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NO. 70034-1-1

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

REC'D  
APR 04 2014  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM JONES,

Appellant.

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

The Honorable Timothy Bradshaw, Judge

REPLY BRIEF OF APPELLANT

DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ARGUMENT IN REPLY

1. THE INFORMATION CHARGING JONES WITH PROMOTING PROSTITUTION WAS CONSTITUTIONALLY DEFICIENT.

The information must give notice of all essential elements of the crime. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). The State does not dispute that the charging language for count 2 mistakenly indicated Jones was guilty if he did “knowingly attempt to advance prostitution” instead of the correct language “knowingly advances prostitution.” Instead, the State argues “attempt” had no practical impact.

Specifically, the State relies on the statutory definition of “advances prostitution,” which includes “conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.” RCW 9A.88.060(1). This language has been interpreted to encompass certain attempted activities. See State v. Cann, 92 Wn.2d 193, 198, 595 P.2d 912 (1979). Because one can advance prostitution by attempted conduct, reasons the State, it was not improper or misleading to describe the offense in the charging documents as an attempt to advance prostitution. See Brief of Respondent, at 17-19. The State is mistaken.

Had the charging documents indicated that Jones was guilty of Promoting Prostitution because, for example, he “did knowingly advance the prostitution of Tara Makepeace, i.e., engaged in conduct designed to institute, aid, or facilitate an act or enterprise of prostitution,” Jones would have been correctly informed. But this is not what they say. Rather than indicate attempted acts may qualify as “advancing prostitution,” the charging documents indicate Jones is guilty if he “attempts to advance prostitution,” a far more inchoate situation. Because “advancing prostitution” itself is defined as certain attempted acts, Jones was told he could be convicted if he merely attempted to attempt the prohibited conduct.

Jones’ situation is similar to that in State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997). Smith was charged with Conspiracy to Commit Murder in the First Degree. Instead of telling jurors the State had to prove Smith conspired with others to commit first-degree murder, the “to convict” instruction required jurors to find that Smith conspired to commit conspiracy to commit murder. In other words, the jury merely had to find that Smith conspired to conspire – much like the attempt to attempt in the amended information and second amended information prosecutors filed in Jones’ case. Smith, 131 Wn.2d at 261-62. Because the instruction

misstated an element of the charged crime, possibly resulting in conviction for a far more inchoate crime, the Supreme Court reversed Smith's conviction. Id. at 263-64.

While the "to convict" instruction in Jones' case did not repeat the error in the charging documents and properly described the elements of Promoting Prostitution, because charging documents – like "to convict" instructions – must include all elements of the charged offense, Smith presents a situation comparable to the mistake in Jones' charging documents.

It is permissible to charge Promoting Prostitution in the language of the statute because the statute defines the crime with certainty. State v. Merrill, 23 Wn. App. 577, 579-580, 597 P.2d 446 (1979). By adding "attempted" to that language, however, the crime was mis-defined with certainty. Jones' conviction for Promoting Prostitution in the Second Degree must be reversed. State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992).

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO DETECTIVE GUYER'S LENGTHY AND EMOTIONAL ANSWER ABOUT THE REWARDS OF WORKING IN THE VICE UNIT.

The State contends that defense counsel's failure to object was a thoughtful, tactical decision. Specifically, the State argues

defense counsel wanted Detective Guyer to discuss the benefits of helping victims of prostitution and their families so that defense counsel could contrast Johnson as “the exact opposite of the girls Guyer referred to in the testimony . . . .” Brief of Respondent, at 32.

The record does not support this attempted justification of counsel’s mistake. First, it would have to be assumed that defense counsel somehow knew what Detective Guyer intended to say in response to the very open ended and objectionable question, “What’s the most rewarding part of [your] work?” RP 155. The State does not explain how defense counsel could know this ahead of time and therefore tactically decline to prevent the answer.

Second, rather than providing a contrast, Detective Guyer’s description of the greatest rewards of his job largely describes Johnson’s circumstances. Guyer had just finished telling jurors that most of his cases involved prostitutes, many juveniles, where he would attempt to recover the girls. RP 155. After then being asked the most rewarding part of his job, Guyer talked about prostitution being the lowest point in these girls’ lives, how rewarding it is to show them they can still achieve their dreams despite the circumstances, and the satisfaction of assisting where “the parents are saying, please help us, you have to find our daughter, you know,

we don't know where she is, she's with bad people, help us out.”  
RP 155-157.

Johnson was merely 18 when these events took place, she was the subject of just such a recovery urged by her parents, and afterward she was able to put the greatest mistake of her life behind her, reunite with her family, and achieve her goal of attending college despite previously feeling she was without options and “in too deep.” RP 253, 280-281, 326-327, 330, 448-449, 498; CP 10. There was little in the way of contrast between Johnson and the girls Guyer discussed.

