

NO. 45811-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY PARKER,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's refusal to grant the defense attorney's motions to withdraw after he informed the court that he had two separate conflicts of interest denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

2. The trial court erred when it added firearm enhancements to the defendant's convictions for human trafficking and promoting prostitution because substantial evidence does not support a finding of a nexus between the defendant's possession of a firearm and the commission of either offense.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment if it denies a defense attorney's motion to withdraw after that attorney informs the court that he or she (1) represents other clients whose interests are directly contrary to those of the defendant and (2) if the trial attorney informs the court that the defendant has used the trial attorney and the trial attorney's investigator to facilitate the commission of the crime of subornation of perjury?

2. Does a trial court err if it adds firearm enhancements to a defendant's convictions for human trafficking and promoting prostitution if substantial evidence does not support the finding of a nexus between the defendant's possession of the firearm and the commission of either offense?

STATEMENT OF THE CASE

Factual History

By November of 2012 then 22-year-old Johanna Holliday found herself in the Kitsap County Jail and unable to post bail. RP 446-447.¹ She was an opiate addict whose drug of choice was percocet or heroin. RP 570-572. By the time she was incarcerated she was homeless and had lost her job and presumably lost her car when it was towed upon her most recent arrest. RP 446-447. While in jail Ms Holliday was housed in the same area in the jail as a person by the name of Lorena Llamas. RP 447. The two spoke often and became friends. *Id.* During these conversations Ms Holliday explained that she did not know how she was going to make money once she got out of jail. *Id.* Eventually Ms Llamas told Ms Holliday that her friend Anthony Parker might be willing to bail her out if she was interested in working for him as a prostitute while living with him in a home Ms Llamas's family owned in Bremerton. RP 448-449. Ms Holliday agreed and on December 6, 2012, the defendant Anthony Parker arranged to have her bail posted. RP 451-452. Upon release Ms Holliday had twenty dollars on a prepaid credit

¹The record on appeal includes seven volumes of verbatim reports of pretrial hearings, 12 volumes of verbatim reports of trial and two volumes of verbatim reports of sentencing. The trial transcripts are referred to herein as "RP [page #]." The pretrial and sentencing transcripts are referred to herein as "RP [date] [page #]."

card, a cell phone and the clothes she was wearing. *id.*

The day after her release Ms Holliday met the defendant for the first time. RP 454-455. He first took her to a Walmart and purchased some personal items for her and then took her to a house on 14th in Bremerton by the high school. *Id.* Although she did not necessarily want to work as a prostitute, the defendant told her that she could make a lot of money and that they could make a good life together if she did. RP 457-458. With her consent he then took some pictures of her and showed her how to post personal ads on a website called backpage.com. RP 458-459. He told her that it was dangerous to use her real name while working so he told her that her nickname would be “Baby Doll” and that his street name was “Baby Deuce.” RP 456-457. Thereafter she began working as a prostitute with the majority of her customers contacting her through backpage.com ads via her cell phone number or the defendant’s cell phone number which she would include in her periodic backpage.com posts. RP 463-468. She would meet with those customers at various locations, including hotel rooms she or the defendant would rent, hotels rooms the customers rented, or at the house on 14th in Bremerton. *Id.*

In each instance she would give the money she made to the defendant who would give her money back for food, personal items, and sometimes to purchase percocet pills, although the majority of the time he gave them to her.

RP 471-472. For the first few weeks he would tell her that he was saving the money for them. RP 467-468. In fact Ms Holliday believed that she was in a romantic relationship with the defendant. RP 530, 610, 643. Although she gave most of the money she made to the defendant she secretly did hold some back and used it to buy drugs. RP 471. Ms Holliday also cleaned the house on 14th where she and the defendant lived, although the defendant would spend time at other houses. RP 479-480. During this time he was very controlling of her actions, requiring her to get permission to leave the house and requiring that she lock herself in her bedroom when his friends came to visit. RP 471.

