did *not* “cause[] another person to engage in prostitution,” are fatal to a prosecution under

R.C.W. 9A.88.080(1)(b).

**C. THE EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SHOWS ONLY A SUBSTANTIAL STEP TO “ADVANCE PROSTITUTION,” THAT IS, ONLY AN *ATTEMPT* TO PROMOTE PROSTITUTION AND NOT THE CRIME CHARGED, THUS REQUIRING DISMISSAL FOR INSUFFICIENT EVIDENCE**

The state’s alternative theory on Count II was that while Ms. Li was in the massage room providing massage services to the officer she was acting as a “prostitute” but at the same time she was “trying” unsuccessfully to find a second masseuse. RP 72-74. The latter marginally relevant and ambiguous evidence is wholly insufficient to establish the completed crime of promoting prostitution which requires that the accused promoter actually cause or aid another person to “commit or engage in prostitution.” No such evidence was presented.

In closing argument, the prosecutor conceded that the state had made no showing that another person was even available let alone proof that Appellant “caused or aided” another person or that another person “commit[ted] or engage[d] in prostitution” at her instigation:

“She opened the door [of the massage room] and had a conversation with the defendant, Mr. Pu, and asked if he could make arrangements to *try* to get a second girl there ...

“Ms. Li, in addition to offering prostitution services herself, was certainly involved in *trying* to procure that second girl ... .” RP III, 72, 74 (emph.ad.).

Under these circumstances, the most that can be said for the state’s evidence is that it shows Ms. Li made a substantial step toward promoting prostitution. But a “substantial step” proves only the *attempt* to commit

the crime and not the completed crime itself. *See* R.C.W. 9A.28.020(1). Nor was there sufficient evidence to convict on a theory that Appellant “procure[d] or solicit[ed] customers for prostitution” because, again, the evidence showed that her contact with the undercover officer was only as “a single girl” targeted by *him* as a possible prostitute. Moreover, such evidence as there was of an alleged conversation between Ms. Li and Mr. Pu is of minimal value as Mr. Pu was acquitted of promoting prostitution.

As noted in part II *supra*, where the evidence relied upon for conviction is “reasonably susceptible of construction that only an attempt was made,” the conviction cannot stand. *State v. Charley, supra* (reversing and dismissing where evidence showed only an attempt to commit the charged crime); *State v. Swane, supra* (same); *State v. Hundley, supra* (same).

**IV. WHERE APPELLANT WAS NOT CHARGED WITH THE ALTERNATIVE MEANS OF “PROFITS FROM PROSTITUTION,” IT IS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO INSTRUCT THE JURY (INSTRUCTION NO. 7) THAT IT COULD NEVERTHELESS CONVICT ON SUCH MEANS**

It has long been the law in the State of Washington that when an information charges only one possible statutory alternative method of committing a crime, “it is error to instruct the jury that they may consider other ways or means by which the crime could have been committed, regardless of the range of evidence admitted at trial.” *State v. Bray*, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988), citing *State v. Severns*, 13 Wn.2d 542, 125 P.2d 659 (1942). Such error is presumed prejudicial and constitutes reversible error. *State v. Laramie*, 141 Wn.App. 332, 169 P.2d 859

(2007); *State v. Chino*, 117 Wn.App. 531, 72 P.3d 256 (2003); *State v. Bray*, *supra*; *State v. Severns*, *supra*.

Where such error occurs, it implicates the constitutional right to fair notice in the information of the crime charged and is thus manifest constitutional error which may be considered for the first time on appeal. Sixth Amendment; Art. I, sec. 22; RAP 2.5(a)(3). *See State v. Chino*, *supra*, 117 Wn.App. at 538 (error in instruction on uncharged alternative means may be challenged for first time on appeal); *State v. Laramie*, *supra*, 141 Wn.App. at 343 (same).

