IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TUROMNE ANDREW WASHINGTON, Appellant.	)	No. 62144-1-I (Consolidated) DIVISION ONE
STATE OF WASHINGTON, Respondent, v. JOSEPH FAATTUI OLIVE, Appellant.	)	No. 62211-1-I UNPUBLISHED FILED: August 23, 2010

Cox, J. — In these consolidated cases, Turomne Washington and Joseph Olive both claim they were denied effective assistance of counsel by their respective trial attorneys. We agree that both counsel rendered deficient performance to their clients by misadvising them of the potential sentencing consequences of the charged crimes. But neither Washington nor Olive has affirmatively established prejudice under the governing test for ineffective assistance of counsel. Moreover, trial counsel did not provide deficient

performance by failing to request lesser included instructions to the charges. There was no factual basis for such requests. We also conclude that the acts of Washington and Olive in this case constituted continuing courses of conduct. Unanimity instructions were not required. We affirm.

In January 2008, C.W. and her best friend, C.J., visited Seattle from the Bellingham area for a weekend. Both girls were then 17 years old. They came to Seattle with C.W.'s mother.

The first night of their visit, January 4, 2008, the two girls left C.W.'s mother and headed toward the Delridge Community Center. On the way, they encountered Joseph Olive, whom C.W. had met when she was 14 or 15 years old. After spending about an hour in a park with Olive and one of his friends, the girls left. Before they left, Olive told C.W. he would call her the next day.

The next day, Olive picked up the two girls. Turomne Washington was in the car with Olive. At some point that day, Olive talked to C.W. alone and told her that he wanted her to work for him as a prostitute. Similarly, Washington talked to C.J. alone and told her that she needed to "get out there . . . and make money." C.J. understood from this conversation that he wanted her to engage in prostitution. Olive and Washington drove them to a point on Highway 99 and gave the girls instructions to call Washington after they made money from turning tricks.

Based on events starting that day, the State charged both Olive and Washington with two counts of promoting commercial sexual abuse of a minor. Count I for each defendant was based on his acts with respect to C.J. Count II

for each defendant was based on his acts with respect to C.W.

Before trial, Stacey MacDonald, appointed counsel for Olive, advised him that the charged offenses carried a seriousness level of III on the sentencing grid. That would have subjected him to a standard sentencing range of four to 12 months upon conviction based on his offender score.

Justin Wolfe, appointed counsel for Washington, similarly advised Washington that the charged offenses carried a seriousness level of III on the sentencing grid. That would have subjected him to no prison time upon conviction based on the fact he had no prior felony convictions.

In fact, at the time of the alleged offenses, promoting commercial sexual abuse of a minor was a level VIII offense on the sentencing grid.[1] This subjected both defendants to substantially longer sentences upon conviction than trial counsel had advised.

After a joint trial, a jury convicted Washington and Olive as charged. Counsel for both defendants first discovered their errors as to the seriousness level of the offenses after the jury verdicts. The trial court granted counsels' respective motions to withdraw, and appointed new counsel for each defendant.

Through new counsel, Washington and Olive moved for a new trial. Among other things, they claimed that they had been denied the effective assistance of counsel. Both motions were primarily rooted in the failure of trial counsel to correctly advise them of the sentencing consequences of the charged offenses. The trial court denied both motions.

[1] Former RCW 9.94A.515 (2007).

The trial court sentenced Washington to 36 months of confinement. The court also sentenced Olive to 36 months of confinement.

Washington and Olive appeal. We consolidated their cases for review.

EFFECTIVE ASSISTANCE OF COUNSEL

Washington and Olive claim that their respective trial attorneys provided ineffective assistance primarily by misadvising them that the seriousness level of the charged crimes was at level III rather than level VIII of the sentencing grid. The State properly concedes that these failures constitute deficient performance. Nevertheless, the failure of either Washington or Olive to show affirmatively prejudice from the deficient performances defeats their ineffective assistance of counsel claims.

Incorrect Advice of Seriousness Level of Charged Crimes

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[2] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[3] But even deficient performance by counsel does not warrant setting aside the judgment of a criminal proceeding if the error had no

[2] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[3] McFarland, 127 Wn.2d at 336.

effect on the judgment.[4] "A defendant must *affirmatively prove prejudice*, not simply show that 'the errors had some conceivable effect on the outcome.'"[5] In doing so, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[6] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[7]

The State correctly concedes that the trial attorneys for Olive and Washington provided deficient performance by failing to advise their respective clients of the correct seriousness level on the sentencing grid. This deficient advice caused the attorneys to conclude that an incorrect standard range applied to each of their respective clients in the event of conviction of the charges.

