71164-4

71164-4

No. 71164-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SHACON F. BARBEE,

Appellant.

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

BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Washington Constitution

United States Supreme Court Decisions

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Rules and Statutes

A. ASSIGNMENTS OF ERROR

1. Mr. Barbee's convictions for two counts of promoting commercial sexual abuse of a minor, involving the same minor over a one-year period, violated the prohibition against double jeopardy where the temporal division of the charging period was arbitrary and the two counts encompassed a single unit of prosecution.

2. Mr. Barbee's convictions for two counts of promoting prostitution involving two women over the same period of time and under the same circumstances violated the prohibition against double jeopardy where the two counts encompassed a single unit of prosecution.

3. Mr. Barbee's convictions for two counts of theft in the first degree from the same governmental institution violated the prohibition against double jeopardy where the temporal division of the charging periods was arbitrarily based on a statutory increase in the monetary threshold for the offense from $1500 to $5000 and when the two counts encompassed a single unit of prosecution.

4. Mr. Barbee's convictions for two counts of promoting prostitution violated the prohibition against double jeopardy when the counts merged into the count of leading organized crime by promoting prostitution.

5. The trial court erred in denying Mr. Barbee's motion to sever the three counts of theft from the seven counts related to sexual abuse of a minor and prostitution, and thereby allowed admission of confusing and highly prejudicial evidence that was not cross-admissible.

6. The trial court erred in admitting out-of-court statements by S.E., the alleged victim of commercial sexual abuse of a minor, and statements by C.W. and B.K., victims of promoting prostitution, as statements by co-conspirators to the offense of leading organized crime, pursuant to ER 801(d)(2)(v).

7. The trial court erred in admitting the fruits of a warrantless search of a motel registry, and in entering Conclusion of Law 4(f) (Sutton Suites Incident): "The deputies' subsequent accessing of the motel registry was lawful under *Jorden* and *Nichols* because the deputies had individualized suspicion of prostitution or promoting prostitution going on in the room."

8. The trial court erroneously imposed an exceptional sentence on Counts 1 and 2 based on an incorrect calculation of the standard range.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The double jeopardy clauses of the Fifth Amendment to the United States Constitution and Article I, section 9 of the Washington Constitution prohibit multiple convictions based on a single unit of

prosecution. The unit of prosecution for promoting commercial sexual abuse of a minor in an on-going enterprise is the advancing and profiting from the commercial sexual abuse of one or more minors. Mr. Barbee was charged with two counts of promoting commercial sexual abuse of a minor involving the same minor, one count spanning the first eight months of 2010, and another count spanning the last four months of 2010. Did the artificial division of the offense into two counts based on arbitrary charging periods violate the prohibition against double jeopardy?

2. The double jeopardy clauses of the Fifth Amendment to the United States Constitution and Article I, section 9 of the Washington Constitution prohibit multiple convictions based on a single unit of prosecution. The unit of prosecution for promoting prostitution in an on-going enterprise is the advancing and profiting from the prostitution of other persons, regardless of the number of persons engaged in prostitution. Mr. Barbee was charged with two counts of promoting prostitution involving two women in an on-going enterprise. Did the artificial division of the offense into two counts based on two victims of the same enterprise violate the prohibition against double jeopardy?

3. The double jeopardy clauses of the Fifth Amendment to the United States Constitution and Article I, section 9 of the Washington Constitution prohibit multiple convictions based on a single unit of

prosecution. The unit of prosecution for theft by a series of transactions that constitute a common plan or scheme is the aggregate value of the misappropriated goods or services. Effective August 31, 2009, the monetary threshold for theft in the first degree was increased from $1500 to $5000. Mr. Barbee was charged with two counts of theft in the first degree from the Social Security Administration, one count spanning a 20-month period of time prior to the increase in the threshold, and the other count spanning a 14-month period of time following the increase. Did the artificial division of the on-going scheme into two counts based on arbitrary charging periods violate the prohibition against double jeopardy?

4. The double jeopardy clauses of the Fifth Amendment to the United States Constitution and Article I, section 9 of the Washington Constitution protect an individual from multiple punishments for the same offense. Where proof of promoting prostitution was necessary to prove leading organized crime predicated on promoting prostitution, as charged, did Mr. Barbee's convictions for promoting prostitution and leading organized crime violate the double jeopardy provisions of the federal and state constitutions?

5. A defendant's constitutional right to a fair trial and CrR 4.4 require severance of counts when necessary to promote a fair determination of the guilt or innocence of a defendant. Did the trial court

err when it denied his motion to sever three counts of theft from seven counts relating to commercial sexual abuse of a minor and promoting prostitution, and thereby allowed admission of highly prejudicial evidence that was not cross-admissible?

6. ER 801(d)(2)(v) provides out-of-court statements by a party-opponent are not hearsay when the statements were made by a co-conspirator during the course of and furtherance of the conspiracy. However, a person is a co-conspirator to a crime only if he or she agrees to engage in or cause conduct that constitutes the crime. Did the trial court err when it admitted out-of-court statements by a juvenile and two women who acted a prostitutes as non-hearsay statements by co-conspirators to the crime of leading organized crime when they did not agree to engage in or cause conduct that constituted leading organized crime and they were victims of the offense of promoting sexual commercial sexual abuse of a minor and promoting prostitution, respectively?

