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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
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No. 67857-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JERRY LEWIS SMITH

Appellant.

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

PRO-SE SUPPLEMENTAL BRIEF OF APPELLANT

JERRY LEWIS SMITH
Stafford Creek Corrections Ctr.,
191 Constantine Way, Aberdeen, WA.,
98520

Appellant.

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RCW 9.68A.101

A. SUMMARY OF ARGUMENT

1. The Appellant was a passenger in a rented vehicle driven by his Las Vegas relative, who approached an undercover Seattle Police Officer posing as a minor. Based upon speculative comments the appellant made in response to the relative's statements to the police officer, and an offer to give the "minor" a ride eight days later, he was arrested and charged with attempted promoting commercial sexual abuse of a minor. Because the State failed to prove beyond a reasonable doubt that the appellant took a substantial step towards the commission of the crime, his conviction must be reversed and dismissed with prejudice.

2. When the Appellant left the Seattle downtown area, he did not leave his name and phone number for the Seattle Police Officer to reach him. Eight days later, the "minor" made a phone call to the appellant, simply asking for a ride to a non-specific location. The appellant informed Officer Gill to meet him at a gas station, and when he arrived and parked his truck, the appellant was arrested. Because mere parking his truck at a gas station is not considered a crime, police lacked probable cause to arrest him and the motion to suppress must be granted.

B. ASSIGNMENTS OF ERROR

1. The jury's verdict that Smith was guilty of attempting promoting commercial sexual abuse of a minor is not supported by sufficient evidence.

2. The State failed to prove that the appellant had taken a substantial step toward committing a crime.

3. The police lacked probable cause to arrest Smith for merely parking his truck at a gas station.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clause requires the State prove every element of the offense beyond a reasonable doubt. The crime alleged to have been committed requires the State to prove that the defendant had taken a 'substantial step' toward the committing the crime. Can a defendant be found guilty of attempted promotion of commercial sexual abuse of a minor when the defendant does not intent the criminal result of the crime, and does not take a substantial step toward the commission of the crime?

2. The Fourth Amendment guarantee's the right of the people to be secure in their persons against unreasonable seizures. Probable cause does not exist when facts and circumstances within the knowledge of the arresting officer are insufficient to warrant a person of reasonable caution in a belief that a person has committed an offense. Can a defendant

be arrested for merely parking his truck to give a "minor" a ride to a non-specific location?

D. STATEMENT OF THE CASE

The Seattle Police Department, seeking to explore a suspected link between gang activity and prostitution, formulated an undercover sting operation called "Operation Fast Track," in a small area east of the Space Needle. 6RP, (May 24, 2011), at 26-30, 128-29; 11RP, (June 2, 2011), at 76-79.² The ultimate goal was to arrest pimps, especially those who target minors for prostitution. 6RP-36-37; 10RP 79-82. As part of the OPT, Seattle Police Officer, Daljit Gill, assumed the role as an undercover-prostitute, who walked the streets posing as a "minor." 6RP 40, 172; 7RP 21-28; 10RP 57-58, 82.

In this regard, Officer Gill, [hereafter "Gill"], hung out at what was called the 'fashion show,' wearing a wire that recorded most of what her conversations were with those who had contact with her. 6RP 38, 135-37.

On June 13, 2011, Mr. Anthony Woods, the appellant's cousin, who resided in Las Vegas, pulled alongside Gill and from the passenger seat, the appellant thought that Gill needed a ride, and asked her to get in. 7RP 29-30. The audio-recording transcripts reflects that Gill stated "I'm working," and Woods stated "I know you're working, get in." 9RP, (May 31, 2011).

²Appellant incorporates by reference to OPENING BRIEF. SUPPLEMENTAL PRO-SE BRIEF - 3

However, Gills' uncertified police report only states that the appellant asked her into the vehicle. 9RP 38.

Thereafter, Gill's report states "I was asked to come closer." This was false, rather, Gill testified that it was rather a motion to come closer." 9RP 38, 40.

Other passive statements were "I was told I should wear a condom for protection." Neither Woods or Smith made this statement -- Smith stated that "It's dangerous out here, 'you got to be careful,'" and that Gill should have protection to defend herself. 11RP, (June 6, 2011), at 82.

