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NO. 65737-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM E. ARNETTE,

Appellant.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL TRICKEY

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	6
1. THE TRIAL COURT PROPERLY DENIED ARNETTE'S MOTION TO SUPPRESS	6
2. SUFFICIENT EVIDENCE SUPPORTS ARNETTE'S CONVICTION FOR PROMOTING COMMERCIAL SEXUAL ABUSE OF A MINOR	13
3. ARNETTE IS NOT ENTITLED TO REVERSAL OF HIS CONVICTION BASED UPON THE DOCTRINE OF COLLATERAL ESTOPPEL	15
D. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Bruton v. United States, 391 U.S. 123,
88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)..... 17

Standefer v. United States, 447 U.S. 10,
100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980)..... 18, 20

Washington State:

Clark v. Baines, 150 Wn.2d 905,
84 P.3d 245 (2004)..... 17, 20

State v. Acrey, 148 Wn.2d 738,
64 P.3d 594 (2003)..... 6

State v. Carnahan, 130 Wn. App. 159,
122 P.3d 187 (2005)..... 7

State v. Cottrell, 86 Wn.2d 130,
542 P.2d 771 (1975)..... 7

State v. Fisher, 145 Wn.2d 209,
35 P.3d 366 (2001)..... 7

State v. Fore, 56 Wn. App. 229,
783 P.2d 626 (1989)..... 11

State v. Gaddy, 152 Wn.2d 64,
93 P.3d 872 (2004)..... 7

State v. Graham, 130 Wn.2d 711,
927 P.2d 227 (1996)..... 11

State v. Hosier, 157 Wn.2d 1,
133 P.3d 936 (2006)..... 13, 14

<u>State v. Johnson</u> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	7
<u>State v. Klinker</u> , 85 Wn.2d 509, 537 P.2d 268 (1975).....	7
<u>State v. Mullin-Coston</u> , 152 Wn.2d 107, 95 P.3d 321 (2004).....	15, 16, 17, 19
<u>State v. Neth</u> , 165 Wn.2d 177, 196 P.3d 658 (2008).....	9, 10, 12
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	13
<u>State v. Scott</u> , 93 Wn.2d 7, 604 P.2d 943 (1980).....	7
<u>State v. Wagner-Bennett</u> , 148 Wn. App. 538, 200 P.3d 739 (2009).....	7
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	14
<u>State v. Wilson</u> , ___ Wn. App. ___, 242 P.3d 19 (2010).....	13

Statutes

Washington State:

RCW 9.68A.100	14
RCW 9.68A.101	14

A. ISSUES PRESENTED

1. Whether the trial court properly concluded that the police had probable cause to arrest appellant William Arnette for promoting commercial sexual abuse of a minor.

2. Whether the trial court properly denied Arnette's motion to suppress.

3. Whether the State presented sufficient evidence that Arnette was guilty of promoting commercial sexual abuse of a minor.

4. Whether Arnette is not entitled to reversal of his conviction based upon the fact that the minor whose sexual abuse he promoted was found not guilty of prostitution loitering at a separate trial.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Arnette in the juvenile division of the King County Superior Court with one count of promoting commercial sexual abuse of a minor. CP 6. After a fact-finding hearing in June 2010, the Honorable Michael Trickey found Arnette guilty as charged. CP 39. This appeal follows.

2. SUBSTANTIVE FACTS

On April 23, 2010, King County Sergeant Richard McMartin learned that 16-year-old M.K. had run away from home and had been seen out on International Boulevard South in Tukwila, Washington. 1RP 27-29, 85-86; CP 32.¹ Sgt. McMartin talked with M.K.'s mother, who provided her daughter's description and information on M.K.'s boyfriend, Arnette. 1RP 29-30.

On April 26, 2010, Sgt. McMartin saw M.K. at the corner of South 260th Street and Pacific Highway South. 1RP 32. This area is a chronic area of prostitution activity. 1RP 91.