7. A warrantless search of private affairs is per se unreasonable under Article I, section 7 of the Washington Constitution, absent specific carefully delineated exigent circumstances. In *State v. Jorden*,[1] our supreme court ruled motel registries are private affairs. Nonetheless,

[1] 160 Wn.2d 121, 156 P.3d 893 (2007).

several years later in *In re Pers. Restraint of Nichols*,[2] the Court ruled officers may conduct warrantless searches of motel registries where they have individualized suspicion a particular guest is engaged in criminal activity. Relying on *Nichols*, the trial court admitted evidence obtained pursuant to a warrantless search of a motel registry that identified Mr. Barbee as a registered guest at a motel room where the officers had reasonable suspicion to believe the room was being used for prostitution. Insofar as the majority opinion in *Nichols* is contrary to Article I, section 7, did the trial court err in admitting the evidence obtained from the registry?

8. Due process requires a court to impose a sentence according to the law in effect at the time the offense was committed. Where the penalty for an offense is increased during the alleged charging period, and the evidence indicates the offense was committed before the increase went into effect, the court must impose the lesser penalty. Prior to June 10, 2010, commercial sexual abuse of a minor was classified as a B felony with a seriousness level of VIII. Effective June 10, 2010, commercial sexual abuse of a minor was classified as an A felony with a seriousness level of XII. Where Mr. Barbee was charged with promoting commercial sexual abuse of a minor from January 1, 2010 through December 31,

[2] 171 Wn.2d 370, 256 P.3d 1131 (2011).

2010,[3] but he was sentenced under the increased penalty, must his sentence be reversed as in violation of his right to due process?

C. STATEMENT OF THE CASE

Shacon F. Barbee befriended S.E. when she was thirteen years old and working as a prostitute. 8/27/13RP 9. In February 2010, after S.E. turned sixteen, she agreed to work as a prostitute for Mr. Barbee. 8/27/13RP 23. Mr. Barbee also asked S.E. to recruit girls or women to work as prostitutes for him. 8/29/13RP 29.

In early March 2010, S.E. recruited Brittany Klein. S.E. invited Ms. Klein to a motel room at the Sutton Suites, SeaTac, Washington, where she explained how to work as a prostitute and she introduced Ms. Klein to Mr. Barbee. 8/22/13 RP 105, 107-08, 109-10, 111-12, 113. Mr. Barbee stated that he would collect the money Ms. Klein earned and he would take care of her. 8/22/13RP 114. Mr. Barbee gave her a pre-paid cellular telephone, chose an alias for her, chose photographs of her taken by S.E. to post at on-line advertising sites, especially Backpage.com, and coached her on talking to potential customers. 8/22/13RP 114, 120, 122-23, 135. Together with S.E., Ms. Klein worked out of the motel room for several days and then she worked on "the track," a term for a street where

[3] Mr. Barbee contends Counts 1 and Counts 2 constitute a single unit of prosecution. *See* (D)(1)(a)(i), *infra.*

women working as prostitutes attempt to attract customers. 8/15/13RP 17; 8/22/13RP 118.

On March 10, 2010, Ms. Klein was arrested for prostitution and Mr. Barbee bailed her out of jail. 8/19/13RP 90, 95-97, 117-18, 122-24, 140-41; 8/22/13RP 129, 131. Ms. Klein allowed the arresting officer, Detective Brian Lewis, to look through her cellular telephone and he located a telephone number associated with Mr. Barbee. 8/19/13RP 126-26.

On March 25, 2010, police officers were dispatched to the Sutton Suites to investigate suspected prostitution based an unusually high number of unregistered people coming and going from a specific room. 8/19/13RP 9-10. Officers entered the room, and observed S.E. and Ms. Klein provocatively dressed, as well as sex toys, condoms, several pairs of high-heeled shoes, lingerie, several computers, a camera, and several cellular telephones. 8/15/13RP 87; 8/19/13RP 16, 17, 70. The officers obtained a search warrant for the room but they searched the motel registry without a warrant and learned the room was registered to Mr. Barbee. 8/19/13RP 52, 69-70; CP 130-34; Ex. 26, 52. Following her arrest, Ms. Klein stopped working for Mr. Barbee until the fall of 2010. 8/22/13RP 154.

In May 2010, S.E. recruited Cassandra Waller. 8/20/13RP 19. As with Ms. Klein, S.E. invited Ms. Waller to a motel room, this time at the Motel 6, Tukwila, Washington, where she again explained how to work as a prostitute and she introduced Ms. Waller to Mr. Barbee. 8/20/13RP 27, 30. Mr. Barbee provided her with a cellular telephone, and he brought lingerie to the motel room, took photographs of her wearing the lingerie to be posted on Backpage.com. 8/20/13RP 50-51, 55. The Backpage.com posts included a written description of her services that was composed by S.E. 8/20/13RP 65. Ms. Waller gave any money she earned to S.E. who, in turn, gave the money to Mr. Barbee. 8/20/13RP 36-37. After several weeks, Ms. Waller realized she would never be able to keep the money she earned so, in early June 2010, she left the motel and she never again saw Mr. Barbee or S.E. 8/20/13RP 115; 8/21/13RP 30, 35.

S.E. frequently argued with Mr. Barbee and she regularly returned to her mother's home for various periods of time until Mr. Barbee coaxed her back. 8/27/13RP 23-24. In the fall of 2010, S.E. left the state to visit friends on the east coast, but she remained in contact with Mr. Barbee. 8/27/13RP 24, 80, 110, 114-16. While S.E. was out-of-town, Mr. Barbee contacted Ms. Klein and coaxed her back to working for him. 8/22/13RP 155-56. She stayed at Mr. Barbee's apartment and worked "the track" for

several weeks before she left permanently. 8/22/13RP 158, 160, 167; 8/26/13RP 41, 53, 62.