In 2007, the legislature created the crime of promoting commercial sexual abuse of a minor.[8] In the same session law, the legislature revised the Sentencing Reform Act to provide that the crime was a level VIII offense.[9] The statutory changes became effective in July 2007.[1] The State charged Washington and Olive with crimes alleged to have been committed in January 2008. Thus, it is clear that the seriousness level for these charges would then

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[4] State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (citing Strickland, 466 U.S. at 691).
[5] Id. (quoting Strickland, 466 U.S. at 693).
[6] Id. at 99-100 (quoting Strickland, 466 U.S. at 694).
[7] Id. at 100 (quoting Strickland, 466 U.S. at 694).
[8] Former RCW 9.68A.101 (Laws of 2007, ch. 368, § 4).
[9] Laws of 2007, ch. 368, § 14.
[1] Laws of 2007, ch. 368.

have been at level VIII, not level III.[11]

Because the State properly concedes that the deficient performance prong of the test is satisfied, we turn to the question of prejudice.[12] Washington first argues that his trial attorney's failure to correctly inform him of the correct seriousness level and standard range deprived him of the opportunity to pursue a beneficial plea bargain. Specifically, Washington argues that plea bargaining was "discussed informally, but not reduced to a formal offer, apparently in large part because Washington's counsel did not pursue an offer."

In evaluating whether Washington has affirmatively shown prejudice, we first examine the declaration of his trial attorney, Justin Wolfe. In that document, he testifies that he "discussed possible plea resolutions" with the first prosecutor working on the case, Zach Wagnild." Wolfe further testifies:

> 9. On April 21st, 2008 I received an email from Deputy Prosecuting Attorney Sean O'Donnell inquiring what plea arrangement Mr. Washington [would] consider.
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> 10. On May 6th, 2008 I met with Mr. Washington and a family member in my office. We spent several hours reviewing evidence in his case and discussing potential plea arrangements. At this time Mr. Washington was still under the impression that he was not looking at a prison sentence if convicted.
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> 11. On May 7th, 2008 I formally responded to Mr. O'Donnell with an offer and invited a counteroffer in the event the State rejected the offer.
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> 12. No response to the May 7th offer or invitation to counter-offer was ever received.[13]

There is no declaration or other testimony of Washington regarding the issue of

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[11] Former RCW 9.68A.101; former RCW 9.94A.515.
[12] See Strickland, 466 U.S. at 697.
[13] Clerk's Papers (Washington) at 96-97.

ineffective assistance of counsel.

The Wolfe declaration makes clear that he consulted with Washington and then made a plea offer in response to the deputy prosecutor's request. The testimony also shows that he invited a counteroffer in the event that the deputy prosecutor rejected Washington's offer. There is no discussion in the declaration about the substance of the offer Wolfe made. Finally, the record shows that Wolfe never received a reply from the State. In sum, the record does not support the claim that Wolfe failed to pursue a beneficial plea bargain. He pursued plea negotiations, but there is no evidence that they went anywhere beyond the initial stages. The absence of any explanation of the nature of Wolfe's response to the State with an offer or his invitation for a counteroffer makes it impossible to assess whether anything beneficial would have come about. This falls far short of the affirmative showing that Washington is required to make to substantiate a claim for ineffective assistance of counsel. There appears to have been no plea offer for him to contemplate accepting.

Washington cites In re Personal Restraint of McCready[14] and State v. Holm[15] for support. In McCready, a divided Division Three panel of this court concluded that McCready received ineffective assistance of counsel where his attorney did not advise him of a mandatory minimum sentence.[16] McCready claimed he would have accepted the State's plea offer of a lesser charge had he known about that mandatory minimum.[17] The court concluded that counsel's

[14] 100 Wn. App. 259, 996 P.2d 658 (2000).
[15] 91 Wn. App. 429, 957 P.2d 1278 (1998).
[16] McCready, 100 Wn. App. at 262-63, 265.