M.K. was standing at an intersection, but did not cross the street. Instead, she watched the passing cars and looked into them as they drove by. 1RP 32. She focused her attention on vehicles driven by lone men; she did not pay attention to vehicles with families or multiple occupants. 1RP 94-95.

After the traffic light cycled through five times, Arnette came out of a store and joined M.K. 1RP 32-33. They spoke for a short time, and M.K. crossed the street and walked up and down the highway, watching the passing cars. 1RP 33-34.

¹ The report of proceedings consists of two volumes: 1RP dated June 11, 14 and 17, 2010 and 2RP dated June 21 and July 14, 2010.

As M.K. returned to Arnette, he waved at her to hurry up, and she ran back to him. 1RP 34. He talked to her and pointed to a pickup truck occupied by a lone male in a parking lot. 1RP 34-35, 108-09. M.K. approached the truck, and the driver exited and walked to a DVD kiosk. 1RP 35-36. M.K. watched the man for a few minutes and then re-joined Arnette. 1RP 36.

They walked to a bus stop, and M.K. stood out on the edge of the roadway, while Arnette sat down on a rockery approximately 10 feet away. 1RP 40-42. After seven minutes, she began walking down the highway, watching the passing traffic. 1RP 43. A Toyota RAV4, driven by a lone male driver, passed her and pulled up into a parking lot. 1RP 43, 153. M.K. walked up to the vehicle, and got into the front passenger seat. 1RP 43, 153. After a few minutes in the car, she got out and walked back out to the highway. 1RP 43, 153.

M.K. crossed the highway and walked over to another parking lot. 1RP 43-44. She walked toward a silver Lexus, occupied by a lone male driver. 1RP 44-45, 96, 153. As she approached, the car moved into a different parking spot. 1RP 44, 153. M.K. walked toward the car again, and the driver

pulled out and re-parked again. 1RP 44-45, 153-54. M.K. went back to the highway. 1RP 45, 154.

Detective Joel Banks, working undercover in an unmarked vehicle, pulled into a parking place near M.K. 1RP 45, 97. She stopped, turned around and walked up to his car. 1RP 98. After staring at him for a long time, she finally stated that she thought he was someone else and walked away. 1RP 45, 98. She then returned to the highway and met Arnette. 1RP 45, 98.

The two walked up the highway and returned to the bus stop. 1RP 45-46. Arnette sat back on the rockery while M.K. walked along the highway. 1RP 46. A black pickup truck with a lone male driver pulled into a nearby parking lot, and M.K. walked up to the truck and got into the passenger's seat. 1RP 46-47, 154-55. The truck went down the highway, made a U-turn and dropped M.K. off in the area where she was picked up. 1RP 47, 103, 155. She was in the truck for a total of about 10 minutes. 1RP 47. After she exited the vehicle, Arnette walked to her, and the two crossed the highway and went back to the bus stop. 1RP 47-48.

In all, the police watched M.K. and Arnette for almost two hours. 1RP 51. Each time M.K. walked down the highway, Arnette

went out to the highway and kept an eye on her. 1RP 48, 94. He was never more than one-half mile away from her. 1RP 107.

After M.K. was dropped off by the black pickup truck, Sgt. McMartin decided to arrest her. 1RP 49-50. In an unmarked car, he pulled into the parking lot near M.K. and honked his car horn. 1RP 49-50, 75-76. She walked towards his car and was arrested. 1RP 50.

The police then arrested Arnette. 1RP 53, 160-62. During an interview at the police station, Arnette asked what was going on, and a detective told him that they had arrested M.K. for prostitution loitering and that they had observed her repeatedly meeting with Arnette after she contacted males. 1RP 108-09. Arnette responded that M.K. did not do it for him, that she was doing that kind of thing before they met and that she did it for someone else. 1RP 109. The detective asked Arnette why M.K. reported back to him each time she made contact with a lone male in a car, and Arnette responded, "Truthfully, man, we was out here, hustling up some dollars." 1RP 110.

