

In the Utah Court of Appeals

State of Utah,
Plaintiff *and* Appellee,

-v-

S. Steven Maese,
Defendant *and* Appellant.

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.

The Appellant is not incarcerated.

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	v
Statement of Jurisdiction.....	1
Statement of Issues.....	1
Rules, Statutes, and Constitutional Provisions.....	4
Statement of the Case	5
Statement of Facts	6
Summary of Argument	15
Argument	17
POINT I. The State failed to provide Mr. Maese with adequate notice of the charges against him and the trial court erred by failing to compel the State to provide a bill of particulars.....	17
A. The Amended Information charging Mr. Maese failed to provide him with the sufficient notice and factual detail required to adequately prepare a defense.	19
1. Utah’s Exploiting Prostitution statute defines five conceptually distinct crimes.	19
2. The Probable Cause Statement details two crimes, only one qualifying as Exploiting Prostitution.....	21
3. The Probable Cause Statement’s remaining allegations fail to articulate crimes.....	22
4. In this case, adequate notice exceptions are inapplicable.....	24
B. Mr. Maese sought more particular notice by requesting a bill of particulars.	25

C.	The State failed to provide Mr. Maese with a bill of particulars and the trial court failed to rule on his Motion.....	25
1.	The Trial Court erred by not ruling on Mr. Maese’s Motion for Bill of Particulars, and then created a post hoc rationalization to justify its error.	26
POINT II.	Mr. Maese’s right to jury unanimity was violated because: (1) the trial court failed to compel the State to elect offenses; (2) its initial jury unanimity instruction obviously miscommunicated Utah law; then (3) it compounded this error with its supplemental instruction; and (4) it erred by barring juror statements showing that Mr. Maese’s jury failed to reach a unanimous verdict.....	31
A.	The trial court failed to compel the State to elect offenses.....	32
B.	The trial court’s initial jury unanimity instruction miscommunicated Utah’s jury unanimity principle.	34
1.	This Court should address this jury instruction under plain error.....	36
C.	The trial court’s supplemental instruction failed to address jury unanimity.	37
D.	Mr. Maese’s jury failed to be unanimous, but in misinterpreting Utah R. Evid 606(b) the trial court barred juror statements.....	38
1.	Mr. Maese presents juror statements solely to establish that his jury failed to reach a true and valid verdict, and therefore the statements are admissible.....	39
2.	Mr. Maese’s juror statements prove that his jury failed to reach a unanimous verdict.....	40
POINT III.	The evidence at trial failed to support at least three Exploiting Prostitution episodes; consequently, the State provided insufficient evidence of a Pattern of Unlawful Activity.....	44
A.	When comparing the specifics of the crimes charged in Mr. Maese’s Information to the evidence the State adduced at trial, fatal variance exists.....	44

B.	The State presented insufficient evidence to sustain convictions on four Exploiting Prostitution alternatives.	46
1.	Mr. Maese did not procure inmates for a house of prostitution.....	47
2.	As a matter of law, Mr. Maese did not encourage, induce, or otherwise purposely cause anyone to become or remain a prostitute.....	51
3.	The State failed to introduce evidence that an understanding existed between Mr. Maese and any prostitute where he was to share in proceeds of prostitution, or that he received any proceeds from prostitution.	52
4.	The State failed to introduce evidence that The Doll House was a House of Prostitution or a Prostitution Business.....	53
C.	The State’s evidence at trial for the remaining Exploiting Prostitution alternatives was inherently improbable.	55
1.	The State’s only instance of Mr. Maese transporting a person to promote prostitution relied upon Nicole Fernandez’s inherently improbable testimony.	55
D.	The State failed to prove Mr. Maese violated a Pattern of Unlawful Activity.	59
E.	The State failed to prove beyond a reasonable doubt that Mr. Maese acted with the required mens rea.	60
	POINT IV. The trial court improperly instructed the jury regarding Pattern of Unlawful Activity’s charged elements; a fatal variance from the information. This allowed the jury to convict Mr. Maese of an uncharged Pattern of Unlawful Activity alternative.	62
	Conclusion	64

TABLE OF AUTHORITIES

CASES

<i>Acton v. Deliran</i> , 737 P.2d 996 (Utah 1987).....	26
<i>Argersinger v. Hamlin</i> , 407 U.S. 25 (1972).....	28
<i>Crellin v. Thomas</i> , 247 P.2d 264 (Utah 1952)	48
<i>Elfbrandt v. Russell</i> , 384 U.S. 11 (1966)	24
<i>Fox v. United States</i> , 417 F.2d 84 (5th Cir. 1969).....	40
<i>In re O.D.</i> , 2006 UT App 382, 145 P.3d 1180	51
<i>McNair v. Hayward</i> , 666 P.2d 321 (Utah 1983)	44
<i>Orem City v. Martineau</i> , 2006 UT App 136, 135 P.3d 884	21, 64
<i>Resolution Trust Corp. v. Stone</i> , 998 F.2d 1534 (10th Cir. 1993)	40
<i>Salt Lake City v. United Park City Mines Co.</i> , 503 P.2d 850 (Utah 1972).....	18
<i>State v. Arceo</i> , 928 P.2d 843 (Haw. 1996).....	32
<i>State v. Barrett</i> , 2006 UT App 417, 147 P.3d 491	28
<i>State v. Beckstead</i> , 2006 UT 42, 140 P.3d 1288	28
<i>State v. Bell</i> , 770 P.2d 100 (Utah 1988).....	17, 18, 19
<i>State v. Bernards</i> , 2007 UT App 238, 166 P.3d 626	17, 18, 27, 28
<i>State v. Brown</i> , 948 P.2d 337 (Utah 1997)	46
<i>State v. Brown</i> , 992 S.W.2d 389 (Tenn. 1999)	33
<i>State v. Bullock</i> , 791 P.2d 155 (Utah 1989).....	36
<i>State v. Burnett</i> , 712 P.2d 260 (Utah 1985)	17, 44, 45
<i>State v. Cruz</i> , 2005 UT 45, 122 P.3d 543.....	30, 34
<i>State v. Davie</i> , 240 P.2d 263 (Utah 1952)	60
<i>State v. DeMille</i> , 756 P.2d 81 (Utah 1988).....	40
<i>State v. Fertig</i> , 233 P.2d 347(1951)	51
<i>State v. Fulton</i> , 742 P.2d 1208 (Utah 1987)	44, 45
<i>State v. Gates</i> , 221 P.2d 878 (Utah 1950).....	51
<i>State v. Gee</i> , 498 P.2d 662 (Utah 1972)	39

<i>State v. Gonzales</i> , 2002 UT App 256, 56 P.3d 969	62
<i>State v. Gulbransen</i> , 2005 UT 7, 106 P.3d 734.....	24
<i>State v. Helm</i> , 563 P.2d 794 (Utah 1977)	23
<i>State v. Helmick</i> , 2000 UT 70, 9 P.3d 164	36
<i>State v. Hilberg</i> , 61 P. 215 (Utah 1900)	3, 33
<i>State v. Honie</i> , 2002 UT 4, 57 P.3d 977	44
<i>State v. Houskeeper</i> , 2002 UT 118, 62 P.3d 444.	2, 4
<i>State v. King</i> , 2006 UT 3, 131 P.3d 202.....	65
<i>State v. Knight</i> , 734 P.2d 913 (Utah 1987).....	65
<i>State v. Lee</i> , 2006 UT 5, 128 P.3d 1179.....	4
<i>State v. Low</i> , 2008 UT 58, 192 P.3d 867	46
<i>State v. Marcum</i> , 750 P.2d 599 (Utah 1988).....	45
<i>State v. Martin</i> , 1999 UT App 62, 977 P.2d 1224	28
<i>State v. Myers</i> , 302 P.2d 276 (Utah 1956).....	30, 44
<i>State v. Neal</i> , 2002 TN Crim App 76 (unpublished).....	36
<i>State v. Nelson-Waggoner</i> , 2004 UT 29, 94 P.3d 186.....	17
<i>State v. Norcutt</i> , 2006 UT App 269, 139 P.3d 1066.....	2
<i>State v. Quinonez-Gaiton</i> , 2002 UT App 273, 54 P.3d 139.....	3
<i>State v. Ramirez</i> , 817 P.2d 774 (Utah 1991)	26
<i>State v. Reyes</i> , 2005 UT 33, 116 P.3d 305.....	34
<i>State v. Robbins</i> , 2006 UT App 324, 142 P.3d 589	3
<i>State v. Robbins</i> , 2009 UT 23.....	55
<i>State v. Saunders</i> , 1999 UT 59, 992 P.2d 951.....	31, 34, 35, 39
<i>State v. Tacconi</i> , 171 P.2d 388 (Utah 1946)	47
<i>State v. Tillman</i> , 750 P.2d 546 (Utah 1987)	19, 37, 44
<i>State v. Topham</i> , 123 P. 888 (Utah 1912)	51
<i>State v. Wilcox</i> , 808 P.2d 1028 (Utah 1991).....	17, 24, 25, 30
<i>State v. Woodall</i> , 305 P.2d 473 (Utah 1956).....	48

<i>United States v. Gipson</i> , 553 F.2d 453 (5th Cir. 1977)	37
<i>United States v. Teague</i> , 443 F.3d 1310 (10th Cir. 2006)	31, 36
<i>United States v. Walters</i> , 269 F.3d 1207 (10th Cir. 2001)	26

STATUTES

Utah Code Ann. § 76-10-1301 (2006)	47
Utah Code Ann. § 76-10-1304 (2006)	22, 51
Utah Code Ann. § 76-10-1305 (2006)	20, 21, 47, 48, 51, 52, 53, 56, 60
Utah Code Ann. § 76-10-1602 (2006)	59
Utah Code Ann. § 76-10-1603 (2006)	21, 59, 63
Utah Code Ann. § 76-10-1903 (2006)	21
Utah Code Ann. § 76-1-501 (2008)	52
Utah Code Ann. § 76-4-202 (2008)	64
Utah Code Ann. § 76-4-301 (2008)	64

RULES

Utah Rule of Criminal Procedure 12(e) (2008)	26
Utah Rule of Criminal Procedure 12(f) (2008)	28
Utah Rule of Criminal Procedure 19(e) (2008)	4
Utah Rule of Criminal Procedure 4(b) (2008)	62
Utah Rule of Criminal Procedure 4(h) (2008)	54
Utah Rule of Evidence 606(b) (2008)	39

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI	17
Utah Constitution, Article I, Section 10	31
Utah Constitution, Article I, Section 12	17, 63
Utah Constitution, Article I, Section 13	63

OTHER AUTHORITIES

<i>Trubitt, Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts are Invalidated by Juror Disagreement on Issues</i> , 36 Okla. L. Rev. 473 (1983).....	34
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In the Utah Court of Appeals

State of Utah,
Plaintiff *and* Appellee,

-v-

S. Steven Maese,
Defendant *and* Appellant.

Brief of Appellant

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this matter under Utah Code Ann. § 78A-4-103(2)(e) (2008). The Appellant, S. Steven Maese, appeals convictions for a Pattern of Unlawful Activity, a second degree felony in violation of Utah Code Ann. § 76-10-1603; and four counts of Exploiting Prostitution, third degree felonies in violations of Utah Code Ann. § 76-10-1305(2).

STATEMENT OF ISSUES

POINT I. The State charged Mr. Maese with four counts of Exploiting Prostitution. Yet its charging documents factually described only one Exploiting Prostitution count. The Probable Cause Statement inadequately notified Mr. Maese of the remaining crimes' factual allegations. Therefore, Mr. Maese moved the trial court for a bill of particulars. The trial court, however, failed to rule on his motion. Should the trial court have compelled the State to produce a bill of particulars?

STANDARD OF REVIEW AND PRESERVATION OF ISSUE

Under Utah law, this Court accords “a trial court’s conclusions of law no particular deference, reviewing them for correctness. Here, the question of the adequacy of the notice given defendant is one of law.”¹ Mr. Maese preserved this issue by moving the trial court for a bill of particulars.²

POINT II. Under Utah law, jury unanimity means unanimity as to a specific crime and as to each element of the crime. The Exploiting Prostitution and Pattern of Unlawful Activity statutes enumerate separate crimes through distinct *actus reus* alternatives. Furthermore, the State claimed it presented evidence of more Exploiting Prostitution instances than it charged. Did the trial court err by failing to compel the State to elect the offenses it would submit to the jury? Next, did the trial court properly instruct the jury:

- that jury unanimity means unanimity to verdict only; and
- that tacitly, jurors could individually pick and choose from *actus reus* alternatives in reaching its verdict.

Finally, did the trial court err by preventing Mr. Maese from entering juror statements into evidence which proved his jury failed to reach a unanimous verdict?

STANDARD OF REVIEW AND PRESERVATION OF ISSUE

“Whether a jury instruction correctly states the law presents a question of law which we review for correctness.”³ Furthermore, court rules are interpreted “by examining the rule’s plain language and resort to other methods only if the language is ambiguous.”⁴

¹ *State v. Norcutt*, 2006 UT App 269, ¶ 8, 139 P.3d 1066 (quotations and citation omitted).

² R. at 167.

³ *State v. Houskeeper*, 2002 UT 118, ¶ 11, 62 P.3d 444.

Mr. Maese failed to preserve the election issue, but election is a question of law and its lacking has been deemed a manifest injustice.⁵

Though raised in his Motion for Arrest of Judgment, Mr. Maese failed to preserve his grievance with the trial court's initial jury unanimity instruction at trial and raises it as plain error and manifest-injustice on appeal. The trial court's supplemental jury instruction was objected to⁶ and the Utah R. Evid. 606(b) argument was raised in Mr. Maese's Motion for Arrest of Judgment.⁷

POINT III. Was the evidence at trial sufficient to satisfy required elements of Mr. Maese's charged crimes where the State failed to introduce evidence of a "house of prostitution," an "inmate," "prostitute" status, an "understanding," and a "prostitution business," all necessary elements of Exploiting Prostitution, and where the only "transporting" evidence was inherently improbable?

STANDARD OF REVIEW AND PRESERVATION OF ISSUE

This Court will "reverse the jury's verdict in a criminal case when we conclude as a matter of law that the evidence was insufficient to warrant conviction."⁸ Mr. Maese preserved this issue in his Motion for Arrest of Judgment.⁹

⁴ *State v. Quinonez-Gaiton*, 2002 UT App 273, ¶ 11, 54 P.3d 139 (alterations omitted).

⁵ *State v. Hilberg*, 61 P. 215, 217 (Utah 1900).

⁶ R. at 862-73.

⁷ R. at 345.

⁸ *State v. Robbins*, 2006 UT App 324, ¶ 7, 142 P.3d 589.

⁹ R. at 369.

POINT IV. Utah law requires crimes to be prosecuted by information and in the specific. Here, the State charged Mr. Maese with a Pattern of Unlawful Activity, but failed to enumerate one of its alternatives. The missing alternative was published in jury instructions however. Therefore, did the trial court err by giving the jury an instruction which allowed them to convict Mr. Maese of a crime he was not charged with violating?

STANDARD OF REVIEW AND PRESERVATION OF ISSUE

Under Utah law, “Whether a jury instruction correctly states the law presents a question of law which we review for correctness.”¹⁰ Mr. Maese preserved this issue in his Motion for Arrest of Judgment.¹¹ If this Court finds Mr. Maese’s objection untimely, he raises it as plain error or under Utah R. Crim. P. 19(e)’s “manifest injustice”¹² exception. He demonstrates that “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome.”¹³

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

This Court’s interpretation of the following rules, statutes, and constitutional provisions is important to the issues on appeal and their full texts are attached at ADDENDUM A:

RULES

- Utah Rules of Criminal Procedure 4(b), 4(e), 4(h), 12(e), and 12(f) (2008);
- Utah Rule of Evidence 606(b) (2008).

¹⁰ *State v. Houskeeper*, 2002 UT 118, ¶ 11, 62 P.3d 444.

¹¹ R. at 358.

¹² Utah R. Crim. P. 19(e) (2008).

¹³ *State v. Lee*, 2006 UT 5, ¶ 26, 128 P.3d 1179.

STATUTES

- Utah Code Ann. §§ 76-10-1301, 76-10-1305, 76-10-1603 (2006).

CONSTITUTIONAL PROVISIONS

- Utah Constitution, Article I, Section 12.
- Utah Constitution, Article I, Section 13.

STATEMENT OF THE CASE

On October 5, 2008, Mr. Maese was charged with a Pattern of Unlawful Activity, a second degree felony in violation of Utah Code Ann. § 76-10-1603; four counts of Exploiting Prostitution, third degree felony violation of Utah Code Ann. § 76-10-1305(2); and Money Laundering, a second degree felony in violation of Utah Code Ann. § 76-10-1904(1). Mr. Maese was bound over on all charges.

Following a two day jury trial, on July 11, 2008, Mr. Maese was convicted of four counts of Exploiting Prostitution and the single count of Pattern of Unlawful Activity. He was acquitted of Money Laundering.¹⁴

On January 26, 2009, Mr. Maese was sentenced to a term of one-to-fifteen years in the State Prison for the second degree felony conviction, and a term of zero-to-five years for each of the four third degree felony convictions. The court suspended the prison terms but required Mr. Maese to serve sixty days in jail, and placed him on probation.¹⁵ Previously, he filed a timely Motion for Arrest of Judgment, which the court denied.¹⁶

¹⁴ R. at 313.

¹⁵ R. at 808.

¹⁶ R. at 323; R. at 733.

STATEMENT OF FACTS

Steven Maese had worked for Wells Fargo as a business banker and specialized in marketing.¹⁷ Tiffany Curtis had worked as an erotic escort and knew the inside of the escort industry.¹⁸ In late 2004 the escort agency Curtis worked for, Cinderella's, was put up for sale and she wanted to buy it.¹⁹ Knowing Mr. Maese's business background, she asked him to review its books.²⁰ He did and told Curtis it would cost less to start an agency from scratch.²¹ Mr. Maese and Curtis would have specific roles. He handled advertising, vendors, IT and similar business decisions, while she primarily interacted with the escorts and clients;²² answering phone calls and directing escorts to their various appointments.²³ Mr. Maese was concerned about operating an escort agency legally but Curtis assured him that she made good money while escorting without performing sex acts, without breaking the law.²⁴ So was born The Doll House escort agency.²⁵

Mr. Maese took steps to insure that The Doll House was established and operated legally. Mr. Maese and Curtis hired an attorney to set up the business properly;²⁶ he al-

¹⁷ R. at 319-20 (Tr. 109:8-10, July 10, 2008; Tr. 261:6-7, July 11, 2008.).

¹⁸ R. at 319 (Tr. 109:14-19, 70:2-3, July 10, 2008.).

¹⁹ R. at 319 (Tr. 110:3-4, July 10, 2008.).

²⁰ R. at 319 (Tr. 110:7-11, July 10, 2008.).

²¹ R. at 319 (Tr. 110:12-14, July 10, 2008.).

²² R. at 319 (Tr. 70:14-16, 136:23-25, July 10, 2008.).

²³ R. at 319-320 (Tr. 89:3-5:10, July 10, 2008; the word "send" and "sent" occur 37 times throughout the trial transcript.).

²⁴ R. at 319 (Tr. 108:12-109:7, July 10, 2008.).

²⁵ R. at 319 (Tr. 69:15-20, July 10, 2008.).

²⁶ R. at 319 (Tr. 110:17-19, July 10, 2008.).

so paid attorneys to teach escorts how to work within the law, to prevent prostitution.²⁷ Moreover, escorts were told that to avoid being arrested, they should not have sex for money.²⁸ Mr. Maese never required escorts to perform sex acts.²⁹ Escorts were required to be punctual, be congenial, and completely disrobe.³⁰ These requirements, and especially the nonrequirements, were clearly communicated to all escorts.³¹

But on April 5, 2006, on suspicion of a Class B misdemeanor business license violation, ten Sheriff's Deputies executed a search warrant on Curtis's home.³² While typically executed in secret, someone tipped off the press, informing them of the warrant's execution. A news crew was present before deputies breached the door.³³ Six months later, on October 5, 2006, Tiffany Curtis and S. Steven Maese were charged with Money Laundering, a Pattern of Unlawful Activity, and four counts of Exploiting Prostitution.

Yet the only factual details set forth in the Amended Information were the place and time of the counts. All charges occurred at Curtis's home: 7567 S. 2160 East, and in and around Salt Lake County, State of Utah; on or about July 1, 2004 through April 30, 2006 (Curiously, the Doll House began operations well after July, on December 16, 2004³⁴).³⁵

²⁷ R. at 319-20 (Tr. 72:3-73:10, July 10, 2008; Tr. 323:21-324:10, July 11, 2008.).

²⁸ R. at 320 (Tr. 161:4-9, July 11, 2008.).

²⁹ R. at 320 (Tr. 146:13-17, 159:19-24, 270:16-18, July 11, 2008.).

³⁰ R. at 320 (Tr. 271:15-19, 180:34-181:21, July 11, 2008.).

³¹ R. at 319 (Tr. 106:2-8, July 10, 2008.).

³² R. at 319 (Tr. 17:23-18:18, July 10, 2008.).

³³ R. at 319 (Tr. 47:11-23, July 10, 2008.).

³⁴ R. at 320 (Tr. 265:22-23, July 11, 2008.).

³⁵ R. at 8-13 (The Amended Information is attached at ADDENDUM B).

Counts II through V, the Exploiting Prostitution charges, used identical language.³⁶ The accompanying probable cause statement applied to both Mr. Maese and Curtis. It alleged that through The Doll House escort agency, "MEESE [sic] and CURTIS aided and encouraged prostitution..." It also contained seven subparagraphs from initialed witnesses. Five of the seven subparagraphs implicated Curtis as the sole criminal actor.³⁷

First, witness A.F. alleged that Curtis encouraged her to perform oral sex on clients and that Curtis would refrain from giving her appointments if she failed to pay kickbacks. A.F. stated that Mr. Maese threatened her if she quit working. Second, H.T. frequently prostituted herself and alleged that she always gave money to Curtis. Mr. Maese's name is absent from H.T.'s statement. Third, H.R. also frequently prostituted herself and alleged that Curtis and Mr. Maese offered her an attorney if she was ever arrested. Fourth, J.H. alleged that Curtis told her clients always wanted sex and that she did prostitute herself. J.H. recalled a specific instance where she paid a \$200 kickback to Curtis personally. She regularly paid Curtis a 20% kickback. J.H. also said Mr. Maese offered her an attorney. Fifth, T.N. alleged that she regularly paid a 20% kickback to Curtis. Moreover, Curtis frequently asked her to perform specific sex acts with particular customers, because other escorts were unwilling to.³⁸

Only N.F. (Nicole Fernandez) and D.T.'s (Danielle Thomas) statements accused Mr. Maese of crimes. N.F. said Mr. Maese told her when specific customers wanted specific sex acts. She refused. But despite being given few appointments because of her refusal,

³⁶ R. at 9-10 (Amended Information, Counts II-V).

³⁷ R. at 11-13 (Probable Cause Statement).

³⁸ R. at 11-13 (Probable Cause Statement at ¶5.).

Mr. Maese threatened her when she left The Doll House. D.T. said she was asked by Mr. Maese to obtain condoms for a customer and to “work something out.”³⁹

The State’s Amended Information failed to differentiate between counts ascribed to Curtis or Mr. Maese.⁴⁰ Then, at Preliminary Hearing, the State claimed it presented evidence of criminal episodes exceeding the four Exploiting Prostitution counts charged.⁴¹ And although Curtis eventually pled guilty to two counts of Attempted Exploitation of Prostitution, the State failed to amend their information a second time.⁴² Accordingly, Mr. Maese moved the trial court for a bill of particulars, but the trial court never ruled.⁴³

* * *

At trial, the State introduced substantial testimony that its witnesses prostituted themselves on their own initiative. Allyson Jensen and Jennifer Harris testified they prostituted themselves 50 percent of the time;⁴⁴ Heather Twede testified she had sex for money “maybe a third of the time.”⁴⁵ Danielle Thomas testified she prostituted herself “at least 60 to 70 percent”⁴⁶ of the time. Heather Wright testified she prostituted herself “Probably at least 90 percent of the calls.”⁴⁷ Nicole Fernandez said that she “had sex

³⁹ R. at 11-13 (Probable Cause Statement at ¶5.).

⁴⁰ R. at 8-13 (Amended Information and Probable Cause Statement combined.).

⁴¹ R. at 81 (Tr. 137:6-11, April 3, 2007.).

⁴² R. 319 (Tr. 74:24-75:6, July 10, 2008.).

⁴³ R. at 716.

⁴⁴ R. at 319-320 (Tr. 125:3, July 10, 2008; 151:18-23, Tr. July 11, 2008.).

⁴⁵ R. at 320 (Tr. 167:13, July 11, 2008.).

⁴⁶ R. at 320 (Tr. 183:19, July 11, 2008.).