The crime of promoting prostitution can be committed in a number of ways. One group of alternative means is set forth under the heading of “advances prostitution.” R.C.W. 9A.88.060(1); 9A.88.080(1)(b). A second group of alternative means is set forth under the heading of “profits from prostitution.” R.C.W. 9A.88.060(2); 9A.88.080(1)(a). In this case, the state charged Appellant *only* under the alternative means included in “advances prostitution.” CP 10-11. However, the trial court instructed the jury on *both* alternative means:

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

Instruction No. 7 (emph.ad.); CP 37-56.

It was patent error for the trial court to allow the jury to consider -- and convict on -- the *uncharged* alternative means included in “profits from prostitution.” *See Comment, supra* to WPIC 4.23 at p. 105 (“the

judge should include only those alternative means that are set forth in the charging document”). Nevertheless, the trial court instructed, with the consent of the prosecutor and absent defense objection, that the jury could consider the *uncharged* alternative means of “profits from prostitution.” This is patently prejudicial error. *State v. Bray, supra; State v. Severns, supra; State v. Laramie, supra; State v. Chino, supra.*

In this case the prosecutor erroneously accused Appellant of committing a crime never charged – prostitution.<sup>4</sup> The prosecutor argued:

“Ms. Li, *in addition to offering prostitution services herself ...*” RP III 74 (emph.ad.), thus asserting that she was guilty of *promoting* because she was personally profiting from *committing* prostitution. Ironically, so long as Ms. Li was allegedly acting as a prostitute she was completely exempted from being prosecuted for promoting prostitution and the issue should never have been before a jury in the first place. The prosecutor then compounded the error by emphasizing to the jury that because Ms. Li was receiving compensation as a “prostitute” [in reality, the only money she received was for performing a routine massage], she was therefore “profiting” from running a prostitution enterprise. In the same vein, the prosecutor suggested to the jury that the evidence for the proffered additional 30 minute massage for \$30 in Count I and the \$10 tip

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“One cannot be tried for an uncharged offense.” *State v. Bray*, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988); *State v. Brown*, 45 Wn.App. 571, 576, 726 P.2d 60 (1986). A prosecutor’s insinuation in closing that a defendant is guilty of an uncharged crime violates “the integrity of the trial itself” and constitutes independent constitutional grounds for reversal. *See, e.g., Hall v. United States*, 419 F.2d 582, 587 (5<sup>th</sup> Cir.1969).

for the 60 minute massage was actually evidence of money for sex, that is “profits from prostitution.” RP III 69. This is the only logical inference since the state presented the unrebutted evidence that any sex acts at Global were “free” as the police testified they were included in the price of massage. RP III 16, 23.

The Washington Supreme Court dealt with an analogous situation in *State v. Severns, supra*. *Severns* was a rape case in which the defendant was charged under one alternative means but the court instructed the jury it could consider another uncharged means. The Supreme Court stated:

“[W]e have been cited to no authority, nor do we know of any, which permits a court, when the information charges the act to have been done in only one of the ways or by one of the means named in the statute, to instruct the jury that they may consider other ways or means by which the act may have been committed.

“We are firmly of the opinion that, where, as in the instant case, the information charges that the crime was committed in a particular way, under one subdivision of a statute, *it is error for the trial court to instruct the jury, as was done in this case, that they may consider other ways or means by which the act charged might have been committed*, regardless of the range which the court may have permitted the testimony to take.”

“*We seriously doubt* that, where an instruction such as instruction No. 5 in this case has been given, *the error can be corrected by a subsequent instruction*, especially where, as in the instant case, the state, in its argument to the jury, is permitted, over objection, to call the jury’s attention to the way or means by which the act might have been committed, as set out in the instruction, although not charged in the information.”

*State v. Severns*, 13 Wn.2d at 548-49 (emph.ad.). Accordingly, the Court reversed the conviction and remanded for new trial.