Initially Ms Holliday worked as a prostitute when she wanted and didn't work when she did not. RP 467-468. However, after a few weeks the defendant began to become insistent that she work more often and seek more customers each day than she did. *Id.* On a slow day she would usually make around \$1,000.00 while on a good day she could make up to \$5,000.00. RP 566. Although the defendant was initially very solicitous towards her, his demeanor began to change after a few weeks and he began to be verbally abusive. RP 479-480. On one occasion when she was coming down off drugs and couldn't work he became verbally abusive, calling her a "raggedy assed Ho" and a "Dope Fiend." *Id.* According to Ms Holliday, during this period of time the defendant did not have a job. RP 472. Although he made some

money selling drugs he got the majority of his money from her work as a prostitute. *Id.*

In December of 2012 or January of 2013 Ms Holliday had a court appearance in King County and got a customer to take her there and then drop her off at a nearby business. RP 486-487. She then called a gang associate of the defendant by the name of Anthony Flewellen, who gave her a ride to a house he shared with a woman by the name of Jennifer Prerost. *Id.* Mr. Flewellen goes by the nickname of “Blacc Jaccet.” *Id.* During this time the defendant had been attempting to call her and she had lied to him about where she was and what she was doing. *Id.* The next day Mr. Flewellen took her back to the defendant’s house in Bremerton. RP 487-488. Once at the house Mr. Flewellen and the defendant spoke for a little while and then the defendant had everyone leave. *Id.* At that point he locked the door and started beating Ms Holliday about the head, the face, legs and chest. RP 491-492. The beating lasted about 10 minutes with him verbally berating her during the assault. *Id.* According to Ms Holliday this was the first time he physically assaulted her. *Id.*

About a week later the defendant went to a friend’s funeral in Tacoma and left Ms Holliday alone at the house on 14th. RP 492-493. After he left she called “Blacc Jaccet” to bring her a pill because she was “dope sick.” *Id.* He drove over and then took her to the house he shared with Jennifer Prerost.

Id. During the drive she stated that she wanted to work for him instead of the defendant. RP 493-494. However, when Mr. Flewellen told her to decide one way or the other she decided that she would try to work things out with the defendant. *Id.* As a result, Mr. Flewellen left her with Jennifer Prerost at the house they shared. RP 495. A short time later the defendant showed up and started banging on the door to be let in. RP 495-497. Although Ms Holliday tried to hide by locking herself in a bedroom, the defendant eventually got into the house, kicked open the door to the bedroom and began to beat her. *Id.* During the assault he repeatedly smashed her head against the wall, threw her down, pulled out chunks of her hair, and beat her about the body until she lost bladder control and urinated on herself. *Id.*

At this point the defendant drug her out to his car and made her get in the back seat. RP 498-500. A woman was in the front seat and after driving off the defendant continued to verbally berate Ms Holliday to the woman in the front seat. *Id.* After dropping off the front seat passenger the defendant drove to a cousin's house, all the time telling Ms Holliday that he was going to take her in and let his cousin and his friends repeatedly rape her. *Id.* Once at this house the defendant parked the car and beat her again about her head and upper body causing significant bruising. RP 500-502. He then forced her into the house. *Id.* However, once inside he simply ordered her to go into the bathroom and clean herself up. *Id.* She did and within a few

minutes the defendant ordered her back out in the car. RP 502-506. Once back in the car he drove them back to the house on 14th in Bremerton. *Id.*

Upon arrival at the house the defendant ordered her to enter and she complied. RP 507-508. He then got out a pistol he kept hidden in the house, held it up to her head and asked her if she wanted to die. *Id.* Eventually the defendant passed out as did Ms Holliday a little while later. *Id.* Over the next week the defendant would occasionally strike her in the head, arms and legs. RP 510-511. At one point he became enraged with her, pulled a hanger out of a closet and whipped her with it. *Id.* For the next week he forced her to work as a prostitute, beating her if she did not bring back enough money. *Id.* Sometime the next week he became mad at her and kicked her in the ribs, knocking her out of bed. RP 538-540.