⁴⁷ R. at 320 (Tr. 210:24, July 11, 2008.).

with all of them.”⁴⁸ And while all escorts had plea agreements in place,⁴⁹ each failed to testify that Mr. Maese required or pressured them to prostitute.⁵⁰ Escorts rarely spoke to Mr. Maese regarding clients and appointments; they generally spoke with Curtis.⁵¹

On each appointment, escorts were required to collect \$145 from the client; \$95 paid to the company and \$50 to the escort.⁵² Escorts were required to collect this fee within the first ten minutes of the appointment, before initiating any services.⁵³ This prevented clients from withholding money upon learning that sex acts were not for sale.⁵⁴ Subsequently, escorts would negotiate fees for any additional services provided to clients.⁵⁵ Shower shows, lap dances, back rubs, and dirty talk were such optional services.⁵⁶

From these additional services fees, escorts often tipped Curtis personally – not the business – a portion of their earnings.⁵⁷ This was considered a gratuity for sending an escort on the call.⁵⁸ Although one escort testified she saw all monies comingled,⁵⁹ Curtis

⁴⁸ R. at 320 (Tr. 240:21, July 11, 2008.).

⁴⁹ DEFENSE EXHIBITS 31-34.

⁵⁰ R. at 319-20 (Tr. 114:7-11, July 10, 2008; Tr. 153:13-24, 160:15-24, 174:19-25, 201:4-6, 218:19-219:16, July 11, 2008.).

⁵¹ R. at 320 (Tr. 224:2-225-2, July 11, 2008;

⁵² R. at 319 (Tr. 88:17-21, July 10, 2008.).

⁵³ R. at 320 (Tr. 148:2-10, July 11, 2008.).

⁵⁴ R. at 320 (Tr. 159:25-160:2, 274:11-23, July 11, 2008.).

⁵⁵ R. at 320 (Tr. 147:24-148:16, July 10, 2008.).

⁵⁶ R. at 320 (Tr. 267:2-3, July 11, 2008.).

⁵⁷ R. at 319 (Tr. 88:22-89:2, 136:1-8, July 10, 1008.).

⁵⁸ R. at 320 (Tr. 182:4-18, July 11, 2008.).

⁵⁹ R. at 320 (Tr. 222:8, July 10, 2008.).

herself testified that she kept the tips and The Doll House never shared in or received any tip money.⁶⁰ Importantly, Mr. Maese never received or shared in any tip money.⁶¹

On occasion, tales of the escorts' additional services appeared on The Erotic Review ("TER"). The Erotic Review is a nationwide website for the posting and reading of escort, massage parlor, and gentlemen's clubs reviews.⁶² TER's gossip, however, is posted anonymously and cannot be verified as true or fictitious.⁶³

TER contained stories alleging Doll House escorts engaged in sex acts. Mr. Maese read some of these various tales.⁶⁴ Furthermore, Curtis and Mr. Maese discussed stories they had read on TER⁶⁵ and jointly posted fictitious stories containing sex acts.⁶⁶

During a company meeting, Mr. Maese shared printed examples of good and bad reviews with escorts, but any references to sex acts were redacted.⁶⁷ As Curtis recalled, bad reviews were given for behavior such as, "A girl talking on her cell phone with her boyfriend; a girl refusing to be nice, to even you know, refusing to get naked, any number of things can cause a bad review..."⁶⁸ not necessarily for failing to perform sex acts.

⁶⁰ R. at 319 (Tr. 105:13-21, Tr. 138:4-6, July 10, 2008.).

⁶¹ R. at 320 (Tr. 277: 19-278:10, July 11, 2008.).

⁶² R. at 319 (Tr. 16:18-21, July 10, 2008.).

⁶³ R. at 319 (Tr. 43:1-44:13, July 10, 2008; Tr. 106:9-107:3, July 11, 2008.).

⁶⁴ R. at 320 (Tr. 311:4-9, July 11, 2008.).

⁶⁵ R. at 319 (Tr. 83:14-17, July 10, 2008.).

⁶⁶ R. at 319 (Tr. 116:15-117:5, July 10, 2008.).

⁶⁷ R. at 319 (Tr. 24:3-27:9, Jul 10, 2008; Tr. 114:17-21, July 10, 2008.).

⁶⁸ R. at 319 (Tr. 114:23-115:1, July 10, 2008.).

Beyond TER, Mr. Maese participated in, or was present at, various conversations with escorts. Mr. Maese was present when an escort spontaneously declared she had performed oral sex on a client.⁶⁹ He attended a bachelor party where two escorts performed oral sex on each other.⁷⁰ An escort also told Mr. Maese she had been raped;⁷¹ upon hearing this, he offered to call the police himself – on behalf of the woman – but the woman declined.⁷² Mr. Maese told an escort that the \$300 per hour she was charging was unreasonable, yet the escort never explicitly referenced sex⁷³ saying, “sex wasn’t said.”⁷⁴ Curtis also testified that the escort never explicitly discussed sex.⁷⁵

Witnesses also testified that Mr. Maese spoke with them regarding specific appointments. Danielle Thomas, who was diagnosed with bi-polar disorder and at the time of trial was being treated for it by a psychiatrist, a therapist and a medical doctor with Proflexor, Abilify, Xanax and Ambien,⁷⁶ testified that she was directed to buy condoms for a client and to make him happy.⁷⁷ Yet she also remembered telling police “I really fucking hate his ass. I’m talking like, like I really fucking hate him.”⁷⁸ And “I will take [The Doll House] down just to fucking get a good kick, ha, ha, about it... Yeah, I

⁶⁹ R. at 319 (Tr. 88:11-13, July 10, 2008.).

⁷⁰ R. at 319 (Tr. 97:24, July 10, 2008.).

⁷¹ R. at 320 (Tr. 168:19-171:22, July 11, 2008.).

⁷² R. at 320 (Tr. 173:11-15, July 11, 2008.).

⁷³ R. at 320 (Tr. 188:9:10, July 11, 2008.).

⁷⁴ R. at 320 (Tr. 202:12-13, July 11, 2008.).

⁷⁵ R. at 319 (Tr. 103: 18-22, July 10, 2008, “Okay, I can’t say that...”).

⁷⁶ R. at 320 (Tr. 204:19-21, July 11, 2008; Tr. 206:19-20, July 11, 2008.).

⁷⁷ R. at 320 (Tr. 186:20-21, July 11, 2008.).

⁷⁸ R. at 320 (Tr. 203:7-8, July 11, 2009.).

want to shut him down. I want to ruin his life just because he's a cocksuck."⁷⁹ Expectedly, she admitted having a "vendetta" against Mr. Maese.⁸⁰

Nicole Fernandez also disliked Mr. Maese. Her testimony completely contradicted her police interview wherein she confessed to prostituting herself with her personal clients, but not with The Doll House clients.⁸¹ At trial, she stated that Mr. Maese drove her to an appointment and was told it was "not just a lap dance or dancing or anything," and that the customer usually paid "like \$400."⁸² Subsequently, when being picked up, she told him she had performed oral sex, and "you need to be a little more liberal than that" was the reply.⁸³ Like Thomas, she told police, "I hate him, he's a little fucker, you know, and even on bad people I don't wish bad things but I just wish you know, I'll tell you so that he can get his everything gone."⁸⁴

Lastly, Allyson Jensen, who left The Doll House in December of 2005,⁸⁵ testified that in early April, 2006, her mother received a letter.⁸⁶ Curtis attributed the authorship to Mr. Maese.⁸⁷ The letter accused Jensen of being a prostitute and included photos of her from the Internet. The letter also directed the reader to her reviews on TER.

⁷⁹ R. at 320 (Tr. 203:25-204:2, 204:8-9, July 11, 2008.).

⁸⁰ R. at 320 (Tr. 205:16-18, July 11, 2008.).

⁸¹ R. at 320 (Tr. 245:5-249:8, July 11, 2008.).

⁸² R. at 320 (Tr. 233:18-19, 234:5-20, July 11, 2008.).

⁸³ R. at 320 (Tr. 235:18, 236:4, 235:21-25, July 11, 2008.).

⁸⁴ R. at 320 (Tr. 248:22-25, July 11, 2008.).

⁸⁵ R. at 319 (Tr. 121:6, July 10, 2008.).

⁸⁶ R. at 319 (Tr. 133:2-9, July 10, 2008.).

⁸⁷ R. at 319 (Tr. 99:15-17, July 10, 2008.).

* * *

In his closing argument, the Deputy District Attorney argued that Danielle Thomas's testimony proved "one specific instance of conduct where he exploited a prostitute as it's defined under Utah law."⁸⁸ He then argued that the letter to Allyson Jensen's mother proved an Exploiting Prostitution count and that Mr. Maese "has absolutely encouraged or induced another to remain a prostitute."⁸⁹ Next he argued that Nicole Fernandez's testimony proved Mr. Maese, "Did transport a person into or within the state for the purpose of prostitution."⁹⁰ Continuing, the prosecutor argued that Heather Twede's rape established Mr. Maese Exploited Prostitution because "they still took that agency fee despite what had happened."⁹¹ No evidence was presented that Twede paid The Doll House, much less Mr. Maese, any fee from this incident.

Next, the prosecutor rhetorically asked the jury if Mr. Maese "procure[d] inmates for a house of prostitution or place women into prostitution? Absolutely. That was the whole purpose of that website and that was the whole purpose of the advertising to bring those girls in."⁹² It was then nebulously argued that each interview Mr. Maese participated in – in conjunction with advertising – was a distinct instance where Mr. Maese encouraged women to "become or remain a prostitute."⁹³ Regarding Jennifer Harris, the prosecutor argued that "she had allowed sexual conduct and she did in

⁸⁸ R. at 320 (Tr. 347:25-348:2, July 11, 2008.).

⁸⁹ R. at 320 (Tr. 348:15-19, July 11, 2008.).

⁹⁰ R. at 320 (Tr. 351:15-19, July 11, 2008.).

⁹¹ R. at 320 (Tr. 352:10-14, July 11, 2008.).

⁹² R. at 320 (Tr. 375:12-15, July 11, 2008.).

⁹³ R. at 320 (Tr. 375:17-18, July 11, 2008.).

about 50 percent of the cases and she did about 300 appointments. That's 150 right there."⁹⁴ As the State concluded it argued, "We've shown actually more than the necessary charges in terms of the separate instances of exploitation of a prostitute."⁹⁵ In total, the State argued it proved Mr. Maese Exploited Prostitution at least 155 times.

SUMMARY OF ARGUMENT

POINT I. The Utah Constitution requires the State to provide a physical copy of charges against a defendant with sufficient factual details to enable an adequately prepared defense. The information charging Mr. Maese failed to adequately articulate acts constituting crimes; therefore he requested a bill of particulars. No bill was provided. Therefore, the central question is: Factually and specifically for each count, what was Mr. Maese charged with? The State failed to answer this question and the record shows that even with hindsight, it is unanswerable. The State's failure to factually illuminate the charges gave it nearly unfettered latitude in presenting its case. Immune from variance, the State's moving target prevented Mr. Maese from offering a cogent defense. This structural error merits reversal and remand.

POINT II. Jury unanimity means unanimity as to a specific crime and as to each element of the crime. First, both Exploiting Prostitution and Pattern of Unlawful Activity define multiple *actus reus* alternatives under which a jury may convict; this means both statutes define multiple crimes. Second, the State claimed it presented evidence of over 155 Exploiting Prostitution instances from which to convict. This convergence jeopard-

⁹⁴ R. at 320 (Tr. 375:23-25, July 11, 2008.).

⁹⁵ R. at 320 (Tr. 380:21-23, July 11, 2008.).

dized jury unanimity by providing the jury with limitless theories to convict Mr. Maese under. The jurors could pick-and-choose from the evidence to fulfill each count. This should have alarmed the trial court. It needed to give a detailed and specific jury unanimity instruction or compel the State to elect which specific acts it would submit to the jury for deliberation. Instead, it issued a unanimity instruction that applied to verdict only and was legally incorrect. Next, the jury's question from deliberations reminded the trial court that unanimity was compromised. This should have prompted a detailed jury unanimity instruction in response. Lastly, Utah R. Evid. 606(b) permits statements that prove a jury has rendered an invalid verdict. Therefore, the trial court should have considered juror statements proving a nonunanimous verdict. These errors deprived Mr. Maese of jury unanimity and warrant reversal and remand.

POINT III. The State must prove all elements of an offense including *mens rea* and attendant circumstances. In this case, the State failed to introduce evidence of a "house of prostitution," an "inmate," "prostitute" status, an "understanding," and a "prostitution business" all attendant circumstances. Moreover, the State failed to introduce evidence of intentional *mens rea*, repeatedly arguing that it had proved knowledge only. Additionally, the State's witness's testimony regarding an incident of "transporting" was inherently improbable. Finally, and perhaps most importantly, the evidence at trial greatly deviated from the allegations charged in the Amended Information. For all these reasons, the evidence at trial was insufficient to sustain the convictions.

POINT IV. Utah Law requires informations to charge by statute or by stating in concise terms the definition of the offense. The information charging Mr. Maese with a Pat-

tern of Unlawful Activity failed to enumerate the statute's last subsection. Yet Mr. Maese's jury instructions recited the final subsection, allowing the jury to convict him of a crime, a distinct *actus reus*, that he was not charged with. The trial court erred by issuing this jury instruction and this error should have been obvious to the trial court.

ARGUMENT

POINT I. The State failed to provide Mr. Maese with adequate notice of the charges against him and the trial court erred by failing to compel the State to provide a bill of particulars.

The risk of losing liberty is a formidable jeopardy. Therefore, both the Federal and Utah constitutions grant an accused the fundamental right to know the nature of the offense with which he is charged.⁹⁶ This "requires the prosecution to state the charge with sufficient specificity to protect the defendant from multiple prosecutions for the same crime and to give notice sufficient for the one charged to prepare a defense."⁹⁷ In *State v. Wilcox*, the Utah Supreme Court held that if "the elements of the crimes are covered by the factual allegations"⁹⁸ within the information, the State has provided adequate notice.⁹⁹

Importantly, adequate notice must be provided in specific documents. In *State v. Bernards*, this Court held that, "The probable cause statement... and Amended Informa-

⁹⁶ *State v. Nelson-Waggoner*, 2004 UT 29, ¶ 17 n. 1, 94 P.3d 186, Citing Utah Const., Article I, Section 12, and U.S. Const. amend. VI; *State v. Wilcox*, 808 P.2d 1028, 1031 (Utah 1991), Citing Utah and U.S. Const. Due Process Clauses.

⁹⁷ *State v. Bernards*, 2007 UT App 238, ¶ 15, 166 P.3d 626.

⁹⁸ *State v. Wilcox*, 808 P.2d 1028, 1033 (Utah 1991).

⁹⁹ *State v. Bell*, 770 P.2d 100, 104 (Utah 1988); *State v. Burnett*, 712 P.2d 260, 262 (Utah 1985).

tion, should be considered as part of the notice given Defendant.”¹⁰⁰ A bill of particulars also contributes to adequate notice. Other documents, such as discovery and evidence from pretrial hearings, specifically, have been excluded from adequate notice, however.

In *State v. Bell*, the Utah Supreme Court rejected the State’s assertion that “materials provided to [the defendant] through pretrial discovery”¹⁰¹ constituted adequate notice:

[W]e reject the implication of the State’s argument... that [the defendant] had pretrial access to a mass of various items of information from which, one can conclude in hindsight, [the defendant] could have gleaned the State’s theories for the essential elements of the crimes charged. For this Court to accept such an argument... would negate the accused’s constitutional right... to “have a copy” of a document setting out in clear terms “the nature and cause of the accusation.”¹⁰²

Moreover, discovery is precluded from contributing towards adequate notice because it is beyond the record’s scope. In *Salt Lake City v. United Park City Mines Co.*, the Utah Supreme Court held that “the findings of all triers of fact, either court or jury, must be based upon testimony of witnesses or *other evidence made a part of the record.*”¹⁰³ Accordingly, any findings of fact based on discovery are invalid; without a foundation, facts found by speculation are clearly erroneous.

Therefore, the *Bell* Court then established a three part test to determine if a defendant has received adequate notice: (1) whether the information itself is detailed enough to give a defendant sufficient notice of the charges; (2) whether a defendant exercises

¹⁰⁰ *State v. Bernards*, 2007 UT App 238, ¶ 17, 166 P.3d 626.

¹⁰¹ *State v. Bell*, 770 P.2d 100, 107 (Utah 1988).

¹⁰² *Ibid.*

¹⁰³ *Salt Lake City v. United Park City Mines Co.*, 503 P.2d 850, 852 (Utah 1972) (emphasis added).

the right to seek more particular notice by requesting a bill of particulars under Utah R. Crim. P. 4(e); and (3) whether the State met the burden of providing adequate notice.¹⁰⁴

Upon establishing deficient notice, the Utah Supreme Court held that the error is structural, with prejudice presumed. Again, in *State v. Bell*, the Utah Supreme Court noted “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”¹⁰⁵ and therefore the State’s burden is to prove the error was harmless.

Applying the *Bell* test here shows that the State deprived Mr. Maese of adequate notice. The Information and Probable Cause Statement, considered in concert, fail to provide Mr. Maese with sufficient factual details for the charged crimes. Mr. Maese requested a bill of particulars in conformity with Utah R. Crim. P. 4(e) yet the State never produced a bill and the trial court failed to compel it to do so.

A. The Amended Information charging Mr. Maese failed to provide him with the sufficient notice and factual detail required to adequately prepare a defense.

1. Utah’s Exploiting Prostitution statute defines five conceptually distinct crimes.

Utah’s Exploiting Prostitution statute defines five separate crimes, not merely one crime which may be committed in several different ways. This is because Exploiting Prostitution provides “alternatives for the *actus reus* of the charged crime.”¹⁰⁶ Those five conceptually distinct acts are:

¹⁰⁴ *State v. Bell*, 770 P.2d 100, 104-05 (Utah 1988).

¹⁰⁵ *State v. Bell*, 770 P.2d 100, 106 (Utah 1988) (quotations, brackets, and citations omitted).

¹⁰⁶ *State v. Tillman*, 750 P.2d 546, 565 (Utah 1987).

- (a) procures an inmate for a house of prostitution or place in a house of prostitution for one who would be an inmate;
- (b) encourages, induces, or otherwise purposely causes another to become or remain a prostitute;
- (c) transports a person into or within this state, with the purpose to promote that person's engaging in prostitution, procuring or paying for the transportation with that purpose;
- (d) not being a child or legal dependent of a prostitute share the proceeds of prostitution with a prostitute pursuant to their understanding that he is to share therein; or
- (e) owns, controls, manages, supervises, or otherwise keeps, alone or in association with another, a house of prostitution or a prostitution business.¹⁰⁷

These alternatives are discrete criminal activities; separate and distinct *actus reus* elements constituting separate and distinct crimes. Accordingly:

In subsection (a) the actor succeeds in explicitly recruiting an individual for a house of prostitution as defined by Utah Code Ann. § 76-10-1301(1);

In subsection (b) the actor's speech or conduct encourages a person to change status from nonprostitute to prostitute or to remain in prostitute status;

In subsection (c) the actor must physically transport a person, or pay for transportation, with the intent that the person transported will engage in prostitution as defined by Utah Code Ann. § 76-10-1302(1);

In subsection (d) the actor, before sharing, agrees to take profits from prostitution as defined by Utah Code Ann. § 76-10-1302(1) and then shares in those profits;

In subsection (e) the actor operates a house of prostitution as defined by Utah Code Ann. § 76-10-1301(1), or an explicit prostitution business, and is episodic.

Because the Exploiting Prostitution statute defines five separate crimes, and Mr.

Maese is entitled "to be charged with a specific crime,"¹⁰⁸ the State cannot generally cite

¹⁰⁷ Utah Code Ann. § 76-10-1305(1) (2006).

the statute to provide adequate notice. Yet despite supplementing the Information with a probable cause statement, the State failed to adequately notify Mr. Maese.

2. *The Probable Cause Statement details two crimes, only one qualifying as Exploiting Prostitution.*

The State deprived Mr. Maese of the factual basis for the charges against him. The State charged Mr. Maese via an Amended Information which recited, verbatim, Utah's Pattern of Unlawful Activity,¹⁰⁹ Money Laundering,¹¹⁰ and Exploiting Prostitution¹¹¹ statutes, but no facts. The accompanying Probable Cause Statement¹¹² detailed only two factual episodes that allege Mr. Maese committed crimes.

- ... N.F. describes one particular instance where MEESE (sic) ordered her to an appointment where the customer wanted sex. N.F. tried not to have sex, and the customer called MEESE to complain. MEESE then called N.F. and told her "B*tch, you're gonna have to make it work." ... N.F. states she was not given many appointments because she would not have sex with clients.¹¹³

This witness clearly asserts that she is not a prostitute ("she would not have sex with clients.") and accuses Mr. Maese of making statements that could reasonably be inferred as encouraging her to change her status to prostitute.

- D.T.... states that she would have sex for money while working for the Doll House. D.T. describes on one particular occasion being asked by a customer to have sexual intercourse for \$200.00 without a condom. When D.T. refused, the customer called MEESE to complain. MEESE then got on the phone and

¹⁰⁸ *Orem City v. Martineau*, 2006 UT App 136, ¶ 6, 135 P.3d 884.

¹⁰⁹ Utah Code Ann. § 76-10-1603, *sans* subsection (4) (2006).

¹¹⁰ Utah Code Ann. § 76-10-1903 (2006).

¹¹¹ Utah Code Ann. § 76-10-1305(1).

¹¹² Attached at ADDENDUM B.

¹¹³ R. at 11 (Probable Cause Statement at ¶5, § a.).

told D.T. to drive down the hill and get condoms and go back and “work something out.”¹¹⁴

The witness is a prostitute and accuses Mr. Maese of asking her to buy condoms and telling her to “work something out.” These facts fail to satisfy any Exploiting Prostitution alternative but qualify as a crime under Aiding Prostitution’s¹¹⁵ “procures or attempts to procure a prostitute for a patron” alternative.

3. *The Probable Cause Statement’s remaining allegations fail to articulate crimes.*

The remaining allegations range from benign to scandalous, yet none articulate crimes. Overall, the State’s document recounts legal conduct and cannot substantiate Counts I through V of the Information. The allegations are:

- A.F... states that MEESE (sic) threatened her if she did not continue working for Doll House.¹¹⁶

A threat by itself is not illegal. This statement fails to inform Mr. Maese if the State alleges he threatened to sue A.F. for breach of contract, or if he threatened to key A.F.’s car. Mr. Maese cannot divine the factual basis of any crime from this language, let alone Exploiting Prostitution’s necessary elements.

- H.T.... states she did have sex with clients for money, and that she always paid CURTIS out at the cottonwood address following the appointments.¹¹⁷

This paragraph fails to allege any crime against Mr. Maese.

¹¹⁴ R. at 12 (Probable Cause Statement at ¶5, § f.).

¹¹⁵ Utah Code Ann. § 76-10-1304(b) (2006).

¹¹⁶ R. at 12 (Probable Cause Statement at ¶5, § b.).

¹¹⁷ R. at 12 (Probable Cause Statement at ¶5, § c.).

- H.R. states that MEESE (sic) and CURTIS told her that if she ever got arrested for prostitution, to not say anything, and they would provide a lawyer for her.¹¹⁸

The Exploiting Prostitution statute does not prohibit Mr. Maese from informing H.R. of her Fifth Amendment right to remain silent. Similarly, providing an attorney to an individual in police custody does not demonstrate an Exploiting Prostitution element.

- J.H... states that MEESE [sic] told her they would pay for a lawyer if she would not talk to police. J.H. states that money was paid out to CURTIS and/or MEESE [sic] at the Cottonwood address every time.¹¹⁹

Again, offering to pay for J.H.'s legal fees fails to constitute criminal conduct. Next, paying money owed in the course of employment as a licensed escort is legal and expected. The document may imply that Mr. Maese operated a sexually oriented business without a license, but the factual basis for Exploiting Prostitution is nonexistent.

- T.N... states that in practice the girls frequently told CURTIS and MEESE [sic] of the specific sex acts they perform.¹²⁰

This hearsay statement – the witness alleges *others* told Mr. Maese about sex acts – fails to constitute a crime under Utah law. Hearing someone recount a crime, allegedly committed by a third party, is not a crime. The Utah Supreme Court has long held that “the mere presence where a crime is being committed... without such an intent to join therein, being shown, is not sufficient to find that one is an accomplice.”¹²¹

¹¹⁸ R. at 12 (Probable Cause Statement at ¶5, § d.).

¹¹⁹ R. at 12 (Probable Cause Statement at ¶5, § e.).

¹²⁰ R. at 13 (Probable Cause Statement at ¶5, § g.).

¹²¹ *State v. Helm*, 563 P.2d 794, 797 (Utah 1977).

The State’s remaining allegations pertain to Tiffany Curtis. But conduct ascribed to Curtis cannot be charged to Mr. Maese – the First Amendment of the United States Constitution prohibits guilt by association.¹²²

* * *

The State’s Information and Probable Cause Statement are too vague to provide Mr. Maese with sufficient notice of his charges because they fail to enumerate “the elements of the crimes [by] factual allegations;”¹²³ these documents lack sufficient relevant facts.