Arnette requested that a detective tell M.K. that Arnette had not meant what he said to her during an argument and that he loved her. 1RP 165-66. The detective then asked Arnette why he

allowed her out to be on the highway and to get into vehicles with men, and Arnette responded, "she was doing that before I met her." 1RP 166.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED ARNETTE'S MOTION TO SUPPRESS.

Arnette contends that the trial court erred in denying his motion to suppress, arguing that the police lacked probable cause to arrest him. However, based upon their two hours of observation, the police reasonably believed that Arnette was assisting M.K. in attempting to engage in prostitution. The trial court properly concluded that the police had probable cause to arrest Arnette, and this Court should affirm that decision.

The trial court entered detailed findings of fact and conclusions of law with respect to Arnette's motion to suppress. CP 59-64. Arnette challenges only one of the trial court's findings,² and the remaining 38 findings are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). This Court

² In the challenged finding, No. 38, the court found that, "ARNETTE and [M.K.] were engaged in some kind of joint enterprise." Appellant's Opening Brief at 2; CP 63.

reviews the trial court's conclusions of law de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

A lawful custodial arrest requires the officer to have probable cause to believe that a person has committed a crime. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). "Probable cause 'boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed the crime.'" State v. Fisher, 145 Wn.2d 209, 220 n.47, 35 P.3d 366 (2001) (quoting State v. Klinker, 85 Wn.2d 509, 521, 537 P.2d 268 (1975)). Probability of criminal activity is the standard for probable cause. State v. Wagner-Bennett, 148 Wn. App. 538, 542, 200 P.3d 739 (2009). The court considers the totality of the facts and circumstances within the officers' knowledge at the time of the arrest. State v. Carnahan, 130 Wn. App. 159, 165, 122 P.3d 187 (2005). "[T]he arresting officer's special expertise in identifying criminal behavior must be given consideration." State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980) (quoting State v. Cottrell, 86 Wn.2d 130, 132, 542 P.2d 771 (1975)).

In this case, several police officers with substantial experience investigating prostitution observed M.K. and Arnette for

approximately two hours. 1RP 27-28, 90-91, 104-05, 142-50. They saw M.K. repeatedly walk up and down the highway. CP 60-62. She watched passing cars and paid particular attention to cars driven by lone male drivers. CP 60. Twice, cars driven by male drivers pulled over and M.K. got into the car. CP 61. M.K. also attempted to contact several other male drivers, including an undercover police officer. CP 60-62. This occurred in an area known for chronic prostitution activity, and Sgt. McMartin opined that M.K.'s actions were consistent with prostitution. CP 59-60. Based upon this undisputed evidence, there was probable cause to believe that M.K. was attempting to solicit customers to engage in prostitution.

Arnette kept watch on M.K. this entire time; he was never more than one-half mile away. CP 62. M.K. repeatedly returned to him between her contacts with male drivers. CP 60-62. At one point, Arnette directed her to a car driven by a sole male driver. CP 60-61. Based upon these observations, the police could reasonably believe that Arnette was assisting M.K. in attempting to engage in prostitution. Given that the police knew that M.K. was a minor, they had probable cause to arrest Arnette for promoting commercial sexual abuse of a minor.

Arnette compares the facts of this case to those in State v. Neth, 165 Wn.2d 177, 196 P.3d 658 (2008), where the Supreme Court held that the police lacked probable cause for a search warrant. Neth is easily distinguishable. In that case, a trooper pulled over Neth for speeding. Id. at 179. Neth acted nervous and stressed, had no identification, registration or insurance documents, and was unable to provide the address of his residence. Id. He had several unused plastic baggies in his coat pocket and told the trooper that he had several thousand dollars in cash in the car. Id. at 180. The trooper subsequently obtained a search warrant to look for drugs in the car. Id. at 181. Neth challenged whether there was probable cause to obtain the search warrant based upon these facts. Id.