performance was deficient and that the error prejudiced McCready.[18] The facts of the underlying crime showed certain mitigating circumstances in favor of McCready.[19] The court concluded that if McCready had realized that 10 years was "the absolute minimum sentence he would receive" for the charged crimes, "he may have made a different choice. He may have decided not to take the chance on acquittal by reason of self-defense or on an exceptional sentence and, instead, opted for the plea bargain."[2]

Here, there is no evidence that any plea offer was ever made by the State. Instead, the record shows that counsel invited a plea offer from the State and that the State did not respond. Moreover, there is no argument of any mitigating circumstances here that would have supported a lower sentence and potentially affected Washington's decision to go to trial, as in McCready. In fact, the declaration from Olive's attorney, Stacey MacDonald, states that the deputy prosecuting attorney "conveyed to defense that he would not offer a deal unless both co-defendants plead guilty." As discussed further with respect to Olive below, there is no evidence in this record that both defendants were prepared to plead guilty to anything. Washington's claim amounts to speculation, not affirmative proof of prejudice. For these reasons, McCready is distinguishable.

In Holm, this court discussed the circumstances under which defense counsel's failure to pursue plea discussions could constitute ineffective

[17] Id. at 263.
[18] Id. at 263-65.
[19] Id. at 264.
[2] Id. at 265.

assistance of counsel.[21] As we have already explained, Washington's trial counsel did pursue plea negotiations. This is distinct from the facts of Holm where counsel failed to do so. Thus, Holm is also inapplicable.

Olive also argues that his attorney's deficient performance prevented him from making an informed decision about whether to go to trial. The sum of his argument is that "because defense counsel was unaware that Olive faced a substantial risk if he went to trial, as opposed to pleading guilty to a reduced charge, counsel discouraged Olive from pleading guilty and, based on her incorrect advice, Olive himself did not believe a guilty plea was worth pursuing."[22]

We hold that this argument does not meet Olive's required burden.

We again first turn to the declaration of trial counsel to determine whether Olive has made the required affirmative showing of prejudice.

MacDonald's declaration to the trial court states,

> I contacted the Deputy Prosecuting Attorney, Sean O'Donnell to request a deal so that Mr. Olive could plead guilty to a lesser charge of Promoting Second. O'Donnell conveyed to defense that he would not offer a deal unless both co-defendants plead guilty.[23]

Olive's declaration to the trial court is more expansive. The declaration states, in relevant part,

> 4. Before my trial, Stacey MacDonald also told me about two plea deals the prosecutor offered. The first deal was to plead guilty and receive a 20 month sentence. The second plea offer was to plead guilty to one of the counts of Promoting Commercial Sexual Abuse of a Minor and the prosecutor would drop the other charge. The

[21] Holm, 91 Wn. App. at 437-39.
[22] Brief of Appellant Olive at 19.
[23] Clerk's Papers (Olive) at 105.

> Prosecutor would have recommended a sentence of 9 to 12 months.
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> 5. I turned down both of the State's plea offers because I was under the impression, based on Stacey MacDonald's advice, that I would receive a sentence between 4 and 12 months if I was found guilty at trial.
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> . . . .
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> 10. My attorney admitted that she advised me wrong and I don't feel like I was treated fairly at the time I had to choose to go to trial because I didn't have all the information.
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> 11. Had I known the actual sentencing range for Promoting Commercial Sexual Abuse of a Minor was 36 to 48 months and that I would have to register as a sex offender, I would have taken one of the plea offers made by the State. I would have made very different choices instead of going to trial.[24]

We first note that MacDonald's declaration makes no mention of any of the alleged offers that Olive describes. Surely, as defense counsel for Olive, any such offers would have been known to her. Moreover, we presume that if any such offers had been made and she had communicated them to Olive, that testimony would have been in her declaration to buttress her former client's case. Yet, there is nothing in her declaration to substantiate Olive's version of events.

Deputy Prosecuting Attorney O'Donnell also submitted a declaration to the trial court. It states, in part,

> 4. I have reviewed the file for any offer(s) made to either defendant prior to me receiving these cases. I have conferred with the supervising deputy prosecutors, Zach Wagnild and the unit chair, Lisa Johnson. No one from my office made any offers to either defendant before I received these cases.
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> 5. During the time that I had these cases, I never made any formal

[24] Clerk's Papers (Olive) at 113-14.