Furthermore, the Information and Probable Cause Statement cannot be reconciled because they fail to provide a nexus – customarily done through specific times, places, or participants – between counts in the Information and paragraphs in the Probable Cause Statement. Counts II through V use identical generic statutory language as a descriptor and a vast 22 month (“July 1, 2004 through April 30, 2006”) time frame. This vague window is not the “best information the prosecution has... that may be useful in helping to fix a date, time or place of the alleged offenses”¹²⁴ because, as evidenced by the Probable Cause Statement, the State had temporal windows as short as two months. This served as an effective strategy to preserve the State’s case from haphazard witnesses, but fails as an exception for denying Mr. Maese adequate notice.

4. *In this case, adequate notice exceptions are inapplicable.*

When the State predicates charges on adult witnesses, notice exceptions are inapplicable. The Utah Supreme Court has “recognized that there are notice problems, especially

¹²² *Elfbrandt v. Russell*, 384 U.S. 11, 18-19 (1966).

¹²³ *State v. Wilcox*, 808 P.2d 1028, 1033 (Utah 1991).

¹²⁴ *State v. Gulbransen*, 2005 UT 7, ¶ 27, 106 P.3d 734 (quotations and citation omitted).

as to the date, place, and time, inherent in prosecutions based on the testimony of very young victims,”¹²⁵ therefore the Court has “been less vigorous in requiring specificity as to time and place when young children are involved than would usually be the case where an adult is involved.”¹²⁶ In this case, Mr. Maese’s youngest accuser is in her mid 20s; his oldest is nearly 35. These witnesses do not enjoy the same latitude as an eight year old; and even in child abuse cases, facts are connected to counts by using initials.

Admittedly, “there are few ironclad rules for determining the adequacy of notice beyond the requirement that the elements of the offense be alleged.”¹²⁷ But here, the State’s Information and Probable Cause Statement are woefully inadequate in alleging facts for the crimes charged. Therefore, Mr. Maese satisfies the *Bell* test’s first prong.

B. Mr. Maese sought more particular notice by requesting a bill of particulars.
On May 27, 2008, Mr. Maese filed his Motion for Bill of Particulars. Filed almost 45 days prior to Mr. Maese’s trial date, the State opposed, but failed to object to, Mr. Maese’s Motion. On July 7, 2008, the Trial Court heard oral arguments regarding this Motion. Mr. Maese satisfied the *Bell* test’s second prong.

C. The State failed to provide Mr. Maese with a bill of particulars and the trial court failed to rule on his Motion.
The State failed to provide Mr. Maese with a bill of particulars and the trial court failed to rule on Mr. Maese’s Motion. These facts satisfy the *Bell* test’s third prong. The trial court’s failure to rule on Mr. Maese’s Motion merits attention however.

¹²⁵ *State v. Wilcox*, 808 P.2d 1028, 1032 (Utah 1991).

¹²⁶ *Id.* at 1033.

¹²⁷ *Id.* at 1032.

1. *The Trial Court erred by not ruling on Mr. Maese's Motion for Bill of Particulars, and then created a post hoc rationalization to justify its error.*

Under the Rules of Criminal Procedure, pretrial motions must be ruled on before trial:

A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.¹²⁸

Rule 12(e) exists because, as the Utah Supreme Court reasoned, "issues are for the trial court to decide and... the findings of fact must reveal how the court resolved each material issue."¹²⁹ The Tenth Circuit Court of Appeals also concluded that "an appellate court does not consider issues not ruled upon below..." and therefore "it is appropriate to remand the case to the district court to first address this issue."¹³⁰

Remanding constitutional issues to a trial court can be problematic, however. In *State v. Ramirez*, the Utah Supreme Court held that a post-trial ruling regarding a constitutional question is an inappropriate remedy and a retrial is required:

To ask the trial court to address the [motion] now would be to tempt it to reach a *post hoc* rationalization for the [resulting effect]... Such a mode of proceeding holds too much potential for abuse. The only fair way to proceed is to vacate defendant's conviction and remand the matter for retrial.¹³¹

The trial court in this case fulfilled the *Ramirez* Court's fears. In issuing its Memorandum Decision and Order on Mr. Maese's Motion for Arrest of Judgment,¹³² the trial

¹²⁸ Utah R. Crim. P. 12(e) (2008) (emphasis added).

¹²⁹ *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987).

¹³⁰ *United States v. Walters*, 269 F.3d 1207, 1219 (10th Cir. 2001).

¹³¹ *State v. Ramirez*, 817 P.2d 774, 789 (Utah 1991).

¹³² Attached at ADDENDUM C.

court misstated the facts and the law. For example, in reciting the Probable Cause Statement charging Mr. Maese, the trial court wrote:

(b) an escort with the initials A.F. was encouraged by Mr. Maese during October and December 2005 to engage in oral sex without a condom and that if she didn't engage in sex acts she would not get work;¹³³

Yet the Probable Cause Statement, quoted in whole and verbatim, shows:

b. A.F., who worked as a Doll House escort between October and December of 2005, states that MEESE [sic] threatened her if she did not continue working for Doll House. A.F. states CURTIS regularly encouraged good reviews on TER, and specifically encouraged bbbj, which is a term for oral sex without a condom. A.F. states that CURTIS made clear that if she did not tip the phone girl, which was usually her self [sic] (the person that sets appointments), she would not get any more appointments.¹³⁴

The alleged illegal conduct is clearly attributed to Mr. Maese's former codefendant, Tiffany Curtis.

Additionally, the trial court's order misstates the law. For example, the court cites *State v. Bernards*¹³⁵ for the proposition that "specific dates are not necessary when a count is part of an ongoing criminal enterprise."¹³⁶ Yet in *State v. Bernards* this Court noted that, after receiving a motion for bill of particulars, the trial court compelled the State to narrow the timeframe for each count alleged. The State complied, narrowing down to a month for one count, and to single dates for two counts. More importantly, this Court found that that, "The probable cause statement also provided detailed facts

¹³³ R. at 720 (Memorandum Decision and Order at 25.).

¹³⁴ R. at 12 (Probable Cause Statement at ¶5, § b.).

¹³⁵ *State v. Bernards*, 2007 UT App 238, 166 P.3d 626.

¹³⁶ R. at 723 (Memorandum Decision and Order at 28.).

associated with each charged offense.”¹³⁷ Furthermore, in *Bernards*, references to an “ongoing criminal enterprise” are nonexistent.

Thus here, as predicted by the Utah Supreme Court, the trial court succumbed to its temptation to reach a *post hoc* rationalization for its failure to rule on Mr. Maese’s Motion for Bill of Particulars; compromising Mr. Maese’s right to adequate notice.

i. The trial court’s waiver claim misinterprets Utah R. Crim. P. 12(f).

In its Memorandum Decision and Order, the trial court asserted that Mr. Maese waived his right to a ruling on his motion for a bill of particulars. Here the record shows that the trial court asked both litigants if they were ready to proceed with trial. Both parties answered affirmatively. Yet Mr. Maese did not, and could not, have knowingly and intelligently waived his right to adequate notice through a general question.

Importantly, knowing and intelligent is the standard for waiver of counsel,¹³⁸ Miranda rights,¹³⁹ entering a guilty plea,¹⁴⁰ even waiving a probation revocation hearing.¹⁴¹ Furthermore, the trial court’s analysis, predicated on Utah Rule of Criminal Procedure 12(f), is flawed. Rule 12(f) states in relevant part:

Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof...¹⁴²

¹³⁷ *State v. Bernards*, 2007 UT App 238, ¶ 17, 166 P.3d 626.

¹³⁸ *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

¹³⁹ *State v. Barrett*, 2006 UT App 417, ¶ 11, 147 P.3d 491.

¹⁴⁰ *State v. Beckstead*, 2006 UT 42, ¶ 16, 140 P.3d 1288.

¹⁴¹ *State v. Martin*, 1999 UT App 62, ¶ 13, 977 P.2d 1224.

¹⁴² Utah R. Crim. P. 12(f) (2008).

In this case, the State and the trial court received Mr. Maese’s motion for a bill of particulars¹⁴³ and heard oral arguments;¹⁴⁴ all parties knew the matter was ripe for decision. These facts are uncontested; consequently, Mr. Maese made a timely request prior to trial and Rule 12(f)’s mandates are satisfied.

Yet under the trial court’s theory, these documented realities are irrelevant; a trial court can inoculate itself against any Rule 12(e) claims, pursuant to Rule 12(f), by asking a general and customary “readiness” question. Therefore the trial court’s rule interpretation requires Mr. Maese to nag the trial court into ruling on his motion. But Mr. Maese has no affirmative obligation to, and moreover cannot, compel the trial court to rule. The trial court maintains its obligation to enter a decision before the start of trial. To hold otherwise renders, Utah Rule of Criminal Procedure 12(e) meaningless.

The record shows that the trial court had the first opportunity to address the adequate notice claim but abdicated its responsibility. The trial court’s theory – that Mr. Maese’s counsel would identify an adequate notice issue, move for a bill of particulars, orally argue the merits, then waive his right to adequate notice in the eleventh hour – creates an ineffective assistance of counsel issue which overcomes the waiver claim.

* * *

In his *State v. Wilcox* dissent, Justice Stewart noted that “the more amorphous the prosecution’s case, the less notice the defendant receives and the less chance the defendant will have of defending... If the defendant goes to trial on [vague information], the result

¹⁴³ R. at 167.

¹⁴⁴ R. at 197.

is virtually foreordained.”¹⁴⁵ Here, inadequate notice created an inherently unfair framework, not just a flaw in trial presentation; structural error.

As the Utah Supreme Court held in *State v. Cruz*, “Structural errors are flaws in the framework within which the trial proceeds, rather than simply an error in the trial process itself.”¹⁴⁶ Inadequate notice deprived Mr. Maese – and they jury – of a roadmap to follow the case. By failing to correlate each count with specific witnesses or victims, the State made the scope of its case practically limitless. And considering the incalculable number of interactions Mr. Maese had with scores of escorts over the course of nearly two years, the State’s failure rendered its case immune from variance.

A bill of particulars’ – and adequate notice’s – purpose is to bind the State to specific facts. In *State v. Myers*, the Utah Supreme Court wrote, “The bill of particulars thus limits the field of inquiry under the charge laid in the information.”¹⁴⁷ Yet not bound to any unified theories of law or fact, here, the State presented the jury with a moving target.

At trial, the State argued it proved Mr. Maese Exploited Prostitution at least 155 times and emphasized, “We’ve shown actually more than the necessary charges in terms of the separate instances of exploitation of a prostitute.”¹⁴⁸ Mr. Maese was prejudiced when, by anticipating to defend against four counts of Exploiting Prostitution, he unexpectedly had to answer more than 150 accusations. Mr. Maese’s defense, predicated on the State’s Amended Information, was only 1/40th of what was necessary. This

¹⁴⁵ *State v. Wilcox*, 808 P.2d 1028, 1035-36 (Utah 1991) (Stewart, J. dissenting).

¹⁴⁶ *State v. Cruz*, 2005 UT 45, ¶ 17, 122 P.3d 543 (quotations and citations omitted).

¹⁴⁷ *State v. Myers*, 302 P.2d 276, 279 (Utah 1956).

¹⁴⁸ R. at 320 (Tr. 376:23-25, 380:21-23, July 11, 2008.).

structural error affected Mr. Maese’s entire trial, and led to a very foreseeable outcome: An unconstrained prosecution and a jury that lacked unanimity.

POINT II. Mr. Maese’s right to jury unanimity was violated because: (1) the trial court failed to compel the State to elect offenses; (2) its initial jury unanimity instruction obviously miscommunicated Utah law; then (3) it compounded this error with its supplemental instruction; and (4) it erred by barring juror statements showing that Mr. Maese’s jury failed to reach a unanimous verdict.

Jury unanimity is a fundamental principle and right of justice in American criminal law; “a right so fundamental that it may not be waived.”¹⁴⁹ In Utah, constitutionally mandated¹⁵⁰ jury unanimity “means unanimity as to a specific crime and as to *each element* of the crime.”¹⁵¹ It is “not enough that [the jury] simply unanimously agree on guilt.”¹⁵²

Therefore, where (1) the State prosecutes an individual under a statute that defines separate crimes; or (2) where the State presents evidence of a greater number of separate criminal offenses than a defendant is charged with, jury unanimity is jeopardized. A trial court can protect a defendant, however. The Hawaii Supreme Court held that one of two mechanisms, election of offenses or a specific jury unanimity instruction, preserves jury unanimity:

...we hold that when separate and distinct culpable acts are subsumed within a single count... – any one of which could support a conviction thereunder – and the defendant is ultimately convicted by a jury of the charged offense, the defendant’s constitutional right to a unanimous verdict is violated unless one or both of the following occurs: (1) at or before the close of its case-in-chief, the prosecu-

¹⁴⁹ *United States v. Teague*, 443 F.3d 1310, 1317 (10th Cir. 2006) (quotations omitted).

¹⁵⁰ Utah Constitution, Article I, section 10.

¹⁵¹ *State v. Saunders*, 1999 UT 59, ¶ 60, 992 P.2d 951 (emphasis added).

¹⁵² *Id.* at ¶ 64.

tion is required to elect the specific act upon which it is relying to establish the “conduct” element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction, i.e., an instruction that advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.¹⁵³

In this case, the State created both factors jeopardizing jury unanimity. First, as argued above, Exploiting Prostitution can be committed through five *actus reus* alternatives. Similarly, Utah’s Pattern of Unlawful Activity Statute can be violated through at least three distinct *actus reus* alternatives: (1) & (2) by *acquiring, maintaining an interest in, or operate an enterprise* through a pattern of unlawful activity or a pattern’s proceeds; (3) by *participating in an enterprise’s affairs* through a pattern of unlawful activity; or (4) by *conspiring* to perform (1), (2), or (3). Second, the State argued that Mr. Maese violated the Exploiting Prostitution statute no fewer than 150 times.¹⁵⁴ Despite these red flags, the trial court failed to protect Mr. Maese’s jury unanimity right.

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

When the State introduces evidence of more than one possible act constituting a charged criminal offense, the doctrine of election is implicated. Election of offenses requires the State, compelled by the trial court, to submit to the jury specific acts reconciled with specific counts for deliberation and verdict purposes. As articulated by the Tennessee Supreme Court, election of offenses serves numerous interests:

it enables the defendant to prepare for the specific charge; it protects a defendant against double jeopardy; it enables the trial judge to review the weight of the evidence in its role as thirteenth juror; and it enables an appellate court to review the legal sufficiency of the evidence. The most important interest served by elec-

¹⁵³ *State v. Arceo*, 928 P.2d 843, 874-75 (Haw. 1996).

¹⁵⁴ R. at 320 (Tr. 376:25, July 11, 2008.).

tion, however, is to ensure that the jurors deliberate over and render a verdict based on the same offense.¹⁵⁵

And while Utah's appellate courts last explicitly addressed the election doctrine many years ago, the courts' holdings have remained consistent and intact. In *State v. Hilberg*, the Utah Supreme Court addressed the State's failure to elect offenses:

The trial court permitted the prosecution to introduce six distinct acts or crimes to be shown in evidence before the jury... without requiring any election to be made, and allowed the case to go to the jury upon all the several acts... Whether the jury united in a verdict upon each act, or some on one and others on another of the acts proved is problematical.

No jury should be set to fishing or hunting for a charge which they are called upon to try. Such a course deprived the defendant of a fair trial, and compelled him, without warning, to defend against acts of which he had no notice. Manifestly, he could not be prepared to meet such confusing charges not contained in the information.¹⁵⁶

In this case, the State argued that Mr. Maese violated the Exploiting Prostitution statute no fewer than 150 times¹⁵⁷ yet charged him with only four counts. The State used a similar argument regarding a Pattern of Unlawful Activity, arguing that "once you find three of these specific instances of unlawful conduct or more – and we charged four – you then qualify for the pattern of unlawful activity..."¹⁵⁸ Also it argued that "pattern of unlawful activity means engaging in conduct which constitutes the commission of at least three episodes"¹⁵⁹ with the additional element of an enterprise. Yet like Exploiting

¹⁵⁵ *State v. Brown*, 992 S.W.2d 389, 391 (Tenn. 1999) (citations omitted).

¹⁵⁶ *State v. Hilberg*, 22 Utah 27, 61 P. 215, 216 (Utah 1900).

¹⁵⁷ R. at 320 (Tr. 376:25, July 11, 2008.).

¹⁵⁸ R. at 320 (Tr. 352:21-24, July 11, 2008.).

¹⁵⁹ R. at 320 (Tr. 353:2-4, July 11, 2008.).

Prostitution, a Pattern of Unlawful Activity conviction can be sustained through any of three distinct *actus reus* elements.

The State's case presentation satisfies the *Hilberg* criteria. And yet the trial court failed to require the State to elect which offenses it would submit to the jury. Necessarily, the jury went fishing for the four discrete acts – and predicate episodes – they were called upon to try. This error invited a patchwork verdict¹⁶⁰ and stole Mr. Maese's unwaivable constitutional right to jury unanimity.

B. The trial court's initial jury unanimity instruction miscommunicated Utah's jury unanimity principle.

In *State v. Cruz*, the Utah Supreme Court validated reasonable doubt instructions by stating, "we need only ask whether the instructions, taken as a whole, correctly communicate the principle of reasonable doubt..."¹⁶¹ This same simple question can be asked of jury unanimity instructions.

Yet necessarily, jury unanimity instructions require more precision than reasonable doubt instructions. As the Utah Supreme Court noted in *State v. Reyes*, the English language permits "many formulations for proof beyond a reasonable doubt that correctly convey its meaning."¹⁶² But jury unanimity's specific definition – "unanimity as to a specific crime and as to *each element* of the crime"¹⁶³ – cannot be accurately conveyed in myriad ways. Especially in this case.

¹⁶⁰ Trubitt, *Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts are Invalidated by Juror Disagreement on Issues*, 36 Okla. L. Rev. 473 (1983).

¹⁶¹ *State v. Cruz*, 2005 UT 45, ¶ 21, 122 P.3d 543 (quotations and citations omitted).

¹⁶² *State v. Reyes*, 2005 UT 33, ¶ 20, 116 P.3d 305.

¹⁶³ *State v. Saunders*, 1999 UT 59, ¶ 60, 992 P.2d 951 (emphasis added).

As previously established, the State charged Mr. Maese under singular statutes that defined multiple crimes and presented evidence of a greater number of separate criminal offenses than he was charged with. Despite this, the trial court issued only a two sentence jury instruction regarding unanimity. Jury Instruction № 25 reads:

25. 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.¹⁶⁴

While this Instruction generally advises the jury, it incorrectly states Utah law. Instruction 25 requires the jury to agree on guilt – the obvious binary choice in a verdict being guilty or not guilty – and nothing more. Specifically, the Instruction informs the jury that its only purpose is to determine a verdict. When the jury agrees on a verdict, their “work is finished;” yet the Utah Supreme Court has held that it is “not enough that [the jury] simply unanimously agree on guilt.”¹⁶⁵ This Instruction fails to insure that Mr. Maese cannot be convicted except upon jury unanimity of every factual element necessary to constitute Exploiting Prostitution and a Pattern of Unlawful Activity.

The Court of Criminal Appeals of Tennessee illuminates the inherent dangers in providing a jury with a cursory unanimity instruction:

...a conviction that is not unanimous as to the defendant’s specific illegal action is no more justifiable than a conviction by a jury that is not unanimous on a specific count. Where the State presents evidence of numerous offenses, the trial court must augment the general jury unanimity instruction to insure that the jury understands its duty to agree unanimously to a particular set of facts. A skeletal

¹⁶⁴ R. at 284 (Jury Instruction № 25, attached at ADDENDUM D).

¹⁶⁵ *State v. Saunders*, 1999 UT 59, ¶ 64, 992 P.2d 951.

jury instruction of unanimity ferments a strong possibility of a composite jury verdict in violation of an appellant's constitutional rights.¹⁶⁶

Here the State's case, predicated on numerous and diverse criminal theories, prevented Jury Instruction № 25 from accurately communicating Utah's jury unanimity law.

1. *This Court should address this jury instruction under plain error.*

Plain error occurs when "(i) an error was made; (ii) the error should have been obvious to the trial court; and (iii) the error was harmful, so that in the absence of the error, a more favorable outcome was reasonably likely."¹⁶⁷ The doctrine exists because, "Neither a counsel's nor a judge's error should be the cause of one's"¹⁶⁸ conviction.

Here, Mr. Maese failed to request a specific jury unanimity instruction. The Plain Error doctrine governs, however, because jury unanimity is "a right so fundamental that it may not be waived."¹⁶⁹ Moreover, this case satisfies the plain error test.

As argued above, an error was made; the jury instructions – particularly in this case where the trial court failed to compel the State to elect offenses – inaccurately communicate the law regarding jury unanimity. This error should have been obvious to the trial court because the case law regarding jury unanimity is well settled; *State v. Saunders* was decided nearly a decade ago, *State v. Russell* more than 20 years ago, *United State v. Gipson* more than 30. Gross deviation from, or blindness to, *stare decisis* is obvious error.

The last prong, a reasonably likely more favorable outcome, is established in several ways. Had a split jury – which apparently existed here as inferred by their written ques-

¹⁶⁶ *State v. Neal*, 2002 TN Crim App 76, 5-6 (unpublished) (Attached at ADDENDUM E).

¹⁶⁷ *State v. Helmick*, 2000 UT 70, ¶ 9, 9 P.3d 164.

¹⁶⁸ *State v. Bullock*, 791 P.2d 155, 164 (Utah 1989).

¹⁶⁹ *United States v. Teague*, 443 F.3d 1310, 1317 (10th Cir. 2006) (quotations omitted).

tion alone – been forced to reconcile its differences, it may have been unable to; resulting in a hung jury or acquittal. Alternatively, as articulated in his concurring opinion in *State v. Tillman*, Justice Stewart wrote that

nonunanimity tends to subvert the proper operation of the lesser included offense doctrine... because the jury may never have to consider that doctrine since it is not compelled to decide whether the defendant committed one or the other (or both) alternative elements in the definition of the crime.¹⁷⁰

Here, the jury was presented with Aiding Prostitution¹⁷¹ as Exploiting Prostitution's lesser included offense.

Under any alternative outcome theory – acquittal, hung jury, or conviction of lesser included offenses – Mr. Maese's outcome would certainly have been more favorable.

C. The trial court's supplemental instruction failed to address jury unanimity.

This case is analogous to *United States v. Gipson*, the original federal jury unanimity case. In that case, "the jurors returned to the courtroom to request additional instructions from the court, handing the judge a note that read, 'In Count Two, will he be guilty of all counts or will it be broken down?'" There, "The judge accurately perceived that this question could be interpreted in several different ways."¹⁷² Here, the trial court did not.

In this case the trial court received a question from the jury which asked:

In instruction #37 a, b, c, d Do all of them have to be fulfilled in order to find the defendant guilty or just one of the conditions met? Also the same question for instruction #40.¹⁷³

¹⁷⁰ *State v. Tillman*, 750 P.2d 546, 560 (Utah 1987) (Stewart, J., concurring).

¹⁷¹ R. at 299-300 (Jury Instruction Nos 41 & 42.).

¹⁷² *United States v. Gipson*, 553 F.2d 453, 455 (5th Cir. 1977).

¹⁷³ R. at 312, (Jury Question No 1, attached at ADDENDUM F).

The trial court instructed the jury with:

Answer: Both Instructions 37 and 40's subparagraph (the a, b, c's) you refer to end with the word "or" and therefore should be read accordingly.¹⁷⁴

The Supplemental Instruction inaccurately conveyed Utah law. The Supplemental Instruction encouraged individual jurors to find Mr. Maese guilty of subsection (a) "or" (b) of both Pattern of Unlawful Activity (Instruction 37)¹⁷⁵ and Exploiting Prostitution (Instruction 40).¹⁷⁶ Because jury unanimity has a strict definition, the trial court should have instructed the jury that it must be unanimous as to: (1) which *actus reus* alternative Mr. Maese violated; as well as (2) what specific acts it relied upon in finding guilt.

D. Mr. Maese's jury failed to be unanimous, but in misinterpreting Utah R. Evid 606(b) the trial court barred juror statements.

A guilty verdict that is not unanimous is not a true verdict. In *State v. Saunders*, the Utah Supreme Court held that when a jury agrees a defendant is guilty of crime, but the jury disagrees upon the specific crime or each element thereof, its unanimous guilty verdict fails to meet the Utah Constitution's requirements.

For example, if a jury were given no elements instructions, *a unanimous guilty verdict would not meet* the requirements of Article I, section 10. Nor would a guilty verdict be valid if some jurors found a defendant guilty of robbery while others found him guilty of theft, *even though all jurors agree that he was guilty of some crime*. Nor would a verdict be valid if some jurors found a defendant guilty of a robbery committed on December 25, 1990, in Salt Lake City, but other jurors found him guilty of a robbery committed January 15, 1991, in Denver, Colorado,

¹⁷⁴ R. at 312 (Supplemental Jury Instruction, Answer to Jury Question No 1, attached at ADDENDUM F).

¹⁷⁵ R. at 294, (Instruction No 37 detailed Utah Code Ann. § 76-10-1603.).