The Supreme Court held these facts were insufficient to establish probable cause to search the car.³ The Court explained:

These facts are unusual, and, taken together, they seem odd and perhaps suspicious. However, all of these facts are consistent with legal activity, and very few have any reasonable connection to criminal activity. We do not permit searches merely because

³ In his brief, Arnette includes the fact that a K-9 dog trained in narcotics detection repeatedly "hit" on the car. Appellant's Opening Brief at 12. However, the Washington Supreme Court held that there was an inadequate foundation for the dog sniff evidence and that it would not consider this fact when determining whether probable cause existed. 165 Wn.2d at 181-82.

people do not have proper identification or documentation, are nervous, or tell inconsistent versions of events. [Citation omitted]. Absent the dog's alert, the only facts that can be said to show a nexus connecting Neth's car to criminal activity are the plastic baggies, a relatively large sum of money in the car, and his criminal history.

The trooper stated that in his experience, clear plastic baggies are often used in delivery of illegal controlled substances.... But absent some other evidence of illicit activity, the mere possession of a few empty, unused plastic baggies in a coat pocket does not constitute probable cause to search an automobile, even when combined with nervousness, inconsistent statements, and a large sum of money in the car.

Id. at 184-85.

The Court further suggested what additional facts would have established probable cause. "Additional information such as being in a high drug crime area, baggies with the appearance of having once contained illicit substances, or observations of transactions involving the baggies may well have been sufficient."

Id. at 185 n.3.

Arnette's argument that the facts in this case are more tenuous than those in Neth is inaccurate. Rather, the facts here are consistent with what the Court suggested was needed for probable cause. Unlike Neth, the detectives observed behavior that had an obvious and reasonable connection to criminal activity.

They saw a teenage girl in a high prostitution area walk back and forth along the highway repeatedly attempting to make contact with male drivers. They observed her engage in this behavior for hours. They saw Arnette maintain close observation over her and direct her to a suspected customer. Any reasonable person would believe that M.K. was attempting to engage in prostitution and that Arnette was assisting her.

Arnette argues that his and M.K.'s conduct was consistent with innocent, legal behavior, suggesting that they were two teenagers "awkwardly looking for a ride." Appellant's Opening Brief at 14. This explanation does not account for M.K.'s focus on lone male drivers and her act of getting into the black truck and going for a ride down the highway without Arnette. In any event, "probable cause is not negated merely because it is possible to imagine an innocent explanation for observed activities." State v. Graham, 130 Wn.2d 711, 725, 927 P.2d 227 (1996) (quoting State v. Fore, 56 Wn. App. 229, 344, 783 P.2d 626 (1989)).

Arnette argues that their behavior was inconsistent with some of the expert testimony about prostitution and pimp behavior. Appellant's Opening Brief at 14-15. He notes that M.K. was not dressed provocatively. However, the expert testimony was that

prostitutes dressed in a variety of ways: some women "have all kinds of clothes on" and "don't want to be obvious." 1RP 38. He claims that the police testified that pimps usually monitor their prostitutes from a distance and that the length of time Arnette spent near M.K. was uncommon. Actually, Sgt. McMartin testified that there was no single way that pimps behaved. He noted that some pimps patrolled the area in a car and used a cell phone to stay in contact with the female, while others are not around at all. 1RP 38-39. He summarized, "across the board it's handled in different ways." 1RP 39.

Arnette cites a number of cases for the proposition that presence in a high crime area is not sufficient to establish probable cause. Appellant's Opening Brief at 16-17. The State never argued and the trial court did not find probable cause based solely on the fact that the area in question was a high prostitution area. However, this fact was a relevant consideration in determining whether probable cause existed. Neth, 165 Wn 2d at 185 n.3.

The trial court properly concluded that the police had probable cause to arrest Arnette. This Court should affirm that decision.

