Case № 20090084-CA

In the Utah Court of Appeals

State of Utah,
Plaintiff *and* Appellee,

-*v*-

S. Steven Maese,
Defendant *and* Appellant.

Reply Brief *of* Appellant

Appeal from convictions for a Pattern of Unlawful Activity, a second degree felony under Utah Code Ann. § 76-10-1603.5; and four counts of Exploiting Prostitution, third degree felonies under Utah Code Ann. § 76-10-1305(2).

This judgment was entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Randall N. Skanchy presiding.

LAURA B. DUPAIX (5195)
ASSISTANT UTAH ATTORNEY GENERAL
160 EAST 300 SOUTH, 6TH FLOOR
P.O. BOX 140854
SALT LAKE CITY, UTAH 84114-0854

Counsel for Appellee

S. STEVEN MAESE

Appellant Pro Se

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Argument

POINT I. In this case, the invited error doctrine is inapplicable and therefore Mr. Maese's issues are preserved and ripe for decision.

The invited error doctrine, a form of estoppel, precludes a party from grieving an error he led the trial court into committing.[1] In *Pratt v. Nelson*, the Utah Supreme Court wrote that invited error discourages litigants from "intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal." And it encourages "counsel to actively participate in all proceedings and to raise any possible error at the time of its occurrence." The doctrine also fortifies this Court's "long-established policy that the trial court should have the first opportunity to address a claim of error."[2] But to create invited error, a party must make an affirmative representation to the trial court that "encourage[s] it to proceed without further consideration of the issues."[3]

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[1] *Pratt v. Nelson*, 2007 UT 41, ¶ 17, 164 P.3d 366.

[2] *Ibid*. (internal quotations and citations omitted).

[3] *Id*. at ¶ 18.

In *United States v. Teague* the Tenth Circuit Court of Appeals held these affirmative representations waive a party's right to complain about the created error: "…a party that has *forfeited* a right by failing to make a proper objection may obtain relief for plain error; but a party that has *waived* a right is not entitled to appellate relief."[4] Invited error effectively extinguishes error because the underlying right is waived.

Despite *ostensible* waiver, this Court may review certain errors. When a trial court issues a post-trial ruling on an error's merits, the court preserves its reviewability, resuscitating it. Moreover, some rights are nonwaivable; immune from invited error.

Here, the State essentially concedes errors at trial occurred. Yet it contends that Mr. Maese invited these errors. Under its theory, Mr. Maese waived his right to adequate notice, jury unanimity, to be convicted of charged crimes only, and to be convicted upon sufficient evidence beyond a reasonable doubt.[5]

Yet the record shows, Mr. Maese unequivocally asserted his right to adequate notice. Moreover, the State fails to account for the trial court's post-trial ruling and disregards the underlying—and nonwaivable—rights these instructions should have conveyed.[6]

A. Mr. Maese did not invite the trial court's failure to rule on his Motion for Bill of Particulars. Rather, he gave the trial court an opportunity to rule on his motion. It denied his motion but failed to issue a formal ruling.

The State concedes that: Mr. Maese filed a timely motion for bill of particulars; the State opposed the Motion; Mr. Maese filed a reply memorandum; and that the trial court held oral arguments on this Motion and promised to issue a ruling on the merits.[7] The record

[4] *United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006) (emphasis in original).

[5] Brief of Appellant at 16-21, 37-41, 64, 50, respectively.

[6] Utah Constitution, Article I, Sections 10 & 13.

[7] Brief of Appellee at 16-17.

shows that Mr. Maese provided the trial court with ample opportunity to rule on his motion. Yet despite this, the State argues he invited error. The State is wrong.

1. *The trial court's vague readiness question was separate and distinct from its effective denial of Mr. Maese's Motion for a Bill of Particulars.*

In *Pratt v. Nelson*, the Utah Supreme Court wrote that, "invited error generally occurs in [an] affirmative manner, such as where counsel stipulates to the court's instruction, states directly that there is no objection to *a specific ruling* of the court, or provides the court with erroneous authority upon which the court relies."[8]

In this case, the trial court asked the parties if they were ready to proceed with trial; both answered yes. The question before the court is: Does the trial court's general question equal a specific ruling or permission from counsel to decline ruling? It does not.

Yet the State attempts equating the two with a logic-defying leap. It asserts, "That statement affirmatively represented to the court that Defendant, in fact, did have sufficient notice to adequately prepare a defense and that a bill of particulars was unnecessary."[9] A simple "yes," in response to a general question, cannot convey the particularized affirmative representation the State wishes it to and certainly did not "deprive[] the trial court of an opportunity to avoid any error or prejudice to Defendant."[10]

The State then compares this case to *State v. Lowder*. This is a faulty syllogism. Lowder received a bill of particulars but did not ask for a continuance; he then complained the time between bill and trial was insufficient. Yet here, as the State footnotes,

[8] *Pratt v. Nelson*, 2007 UT 41, ¶ 23, 164 P.3d 366 (emphasis added).

[9] Brief of Appellee at 22.

[10] *Ibid*.

the trial court's failure to rule on Mr. Maese's motion for a bill of particulars resulted in its effective denial.[11] The State's argument, that Mr. Maese should have begged, is moot.

Although adequate notice was crucial to Mr. Maese's defense—the reason he moved for a bill of particulars—the trial court was unwilling to grant his motion.