¹⁷⁶ R. at 297 (Instruction No 40 detailed Utah Code Ann. § 76-10-1305.).

even though all jurors found him guilty of the elements of the crime of robbery and all the jurors together agreed that he was guilty of some robbery.¹⁷⁷

If a jury agrees that some crime was committed, but disagrees upon which crime or which acts were criminal, their verdict is invalid. Their verdict cannot be a true verdict; invalid, it is no verdict at all.

1. *Mr. Maese presents juror statements solely to establish that his jury failed to reach a true and valid verdict; the statements are therefore admissible.*

Utah Rule of Evidence 606(b) states in relevant part:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to 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 processes in connection therewith...¹⁷⁸

In *State v. Gee*, the Utah Supreme Court interpreted Utah R. Evid. 606(b). It wrote that testimony that the jury "[misunderstood] fact or law, or that they misunderstood the charge of the court, or the effect of their verdict, or opinions, surmises and processes of reasoning in arriving at a verdict"¹⁷⁹ is precluded.

Yet in this case, Mr. Maese sought to introduce testimony that his jury failed to reach a unanimous verdict. Accordingly, long-held law permits inquiry into verdicts that are untrue, even verdicts that at first glance are seemingly valid. The Tenth Circuit Court of Appeals held that Fed. R. Evid. 606(b) permits inquiries regarding verdict accuracy:

Rule 606(b) forbids a juror from testifying as to matters occurring during deliberations or the juror's mental processes. However, we agree with the Second Cir-

¹⁷⁷ *State v. Saunders*, 1999 UT 59, ¶60, 992 P.2d 951 (emphasis added).

¹⁷⁸ Utah R. Evid. 606(b) (2008).

¹⁷⁹ *State v. Gee*, 498 P.2d 662, 665-66 (Utah 1972).

cuit that Rule 606(b), by its own terms, is silent as to queries designed to confirm the accuracy of the verdict, and that the rule therefore does not preclude a juror from testifying as to the potential miscommunication of the verdict.¹⁸⁰

Therefore a direct inquiry into the verdict, and its validity, alone is permissible. In *Fox v. United States*, the Fifth Circuit Court of Appeals addressed similar situations:

By considering these affidavits, we do not impinge upon the rule that the affidavit of a juror may not be used to impeach a verdict which has been announced in open court. It has long been well settled that the affidavit of a juror is admissible to show the true verdict or that no verdict was reached at all.¹⁸¹

The court lists four cases to support its position.

Similarly under Utah law, Justice Stewart wrote that Utah R. Evid. 606(b) is not absolute and “certainly verdicts are not absolutely inviolate. Verdicts based on chance or bribery, for example, have long been subject to challenge, since they do not even purport to be based on the law and the evidence.”¹⁸² If juror statements show an invalid verdict, they are permissible evidence.

2. *Mr. Maese's juror statements prove that his jury failed to reach a unanimous verdict.*

Mr. Maese submitted juror interviews to the trial court which convincingly demonstrate his verdict was not unanimous and therefore no verdict was reached.

On July 19, 2008, just days following the verdict in this case, Juror Dan Christensen, Juror Number 4, was interviewed. In that interview, he stated that the jury deliberated

¹⁸⁰ *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1548 (10th Cir. 1993).

¹⁸¹ *Fox v. United States*, 417 F.2d 84, 89 (5th Cir. 1969).

¹⁸² *State v. DeMille*, 756 P.2d 81, 85 (Utah 1988) (Stewart, J., dissenting).

for quite some time about the specific acts that may have constituted the Exploiting Prostitution counts. Mr. Christensen said:

And then there was also some confusion as to whether we had to agree on the same letter or if we could agree on different letters but still find each of them.

And then as far as A, D, and E... it was kind of like split across the room... like some people agree on A but weren't sure, some people agreed on D but weren't sure, and some people agreed on E but weren't, like, so there were some people who said yes on A, B, C, and E, and then there were some members of the jury who said I well no I only feel B, C, D and E. Some people felt like A was true and some people felt like D was true but not necessarily both.¹⁸³

Mr. Christiansen also said that he did not believe that Mr. Maese shared in prostitution proceeds, but that other jurors did. Therefore some jurors believed Mr. Maese was guilty of Exploiting Prostitution under subsection (d), others did not.

On August 9, 2008, another juror, Tricia Odeneal, Juror Number 8, was interviewed. She said that the jury failed to agree upon which specific acts Mr. Maese performed that violated the Exploiting Prostitution statute.

Q: So he necessarily exploited prostitution at least four times?

A: Oh, well, definitely. If he had ten girls that he was sending out on a daily basis, of course.

...

Q: Sure. Sure. But so you didn't necessary --

A: -- inaudible.

¹⁸³ R. at 352 (Motion for Arrest of Judgment at 30. Interview with Juror Dan Christiansen, conducted on July 19, 2008 by Kelly Ann Booth.).

Q: You 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; you kind of took a more general and organic approach to it?

A: Yeah.

Q: Okay.¹⁸⁴

Still another juror, Shawn Meik, Juror Number 7, stated in his interview on August 5, 2008 that the trial court instructed the jury to convict Mr. Maese of all four Exploiting Prostitution counts even if they believed he was guilty of only one count.

Q: [Mr. Maese] knows he was convicted, but he doesn't know what conduct he was convicted of, and I was hoping you might talk to me a little bit about that.

A: Well, can you be a little more specific?

Q: Well, there were – there were four guilty verdicts on exploitation of prostitution, and so I was hoping you could just say, like, on, you know, on the first count of that, we found that he was guilty because of this; on the second one, because of this; third, this; fourth this.

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.

Q: Okay. I'm talking about specifically the exploitation of prostitution.

A: Right. And that's what I'm talking about. There were four counts of that.

Q: Gotcha.¹⁸⁵

¹⁸⁴ R. at 352-53 (Motion for Arrest of Judgment at 30-31. Interview with Juror Tricia Odeneal, conducted on August 9, 2008 by Shane Johnson.).

This evidence directly supports Mr. Maese's assertion that the jury failed to reach a unanimous verdict. While the reasoning behind nonunanimity – namely poor jury instructions – may be inadmissible under Utah R. Evid. 606(b), the fact that the jury failed to render a true verdict, or that no verdict was reached at all, is admissible. These statements prove that Mr. Maese was convicted by a non-unanimous jury verdict.

* * *

The State's amorphous case allowed the jury to choose from dozens of combinations of factual bases and legal theories to find Mr. Maese guilty of Exploiting Prostitution and a Pattern of Unlawful Activity. Yet the trial record fails to demonstrate connections between the evidence the State produced and the counts the jury convicted him on. Count II could be a conviction for violating Exploiting Prostitution's subsection (a), (b), and (c). Or it could be (d) and (e). Or some jurors could have found subsection (a) was violated while others found that (c) or (d) was violated. Likewise, each Exploiting Prostitution conviction could be ascribed to testimony from any one witness or from all of them.

Circumstances like these are why Utah's jury unanimity principle exists. In his *State v. Tillman* concurring opinion, Justice Stewart recognized that jury unanimity is synonymous with a fair trial. He warned:

if the principle of jury unanimity is relaxed, all the vaunted protections of proof beyond a reasonable doubt will be threatened. Requiring juror unanimity as to the crime itself only, rather than each element of the crime, would permit a jury to render inconsistent and potentially irrational verdicts because they may be

¹⁸⁵ R. 353-54 (Motion for Arrest of Judgment at 31-32. Interview with Juror Shawn Meik, conducted on August 5, 2008 by Shane Johnson.).

based on conflicting and even inconsistent determinations of the facts. That is no small erosion of a fundamental principle of our criminal justice system.¹⁸⁶

Mr. Maese faced this very scenario; the State failed to elect offenses for specific charges and a jury convicted him based on conflicting and/or inconsistent factual determinations. Contributing to this was an erroneous jury unanimity instruction which failed to correctly communicate the law; this error is obvious. Moreover, we know that Mr. Maese's jury was not unanimous because they have told us. The factual basis for the verdict is unexplained; which counts were ascribed to which acts, or that counts and acts were ascribed to particular subsections or even theories is unknown.

POINT III. The evidence at trial failed to support at least three Exploiting Prostitution episodes; consequently, the State provided insufficient evidence of a Pattern of Unlawful Activity.

After reviewing "the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict,"¹⁸⁷ the record shows that the State presented insufficient evidence to sustain Mr. Maese's convictions.

A. When comparing the specifics of the crimes charged in Mr. Maese's Information to the evidence the State adduced at trial, fatal variance exists.

The notice the State provides a defendant binds it to the specific facts it alleges.¹⁸⁸ This doctrine, variance, is based in constitutional due process.¹⁸⁹ In *State v. Burnett*, the Utah Supreme Court held that material "variance between the specifics of the crime charged

¹⁸⁶ *State v. Tillman*, 750 P.2d 546, 560 (Utah 1987) (Stewart, J., concurring).

¹⁸⁷ *State v. Honie*, 2002 UT 4, ¶ 44, 57 P.3d 977.

¹⁸⁸ See Generally, *State v. Burnett*, 712 P.2d 260 (Utah 1985); *McNair v. Hayward*, 666 P.2d 321 (Utah 1983); *State v. Myers*, 302 P.2d 276, (Utah 1956).

¹⁸⁹ *State v. Fulton*, 742 P.2d 1208, 1215 n. 10 (Utah 1987).

in the information and the crime of which the court permit[s] the jury to convict”¹⁹⁰ requires reversal. In *State v. Marcum*, the Utah Supreme Court wrote, “A variance is material if it actually prejudices the accused with respect to a substantial right, or where the information is so defective that it results in a miscarriage of justice.”¹⁹¹ Furthermore, in *State v. Fulton* the Utah Supreme Court wrote:

It would be a mockery of the constitutional rights of defendant to allow the state to falsely state the particulars of the offense charged and then... obtain a conviction founded on said evidence.¹⁹²

Here, the record shows a material – and constitutionally fatal – variance between the Information’s factual allegations and the evidence adduced at trial. Almost exclusively, the State introduced evidence of *actus rei* that vastly diverged from its Information’s factual allegations. As detailed above, the Amended Information and Probable Cause Statement enumerated crimes from two witnesses, D.T. and N.F. Yet, as partially detailed below, the State introduced evidence of instances where:

- A letter was mailed to an escort’s family alleging sexual activity.¹⁹³
- An escort was told she charged too much.¹⁹⁴
- Fictionalized tales of escorts performing sex acts were written on the Internet.¹⁹⁵
- An escort told Mr. Maese she was raped by a client.¹⁹⁶

¹⁹⁰ *State v. Burnett*, 712 P.2d 260, (Utah 1985).

¹⁹¹ *State v. Marcum*, 750 P.2d 599, 601 (Utah 1988).

¹⁹² *State v. Fulton*, 742 P.2d 1208, 1215 (Utah 1987) (citation omitted).

¹⁹³ R. at 319 (Tr. 100:16-23, July 10, 2008.).

¹⁹⁴ R. at 319 (Tr. 103:16-22, July 10, 2008.).

¹⁹⁵ R. at 319 (Tr. 116:14-117:5, July 10, 2008.).

¹⁹⁶ R. at 320 (Tr. 170:6-171:22 July 11, 2008.).

The State omitted these allegations from the Information and Probable Cause Statement. When Mr. Maese failed to receive a bill of particulars, his defense became predicated on the theory that the factual allegations against him failed to constitute criminal acts. That theory is true and correct. These instances, and all other evidence – outside testimony relating to D.T. and N.F. – fail to establish the crimes articulated in the State’s Information. Moreover, the State failed to introduce evidence of the essential elements and attendant circumstances required to sustain criminal convictions.

B. The State presented insufficient evidence to sustain convictions on four Exploiting Prostitution alternatives.

In presenting its case, the State “carries the burden of proving beyond a reasonable doubt each element of an offense...”¹⁹⁷ And while circumstantial evidence alone can be sufficient to satisfy this burden, a jury conviction grounded exclusively in circumstantial evidence must be examined to decide:

(1) whether there is any evidence that supports each and every element of the crime charged, and (2) whether the inferences that can be drawn from that evidence have a basis in logic and reasonable human experience sufficient to prove each legal element of the offense beyond a reasonable doubt. A guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt.¹⁹⁸

Here, the State failed to present elements required to satisfy three alternatives of Exploiting Prostitution. Of the remaining alternatives, multiple convictions cannot be entered; one as a matter of law, the other because of testimony at trial. Therefore, the four Exploiting Prostitution convictions are erroneous.

¹⁹⁷ *State v. Low*, 2008 UT 58, ¶ 45, 192 P.3d 867 (quotations and citations omitted).

¹⁹⁸ *State v. Brown*, 948 P.2d 337, 344 (Utah 1997).

1. *Mr. Maese did not procure inmates for a house of prostitution.*

As described above, Utah's Exploiting Prostitution statute prohibits five discrete criminal acts; subparagraph (a) reads as follows:

(a) procures an inmate for a house of prostitution or place in a house of prostitution for one who would be an inmate;¹⁹⁹

Furthermore, Utah Code defines "house of prostitution" and "inmate" as:

(1) "House of prostitution" means a place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

(2) "Inmate" means a person who engages in prostitution in or through the agency of a house of prostitution.²⁰⁰

These legal definitions were recited to the jury via Jury Instructions № 38 and № 40. But central to House of Prostitution's definition is "a place." The place referred to is physical premises (versus just "a business"). This definition is consistent with the common usage of House of Prostitution and Utah case law as well. The American Heritage Dictionary defines "house of prostitution" as:

n. An establishment in which the services of prostitutes are available on the premises.²⁰¹

Additionally, Utah's case law describes houses of prostitution occurring in a hotel in Ogden,²⁰² a trailer house on U. S. Highway 91,²⁰³ and a dance hall in Ely, Nevada.²⁰⁴

¹⁹⁹ Utah Code Ann. § 76-10-1305(1) (2006).

²⁰⁰ Utah Code Ann. § 76-10-1301 (2006).

²⁰¹ "house of prostitution." *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 03 Jan. 2009. <Dictionary.com [http://dictionary.reference.com/browse/house of prostitution](http://dictionary.reference.com/browse/house%20of%20prostitution)>.

²⁰² *State v. Tacconi*, 171 P.2d 388, 390 (Utah 1946).

All definitions reference physical locations – premises – where prostitution or promotion of prostitution occur with customers traveling to the respective locations. Furthermore, the legislature distinguished “a house of prostitution” from “a prostitution business”²⁰⁵ in Code. Statutory construction rules require that the two definitions differ.

This definition, house of prostitution as a place, is further supported by the common usage of the word inmate. The American Heritage Dictionary defines “inmate” as:

n. A resident of a dwelling that houses a number of occupants, especially a person confined to an institution, such as a prison or hospital.²⁰⁶

To define “inmate” merely as a prostitute is repugnant to both its plain and legal definitions. An inmate is defined by a house of prostitution. The house of prostitution is defined by a place. An inmate without a premises or house is a merely prostitute.

The Doll House Escorts was a business which sent escorts to multiple locations throughout Utah.²⁰⁷ The Doll House was not a “house of prostitution” as defined by statute, jury instruction, or common usage. Accordingly, Mr. Maese could not be convicted for recruiting prostitutes for a nonexistent house of prostitution.

Moreover, trial testimony failed to establish that Mr. Maese recruited prostitutes at all. To the contrary, Tiffany Curtis testified that neither she nor Mr. Maese required es-

²⁰³ *State v. Woodall*, 305 P.2d 473, 474 (Utah 1956).

²⁰⁴ *Crellin v. Thomas*, 247 P.2d 264, 265-66 (Utah 1952).

²⁰⁵ Utah Code Ann. § 76-10-1305(1)(e).

²⁰⁶ “inmate.” *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 08 Jan. 2009. <Dictionary.com <http://dictionary.reference.com/browse/inmate>>.

²⁰⁷ Trial testimony references the word “send” and “sent” on appointments 37 times.

corts to perform sex acts.²⁰⁸ They refrained from discussing sex acts because they didn't want escorts "to think that these guys were going to be aggressive with them."²⁰⁹

The remaining witnesses' testimony proves Mr. Maese failed to procure Inmates for a House of Prostitution.

Allyson Jensen testified that Mr. Maese was present for her interview²¹⁰ but Allyson offered no additional testimony about her interview.

Jennifer Harris testified that Tiffany Curtis interviewed her, and Mr. Maese was *not* present at any time.²¹¹ On cross-examination, Jennifer was asked directly "did Mr. Maese ever tell you that as part of your condition of employment you would have to have sex?" to which she replied, "No."²¹²

Heather Twede testified that Mr. Maese was present for her interview²¹³ but that "Nothing was really required except that we had to wear a dress and heels I think and it consisted of, you know, maybe dancing."²¹⁴

Danielle Thomas testified that Mr. Maese was present for the latter portion of her interview with The Doll House.²¹⁵ Yet when asked if sexual activity was required of her, Danielle said "No escort service in their right mind is really going to tell you up front

²⁰⁸ R. at 319 (Tr. 114:7-11, July 10, 2008.).

²⁰⁹ R. at 319 (Tr. 73:24-25, July 10, 2008.).

²¹⁰ R. at 319 (Tr. 121:10-17, July 10, 2008.).

²¹¹ R. at 320 (Tr. 146:6-8, July 11, 2008.).

²¹² R. at 320 (Tr. 159:22-25, July 11, 2008.).

²¹³ R. at 320 (Tr. 164:10-16, July 11, 2008.).

²¹⁴ R. at 320 (Tr. 166:2-4, July 11, 2008.).

²¹⁵ R. at 320 (Tr. 177:10-19, July 11, 2008.).

you need to have sex. I had already been doing it for five years so I kind of already knew what was going on.”²¹⁶

Heather May Wright testified that Mr. Maese was present at her interview,²¹⁷ but neither the State nor Mr. Maese asked additional questions regarding the interview.

Nicole Fernandez testified that Tiffany Curtis contacted her about working for The Doll House²¹⁸ but did not indicate that she was formally interviewed. Her testimony indicated that Mr. Maese “just wanted to make sure that I had the looks to do the [bachelor] party... [and] He just asked if I wanted to do it and if I’d done parties before and I told him yes.”²¹⁹

Plus, Exploiting Prostitution’s subsection (a), through the word “procures,” requires an intentional *mens rea*. Regardless of whether these witnesses eventually prostituted themselves, the State failed to prove that Mr. Maese intentionally obtained Inmates for a House of Prostitution. Mr. Maese freely admitted to placing ads in various media and participating in interviews for legal and licensed escorts.²²⁰ This greatly differs from purposely recruiting prostitutes, much less Inmates, for a House of Prostitution.

Because the State failed to introduce evidence that The Doll House was a House of Prostitution, or that Mr. Maese recruited Inmates, as a matter of law under Exploiting Prostitution’s subparagraph (a), Mr. Maese could not be convicted.

²¹⁶ R. at 320 (Tr. 181:11-14, July 11, 2008.).

²¹⁷ R. at 320 (Tr. 209:22-25, July 11, 2008.).

²¹⁸ R. at 320 (Tr. 231:8-10, July 11, 2008.).

²¹⁹ R. at 320 (Tr. 232:13-17, July 11, 2008.).

²²⁰ R. at 320 (Tr. 307:13-20; Tr. 269:19-271:17, July 11, 2008.).

2. *As a matter of law, Mr. Maese did not encourage, induce, or otherwise purposely cause anyone to become or remain a prostitute.*

As described above, Utah's Exploiting Prostitution statute prohibits five discrete criminal acts; subsection (b) reads as follows:

- (b) encourages, induces, or otherwise purposely causes another to become or remain a prostitute;²²¹

Utah law has long held that encouraging someone to become or remaining a prostitute refers to a change in status; not encouraging individual prostitution acts. Specifically in *State v. Gates*, the Utah Supreme Court explored the meaning of nearly identical language—the pandering statute at the time—and concluded that, “the meaning of that term is that the other person attempt or try to persuade her to change her course of life.”²²² This construction, with prostitute as status, dates to at least 1912.²²³ To “become a prostitute” is also referenced in *dicta*, as status, as recently as 2006 and throughout multiple cases.²²⁴ This interpretation is also consistent with Aiding Prostitution's contrast; a person is guilty of Aiding Prostitution if he “procures or attempts to procure a prostitute for a patron.”²²⁵

No testimony exists that Mr. Maese encouraged anyone to change their status from nonprostitute to prostitute. Additionally, no testimony was introduced where Mr. Maese was confronted by an employee contemplating reversion to nonprostitute from

²²¹ Utah Code Ann. § 76-10-1305(1).

²²² *State v. Gates*, 221 P.2d 878, 880 (Utah 1950).

²²³ *State v. Topham*, 123 P. 888 (Utah 1912).

²²⁴ *In re O.D.*, 2006 UT App 382, ¶ 3, 145 P.3d 1180; *State v. Fertig*, 233 P.2d 347 (Utah 1951).

²²⁵ Utah Code Ann. § 76-10-1304(b).

prostitute; Mr. Maese could not have encouraged someone to continue in their prostitute status. Mr. Maese's statements and actions fail to meet the statute's requirements.

3. *The State failed to introduce evidence that an understanding existed between Mr. Maese and any prostitute where he was to share in proceeds of prostitution, or that he received any proceeds from prostitution.*

As described above, Utah's Exploiting Prostitution statute prohibits five discrete criminal acts; subsection (d) reads as follows:

- (d) not being a child or legal dependent of a prostitute share the proceeds of prostitution with a prostitute pursuant to their understanding that he is to share therein;²²⁶

Utah Code states that Mr. Maese is "presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt" and, "In absence of such proof, the defendant shall be acquitted."²²⁷ Integral to this Exploiting Prostitution alternative is evidence of an understanding, attendant circumstances and an element of the offense.²²⁸ The State's evidence has two deficiencies here.

First, a conviction under this Exploiting Prostitution alternative would create a repugnant verdict when contrasted with the jury's Money Laundering acquittal. Under Utah law, Money Laundering encompasses all proceeds of any kind received from any Utah Code Ann. § 76-10-1602 enumerated crime; prostitution is listed there.

Next, the State failed to prove that an understanding between prostitutes and Mr. Maese existed where he was to share in proceeds from prostitution; and that he actually shared in those profits. The State proved that escorts were required to collect \$145 from

²²⁶ Utah Code Ann. § 76-10-1305(1).

²²⁷ Utah Code Ann. § 76-1-501(1).

²²⁸ Utah Code Ann. § 76-1-501(2)(a) (2008).

clients; \$95 going to the company and \$50 to the escort.²²⁹ Additionally, all witnesses agreed that clients generally engaged in two contracts: one which required escorts to show up and fully disrobe followed by a second and separate contract where escorts negotiated with clients for any additional services.²³⁰ The Doll House had specific understandings with each witness. It would share in monies from the initial contract which required their presence only. Specifically, it disclaimed any proceeds from subsequent contracts, regardless of what services the escort contracted for and provided.²³¹

Therefore, the evidence introduced at trial was insufficient to sustain a conviction against Mr. Maese under Exploiting Prostitution's subsection (d).

4. The State failed to introduce evidence that The Doll House was a House of Prostitution or a Prostitution Business.

As described above, Utah's Exploiting Prostitution statute prohibits five discrete criminal acts; subsection (e) reads as follows:

(e) owns, controls, manages, supervises, or otherwise keeps, alone or in association with another, a house of prostitution or a prostitution business.²³²

Here, Mr. Maese acknowledged that he was partner in The Doll House.²³³ Yet, as established above, The Doll House was not a house of prostitution. Therefore, The Doll House must meet the definition of a "prostitution business." Utah Code fails to provide

²²⁹ R. at 319 (Tr. 88:17-21, July 10, 2008.).

²³⁰ R. at 319-320 (Tr. 105:22-106:1, July 10, 2008; Tr. 148:14-149:11, Tr. 166:20-167:3, Tr. 200:10-201:6, Tr. 220:21-221:12, Tr. 240:25-241:16, July 11, 2008.).

²³¹ R. at 319-320 (Tr. 88:22-89:5, Tr. 105:13-21, Tr. 136:1-15, July 10, 2008; Tr. 149:20-150:1, Tr. 175:1-7, Tr. 182:4-14, July 11, 2008.).

²³² Utah Code Ann. § 76-10-1305(1).

²³³ R. at 320 (Tr. 293:1-2, July 11, 2008.).

a legal definition for Prostitution Business. Therefore, defining Prostitution Business by the fair import of the word provides some help.²³⁴ The word “business” is defined as:

1. an occupation, profession, or trade: *His business is poultry farming.*
2. the purchase and sale of goods in an attempt to make a profit.
3. a person, partnership, or corporation engaged in commerce, manufacturing, or a service; profit-seeking enterprise or concern.²³⁵

These ordinary meanings support a criminal definition of The Doll House selling prostitution. Yet the State failed to introduce evidence that The Doll House sold prostitution.

The Doll House sold fully-nude companionship in one hour increments. Certainly The Doll House was a Sexually Oriented Business; its services were sexual by nature. Yet those services are State sanctioned and Mr. Maese specifically created constructs to prevent The Doll House’s services from devolving to illegal activities.