In November, 2010, at S.E.'s request, Mr. Barbee sent her $250 to buy a return airplane ticket. 8/27/13RP 118. When she returned, Mr. Barbee demanded she repay the money. 8/27/13RP 119. Accordingly, S.E. agreed to continue working for him as a prostitute until she could repay him. 8/27/13RP 126.

On December 3, 1020, Detective Eric Steffes organized an undercover "sting" operation at the Hampton Inn, Kent, Washington, focused on prostitution. 8/29/13RP 113-14. An undercover officer, Detective Jeremiah Johnson, was assigned to pose as a customer in a hotel room, Det. Steffes and two other officers conducted surveillance from unmarked patrol cars in the hotel parking lot, and an arrest team of two uniform officers in marked cars waited near the parking lot. 8/29/13RP 113-16. Det. Johnson responded to a Backpage.com advertisement placed by S.E. and arranged for her to come to his room at the Hampton Inn. 8/28/13RP 121, 122, 124; 8/29/13RP 119. S.E. arrived at the hotel in a car driven by a man later identified as Mr. Barbee. 8/29/13RP 121. In the room, S.E. agreed to have sex with Det. Johnson, they exchanged money, and S.E. was immediately arrested for prostitution. 8/28/13RP 42, 43, 52, 140-41.

In the meantime, Mr. Barbee waited in his car in a parking lot adjacent to the hotel. 8/26/13RP 107; 8/29/13RP 121-22. Det. Steffes and an officer in a second unmarked patrol car started to approach Mr. Barbee's car, but he drove away. 8/26/13RP 110, 113; 8/29/13RP 126. Within blocks, however, the arrest team stopped and arrested Mr. Barbee for promoting prostitution. 8/26/13RP 119-20, 122; 8/29/13RP 126, 128, 129.

Det. Steffes was assigned as the lead investigator into Mr. Barbee's activities and he searched two storage units rented to Mr. Barbee, in which he found a large quantity of women's clothing and lingerie, expensive men's clothing, books and DVD's pertaining to "pimping," financial records from an account with Watermark Credit Union in Mr. Barbee's name, and a safe that contained cash in the amount $18,300, mostly in denominations of $100. 9/3/13RP 15, 63, 67, 118, 120, 121-22, 127, 128; 9/9/13RP 99-100. He also obtained Backpage.com records of advertisements placed in Mr. Barbee's name, and he arranged for forensic examinations of Mr. Barbee's cellular telephones and laptop computers, and S.E.'s cellular telephone. 9/3/13RP 28; 9/9/13RP 21, 64, 65, 67.

The Backpage.com records indicated Mr. Barbee paid for numerous advertisements for escort services. 8/29/13RP 20; Ex. 13, 14, 15, 24, 35, 44-A, 50, 51, 52, 53, 74, 75, 76. The forensic examination of

the cellular telephones revealed contact information for and numerous photographs of S.E., Ms. Klein, and Ms. Waller, and a very large number of communications between Mr. Barbee, S.E., Ms. Klein, and Ms. Waller. 8/28/13RP 77, 91, 95-98, 99-114; Ex. 57, 58, 59, 87-94.

Det. Steffes contacted Vanessa Mullen, a fraud investigator for Watermark Credit Union and learned that a federal treasury check was deposited into Mr. Barbee's account each month. Ex. 132. In April 2009, the credit union started monitoring Mr. Barbee's account because he frequently changed $10 and $20 bills into $100 bills and he had a high volume of debit transactions involving on-line advertising. 9/11/13RP 44-48, 56-57, 64-65; Ex. 130-135.

Det. Steffes also contacted Special Agent Robert Rodriguez with the Inspector General's Office for the Social Security Administration (SSA), an agency that provides Supplemental Security Income (SSI) benefits to persons who are disabled and have no other source of income. 9/11/13RP 77, 80-81. In 2005, Mr. Barbee applied for benefits on the grounds he was disabled and his only source of income was state welfare benefits. 9/11/13RP 98, 100; Ex. 155. Following an SSA-approved medical examination, he was awarded SSI benefits starting November 2005. 9/12/13RP 4-10; Ex. 138, 1`41. When Mr. Barbee received notice of the award, he was instructed to contact the SSA if he had a change in

circumstances, but he never did so. 9/12/13RP 40; Ex. 138. Agent Rodriguez opined that if Mr. Barbee had an undeclared source of income from January 1, 2009 through June 20, 2011, he did not qualify for the $15,078 in SSI benefits he received during that time. 9/12/13RP 39.

Agent Rodriguez contacted the Department of Social and Health Services (DSHS), which awards food and medical benefits for persons who have qualified for SSI benefits. 9/12/13RP 66-67. In April 2007, Mr. Barbee applied for DSHS benefits and declared his only source of income was the SSI benefit. 9/12/13RP 91092; Ex. 158, 161. He received DSHS food and medical benefits from May 2007 through March 2011. 9/12/13RP 145. Renee Pelletier with the DSHS fraud unit reviewed Mr. Barbee's credit union statements and she concluded he had an undeclared source of income that disqualified him from its benefits he received from January 1, 2009 through December 2010, during which time Mr. Barbee received $4895 in benefits. 9/16/13RP 28, 34-35, 36-37; Ex. 169, 170.

