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AUG 27 2012

King County Prosecutor
Appellate Unit

NO. 67857-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JERRY L. SMITH,

Appellant.

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

The Honorable Jim Rogers, Judge

REPLY BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

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A. ARGUMENT IN REPLY

1. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

Jerry L. Smith contends the prosecutor committed misconduct in closing argument by emphasizing potential dangers faced by child prostitutes because his case did not involve any child prostitutes. Brief of Appellant (BOA) at 12-15. He asserts the prosecutor improperly appealed to the jurors' emotion and sympathy. Included was the following:

The prosecutor suggested Smith sought to profit from forced child prostitution, thereby coldly disregarding the risk of exposing the child to violent crime such as rape and murder, as well as pregnancy and sexually transmitted diseases.

BOA at 14.

In response, the prosecutor argues,

The prosecutor did not *suggest* anything. Smith did intend to profit from forced child prostitution. The evidence demonstrated that Smith, Woods's accomplice, was to pick Gill up, take the money that she had earned that night, and wire it to Woods.

Brief of Respondent at 18-19.

Smith takes issue with the accuracy of this statement. On direct examination, Officer Gill, the undercover "prostitute" during the operation on the night at issue, testified *Woods* instructed her to give Smith all the money she had, have him drive her to Western Union, and work with him

until she could get a flight to Las Vegas. 7RP 101-03; 9RP 65-72, 123. There was no evidence, however, to establish that Woods shared this information with Smith.

Smith testified Woods called him and asked him to pick up Gill and to give her a ride. Woods did not tell him why. 11RP 106-07, 114. And Gill did not even have Smith's telephone number until Woods gave it to her on June 21, the day Smith was arrested. 7RP 75-76, 82-84, 131-32. During several phone conversations between Gill and Smith leading up to him going to pick her up, Smith did not mention anything about Woods's instructions about money or Western Union. 7RP 103-06, 131-40; 9RP 72-76. And all Smith said to Gill before he was arrested was, "Get in. Get in." 7RP 104.

This was consistent with the fact that Woods, not Smith, was the primary actor from the beginning of the contact with Gill until Smith was arrested. The prosecutor noted as much at the end of his rebuttal argument. 13RP 71-72.

Again, the State failed to present evidence that Smith knew what Woods had told Gill to do when she met with Smith. Instead, the State at most produced evidence that Woods and Smith likely spoke with each other on June 21. 7RP 131-40.

The prosecutor's closing argument emphasized the potential dangers faced by child prostitutes in a case that did not involve child prostitutes. The prosecutor mentioned rape and murder, and asked jurors to speculate as to what might have happened to Gill had she really been 17 as she represented. The argument was an improper appeal to passion and requires reversal of Smith's conviction.

B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Smith asks this Court to reverse his conviction and remand for a new trial.

DATED this 24 day of August, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67857-4-1
)	
JERRY SMITH,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 24TH DAY OF AUGUST 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JERRY SMITH
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2012 AUG 24 PM 11:23
CLERK OF COURT
STATE OF WASHINGTON

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF AUGUST 2012.

x Patrick Mayovsky