Additionally, as previously detailed, because The Doll House customers contracted separately with individual escorts for services beyond companionship, The Doll House never received profits from prostitution. Undisputedly, The Doll House received \$95 from nearly every appointment performed. Yet that money was received regardless of whether or not escorts engaged in prostitution activities.²³⁶

The Doll House generated profits only from the initial contract, regardless of whether escorts successfully negotiated secondary contracts. Jennifer Harris testified that 50%

²³⁴ See Utah R. Crim. P. 4(h) (2008).

²³⁵ business. Dictionary.com. *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. <http://dictionary.reference.com/browse/business> (accessed: January 18, 2009).

²³⁶ R. at 319 (Tr. 88:17-21, July 10, 2008.).

of her appointments involved illegal sexual activity;²³⁷ necessarily, 50% of her appointments failed to involve illegal sexual activity. Therefore, as testified to explicitly by Mr. Maese and implicitly by others, the purpose of collecting “agency fees” upfront, before escorts entered into further negotiations with clients, was so that the company was paid despite customers learning that they would not receive sex acts.²³⁸

Accordingly, The Doll House was not a prostitution business and the State failed to introduce evidence that Mr. Maese Exploited Prostitution under this subsection.

C. The State's evidence at trial for the remaining Exploiting Prostitution alternatives was inherently improbable.

In *State v. Robbins*, the Utah Supreme Court held that, “A conviction not based on substantial reliable evidence cannot stand”²³⁹ and that “the definition of inherently improbable must include circumstances where a witness’s testimony is incredibly dubious and, as such, apparently false.”²⁴⁰ Importantly, using this standard, the Court mentioned an Iowa case that was overturned based on “witnesses who had motive to lie.”²⁴¹

1. The State's only instance of Mr. Maese transporting a person to promote prostitution relied upon Nicole Fernandez's inherently improbable testimony.

As described above, Utah’s Exploiting Prostitution statute prohibits five discrete criminal acts; subsection (c) provides:

²³⁷ R. at 320 (Tr. 151:18-21, July 11, 2008.).

²³⁸ R. at 320 (Tr. 274:11-275:17, July 11, 2008.).

²³⁹ *State v. Robbins*, 2009 UT 23, ¶ 14 (quotations and citations omitted).

²⁴⁰ *Id.* at ¶ 18.

²⁴¹ *Id.* at ¶ 20.

(c) transports a person into or within this state with a purpose to promote that person's engaging in prostitution or procuring or paying for transportation with that purpose;²⁴²

Nicole Fernandez' substantive trial testimony regarded a specific appointment, her first as a Doll House escort. Her testimony at trial regarding this material event dramatically contradicted her testimony at the preliminary hearing. Fernandez's testimony at both events contradicted her prior statements to police, which exonerated Mr. Maese.

Although no other witness testified that Mr. Maese transported them, Fernandez testified that Mr. Maese drove her to her first appointment. At this appointment, she testified that *Mr. Maese* told her the client regularly tips Doll House escorts \$400.²⁴³ Yet at preliminary hearing, she testified that it was the *client* who told her he regularly tips escorts \$200.²⁴⁴ (Fernandez testified at trial and at preliminary hearing that this client requested sexual intercourse but would not meet Fernandez' \$800 asking price.²⁴⁵)

Fernandez continued by testifying that she eventually came to terms with the client and provided manual and oral sex for \$400, but the client was unhappy with this and called Mr. Maese to complain.²⁴⁶ At preliminary hearing, Fernandez testified that she had sexual intercourse with the client for \$200 because she didn't want Mr. Maese to think she was a "flake." In this version, the satisfied customer failed to complain.²⁴⁷

²⁴² Utah Code Ann. § 76-10-1305(1) (2006).

²⁴³ R. at 320 (Tr. 234:17-22, July 11, 2008.).

²⁴⁴ R. at 81 (Tr. 72:20-73:3, April 3, 2007.).

²⁴⁵ R. at 320 (Tr.235:8-12, July 11, 2008); R. at 81 (Tr. 72:20-73:3, April 3, 2007.).

²⁴⁶ R. at 320 (Tr. 235:22-236:4, July 11, 2008.).

²⁴⁷ R. at 81 (Tr. 73:4-13, April 3, 2007.).

At trial, Fernandez testified that she and Mr. Maese arranged for Mr. Maese to drop her off at this appointment and that she would call him to come pick her up when the appointment concluded.²⁴⁸ At the preliminary hearing, Fernandez testified that Mr. Maese waited for her outside throughout the appointment.²⁴⁹

At trial, Fernandez testified that she “had sex with all of [her Doll House clients].”²⁵⁰ At the preliminary hearing, she testified that she had sex with about half of them.²⁵¹ Yet in her police interview she claimed that she never had sex with Doll House clients.²⁵² This version is supported by the State’s Probable Cause Statement which states that she “was not given many appointments because she would not have sex with clients.”²⁵³

Prior to trial, the State was well aware of Fernandez’ wildly inconsistent accounts. She was initially emphatic to investigating officers that she never prostituted herself with Doll House clients, but prostituted herself with her personal clients exclusively. She was asked “Did you ever have sex with any of their clients?” and she replied “Not theirs, no... I had sex with a few of my own...”²⁵⁴ At trial, she stated “I’ve seen so many clients, I don’t remember who I did.”²⁵⁵ From the same police interview she said “I hate him [Mr. Maese], he’s a little fucker, you know, and even on bad people I don’t wish

²⁴⁸ R. at 320 (Tr. 234:23-235:2, July 11, 2008.).

²⁴⁹ R. at 81 (Tr. 73:15-17, April 3, 2007.).

²⁵⁰ R. at 320 (Tr. 240:19-21, July 11, 2008.).

²⁵¹ R. at 81 (Tr. 74:18-24, April 3, 2007.).

²⁵² R. at 320 (Tr. 245:5-25, July 11, 2008.)

²⁵³ R. at 11 (Probable Cause Statement at ¶5, § a.).

²⁵⁴ R. at 320 (Tr. 245:7-12, July 11, 2008.).

²⁵⁵ R. at 320 (Tr. 245:24-25, July 11, 2008.).

bad things but I just wish you know, I'll tell you so that he can get his everything gone" Fernandez acknowledged that she "remember[ed] saying a few words out of anger, I do, yeah."²⁵⁶ She only later agreed to provide contrary damaging testimony against Mr. Maese in exchange for a plea-in-abeyance on an unrelated criminal charge.²⁵⁷

When asked about the contradictions regarding prostitution in her testimony, Fernandez replied "If I answered any of the questions like that to the cops it's because I thought they were going to try and charge me with more stuff." That answer alone, however, demonstrates her testimony's inherent improbability. If Fernandez was afraid that the police would charge her with prostitution for sexual activity with clients, she would have denied prostituting herself with her own clients as well as Doll House clients. Furthermore, she testified that she failed to remember exactly whom she "did;" this negates her recollection of events transpiring between her and Mr. Maese. Finally, her recollection and motivation from a police interview conducted before the start of trial would necessarily support that she was honest at that time.

On many crucial details, Fernandez' trial testimony is at complete odds with her preliminary hearing testimony. And her testimony in both venues contradicts her prior statements to police and the testimony given by all of the State's other witnesses. These direct lies and contradictions display Nicole Fernandez's testimony's inherent improbability; her uncorroborated testimony was blatantly false.²⁵⁸

²⁵⁶ R. at 320 (Tr. 248:20-249:3, July 11, 2008.).

²⁵⁷ R. at 320 (Tr. 251:22-252:6, July 11, 2008.).

²⁵⁸ A text of Nicole Fernandez's complete police interview is found at R. at 524-86; her preliminary hearing testimony is found at R. 81 (Tr. 66:1-90:20, April 3, 2007); and her trial testimony is found at R. 320 (Tr. 230:10-252:22, July 11, 2008).

D. The State failed to prove Mr. Maese violated a Pattern of Unlawful Activity.

As described above, Mr. Maese was charged with violating specific sections of Utah's Pattern of Unlawful Activity statute. The sections he was charged with read as follows:

- (1) It is unlawful for any person who has received any proceeds derived, whether directly or indirectly, from a pattern of unlawful activity... to use or invest, directly or indirectly, any part of that income... in the acquisition of any interest in, or the establishment or operation of, any enterprise.
- (2) It is unlawful for any person through a pattern of unlawful activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.
- (3) It is unlawful for any person employed by or associated with any enterprise to conduct or participate, whether directly or indirectly, in the conduct of that enterprise's affairs through a pattern of unlawful activity.²⁵⁹

Here, the State failed to prove the three predicate episodes – episodes limited to the charged conduct contained within the Information.²⁶⁰ – required by a Pattern of Unlawful Activity's definition.²⁶¹ Beyond that failure, the State failed to prove a nexus between a Pattern of Unlawful Activity and an enterprise as required by the law.

The State failed to introduce any evidence that Mr. Maese used profits from Exploiting Prostitution to acquire, establish, or operate any enterprise; it failed to introduce any evidence that Mr. Maese acquired or maintained, either directly or indirectly, any interest in or control of any enterprise through Exploiting Prostitution. Finally, the State failed to introduce any evidence that Mr. Maese directly or indirectly conducted or participated in any enterprise's affairs through Exploiting Prostitution.

²⁵⁹ Utah Code Ann. § 76-10-1603.

²⁶⁰ R. at 9 (“...as indicated in Counts TWO through FIVE of this Information.”).

²⁶¹ Utah Code Ann. § 76-10-1602(2) (2006).

E. The State failed to prove beyond a reasonable doubt that Mr. Maese acted with the required mens rea.

The trial court failed to instruct the jury regarding the *mens rea* required for Exploiting Prostitution and Pattern of Unlawful Activity, yet statutory construction and legal precedent demonstrate that the *mens rea* for both is purposeful.

Each Exploiting Prostitution subsection articulates an intentional *mens rea* wherein it states, “(a) ...procures... or places an inmate... (b) otherwise purposely causes... (c) transports... with a purpose to promote... prostitution... (d) shares the proceeds of prostitution... pursuant to their understanding that he is to share therein... (e) owns, controls, manages, or otherwise keeps”²⁶²; furthermore, “the gist of the offense of ‘keeping a house of ill fame’ [Subsection (e)’s predecessor] is the management, control and operation of it.”²⁶³

Despite Exploiting Prostitution requiring intentional *mens rea*, the prosecutor acknowledged in his closing that the evidence he introduced proved only knowledge:

This is money coming in for prostitution and he knows it. We’ve established knowledge.²⁶⁴

Now again, we have to show knowledge and the evidence as it’s come in shows knowledge.²⁶⁵

Knowledge. The State had the burden of showing knowledge, knowledge on the part of the defendant of what was taking place with his escorts. ²⁶⁶

²⁶² Utah Code Ann. § 76-10-1305(1).

²⁶³ *State v. Davie*, 240 P.2d 263, 264 (Utah 1952) (internal quotations added).

²⁶⁴ R. at 320 (Tr.354:6-7, July 11, 2008.).

²⁶⁵ R. at 320 (Tr. 350:8-9, July 11, 2008.).

²⁶⁶ R. at 320 (Tr. 345:8-10, July 11, 2008.).

Here's your specific incidents of conduct that describes both the knowledge that the defendant has...²⁶⁷

Do you think the defendant has knowledge when he edits this letter and sends it to the mother of one of his employees?²⁶⁸

She told them about it, there's your knowledge, and they still took that agency fee despite what had happened.²⁶⁹

Although the State argued the incorrect standard to the jury – explaining why the jury felt justified in convicting Mr. Maese – the evidence showed that Mr. Maese could have known that escorts working for The Doll House had engaged in prostitution; though only through after-the-fact accounts from escorts.²⁷⁰ But the State failed to prove Mr. Maese knew escorts would prostitute themselves prior to any appointment. Mr. Maese advertised for and hired people to work as escorts for The Doll House and escorts were never required to engage in prostitution.²⁷¹ This demonstrates that he failed to employ escorts for the purpose – and intent – that they engage in prostitution. The evidence demonstrated that Mr. Maese edited and sent a letter to Alyson Jensen's mother which alleged that she had engaged in prostitution.²⁷² The letter shows that Mr. Maese knew that Jensen prostituted herself.²⁷³ Yet the letter cannot provide a temporal reference to

²⁶⁷ R. at 320 (Tr. 348:15-19, July 11, 2008.).

²⁶⁸ R. at 320 (Tr. 349:19-21, July 11, 2008.).

²⁶⁹ R. at 320 (Tr. 352:12-14, July 11, 2008.).

²⁷⁰ R. at 319-20 (Tr. 87:14-88:16, July 10, 2008; Tr. 236:1-4, July 11, 2008.).

²⁷¹ R. at 320 (Tr. 146:13-17, Tr. 263:4-10, Tr. 269:19-24, Tr. 270:16-18, July 11, 2008.).

²⁷² R. at 320 (Tr. 286:19-21, July 11, 2008.).

²⁷³ STATE'S EXHIBIT 30.

show that (1) Mr. Maese knew she prostituted herself while working for The Doll House and (2) then used that knowledge to commit a crime.

The evidence is insufficient to prove Mr. Maese acted with any *mens rea* greater than knowledge and Exploiting Prostitution fails to provide a crime with that intent.

* * *

The State presented insufficient evidence to sustain the charges against Mr. Maese for three reasons. First, the evidence introduced at trial contained fatal variances from Mr. Maese's Information and Probable Cause Statement. Second, the State failed to prove vital Exploiting Prostitution elements, virtually ignoring Exploiting Prostitution's attendant circumstances. Finally, the State failed to prove the charged crimes *mens rea* element. Accordingly, the convictions against Mr. Maese should be vacated.

POINT IV. The trial court improperly instructed the jury regarding Pattern of Unlawful Activity's charged elements; a fatal variance from the information. This allowed the jury to convict Mr. Maese of an uncharged Pattern of Unlawful Activity alternative.

Rule 4(b) of the Utah Rules of Criminal Procedure states in relevant part that "[a]n indictment or information shall charge the offense for which the defendant is being prosecuted by... statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge."²⁷⁴ And in discussing what constitutes a valid information, this Court held that "the information provided to [the Defendant] contained the charge [], the name of the victim, the date and place of the crime, and the relevant text of the [] statute."²⁷⁵ This rule solidifies the Utah Constitution's guarantees

²⁷⁴ Utah R. Crim. P. 4(b).

²⁷⁵ *State v. Gonzales*, 2002 UT App 256, ¶11, 56 P.3d 969.

that an accused may know “the nature and cause of the accusation against him, [and] to have a copy thereof”²⁷⁶ and that these offenses “shall be prosecuted by information after examination and commitment by a magistrate.”²⁷⁷

The Information in Mr. Maese’s case failed to charge Utah Code Ann. § 76-10-1603 (4), the Pattern of Unlawful Activity Act’s conspiracy alternative;²⁷⁸ the charges read by the trial court to the jury did not recite this subsection.²⁷⁹ That subsection provides:

(4) It is unlawful for any person to conspire to violate any provision of Subsection (1), (2), or (3).²⁸⁰

Yet Jury Instruction N^o 37 included the Conspiracy Alternative and stated:

Before you can convict STEVEN SANTIAGO MAESE [sic] of engaging in a pattern of unlawful activity, *as charged in the information*, you must find... STEVEN SANTIAGO MAESE [sic], did commit an unlawful act or acts as defined: ...

d. did conspire to commit any unlawful act as described in paragraphs a, b, or c above.²⁸¹

Although the Information contains the words “conspired” and “conspiracy,” the State notified Mr. Maese only that it may consider conspiracy as an inchoate offense. The Conspiracy Alternative exists to elevate conspiring to violate Utah’s Pattern of Unlaw-

²⁷⁶ Utah Constitution, Article I, Section 12.

²⁷⁷ Utah Constitution, Article I, Section 13.

²⁷⁸ R. at 8-9.

²⁷⁹ R. at 838 (Tr. 6:12-7:17, July 10, 2008.).

²⁸⁰ Utah Code Ann. § 76-10-1603(4).

²⁸¹ R. at 294 (Jury Instruction N^o 37.) (emphasis added).

ful Activity Act from an inchoate offense to a primary offense;²⁸² allowing the State to charge conspiracy as a second degree felony instead of a third degree felony.

In *Orem City v. Martineau*, this Court held that “well-established principles of statutory construction require that a more specific statute governs instead of a more general statute.”²⁸³ Therefore, in charging Mr. Maese under Pattern of Unlawful Activity’s Conspiracy Alternative, the Amended Information is fatally defective and Jury Instruction № 37 is erroneous. In *State v. Dunn* the Utah Supreme Court held that, “The remedy for an erroneous jury instruction is a new trial.”²⁸⁴ This error should have been obvious to the trial court. Moreover, because the State’s evidence was largely conspiratorial, the instruction severely prejudiced Mr. Maese’s defense by encouraging the jury to convict him under a statute subsection the State failed to charge him with.

CONCLUSION

All trials have errors, and Mr. Maese understands that he is entitled to a fair trial, not a perfect one. This Court, however, requires less than a preponderance of the evidence to show that if the errors addressed here had never taken place, the outcome would be different. This is because “thoughtful reflection suggests that confidence in the outcome may be undermined at some point substantially short of the ‘more probable than not’

²⁸² See generally Utah Code Ann. §§ 76-4-202, 76-4-301 (2008).

²⁸³ *Orem City v. Martineau*, 2006 UT App 136, ¶6, 135 P.3d 884 (quotations and citations omitted).

²⁸⁴ *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993) (Stewart, J., concurring in part and dissenting in part).

portion of the spectrum.”²⁸⁵ Therefore, confidence in the verdict is undermined at some point substantially short of greater than fifty percent.

The justice system has a “duty to ensure a fair trial.”²⁸⁶ Because numerous errors affecting Mr. Maese’s substantial rights occurred, this Court’s only avenue to ensure Mr. Maese receives a fair trial is to grant him a new one.

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

RESPECTFULLY SUBMITTED on this 3rd day of June, 2009.

S. Steven Maese
Appellant Pro Se

CERTIFICATE *of* SERVICE

This is to certify that on the 3rd day of June, 2009, two true and correct copies of the foregoing were served by the method indicated below, and addressed to the following:

J. Frederic Voros Jr.
Utah Attorney General’s Office
Appeals Division
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

²⁸⁵ *State v. Knight*, 734 P.2d 913, 920 (Utah 1987).

²⁸⁶ *State v. King*, 2006 UT 3, ¶19, 131 P.3d 202.

RULE 4 PROSECUTION OF PUBLIC OFFENSES.

Utah Rules of Criminal Procedure

(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they may be identified without setting forth a copy. However, details concerning such things may be obtained through a bill of particulars. Neither presumptions of law nor matters of judicial notice need be stated.

(e) When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment or within ten days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. 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 offense charged.

(h) Words and phrases used are to be construed according to their usual meaning unless they are otherwise defined by law or have acquired a legal meaning.

RULE 12 MOTIONS.

Utah Rules of Criminal Procedure

(e) A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(f) Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

RULE 606 COMPETENCY OF JUROR AS WITNESS.

Utah Rules of Evidence

Article VI—Witnesses

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to 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 processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and comports with Rules 41 and 44, Utah Rules of Evidence (1971), and Utah case law, *State v. Gee*, 28 Utah 2d 96, 498 P.2d 662 (1972).

76-10-1301. DEFINITIONS.

Title 76 – Utah Criminal Code

Chapter 10 – Offenses Against Public Health, Safety, Welfare, and Morals

Section 1301 – Definitions.

For the purposes of this part:

- (1) “House of prostitution” means a place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.
- (2) “Inmate” means a person who engages in prostitution in or through the agency of a house of prostitution.
- (3) “Public place” means any place to which the public or any substantial group of the public has access.
- (4) “Sexual activity” means acts of masturbation, sexual intercourse, or any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.

Amended by Chapter 199, 1988 General Session

76-10-1305. EXPLOITING PROSTITUTION.

Title 76 – Utah Criminal Code

Chapter 10 – Offenses Against Public Health, Safety, Welfare, and Morals

Section 1305 – Exploiting prostitution.

- (1) A person is guilty of exploiting prostitution if he:
 - (a) procures an inmate for a house of prostitution or place in a house of prostitution for one who would be an inmate;
 - (b) encourages, induces, or otherwise purposely causes another to become or remain a prostitute;
 - (c) transports a person into or within this state with a purpose to promote that person's engaging in prostitution or procuring or paying for transportation with that purpose;
 - (d) not being a child or legal dependent of a prostitute, shares the proceeds of prostitution with a prostitute pursuant to their understanding that he is to share therein; or
 - (e) owns, controls, manages, supervises, or otherwise keeps, alone or in association with another, a house of prostitution or a prostitution business.
- (2) Exploiting prostitution is a felony of the third degree.

Amended by Chapter 1, 2000 General Session

76-10-1603. UNLAWFUL ACTS.

Title 76 – Utah Criminal Code

Chapter 10 – Offenses Against Public Health, Safety, Welfare, and Morals

Section 1603 – Unlawful acts.

- (1) It is unlawful for any person who has received any proceeds derived, whether directly or indirectly, from a pattern of unlawful activity in which the person has participated as a principal, to use or invest, directly or indirectly, any part of that income, or the proceeds of the income, or the proceeds derived from the investment or use of those proceeds, in the acquisition of any interest in, or the establishment or operation of, any enterprise.
- (2) It is unlawful for any person through a pattern of unlawful activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.
- (3) It is unlawful for any person employed by or associated with any enterprise to conduct or participate, whether directly or indirectly, in the conduct of that enterprise's affairs through a pattern of unlawful activity.
- (4) It is unlawful for any person to conspire to violate any provision of Subsection (1), (2), or (3).

Repealed and Re-enacted by Chapter 238, 1987 General Session

UTAH CONSTITUTION, ARTICLE I. DECLARATION OF RIGHTS

Section 12. Rights of accused persons

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.


Section 13. Prosecution by information or indictment – Grand jury

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. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

ORIGINAL

DAVID E. YOCOM
District Attorney for Salt Lake County
CHAD L. PLATT, 8475
Deputy District Attorneys
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

<p>THE STATE OF UTAH, Plaintiff, -vs- STEVEN SANTIAGO MAESE,  Defendant. TIFFANY FRENCH CURTIS, Co-Defendant.</p>	<p>Screened by: C. Platt Assigned to: C. Platt BAIL: PTS Warrant/Release: Summons / Surrender DAO # 6018158 AMENDED INFORMATION Case No. 061906590</p>
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The undersigned, Detective D. Bartlett – Salt Lake County Sheriff’s Office, Agency Case No 2006-28791, under oath states on information and belief that the defendant committed the crimes of:

COUNT I
PATTERN OF UNLAWFUL ACTIVITY, a Second Degree Felony, at 7567 S. 2160 East, and in and around Salt Lake County, State of Utah, on or about July 1, 2004 through April 30, 2006, in violation of Title 76, Chapter 10, Section 1603(3), Utah Code Annotated 1953, as amended, in that the defendants, **STEVEN SANTIAGO MAESE and TIFFANY FRENCH CURTIS**, as parties to the offense, attempted, conspired, solicited, requested, commanded, encouraged, or intentionally aided another to participate as a principal in a pattern of unlawful activity intending to receive directly or indirectly, proceeds derived from that pattern of unlawful activity to be invested in the acquisition of an interest in the establishment or operation of an enterprise contrary to Title 76, Chapter 10, Section 1603(1), Utah Code Annotated, 1953 as amended, or did acquire or maintain, directly or indirectly, an interest in or control of an enterprise through a pattern of unlawful activity contrary to Title 76, Chapter 10, Section 1603(2), Utah Code

Annotated, 1953 as amended, or did become persons employed by or associated with an enterprise intending to conduct or participate, directly or indirectly in the functions of the enterprise through a pattern of unlawful activity contrary to Title 76, Chapter 10, Section 1603(3), Utah Code Annotated, 1953 as amended, and committed an act or acts in the pursuance of such attempt or conspiracy; to-wit: 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.

NOTICE is given that the defendants' **STEVEN SANTIAGO MAESE** and **TIFFANY FRENCH CURTIS**, interest in any property or proceeds from the conduct prohibited in Count I is subject to forfeiture pursuant to Utah Code Annotated Title 76, Chapter 10, Section 1603(5), 1953 as amended. NOTICE is further given pursuant to U.C.A. § 76-10-1603.5 that the district attorney seeks the costs of investigating and prosecuting the offense described in Count I, to be paid by defendant, in lieu of a fine otherwise authorized by law, and that the defendant be fined not more than twice the amount of the net proceeds derived from the conduct engaged in and prohibited by Section 76-10-1603.

COUNT II

EXPLOITATION OF PROSTITUTION, a Third Degree Felony, at 7567 S. 2160 East, and in and around Salt Lake County, State of Utah, on or about July 1, 2004 through April 30, 2006, in violation of Title 76, Chapter 10, Section 1305(1), Utah Code Annotated 1953, as amended, in that the defendants, **STEVEN SANTIAGO MAESE and TIFFANY FRENCH CURTIS**, as parties to the offense, owned, controlled, managed, supervised, or otherwise kept, alone or in association with another, a house of prostitution or a prostitution business; or procured an inmate for a house of prostitution or placed one who would be an inmate in a house of prostitution; or encouraged, induced or otherwise purposely caused another to become or remain a prostitute; or transported, procured, or paid for transportation of a person into or within this state with a purpose to promote that person's engaging in prostitution; or not being a child or legal dependent of a prostitute, shared the proceeds of prostitution with a prostitute pursuant to an understanding that she was to share therein.