The June 21st. police report states that the person who identified himself as "elvis" was "Mr. Woods," and the June 13th. report states "Elvis" is "Mr. Smith," the appellant. 9RP 49-50. Gill had brought up several, specific sexual acts during the June 13th. encounter, including "blow jobs," "anal sex," "tag-teaming," and the mention of a payment of "\$40." However, the police report misstates that "I was asked several questions about my activities as a prostitute, including specific sexual acts. 9RP 50-51. For instance, when Gill mentioned anal sex, the appellant replied "Oh, no, no, I ain't [into] none of that [shit]." Id. Gill further misstates "I initiated a call to Woods and Smith." However, Gill only had Woods' phone number. 9RP 53-54.

The police report used the word "them" instead of "Mr. Woods," and Gill testified that she was referencing Woods. 9RP 55. Gill admitted in her testimony that the appellant never gave his real name or phone number, and that Mr. Woods was the only person who gave specific statements concerning prostitution. 9RP 55-56.

The June 13th. report stated "I asked Woods and Smith if they had any other girls working for them, meaning prostitutes." This was clearly in error -- Gill only asked Mr. Woods "You got somebody else working with you too or no?" Woods replied "No, this is just me and you." 9RP 56-57. Gill made a statement on her report as to when the police had arrived to detain her; Smith supposedly stated that if Gill had gotten into their vehicle, "none of this would have happened." However, only Woods made this statement during the phone call between Woods and Gill on June 21, 2011. 9RP 58, 60-62.

On June 13th., Officer Gill did announce that she was "17," and that she had been out and about for 2-hours that night, and made \$160." 7RP 37-40; Ex. 12 at 4-8 of 11. The conversation ended with only Woods giving Officer Gill his phone number. 7RP 35-36, 39; Ex. 12 at 9-11 of 11.

Woods' phone had a low-battery, and he asked Smith to use his phone to call Gill. The parties arranged
SUPPLEMENTAL PRO-SE BRIEF - 5

to meet near where they had been earlier. This time, Woods got out of his car and spoke with Gill. 7RP 45-47; Ex. 12 at 1-2 of 22. Smith did not speak directly at Gill except to ask for a cigarette. Id.

During the conversation between Woods and Gill, Smith commented to Woods "I like a 17 and mean and all about green." 9RP 127-28; Ex. 12 at 3 of 22. Smith requested that Woods leave, and became agitated when Woods continued his conversation. Woods began talking about prostitution and Smith made a rhyme: "I can see it in Vegas living outrageous and we can go to the bay area ok." 9RP 128; Ex. 12 at 3 of 22. These rhymes were not clarified by Officer Gill, which the comments remain speculative. However, Woods regained the conversation and made actual chimes to work with Gill as a pimp. Ex. 12 at 4-7 of 22. Gill did ask Woods to clarify, and Woods specifically stated that he would handle all of Gill's income, use the Internet to make money, and protect Gill. 7RP 48-49; 8RP 82-94; Ex. at 4-13 of 22.

Officer Gill noticed that Smith leaned back in his seat so that she could converse with Woods, and the contact ended when Woods engaged in a loud conversation with occupants in a maroon van. 7RP 47-49; 8RP 19-24, 125-128. Gill became uneasy and called colleagues

for assistance. 7RP 49; 8RP 96, 128-29; 9RP 59-60.

During the ruse, an officer announced that he was arresting Gill on a "juvenile runaway arrest warrant." She was escorted out of the 'fashion show.' 6RP 45-47; 7RP 53-56; 6RP 129-30; Ex. 12 at 22 of 22. Woods, who had seen the officer's approach, jumped into his rental car and drove off leaving Smith. 7RP 50, 55; 8RP 94-95. Thereafter, Smith made an attempt to reassure an "upset" Gill during her "arrest." 6RP 47-48; 7RP 50, 53-55; 8RP 95-96. Officer Hanley check I.D.'s for warrants, and once cleared, Smith was allowed to leave. 6RP 47.

Officer Gill had no way of contacting the appellant-"Mike," because Smith did not give Gill his real name or phone number where he could be reached. 8RP 43-44, 66-67, 81-82; 9RP 55-56.