Similarly, in *State v. Bray, supra*, a forgery case where the information charged one alternative means but the court instructed the jury they could consider uncharged alternatives in reaching their decision, this Court found the error to be prejudicial despite the fact that the uncharged alternatives were not set forth in the to-convict instruction. 52 Wn.App. at 35-36. The Court in *Bray* also found it noteworthy, as in *Severns*, that the prosecutor in closing argument referred to the uncharged means.

Here, the prejudice is exacerbated because the prosecutor argued improperly, on the one hand, that Appellant was personally profiting from her own alleged prostitution activities, and on the other, that she was profiting from alleged sexual massage activities performed by others. There was great potential for confusion to the jury where the prosecutor argued a separate uncharged *crime* – prostitution (which by law provided an exemption to the crime charged) and a separate uncharged *alternative means* (which the prosecutor argued was proven in this case). The trial court had the ultimate duty to insure a fair trial by permitting only the offense as charged – not the uncharged prostitution crime and not the uncharged alternative means – to be considered by the jury. *Comment to WPIC 4.23*. In erroneously instructing the jury in accordance with the state's wishes and in not confining the prosecutor's arguments to the offense as charged, the trial judge denied Appellant a fair trial.

**V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY THAT IT COULD CONVICT OF AN *ATTEMPT* TO COMMIT PROMOTING PROSTITUTION IN THE SECOND**

### **DEGREE CONTRARY TO R.C.W. 10.61.003 AND .010**

A defendant has the statutory right to present lesser included offense instructions to the jury. *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). “An attempted crime is a lesser included offense of the crime charged and the jury may convict a defendant of attempting to commit a crime charged, even though attempt was not specifically charged. R.C.W. 10.61.010.” *State v. Gallegos*, 65 Wn.App. 230, 234, 828 P.2d 37 (1992)(also citing R.C.W. 10.61.003 and .006).

An attempt is defined as having an “intent to commit a specific crime” and then taking “a substantial step toward the commission of that crime.” R.C.W. 9A.28.020(1). Since before statehood, Washington statutory law has authorized a jury to consider the lesser offense of attempt, explicitly permitting a jury to acquit on the charge alleged in the information and to convict on an attempt to commit such charge.

R.C.W. 10.61.003, based on the Code of 1881, provides:

“Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant *not guilty* of the degree charged in the indictment or information, and *guilty* of any degree inferior thereto, *or of an attempt to commit the offense.*”

Similarly, R.C.W. 10.61.010 provides:

“Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, *or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime.* Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree *or attempt* of which the accused is guilty.”

Because the evidence on both Counts I and II established neither an act of prostitution nor the completed crime of promoting prostitution, Appellant was clearly entitled to have her jury instructed on the lesser included offense of *attempting* to promote prostitution in the second degree. *State v. Gamble, supra; State v. Gallegos, supra*; R.C.W., 10.61.010; 10.61.003; 9A.28.020(1).

As to Count I, the state conceded “we don’t have an actual act of prostitution.” The state further conceded that since there was no proof of prostitution it was “not alleging that Ms. Li caused another person to engage in prostitution.” RP III 70. The *only* evidence on this count is that the undercover officer was offered an additional 30 minute routine massage at the regular price accompanied by a possible sexual gesture. However, the officer declined any further contact of any kind with either masseuse and did not pay for any further services.

Arguably, this evidence is sufficient to constitute a “substantial step” toward the commission of the charged crime, that is, an *attempt* to commit promoting prostitution in the second degree.<sup>5</sup>

As to Count II, the jury was expressly instructed that Appellant could not be convicted if “acting ... as a prostitute” while providing a massage to the undercover officer. Instruction No. 11. In closing, the prosecutor told the jury Appellant *was* acting in this capacity. RP III 74.

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Unlike *State v. Jessup*, 31 Wn.App. 304, 308, 641 P.2d 1185 (1982), Appellant was neither charged with conspiracy nor with “agreeing with others.” Count I *only* referred to Ms. Li.

The only other evidence available to the jury was that while Appellant was in the massage room acting in this capacity she requested of her co-defendant – who was acquitted of promoting on the same count – to “try” and contact a second masseuse.