COUNT III

EXPLOITATION OF PROSTITUTION, a Third Degree Felony, at 7567 S. 2160 East, and in and around Salt Lake County, State of Utah, on or about July 1, 2004 through April 30, 2006, in violation of Title 76, Chapter 10, Section 1305(1), Utah Code Annotated 1953, as amended, in that the defendants, **STEVEN SANTIAGO MAESE and TIFFANY FRENCH CURTIS**, as parties to the offense, owned, controlled, managed, supervised, or otherwise kept, alone or in association with another, a house of prostitution or a prostitution business; or procured an inmate for a house of prostitution or placed one who would be an inmate in a house of prostitution; or encouraged, induced or otherwise purposely caused another to become or remain a prostitute; or transported, procured, or paid for transportation of a person into or within this state with a purpose to promote that person's engaging in prostitution; or not being a child or legal dependent of a prostitute, shared the proceeds of prostitution with a prostitute pursuant to an understanding that she was to share therein.

COUNT IV

EXPLOITATION OF PROSTITUTION, a Third Degree Felony, at 7567 S. 2160 East, and in and around Salt Lake County, State of Utah, on or about July 1, 2004 through April 30, 2006, in violation of Title 76, Chapter 10, Section 1305(1), Utah Code Annotated 1953, as amended, in that the defendants, **STEVEN SANTIAGO MAESE and TIFFANY FRENCH CURTIS**, as parties to the offense, owned, controlled, managed, supervised, or otherwise kept, alone or in association with another, a house of prostitution or a prostitution business; or procured an inmate for a house of prostitution or placed one who would be an inmate in a house of prostitution; or encouraged, induced or otherwise purposely caused another to become or remain a prostitute; or transported, procured, or paid for transportation of a person into or within this state with a purpose to promote that person's engaging in prostitution; or not being a child or legal dependent of a prostitute, shared the proceeds of prostitution with a prostitute pursuant to an understanding that she was to share therein.

COUNT V

EXPLOITATION OF PROSTITUTION, a Third Degree Felony, at 7567 S. 2160 East, and in and around Salt Lake County, State of Utah, on or about July 1, 2004 through April 30, 2006, in violation of Title 76, Chapter 10, Section 1305(1), Utah Code Annotated 1953, as amended, in that the defendants, **STEVEN SANTIAGO MAESE and TIFFANY FRENCH CURTIS**, as parties to the offense, owned, controlled, managed, supervised, or otherwise kept, alone or in association with another, a house of prostitution or a prostitution business; or procured an inmate for a house of prostitution or placed one who would be an inmate in a house of prostitution; or encouraged, induced or otherwise purposely caused another to become or remain a prostitute; or transported, procured, or paid for transportation of a person into or within this state with a purpose to promote that person's engaging in prostitution; or not being a child or legal dependent of a prostitute, shared the proceeds of prostitution with a prostitute pursuant to an understanding that she was to share therein.

COUNT VI

MONEY LAUNDERING, a Second Degree Felony, at 7567 S. 2160 East, and in and around Salt Lake County, State of Utah, on or about July 1, 2004 through April 30, 2006, in violation of Title 76, Chapter 10, Section 1903, Utah Code Annotated 1953, as amended, in that the defendants, **STEVEN SANTIAGO MAESE and TIFFANY FRENCH CURTIS**, as party to the offense, did transport, receive, or acquired property which was in fact proceeds of unlawful activity, to wit: Exploitation of a Prostitute, knowing that the property involved represented the proceeds of some form of unlawful activity, or made proceeds of unlawful activity available to another by transaction or transportation, or other means, knowing that it was intended to be used for the purpose of continuing or furthering the commission of specified unlawful activity.

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

Detective D. Bartlett; Sgt. Paul Brenneman; witnesses N.F., A.F., H.T., H.R., J.H., D.T., T.N., H.W., M.H.

PROBABLE CAUSE STATEMENT:

Your affiant bases this information on the following:

1. D House LLC, aka “Doll House” is a registered sexually oriented business (“SOB”) in Summit County, Park City. Doll House is not a registered SOB in any city within Salt Lake County. The registered owners of D House LLC are TIFFANY FRENCH CURTIS (“CURTIS”) and STEVEN SANTIAGO MEESE (“MEESE”).

2. In March of 2006, the Cottonwood Heights Precinct of the Salt Lake County Sheriff’s Office received complaints that the residence located at 7567 South 2160 East, in Salt Lake County, was operating as an SOB, specifically, as the escort agency, Doll House.

3. In March and April, 2006, Detective Dan Bartlett (“Bartlett”) conducted trash-covers at 7567 S. 2160 East. In both instances Bartlett discovered discarded customer names, addresses, and escort names on company letterhead, along with appointment dates and meeting times, consistent with an SOB being operated without an SOB license.

4. In an investigation based upon names obtained from the trash covers, as well as the Doll House Web Site which contained a link to “theeroticreview.com” (“TER”) – a website that gives reviews of escorts, written by patrons, Bartlett discovered hundreds of reviews on TER which describe specific sexual acts Doll House escorts have performed.

5. Detective Bartlett conducted numerous interviews with current and past “escort” employees of the Doll House. Each interviewee describes an ongoing pattern by which MEESE and CURTIS aided and encouraged prostitution, and received the proceeds from the appointments. A non-exhaustive description of MEESE and CURTIS’ activities as related by escorts follows:

a. N.F., who worked as a Doll House escort between July and September of 2005 stated that MEESE would tell her when a customer was a “reg” (a regular) and would explain what likes the “reg” had, such as oral sex. N.F. describes one particular instance where MEESE ordered her to an appointment where the customer wanted sex. N.F. tried not to have sex, and the customer called MEESE to complain. MEESE then called N.F. and told her “B*tch, you’re gonna have to make it work.” N.F. states when she attempted to leave Doll House, MEESE threatened her. N.F. states she was not given many appointments because she would not have sex with clients.

b. A.F., who worked as a Doll House escort between October and December of 2005, states that MEESE threatened her if she did not continue working for Doll House. A.F. states CURTIS regularly encouraged good reviews on TER, and specifically encouraged bbbj, which is a term for oral sex without a condom. A.F. states that CURTIS made clear that if she did not tip the phone girl, which was usually her self (the person that sets appointments), she would not get any more appointments.

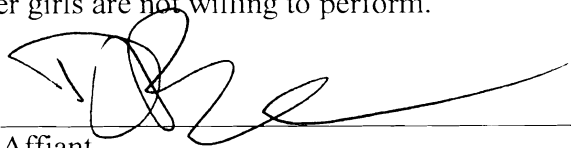
c. H.T., who worked as a Doll House escort between January and March of 2006, states she did have sex with clients for money, and that she always paid CURTIS out at the cottonwood address following the appointments. H.T. states for the first four appointments, the entire \$145.00 agency fee went to Doll House, plus 20% of any tips. H.T. states that not all customers received intercourse – approximately 1 in 8, but that manual sex was frequent and easy, approximately 7 in 8.

d. H.R., who worked as a Doll House escort between September 2005 and February 2006, states that she did have intercourse with clients for money, but usually provided manual or oral sex because it was easy. H.R. states that MEESE and CURTIS told her that if she ever got arrested for prostitution, to not say anything, and they would provide a lawyer for her.

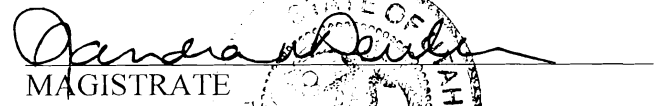
e. J.H., who worked as a Doll House escort between November and December of 2005, states that MEESE told her they would pay for a lawyer if she would not talk to police. J.H. states that money was paid out to CURTIS and/or MEESE at the Cottonwood address every time. J.H. states that CURTIS told her that clients would ask for sex every time. J.H. states that she did have sex with men for money, and would pay CURTIS 20% of the tips. J.H. describes as an example one occasion being paid \$1,000 for an appointment where she had sex, paying out \$100 for the “agency fee” and then an additional \$200 to CURTIS as a tip.

f. D.T., who worked as a Doll House escort between April and May of 2006, states that she was sent on 3 to 4 dates per day in the beginning. D.T. states that she would have sex for money while working for the Doll House. D.T. describes on one particular occasion being asked by a customer to have sexual intercourse for \$200.00 without a condom. When D.T. refused, the customer called MEESE to complain. MEESE then got on the phone and told D.T. to drive down the hill and get condoms and go back and “work something out.”

g. T.N., who worked as a Doll House escort for approximately one year between 2005 and 2006, states that in practice the girls frequently told CURTIS and MEESE of the specific sex acts they perform, and that they are required to tip 20% of the “tip” received by customers to the call girl that sets the appointment, which was normally CURTIS. T.N. states that CURTIS frequently called her and asked her to go to an appointment because the particular customer wanted a specific sexual act which other girls are not willing to perform.



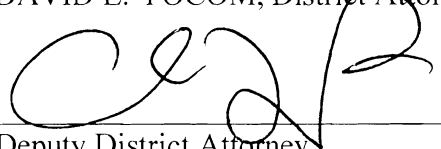
Affiant
Subscribed and sworn to before me this 5
day of October, 2006.



MAGISTRATE



Authorized for presentment and filing:
DAVID E. YOCOM, District Attorney



Deputy District Attorney
October 5th, 2006

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MEMORANDUM DECISION AND ORDER
Plaintiff,	:	CASE NO. 061906590
vs.	:	
S. STEVEN MAESE,	:	Judge Randall N. Skanchy
Defendant.	:	

The Court has before it the defendant S. Steven Maese's ("Mr. Maese") Motion for Arrest of Judgment and/or For a New Trial. The matters have been fully and extensively briefed and the parties argued the matter before the Court on October 27, 2008. The matter is now ready for decision.

BACKGROUND

On July 11, 2008, after a two day jury trial, the jury returned guilty verdicts against Mr. Maese in the above-entitled matter on the following counts:

Count I - Pattern of Unlawful Activity, a Second Degree Felony
Counts II, III, IV, V - Exploiting Prostitution, Third Degree
Felonies

The jury acquitted Mr. Maese on Count VI, Money Laundering, a Second Degree Felony. The charges arose as a result of Mr. Maese's ownership and operation of an escort service named the "Doll House," which was a

sexually oriented business, licensed in Park City, Summit County, Utah.¹ The Doll House, however, under Mr. Maese's ownership, was operated out of a residence in Cottonwood Heights, located in Salt Lake County, where the co-owner of the business, Tiffany Curtis ("Ms. Curtis"), resided. While the Doll House held itself out to be an escort service, the overwhelming weight of evidence produced at trial indicated it provided more client services than merely those associated with an escort service, but rather services which included sex acts, and the owners, the escorts and their clientele understood, or came to understand quite quickly, that prostitution was a service the Doll House and its escorts provided, and that anywhere from 50% to 90% of the Doll House customers fully expected and received some type of sexual activity from a Doll House escort.

Legal Discussion

A. Motion to Arrest Judgment

At the conclusion of the trial, and prior to sentencing, Mr. Maese filed a Motion in Arrest of Judgment, or, in the Alternative, a Motion for a New Trial. Motions to arrest Judgment are governed by Utah Rule of Criminal Procedure 23:

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment....

¹Mr. Maese owned the Doll House with his then girlfriend, Tiffany Curtis, who had formerly worked as an escort, and had advised Mr. Maese about the "business" opportunities associated with an escort service. The Doll House was licensed in Park City, and maintained a small office there, but did no actual business from the Park City location.

Under Rule 23, a trial court should arrest Judgment if the evidence presented by the State or admitted to by a defendant "is so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element," that is, if it is factually insufficient to support the jury's guilty verdict. See, State v. Workman, 852 P.2d 981, 984 (Utah 1993). Thus, when Mr. Maese attacks the jury's verdict for sufficiency of the evidence, or lack of unanimity, it may be considered under Rule 23 prior to being sentenced. Mr. Maese urges the Court that it should arrest Judgment both because of the alleged insufficiency of the evidence and the lack of unanimity of the jury verdict.

B. Motion for a New Trial²

Rule 24 of the Utah Rules of Criminal Procedure sets forth the basis upon which a new trial may be granted. The Court may grant a new trial in the interest of justice if "there is any error or impropriety which had a substantial adverse effect upon the rights of a party."

Mr. Maese urges the Court to grant him a new trial because of the same two bases as set forth above, and various errors he ascribes to the Court, including not ruling upon, or compelling the State, to provide a

²The State correctly notes that a Motion for New Trial should be filed after sentencing. *See*, Rule 24(c) of the Utah Rules of Criminal Procedure. While Mr. Maese concurs with the State's assessment, he argues that Rule 23 permits a trial Court to exercise "wide discretion" in any considerations for the arrest of judgment, and that his arguments may be considered for both. This Court will consider all of the arguments of Mr. Maese without worrying whether the Motion for a New Trial could be considered now or later.

bill of particulars, permitting evidence to be presented to the jury of one of the escort's non-consensual sex acts, allowing the jury to consider four alternative statutory prongs as a basis for the Pattern of Unlawful Activity charge, permitting the introduction of a letter addressed to the parents of one of the escorts, penned by Mr. Maese, and actions or remarks by the prosecutor which Mr. Maese alleges was prosecutorial misconduct and which therefore prejudiced the trial. Mr. Maese alleges that any one of these issues had a "substantial adverse effect" upon his rights. The Court will address each of these arguments herein.

1. Sufficient Evidence was Adduced by the State at Trial that Mr. Maese is Guilty of the Counts Charged Beyond a Reasonable Doubt.

Notwithstanding the mountain of evidence provided at trial and the jury's verdict of guilt, Mr. Maese now urges the Court that such evidence was insufficient to convince a jury beyond a reasonable doubt of his guilt. In the face of this evidence, it is as if Mr. Maese is asking the Court to look squarely into the brightness of an unobscured noonday sun and then seek to persuade the Court that the sun does not exist. Such is the quantum of evidence provided at trial to support the jury verdict.

Without attempting to create an exhaustive list of the evidence provided at trial which supports the jury verdict on each of the respective counts, the following is a summary of the evidence provided at trial concerning the nature of the Doll House's business and the knowledge of Mr. Maese about the purpose of the business.

(a) After creation of the Doll House as a business, Mr. Maese and Ms. Curtis advertised it on a website which provided a link to a site entitled "The Erotic Review," which was a national posting of reviews of the places around the country where "erotic" escorts, massages, strip clubs, and "gentlemen clubs" could be located and the various types of "service" the clientele could expect from the individuals involved with a business such as the Doll House. (Trial Tr. Day 1 ("T1") 16.) Mr. Maese put together the Doll House website, monitored the "reviews" his escorts received (T1 84), wrote his own fictitious reviews of the sexual acts his escorts would perform for paying clients (T1 117) and discussed bad reviews with the escorts to encourage them to generate "positive" reviews (T1 114-15). He specifically spoke to the escorts that refusing sex was bad for business and would result in a bad review. (T1 125-27)

(b) The Doll House employed numerous women as escorts, who were sent to various appointments, in which they were required to become completely naked. (Trial Transcript Day 2 ("T2") 270.) While Mr. Maese created a "Policy & Procedures Handbook" for the Doll House that explicitly prohibited sexual acts, it was understood that sex was the service the Doll House provided.³ This was certainly true as to the

³A theme of Mr. Maese's defense was, that while escorts may have engaged in sex acts, he was oblivious to such activity and he presumed the business was only providing escort services that did not involve sex acts. Indeed, as part of his defense, Mr. Maese introduced evidence at trial that he had drafted a "policy and procedure manual" that explained that sex acts were not allowed by law or by the Doll House, and held at least two quarterly business meetings where escorts were trained by a legal professional as to what legally could or could not be done as an escort. As will be seen by a cursory review of the evidence, this was a facade, as the evidence suggests Mr. Maese fully understood sex was part of the service the Doll House

owners, Mr. Maese and Ms. Curtis, who did all they could to make the Doll House a successful and lucrative concern. Financial success for an escort and for the Doll House involved sexual activity.

(c) Mr. Maese and Ms. Curtis often obtained the details of the escort's individual appointments, including the following low lights:

(i) one escort noted to Mr. Maese that during an appointment where she performed oral sex the client "tasted" disgusting. (T1 87-88);

(ii) another escort complained to Mr. Maese that other escorts were not charging enough for sex so clients were reluctant to pay her the price she demanded for sex (T1 103), to which Mr. Maese told her that the fee she charged for sex was too much. (T1 103, T2 187); and

(iii) Mr. Maese told the escorts to "keep the guys happy but whatever happens between you guys is between you guys" (T1 152-53);

(iv) Mr. Maese attended a bachelor party with two of his escorts where oral sex was performed with clients. Mr. Maese accompanied the escorts to the event and called the Doll House to report they had arrived and collected the Doll House fee (T1 97-98);

(v) Mr. Maese told an escort during a dispute with a "regular" client over the fee for sexual intercourse that she was to go to a gas

provided, he actively participated in "marketing" the types of sexual activity individual escorts would perform by creating fictitious reviews by supposed satisfied clientele, encouraged the escorts to provide the sex acts the clients demanded, and demanded that his escorts satisfy the clients and obtain "good" reviews from their clientele. The idea that sex acts were not permitted is more appropriately called a "wink, wink" defense, wherein Mr. Maese tells an escort not to do something, but fully expects them to do exactly that.

station, purchase condoms and go back and make the guy happy because he was a "regular." (T2 186);

(vi) An escort told Mr. Maese that she had performed oral sex for \$400 and Mr. Maese responded that for \$400 she would need "to be a little more liberal than that." (T2 235-36); and

(vii) In a dispute with an escort who left the Doll House to work with a competitor, Mr. Maese drafted and sent a letter to the escort's parents highlighting the sexual activities she had engaged in while an escort at the Doll House, which letter included photographs and the "reviews" she had received from The Erotic Review. (T1 100-02, 133-35)

(viii) Mr. Maese and Ms. Curtis referred to the escorts who were willing to have sex with a client as "ballers" and/or that they would "play ball." (Testimony of Ms. Curtis)⁴

(ix) Mr. Maese was present at least 70% of the time when one escort returned from appointments and paid the agency fee and was seen by this escort handling and wrapping the money in rubber bands. (Testimony of Allison H.)⁵

(x) A typical escort would do three to four dates a day, worked a 50 hour work week and engaged in sexual activity on approximately 50% of the appointments. (Testimony of Jennifer H.)

(xi) One escort was involved in a non-consensual sex act from a regular client and she informed Mr. Maese, and he responded that the Doll House would never provide services to that client again. (Testimony of Heather T.)

(xii) The witnesses testified that from 30% to 90% of the appointments scheduled by the Doll House involved sexual acts. (Testimony of Allison H., Jennifer H., Heather W., Danielle T., Allison J.)

(xiii) Mr. Maese arranged some of the escort appointments with clients and drove the escorts to the location. (Testimony of Nicole F.)

⁴Where the Court cites to testimony rather than to a reference in the trial transcript, it is because the Court does not have a trial transcript and is relying on its own trial notes. Where a trial transcript is referenced, it has been taken from the briefs of one of the litigants.

⁵The witnesses who were escorts at the Doll House will be referred to in this Decision by their first name and last initial.

(xiv) In addition to a Doll House fee of \$95 for each appointment, the escorts paid Ms. Curtis, the appointment scheduler, a "tip" of from ten to twenty percent of any additional money the escort earned from engaging in sex acts, which was commingled with Doll House fees. (T2 222, 226).

(xv) The more "tip" Ms. Curtis and the Doll House received from an escort, the more appointments the escort received. (T2 149-50, 182)

(xvi) The Erotic Review, reviewed and supplemented by Mr. Maese, detailed the sex acts the Doll House escorts performed. (T1 12-16, 82-84, 114-115, 127)

(xvii) Mr. Maese checked the reviews of his escorts in The Erotic Review daily and discussed with Ms. Curtis and the escorts their respective reviews. (T1 84, 114-115, 117, 125-27)

(xviii) During the execution of a search warrant on the Doll House, law enforcement discovered hard copies of The Erotic Review which detailed the sexual repertoire of the Doll House escorts. (T1 23)

(xix) During the execution of a search warrant on the Doll House, law enforcement retrieved escort schedule lists, escort appointment lists, business application for the Doll House signed by Mr. Maese, and Doll House financial accounts signed by Mr. Maese, as well as financial records of money transfers from the Doll House to Mr. Maese's personal financial account. (Testimony of Detective Dan Bartlett)

(xx) Mr. Maese and Ms. Curtis abandoned the quarterly discussions with escorts about prohibitions against sex on appointments

because they "did not want the girls to think that they would get in trouble...if they were to have sex on an appointment." (T1 72-80)

(xxi) In a meeting with all the escorts, Mr. Maese went over The Erotic Review, and encouraged the escorts to work harder, provide more "services" for less money and generate better reviews so the Doll House could become the best escort service in Salt Lake City. (Testimony of Allison J.)

(xxii) Mr. Maese spoke to one escort on strategies to employ to avoid getting busted for illegal sexual activity. (Testimony of Jennifer H.)

(xxiii) The escorts felt pressure to provide sex on their appointments from the Doll House owners. (Testimony of Jennifer H.)

* * *

When a Court is asked to review a jury verdict on the grounds that the evidence is insufficient to support the verdict, the Court is to:

...review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.

State v. Hamilton, 827 P.2d 232, 236 (Utah 1992) (quoting State v. Booker, 709 P.2d 342, 345 (Utah 1985).)

As set forth in this Court's summary recitation of the evidence, there is nothing insufficient or inconclusive in the evidence the State presented of Mr. Maese's guilt to support his conviction beyond a reasonable doubt. Evidence of guilt is sufficient when a jury, based on

the evidence, may find beyond a reasonable doubt that a defendant committed the charged offenses. State v. Murphy, 617 P.2d 399, 402 (Utah 1980). Each piece of evidence does not need to be sufficient, in and of itself, to support a jury finding of guilt. State v. Gurr, 904 P.2d 238, 241-42 (Utah App. 1995). Rather, a court is to review the evidence in its totality to determine whether the totality of facts is sufficient to support a finding of guilt beyond a reasonable doubt. Id.

In Gurr, the defendant argued that his conviction was not supported by sufficient evidence. Id. at 240. To support his arguments, he isolated each piece of evidence presented by the prosecution, arguing that each by itself was insufficient to convict him. Id. at 242. The court rejected his arguments stating, "Although Gurr offers alternative explanations for pieces of the evidence, those explanations would require us to view the evidence as individual still frames rather than a whole moving picture." Id.

Mr. Maese is asking this Court to engage in the same limited view of each piece of evidence against him. But viewing the evidence in its totality, the jury correctly found that Mr. Maese knew the escorts working for him were performing sex acts for money, that he accepted money they received from the work, and that he encouraged them to prostitute themselves. Utah Code Ann., § 76-10-1305, provides that a person may be found guilty of exploiting prostitution if he:

- (a) procures an inmate for a house of prostitution or place in a house of prostitution...;
- (b) encourages, induces, or otherwise purposely causes another to become or remain a prostitute;
- (c) transports a person...within this state with a purpose to

promote that person engaging in prostitution...;

(d) ...shares the proceeds of prostitution with a prostitute pursuant to their understanding that he is to share therein;
or

(e) owns, controls, manages, supervises, or otherwise keeps, alone or in association with another, a house of prostitution or a prostitution business.

In the face of the quantum of evidence presented at trial it is an impossible task for Mr. Maese to argue that the quantum of evidence is insufficient or inconclusive as to his guilt. The impossibility of that task is only highlighted by each of the pieces of evidence Mr. Maese tries to explain away. Indeed, from Mr. Maese's own marshaling of the evidence and arguments thereon, one may conclude that:

(i) Mr. Maese encouraged an escort who was unwilling to have unprotected sex to go get some condoms, work it out and make "the guy happy." Exploitation of Prostitution may be proven by encouraging, inducing or causing a person to become or remain a prostitute;

(ii) Unhappy with a different escort who left the Doll House, Mr. Maese sent a letter to her parents detailing her sexual activity as an escort for the Doll House. Exploitation of Prostitution may be proven by the ownership, control or management of a prostitution business;

(iii) Mr. Maese received proceeds from a sexual encounter by a Doll House escort for which she was forced to perform a sexual act for less than she demanded, and received money from the escorts from their appointments. Exploitation of Prostitution may be shown by the sharing of proceeds of prostitution.

(iv) Mr. Maese maintained a house of prostitution by setting

up a website, handling advertisements, writing reviews of his escorts on The Erotic Review which contained information about sexual activity. Exploitation of Prostitution may be shown by owning, controlling, managing or supervising a prostitution business.

Furthermore, the "low lights" list of activity stated above, the State provided sufficient and conclusive evidence to support claims against Mr. Maese for exploiting prostitution, including the following:

(a) Procuring an individual to engage in prostitution:

Mr. Maese interviewed, photographed, hired, trained and advertised for the Doll House escorts. Without exception, each of the escorts were interviewed and hired by Mr. Maese. One escort was drawn to the Doll House for employment by an ad she saw for the Doll House in a weekly newspaper. (Testimony of Allison J.)