In further support of its suggested tactic, the State notes that defense counsel frequently suggested that Johnson may have wanted to exercise her independence and engage in prostitution activities for the money, providing a further supposed contrast between her and the victims of prostitution mentioned by Detective Guyer. Brief of Respondent, at 32-35. But these arguments were made to convince jurors that Jones was not guilty of Human Trafficking because he had not coerced Johnson into prostitution activities, an element of that offense. See CP 41; RP 560 (defense counsel tells jurors they are not there to decide if Johnson engaged in prostitution but, rather, “to determine whether or not she was

forced into doing so.”). Defense counsel could have made all these arguments without Detective Guyer’s very damaging testimony. To the extent defense counsel attempted to contrast situations, this was necessary only because of a self-inflicted wound, not legitimate strategy.

The State also argues that Jones cannot demonstrate prejudice because he was acquitted of Human Trafficking. Brief of Respondent, at 35. One does not follow from the other, however. Jones was acquitted on count 1 because the State overcharged him. The State simply could not demonstrate coercion. That jurors obviously could not convict on count 1 does not mean Detective Guyer’s emotional answer had no impact on count 2, where the evidence was a closer call.

Defense counsel conceded during closing argument that jurors probably could find Jones guilty of “some kind of prostitution” (likely Promoting Prostitution) regarding Johnson, but argued they had to acquit because he no longer faced that charge. RP 593; see also RP 587 (“this is realistically a prostitution case. This is not a human trafficking case.”). Thus, defense counsel actually admitted Jones’ involvement in the very conduct Guyer sought to prevent, but argued jurors could do nothing about it because Jones had

been overcharged in count 1. That jurors' hands were tied on count 1 would not have engendered juror sympathy for Jones on count 2.

Without counsel's mistake, there is a reasonable likelihood Jones would have been acquitted on count 2. Defense counsel argued that Jones' conversations with Makepeace fell short of Promoting Prostitution and were, instead, a precursor to that conduct. See RP 590-591. Jones has made this same argument on appeal in challenging the sufficiency of the evidence on that charge. See Brief of Appellant, at 16-19. Even if this Court ultimately finds the evidence sufficient to sustain Jones' conviction, Guyer's emotional answer engendered general disdain for Jones, thereby increasing the likelihood of conviction on count 2.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR OPENING THE DOOR TO EVIDENCE JONES WAS ASSOCIATED WITH THE CRIPS GANG.

As with Detective Guyer's improper narrative, the State argues that opening the door to evidence Jones was associated with Crips gang members was not a serious and costly mistake; instead, it was a legitimate trial strategy to show Makepeace was not intimidated by Jones. See Brief of Respondent, at 39.

As the State concedes, whether Jones used intimidation was only relevant to the charge involving Johnson in count 1. Brief of

Respondent, at 39-40. And, since intimidation was irrelevant to the charge in count 2 involving Makepeace, whether Jones intimidated *her* was of little importance. Competent counsel would not, therefore, open the door to evidence Jones had ties to gang members in an attempt to impeach Makepeace on this point, especially since it was already clear Makepeace was not too intimidated (she admitted telling Jones she would be his worst nightmare and she went to police). See RP 418-419, 432. Yet, counsel did so, permitting jurors to consider one of the most inherently prejudicial subjects for a criminal defendant. See State v. Mee, 168 Wn. App. 144, 160-161, 275 P.3d 1192, review denied, 175 Wn.2d 1011, 287 P.3d 594 (2012).

The State also argues, as it did concerning Detective Guyer's emotional answer, that Jones cannot demonstrate prejudice because he was acquitted on count 1. See Brief of Respondent, at 39-40. But, as already discussed, acquittal on count 1 was inevitable given that Jones was overcharged. Nothing was going to change that. Jurors were not limited to considering this improper and previously excluded gang evidence solely on count 1. Makepeace's testimony that Jones "was threatening me

with his Crip gang” also put Jones in a very bad light generally and made conviction more likely on count 2.

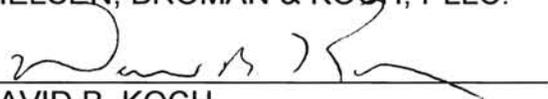
B. CONCLUSION

For all of the reasons discussed in Jones’ opening brief and above, this Court should reverse Jones’ conviction and remand for a new trial.

DATED this 4<sup>th</sup> day of April, 2014.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
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DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

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WILLIAM JONES,	)	
	)	
Appellant.	)	

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**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 4<sup>TH</sup> DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM JONES  
DOC NO. 888764  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 4<sup>TH</sup> DAY OF APRIL 2014.

X *Patrick Mayovsky*

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