Arguably, this evidence is sufficient to constitute a “substantial step” toward the commission of the charged crime, that is, an *attempt* to commit promoting prostitution in the second degree.<sup>6</sup>

Defense counsel did not propose *attempt* instructions. The trial judge did not instruct the jury *sua sponte* on *attempt*. The appellate court reviews error in jury instructions *de novo*. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.2d 142 (2010). On this record, it is clear that Appellant did not receive a fair trial in the absence of the jury being allowed to consider the lesser offenses of attempt to promote prostitution in the second degree.

**VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY THAT IT COULD CONVICT OF THE LESSER INCLUDED OFFENSE AS CHARGED OF PERMITTING PROSTITUTION CONTRARY TO R.C.W. 10.61.006**

In addition to R.C.W. 10.61.003 and .010, *supra*, R.C.W.10.61.006 provides a catch-all statutory right to have the jury consider *all* lesser included offenses to the crime *as charged and prosecuted*. *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). R.C.W. 10.61.006 provides:

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Unlike *State v. Jessup*, *supra*, Appellant was neither charged with conspiracy nor with “agreeing with others.” Moreover, the co-defendant, Mr. Pu, was acquitted on Count II.

“In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.”

The state’s theory in this case was that Appellant was advancing prostitution by “provid[ing] ... premises for prostitution purposes, operat[ing] or assist[ing] in the operation of a house of prostitution or a prostitution enterprise ... .” Instruction No. 11; R.C.W. 9A.88.060(1). RP III 70. As charged in both counts of the amended Information, Appellant was accused by all means, without any limitations or deletions, set forth in R.C.W. 9A.088.060(1). As prosecuted on both counts, Appellant was accused by all means, without any limitations<sup>7</sup> or deletions, set forth in Instruction No. 11; *see also* Instruction No. 7.

As charged and prosecuted, and based on the evidence presented, there is a lesser included charge which the jury should have been instructed on, the crime of *permitting prostitution*. R.C.W. 9A.88.090(1) provides:

“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.”

It was undisputed at trial that Ms. Li had “possession” and “control” of the “premises” at issue. She was the owner of Global and was listed as president on the business license. She was also named on the lease agreement for the building. The “premises” which Ms. Li possessed

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While the state conceded in closing that the means of “causes or aids a person to to commit or engage in prostitution,” was not proven, RP III 70, this concession is not relevant to the issue presented in this section.

and controlled were the same “premises” which the state accused her of using for prostitution purposes. Instruction No. 11. If she “knowingly ... provide[d] ... premises for prostitution purposes,” as charged and prosecuted in Counts I and II (Instruction No. 11; R.C.W. 9A.88.080(1)(b); 9A.88.060(1)), she also necessarily “know[ingly]” allowed such “premises” to be “used for prostitution purposes.” As charged and prosecuted in this case, *permitting prostitution* is a lesser included charge of *promoting prostitution*. R.C.W. 10.61.006.

To determine whether a crime is a lesser included offense of a greater crime, a court applies the two-part *Workman* test: “First, each of the elements of lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.” *State v. Berlin, supra*, 133 Wn.2d at 545-46, citing *State v. Workman, supra*, 90 Wn.2d at 447-48. The Supreme Court in *Berlin* clarified that the analysis must be conducted based on the greater offense “as charged and prosecuted.” 133 Wn.2d at 548. Furthermore, the evidence must be viewed in the light most favorable to the proponent of the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). Appellant satisfies the *Workman* test here.

First, as charged and prosecuted, the state explicitly relied on the theory that Appellant: 1) ran a “house of prostitution” at Global by “provid[ing] ... premises for prostitution purposes,” and, 2) did so “knowingly.” Each of the elements of the lesser crime of permitting prostitution

tracks the elements of the greater: 1) “having possession or control of premises ... used for prostitution purposes,” and, 2) did so with knowledge [“knows”].