On June 21, 2010, eight days later, OFT made an attempt to arrest Woods, by drawing him to Officer Gill. Gill, who may not have realized that Woods had given her his phone number in Las Vegas, called him, asking for a ride after being released from the "juvenile detention center." Gill clarified Woods' role as her "pimp," before actually attempting to arrest him. 6RP 49-54; 7RP 76-77. Since Woods was not in the State of Washington, he stated over the phone that he would send someone to pick her up. See 7RP 81.

Gill demanded over the phone, that either Woods or "mike" pick her up, not just someone. At this point, Woods gave Gill "Mike's" phone number, (the appellant). 9RP 68-69; 7RP 62-101; 9RP 64-65.

Smith was not privy to the phone conversations between Woods and Gill -- only that Gill called him, asking for a ride to a non-specific location. In this regard, Gill testified that Woods had not designated a driver named as yet in their phone conversation, before Gill asked "[w]here's 'Mike?'" 9RP 66. Ironically, Gill further testified that she attributed Woods' Las Vegas phone number with Smith's local phone number. 9RP 86.

"As far as pimps go, they're offering a prostitute something, they're offering them money, protection, housing..." 9RP 102. When asked whether the appellant offered anything, Gill responded "no," and admitted that Smith only offered her a ride when asked by her; Woods was the only person to make specific statements as to being her pimp, and prostitution. 9RP 109.

E. APPELLANT'S TESTIMONY

Mr. Jerry Lewis Smith, having been first duly sworn, testified that the circumstances surrounding the phone calls he received from Gill -- simply needing a ride to a non-specific location, after retrieving his phone number from Woods, led to his arrest on a "warrant." 2RP- (May 17, 2011), at 4. On June 21, 2010, Officer Hanley
SUPPLEMENTAL PRO-SE BRIEF - 8

had indicated that the appellant had a warrant for his arrest, after Smith parked his truck at the AM/PM. 2RP-6-7. Subsequently, when Smith saw Gill approaching the parking lot at the gas station, she began looking into other cars before seeing him sitting in his truck. 2RP 8. Gill came within 15-feet of the truck and stated "[w]here's Elvis?" Appellant was taken on a "warrant" to police headquarters -- not the county jail.

After waiving his Miranda rights, Smith made statements as to his innocence, and Detective James stated that he simply wanted to know the whereabouts of Mr. Anthony Woods and that Smith would be released once he cooperated. However, Smith explained that he had not seen Woods in over 15-years prior to June 13, 2010; Woods lived in Las-Vegas, and the only reason why Smith was downtown Seattle, was to look for Woods' brother Leroy. 2RP 15, 20-21.

F. DEFENSE'S MOTION TO DISMISS

The defense moved to dismiss² under CrR 8.3(b), based upon the fact that, under the interpretation of the facts, in the light most favorable to the prosecution, the State failed to prove that Smith made an attempt to promote commercial sexual abuse of a minor. 11RP,(June 6, 2011), at 5-6. Further, Smith was unlawfully seized under the Fourth Amendment, when police arrested him without probable cause, while he simply sat in his truck at the AM/PM.

²Counsel further moved to suppress evidence. 2RP 37.
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More specifically, Smith did not participate in the Las Vegas phone conversations between Woods and Gill. 11RP, (June 6, 2011), at 83. Smith stated on multiple occasions "Come on Man, let's go," on the 13th. of June, during Woods and Gills' conversation. Smith was simply a passenger in Woods' vehicle, who had made an attempt to look for Woods' missing brother Leroy. Smith never chimed in on Gill's sexual propositions, and made speculative rhymes to Woods in response to Woods' statements to Gill. These comments by Smith "I like a 17 and mean and all about green" I can see it in Vegas living outrageous and we can go to the bay area..." were never clarified by Officer Gill -- Smith was agitated, frustrated, tired, and simple wanted to go home. 11RP 83-85, 91, 238-39; 12RP 77-78.