During this period of time the defendant would occasionally leave the house for periods of time. RP 524-526. On one of these occasions Ms Holliday called her friend Alisha for a ride to buy some percoset pills. RP 532-533. After buying the pills, the police stopped the car in which she was riding, took her cell phone and drugs, and asked her to meet with them. RP 534-535, 812-814. She agreed to do so but did not meet with them. *Id.* She later told the defendant that the police had taken her cell phone while she was out working. *Id.* About a week later Ms Holliday posted another ad on Backpage.com. RP 538-540. Within a short time she got a response and

agreed to go the Oyster Bay Inn in Bremerton to meet the customer who called. RP 541-543. However, when she entered the motel room with the customer she found out that he was a police officer. RP 541-543, 814-818. Two more officers then entered and arrested her and took her to the police station where she eventually gave them a lengthy statement about her activities with the defendant. *Id.*

After the interview the police obtained a search warrant for the house on 14th based upon Ms Holliday's statements. RP 819-821, 903-904. During the execution of the warrant the police arrested the defendant and found a .45 caliber semi-automatic pistol hidden in the basement. *Id.* In fact, Ms Holliday had previously retrieved the pistol from its original hiding place and put it in a bag and then in the basement at the request of the defendant, who was in jail at the time. RP 531. He had made this request via a coded telephone conversation with Ms Holliday in which he told her that the "monster under the bed needs to go downstairs and be put into a baggie." *Id.* In fact, the defendant has a prior conviction for a serious offense and cannot legally possess a firearm. RP 1118.

Procedural History

By information originally filed June 10, 2013, and later amended three times, the Kitsap county Prosecutor charged the defendant Anthony Dewayne Parker with the following 11 separate offenses and aggravators:

1. Human Trafficking in the First Degree (DV) with special allegations that (1) the defendant acted with deliberate cruelty and (2) while armed with a firearm when committing the offense;

2. Promoting Prostitution in the First Degree (DV) with special allegations that (1) the defendant acted with deliberate cruelty and (2) while armed with a firearm when committing the offense;

3. Second Degree Assault (DV) under a claim that he assaulted Johanna Holliday with intent to commit the felony of unlawful imprisonment and with special allegations that (1) the offense was part of an ongoing pattern of abuse manifested by multiple incidents over a prolonged period of time, (2) that the offense occurred within sight or sound of the victim or the defendant's minor child, or (3) that the defendant's conduct manifested deliberate cruelty or intimidation;

4. First Degree Burglary (DV);

5. Second Degree Assault (DV) by the reckless infliction of substantial bodily injury with special allegations that (1) the offense was part of an ongoing pattern of abuse manifested by multiple incidents over a prolonged period of time, (2) that the offense occurred within sight or sound of the victim or the defendant's minor child, or (3) that the defendant's conduct manifested deliberate cruelty or intimidation;

6. First Degree Kidnapping (DV) with special allegations that (1) the offense was part of an ongoing pattern of abuse manifested by multiple incidents over a prolonged period of time, (2) that the offense occurred within sight or sound of the victim or the defendant's minor child, or (3) that the defendant's conduct manifested deliberate cruelty or intimidation;

7. Second Degree Assault (DV) by the reckless infliction of substantial bodily injury with special allegations that (1) the offense was part of an ongoing pattern of abuse manifested by multiple incidents over a prolonged period of time, (2) that the offense occurred within sight or sound of the victim or the defendant's minor child, or (3) that the defendant's conduct manifested deliberate cruelty or intimidation;

8. Second Degree Assault (DV) by a deadly weapon with special allegations that (1) the offense was part of an ongoing pattern of abuse manifested by multiple incidents over a prolonged period of time, (2) that the offense occurred within sight or sound of the victim or the defendant's minor child, or (3) that the defendant's conduct manifested deliberate cruelty or intimidation; and with a special allegation that the defendant was armed with a firearm during the commission of the offense;

9. Fourth Degree Assault (DV);

10. First Degree Unlawful Possession of a Firearm; and

11. Tampering with a Witness.

CP 1-9, 23-27, 46-60, 252-266.