Second, as charged and prosecuted, the facts elicited support an inference that the lesser offense was committed. Ms. Li testified that although she was the owner, she was seldom on the premises because of health concerns including recent auto accident injuries. Moreover, the evidence supports an inference that if illegal activities occurred on the premises, they were engaged in by others.

*State v. Putnam*, 31 Wn.App. 156, 639 P.2d 858 (1982), properly understood, does not compel a different result. *Putnam* was decided 15 years before *Berlin* and applied the wrong analysis. The *Putnam* court applied a strict application to the first (“legal”) prong of the *Workman* test so that “if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime.” 31 Wn. App. at 163. But this is not the current test and it has been repudiated by the Washington Supreme Court. *See State v. Berlin, overruling Putnam* line of authority, 133 Wn.2d at 549.

*Berlin* requires the reviewing court to apply the lesser included analysis “to the offenses as charged and prosecuted.” 133 Wn.2d at 548. In other words, although there are a number of means of committing promoting prostitution and some of them do not necessarily include ~~permitting prostitution, as charged and prosecuted in this case, permitting~~

prostitution is clearly a lesser included offense.

There is a second reason *Putnam* is not controlling. On the second (“factual”) prong of the *Workman* test, the court said if “a person violates R.C.W. 9A.88.080, promoting prostitution in the second degree, without possessing or controlling the premises, the greater offense has been committed without committing the lesser.” *State v. Putnam*, 31 Wn.App. at 163. The contrary of this proposition, of course, is that if it is shown that the accused *did* possess or control the premises, then under *Berlin* the offense of permitting prostitution is in fact a lesser included of promoting prostitution. It appears that the *Putnam* court was analyzing the facts of the case under the second *Workman* prong<sup>8</sup> and, if in fact, Mr. Putnam did not personally “possess” or “control” the premises, the court was correct even under *Berlin* that in those circumstances permitting was not a lesser included offense. But if the *Putnam* court meant to say as a matter of law under the legal prong that permitting prostitution can never be a lesser included offense of promoting prostitution, such analysis runs afoul of the current law in *Berlin* which mandates that the reviewing court consider the greater offense “as charged and prosecuted.”

Under the circumstances presented here, Appellant was clearly entitled as a matter of right to a lesser included jury instruction on permitting prostitution. Defense counsel did not propose such an instruction.

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Understanding *Putnam* is complicated by the court’s failure to fully state the relevant facts, *i.e.*, whether Putnam did, or did not, possess or control the premises.

The trial judge did not instruct the jury *sua sponte* on the lesser charge of permitting. On this record, it is clear that Appellant did not receive a fair trial in the absence of the jury being allowed to consider the lesser included offense of permitting prostitution. *State v. Parker*, 102 Wn.2d 161, 683 P.2d 189 (1984)(where there is even the “slightest” evidence that defendant may have committed lesser-included-offense, failure to give such instruction can never be harmless).

**VII. APPELLANT’S TRIAL COUNSEL DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT AND ART I, SEC. 22**

**Standard of Review.** The 2-prong standard of review for ineffective assistance of counsel cases is set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984):

"First, the defendant must show that counsel's performance was deficient. ... Second, the defendant must show that the deficient performance prejudiced the defense."

Accord: Pirtle v. Morgan, 313 F.3d 1160, 1169 (9th Cir. 2002); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); State v. Ward, 125 Wn.App. 243, 104 P.3d 670, 672 (2004); State v. Lopez, 107 Wn. App. 270, 27 P.3d 237 (2001).