> offer to the defendants or their lawyers. Any discussions we had about resolving the cases were non-binding, speculative and informal.
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> 6. The decision to reduce charges is not mine alone. My office's protocol requires that I consult with the victims and police before reducing a charge. I must also have the express approval of the unit chair or her immediate designee. I neither sought, nor obtained, the approval to reduce charges in this case as a result of plea negotiations.
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> . . . .
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> 8. . . . I never reduced or promised to reduce charges for either defendant.[25]

A fair evaluation of this record supports the conclusion that Olive has also failed to fulfill his burden to make an affirmative showing of prejudice. Absent an offer from the State, what he would have done if such an offer had been made is pure speculation.

Olive argues that the statements in his declaration are sufficient to establish that the outcome of plea bargaining would have been different had he received accurate advice from MacDonald. We disagree.

Division Three of this court dealt with a similar question in State v. Cox.[26] In that case, counsel failed to advise Cox that community placement was a mandatory requirement in cases of third degree assault.[27] Cox rejected the State's plea offer for fourth degree assault.[28] On appeal, Cox claimed that he would have accepted the State's offer had he known of the community

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[25] Clerk's Papers (Washington) at 121-22.
[26] 109 Wn. App. 937, 38 P.3d 371 (2002).
[27] Id. at 939-40.
[28] Id. at 938-39.

placement requirement.[29] The court held that Cox's after-the-fact, self-serving claims were insufficient to establish that he suffered prejudice, noting, "Mr. Cox invites us to speculate about why he rejected the plea offer."[3]

Olive argues that Cox should not apply here because Cox had already served his prison sentence at the time he sought to relieve himself of community placement. But here, even more speculation is required to find prejudice to Olive than was present in Cox. In addition to Olive's after-the-fact claims that he "would have taken one of the plea offers made by the State" if he had received accurate advice, Olive is asking the court to accept as true that any "offers" existed. As we have explained, this assertion is not corroborated by former defense counsel, one of two other possible persons who would have had personal knowledge of such offers. The deputy prosecutor also denies either any authority to make an offer or that an offer was made. Olive has not refuted that testimony in any persuasive manner.

This is not to say that there are not situations in which the court may find prejudice even if the State has not made a formal offer. But here, it would be a closer question if the plea discussions had advanced to a more concrete stage. Olive cites United States v. Gordon,[31] a case from the United States Court of Appeals for the Second Circuit, to argue that the lack of a formal plea offer is irrelevant to the question of prejudice. But there, unlike here, the defendant's counsel and the government agreed with the defendant's representations that

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[29] Id. at 941.
[3] Id.
[31] 156 F.3d 376 (2nd Cir. 1998).

the government had in fact made an offer to Gordon.[32] Defense counsel informed the district court of a specific plea offer on the record at a pretrial conference.[33] At the sentencing hearing, the government also stated details about the terms of its plea offer to Gordon.[34] Thus, the Second Circuit agreed with the district court's conclusion "that whether the government had made a formal plea offer was irrelevant" because Gordon was prejudiced by not having accurate information upon which to decide whether to pursue further plea negotiations or go to trial.[35] Here, unlike in Gordon, it is much less apparent that a plea was available. Gordon is not persuasive here.

In sum, neither Washington nor Olive has affirmatively proven prejudice in this regard.[36]

Lesser Included Instruction

Washington next claims that he was prejudiced because properly-informed counsel would have sought and received a lesser included offense instruction. He speculates that that would have resulted in a better outcome at trial for him. Similarly, Olive claims that his counsel did not pursue an instruction for attempted promoting commercial sexual abuse of a minor because of her erroneous belief that he faced, at most, a 12-month sentence. We are unpersuaded by any of these arguments.

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[32] Id. at 377-78.
[33] Id. at 377.
[34] Id. at 378.
[35] Id. at 380.
[36] See Crawford, 159 Wn.2d at 99 (defendant must affirmatively prove prejudice, not simply show that the errors had some conceivable effect on the outcome (quoting Strickland, 466 U.S. at 691)).