By July 15, 2013, the court allowed the defendant's second appointed attorney to withdraw because of a conflict arising from that attorney having previously represented a state's witness. RP 7/15/13 1-7. The court thereafter appointed Mr. Matthew Wareham out of Tacoma to represent the defendant. RP 7/19/13 1-7. On October 28, 2014, about a week prior to the start of trial, Mr. Wareham appeared with the defendant in court and moved to withdraw based upon a conflict of interest arising from a business relationship between at least one of his current clients and one of the state's witnesses. RP 10/28/13 10-12. In making the motion Mr. Wareham requested the opportunity to speak *in camera* with the court without the defendant or the prosecutors present because of his duty of confidentiality to his current clients. *Id.* After doing a *Bone-Club* analysis the court found the

necessity for the closed hearing and allowed Mr. Wareham to set out his motion before another judge *in camera* without either the defendant or the prosecutor present. *Id.*

During the *in camera* hearing Mr. Wareham explained the following to the court concerning his conflict of interest: (1) the state's first witness was Seattle Police Officer Brian Taylor, who would be testifying as an expert witness on human trafficking, (2) Officer Taylor had been one of three officers who had formed a non-profit organization to aide the victims of human trafficking to get out of prostitution and get necessary drug and psychological treatment, (3) Mr. Wareham had previously provided legal advice to wealthy clients recommending that they contribute large sums of money to non-profit organizations involved in combating human trafficking including the non-profit Officer Taylor had helped found, (4) that Officer Taylor had left the non-profit he had helped found after allegations of embezzlement were made against another one of the other founding officers, and (5) that Mr. Wareham had subsequently recommended that his clients stop making any donations to the non-profit that Officer Taylor had helped found but had left. RP 10/28/13 (in camera) 1-15.

Mr. Wareham went on to state that he had explained the basis of the conflict to the defendant, who objected to Mr. Wareham continuing as his attorney. RP 10/28/13 (in camera) 15-16. Based upon these facts Mr.

Wareham argued that he had an actual conflict of interest and should be allowed to withdraw. RP 10/28/13 (in camera) 18-21. After considering the matter the court denied the motion on its belief that while there was the appearance of a conflict there was not actual conflict. RP 10/28/13 27.

The trial in this case began on November 4, 2013 and ran for 12 days. RP 1-1278. During this trial the state called thirteen witnesses and then recalled two of those witnesses for further testimony. RP 357-1118. These witnesses included Officer Brian Taylor, Johanna Holliday, Jennifer Prerost, and a number of investigating officers as well as civilian witnesses. *Id.* They testified to the facts contained in the preceding factual history. *See Factual History.*

During the morning of November 20, 2013, which was the ninth day of trial, the defense revealed that it had two or three witnesses to call once the state closed its case. RP 949-951. The prosecutors trying the case then complained to the court that they had not yet been able to interview them. *Id.* Mr. Wareham responded that he had instructed them to appear at the prosecutor's office at noon to be interviewed with him present. *Id.* In fact, the defendant had previously identified these witnesses to Mr. Wareham, arguing that they could provide evidence that he had never beaten or mistreated Ms Holliday, that he had tried to get her off drugs, that he had never coerced or encouraged her into performing an act of prostitution, and

that she performed acts of prostitution in order to finance her drug habit. RP 1/14/14 26-36. Upon receiving this information Mr. Wareham had his investigator interview these witnesses and get their information. RP 981-986. His conversations with his investigator and his investigator's responses following the interviews were contained in e-mails on Mr. Wareham and his investigator's computers. RP 1063-1067.

On the afternoon of November 20th the parties appeared before the court and Mr. Wareham made the following statement to the court:

MR. WAREHAM: Your Honor, there's just a few things that I need to put on the record, I believe, at this point in time.

It appears that – Mr. Parker insisted that I contact these witnesses. These witnesses were contacted by my private investigator. They were never contacted by me. We had thought they would have information that would be pertinent to the case. It has come to my attention during these interviews that my client may very well have sent letters to these witnesses. Now, the contents of the letters are unknown to me, but the State hinted that it had information or may have information – and the witnesses hinted to information too, as well – that it had information indicating that it was my client telling them what to say and what to do. Now, at this point in time, I don't know if that necessarily makes me a witness in this case. I don't believe it does. At this point in time, I believe this makes me a witness to the interview. I didn't witness the actual crime taking place. So I don't think there's any justification for me withdrawing at this point in time or any grounds for me to withdraw. But I just wanted to put it on the record that that's kind of what happened this afternoon.

RP 984-985.