**A. DEFENSE COUNSEL FAILED TO EXCEPT TO INSTR. 7**

**B. DEFENSE COUNSEL FAILED TO PROPOSE A *PETRICH* TYPE INSTRUCTION [WPIC 4.23/4.25]**

It is a basic concept of criminal law that the state must provide fair notice of the charge to a defendant and that the defendant may only be tried on such charge. Sixth Amendment; Art I. sec. 22. A corollary to this

basic principle is that when a crime may be committed in more than one way, the defendant may only be tried on the way or ways set forth in the charging document. This principle was set down in *State v. Severns*, *supra*, more than forty-seven years before Appellant was tried. It has been reiterated many times, most recently in *State v. Laramie*, *supra*, two years before Appellant was tried. Counsel was further provided guidance by the *Comment* to WPIC 4.23 issued in 2005 more than four years before Appellant was tried.

Nevertheless, trial counsel for Ms. Li failed to object to the court's giving of Instruction No. 7 which prejudicially permitted the jury to consider, and convict on, alternative means *not* set forth in the amended Information. This omission was aggravated by counsel's further failure to propose a *Petrich*-type instruction which would have ameliorated the first error by requiring the jury to either unanimously agree on a particular means (WPIC 4.25) or at least assure that each individual juror found that a particular means had been proved beyond a reasonable doubt (WPIC 4.23).

Since defense trial counsel utterly failed to propose a theory of defense instruction, *see* CP 12-24, it was incumbent on him to at the very *least* insure that: 1) the jury did not convict on an uncharged means, and 2) before the jury could convict, it was unanimous in agreeing on the method the crime was committed. Without a *Petrich*-type instruction, defense counsel's performance was deficient and clearly prejudiced Ms. Li.

**C. DEFENSE COUNSEL FAILED TO PROPOSE AN  
*ATTEMPT* INSTRUCTION**

**D. DEFENSE COUNSEL FAILED TO PROPOSE A  
LESSER INCLUDED INSTRUCTION FOR  
*PERMITTING PROSTITUTION***

To the extent counsel for Ms. Li had a theory of defense, it appears to have been an “all or nothing” strategy. Under the circumstances of the case, such an approach was completely unjustified. Had defense counsel requested lesser included instructions on *attempt* and *permitting prostitution*, the trial court certainly would have instructed on the former and, most likely, on the latter. *State v. Gamble, supra; State v. Berlin, supra; State v. Parker, supra; State v. Gallegos*; R.C.W. 10.61.003, .006, .010. Given the severe disparity between the charged crimes (both felonies) and the lesser offenses (both misdemeanors), and the serious immigration consequences of felony conviction known to defense counsel, it was objectively unreasonable for counsel to rely on an “all or nothing” strategy. *State v. Ward*, 125 Wn.App. at 250 (“objectively unreasonable” to rely on “all or nothing” strategy); *State v. Pittman*, 134 Wn.App. 376, 390, 166 P.2d 720 (2006)(“as in *Ward*,” defense counsel’s ‘all or nothing’ approach “was not legitimate trial strategy”); *State v. Smith*, 154 Wn.App. 272, 278, 223 P.3d 1262 (2009)(“defense counsel’s all or nothing strategy was not a legitimate trial tactic and constituted deficient performance”).

Moreover, in light of the English language disadvantage found by the trial judge, the court should have engaged in some colloquy with Appellant to insure that she was aware of her statutory right to have the jury instructed on lesser included offenses and that the decision not to ask

the court to do so was made with her knowledge and informed consent. There is nothing in the record whatever to show that defense counsel advised the court that Ms. Li was aware of his ill-advised decision to forgo her right to lesser included instructions and that she agreed to it or that the court made any inquiry on the issue at any time when jury instructions were discussed. RP III 4-5, 53-58.

Once the reviewing court determines that a defendant would have been entitled to a lesser included instruction by satisfying the *Workman* test (as modified by *Berlin*) and that it was objectively unreasonable for defense counsel to neglect to request such an instruction, it necessarily follows that the trial judge would have so instructed *but for* the ineffectiveness of counsel. The failure to allow the jury to consider the lesser offense is therefore prejudicial error and requires reversal of the conviction. *State v. Ward*, 125 Wn.App. at 251 (reversing for failure of defense counsel to request lesser included offense instruction); *State v. Pittman*, 134 Wn.App. at 390 (same); *State v. Smith*, 154 Wn.App. at 279 (same).