Mr. Barbee was charged with Count 1, promoting commercial sexual abuse of a minor, S.E., alleged to have occurred from January 1, 2010 through August 31, 2010 (Count 1),[4] promoting commercial sexual abuse of a minor, S.E., alleged to have occurred from September 1, 2010

[4] RCW 9.68A.101(1).

through December 31, 2010 (Count 2),[5] promoting prostitution in the first degree of Ms. Klein alleged to have occurred from January 1, 2010 through December 31, 2010 (Count 4),[6] promoting prostitution in the second degree of Ms. Waller alleged to have occurred from May 10, 2010 through August 1, 2010 (Count 5),[7] leading organized crime by promoting prostitution alleged to have occurred from January 1, 2010 through December 310, 2010 (Count 6),[8] theft in the first degree form the United States Social Security Administration alleged to have occurred from January 1, 2009 through August 31, 2009 (Count 7),[9] theft in the first degree form the United State Social Security Administration alleged to have occurred from September 1, 2009 through December 31, 2010 (Count 8),[10] and theft in the second degree from the Department of Social and Health Services alleged to have occurred from January 1, 2009 through November 30, 2010 (Count 9).[11] Counts 3 and 10 involved a witness who did not appear and were dismissed. 9/16/13RP 23-24. On Count 1, the Count State further charged the offense involved an on-going pattern of sexual abuse of the same minor victim that manifested in

[5] RCW 9.68A.101(1).
[6] RCW 9A.88.070(1).
[7] RCW 9A.88.080(1)(b).
[8] RCW 9A.82.060(1)(a), 9A.82.010(12).
[9] RCW 9A.56.030(1)(a), 9A.56.020(1)(a), 9A.56.010(21)(c).
[10] RCW 9A.56.030(1)(a), 9A.56.020(1).
[11] RCW 9A.56.040(1)(a), 9A.56.020(1).

multiple incidents over a prolonged period of time.[12] On all counts, the State charged Mr. Barbee had committed multiple current offenses and his high offender score resulted in some of the current offenses going unpunished.[13]

The matter proceeded to trial by jury. The trial court denied Mr. Barbee's motion to sever the prostitution-related offenses from the financial crimes. 8/1/13RP 10-16, 27-30. Over defense objection, the trial court admitted statements by S.E., Ms. Klein, and Ms. Waller as statements of co-conspirators to the offense of leading organized crime. 8/1/2013 RP 103-06; 8/15/13RP 97. Also over defense objection, the court admitted the results of the warrantless search of the Sutton Suites motel register. 8/1/13RP 83-87; CP 148-51.

Following a five-week trial, Mr. Barbee was convicted as charged, except on Count 4 he was convicted of the lesser included offense of promoting prostitution in the second degree. CP 307-16. In addition, the jury found Count 1 was part of an on-going pattern of sexual abuse of the same minor involving multiple incidents over a prolonged period of time. CP 308.

At sentencing, on Counts 1 and 2, the court calculated Mr. Barbee's standard range as 240 to 318 months, based on its understanding

[12] RCW 9.94A.535(3)(g).
[13] RCW 9.94A.535(2)(c).

that Promoting Commercial Sexual Abuse of a Minor was a Class A felony with a seriousness level XII. CP 325. Based on the jury finding of an aggravating circumstance and a judicial finding that some current offenses would go unpunished without an exceptional sentence, the court imposed an exceptional sentence above the standard range on counts 1, 2, and 6, and imposed a standard range on the remaining counts.

D. ARGUMENT

1. Mr. Barbee's convictions for two counts of promoting commercial sexual abuse of a minor violated the prohibition against double jeopardy, as did the convictions for two counts of promoting prostitution, and for two counts of theft from the same institution.

The double jeopardy clauses of the Fifth Amendment to the United States Constitution and of Article I, section 9 of the Washington Constitution protect a defendant from multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688-89, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980); *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). The Fifth Amendment double jeopardy clause applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969). The state double jeopardy clause provides the same scope of protection as does the federal double

jeopardy clause. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

Double jeopardy jurisprudence recognizes "[w]ithin constitutional constraints, the legislative branch has the power to define criminal conduct and assign punishment." *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). However, when a person is charged with violating the same statutory provision a number of times, multiple convictions violate the prohibition against double jeopardy unless each conviction is predicated on a separate "unit of prosecution." *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). The prosecution may not divide conduct that constitutes a single unit of prosecution into multiple charges for which it seeks multiple punishments. *Id.*

In addition, although the State may charge multiple offenses arising from the same criminal conduct, double jeopardy prohibits a court from entering multiple convictions and punishments for the same offense. *Ball v. United States*, 470 U.S. 856, 860, 105 S. Ct. 1668, 84 L.Ed.2d 740 (1985); *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L.Ed.2d 275 (1981); *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 789 (1997). Multiple convictions can stand only if proof of one offense does not necessarily prove the other offense. *State v. Vladovic*, 99 Wn.2d 413, 422-23, 622 P.2d 853 (1983).

a. Unit of prosecution.

Double jeopardy protects a defendant from multiple convictions under a single statute for committing a single unit of the crime. *Bobic*, 140 Wn.2d at 261. "The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges." *Adel*, 136 Wn.2d at 635, citing *Brown v. Ohio*, 432 U.S. 161, 169, 97 S.Ct., 2221, 53 L.Ed.2d 187 (1977) ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."), *Ex parte Snow*, 120 U.S. 274, 282, 7 S.Ct. 556, 30 L.Ed. 658 (1887) (if prosecutors were allowed arbitrarily to divide up ongoing criminal conduct into separate time periods to support separate charges, such division could be done ad infinitum, resulting in hundreds of charges).