Eight days later, police attempt to contact Woods and unknowingly called him in Las Vegas, whereby, Gill requests a ride from the "detention center." When Woods could not pick Gill up, and informed her that he would send "someone," Gill opens the door with "where's Mike?" At this point, Woods gave Gill Smith's phone number. 11RP-106-07; 12RP 61-62. Woods called Smith, asking for a favor -- please give Gill a ride, and Gill calls Smith asking him for a ride to a non-specific location. 11RP 114. Smith informed the "scared desperate" sounding Gill to meet him at the AM/PM. 11RP 116-17; 12RP 19-21.

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During the drive to the AM/PM, Gill continued to call Smith by phone, only asking general questions as to where he was, and when he arrived, she was not there. 11RP 124-25. Thereafter, Gill called, asking Smith what type of vehicle he was driving, and where he was parked. 11RP 124-25. Gill approached Smith's truck, and within 15-feet, Gill stated "Where's Elvis?" She never made any attempt to get Smith to chime in on any specific sexual acts, and requested back-up units to arrest him.

The plain clothes Officer Hanley appeared, and with handgun drawn, ordered Smith out of his vehicle, and placed him under arrest for what he stated was a "warrant." 11RP 125-27; Ex.'s 35-36. This "warrant" was never produced at any court proceedings.

A jury found the appellant guilty as charge in the amended information. CP 104. The trial court imposed a standard range sentence, and Smith timely filed notice of appeal. CP 158-67.

G. ARGUMENT

THE APPELLANT'S CONVICTION WAS A DIRECT RESULT OF INSUFFICIENT EVIDENCE, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

a. The State bears the burden of proving each of the essential elements of the crime beyond a reasonable doubt. The Due Process Clause of the Federal and State Constitutions, requires the prosecution to prove every element of the crime beyond a reasonable

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doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Wash. Const. art. 1, §§ 3, 22.

The critical inquiry on appellate review, 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. supra at 334; State v. Green, 94 Wn.2d 218, 220-22, 616 P.2d 628 (1980). The appellate court draws all reasonable inferences in favor of the State. State v. White, 150 Wn.App. 237, 342, 207 P.3d 1278 (2009).

Mr. Smith was convicted of attempted promoting commercial sexual abuse of a minor. An attempted crime involves two elements: the intent to commit a specific crime and taking a 'substantial step' toward its commission. RCW 9A.28.020(1); State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003); State v. Chhon, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996).

A person is guilty of promoting commercial sexual abuse of a minor, if he knowingly advances the commercial sexual abuse of a minor or profits from a minor engaged in sexual conduct. RCW. 9.68A.101.

Among other things, a person "advances commercial sexual abuse of a minor" if he or she engages in any

conduct "designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor." Id. A "minor" is a person under the age of 18 years old. RCW 9.68A.011.

In its essentials, the State was required to prove that Mr. Smith had the specific intent to advance the commercial sexual abuse of Officer Gill, and took a substantial step toward commission of that offense. RCW 9A.28.020(1); RCW 9.68A.101(1), (3)(a).

Mr. Smith argues that the prosecution failed to prove that he had specific intent, and failed to prove that he took a 'substantial step' toward commission of this offense.

b. The State must prove that the appellant had the specific intent, and took a substantial step toward the commission of the crime charged. The attempt statute requires both of these elements. RCW 9A.28.020-(1). The substantial step must be an overt act which convincingly demonstrates "a firm purpose to commit a crime." State v. Workman, 90 Wn.2d 443, 452, 584 P.2d 382 (1978). Thus, to constitute a substantial step depends upon the individual facts of the case. Id. at 449-50. Here, Mr. Smith's acts do not rise to a level of a specific intent, nor a substantial step under the attempt statute.

The 'intent' required is the intent to accomplish the criminal result of the base crime. DeRyke, 149 Wn.2d at 913.

A person, other than the minor or the customer, profits from commercial sexual abuse of a minor by [attempting] to accept or [attempt] to receive "money or other property pursuant to an agreement or understanding with any person whereby he or she participates or will participate in the proceeds of commercial sexual abuse of a minor." RCW 9.68A.101-(3)(b). [emphasis added].

Here, appellant never gave Officer Gill his real name, and did not give his phone number and address where he could be reached. Accordingly, he did not intend to either advance or profit from the commercial sexual abuse of a minor when he only agreed to give the "minor" a ride to a non-specific location.