The showing of prejudice is even stronger in cases like Appellant's where the charged crimes are *felonies* but the lesser included crimes are *misdemeanors*. See *State v. Ward, supra* (charged crimes of assault were felonies; omitted lesser included crime of unlawful display of weapon was a gross misdemeanor); *State v. Pittman, supra* (charged crime of attempted residential burglary was a felony; omitted lesser included crime of attempted first degree criminal trespass was a misdemeanor); *State v. Smith, supra*

(charged crime of first degree animal cruelty was a felony; omitted lesser included crime of second degree animal cruelty was a gross misdemeanor).

As charged and prosecuted, *attempt* to promote prostitution in the second degree and *permitting prostitution* were lesser included offenses on which Appellant was entitled to have her jury instructed. Defense counsel's failure to propose *either* lesser offense instruction was not a legitimate defense strategy – it was a denial of Appellant's constitutional right to effective assistance of counsel. Viewed in the light most favorable to Appellant, the evidence of promoting prostitution was so “meager” that a jury “could have reasonably found” that she only either *attempted* to promote, or that she merely *permitted*, prostitution. *State v. Pittman, supra*, 134 Wn.App. at 386. Reversal is therefore mandated.

**E. DEFENSE COUNSEL'S FAILURE TO PREPARE,  
SUBMIT AND ARGUE MOTIONS FOR DISMISSAL,  
ARREST OF JUDGMENT AND NEW TRIAL IS  
INEFFECTIVE ASSISTANCE OF COUNSEL**

Where the state's evidence is insufficient as a matter of law, there is no legitimate strategic or tactical reason for trial counsel to fail to move for dismissal at the close of the state's case-in-chief. *State v. Lopez, supra*. For the same reason, it is the duty of a defense attorney to diligently prepare, timely submit and vigorously argue a motion for arrest of judgment, CrR 7.4(a)(3), and a motion for new trial, CrR 7.5(a), following an adverse jury verdict. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). This duty is so elementary and such a vital part of defense counsel's function that it

cannot seriously be contended that a competent defense attorney can choose to forgo these obligations to the detriment of his or her client.

**1. Motion for Dismissal.** The law on dismissal motions is:

“In a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) *at the end of the State’s case in chief*, (c) at the end of all the evidence, (d) *after verdict*, and (e) on appeal.”

*State v. Lopez*, 107 Wn.App at 276, quoting *State v. Jackson*, 82 Wn.App. 594, 607-08, 918 P.2d 945 (1996)(emph. ad.).

Even though the trial judge explicitly offered counsel for Ms. Li the opportunity to make a motion for lack of *prima facie* case at the close of the state’s evidence, he declined.

“Judge: Mr. Felker, you have a motion?

Mr. Felker: No.” RP III 30.

At that point in the trial, the state had failed to present sufficient evidence to establish either Count I or II. As to Count I, there was no proof of an act of prostitution as well as a complete lack of proof that a second masseuse had offered or agreed to engage in an act of prostitution. In the light most favorable to the state, at most there was a *prima facie* showing of *attempt*. This was insufficient as a matter of law to permit the case to proceed to the jury. As to Count II, the evidence presented by the state showed that Appellant was allegedly acting in the capacity of “prostitute,” which completely exempted her, as a matter of statutory exclusion, from application of the promoting statute. Therefore, this too was insufficient as a matter of law to permit the case to proceed to the jury.

As the Court of Appeals said in analogous circumstances in reversing a conviction for ineffective assistance of counsel:

“Here, defense counsel should have moved for dismissal of the ... charge at the close of the State’s case in chief. Because the State had neglected to prove an essential element ... the trial court would have necessarily granted the motion.”

*State v. Lopez, supra*, 107 Wn.App. at 277.