The "unit of prosecution" is based on the statutory definition of the punishable act or course of conduct. *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). In determining the unit of prosecution, courts look to the statute to determine what act or course of conduct the Legislature intended to be the punishable act. *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007).

> [T]he first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts of a particular case may reveal more than one "unit of prosecution" is present.

Varnell, 162 Wn.2d at 168; *accord State v. Morales*, 174 Wn. App. 370, 385, 298 P.3d. 791 (2013). "If the statute does not clearly and unambiguously identify the unit of prosecution, then we resolve any ambiguity under the rule of lenity to avoid turning a single transaction into multiple offenses." *State v. Sutherby*, 165 Wn.2d 870, 878-789, 204 P.3d 916 (2009) (internal citations omitted).

i. The two convictions for promoting commercial sexual abuse of a minor encompassed a single unit of prosecution.

Mr. Barbee was convicted of two counts of promoting commercial sexual abuse of a minor by knowingly advancing commercial sexual abuse of S.E. and knowingly profiting from S.E. engaged in sexual conduct. CP 244-45, 307, 309.[14] The State arbitrarily alleged Court I occurred from

---

[14] RCW 9.68A.101 provides, in relevant part:

(1) A person is guilty of promoting commercial sexual abuse of a minor if he or she knowingly advances commercial sexual abuse or ... profits from a minor engaged in sexual conduct ....

...

(3) For the purposes of this section:

(a) A person "advances commercial sexual abuse of a minor" if, acting other than as a minor receiving compensation for personally rendered sexual conduct or as a person engaged in commercial sexual abuse of a minor, he or she causes or aids a person to commit or engage in commercial sexual abuse of a minor,

January 1, 2010 through August 31, 2010 and alleged Count 2 occurred from September 1, 2010 through December 31, 2010. CP 244-45. This artificial division of a year-long enterprise into two units of prosecution violated the prohibition against double jeopardy.

The jury was instructed:

> The term "advances commercial sexual abuse of a minor" means that a person, acting other than as a minor receiving compensation for personally rendered sexual conduct or as a person engaged in commercial sexual abuse of a minor:
> 1) causes or aides a person to commit or engage in commercial sexual abuse of a minor, or;
> 2) procures or solicits customers for commercial sexual abuse of a minor, or;
> 3) provides persons or premises for the purposes of engaging in commercial sexual abuse of a minor, or;
> 4) operates or assists in the operation of a house or enterprise for the purposes of engaging in commercial sexual abuse of a minor, or;
> 5) engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of commercial sexual abuse of a minor.

---

procures or solicits customers for commercial sexual abuse of a minor, provides persons or premises for the purposes of engaging in commercial sexual abuse of a minor, operates or assists in the operation of a house or enterprise for the purposes of engaging in commercial sexual abuse of a minor, or engages in any other conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor.
(b) A person "profits from commercial sexual abuse of a minor" if, acting other than as a minor receiving compensation for personally rendered sexual conduct, he or she accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or will participate in the proceeds of commercial sexual abuse of a minor.

CP 267 (Instruction No. 10). The repeated use of plurals plus the term "enterprise" clearly indicates that the phrase "advances commercial sexual abuse of a minor" encompasses multiple acts within a single unit of prosecution.

For the crime of promoting prostitution, this Court has determined that the definition of "advances prostitution" manifests the Legislature's intent to treat an on-going enterprise as a single unit of prosecution.

> A person "advances prostitution" if ... he causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a *prostitution enterprise*, or engages in any other conduct designed to *institute, aid, or facilitate an act or enterprise of prostitution.*

State v. Gooden, 51 Wn. App. 615, 619, 754 P.2d 1000 (1988), quoting RCW 9A.88.060(1) (emphasis added by court).

When *Gooden* was decided, one means of committing the crime of promoting prostitution in the first degree was to advance or profit from the prostitution of a minor. Former RCW 9A.88.070(1)(b). In 2007, the Legislature deleted that means from the promoting prostitution statute and enacted the new crime of promoting commercial sexual abuse of a minor that included nearly identical language as that interpreted in *Gooden*. Laws of 2007, ch. 368. The Legislature is presumed to be aware of judicial

interpretations of its statutes. *State v. George*, 161 Wn.2d 203, 211, 164 P.3d 506 (2007). By including the previously interpreted language, the Legislature manifested its intent that, as with promoting prostitution, the unit of prosecution for promoting commercial sexual abuse of a minor is a single on-going enterprise and not discrete acts.

Moreover, the term "any" has consistently been interpreted to include "every" and "all." *Sutherby*, 165 Wn.2d at 882. Here, the "to convict" instructions included as an element: "That *any* of these acts occurred in the State of Washington." CP 270, 271 (Instruction No. 13, 14) (emphasis added). Thus, the jury was specifically instructed to consider all the alleged acts as a single unit of prosecution.

The State may argue Count 2 was based solely on the December 2010 incident at the Hampton Inn, when S.E. returned from her out-of-town trip. However, S.E. testified that she worked for Mr. Barbee "on and off" from February 2010 through December 2010. 8/27/13RP 23-24. They argued regularly and she often left for various periods of time, including a two month period in the fall of 2010, until she was coaxed back by Mr. Barbee. 8/27/13RP 24. Even while she was out of town, Mr. Barbee was in regular contact with her and discussed her continued work for him as a prostitute. 8/27/13RP 114, 115. Therefore, this argument is unsupported by S.E.'s testimony and contrary to the jury instruction for Count 2 that

alleged the offense occurred "during a period of time intervening between September 1, 2010 through December 31, 2010." CP 271 (Instruction No. 14).