2. *This issue is analogous to State v. Rosa-Re where the Utah Supreme Court recognized a timely, but unresolved, objection as preserved.*

The facts regarding this issue are analogous to *State v. Rosa-Re*, which the Utah Supreme Court decided just 18 days after Mr. Maese's trial concluded.[12] In that case, Rosa-Re raised a timely *Batson* challenge but continued with trial. There, "the trial court asked, 'Is this the jury you selected?' Defense counsel replied, 'Yes, Your Honor.'"[13] Upon hearing this, the trial court failed to resolve the objection, swore in the jury, and excused the remaining venire. Despite these facts, the *Rosa-Re* Court held that Rosa-Re "raised the objection in accordance with the Utah Rules of Criminal Procedure… and the case law at the time of the trial"[14] and preserved the issue for appeal.

In this case, Mr. Maese and the State fully briefed the bill of particulars issue and the trial court held oral arguments. Undisputedly, all parties understood Mr. Maese's clearly articulated grievance; a stronger objection than in *Rosa-Re*. Then, the trial court asked if he was ready to proceed with trial; a less specific question than in *Rosa-Re*. Moreover, Mr. Maese agrees with the State that trial court's failure amounted to an effective denial. Rose-Re preserved his issue; *a fortiori*, Mr. Maese preserved this issue for appeal.

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[11] Brief of Appellee at 23, fn. 5.

[12] *State v. Rosa-Re*, 2008 UT 53, 190 P.3d 1259.

[13] *Id*. at ¶ 14 fn. 5.

[14] *Id*. at ¶ 10.

B. Jury Unanimity is an unwaivable right and therefore is immune to the invited error doctrine.

In its brief, the State characterizes invited error as "affirmative waiver."[15] Mr. Maese agrees. In *United States v. Olano* the United States Supreme Court discussed right waiver and held that, "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake."[16] Therefore, a defendant may not waive a nonwaivable right; a truism even under the invited error doctrine.

Several Circuit Courts of Appeal have recognized that jury unanimity is a nonwaivable right. In *United States v. Teague*, the Tenth Circuit Court of Appeals wrote:

> the nonwaivability of the right to a unanimous jury, which we have declared it to be a right so fundamental that it may not be waived.[17]

In *United States v. Scalzitti*, the Third Circuit Court of Appeals wrote:

> we conclude that unanimous verdicts are required without regard to any attempts by any of the parties to dispense with this requirement.[18]

In *United States v. Lopez*, it also wrote:

> Both the defendant and society can place special confidence in a unanimous verdict, and we are unwilling to surrender the values of that mode of fact-finding.[19]

And in *United States v. Pachay*, the Second Circuit Court of Appeals wrote:

> Waiver of unanimity was prohibited… in response to concern that a defendant would inevitably be under pressure to accede to the suggestion of a trial judge

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[15] Brief of Appellee at 20, "…affirmative waiver—or invited error—precludes…"

[16] *United States v. Olano*, 507 U.S. 725, 733 (1993).

[17] *United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006).

[18] *United States v. Scalzitti*, 578 F.2d 507, 512 (3d Cir. 1978).

[19] *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978).

that he accept a non-unanimous verdict and the difficulty of ascertaining a defendant's true motivation under such circumstances.[20]

These circuit courts analyzed jury unanimity under the Federal Rules of Criminal Procedure which state in relevant part "…the verdict *must* be unanimous." And previously read "…the verdict *shall* be unanimous."[21] The Utah Constitution and Rules of Criminal Procedure use identical language stating that "…the verdict shall be unanimous."[22] Therefore, jury unanimity in Utah is nonwaivable; the analysis is identical.

Jury unanimity is a right immune from the invited error doctrine because it is nonwaivable. Mr. Maese cannot succeed in waiving jury unanimity just as he could not succeed in waiving reasonable doubt requirements or jurisdiction. As a matter of law, the jury unanimity instruction issue is preserved and the State's invited error claim is moot.

C. *The trial court resuscitated the erroneous Pattern of Unlawful Activity elements instruction issues. Moreover, prosecution by information is nonwaivable. Therefore, the issue is preserved.*

1. *By ruling on the merits post-trial, the trial court preserved the Pattern of Unlawful Activity elements instruction issue for appeal.*

The waiver doctrine exists to ensure that a trial court has the first opportunity to address a claimed error. Yet, as the Utah Supreme Court explained in *State v. Johnson*, "If the trial court already has had that opportunity, the justification for rigid waiver requirements is weakened considerably."[23] Therefore, with an instrument like a Motion to Arrest Judgment, a trial court may overlook waiver and rule on an issue's merits post-trial, preserving the issue for appeal. In *State v. Seale* the Utah Supreme Court wrote:

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[20] *United States v. Pachay*, 711 F.2d 488, 493 (2nd Cir. 1983).

[21] Fed R. Crim. P. 31(a) (emphasis added).

[22] Utah Constitution, Article I, Section 10 & Utah R. Crim. P. 21(b).

[23] *State v. Johnson*, 821 P.2d 1150, 1161 (Utah 1991).

> [The Defendant] did raise the issue in his motion for a new trial, and the court addressed the issue on the merits in denying the motion. Because the court considered the alleged error rather than finding it waived, [the Defendant's] right to assert the issue on appeal was resuscitated.[24]

In this case, the trial court ruled on Mr. Maese's Pattern of Unlawful Activity elements instruction claim on the merits.[25] The trial court resuscitated the issue.

While the State claims resuscitation guts the invited error doctrine,[26] in reality it gives the trial court discretion. The trial court may choose to address the error on the merits or it may decline; the State urges this Court to needlessly limit a trial court's options without any underlying rationale. Accordingly, under the issue resuscitation doctrine, Mr. Maese preserved this issue and the State's invited error claim is moot.[27]

2. *Prosecution by information is a nonwaivable right.*

Under the Utah Constitution and Rules of Criminal Procedure, felonies must be prosecuted by information. In relevant part the Constitution states:

> Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment.[28]

Specifically, the constitution allows accused persons to waive the examination, but not the information. This distinction is purposeful, contrasting the clauses' language. Therefore, because prosecution by information is nonwaivable, this issue is preserved as a matter of law and the State's invited error argument is moot.