By the next morning of trial Mr. Wareham had reconsidered his

position and moved to withdraw as the defendant's attorney based upon an actual conflict of interest between him and his client. RP 1063-1067. Specifically, Mr. Wareham noted that the e-mails between him and his investigator concerning the investigator's interviews with the witnesses the defendant had identified were discoverable materials in this case. *Id.* In fact, the state was now calling the witness he had endorsed the day previous and that witness had produced a letter he claimed the defendant sent him telling him what to say during his testimony. RP 2063-1067; Trial Exhibits No. 64-65. The trial court denied the motion. RP 1067. In fact, that witness did then testify before the jury, produced a letter he stated the defendant sent him, and stated that the defendant had requested that he testify to a number of facts that were not true. RP 1070-1098; Trial Exhibits No. 64-65.

Following the close of the state's case Mr. Wareham closed the case for the defense without calling any witnesses. RP 1118-1119. The defendant later complained to the court that Mr. Wareham had refused to call a number of family members and friends who were present in the courtroom and ready to testify that he had never abused or harmed Ms Holliday, forced her into any act of prostitution, provided her drugs, or in any way imprisoned her. RP 1/14/14 26-36. The court then instructed the jury and the parties presented closing arguments. CP 303-407; RP 1169-1261. After argument the jury retired for deliberation, during which it sent out two questions, both of which

were answered by the court at the specific request of both parties. RP 12-66-1278. Eventually the jury returned verdicts of “guilty” on each count charged as well as finding that all of the special verdicts and special allegations had been proven beyond a reasonable doubt. RP 1270-1278; CP 465-477.

The court later held a sentencing hearing in this case during which the defense did not dispute the state’s claim on the defendant’s offender score. RP 1/14/14 1-40. Following argument by counsel and a statement by the defendant and his witnesses, the court imposed an exceptional sentence of 601 months based upon the aggravators found by the jury and based upon the defendant’s high offender score. CP 514-526. The defendant thereafter filed timely notice of appeal. CP532-533.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO GRANT THE DEFENSE ATTORNEY'S MOTIONS TO WITHDRAW AFTER HE INFORMED THE COURT THAT HE HAD TWO SEPARATE CONFLICTS OF INTEREST DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, all persons charged with a crime are guaranteed the right to effective assistance of counsel. *Anders v. California*, 386 U.S. 738, 742, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel includes the right to the assistance of an attorney who is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *State v. Davis*, 141 Wn.2d 798, 10 P.3d 977 (2000). If at any point during representation an attorney has or develops an interest that does not align with that of his or her client, then that counsel has a conflict of interest and must withdraw absent a knowing and voluntary waiver of the conflict by the client. *In re Richardson*, 100 Wn.2d 669, 675 P.2d 209 (1983).

When determining whether there was a conflict of interest in a case, appellate courts review the record on appeal de novo. *State v. Vicuna*, 119 Wn.App. 26, 79 P.3d 1 (2003). Furthermore, under RAP 2.5 the denial of an attorney who does not have a conflict of interest is a “manifest error affecting

a constitutional right” which may be raised for the first time on appeal. *State v. Nguyen*, 165 Wn.2d 428, 97 P.3d 673 (2008). A conflict will be presumed if the defendant can demonstrate that (1) counsel actively represented conflicting interests, and (2) the actual conflict of interest adversely affected counsel’s performance. *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); *State v. Dhaliwal*, 150 Wn.2d 559, 79 P.3d 432 (2003). The adverse affect need not be prejudicial to merit a new trial; rather, it only need be negative or adverse. *State v. Dhaliwal*, 150 Wn.2d at 571.

For example, in *State v. Regan*, 143 Wn.App. 418, 177 P.3d 783 (2008), a defendant charged with possession of drugs arrived an hour late for trial. By the time he did arrive the court had released the jury and issued a warrant for his arrest. At that trial the defendant was represent by two attorneys. The first was his primary attorney who had only tried two prior cases and the second was her supervising attorney. The state later added a charge of bail jumping and endorsed the supervising attorney as a witness. At the second trial in the matter the court compelled the supervising attorney over defense objection to testify against the defendant without any showing by the state that it had no other way to prove the facts the supervising attorney provided. Following conviction the defendant appealed, arguing that requiring one of his attorneys to testify against him created a conflict of interest and thereby violated his state and federal constitutional guarantees to

effective assistance of counsel.