**2. SUFFICIENT EVIDENCE SUPPORTS ARNETTE'S
CONVICTION FOR PROMOTING COMMERCIAL
SEXUAL ABUSE OF A MINOR.**

Arnette claims that the State presented insufficient evidence for his adjudication for promoting commercial sexual abuse of a minor. This Court is required to consider the evidence in the light most favorable to the State when assessing the merits of this claim, yet Arnette presents the evidence in the light most favorable to him. Viewing the evidence in the proper light, this Court should conclude that there was sufficient evidence for the trial judge to find beyond a reasonable doubt that Arnette was engaged in promoting commercial sexual abuse of a minor.

In a challenge to the sufficiency of the evidence, the appellate court views the evidence in the light most favorable to the State. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. State v. Wilson, __ Wn. App. __, 242 P.3d 19, 25 (2010); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient to support a conviction if any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. State v. Hosier,

157 Wn.2d 1, 8, 133 P.3d 936 (2006). The appellate court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Arnette was charged with the crime of promoting commercial sexual abuse of a minor, and, more specifically, with knowingly advancing the commercial sexual abuse of a minor. CP 6.

A person advances the commercial sexual abuse of a minor if, among other things, he engages in any conduct designed to institute, aid or facilitate the commercial sexual abuse of the minor.

RCW 9.68A.101. Commercial sexual abuse of a minor occurs when a person pays a minor to engage in sexual contact with him.

RCW 9.68A.100.

Here, as described more fully above, the police observed M.K. walking the highway and attempting to solicit customers for sex. Arnette repeatedly conferred with M.K. and, on one occasion, pointed out a potential customer to her. After he was arrested, Arnette admitted that he knew M.K. was involved in prostitution, though he claimed that she was engaged in prostitution before he had met her and "did it for someone else." 1RP 109. When asked why M.K. kept returning to him after she had contact with strange

men, he acknowledged that they were "hustling up some dollars."

1RP 110.

Arnette claims that the evidence against him was ambiguous and became weaker after his arrest. He argues that he did not have items on his person that one might expect to find on a pimp, such as condoms, money or a cell phone, and he suggests a less incriminating spin to the statements that he made after his arrest. This argument overlooks the standard of review for his challenge. The court does not evaluate the evidence in the light most favorable to Arnette; instead, the evidence is evaluated in the light most favorable to the State. Reviewed under this standard, there should be no question that the evidence was sufficient for the trial court to conclude Arnette was guilty of promoting the commercial sexual abuse of a minor.

3. ARNETTE IS NOT ENTITLED TO REVERSAL OF HIS CONVICTION BASED UPON THE DOCTRINE OF COLLATERAL ESTOPPEL.

Arnette, citing the doctrine of nonmutual collateral estoppel, argues that his conviction should be reversed because a different juvenile court judge found M.K. not guilty of prostitution loitering. However, in State v. Mullin-Coston, 152 Wn.2d 107, 95 P.3d 321

(2004), the Washington Supreme Court held that the doctrine of nonmutual collateral estoppel does not apply in a criminal case where the basis for asserting preclusion is the verdict in another defendant's case. Though Arnette attempts to distinguish Mullin-Coston on the basis that it involved a jury trial rather than bench trial, the Court's rationale for its decision in Mullin-Coston clearly applies to Arnette's case. This Court should reject his collateral estoppel argument.

M.K. was charged with prostitution loitering, and her case and Arnette's cases were originally joined for trial. CP 5, 8. The court subsequently granted M.K.'s motion to sever the cases because Arnette's statements to the police, wherein he admitted that M.K. was working as a prostitute, were inadmissible against her. 1RP 210-11. M.K. went to trial first, and a juvenile court judge found her not guilty of prostitution loitering. CP 8, 22-23.

Citing the doctrine of collateral estoppel, Arnette asked the court to preclude the State from arguing that M.K. was involved in prostitution loitering. 1RP 14-16; CP 22-24. The trial judge denied this motion, noting that Arnette had not been a party in the prior proceeding and concluding that "normal estoppel [does not] apply here." 2RP 13. The court further added, "If it does, I do think it

would work an injustice against the State to apply it because the two individuals were not tried together. There was good reason not to try them together because a Bruton^[4] issue, it would not be fair to the State to apply it here even if it did apply." 2RP 13-14.