Second, Mr. Smith never asked the minor if she was interested in working for him, or request favors for money. Further, Smith never made any specific statements or requests to Gill; she did not ask the appellant to clarify which left the "rhymes and sarcastic" comments speculative. 9RP 128; Ex. 12 at 3 of 22; 4-7 of 22.

Third, Smith was not privy to any specific conversations between Woods and Gill, and therefore,
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did not know any specific information other than a surprise phone call from Officer Gill, asking him for a ride to a non-specific location. 9RP 66. Without authorization, Woods gave Gill the appellant's phone number, which touched off a series of phone conversations. However, Smith did not have any idea that he was supposed to pick Gill up before this, or take her to any specific place and drop her off according to the phone conversation she made to him on June 21, 2010. It was just "Where are you?"

"How far are you?" "Are you coming from Renton?" 11RP, (June 6, 2011) at 6-7. There was simply no specific statements made by Smith and no evidence that he knew he was involved in a prostitution venture and the setting up of a "pimping" operation.

The evidence shows that Smith disfavored prostitution, and the foul language that Officer Gill when making specific sexual acts. 9RP 50-54. Accordingly, the prosecution failed to prove that Smith intended to accomplish the criminal result of the base crime. DeRyke, 149 Wn.2d at 913.

Next, the prosecution was required to prove that Smith had taken a "substantial step" toward the commission of the offense in question.

The jury was instructed that "a substantial step is misconduct that strongly indicates a criminal purpose and it is more than mere preparation." Instruction-
SUPPLEMENTAL PRO-SE BRIEF - 15

15; 13RP, (June 8, 2011), at 43.

If an individual takes a substantial step, that person is not going to withhold their name, phone number or address where he or she could be reached. A person would not reject the various suggested sexual acts; a person would not suggest leaving and getting cocoa or going home. This is the case here.

Based on these individual facts of the case, Smith merely skirted the edges of the conversation between Woods and Gill, where Woods is enlisting Gill. Smith merely chimed in on occasion with something sarcastic, and never advanced² any propositions to Gill. It may be true that Smith flirted with the officer, but only because he thought she was cute, but nothing more. 13RP 43-44.

Second, there was no evidence in trial of what was said between Woods and Smith when they called each other on June 21, 2010. 11RP, (June 6, 2011), at 8. In this regard, the State lacked the substance of those phone calls, and therefore, the trial court was handcuffed when considering those possible conversations -- only speculation. Id. Smith's comment in response to Woods' conversation he had with Gill, "I can see it in Vegas living outrageous...", was not clarified by Officer Gill, only mere words.

Accordingly, this standing alone, does not prove

² "Advancing" means "pushing forward any kind of plan." Smith's mere presence at the scene, without more, does not establish that he was an 'accomplice.' 13RP 45.

without clarification, of a substantial step. "I like a 17 and mean and all about green," without clarification, and without any specific proposition, simply does not constitute an overt act which convincingly demonstrates "a firm purpose to commit a crime." Workman, 90 Wn.2d supra, at 452. Accordingly, since appellant never made an attempt to commit the crime charged, his conviction cannot stand.

For instance, in State v. Grundy, 76 Wn.App. 335, 886 P.2d 208 (1994), on appellate review, Grundy argued there was insufficient evidence that he took a substantial step toward possession of a controlled substance. This Court agreed, holding that Grundy's words, "without more," were insufficient "to constitute the requisite overt act." Id. at 337. The Court further noted that at the time of Grundy's arrest, the parties were still in the "negotiating stage." Grundy, at 338.

Here, like Grundy, the evidence established that [after the "minor" had gotten his phone number without his permission], Smith was simply asked for a ride. No "negotiations" between the appellant and the "minor" ever occurred before his arrest. In this regard, Smith had never taken any action that would corroborate an intent to commit a crime or attempted to promote. No money was talked about, no agreements were made between them to pay for any sexual favors with a 17-year old.