In addressing this issue the court first undertook an analysis of the federal and state approaches to determining the existence of a conflict of interest and what standard of review applied. The state had argued that in *Mickens v. Taylor* the United States Supreme Court had held that in order to prevail on a conflict of interest argument in any setting other than an instance of joint representation of co-defendants the defense had the burden of proving deficient performance and actual prejudice under the standard for proving ineffective assistance set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court of Appeals rejected this argument, noting as follows:

In *Dhaliwal*, our Supreme Court clarified the analytical framework for determining whether counsel labored under an actual conflict of interest in violation of the Sixth Amendment. Notably, the standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An actual conflict is a conflict that affected counsel's performance – as opposed to a mere theoretical division of loyalties.”

In order to show adverse effect, therefore, Mr. Regan need not demonstrate prejudice – that the outcome of his trial would have been different but for the conflict – but only that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. Thus, the conflict (1) must cause some lapse in representation contrary to the defendant's interests, or (2) have likely affected particular aspects of counsel's advocacy on behalf of the defendant.

State v. Regan, 143 Wn.App. at 427-428 (citations and quotations omitted).

After clarifying this standard the court noted that under former RPC 3.7 an attorney should not represent a client in any matter in which counsel is “likely to be called as a necessary witness.” The court further noted that under the decision in *State v. Sullivan*, 60 Wn.2d 214, 373 P.2d 474 (1962), the Washington Supreme Court held that the trial court should not allow a defendant’s counsel to be called unless the state makes a showing that the attorney’s testimony is both necessary and unobtainable from other sources. Since no such showing was made the state’s action in calling one of the defendant’s attorneys violated the defendant’s right to effective counsel free from a conflict of interest.

In the case at bar trial counsel twice moved to withdraw based upon two separate conflicts of interest. The first conflict arose when counsel determined that he had a continuing client relationship with parties to whom he had provided direct counsel to initially provide monetary support to a non-profit organization created by Officer Brian Taylor, the state’s first witness. Counsel had then provided legal advise to those clients that they withdraw their financial support for the non-profit organization that the officer had created and apparently left. At first blush the claim of conflict would appear tenuous. However, the basis for a finding of an actual conflict arises from a closer look at the specific desire of Mr. Wareham’s other clients. Apparently, prior to undertaking his representation of the defendant, Mr. Wareham was

actively representing wealthy clients who had a philanthropic interest in supporting an organization whose primary goal was combating human trafficking, particularly trafficking in prostitutes. By representing the defendant on a charge that his other clients were donating money to prevent, Mr. Wareham had a direct conflict of interest. In other words, his complete and full representation of the defendant directly conflicted with the stated goals of his other current clients. This constituted an actual conflict of interest.

Mr. Wareham's second motion to withdraw involved an even greater conflict of interest. In essence, that second conflict can be stated as follows, at least from the view of a reasonable person in Mr. Wareham's position: (1) the defendant informed Mr. Wareham of specific witnesses who would be able to directly contradict material claims Ms Holliday was making, (2) Mr. Wareham had his investigator interview these witnesses, take statements from them, and provide reports back to Mr. Wareham, (3) Mr. Wareham endorsed these witnesses and was prepared to call them to present evidence consistent with what they had stated to his investigator, (4) one of those witnesses later stated that the defendant has suborned perjury from him via a letter, and (5) the witness admitted to the prosecutor that the defendant had suborned perjury from him and he produced the letter to support his claim.

These facts lead to two possible alternative conclusions. On the one

hand, Mr. Wareham acted as an unwitting accomplice to the defendant's apparent acts suborning perjury and Mr. Wareham would be a critical witness to that fact. On the other hand, if Mr. Wareham was aware of the defendant's intent, he acted as an actual accomplice to the crime of suborning perjury. In either of these alternatives Mr. Wareham's interests are directly in conflict with those of the defendant. Either he is a witness against the defendant or he is a co-conspirator with him. Even were he the former, he would still be subject to a charge by the state that he was the latter.