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[24] *State v. Seale*, 853 P.2d 862, 870 (Utah 1993).

[25] R. at 724-725.

[26] Brief of Appellee at 21 fn. 4.

[27] See also *State v. Beason*, 2000 UT App 109, ¶¶ 12-15, 2 P.3d 459.

[28] Utah Constitution, Article I, Section 13.

POINT II. Adequate notice entitles Mr. Maese to a Bill of Particulars.

The State argues that its Information and Probable Cause Statement sufficiently notified Mr. Maese of the factual allegations underlying the crimes it charged him with. Yet this argument is fatally flawed because it requires myriad inferences.

As the United State Supreme Court noted in *Richardson v. United States*, crimes are made up of factual elements. Therefore, "A (hypothetical) robbery statute, for example, that makes it a crime (1) to take (2) from a person (3) through force or the threat of force (4) property (5) belonging to a bank would have defined the crime of robbery in terms of the five elements just mentioned."[29] Accordingly, to adequately notify Mr. Maese of the charges against him, the State needs to allege each individual factual element.

Consistently, the State failed to do that. Through fictitious actors (Such as "The Doll House"), other actors (Tiffany Curtis), passive-voice writing, and great liberties with the facts, the State attempts, but fails, to show it provided adequate notice to Mr. Maese.

A. The State impermissibly requires Mr. Maese to draw inferences upon its incomplete facts in order to maintain it provided adequate notice.

The State could have easily disposed of Mr. Maese's adequate notice claim by connecting Counts II through V with specific criminal conduct in the Probable Cause Statement. Yet that is impossible. While Mr. Maese contends that the Information failed to articulate crimes, the State takes the opposite, but still fatally flawed, position; it claims the Information articulates "facts supporting at least six counts of exploiting prostitution."[30] The State, however, fails to show that facts, and not just inferences, articulate the elements of crimes required for adequate notice.

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[29] *Richardson v. United States*, 526 U.S. 813, 817 (1999).

[30] Brief of Appellee at 31.

1. *The Information shows that the Doll House was a licensed sexually oriented business, not a house of prostitution.*

The State claims it notified Mr. Maese he "owned, controlled, managed, supervised, or otherwise kept, alone or in association with another, a house of prostitution or a prostitution business" by alleging the Probable Cause Statement recited the following facts:

> …that Defendant was a registered co-owner of the Doll House, he knew that Doll House escorts regularly engaged in sex acts for money, and the Doll House advertised that its escorts engaged in sex acts for money, by providing a link to TER on its website.[31]

Mr. Maese concedes the Information alleges he was a co-owner of the Doll House. The Information alleges he knew about instances of prostitution yet fails to allege he directed prostitution. The Information fails to allege that Mr. Maese systemically ran the Doll House as a prostitution business. It also fails to allege that he advertised that the Doll House provided prostitution. The Information alleges that the Doll House website links to the TER website, but fails to draw a criminal connection to that legal website.

2. *The Information does not allege that Mr. Maese procured inmates for a house of prostitution.*

Regarding procurement, the State's argument betrays itself. The State claims that, Mr. Maese "'procured an inmate for a house of prostitution,' or 'encouraged, induced or otherwise purposely caused another to remain a prostitute,' by personally encouraging at least two escorts—N.F. and D.T.—to engage in sex acts for money."[32]

As articulated in his Brief, Mr. Maese disputes that encouraging acts of prostitution falls with the Exploiting Prostitution statute. But moreover, the State cannot decide whether encouraging prostitution acts is "procuring an inmate" *or* "encouraging anoth-

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[31] Brief of Appellee at 30.

[32] Brief of Appellee at 30.

er to remain a prostitute." If the State cannot interpret its facts with enough specificity to attach them to a specific *actus reus* alternative, how can Mr. Maese?

> 3. *The Information does not allege that Mr. Maese caused another to become or remain a prostitute.*

In its Probable Cause Statement, the State explicitly alleges that "D House LLC, aka 'Doll House' is a registered sexually oriented business ('SOB') in Summit County, Park City."[33] Therefore, the State alleges it was a legal and legitimate business. And of course, an escort agency employs escorts. Yet in its Brief, the State claims that Mr. Maese "'encouraged, induced or otherwise purposely caused another to remain a prostitute,' by threatening two *escorts* if they quit working for the Doll House."[34]

This is wrong for two reasons. First, in *Robinson v. California*, the United States Supreme Court held that status crimes—like *being* a prostitute—are unconstitutional.[35] For nearly 50 years, determining when someone *is* a prostitute is legally impossible. Second, the State apparently asserts that escort and prostitute are synonymous; despite its social bias, they are not. The escort A.F. "states that MEESE[sic] threatened her if she did not continue working for Doll House." And while A.F. states that CURTIS encouraged her to prostitute herself, A.F. never states whether or not she prostituted herself. Therefore, without a prostitution element, this statement is meaningless.

The alleged threat against N.F. is meaningless too. Allegedly, N.F. was threatened when she tried to leave the Doll House despite "not [being] given many appointments because she would not have sex with clients." If Mr. Maese threatened a self-declared

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[33] R. at 11.

[34] Brief of Appellee at 30-31 (emphasis added).