Mr. Barbee's convictions for two counts of promoting commercial sexual abuse of S.E. encompassed a single unit of prosecution.

ii. The two convictions for promoting prostitution encompassed a single unit of prosecution.

Mr. Barbee was convicted of two counts of promoting prostitution, one count involving B.K. alleged to have occurred from January 1, 2010 through December 31, 2010, and the other count involving C.W. alleged to have occurred from May 10, 2010 through August 1, 2010. CP 246, 310, 311. This artificial division of a single enterprise of advancing and profiting from prostitution violated the prohibition against double jeopardy.

This issue is controlled by *State v. Mason*, in which the operator of a steam bath parlor was convicted of three counts of promoting prostitution based on her employment of three people who committed prostitution at her business during the same period of time. 31 Wn. App. 680, 685, 644 P.2d 710 (1982), *superseded by statute on other grounds in RCW 9.94A.400*. On appeal, the court reversed the convictions on the grounds the conduct encompassed a single unit of prosecution, and noted,

"The apparent evils the legislature sought to attack were 'advancing prostitution' and 'profiting from prostitution.' A person is equally guilty of either of those evils whether he has only one prostitute working for him or several." 31 Wn. App. at 687.

The State presented evidence that during 2010, Mr. Barbee coerced S.E. to recruit Ms. Klein and Ms. Waller for his enterprise, he confined them in motel rooms or his apartment, and he took all of the money they received from customers. Therefore, Mr. Barbee was guilty of the "evils" of advancing and profiting from prostitution, regardless of the number of people working for him. His two convictions for promoting prostitution of different women over the same period of time encompassed a single unit of prosecution.

iii. The two convictions for theft in the first degree encompassed a single unit of prosecution.

Mr. Barbee was convicted of two counts of theft in the first degree from the United States Social Security Administration, based on the award of SSI benefits to which he was not entitled. CP 247. Effective August 31, 2009, the offense of theft in the first degree was amended to increase the monetary threshold from $1500 to $5000. Laws of 2009, ch. 431, § 7(1)(a). Thus, in Count 7, the State charged Mr. Barbee with theft of currency from January 1, 2009 through August 31, 2009, through a series

of transactions which were part of a criminal episode or common scheme or plan to deprive the federal government of property with a sum value that exceeded $1500. CP 247. In Count 8, the State charged Mr. Barbee with theft of currency from September 1, 2009 through December 31, 2010, through a series of transactions which were part of a criminal episode or common scheme or plan to deprive the federal government of property with a sum value that exceeded $5000. CP 247. This artificial division of a single scheme violated the prohibition against double jeopardy. It may be noted, also effective August 31, 2010, the monetary maximum for theft in the second degree was increased from $1500 to $5000, yet the State charged a single count of theft in the second degree from DSHS occurring from January 1, 2009 through November 30, 2010. Laws of 2009, ch. 431, § 8; CP 247.

In *State v. Vining*, the defendant challenged the State's practice of aggregating the value of discrete acts of petit larceny into a single act of grand larceny that exposed him to a greater punishment. 2 Wn. App. 802, 808, 472 P.2d 564 (1970). This Court approved the practice, and noted:

> Where property is stolen from the same owner and from the same place by a series of acts there may be a series of crimes or there may be a single crime, depending upon the facts and circumstances of each case. If each taking is the result of a separate, independent criminal impulse or intent, then each is a separate crime, but, where the successive takings are the result of a single, continuing criminal

> impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time that may elapse between each taking.

2 Wn. App. at 808-09.

In *State v. Turner*, the defendant was convicted of three counts of theft in the first degree against his employer, based on three different schemes to obtain money from the employer. 102 Wn. App. 202, 203, 6 P.3d 1226 (2000). On appeal, this Court reversed two of the three convictions, and concluded the theft in the first degree statute did not support multiple convictions for thefts by various means from the same entity.

> [T]here is no wording in the statute that indicates any other relevant distinction between multiple acts of theft committed against the same person over the same period of time. We conclude that the lack of clarity creates ambiguity whether multiple scheme or plans constitute separate units of prosecution under the theft in the first degree statute. Thus, the rule of lenity dictates that we construe this ambiguity in favor of Turner.

102 Wn. App. at 209.

By contrast, in *State v. Perkerewicz*, the defendant was charged with two counts of grand larceny from her employer, one count alleged to have occurred from October 1 to 31, 1969, and one count alleged to have occurred from November 1 to 30, 1969. 4 Wn. App. 937, 941, 486 P.2d 97 (1971). The defendant was a supervisor at a restaurant and she prepared

daily accounts for cash receipts, maintained a running total of monthly receipts, and started a new running total at the beginning of each month. 4 Wn. App. at 939. On appeal, this Court affirmed to two convictions, and noted, "When the periods covered by the separate counts are separate and distinct, as they are in this case, the wrongful appropriations during each period of time may be charged in a different count. *Id.* at 942. *See also State v. Kinneman*, 120 Wn. App. 327, 84 P.3d 882 (2003) (defendant, an attorney, properly charged with multiple counts of theft based on multiple unauthorized withdrawals from his Interest on Lawyer Trust Account (IOLTA)).