**2. Motion for Arrest of Judgment.** Defense counsel missed yet another opportunity to render effective counsel to his client by not moving post-trial to arrest judgment. This was particularly critical as to Count II since the co-defendant had been *acquitted* on the very same evidence used by the jury to convict Appellant. *Cf. State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1983)(where only two persons charged with conspiracy are jointly tried and one is acquitted and one is convicted, the latter is automatically entitled to judgment of acquittal). In fact, the evidence of *attempt* presented by the state in Count II was stronger against Mr. Pu than against Ms. Li. It was only Mr. Pu who made a direct effort to contact another masseuse and it was only Mr. Pu who discussed his efforts with the undercover officer. RP III 17-18.

“Q Because they told you they couldn’t do it unless they brought their specialist in?

A Well, it wasn’t they. It was a conversation I had with Mr. Pu.” RP III 26.

In view of this evidence and the inconsistent verdicts created by the acquittal of Mr. Pu, as well as the *statutory exemption* of Ms. Li, if presented a timely motion for arrest of judgment, “the trial court would have

necessarily granted the motion.” *State v. Lopez, supra*.

**3. Motion for New Trial.** For more than half a century, it has been understood by the defense bar that effective representation requires the filing of a Motion for New Trial upon conviction. In 1956, the Washington Supreme Court strongly expressed its expectation that competent defense counsel would *always* file a Motion for New Trial after an adverse verdict. *See State v. Case, supra*, 49 Wn.2d at 75:

“[I]t seems to us that such a motion should always be made in order that the trial court might have an opportunity to grant the relief the misconduct warrants and thus save the time and expense of appeal.” (emph. ad.)

The consensus of the defense bar is that it is indeed the trial lawyer’s duty to file motions for arrest of judgment and new trial. *See* American Bar Association Standard 4-7.10:

“The trial lawyer’s responsibility includes presenting appropriate motions, after verdict and before sentence, to protect defendant’s rights.”

And, there is a consensus that the inexcusable failure to file such a new trial motion constitutes ineffective assistance of counsel. *See* Commentary to ABA Standards for Criminal Justice 4-7.10:

“[F]ailure to make a motion for a new trial ... has been considered ineffective assistance of counsel.”

For the reasons stated, a timely motion for new trial would have been granted on the uncharged alternative means issue, the *Petrich* issue, and the failure to submit the lesser included instructions on *attempt* and *permitting prostitution*.

## CONCLUSION

There is insufficient evidence to sustain the convictions on both Counts I and II and they should be dismissed. At most, the state presented sufficient evidence to show *attempts* to promote prostitution. But proving only an *attempt* and not the completed crime requires dismissal. As to Count II, dismissal is independently mandated because: a) Appellant was statutorily exempt from prosecution; and/or b) the verdict of guilty was inconsistent with the acquittal of her co-defendant on the same facts.

Alternatively, the convictions must be reversed for trial court error in allowing the jury to consider an *uncharged* alternative means. This error was compounded by the trial court's failure to delete a *charged* alternative means for which there was no substantial evidence and further compounded by the trial court's failure to insure jury unanimity by giving a *Petrich*-type instruction, either WPIC 4.23 or 4.25. The trial court also denied a fair trial by failing to allow the jury to consider the lesser included offenses of *attempt* and *permitting prostitution*, both of which were supported by the evidence. Finally, Appellant was prejudiced by the deficient representation afforded to her by defense trial counsel.

DATED THIS 23rd DAY OF JULY, 2010.

  
TOM P. CONOM WSBA #5581  
Attorney for Appellant

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 09-1-00803-1 SEA
	)	09-1-00804-0 SEA
vs.	)	
	)	
HAORAN PU and DONGFANG LI,	)	
	)	
Defendants.	)	
_____	)	

COURT'S INSTRUCTIONS TO THE JURY

DATED: *October 15, 2009*

By:   
\_\_\_\_\_  
HONORABLE CATHERINE SHAFFER  
SUPERIOR COURT JUDGE

**APPENDIX**

~~INSTRUCTION~~

INSTRUCTION

7

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