[35] *Robinson v. California*, 370 U.S. 660 (1962).

nonprostitute escort when she tried to leave the Doll House this may have been an employment dispute, but not a crime.

4. The Information does not allege that Mr. Maese transported a prostitute.
The State does not rebut, and therefore concedes, that its Information failed to allege Mr. Maese transported a person for the purpose of prostitution.

5. The Information does not allege that Mr. Maese shared prostitution proceeds.
The State argues that its Information notified Mr. Maese that he "shared the proceeds of prostitution with a prostitute pursuant to an understanding that she was to share therein" because it alleged that "for the first four appointments, H.T. paid the entire $145.00 agency fee to the Doll House, which Defendant co-owned, R12, and other escorts stated that they were required to tip [Tiffany Curtis] 20% of their tips. R12-13."[36]

The State assumes that during her first four appointments, H.T. prostituted herself; yet that fact is unalleged. Moreover, the State affirmatively alleges that these proceeds came from an "agency fee," not prostitution activities. Finally, the State alleges that escorts were required (by whom is unknown and unalleged) to pay Tiffany Curtis portions of their tips. True or not, this allegation fails to implicate Mr. Maese.

* * *

As shown, the State's notice is fatally deficient without drawing multiple inferences upon the facts explicitly alleged. Yet the State fails to cite any precedent showing that defendants must draw these inferences in order to receive adequate notice. This is because none exists. Utah law has long held that defendants are entitled to know the specific facts which constitute the elements of the crimes they are charged with.

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[36] Brief of Appellee at 31.

B. *When the State withholds adequate notice, prejudice is presumed. Furthermore, the record cannot show how the defense would differ with notice.*

The State argues that Mr. Maese's defense at trial obviated—and precluded—any prejudice he may have incurred. This is a circular argument and the State's logic is self fulfilling: General allegations requiring a general defense obviate the need to defend against specific acts; therefore defendants can never be prejudiced by inadequate notice.

The State attempts to use the record to justify its error. But Utah law has already addressed this argument. In *State v. Bell*, the Utah Supreme Court held that "the record cannot reveal how adequate notice of the charges would have affected the actions of defense counsel, either in preparing for trial or in presenting the case to the jury" [37]

Furthermore, the State mischaracterizes the burden shifting standard that the Utah Supreme Court articulated in *State v. Bell*. The *Bell* Court wrote that the defendant:

> contends that the prosecution's failure to sufficiently notify him of the factual basis for its allegations left him unable to make pretrial preparation for a defense or to counter the State's evidence and arguments at trial. Given the plausibility of this contention and the critical nature of the issue involved, we conclude that Bell has made a credible argument that his defense was impaired by the error.[38]

Under the Utah Supreme Court's regime, a defendant must claim inadequate notice. This is a question of law—hence the standard of review—not fact. This Court then determines from the record if the State provided adequate notice. As evidenced by Mr. Bell's two-page winning argument, attached hereto, a defendant need not perform a lengthy analysis filled with speculation and hypotheticals to prove prejudice.[39] Mr. Maese claims this very handicap. If an ambiguity exists, Mr. Maese now states clearly:

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[37] *State v. Bell*, 770 P.2d 100, 106 (Utah 1988) (quotations, brackets, & citations omitted).

[38] *Id*. at 107.

[39] Mr. Bell's Bill of Particulars Argument on appeal is attached as ADDENDUM A.

> The State's failure to adequately notify him of the factual basis for its charges incapacitated his effective preparation against its evidence and arguments.

This Court must decide if this argument is credible based on the facts of this case.

POINT III. Mr. Maese's United States and Utah Constitutional rights to jury unanimity were violated in multiple ways created from multiple errors.

A. The trial court failed to compel the State to elect offenses.

The State does not rebut, and therefore concedes, that the trial court's failure to compel the State to elect offenses was erroneous. Moreover, Mr. Maese cites a Utah Supreme Court case—*State v. Hillberg*—as authority for his argument and therefore *stare decisis* compels this Court to reverse on this error alone.

B. The trial court's supplemental jury instruction was erroneous.

The State does not rebut, and therefore concedes, that the trial court's supplemental jury instruction was erroneous. The Court can reverse on this error alone.

C. The initial jury unanimity instruction obviously failed to communicate Utah's jury unanimity principle.

The State argues that "no settled governing law has held that the unanimity instructions given in this case were deficient." But that argument is spurious because most jury instructions are never litigated yet may still be obviously wrong. An example: A unanimity instruction reads "Your verdict must be found by at least ¾ of you as a jury." This theoretical instruction is obviously incorrect, but is unlitigated.

In this case, the initial unanimity instruction read:

> REACHING A VERDICT—This being a criminal case, your verdict must be unanimous; all jurors must agree. When you are all in agreement, then you have reached a verdict and your work is finished.[40]

[40] R. at 284 (Jury Instruction № 25).

All this instruction requires is unanimity as to guilt. It incorrectly states Utah law because in *State v. Saunders*, the Utah Supreme Court held that it is "not enough that [the jury] simply unanimously agree on guilt."[41] *Stare decisis* is obvious.

Despite this, the State also relies on *State v. Evans* to justify its position.[42] In that case, the State charged Evans with three counts of attempted aggravated murder resulting from one episode which lasted just a few minutes.[43] This case is greatly distinguishable.

First, in *Evans*, the Utah Supreme Court wrote that because the *State v. Saunders* jury unanimity principle became law in 1999, "at the time of [Evans'] trial in 1998, the issue was arguably unclear."[44] *Inclusio unius est exclusio alterius*. Jury unanimity is clear now.