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Contrary to this case, in State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002), a police detective established an e-mail account for "ambergirl87" and posed as a fictitious 13-year old girl. Townsend, Id. at 670. Townsend then began corresponding by e-mail with the detective posing as "Amber." Townsend went to a motel-room at the agreed upon time, knocked on the door, and asked to see Amber. After the arrest and conviction, on appellate review, the Court, in focusing on the attempt statute, held that the defendant's criminal intent to commit the crime, stating "[h]e is guilty... if he intended to have sexual intercourse with her." Id. at 679, (quoting, State v. Townsend, 105 Wn.App. 622, 631, 20 P.3d 1027 (2001)). See also State v. Luther, 157 Wn.2d supra at 74, (under the attempt statute, "the critical focus is on the defendant's criminal intent").

Here, the evidence against the appellant were the fact that he knew the "minor" was 17 years old, and his subsequent travel to the AM/PM station to give her a ride [to a non-specific location], fails to establish a substantial step to committing a crime. Accordingly, this Court should hold that the prosecution here, as in Grundy, failed to produce sufficient evidence of an act leading to the consummation of the attempted crime. Mr. Smith's drive to the gas station and parking- is simply not a substantial step.

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c. The Court must reverse and remand with instructions to dismiss the conviction. Since there was insufficient evidence to support Smith's conviction, this Court must reverse the conviction and do so with instructions to dismiss with prejudice. To do otherwise, would violate double jeopardy. State v. Crediford, 130 Wn.2d 747, 760-61, 927 P.2d 1128 (1996), ((Double Jeopardy Clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding"), quoting, Burks v. United States, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)).

ARGUMENT

THE PETITIONER'S CONVICTION WAS
A RESULT OF THE LACK OF PROBABLE
CAUSE TO ARREST, IN VIOLATION
OF THE FOURTH AND FOURTEENTH
AMENDMENTS TO THE UNITED STATES
CONSTITUTION, WHICH REQUIRES
SUPPRESSION OF EVIDENCE.

a. The trial court abused its discretion when it denied the defense's motion to suppress evidence unconstitutionally seized. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Article 1, §7, of the Wash. Const., states
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that "[n]o person shall be disturbed in his private affairs, or his home invaded without authority of law." Wash. Const. art. 1, §7. Under both Constitutions, warrantless searches and seizures are presumptively unreasonable unless it falls into one or more of the narrowly drawn exemptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000).

Here, Smith argues that police lacked probable cause to arrest him because the facts known to Officer Gill at the time he was arrested, do not support a reasonable inference that he was engaged in any crime.

In denying the defense's motion to suppress for lack of probable cause, the trial court relied solely on a sarcastic comment the appellant made on the 13th. of June, 2010: "I can see it in Vegas living outrageous and we can go to the bay area okay?" 9RP 128; Ex. 12 at 3 of 22; 3RP, (May 18, 2011), at 16-18.

However, the record shows that Officer Gill had no way of contacting Smith after the 13th. of June; Smith did not give Gill his real name, nor his phone number where he could be reached. Gill called Woods and when asking for a ride, also asked for "Mike," which led to Woods in giving Gill Smith's phone number on June 21st., eight days later:

GILL: "Yeah, I hear you, where's Mike?"
WOODS: "Who's Mike?"
GILL: "Where's Mike?"
WOODS: "Who is Mike?"
GILL: "It's your friend." 9RP 63-64.

Accordingly, probable cause to arrest Smith could not have occurred on the 21st. of June, based on the unclarified statements made on the 13th. of June.

Woods lived in Las Vegas -- Smith made the "See it in Vegas" rhyme as an added phrase to Woods' statement.

Officer Gill stated that she need a ride, and since Woods was in Vegas, he stated "I'm going to have someone come and get you..." 9RP 64-65. Gill testified that this statement by Woods did not designate a driver named as yet in her conversation with Woods. 9RP 66.

However, this is when Gill asks for "Mike" to pick her up, and Woods gives her Smith's phone number.

Smith had never propositioned Gill to do anything for him. For instance, Smith never stated anything specific like "We'll make money," "I'll put you to work," "we're going to make more money," or any other type of "pimp" conversations. 2RP 42.