As the court explains in *Regan*, ultimately the question is whether or not the conflict either caused some lapse in representation contrary to the defendant's interests, or (2) likely affected particular aspects of counsel's advocacy on behalf of the defendant. In this case there is no question that the conflict did affect Mr. Wareham's advocacy since he abandoned his plans to call any witnesses on behalf of the defendant, including any family members in spite of his prior endorsement of these witnesses. Thus, the trial court denied the defendant his right to an attorney without a conflict of interest as was his right under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, this court should reverse the defendant's convictions and remand for a new trial.

II. THE TRIAL COURT ERRED WHEN IT ADDED A FIREARM ENHANCEMENT TO THE DEFENDANT'S CONVICTIONS FOR HUMAN TRAFFICKING AND PROMOTING PROSTITUTION BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A FINDING OF A NEXUS BETWEEN THE DEFENDANT'S POSSESSION OF A FIREARM AND THE COMMISSION OF EITHER OFFENSE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364. Under this same constitutional guarantee the state must also prove all sentencing enhancements beyond a reasonable doubt except the fact of prior convictions. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *State v. Jones*, 159 Wn.2d 231, 149 P.3d 646 (2006).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence

may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar the trial court added a firearm enhancement to the charge of human trafficking as well as the charge of promoting prostitution. As the following explains, the evidence presented at trial fails to prove a nexus between the defendant’s possession of the firearm and his commission of these two offenses.

For the purpose of the firearm enhancement found in RCW 9.94A.533(3), a person is “armed” for the purpose of a weapon enhancement if and only if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes in the commission of a specific offense. *State v. Valdobinos*, 122 Wn.2d 270, 858 P.2d 199 (1993). In other words, the evidence presented at trial must show a “nexus” between the defendant, the crime, and the weapon. *State v. Mills*, 80 Wn.App. 231, 233, 907 P.2d 316 (1995).

For example, in *State v. Johnson*, 94 Wn.App. 882, 974 P.2d 855 (1999), the police entered the defendant’s apartment pursuant to a search warrant and found heroin as well as a gun in a coffee table drawer. At the time the police entered the defendant was asleep in the bedroom. The defendant was later convicted on drug charges and the jury found a firearm enhancement. On appeal, the Court reversed the firearm enhancement, finding no *nexus* between the defendant’s possession of the firearm and the crime he committed.

Similarly in the case at bar the evidence presented at trial does not support a finding of a nexus between the defendant’s possession of the firearm and either of the crimes of human trafficking or promoting prostitution. At no point did Ms Holliday ever claim that the defendant used the firearm or the presence of the firearm to coerce her into committing acts

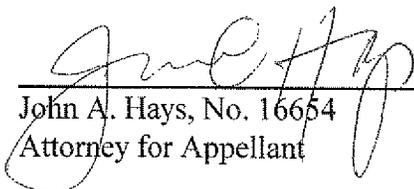
of prostitution. In fact, the one time that he did display the firearm was to commit the separate offense of second degree assault. In this instance there was an obvious nexus between the firearm and the crime he committed because he used the firearm in the commission of the offense. This nexus did not exist for the other two offenses. Thus, in the case at bar the trial court erred when it added the firearm enhancements to the first two offenses because the evidence does not prove the existence of a nexus between the defendant's commission of these two offenses and the defendant's possession of the firearm. Consequently, this court should vacate these two enhancements.

CONCLUSION

The trial court denied the defendant his right under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, to effective assistance of counsel when it refused to allow his attorney with withdraw once he became aware of and informed the court of two actual conflicts of interest. As a result this court should reverse the defendant's convictions and remand for a new trial. In the alternative, this court should vacate the defendant's first two firearm enhancements because the evidence presented at trial failed to prove a nexus between the defendant's possession of the firearm and the commission of the first two offenses.

DATED this 2nd day of October, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

RCW 9.94A.533(3)

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(3);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

COURT OF APPEALS OF WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

vs.

**Anthony Parker,
Appellant.**

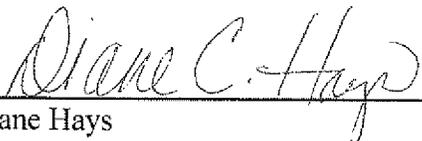
NO. 45811-0-II

**AFFIRMATION OF
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the day noted below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Russell D. Hauge
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Dated this October 2, 2014, at Longview, WA.



Diane Hays

HAYS LAW OFFICE

October 02, 2014 - 5:09 PM

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