An ineffective assistance of counsel claim based upon the failure to propose an instruction for a lesser included offense fails if the trial court would properly have declined to give the instruction.[37] A defendant has the right to have a lesser included offense presented to the jury if (1) all the elements of the lesser offense are necessary elements of the charged offense (the legal prong), and (2) the evidence supports an inference that only the lesser crime was committed (the factual prong).[38] Under the factual prong, "the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense."[39]

An attempted crime involves two elements: the intent to commit a specific crime and taking a substantial step toward its commission.[4] Commercial sexual abuse of a minor occurs when a person pays a minor to engage in sexual conduct with him.[41] A person is guilty of promoting commercial sexual abuse of a minor if he or she knowingly advances the commercial sexual abuse of a minor or profits from a minor engaged in sexual conduct.[42] 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."[43]

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[37] State v. Shcherenkov, 146 Wn. App. 619, 629-30, 191 P.3d 99 (2008), review denied, 165 Wn.2d 1037 (2009).

[38] Id. (citing State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006); RCW 10.61.006).

[39] State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

[4] State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (citing RCW 9A.28.020(1); State v. Chhom, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996)).

[41] Former RCW 9.68A.100 (2007).

[42] Former RCW 9.68A.101 (2007).

Here, only the factual prong of the lesser included offense test is at issue.[44] To prevail, Washington and Olive must show that the evidence raises an inference that ***only*** the lesser included offense was committed, to the exclusion of the charged offense.[45] They cannot do so because the evidence establishes that Washington and Olive, as accomplices, each committed two counts of the crime. There is no evidence to show that either defendant only attempted to commit the crimes charged.

Specifically, as to count I for both Washington and Olive, C.J. testified that Washington and Olive picked her and C.W. up from White Center on the second night that the girls were in the Seattle area. Olive was driving the car and Washington was in the passenger seat. The four drove around for awhile, and eventually ended up at a lookout point. Olive and C.W. left C.J. alone in the car with Washington. Washington told C.J. that she needed to "get out there and make money and see what the night life's like" if she wanted "to do things in life." She asked him how she could make money, and he told her she could by prostituting. Though he did not use the word "prostituting," he "[d]escribed it some other way," and C.J. knew what he meant. C.J. told him, "I wasn't like that, that I had respect for myself, that I wasn't gonna do that." Later in the evening, when C.J. and C.W. had a moment alone, C.J. found out that Olive had also asked C.W. to prostitute for him.

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[43] Former RCW 9.68A.101(3)(a) (2007).

[44] See State v. Gallegos, 65 Wn. App. 230, 234, 828 P.2d 37 (1992) (an attempted crime is a lesser included offense of the crime charged (citing RCW 10.61.010)).

[45] Fernandez-Medina, 141 Wn.2d at 455.

Washington and Olive drove C.J. and C.W. around for awhile, at some point stopping in an area of town that C.J. did not know. Olive and C.W. got out of the car, and then C.W. walked off without telling C.J. where she was going. That left C.J. alone in the car with Olive, Washington, and "some other guy." When C.J. asked where C.W. was going, Washington and Olive told C.J. that C.W. "has to go to work. Leave her alone. Don't bother her. Don't talk to her." They were using a tone of voice that was "[l]ike an order." C.J. tried to get out of the car, but Olive got in the backseat and blocked her from getting out. The men told her if she got out of the car, then she also had to prostitute or she would not get a ride home. Washington and Olive told her she was not going to get a ride home if she did not make any money. She was supposed to make money by having sex. C.J. felt afraid. She did not have any money on her and her cellular phone was not working. Eventually, C.J. "told them that, fine, I'd do it because I was worried about [C.W.] and wanted to go after her."

C.J. got out of the car and walked around. She was supposed to call Washington once she got money. One man paid her $10 to have sex with him at a motel and a second man paid her $40. She called Washington and told him where she was. He asked her how much money she had made. He told her that C.W. had made more money than she did and "sounded upset." Still, Washington told her he would come pick her up. He never did.

This evidence shows that neither Washington nor Olive was entitled to a lesser included instruction of attempt for count I. Washington and Olive both engaged in conduct designed to "aid, cause, assist, or facilitate" acts of

commercial sexual abuse of C.J., a minor. In doing so, their conduct met the definition of the crime charged.[46] The evidence does not show that Washington or Olive merely attempted to commit the crime.