Accordingly, probable cause to arrest Smith could not have occurred on June 13, 2011 -- he never gave anyway for Officer Gill to reach or contact him. Accordingly, Smith's arrest may not be supported by probable cause based on the 21st. of June conversations between Woods and Gill, as to which he had no part of those phone calls. Smith came in at that end and only offered to give Gill a ride to a non-specific location. 2RP 41.

In reviewing the trial court's oral findings of fact for substantial evidence, State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), this 'substantial evidence' exists if the evidence is sufficient to persuade a rational, fair-minded person, that the finding is true. Id. The trial court's conclusions of law are reviewed de novo. Id.

In general, warrantless searches and seizures are per se unreasonable under the Fourth Amendment. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996); State v. Houser, 95 Wn.2d 143, 148, 622 P.2d 1218 (1980). The State must show that a warrantless seizure falls under an established exception. State v. Johnson, 128 Wn.2d 431, 451, 909 P.2d 293 (1996).

Here, under the facts and circumstances, Officer Gill made a phone call to Woods who gave her Smith's phone number. Thereafter, the initial contact with Gill was simply to give her a ride to a non-specific location. This does not establish probable cause to arrest Smith.

Probable cause is an "objective inquiry." State v. O'Neill, 104 Wn.App. 850, 868, 17 P.3d 682, rev. granted, 144 Wn.2d 1008 (2001).

In its essentials, probable cause exists when facts and circumstances within the knowledge of the arresting
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officer are sufficient to warrant a person of reasonable caution in a belief that the defendant has committed an offense. O'Neill, 104 Wn.App. at 868.

Probable cause requires more than 'bare suspicion of criminal activity,' but does not require facts that would establish guilt beyond a reasonable doubt. State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

Mr. Smith argues that mere parking his truck at a gas station, to give a "minor" a ride, is not considered a crime. Smith had no way of knowing what was said during the phone conversation with Woods and Gill -- only that she needed a ride. Gill certainly did not discuss their conversations with Smith on the 21st. of June, when she came up to the truck at the AM/PM gas station. There is simply no evidence implicating Smith in any attempted promotion of sexual abuse, or as an accomplice to Woods.

For instance, Detective James testified that when he questioned Mr. Smith, it was not at the King County Jail. 1RP, (May 13, 2011), at 157. Smith asked why he was in Police Headquarters,² and the detective stated that he did not have a specific charge. 1RP-161. Therefore, Officer Gill overstepped her conception of probable cause based on the facts of this case. In calling for back-up units, she was

² Detective James testified that the appellant "said something...about a warrant." 1RP 162-63.

the poisonous tree, and must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

As Officer Gill lacked probable cause to arrest Smith for offering to give her a ride, the audio-recordings and custodial statements incident to that arrest were unconstitutional. Hence, the evidence must be suppressed. Mere parking at a gas station is not a crime, which leaves the State with insufficient evidence to support the attempt conviction. Accordingly, Smith respectfully request that this Court reverse and remand to dismiss with prejudice. In the alternative, he asks that this Court reverse and remand for a new trial, suppressing the unlawfully seized evidence.

In sum, our State Constitution protects our individual privacy, which means that a citizen is free from unnecessary police intrusion into private affairs unless police clearly associate the crime with that individual. Without specific evidence pinpointing a crime on a person, that person has a right to their own privacy and constitutional protections against unreasonable searches and seizures.

The admission of the evidence was not harmless and thus, requires reversal. State v. Davis, 154 Wn.2d 291, 305, 111 P.3d 844 (2005); State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Jerry Smith, declare and say:

That on the 7/30/12 day of 7/30/12, 2012, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. #67857-4-I:

Pro-se Supplemental Brief ;

_____ ;
_____ ;
_____ ;

addressed to the following:

Prosecutor's Office
King County Prosecuting
Attorney W554 King County
Courthouse 516 Third Ave
Seattle WA 98104.

Court of Appeals
600 UNIVERSITY ST.
ONE UNION SQUARE
SEATTLE, WA 98101

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

DATED THIS 7/30/12 day of 7-30-12 July, 2012, in the City of Aberdeen, County of Grays Harbor, State of Washington.


Signature

JERRY L. SMITH
Print Name

DOC 958879# UNIT H-5-B-68
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520