Unlike the defendants in *Perkerewicz* and *Kinneman*, Mr. Barbee took no additional action to receive SSI benefits after he applied for those benefits in 2007. The theft in the first degree statute was amended to better reflect the current economy. There is nothing in the legislative history to indicate the Legislature intended the amendment to create a separate unit of prosecution. This "lack of clarity" creates an ambiguity that must be construed in favor of Mr. Barbee.

Mr. Barbee's convictions for two counts of theft from the SSA encompassed a single unit of prosecution.

iv. The proper remedy is to vacate the redundant convictions and remand for resentencing.

Where two convictions are predicated on a single unit of prosecution, the proper remedy to vacate one conviction and remand for sentencing on the remaining count. *Adel*, 136 Wn.2d at 637. As discussed, the two convictions for promoting commercial sexual abuse of a minor encompassed a single unit of prosecution, as did the two convictions for promoting prostitution, and the two convictions for theft from the SSA. Accordingly, the proper remedy is to vacate the duplicative counts and remand for sentencing on one count of each offense.

b. Merger.

Double jeopardy also protects a defendant from multiple convictions under separate criminal statutes when the crimes constitute the same offense. *Ball*, 470 U.S. at 860. Thus, although the State may charge multiple offenses arising from the same criminal conduct, double jeopardy prohibits a court from entering multiple convictions and punishments for the same offense. *Albernaz*, 450 U.S. at 344; *Michielli*, 132 Wn.2d at 238-39. Multiple convictions can stand only if proof of one offense does not necessarily prove the other offense. *Vladovic*, 99 Wn.2d at 422-23.

A reviewing court is to determine whether the Legislature intended multiple punishments for conduct that violates multiple criminal statutes.

State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005), quoting *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

Washington courts have developed a three-part test to determine whether the charged crimes constitute the same offense. *Kier*, 164 Wn.2d at 804. First, the court analyzes the relevant statutes for any express or implicit expression of legislative intent. *Freeman*, 153 Wn.2d at 771. Second, if it is not clear whether multiple punishments are authorized by statute, courts utilize the "*Blockburger* test" or "same elements" test to determine whether multiple convictions violate double jeopardy. *United States v. Dixon*, 509 U.S. 688, 697, 113 S. Ct. 2849, 125 L.Ed.2d 556 (1993); *State v. Gocken*, 127 Wn.2d 95, 101-02, 896 P.2d 1267 (1995). "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d

306 (1932). This test is similar to Washington's "same elements" test for double jeopardy. *Adel*, 136 Wn.2d at 632.

In determining whether proof of one offense also establishes another charged offense, the inquiry must focus on the offenses as they were charged and prosecuted in a given case. *See State v. Womac*, 160 Wn.2d 643, 652-56, 160 P.3d 40 (2007) and cases cited therein. *See also State v. Gohl*, 109 Wn. App. 817, 821, 37 P.3d 293 (2001) (courts must examine as charged for double jeopardy analysis). The inquiry is not an abstract determination of the statutory elements but, rather, asks the specific question "whether each provision requires proof of a fact which the other does not." *Orange*, 152 Wn.2d at 818 (criticizing Court of Appeals for applying same elements comparison in a generic fashion rather that determining whether evidence required to prove one offense would have been sufficient to prove other offense).

Third, legislative intent may be clarified by the "merger doctrine," where, if the degree of one offense is elevated by conduct separately criminalized, courts presume the Legislature intended to punish only the elevated offense. *Freeman*, 153 Wn.2d at 772-73. Merger is "a doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." *Vladovic*, 99 Wn.2d. at 419 n.2. Offenses merge

when proof of one offense is necessary to prove an element or a degree of another offense, and if one offense does not involve an injury that is separate and distinct from the other. *Id.* at 419-21. The doctrine applies:

> where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

Id. at 421.

If there is doubt as to the legislative intent for multiple punishments, the rule of lenity requires the interpretation most favorable to the defendant. *Whalen*, 445 U.S. at 694.

i. Because proof of leading organized crime by promoting prostitution necessarily proved the predicate offense of promoting prostitution, Mr. Barbee's convictions for promoting prostitution merged into the greater offense of leading organized crime.

Mr. Barbee was charged and convicted of leading organized crime from January 1, 2010 through December 312, 2010, by engaging in a pattern of criminal profiteering. CP 246, 313. As discussed, he was also charged with one count of promoting the prostitution of Ms. Klein from January 1, 2010 through December 31, 2010, and one count of promoting the prostitution of Ms. Waller from May 10, 2012 through August 1, 2010. CP 246, 311, 312. The jury was provided a definition of criminal

profiteering that stated, "Criminal profiteering means any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable in the State of Washington as promoting prostitution." CP 286 (Instruction No. 25).

The present case is indistinguishable from *Harris v. Oklahoma*, in which the Court concluded convictions for both felony murder and the predicate offense of robbery violated double jeopardy even though the felony murder statue on its face did not require proof of robbery. 433 U.S. 682, 683, 97 S. Ct. 2912, 53 L.Ed.2d 1054 (1977). "When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars conviction of the lesser crime, after conviction for the greater one." 433 U.S. at 682, citing *In re Neilsen*, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889). *See also State v. Johnson*, 92 Wn.2d 671, 679-80, 600 P.2d 1249 (1979) (convictions for kidnapping in the first degree and assault in the first degree vacated as incidental to and necessary to support conviction for rape in the first degree);

In *State v. Harris*, the defendant was convicted of and separately sentenced for leading organized crime, unlawful delivery of cocaine, unlawful possession of cocaine with intent to deliver, money laundering, solicitation to commit murder in the first degree, and maintaining a

building for drug purposes. 167 Wn. App. 340, 350, 272 P.3d 299 (2012), On appeal, the defendant argued his convictions for the predicate offenses merged into his conviction for leading organized crime. 167 Wn. App. at 351. Division Two of this Court disagreed and noted that not all of Mr. Harris's predicate offenses were necessarily "committed for financial gain," an essential element of leading organized crime. *Id.* at 354. Here, however, profiting from prostitution was an essential element of the predicate offenses of promoting prostitution, as charged. CP 246, 273. Therefore, *Harris* is distinguishable from the present case and not controlling.

ii. The proper remedy is to vacate the convictions for promoting prostitution and remand for resentencing.