Furthermore in this case, the State charged Mr. Maese with four counts of Exploiting Prostitution over a 22-month period resulting from multiple episodes (hence the Pattern of Unlawful Activity charge). Moreover, the State alleges not just alternative theories for one criminal act as in *Evans*, but multiple *actus rei*.

This case is analogous to Washington's *State v. Vander Houwen*. In that case, Department of Fish and Wildlife officers found 10 dead elk carcasses on Vander Houwen's property. Vander Houwen admitted that he shot at elk because they were ruining his orchards. Washington charged Vander Houwen with 10 counts each of poaching and waste of wildlife, yet "The elk were not differentiated or labeled or attached to a specific cause number."[45] The jury convicted Vander Houwen of two counts of poaching. Al-

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[41] *State v. Saunders*, 1999 UT 59, ¶ 64, 992 P.2d 951.

[42] Brief of Appellee at 44-45.

[43] *State v. Evans*, 2001 UT 22, ¶¶ 4-8, 20 P.3d 888.

[44] *Id*. at ¶ 17.

[45] *State v. Vander Houwen*, 177 P.3d 93, 96 (WA 2008).

though Vander Houwen failed to argue jury unanimity defects at trial,[46] the Washington Supreme Court reversed and vacated his convictions. Quoted at length it wrote:

> …each juror could have convicted [the Defendant] based on different criminal acts because the State did not properly provide evidence to tie each cause number and alleged act. We previously have held that:
>
> > To ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt.
> >
> > *State v. Kitchen*, 110 Wash.2d 403, 411, 756 P.2d 105 (1988).
>
> Moreover, when the State fails to make proper identification of the specific act charged and the trial court fails to instruct the jury on unanimity, there is constitutional error. The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.
>
> …
>
> The issue is constitutional; the jury has responsibility to connect the evidence to the respective counts. Here there was no unanimity instruction or evidence tying any elk to a particular cause number.… In other words, while the jury may have acted in unison, we do not have a verdict that shows that they did so. The trial court erred when it failed to require unanimity and to provide the jury with the means to associate the evidence with specific counts. [47]

The central question here is: Did the trial court's jury unanimity instruction accurately communicate Utah's jury unanimity principle considering the facts of this case? The answer is no. Under a single count indictment, or even multiple counts arising from a single episode, this instruction may suffice. Here it did not. In *United States v. Ryan*, the Third Circuit Court of Appeals held that similar instructions can be wrong.

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[46] *State v. Vander Houwen*, 115 P.3d 399 (WA App 2005).

[47] *State v. Vander Houwen*, 177 P.3d 93, 99 (WA 2008).

> This general [jury unanimity instruction] does not apply in certain cases where the facts are exceptionally complex,… or where the allegations in a single count are either contradictory or only marginally related to one another,… or where there is a variance between the indictment and the proof at trial,… or where there is a tangible indication of jury confusion.… In these instances, the trial court must give an augmented unanimity instruction.[48]

Here, the State concedes that all four exceptional conditions existed in Mr. Maese's trial: (1) In its three Motions for Enlargement of Time, the State wrote that the issues here are complex; (2) transporting prostitutes is only marginally related to sharing prostitution proceeds which is marginally related to encouraging someone to become or remain a prostitute; (3) The State concedes that the Information is without transporting allegations but vehemently defends Nicole Fernandez's transporting testimony—variance; and (4) the jury was confused as evidenced by their deliberation question.

As evidenced in multiple ways, the trial court's jury unanimity instruction incorrectly conveyed Utah's jury unanimity principle. Yet the State argues that Jury Instructions № 37 and 40 guaranteed unanimity because they stated that the jury must be "convinced of the truth of each and every one of the elements of [the crime], beyond a reasonable doubt."[49] This conflicting jury instruction fact pattern is analogous to *Nielsen v. Pioneer Valley Hosp*.[50]

In that medical malpractice case, the trial court gave jury instructions regarding r*es ipsa loquitur* and common law negligence; they conflicted. The Hospital argued that a jury instruction which read "adverse results 'in and of themselves' do not prove that the

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[48] *United States v. Ryan*, 828 F.2d 1010, 1020 (3rd Cir. 1987).

[49] Brief of Appellee at 37 & 38 quoting R. at 294 & 297 respectively.

[50] *Nielsen v. Pioneer Valley Hosp.*, 830 P.2d 270 (Utah 1992).

doctor was negligent,"[51] resolved any conflicts. The Utah Supreme Court held that "We are not convinced, however, that lay jurors would be able to distinguish between these rather involved negligence theories and instructions simply by noting this one phrase."[52] It concluded that "that a potential for confusion was created,"[53] and reversed.

Here, as evidenced by the jury's question, the unanimity jury instruction created actual confusion; not merely a potential. This alone is reversible error.

D. Invited error is inapplicable to Mr. Maese's 606(b) argument. Furthermore, the jurors statements are admissible as evidence.

The State argues that "juror statements would be relevant only to whether any error in the instructions in fact prejudiced Defendant by causing the verdict to be non-unanimous."[54] The State is wrong.

Mr. Maese, in his Brief, argued that four separate and distinct events violated his constitutional right to a unanimous jury. In this sub-issue, Mr. Maese argues that a nonunanimous verdict is invalid. Mr. Maese offers transcripts of interviews with members of his jury to prove that his verdict was not unanimous and therefore invalid. Instructions aside, this Court must reject a nonunanimous verdict.

Moreover the State misreads the juror's statements. The statements disregard "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental

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[51] *Id*. at 274.

[52] *Ibid*.

[53] *Ibid*.

[54] Brief of Appellee at 45.

processes in connection therewith."[55] Rather, they show that individual jurors failed to reach consensus—unanimity—with other jurors.