The trial court properly rejected Arnette's attempt to rely upon the doctrine of collateral estoppel. That doctrine prevents a party from relitigating issues that have been raised and litigated by the party in a prior proceeding. Clark v. Baines, 150 Wn.2d 905, 912, 84 P.3d 245, 249 (2004). Its underlying purpose is to promote judicial economy and prevent inconvenience or harassment of parties. Id. at 913.

In Mullin-Coston, the Washington Supreme Court held that the doctrine of collateral estoppel does not apply in criminal cases where the basis for asserting preclusion is the verdict in another defendant's case. 152 Wn.2d at 113-21. The holding and the reasoning in that case forecloses Arnette's argument on appeal.

Mullin-Coston and McDaniels were charged with first-degree premeditated murder. Id. at 110. Their cases were severed, and in the first trial, a jury convicted McDaniels of the lesser offense of second-degree intentional murder. Id. at 110-11. At Mullin-Collins'

⁴ Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

trial, the jury was instructed that he could be found guilty if either he or McDaniels acted with premeditation. Id. at 111-12. On appeal, Mullin-Coston argued that collateral estoppel should have prohibited the State from relitigating whether McDaniels acted with premeditation. Id. at 112.

The Court rejected this argument and, citing the United States Supreme Court's decision in Standefer v. United States, 447 U.S. 10, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980), offered a number of reasons for not applying collateral estoppel in criminal cases:

- Washington's accomplice liability statute expressly provides that a defendant can be held liable as an accomplice even if the principal is acquitted.
- In criminal cases, the State often lacks the full and fair opportunity to litigate due to procedural rules limiting the prosecution's discovery, and the fact that evidence may be inadmissible against one defendant but admissible against the co-defendant.
- In criminal cases, a jury can mistakenly acquit out of compromise or compassion, but this decision is unreviewable no matter how strong the evidence.

- The public interest in the accuracy and justice of criminal results outweighs the concern for judicial economy underlying the doctrine of collateral estoppel.

Id. at 115-19.

Arnette claims that Mullin-Coston is limited to jury trials and does not apply to him because he faced a bench trial. This argument simply ignores the Court's reasoning in refusing to apply collateral estoppel in criminal cases. Washington's accomplice statute applies regardless of whether there is a jury or bench trial. Similarly, the rules of discovery and admissibility of evidence remain the same regardless of who acts as the trier of fact. If a judge errs in acquitting a juvenile respondent, the decision is unreviewable. Finally, the public interest in justice and accurate results is the same regardless of whether a judge or jury decides the case.

Even if the holding of Mullin-Coston does not apply to bench trials, the trial court did not err in refusing to apply collateral estoppel. In its ruling below, the trial court did not refer to Mullin-Coston, and, instead, applied the four-part test for determining whether to apply the doctrine of collateral estoppel. 2RP 11-14. Under the four-part test, the party asserting collateral

estoppel must prove that: (1) the issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication must have resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied. Clark, 150 Wn.2d at 913.

As the trial court noted, applying collateral estoppel would work an injustice because the State was not permitted to introduce all of its relevant evidence in the case against M.K. 2RP 13-14. Arnette's statement to the police that M.K. was working as a prostitute was not admissible against her; in fact, her case was severed from Arnette's case due to this fact. "[W]here evidentiary rules prevent the Government from presenting all its proof in the first case, application of nonmutual estoppel would be plainly unwarranted." Standefer, 447 U.S. at 24. The trial court properly rejected Arnette's attempt to rely upon the doctrine of collateral estoppel as a defense in this case.

D. **CONCLUSION**

For the reasons cited above, this Court should affirm Arnette's adjudication and disposition.

DATED this 2nd day of February, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. WILLIAM ARNETTE, Cause No. 65737-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

2/2/11
Date