As to count II for both defendants, C.W. testified that Olive "talked to me about working for him" and wanted her "to go out there and make money." She realized he wanted her to "start prostituting" but she did not want to do it. When she asked if he wanted her to be a prostitute, he said, "I just want you to go make money, you know, go out there . . . pull some tricks, make some money, do what you do." After Olive and Washington drove C.W. and C.J. to a certain location, Olive gave C.W. a pair of high-heeled shoes and an energy drink. Olive told C.W. "to go out there and he said that once I get a trick, to call him." C.W. was instructed to call Washington, "because [Washington] was with [Olive]" and "was going to be with [Olive] the whole time." C.W. gave the money she received from two "tricks" to Olive. C.W. saw Olive give Washington some of that money, and Washington went into a motel and got a room for all of them.

This evidence shows that neither Washington nor Olive was entitled to a lesser included instruction of attempt for Count II. Olive's actions "aid[ed], cause[d], assist[ed], or facilitate[d]" acts of commercial sexual abuse against C.W., a minor.[47] Washington and Olive both profited from a minor engaged in sexual conduct.[48] Thus, both defendants' conduct met the definition of the crime as charged.[49] As with count I, the evidence does not show that Washington or

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[46] Former RCW 9.68A.101 (2007).
[47] Former RCW 9.68A.101 (2007).
[48] Id.

Olive merely attempted to commit the crime charged in count II.

Furthermore, Washington and Olive's arguments ignore the role of accomplice liability in their cases. The to-convict instructions for both counts for both defendants allowed the jury to convict if it found that the "the defendant, or an accomplice," committed the offenses. To the extent that Washington argues that he was less culpable with respect to C.W. and Olive argues that he was less culpable with respect to C.J., these arguments are flawed. The trial court instructed the jury on accomplice liability. The evidence is sufficient to prove that Washington and Olive were each accomplices of the other. This further supports the conclusion that the trial court would have properly declined to give lesser included instructions if counsel had proposed them. Washington and Olive have not shown that they were prejudiced by their counsels' failure to propose lesser included instructions. Because there was no evidence to support the giving of lesser included instructions, we need not speculate on what a jury would have done had such instructions been given.

There was no ineffective assistance of counsel by failure to request lesser included instructions.

UNANIMITY INSTRUCTION

Washington and Olive make related arguments regarding the lack of a unanimity instruction at trial. Washington argues that the trial court's failure to give a unanimity instruction deprived him of his constitutional right to a unanimous jury verdict. Olive argues that he was denied effective assistance of

[49] Id.

counsel because his counsel failed to request a unanimity instruction. We disagree with both arguments.

Criminal defendants in Washington have a right to a unanimous jury verdict.[5] Where the State alleges multiple acts and any one of them could constitute the crime charged, the jury must be unanimous as to which act or incident constitutes the crime.[51] The constitutional requirement of unanimity is assured by either (1) requiring the prosecution to elect the act upon which it will rely for conviction, or (2) instructing the jury that all 12 jurors must agree that the same criminal act has been proved beyond a reasonable doubt.[52] The instruction is based on State v. Petrich[53] and its progeny.

The Petrich rule applies "only where the State presents evidence of 'several distinct acts.'"[54] It does not apply where the evidence indicates a "continuing course of conduct."[55] To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner.[56]

This court has recognized that a defendant's acts of promoting prostitution may constitute a continuing course of conduct. In State v. Gooden,[57]

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[5] State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (citing Const. art. I, § 21).

[51] State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

[52] State v. Barrington, 52 Wn. App. 478, 480, 761 P.2d 632 (1988) (citing State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)).

[53] 101 Wn.2d 566, 683 P.2d 173 (1984).

[54] State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (internal quotation marks omitted) (quoting Petrich, 101 Wn.2d at 571).

[55] Id.

[56] Id.

[57] 51 Wn. App. 615, 754 P.2d 1000 (1988).

Gooden pressured two teenage girls into working as prostitutes for a 10-day period.[58] Gooden appealed his conviction of two counts of promoting prostitution in the first degree, claiming that the court should have given a unanimity instruction.[59] The court rejected the claim, holding:

> Promoting prostitution is a continuing course of conduct which falls within the Petrich exception. In the case sub judice, the State needed only to prove that Gooden advanced or promoted prostitution; the State met that burden. Gooden used W and V to promote an enterprise with a single objective. That objective was to make money. The enterprise or continuing course of conduct occurred over a 10-day period in which Gooden was in constant association with the girls. He took all of W's money, provided shelter for both of the girls, bought them new clothes, told them what to charge for various sex acts and what to say when questioned about their age, drove them to spots known for prostitution or rented them motel rooms, and had them report back and give him the money they earned.[6]