When a juror expresses that she "didn't necessarily agree on each of the counts that this was the behavior that constituted this count, this was the behavior that constituted this count;" that she "kind of took a more general and organic approach to it" she is expressing a failure to reach unanimity for herself alone.

The seven other jurors could have agreed on every element of every act (though they did not) and yet this one juror is telling us that she never reached that analysis. She believed that "If he had ten girls that he was sending out on a daily basis," Mr. Maese must have Exploited Prostitution four times. As articulated by the Utah Supreme Court, that is not jury unanimity. Likewise, the following interaction conveys the same:

> A: I don't know a lot of details. The paperwork we were sent in the room with said that if he was found guilty of one, he was found guilty—he was found guilty of all four.
>
> Q: You say the paperwork you were sent in the room with said if what?
>
> A: That if he was found guilty on one of those counts, he was automatically guilty on all four.[56]

While this conversation seems to communicate that a juror misunderstood an instruction—a prohibited use under 606(b)—this juror is saying something else. He is saying is that he failed to reach the unanimity analysis. Although his foundation for that belief may have been misplaced, this juror failed to connect counts to actions and crimes to specifics. He never agreed with his fellow jurors on what acts took place.

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[55] Utah R. Evid. 606(b).

[56] R. 353-54 (Motion for Arrest of Judgment at 31-32. Interview with Juror Shawn Meik, conducted on August 5, 2008 by Shane Johnson.).

The trial court incorrectly ruled that Rule 606(b) precludes these juror statements for the narrow purpose of showing that the jury failed to reach unanimity and therefore a true verdict. Moreover, the State, in aligning with the trial court's error, fails to cite any case law from any jurisdiction that supports its position. Juror statements showing that individual jurors failed to reach unanimity with the rest of the jury are admissible.

Therefore, Mr. Maese shows that his jury was not unanimous, that they failed to reach a true verdict, and because of that, his constitutional right to jury unanimity was violated. This Court can be confident in reversing on these grounds.

POINT IV. The State's counter-argument to Mr. Maese's insufficiency claim fails to account for its Information. Therefore, Mr. Maese needs only marshal evidence for charged counts, not the State's whole shotgun case.

The State's "Defendant failed to marshal the evidence" argument is inaccurate. Certainly, Mr. Maese did not marshal all of the evidence at his trial; yet that is permissible. As Mr. Maese states in his brief, he marshaled evidence according to the Information. Moreover, to ensure the Court understood fatal flaws in the State's case as a whole, Mr. Maese exposed its weaknesses. Mr. Maese's marshaling is accurate and complete when read with the Information while the State's case is still fatally flawed.

The State fails to account for an escort agency's legitimate business activities. An example: Mr. Maese absolutely concedes that he taught escorts to avoid being arrested; which included telling escorts not to have sex.[57] Certainly this is legitimate. Moreover it is noncriminal. Similarly, offering to provide attorneys for arrested employees is common policy amount most Fortune 500 companies. It is legitimate and noncriminal. Accordingly, this Court must account for general business activity.

[57] R. at 320 (Tr. 161:7-9, July 11, 2008.).

A. *The State concedes that "purposeful" or intentional is the proper* **mens rea** *required for Exploiting Prostitution convictions.*

The State argues that Mr. Maese invited any error regarding incorrect *mens rea* requirements for Exploiting Prostitution. Yet culpable mental state, as an element of an offense, goes to reasonable doubt. Reasonable doubt at trial is a nonwaivable right. Therefore, the State's invited error argument is incorrect. Moreover, it concedes that the evidence at trial "supports the jury verdict that Defendant *knowingly* or purposefully committed at least four counts of exploiting prostitution."[58]

B. *The evidence fails to support four counts of exploiting prostitution.*

1. *The State never charged Mr. Maese with keeping a house of prostitution. Moreover, the evidence at trial failed to substantiate that Mr. Maese intended the Doll House to be a prostitution business.*

The State correctly notes that Mr. Maese relies on "the dictionary and on early to mid-twentieth century case law to support his argument."[59] Conversely, the State fails to cite any authority for its Exploiting Prostitution interpretation. Moreover, the State ignores rules of statutory construction. In *State v. Maestas*, the Utah Supreme Court wrote that courts must presume "the legislature used each term advisedly and according to its ordinary meaning. As a result, we avoid interpretations that will render portions of a statute superfluous or inoperative."[60] Under the State's Exploiting Prostitution interpretation, the phrase "prostitution business" is superfluous and inoperative.

Moreover, the State ignores the facts. Escorts testified they prostituted themselves *some* of the time. Yet the inverse is true; escorts did not prostitute up to 67% of the time. Is a company where sex-for-money happens *sometimes* a prostitution business? No.

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[58] Brief of Appellee at 51 (emphasis added).

[59] Brief of Appellee at 53.

[60] *State v. Maestas*, 2002 UT 123, ¶ 52, 63 P.3d 621.

2. Escorts and inmates are distinct and dissimilar. Therefore the evidence at trial fails to show that Mr. Maese procured inmates for a house of prostitution.

The State argues that "the Doll House escorts fit within the statutory definition of 'inmates.'"[61] This argument fails for two reasons. First, this statement depends on the definition of "house of prostitution" which, as argued above, depends on a physical location. Second, the State relies on "the Doll House" as an actor. The State claims that "All the appointments in which the illegal sex acts testified to were made through the Doll House."[62] Yet the evidence shows that Tiffany Curtis, in her role as phone operator, arranged appointments for escorts; not Mr. Maese.