(b) Encouraging another to Become or Remain a Prostitute:

Mr. Maese coached the escorts on what they could do to avoid being busted, he discussed their Erotic Reviews and encouraged better service for less money, commented on their pricing for sexual services if he felt it was too much or if they needed to provide more service for the price received, told them to keep their customers satisfied, and operated a business that gave the escorts referrals based on how much of a tip the Doll House received for the sexual activity of its escorts.

(c) Transports a person with purpose to promote prostitution:

Mr. Maese drove escorts to several appointments, at one of which he remained to take photographs.

(d) Shares in proceeds of prostitution: Mr. Maese and the Doll

House collected tips from sexual activity of his escorts along with the standard agency fees.

(e) Owned or controlled a prostitution business: Mr. Maese owned, operated and oversaw the business operation of the Doll House.

After a review of the evidence, this Court concludes that the jury had sufficient and conclusive evidence as to the counts of Exploiting Prostitution to find Mr. Maese guilty on those charges. There is neither good cause to arrest the Judgment nor any error or impropriety that had a substantial adverse effect upon Mr. Maese's rights to warrant a new trial.

As to the charge of Pattern of Unlawful Activity, those same facts support this Court's conclusion that the jury had sufficient and conclusive evidence as to the count for a Pattern of Unlawful Activity.

2. Mr. Maese Received a Unanimous Verdict From the Jury

Mr. Maese seeks to introduce evidence of jurors' statements that they were confused during deliberations by the Court's instructions regarding the specific acts that constitute Exploitation of Prostitution and their duty of returning a unanimous verdict.

Mr. Maese argues that his verdict was not a unanimous verdict from the jury as three jurors expressed some confusion during deliberations concerning the jury instructions as it related to what specific acts may be found by the jury in order to return a verdict on a count of Exploitation of Prostitution.

As previously noted, one may be guilty of Exploiting Prostitution

under five alternative categories of the crime. They include:

- (a) procuring an inmate for a house of prostitution;
- (b) encourages, induces, or otherwise purposely causes another to become or remain a prostitute;
- (c) transports a person into or within this state, with the purpose to promote that person's engaging in prostitution...;
- (d) not being a child or legal dependent of a prostitute share the proceeds of prostitution...; or
- (e) owns, controls, manages supervises or otherwise keeps, alone or in association with another, a house of prostitution or a prostitution business.

Utah Code Ann., § 76-10-1305 (1953, as amended.)

During the jury deliberations, the jurors sent out the following question in referring to the elements section of the instruction on Exploiting Prostitution:

Jury Question: In instruction #37, a, b, c, d, do all of them have to be fulfilled in order to find the defendant guilty or just one of the conditions met? Also the same question for instruction #40.

The Court, after consultation with respective counsel submitted the following:

Answer: Both instructions 37 and 40's subparagraphs (the a, b, c's) you refer to end with the word "or" and therefore should be read accordingly.

Mr. Maese's argument is that the jury may have found him guilty on different categories of the offense, but not unanimously on the same

category. Mr. Maese's argument is unpersuasive both based on the Utah Rules of Evidence and on case law.

(i) Utah Rule of Evidence 606 Precludes Consideration of Juror Statements

Utah Rule of Evidence 606(b) forbids the use of juror statements Mr. Maese gathered as to matters occurring during deliberations. Rule 606(b) states in part:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations...except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. (Emphasis added.)

Utah law is clear as to the strictness of this rule. See, State v. Gee, 498 P.2d 662, 665-66 (Utah 1972) (specifying that juror testimony or affidavits may not be received to impeach the jury verdict). All of the statements provided by defense counsel allude to matters and statements which occurred and were made during the course of the jury's deliberations. Therefore, they may not be received for the purposes of impeaching the verdict in seeking a new trial.

Rule 606(b) allows for consideration of juror testimony only to the extent that it may suggest the entry of "extraneous prejudicial information" in deliberations. The mere fact that several jurors were confused as to their duty of unanimity as to a specific crime and as to each element of that crime does not qualify as extraneous prejudicial information or improper influence for admission under Rule 606(b),

especially where that confusion was specifically addressed by the trial court and resolved. The Utah Supreme court has expressly held:

In a long line of decisions in this jurisdiction, the principle has been firmly established that evidence by affidavit or testimony of a juror will not be received to impeach or question the jury verdict or to show the grounds upon which it was rendered, *or to show their misunderstanding of fact or law, or that they misunderstood the charge of the court, or the effect of their verdict, or their opinions, surmises and processes of reasoning in arriving at a verdict.*

State v. Gee, *supra* at 665-66 (emphasis added); see also, Johnson v. Simons, 551 P.2d 515, 516 (Utah 1976) (refusing juror affidavits indicating that jury was confused as to law stated in instructions). The introduction of such evidence is expressly barred by Rule 606(b) and by the clear statements of the Utah Supreme Court.

(ii) Utah Case Law Precludes Consideration of Juror Statements

Mr. Maese cites Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1548 (10th Cir. 1993), for the proposition that Federal Rule 606(b) is silent as to questioning the jury to confirm the accuracy of the verdict, and therefore should not preclude the testimony as to a potential miscommunication of the verdict. The Utah version of Rule 606(b) also does not specifically preclude evidence of verdict miscommunication. However, case law is clear that juror testimony may not be used to impeach or question the verdict or to show a misunderstanding of law or fact or the charge of the court. State v. Gee, 498 P.2d 662, 665-66 (Utah 1972). The Utah Supreme Court has held that in general jurors must agree only to the crime charged, not a particular theory of the crime. State v. Tillman, 750 P.2d 546 (Utah 1987). In Tillman, the Court noted

that there are two classes of criminal statutes: (a) where there is one crime with various means to commit the crime, and (b) where the statute sets forth several acts, and commission of each is a separate crime. When the statute is (a) above (like the one at issue here), the jury need only come to consensus about the crime itself, not the elements of the crime. Id. In State v. Russell, 733 P.2d 162, 165 (Utah 1987) the Utah Supreme Court noted that:

Many jurisdictions have considered the scope of the constitutional requirement of a unanimous jury verdict in criminal cases. The decisions are virtually unanimous that a defendant is not entitled to a unanimous verdict on the precise manner in which the crime was committed, or by which of several alternative methods or modes, or under which interpretation of the evidence so long as there is substantial evidence to support each of the methods, modes, or manners charged.

Thus, if the statute under which the defendant is convicted defines one crime which may be committed several different ways, the defendant is not entitled to jury unanimity on the way in which the crime was committed. State v. Russell, Id. at 166.

Such is the case here. Clearly there was sufficient evidence that the jury could rely upon to find that Mr. Maese (a) procured individuals to engage in prostitution or (b) encouraged individuals to become or remain prostitutes or (c) transported a person within the state to engage in prostitution or (d) shared in proceeds of prostitution and/or (e) owned a prostitution business, as has been previously discussed. Accordingly, Mr. Maese's Motion to Arrest Judgment and for a New Trial based on allegations of lack of juror unanimity fails.

(iii) Even if the Jurors' Statements are Considered, the Jury Requested and Received a Clarification as to the Court's Instructions, Curing Any Confusion and Preserving Mr. Maese's Right to a Unanimous Verdict

The Utah Supreme Court has held that juries are presumed to have relied on instructions given by the Court. See, State v. Harmon, 956 P.2d 262 (Utah 1998). Mr. Maese asserts that after the jury received the clarification instruction from the Court "they immediately returned a guilty verdict on all four counts of Exploiting Prostitution." This, Mr. Maese argues, is evidence that the jury "violated [his] constitutional right to a unanimous verdict."

In this case, the statements of three jurors as to the specific acts that may have constituted the counts of Exploitation of Prostitution is argued to have caused some confusion during the deliberations. However, the jury brought those questions to the Court, and the Court responded by clarifying the instruction that had previously been given. This response was considered and approved by counsel before returned to the jury.⁶ "If a trial judge could not correct errors as they occur, few trials would be successfully concluded." Harmon, 956 P.2d at 272. The Court in this case offered a corrective instruction. It is presumed under Utah law that it is that clarifying instruction which the jury followed in rendering their verdict, not some suggestion of personal confusion related by a juror that preceded this instruction.

⁶While Mr. Maese's counsel acknowledges that he reviewed the answer to the jury question, he does not acknowledge that he "approved" it. There is no record however to suggest that Mr. Maese's counsel objected to the answer or proposed an alternative instruction.

3. Mr. Maese Fails to Demonstrate that the Lack of a Ruling on a Bill of Particulars Prejudiced Him

Before the Court discusses the argument, a procedural history of this case bears some discussion. The Information in this case was originally filed October 4, 2006, and Amended on October 5, 2006. The Amended Information contained a Probable Cause Statement which detailed over the course of three pages the allegations supporting the criminal counts brought against Mr. Maese.

After preliminary proceedings the Court set a jury trial for January 9-11, 2008, with a pretrial on December 17, 2007. Mr. Maese was represented at these proceedings by an attorney different than the attorney who eventually handled his trial in July of 2008. On January 7, 2008, approximately ten days before the beginning of the scheduled jury trial, the parties stipulated to a cancellation of the jury trial and the trial was reset for February 20 and 21, with a pretrial on February 11, 2008. On February 11, 2008, at the pretrial, nine days before the second time this matter was scheduled for trial, Mr. Maese moved, through his counsel, to continue the trial, which Motion was granted. The trial was reset for a third time on April 23, 2008, with a pretrial on April 14, 2008. At the pretrial on April 14, 2008, Mr. Maese's counsel indicated that he was prepared to go to trial on April 23, 2008. However, on the first day of trial, April 23, 2008, Mr. Maese asked to discharge his lawyer, at which point the Court granted his counsel's Motion to Withdraw and assessed Mr. Maese costs for the 35 jurors and seven witnesses who were prepared to appear on that day.

Thereafter, Mr. Athay, Mr. Maese's new trial counsel, made his record of appearance and the matter was thereafter set for its fourth jury trial setting on July 10 and 11, 2008, with a pretrial on July 7, 2008.

Thereafter, Mr. Maese filed a Motion for a Bill of Particulars, which was briefed by the parties and argued at the pretrial conference three days before the jury trial was to begin on its fourth setting. At this pretrial conference additional argument was heard by the Court on a Motion to Disqualify the Salt Lake County District Attorney's Office for their prosecution in the matter, which Motion was filed four days before the pretrial conference, and seven days before the trial was to begin. At the pretrial, after hearing arguments from the parties, the Court indicated it would render a written opinion on the pending Motions prior to the scheduled trial three days later. On that same day, July 7, 2008, the Court issued a Memorandum Decision and Order which denied the defendant's Motion to Disqualify the District Attorney's Office and indicated to the parties that "the trial will proceed as scheduled." (Memorandum Decision and Order, July 7, 2008.) The Court did not include in that Memorandum Decision any reference to Mr. Maese's Motion for a Bill of Particulars, and on the day of trial, after asking both the State and Mr. Maese if they were ready to proceed with the trial, which both affirmed they were, the trial commenced. The Court never issued a decision on Mr. Maese's Motion for a Bill of Particulars.

Mr. Maese argues that the Court's failure to rule on his Motion for a Bill of Particulars caused him prejudice by depriving him of the opportunity to prepare an adequate defense.

(i) **Mr. Maese waived his right to a ruling on the Motion for a Bill of Particulars.**

Rule 12(e) of the Utah Rules of Criminal Procedure provides that "A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination." Rule 12 further provides in subsection (f) that, "Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver." When the Court asked Mr. Maese on the day of trial if they were ready to proceed, and received an affirmative response, Mr. Maese effectively waived his right to obtain a ruling on his Motion for a Bill of Particulars by failing to object to the trial proceeding or to otherwise request the Court to issue its opinion before the trial began. Indeed, Mr. Maese should well have known that his Motion for a Bill of Particulars had been denied when the trial actually began.

(ii) **Mr. Maese suffered no adverse effect for lack of a Ruling on his Motion for a Bill of Particulars.**

a. The Amended Information Provided Adequate Notice of the Charges Against Mr. Maese

Article I Section 12 of the Utah Constitution provides that an accused "shall have the right...to demand the nature and cause of the accusation against him...." Utah Code Ann., further provides in § 77-14-1 that the State provide an accused in writing "As is known to him the

place, date and time of the commission of the offense charged." In interpreting the obligation of the State, the Utah Supreme Court has held that one "be charged with a specific crime, so that he can know the particulars of the alleged wrongful conduct...." State v. Burnett, 712 P.2d 260, 262 (Utah 1985). Mr. Maese's Motion for a Bill of Particulars sought the particulars of Counts II through V of the Amended Information, the Exploitation of Prostitution charges.

Mr. Maese's claim that he was prejudiced by not receiving a ruling by the Court on his Bill of Particulars is not persuasive. Mr. Maese was not deprived of the opportunity to provide an adequate defense. The Amended Information provided three pages, and nine separate subparagraphs detailing the particulars of the crime charged. It provides in paragraph 5, the following:

(a) an escort with initials N.F. was told by Mr. Maese the type of sex acts she should perform with a client during July and September, 2005, and further that she was told in response to a request for sex by a client to work it out;

(b) an escort with initials A.F. was encouraged by Mr. Maese during October and December 2005 to engage in oral sex without a condom and that if she didn't engage in sex acts she would not get work;

(c) an escort with initials H.R. discussed with Maese between September, 2005 and February, 2006, what to do if she was charged with Prostitution because of her sexual intercourse with Doll House clients;

(d) an escort with initials J.H. paid Mr. Maese the Doll House fee after sex with clients;

(e) an escort with initials D.T. was told by Mr. Maese during April and May 2006 in a dispute with a client over a fee for sex acts to "drive down the hill and get condoms and go back and work something out."

(f) an escort named T.N. told Mr. Maese during the year 2005 and 2006 of the specific sex acts she and the other escorts performed.

In addition to the particulars set forth in the Amended Information, Mr. Maese had already been through a preliminary hearing in which dates, places and times of the alleged illegal conduct had occurred. In addition, Mr. Maese, over the almost two years of pendency of this litigation, had received the State's discovery, which included statements and interviews of the escort witnesses who would be testifying against him.

Before Mr. Maese can prevail on his argument that the lack of a Court ruling on his Motion for a Bill of Particulars warrants a new trial, he must show that the failure prejudiced him by depriving him of the opportunity to prepare an adequate defense. Utah Rules of Criminal

Procedure 30 provides in subsection (a) that "Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded."

For an error to affect the substantial rights of Mr. Maese, he must show that absent the error, there is a reasonable likelihood that the result would have been more favorable to the defendant. State v. Knight, 734 P.2d 913 (Utah 1987); see also, State v. Bernards, 2007 UT App. 238, 166 P.3d 626. This has been interpreted as the "erosion of confidence" test and requires a two-part analysis: First, did the error impede the defendant's ability to prepare for trial? Second, did the error so impede his ability to prepare a defense that the likelihood of a different outcome was sufficiently high as to undermine the confidence in the verdict? Id. at 920. Neither can be met here.

Generally, Utah Rule of Criminal Procedure 30 puts the burden on the defendant to show prejudicial error. See, State v. Blubaugh, 904 P.2d 688 (Utah Ct. App. 1995) (court denied Motion where the accused made no showing that further detail would've made any difference in the trial); State v. Swapp, 808 P.2d 241 (Utah 1991) (defendant did not show how his defense was prejudiced by the lack of knowledge; he made only a conclusory statement that it was difficult to defend). However, courts have found that the burden should shift to the State when it comes to a Motion for Bill of Particulars. The State must show that there is no reasonable likelihood that, absent the error, the outcome of the trial would have favored the defendant. See, State v. Knight, 734 P.2d 913 (Utah 1987); State v. Bell, 770 P.2d 100, 104 (Utah 1998).

Even if this Court erred in failing to rule on the defendant's Motion for a Bill of Particulars, such an error does not warrant a new trial because it did not "affect the substantial rights of a party." Utah Rule of Criminal Procedure 30(a). Put differently, because it is clear from the record that Mr. Maese was not entitled to a bill of particulars, any failure to issue an Order denying such bill of particulars is rendered harmless.

In State v. Ramirez, 817 P.2d 774, 778 (Utah 1991), a decision heavily relied upon by Mr. Maese, the trial court did not explicitly rule on a Motion to Suppress which it had taken under advisement. In that case, however, the failure to issue a ruling on the Motion was harmful error because during the suppression hearing, there were numerous factual discrepancies among the testimony of the State's witnesses which were never ruled upon, and the appellate court was not able to resolve these factual discrepancies on its own upon appeal. Id. at 787. Because of the factual discrepancies and the court's failure to resolve them, it was not clear whether Ramirez was entitled to have the evidence against him suppressed. Id. at 788. In turn, the court was required to reverse his

conviction and order a new trial because this was "harmful error." Id. at 789.

The case before this Court is different. Unlike the hearing on the Motion to Suppress in Ramirez, there was no evidentiary hearing to consider in this case, and no factual discrepancies to consider. The only issue before this Court was whether Mr. Maese had received sufficient notice through the Amended Information's probable cause statement, and the evidence the State provided to him through discovery and a preliminary hearing as to what the charges were against him and the underlying evidence to support those charges, a finding the Court could make based upon the record.

The record shows that the Amended Information charging Mr. Maese was constitutionally sufficient. In State v. Bernards, 166 P.3d 626 (Utah Ct. App. 2007), the court explained that an Information is constitutionally sufficient if it fully apprises the defendant of the "State's evidence upon which the charge is based." Id. The court added that a "[l]ack of factual specificity" does not make an Information constitutionally deficient. Further, specific dates are not necessary when a count is part of an ongoing criminal enterprise. Id. at ¶¶ 6, 18. The probable cause statement included with the Amended Information and the evidence the State provides to the defendant must be considered as part of the notice to the defendant. Id. at ¶ 17. In Bernards, the defendant was charged with five counts of Aggravated Sexual Abuse of a Child for sexually abusing his stepdaughter continuously "between September 2000 and January 23, 2008." Id. at ¶¶ 2, 4. The probable

cause statement described the evidence of each count. Id. at ¶ 5. Even though two of the counts for which he was convicted provided a range of dates--"during the first part of 2002" and "December 2002" the court held Bernards received sufficient notice because the abuse was part of a continuing criminal enterprise, the probable cause statement described the evidence for each count, and the State provided him with video and cassette tapes of interviews with the victim and transcripts of the interviews. Id. at ¶¶ 2, 17-18.

As happened in Bernards, Mr. Maese received sufficient notice. The four counts of Exploiting Prostitution for which Mr. Maese sought a Bill of Particulars gives a date range--like the Information in Bernards--of July 1, 2004 through April 30, 2006, and the probable cause statement outlines the evidence the State used to charge him--just like the probable cause statement in Bernards.

Moreover, the probable cause statement in this case gave the initials of former escorts, the dates during which they worked for Mr. Maese, and detailed accounts that as they worked for Mr. Maese they were expected to perform sex acts with their clients, and that Mr. Maese encouraged them in those enterprises. The Amended Information was more than sufficient to identify the witnesses against him and review the evidence occurring during their respective employment with the Doll House. Further, the State provided Mr. Maese with all the evidence it intended to use against him in response to discovery, including witness statements. Furthermore, Mr. Maese had the benefit of a Preliminary Hearing in which those charges had been more fully laid out.

Mr. Maese received constitutionally sufficient notice through the Amended Information, the probable cause statement, and the preliminary hearing, and the evidence the State provided to him. Mr. Maese was not impeded in his preparation for trial by a lack of specificity as to the charges against him, nor would the outcome have been any different. Unlike the scenario in Ramirez, there is no risk of harm to Mr. Maese because that finding is based upon the record. Mr. Maese's notion that a new trial would somehow act as a remedy is faulty reasoning because there is no unresolved factual issue to alter the case--only an unstated legal ruling which Mr. Maese's counsel himself waived the morning of trial, by indicating he was ready to proceed to try the case.

4. Mr. Maese had Adequate Notice of Pattern of Unlawful Activity

Mr. Maese argues that he is entitled to a new trial because the Amended Information referred to subsections 1, 2 and 3 of the statutory provisions for this offense, but not subsection 4, and that the jury instruction referred to all four subsections,⁷ thus not permitting Mr. Maese to be prepared to defend against such a charge. Subsection 4 of the statute provides that "it is unlawful for any person to conspire to violate any provision of Subsection (1), (2) or (3)."

As previously noted in reference to Utah Rule of Criminal Procedure 30(a), any variance in the Information "which does not affect the substantial rights of a party shall be disregarded." Burnett, 712 P.2d

⁷The Amended Information charges Mr. Maese with a violation of Utah Code Ann., § 76-10-1603(3), but in its body continued with a recital of subsections 1, 2 and 3. The recital omits subsection 4.

at 262. Thus, Mr. Maese must show that the variance prevented him from having notice of the charge and hindered his ability to defend against the charge. State v. Kirgan, 712 P.2d 240, 242 (Utah 1985).

Here the Amended Information makes specific reference to subsections (1), (2) and (3) and, while not making a specific reference to the number (4), sets forth the conspiracy nature of the charge. The Amended Information alleges that the parties conspired to undertake the illegal activities as outlined in subsections 1-3 and further sets forth that pursuant to such conspiracy the defendants exploited prostitution. Mr. Maese received notice of the charge of conspiracy as part of a Pattern of Unlawful Activity and the variance in the charging document did not affect a substantial right of Mr. Maese.

5. The Admission of Testimony Regarding a Sexual Assault was Probative and Non-Prejudicial

Mr. Maese argues that the Court improperly admitted evidence during the trial that one of his escorts had been the victim of a sexual assault during a specific appointment as a Doll House escort. Mr. Maese argues that the inclusion of such evidence was prejudicial to him as it was not relevant, and painted "him as a party to the rape, after the fact." Throughout the trial Mr. Maese's defense theory was that while sexual activity may have taken place between his escorts and Doll House clientele, he was wholly unaware of it. Thus, evidence of a conversation between Mr. Maese and an escort about sexual activity occurring during the course of a Doll House appointment was highly relevant and probative on the issue of whether Mr. Maese knew that his escorts were engaging in

sexual activity on their appointments with Doll House clients, and that the fees and tips the Doll House received were from prostitution activities. The evidence adduced at trial was that a regular customer of the Doll House expected sex during his appointment with an escort, and paid for his non-consensual sex with the escort and that the Doll House shared in the proceeds. Thus, the evidence was relevant and probative and not unfairly prejudicial. Furthermore, the record was replete that Mr. Maese did not engage in that act nor condone the non-consensual nature of the act and further offered to report the matter to authorities. (Testimony of Heather T.)

Even if the evidence was admitted erroneously, it was harmless. Even without the testimony of this particular event, there is no reasonable likelihood that the outcome of the case would have been any different, given the volume of testimony adduced at trial. This Court finds that there was no substantial adverse effect upon Mr. Maese's rights to warrant a new trial, and no good cause to arrest Judgment. Accordingly, Mr. Maese's Motion to Arrest Judgment and/or Motion for New Trial is denied.

6. The Admission of the Allison J. Letter was Probative and Not Unfairly Prejudicial

Mr. Maese argues that the admission of the letter he drafted to Allison J.'s parents accusing her of being a prostitute was irrelevant and unfairly prejudicial, and was evidence of other wrongs and therefore should require an Arrest of Judgment or New Trial. Again, the Court notes that Mr. Maese's defense was grounded upon the premise that he was

not aware of the prostitution his escorts were engaged in. Thus to now argue that the admission of a letter, penned in his own hand, informing the parents of one of his former escorts, that their daughter was engaged in prostitution while in his employment is not relevant to the issue before the Court is specious. It is relevant and not unduly prejudicial.

Furthermore, the admission of such a letter was not offered as evidence of any pertinent trait of character of Mr. Maese, although it certainly tells a person about the nature of a person who would do such a thing over an employment dispute. The letter was not offered to show action in conformity with a character trait of Mr. Maese, but rather to demonstrate Mr. Maese's knowledge that Doll House escorts provided sex acts in exchange for money. To this end the letter detailed the conduct Allison J. engaged in while an escort of the Doll House and contained reviews from The Erotic Review which included detailed descriptions of the sex acts she was willing to engage in for a fee as a Doll House escort. The letter further corroborated the testimony of Allison J. and other Doll House escorts that Mr. Maese was aware of the revenue Allison J. could generate for the Doll House and what exactly she had to do to generate that income. Accordingly, the letter's probative value was not substantially outweighed by whatever prejudicial effect it may have had for Mr. Maese. Accordingly, Mr. Maese's Motion to Arrest Judgment/New Trial is denied as to this issue.

7. The State Did Not Violate Rule 16 of the Utah Rules of Criminal Procedure

Rule 16 of the Utah Rules of Criminal Procedure outlines the

requirements of a prosecutor in disclosing to the defense specified evidence obtained in the prosecution of a case. The obligation to produce such information is contingent upon request by a defendant and is a continuing obligation which requires a prosecutor to disclose newly acquired information. State v. Kallin, 877 P.2d 138, 143 (Utah 1994).