Similarly, in State v. Barrington,[61] the court held that no unanimity instruction was required where there was evidence that Barrington promoted prostitution over a three-month period of time.[62] The court observed that the testimony about various incidents of prostitution "were primarily illustrative of the nature of the enterprise rather than solely descriptive of separate distinct acts or transactions."[63] The court held:

> Here the uncontroverted evidence persuasively pointed to the promotion of a prostitution enterprise conducted over a period of about three months in which Barrington received the profits from Lott's prostitution, not separate distinct acts occurring in a separate time frame and identifying place as in Petrich. Neither a unanimity

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[58] Id. at 616, 620.
[59] Id. at 616.
[6] Id. at 620.
[61] 52 Wn. App. 478, 761 P.2d 632 (1988).
[62] Id. at 482.
[63] Id. at 481.

instruction nor an election was necessary.[64]

Because substantial evidence supported Barrington's course of conduct, a unanimous verdict was received and there was no error.[65]

Here, the State charged Washington and Olive with two counts of promoting commercial sexual abuse of a minor in violation of RCW 9.68A.101. None of the parties requested a Petrich instruction and the court did not give one.

As Washington acknowledges, the elements of the crime of promoting prostitution are very similar to the elements of the crime of promoting commercial sexual abuse of a minor.[66] As described in more detail in the preceding section, the testimony at trial established that Washington and Olive encouraged and pressured C.W. and C.J. into working as prostitutes, transported them to an area to work as prostitutes, and demanded that they turn over any money they made. Viewed in a commonsense manner, the State's evidence demonstrated a continuing course of conduct. As in Gooden and Barrington, the defendants

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[64] Id. at 482.

[65] Id.

[66] Compare former RCW 9.68A.101(1) (2007) ("A person is guilty of promoting commercial sexual abuse of a minor if he or she knowingly advances commercial sexual abuse of a minor or profits from a minor engaged in sexual conduct.") and (3) ("A person 'advances commercial sexual abuse of a minor' if . . . he or she causes or aids a person to commit or engage in commercial sexual abuse of a minor . . . or engages in any other conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor.") with RCW 9A.88.070 ("A person is guilty of promoting prostitution in the first degree if he or she knowingly advances prostitution . . . .") and RCW 9A.88.060 ("A person 'advances prostitution' if . . . he causes or aids a person to commit or engage in prostitution . . . or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.").

used C.W. and C.J. to promote an enterprise with a single objective: to make money through the girls' acts of prostitution.

Washington and Olive argue that their conduct with respect to C.J. was too brief to constitute a continuing course of conduct or an "enterprise." They also argue that their conduct with respect to C.W. cannot constitute a continuous course of conduct because C.W. left Olive's supervision for a number of days. C.W.'s testimony was that she "[b]asically" worked for a pimp named Jason for a couple of days, but did not tell Olive that. She went back to working for Olive and Washington later in the week. But this evidence does not negate the fact that the defendants' overall scheme was to make money by promoting the commercial sexual abuse of C.J. and C.W. Gooden and Barrington focus on the conduct of the defendant in the course of committing the crime, not on the actions of the victims. The length of time that C.J. and C.W. worked for Washington and Olive does not undermine the conclusion that the evidence showed that the defendants were engaged in a continuous course of conduct.

MOTION FOR NEW TRIAL

Olive argues that the trial court abused its discretion in denying his motion for a new trial because substantial justice was not done. We hold that the trial court did not abuse its discretion in denying this motion.

Under CrR 7.5(a)(8), a trial court may grant a new trial when "substantial justice has not been done." The decision to grant or deny a new trial will not be disturbed unless it constitutes a manifest abuse of discretion.[67]

[67] State v. Dawkins, 71 Wn. App. 902, 906, 863 P.2d 124 (1993) (citing

Here, Washington and Olive have not shown ineffective assistance of counsel. Thus, there is no showing that the trial court abused its discretion in denying the post trial motions.[68]

We affirm the judgments and sentences for Washington and Olive.

Cox, J.

WE CONCUR:

Appelwick, J.

Ellington, J.

State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989)).

[68] See Dawkins, 71 Wn. App. at 906-11 (affirming the trial court's decision to grant a motion for new trial where the defendant showed ineffective assistance of counsel).