The State draws impermissible inferences with the evidence. The State writes that "Five of the escorts testified that Defendant personally interviewed them before hiring." Mr. Maese concedes this point. In operating an escort agency, he must hire escorts. What the State fails to mention is that the same five escorts all testified that Mr. Maese never required them to perform sex acts.

In order to procure inmates for a house of prostitution, an actor must be explicit. If Mr. Maese hired escorts that then chose to prostitute themselves after-the-fact, he cannot be guilty of procuring inmates. The evidence shows this is what happened.

3. The State fails to cite any authority for its interpretation of "encourages, induces, or otherwise purposely causes another to become or remain a prostitute."

In his brief, Mr. Maese presented relevant and controlling case law to support his interpretation of Utah Code Ann. §76-10-1305(1)(b). Conversely, the State relies upon subsection (b)'s plain language without citing any authority. Under subsection (b)'s established definition, the State fails to present any evidence sustaining its violation.

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[61] Brief of Appellee at 55.

[62] *Ibid*.

4. *In its brief, the State concedes that its Information failed to charge Mr. Maese with transporting prostitutes. Therefore the State's evidence regarding transporting is irrelevant.*

As argued above, the State concedes its Information failed to notify Mr. Maese of even one transporting episode. Yet the State spends two-and-a-half pages attempting to rehabilitate Nicole Fernandez's inherently improbable testimony. Although now pedantic, the record shows that Fernandez's testimony was riddled with contradictions; like the weather, wait five minutes and it changes.

Importantly though, the record cannot illuminate whether or not the jury believed Fernandez because the State failed to tie her testimony to any specific count in the Information. This is another ground upon which to dismiss her testimony.

5. *The evidence fails to show Mr. Maese shared in prostitution proceeds.*

The State's argument is: Escorts working for the Doll House made *only $1 per minute* and therefore Mr. Maese knew they would engage in sex acts.

This argument fails to demonstrate an understanding existed between Mr. Maese and any escort that he would share in proceeds from prostitution. Moreover, the State cannot point to a single specific instance where Mr. Maese accepted money from a prostitution act. This is because such an instance is nonexistent.

Moreover, the jury acquitted Mr. Maese of Money Laundering. Money Laundering by definition is the act of accepting money from crimes. The State is arguing for a repugnant verdict under this Exploiting Prostitution alternative. Yet the record cannot reveal whether or not the jury reached a repugnant verdict because the Information fails to allege a specific instance of Mr. Maese sharing in prostitution proceeds.

C. *The Information limited the Pattern of Unlawful Activity predicate episodes to the Exploiting Prostitution charges within the Information.*

The State argues that "with no explanation or supporting citations to the record, that"[63] Pattern of Unlawful Activity's predicate episodes were limited to charge conduct. Yet the Information charging Pattern of Unlawful Activity in this case plainly states:

> …between the dates of July 1, 2004 through April 30, 2006, the defendants did exploit prostitution in at least three separate episodes which are not isolated, but have the same or similar purposes, results, participants, victim, or methods of commission, *as indicated in Counts TWO through FIVE of this Information*.[64]

Moreover, the State argues that "the Doll House's set agency fee constituted proceeds of exploiting prostitution" in order to sustain the Pattern of Unlawful Activity conviction. As argued above, this theory creates a repugnant verdict. Moreover, this argument presents identical problems. Where is the actual evidence?

* * *

Indisputably, illegal activities occurred. Escort agencies provide opportunities for those wishing to sell sex. Yet the evidence at trial showed that Mr. Maese never recruited people into prostitution; never encouraged people to remain prostitutes; never took money from prostitution; and therefore, never ran a house of prostitution. Lacking entire elements, the State's case was insufficient to sustain Mr. Maese's guilty verdicts.

Most importantly, the State's evidence at trial deviated greatly from the allegations in its Information. In *McNair v. Hayward*, the Utah Supreme Court found that "material difference between the trial testimony and the [allegations] in the information"[65] constituted insufficient evidence. Mr. Maese asks this Court to reaffirm that holding.

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[63] Brief of Apellee at 63.

[64] R. at 9 (emphasis added).

[65] *McNair v. Hayward*, 666 P.2d 321, 326 (Utah 1983).

POINT V. Mr. Maese cannot waive his Utah constitutional right to prosecution by information.

The State concedes that Jury Instruction № 37 allowed the jury to convict Mr. Maese of an uncharged Pattern of Unlawful Activity alternative; it fatally varied from the Information. The State then argues that Mr. Maese invited this error. Impossible.

The trial court addressed this issue on the merits and therefore, as argued above, resuscitated it. Moreover, prosecution by information is nonwaivable. A thought experiment: A defendant strikes a deal with the State. Although initially charged with Exploiting Prostitution he pleads guilty to Attempted Exploiting Prostitution. The State never amends the information. Despite the defendant pleading guilty (which waives many of his rights), this is an illegal conviction. This hypothetical defendant must be prosecuted by an information that accurately articulates the crimes charged.

In *State v. Ramon*, this Court addressed a weaker fact set. In that case, the State amended the information on the first day of trial to include a previously uncharged alternative.[66] This Court held that "Because the amendment charged an additional or different offense than that originally charged, defendants' convictions are reversed."[67]

If, on the first day of trial, amending an information to charge an additional or different offense is reversible error, then *a fortiori*, a jury instruction, on the last day of trial, charging an additional or different offense is also reversible error.