The issue Mr. Maese raises here is whether he received complete information from the State as a result of testimony elicited either at trial or contained in the Amended Information's probable cause statement for which no interview or notes of such material was allegedly provided. Those areas include:

- (a) reference in the probable cause statement of the Amended Information attributed to Nicole F. that said "B*tch, you are gonna have to make it work";
- (b) reference to trial testimony from Ms. Curtis that an escort named Tatiana told Mr. Maese and Ms. Curtis about explicit sex acts and another incident wherein Mr. Maese attended a bachelor party where Doll House escorts provided sex acts to the celebrants.

The State responded by alleging that it supplied all material it had related to statements it received from Nicole F. and that while a summary of an interview of Nicole F. in the probable cause statement prepared by Detective Dan Bartlett ("Detective Bartlett") does not contain the statement alleged to have been made by Nicole F., that statement "or one substantially similar" is in the video recording of Nicole F.'s interview

with Detective Bartlett, and that that video recorded interview was provided to Mr. Maese's counsel before trial. Accordingly, the Court finds no merit in Mr. Maese's argument that the State withheld information from him on this issue.

As to Ms. Curtis' statements, the State points to specific date-stamped documents that make specific mention of bachelor parties conducted by Doll House escorts. The State further notes that the mere fact that a witness may testify at trial to something does not suggest that the State knew of such testimony before trial and failed to disclose it. It is not uncommon for witnesses to provide statements at trial never made in interviews with counsel before trial. The State represents it never interviewed an escort of the Doll House named Tatiana, nor did they interview Ms. Curtis about Tatiana. Accordingly, the Court finds no merit in Mr. Maese's argument on this point.

Mr. Maese fails to provide a basis for this Court to conclude that the State withheld any information in violation of Rule 16.

8. The State Did Not Engage in Prosecutorial Misconduct by Drawing Reasonable Inferences From the Evidence and Questioning Mr. Maese's Credibility

Mr. Maese argues that the prosecutor in this case engaged in misconduct in his closing argument by arguing that Heather T. transferred money to Mr. Maese from an incident of non-consensual sex and that Mr. Maese's testimony in the area of "compliance" meetings with Doll House escorts was not credible.

(a) Reasonable Inference

A prosecutor may draw reasonable inferences from the evidence adduced at trial and argue them to the jury. State v. Bakalov, 979 P.2d 799 (Utah 1999). The State noted in its argument that Heather T. never actually said that she paid Mr. Maese the agency fee for the incident, but that it is a reasonable inference which can be drawn from the evidence.⁸ Several witnesses, including Heather T., testified that Mr. Maese and Ms. Curtis routinely received \$95 for every appointment a Doll House escort handled and typically a tip on top of that. Heather T. testified that after she was sexually assaulted, she received \$300 or \$400 as a tip, and also collected an agency fee. She testified that she returned back to the Doll House immediately after the assault. It was reasonable to infer from this testimony that she paid a Doll House fee for the appointment. Further, Heather T. testified that "when we would return from the appointment we would go and meet back up with Tiffany and Steve, we would give them the agency fee which was at least \$100,...and then the tip we would give to Tiffany because she is the phone person." (See T2 at 166.) Therefore, it was a reasonable inference that could be drawn from the testimony, and argued to the jury. The Court finds no merit in Mr. Maese's argument on this point, nor that it either had a substantial adverse effect upon the rights of Mr. Maese or that good cause exists to arrest the Judgment or grant a new trial.

(b) Credibility of Mr. Maese

⁸The State further asserts that Heather T. had so testified at the earlier preliminary hearing and that the official transcript of the trial is inaudible in parts at this point in the testimony as a result of the emotional state of the witness. (State Memo in Opposition, p. 29.)

As to testimony a defendant may provide at trial, a prosecutor is free to comment on credibility. "When a defendant has testified during trial, it is proper during a closing argument to comment on defendant's credibility and appearance." State v. Jimenez, 21 P.3d 1142 at 1145 (Utah Ct. App 2001). See also, State v. Larsen, 2005 Utah App 201, ¶ 14, 113 P.3d 998; State v. Parsons, 781 P.2d 1275, 1283-84 (Utah 1989); United States v. Machuca-Barrera, 261 F.3d 425, 436 (5th Cir. 2001) (A prosecutor may assert a witness is not credible if he supports his assertion with admitted evidence.)

Here, the testimony Mr. Maese provided about regular "compliance" meetings was contradicted by Mr. Maese's own witnesses, who testified that only two meetings were held. (State Memo in Opp. p. 25.) Indeed, the testimony from Ms. Curtis corroborated the fact that compliance meetings, while initially held on a regular basis, were disbanded altogether because of concerns about scaring the escorts from engaging in sex acts. (Tr. T1 72-80) Clearly, there was a discrepancy between Mr. Maese's testimony and the evidence presented by other witnesses, for which the credibility of the testimony could be challenged.

Accordingly, Mr. Maese's Motion to Arrest Judgment and/or Motion for new Trial is denied.

Sentencing of Mr. Maese is set for December 22, 2008, at noon.

Dated this _____ day of December, 2008.

RANDALL N. SKANCHY
DISTRICT COURT JUDGE

The final test of the quality of your service will be the verdict you return. You will contribute to efficient judicial administration if you focus exclusively on this case and return a just and proper verdict.

25. 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.

26. HOW TO REPORT YOUR VERDICT

When you have reached a verdict, the Chair should date and sign the verdict form which corresponds to your decision. Then notify the bailiff that you are ready to return to court.

27. WHAT HAPPENS AFTER THE VERDICT HAS BEEN REPORTED

After you have given your verdict to the judge, he or the clerk may ask each of you about it to make sure you agree with it. Then you will be excused from the jury box and you may leave at any time. You may remain in the courtroom, if you wish, to watch the rest of the proceedings, which should be quite brief.

After you are excused, you may talk about the case with anyone. Likewise, you are not required to talk about it. If anyone attempts to talk to you about the case when you don't want to do that, please tell the Court Clerk.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs December 4, 2001

STATE OF TENNESSEE v. AVIS NEAL

Appeal from the Criminal Court for Shelby County
No. 97-09071 W. Fred Axley, Judge

No. W2001-00374-CCA-R3-CD - Filed January 28, 2002

The Defendant, Avis Neal was convicted by a Shelby County jury of one count of rape of a child. After a sentencing hearing, he was sentenced as a Range I standard offender to twenty years in the Department of Correction. In this appeal, the Defendant contends that (1) the trial court erred in admitting testimony concerning statements made by the victim to her mother, (2) the trial court's reasonable doubt instruction was deficient, (3) the State failed to make a proper election, (4) the evidence is insufficient to support a verdict of guilty beyond a reasonable doubt, and (5) the trial court erred in denying the Defendant's motion for new trial due to the Defendant's out of court contact with a juror. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which GARY R. WADE, P.J. and DAVID G. HAYES, J., joined.

Christine W. Stephens, Memphis, Tennessee, for the appellant, Avis Neal.

Paul G. Summers, Attorney General and Reporter, Elizabeth B. Marney, Assistant Attorney General; William L. Gibbons, District Attorney General; and Julie Mosley, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In early September 1996, the Defendant was living with Rochelle James, a long-time girlfriend and mother of his three children. The oldest of the children, a ten year old daughter, is the victim in this case. The victim testified that shortly after she started school in 1996, the Defendant entered her room while her mother was at work and penetrated her vagina with his finger. The victim pretended to be asleep during the assault, and told no one of the assault afterwards. A few weeks later, the Defendant again entered the victim's room and penetrated her vagina, this time with his penis. Again, the victim pretended to be asleep during the rape, and told no one afterwards. The next day, Ms. James, the victim's mother, noticed a blood stain on the victim's panties and asked

if the victim had begun to menstruate. The victim said she did not know, and Ms. James explained to her what to expect during menstruation. Between Thanksgiving and Christmas of the same year, the Defendant entered the victim's room again and penetrated both her vagina and her anus with his penis. The victim again pretended to be asleep during the rape. The victim testified that she told no one because she feared her father would harm her or her family.

On January 22, 1997, the Defendant again entered the victim's room, removed her from the bed she was sharing with her younger brother and sister, placed her on the floor and penetrated her vagina and anus with his penis. The next day, the victim recorded the attack in a diary she received for Christmas. The diary entry for January 23, 1997 reads, "[m]y dad is a bitch because he put his dick in me and he does – and I don't like my daddy."

In early February, the victim and Ms. James were arguing about a poor grade on the victim's report card when the victim finally told Ms. James about the abuse. Ms. James testified that she took the victim to a clinic to be examined. Ms. James further stated that she remembered the blood stain on the victim's panties, and that she had asked the victim if she was menstruating. Ms. James testified that the victim's grades dropped between September of 1996 and February of 1997, and that she was punishing the victim for a bad report card on the day the victim told her about the abuse.

Sally DiScenza, a family nurse practitioner specializing in examining victims of sexual assault and an expert in the field of forensic examination, examined the victim and found evidence of penetration. The victim's perihymenal tissue was abnormally narrowed, indicating some form of penetration. The victim's hymen tissue was also irregular, indicating trauma due to penetration. The victim's vaginal opening was fifteen millimeters, much larger than the seven to ten millimeters expected for a normal ten year old. The victim also had scarring around her anus, indicating penetration. Ms. DiScenza testified that the victim's description of the Defendant's abuse was consistent with the trauma to her vagina and anus.

Several friends of the Defendant testified regarding his reputation for truth and honesty. Vanessa Bryson-Neal, the Defendant's wife, testified that she had been dating the Defendant sporadically for about twelve years. Ms. Bryson-Neal stated that she has had several altercations, some violent, with Ms. James about the Defendant. The Defendant testified that he dated both Ms. James and Ms. Bryson-Neal at different times over the past twelve years, and he believed that Ms. James was very jealous of Ms. Bryson-Neal. The Defendant further testified that he did not abuse his daughter in any way, and that he could not explain her injuries.

VICTIM'S STATEMENTS TO MOTHER

The Defendant first argued that the trial court erred by admitting testimony by Ms. James that the victim told her about the abuse. The Defendant contends that this testimony was inappropriate hearsay testimony admitted contrary to Tennessee Rule of Evidence 802. We agree that the trial court erred in admitting the statement, but find the error to be harmless.

Tennessee Rule of Evidence 801 defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Tenn. R. Evid. 801(c). Rule 802 makes all hearsay inadmissible unless the statement falls under one of the exceptions listed in Rule 803. See Tenn. R. Evid. 802, 803. At trial, the following exchanged occurred during Ms. James’ testimony:

[Assistant District Attorney]: And what made it end?

[Ms. James]: My daughter came to me and told me that her father had been messing with her.

[Defense Attorney]: Objection.

The Court: State your grounds. Sir?

[Defense Attorney]: I object on the grounds of hearsay, Your Honor.

.....

The Court: Do you want to respond?

[Assistant District Attorney]: This is not going to the matter asserted. It’s going to show what she did and why she did it and her state of mind.

The Court: That’s the exception. I will give an instruction to the jury.

Immediately following the exchange, the trial court gave the jury a limiting instruction explaining that they could consider the statement in light of Ms. James’ actions after hearing the statement and not for the truth of the statement itself. Ms. James then testified that her daughter told her that the Defendant “took his thing out and stuck it in her.”

The State argues that the testimony was elicited from Ms. James, not to prove that the rapes actually occurred, but to provide the link between the victim’s testimony and the actions of Ms. James that followed. Therefore, the State asserts that the trial court properly overruled the Defendant’s objection because the statement in question was not hearsay. We must respectfully disagree.

The testimony of Ms. James that the victim said the Defendant was “messing” with the victim and “put his thing in her” can have no other effect but to corroborate and bolster the victim’s testimony that she was raped by the Defendant. In our view, the testimony was hearsay offered to prove the truth of the statement, that the Defendant was sexually abusing the victim, and the trial court erred in admitting the testimony. See Tenn. R. Evid. 801. However, in light of the proof presented by the State, the limiting instruction given by the trial judge, and, specifically, the testimony of the victim that the Defendant was abusing her, we conclude that Ms. James testimony was cumulative of the proof already presented, and the trial court’s error was clearly harmless. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52 (a); Chapman v. California, 386 U.S. 18, 23-24 (1967); Phipps v. State, 474 S.W.2d 154, 156 (1971); State v. Kennedy, 7 S.W.3d 58, 69 (Tenn. Crim. App. 1999). This issue is without merit.

REASONABLE DOUBT INSTRUCTION

The defendant next contends that the trial court erred in its reasonable doubt instruction to the jury. In particular, he argues that the court's failure to issue the standard pattern jury instruction containing "moral certainty" language lowered the standard of proof by which the State had to prove him guilty of the offense. We must respectfully disagree.

The defendant asked that the trial court instruct the jury on reasonable doubt by use of Tennessee Pattern Jury Instruction 2.03, which contains language that the jury must find the defendant guilty to a moral certainty. The trial court refused the request, opting instead to use Tennessee Pattern Jury Instruction 2.03(a), which provides as follows:

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in this case. It is not necessary that the defendant's guilt be proved beyond all possible doubt, as absolute certainty of guilt is not demanded by the law to convict of any criminal charge. A reasonable doubt is just that--a doubt that is reasonable after an examination of all the facts of this case. If you find that the state has not proven every element of the offense beyond a reasonable doubt, then you should find the defendant not guilty.

The defendant complains that this instruction fails to adequately define the meaning of reasonable doubt in the context of a criminal trial, allowing the jury to convict a defendant on less proof than that required by the "moral certainty" language of Tennessee Pattern Jury Instruction 2.03. We have previously rejected similar challenges to the use of Tennessee Pattern Jury Instruction 2.03(a). See, e.g., State v. Ronald D. Correll, No. 03C01-9801-CC-00318, 1999 WL 812454, at *8 (Tenn. Crim. App., Knoxville, Oct. 8, 1999), perm. to appeal denied (Tenn. April 24, 2000) (holding that T.P.I-Crim. 2.03(a) is consistent with principles of due process); State v. Tony Fason, No. 02C01-9711-CR-00431, 1999 WL 588150, at *4 (Tenn. Crim. App., Jackson, Aug. 6, 1999), perm. to appeal denied (Tenn. Feb. 7, 2000) (" 'Moral certainty' is not required language in a jury instruction."); State v. Roscoe L. Graham, No. 02C01-9507-CR-00189, 1999 WL 225853, at *12 (Tenn. Crim. App., Jackson, April 20, 1999) (holding that reasonable doubt instruction omitting language of moral certainty is adequate). In State v. Melvin Edward Henning, No. 02C01-9703-CC-00126, 1997 WL 661455, at *9 (Tenn. Crim. App., Jackson, Oct. 24, 1997), we rejected a challenge that Tennessee Pattern Jury Instruction 2.03(a) was constitutionally deficient because it did not contain "moral certainty" language:

Tennessee Pattern Instruction 2.03(a) tracks virtually identical language of pattern reasonable doubt instructions approved by a majority of the federal circuits. See, e.g., United States v. Velasquez, 980 F.2d 1275, 1278 (9th Cir.1992), cert. denied, 508 U.S. 979 (1993); United States v. Campbell, 874 F.2d 838, 841 (1st Cir.1989); United States v. Hall, 854 F.2d 1036, 1039 (7th Cir.1988); United States v. Kirby, 838 F.2d 189, 191-192 (6th Cir.1988); United States v. Colon, 835 F.2d 27, 31-32 (2nd Cir.1987), cert. denied, 485 U.S. 980 (1988); United States v. Dilg, 700 F.2d 620 (11th Cir.1983); United States v. Alonzo, 681 F.2d 997, 1002 (5th Cir.), cert.

denied, 459 U.S. 1021 (1982); United States v. Robertson, 588 F.2d 575, 579 (8th Cir.1978), cert. denied, 441 U.S. 945 (1979). Moreover, the questioned language “based upon reason and common sense” and “absolute certainty is not required” has repeatedly been upheld as passing constitutional muster. See, e.g., United States v. Kime, 99 F.3d 870 (8th Cir.1996), cert. denied, -- U.S.--, 117 S.Ct. 1015 (1997); United States v. Miller, 84 F.3d 1244 (10th Cir.)cert. denied,--U.S.--, 117 S.Ct. 443 (1996) overruled on other grounds by United States v. Holland, 116 F.3d 1353 (10th Cir.1997); United States v. Campbell, 61 F.3d 976, 980-981 (1st Cir.1995), cert. denied, --- U.S. ---, 116 S.Ct. 1556 (1996); Hall, 854 F.2d at 1038- 1039; United States v. Rahm, 993 F.2d 1405, 1412 (9th Cir.1993).

We do not find the instruction to be constitutionally deficient. We find no reasonable likelihood that the jury understood the instruction to permit conviction after anything but a process of careful deliberation or upon less than proof beyond a reasonable doubt. This issue is without merit.

ELECTION OF OFFENSE

The Defendant also contends that the State did not properly elect a specific incidence upon which the State relied to support the rape charge. During the State’s closing argument, the trial court interrupted the State’s attorney in order to remind him to make an election. The State informed the trial court, and the jury during his argument, that the State would rely on the rape that occurred on January 22, 1997. Based upon this, the Defendant argues that he was not given notice of the charges brought against him and that the instruction given by the trial court was insufficient to ensure unanimity as to the specific illegal action of which the Defendant was convicted. We must respectfully disagree.

The right to jury unanimity requires that the jury be unanimous as to the specific act which the Defendant committed upon which their judgment rests. See State v. Hodge, 989 S.W.2d 717, 720 (Tenn. Crim. App. 1998); State v. Brown, 823 S.W.2d 576, 582 (Tenn. Crim. App. 1991). A trial court has the duty of requiring the State to elect the particular act upon which it relies for conviction and to instruct the jury so that the verdict of all jurors will be united as to one offense. See Burlison v. State, 501 S.W.2d 801, 804 (Tenn.1973). When the State presents proof on many offenses within an alleged time period, but neglects election, the jury is improperly allowed to “reach into the brimming bag of offenses and pull out one for each count.” Tidwell v. State, 922 S.W.2d 497, 501 (Tenn.1996).

Furthermore, a conviction that is not unanimous as to the defendant’s specific illegal action is no more justifiable than a conviction by a jury that is not unanimous on a specific count. See Hodge, 989 S.W.2d at 721. Where the State presents evidence of numerous offenses, the trial court must augment the general jury unanimity instruction to insure that the jury understands its duty to agree unanimously to a particular set of facts. Id. A skeletal jury instruction of unanimity ferments

a strong possibility of a composite jury verdict in violation of an appellant's constitutional rights. Id.

Pursuant to a pretrial motion, the Defendant received a Bill of Particulars from the State that detailed the five specific incidents that the State sought to prove at trial. Included in the Bill of Particulars was the vaginal and anal penetration that occurred on January 22, 1997. Based on the Bill of Particulars provided the Defendant by the State, we find that the Defendant had adequate notice of the specific conduct for which he was to be prosecuted.

Furthermore, the instruction given by the trial court was sufficient to ensure that the verdict returned by the jury was unanimous with regard to the specific conduct of the Defendant. The trial court's instruction stated

The alleged victim, [name omitted] in indictment number 97-09071 has testified to several alleged sexual encounters with the defendant. The State must make an election as to which particular offense the Jury must consider in arriving at your verdict.

In indictment number 97-0971 charging the defendant with the offense of Rape of a Child the Court charges you that you may consider the testimony concerning the alleged rape that occurred at the family's apartment on January 22, 1997.

You may also consider all of the alleged incidents that occurred before and after that date in arriving at your verdict.

Additionally, the State's attorney informed the jury during closing arguments that their verdict must be unanimous in regard to a specific instance of child rape.

There were at least five [instances of abuse] that [the victim] named. You have to all agree on one. That's why it's unanimous. You have to be unanimous about not only that he's been raping her, but that this particular rape occurred. Does that make sense to everybody?

And I have to pick the one that you have to agree on, yes or no.

Now there are five different incidents that she described. Some of them she was able to date very specifically. Some of them she was not able to date very specifically.

And you can consider all of that when you determine whether or not you think she is telling the truth and how reasonable it is to believe and how it fits into conjunction with the physical evidence as far as her injuries.

But I'm going to make an election, which is what they call it, again, another technical term, of that January 22nd, 1997 rape.

....

Okay. Now you can talk about the others and consider that all together as part of the proof, but you have to all agree that that particular incident occurred.

The trial court's instruction concerning the prosecution's election of the January 22, 1997 rape, together with the prosecutor's comments during closing argument, were sufficient to ensure the unanimity of the jury's verdict.¹ Therefore, this issue is without merit.

SUFFICIENCY

Next, the Defendant contends that, due to the lack of DNA evidence linking him to the rape of the victim, the evidence is insufficient to support a finding of guilt beyond a reasonable doubt. We must respectfully disagree.

Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Smith, 24 S.W.3d 274, 278 (Tenn. 2000). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. See McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Buggs, 995 S.W.2d 102, 105-06 (Tenn. 1999); State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

In its review of the evidence, an appellate court must afford the State “the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom.” Tuggle, 639 S.W.2d at 914; see also Smith, 24 S.W.3d at 279. The court may not “reweigh or re-evaluate the evidence” in the record below. Evans, 838 S.W.2d at 191; see also Buggs, 995 S.W.2d at 105. Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. Tuggle, 639 S.W.2d at 914. All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact, not the appellate courts. See State v. Morris, 24 S.W.3d 788, 795 (Tenn. 2000); State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987).

In challenging the sufficiency of the evidence relied upon to convict him, the Defendant contends that, without DNA evidence, no reasonable jury could have found him guilty beyond a reasonable doubt. We disagree. The victim testified that the Defendant penetrated her vagina and anus with either his finger or his penis on numerous occasions. After one such occasion, the victim's mother noticed a blood stain in the victim's underwear. The victim recorded her anger regarding her father's assaults in her diary. Finally, Ms. DiScenza, a family nurse practitioner specializing in

¹Clearly the better practice is for the trial judge to give the jury an enhanced jury unanimity instruction advising that the jury must unanimously agree that the facts relied upon for the conviction relate to the particular offense elected by the State.

examining victims of sexual assault and an expert in the field of forensic examination, examined the victim and discovered injuries to the victim's vagina and anus that could only be caused by some form of penetration. Ms. DiScenza testified that the type of injuries she discovered were consistent with the victim's description of the Defendant's abuse.

We find ample evidence to support the jury's verdict. This issue is without merit.

CONTACT WITH A JUROR

Finally, the Defendant asserts that he is entitled to a new trial due to his alleged contact with a juror during his trial. At the hearing on the Motion for New Trial, the Defendant presented the testimony of a juror from his trial. The juror stated that during the trial of the Defendant, she and the Defendant rode on the same elevator. The juror testified that she was never alone on the elevator with the Defendant, and she did not communicate with him in any way, however, the incident frightened her. The juror mentioned the incident to two other jurors immediately after it happened, but the incident was never mentioned after that.

It is the law in Tennessee that an unexplained sequestered juror conversation with a third party is good cause for a new trial. See State v. Blackwell, 664 S.W.2d 686, 689 (Tenn.1984). However, when a jury is not sequestered, the validity of a verdict is questionable only when there is extraneous prejudicial information or any outside influence brought to bear on a juror. Id. In the present case, the jury was not sequestered, and the burden is on the Defendant's to show that the juror in question received prejudicial information or was subjected to outside influence.

In Blackwell, the Supreme Court adopted Rule 606(b) of the Federal Rules of Evidence and defined the type of evidence admissible from a juror to impeach a jury verdict. This holding, subsequently established as Rule 606(b) of the Tennessee Rules of Evidence, prohibits a juror from giving testimony on any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon a juror's mind or emotion as influencing his or her vote except that a juror may testify on the question of whether any extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

If it is shown that one or more jurors has been exposed to extraneous prejudicial information or improper influence, there arises a rebuttable presumption of prejudice, and the burden then shifts to the prosecution to explain the conduct or to demonstrate the harmlessness of it. See Blackwell, 664 S.W.2d at 689; State v. Young, 866 S.W.2d 194, 196 (Tenn. Crim. App., 1992). In order to shift the burden to the prosecution to demonstrate the harmlessness of the communication with the jury, the threshold question is whether the statement communicated to the jury was prejudicial to the Defendant. In the present case, there is no evidence that a communication actually occurred. Without evidence of a communication, there can be no evidence that the communication prejudiced the Defendant. We cannot say that the trial court erred in denying the Defendant's Motion for New Trial. This issue is without merit.

CONCLUSION

For the foregoing reasons, we find that the trial court's error in allowing statements made to the victim's mother by the victim into evidence was harmless, the trial court properly instructed the jury regarding reasonable doubt, the State properly proved the offense that occurred on January 22, 1997, the evidence is sufficient to support the verdict, and the trial court did not err in denying the Defendant's Motion for New Trial. Accordingly, the judgment of the trial court is AFFIRMED.

DAVID H. WELLES, JUDGE

Jury Question No. 1

JUL 11 2008

SALT LAKE COUNTY

By

WOM

Deputy Clerk

IN INSTRUCTION # 37
a, b, c, d Do all of
them ~~have~~ to be
fulfilled in order to
find the defendant
guilty or just one
of the conditions met?

Also the same question
for instruction # 40

Answer: Both instructions 37 and
40's subparagraphs (the a, b, c's) you
refer to end with the word "or"
and therefore should be read
accordingly.