The State argues in its footnote that Mr. Maese was unprejudiced by this error because he had to defend against the three charged alternatives. The record betrays this argument. The State relied upon Mr. Maese's ownership in the Doll House to establish

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[66] *State v. Ramon*, 736 P.2d 1059, 1061 (Utah Ct. App. 1987).
[67] *Id*. at 1063.

his guilt. Often, it has alleged that Mr. Maese was merely a party to the offense; presumably his former co-defendant being the actual actor. Conspiracy here was key.

The State could have asked the trial court to include conspiracy as an inchoate—and lesser—charge of a Pattern of Unlawful Activity. Yet Utah law prohibited the jury from convicting Mr. Maese of conspiring to commit a Pattern of Unlawful Activity with the same effect—a 2nd degree felony—as its charged alternatives. This is reversible error.

Conclusion

The State's brief practically invites a Post Conviction Remedies Act ineffective assistance of counsel petition because its central argument is: Errors occurred, but were created by defense counsel. Yet as Mr. Maese shows, this Court must address his issues because he timely asserted his rights; where he failed to, the trial court resuscitated them and nonwaivablity of rights applies.

If the Court reverses Mr. Maese's convictions, he asks that the Court address all of the issues he presents "because some issues presented may arise on retrial."[68] Specifically, Exploiting Prostitution's statutory interpretation will be central in any future trial.

WHEREFORE, Mr. Maese respectfully requests this Court dismiss his convictions; or alternatively, reverse the trial court's judgment, and grant him a new trial.

RESPECTFULLY SUBMITTED on this 15th day of October, 2009.

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S. Steven Maese
Appellant Pro Se

[68] *State v. Emmett*, 839 P.2d 781, 786 (Utah 1992).

CERTIFICATE *of* SERVICE

This is to certify that on the 15th day of October, 2009, two true and correct copies of the foregoing were served by the method indicated below, and addressed to the following:

Laura B. Dupaix
Utah Attorney General's Office
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
(801) 366-0180 p
(801) 366-0167 f

☒ Hand Delivery
☐ U.S. Mail
☐ Overnight Mail

____

even though some of it might overlap," Brodson, supra, and therefore are different. Said violations being different, and different crimes being involved, application is required to be made as soon as practicable after the information is received, pursuant to the provisions of the State and federal Interception of Communications Act, prior to their use in any proceedings, in accordance with subsection 3 of § 77-23a-9, and 18 U.S.C.A. 2517, which was the use before the Grand Jury and the trial herein. Failing that, the evidence and use should be suppressed, and the indictment and conviction herein reversed and dismissed.

POINT XI: THAT THE TRIAL COURT ERRED IN FAILING TO ORDER THE STATE TO PROVIDE A PROPER BILL OF PARTICULARS TO THE DEFENDANT.

At the time initially set for arraingment of this Defendant, he filed, among other documents, a Motion for a Bill of Particulars, dated July 11, 1983. R. at 8. When no such Bill of Particulars was filed, the Defendant moved for an order requiring such to be provided. As a result of a hearing on July 27, 1983, the State of Utah was ordered to provide the Defendant with a Bill of Particulars as set forth in his motion prior to August 24, 1983. R. at 32, Add. at 9-12. The State of Utah filed what purported to be State's Answer to Bill of Particulars on September 7, 1983. R. at 49, Add. at 13. This was deemed insufficient, and the Defend-

ant therefore filed a Motion to Compel a Proper Bill of Particulars, which motion was summarily denied. See reporter's transcript of hearing proceedings before Judge Sorenson, at pages 136-7. And, as noted elsewhere and argued elsewhere, much concern and prejudice resulted to this Defendant from the lack of specificity in the pleading and Bill of Particulars, as well as a failure of the lower court to hold the State to its pleading.

§ 77-34-4(e), U.C.A., 1953, as amended, is the rule which governs the requests and pleadings on a Bill of Particulars. It provides that "the request for and contents of a Bill of Particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular events charged." Specifically, the Defendant requested that factual information and allegations of the indictment as charged, and in addition, in particular, "those specific activities of the Defendant that constitute the actions herein, a statement of what constitutes racketeering activity, what enterprise is alleged as being involved." R. at 8, Add. at 6-7. Judge Hyde ordered that that be provided. The response by the State, R. at 49, does not do any of that. Initially, it should be noted that the allegations in the Bill of Particulars are not of a factual nature, but rather are of a legal conclusion. The answer does not even come close to being an appropriate response to an order that the matters requested by the Defendant be answered in accordance with the statute.

As noted elsewhere, and specifically in reference to State v. Spencer, supra, a Bill of Particulars is a special pleading which limits the State as to what it can assert and later prove at trial. As such, it is a device which sets forth the factual allegations contained within the legal language of an indictment or an information, so as to state and set forth a charge against a defendant. In connection with that, the argument is again here reasserted as that made with regard to the insufficiency and vagueness of the indictment--that is, that the indictment, when joined together with the Bill of Particulars filed, does not set forth factual and legal matters to set forth a charge under the laws of the State of Utah. That is, that the two documents and pleadings do not put the Defendant on notice as to what it is that he did of which the State complains and charges him with violation of the criminal laws. As such, it is not sufficient, and this Court should reverse and remand with directions to dismiss the case against this Defendant.

POINT XII: THAT THE REFUSAL TO PROVIDE GRAND JURY TRANSCRIPTS TO THIS DEFENDANT PREJUDICED HIS DEFENSE AND DENIED HIM HIS RIGHTS.

The Defendant in this case requested the Grand Jury transcripts on at least three different occasions. The first was in the first pleading filed in District Court, the Motion to Dismiss, and sought the Grand Jury transcripts in order to test the allegations and claims contained in that motion. R. at 2, 6. A second request occurred in the course of the discovery proceedings, in attempting to obtain the proposed State's evidence