Where two convictions merge for purposes of double jeopardy, the proper remedy is to vacate the lesser offense. *Womac*, 160 Wn.2d at 660; *State v. Hughes*, 166 Wn.2d 675, 686, 212 P.3d 558 (2009). The lesser offense is determined primarily by which offense carries the shorter sentence, as well as the seriousness level and the degree of the offense. *Hughes*, 166 Wn.2d at 686 n.13. The offense of leading organized crime, as charged, is a Class A felony with a seriousness level of X. RCW 9A.82.060, 9.94A.515. The offense of promoting prostitution in the

second degree is a Class C felony with a seriousness level of III. RCW 9A.88.080, 9.94A.515.

Where there are two or more predicate offenses, either of which proved the greater offense, only one predicate offense need be vacated. *State v. Chesnokov*, 175 Wn. App. 345, 355-56, 305 P.3d 1103 (2013). As discussed, however, the two counts of promoting prostitution encompassed a single unit of prosecution. Therefore, the proper remedy is to vacate both predicate counts of promoting prostitution and remand for sentencing on the greater offense only.

2. The trial court erroneously denied Mr. Barbee's motion to sever Counts 1-6 from Counts 7-9, thereby allowing admission of confusing, irrelevant, and highly prejudicial evidence, in violation of Mr. Barbee's constitutional right to a fair trial.

a. A defendant is entitled to severance of counts where joinder prevents a fair determination of guilt or innocence.

A defendant has the constitutional right to a fair trial. U.S. Const. Amend. XIV; Wash. Const. art. I, sec. 3. To this end, CrR 4.4 provides for severance of counts when joinder prevents a fair trial. CrR 4.4 provides, in pertinent part:

> (b) Severance of Offenses.
> The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court

> determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

CrR 4.4(b) includes the term "shall," creating a mandatory duty. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Severance is appropriate where it prevents undue prejudice. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Undue prejudice includes the risk that a single trial invites the jury to cumulate evidence or to infer a guilty disposition. *State v. Watkins*, 53 Wn. App. 264, 268, 766 P.2d 484 (1989); *State v. Ramirez*, 46 Wn. App. 223, 228, 730 P.2d 98 (1986).

In *State v. Russell*, the Court set forth the following factors for determining prejudice: 1) the strength of the State's evidence on each count; 2) the clarity of defenses as to each count; 3) the court's instructions to consider each count separately; and 4) the admissibility of evidence of other charges even if not joined for trial. 125 Wn.2d 24, 63, 882 P.2d 747 (1994); *accord State v. Rodriguez*, 163 Wn. App. 215, 228, 259 P.3d 1145 (2011). Washington courts have articulated four specific concerns regarding improper joinder: 1) a defendant may be confounded or embarrassed in presenting separate defenses; 2) the jury may use evidence of one crime to improperly infer a defendant's criminal disposition; and 3) the jury may cumulate evidence of several crimes to find guilt when if considered separately, it would not find guilt. *State v.*

Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), *overruled on other grounds in State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975).

A trial court's decision on a motion to sever is a question of law and reviewed *de novo* for manifest abuse of discretion. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998).

b. Mr. Barbee was entitled to severance of Counts 1-6 from Counts 7-9.

The foregoing factors and concerns weigh in favor of severance of the counts. The State argued the evidence regarding Mr. Barbee's prostitution enterprise was cross-admissible to prove the theft from SSA and DSHS, on the grounds the prostitution-related offenses established he had another source of income and was not disabled. 8/1/13RP 17, 20-22; CP 40-51. This was incorrect. The only evidence necessary to prove the allegations of financial crimes was Mr. Barbee's credit union account records to establish he had additional income and his telephone records to establish that he was not so disabled that he was incapable of employment involving placing or answering a telephone. As the State argued in closing argument, the large volume of telephone communications between Mr. Barbee, S.E., Ms. Klein, and Ms. Waller was evidence that he was not fully disabled. 9/17/13RP 193. The source of his unreported income and

the content of the telephone messages were completely irrelevant to the charges of theft. Therefore, the trial court abused its discretion in denying Mr. Barbee's motion to sever the financial charges from the prostitution-related charges.

c. The proper remedy is reversal and remand for a new trial.

Where a trial court erroneously denies a motion to sever, the proper remedy is reversal, unless the error was harmless. *Bryant*, 89 Wn. App. at 864; *Ramirez*, 46 Wn. App. at 228. The State presented evidence relevant to the prostitution-related offenses over a four week period. The jury was undoubtedly exhausted and overwhelmed by the time the State shifted gears and presented evidence related to the financial crimes. The inundation of evidence presented during the first four weeks of trial begged the jury to infer a guilty disposition to commit the financial crimes and was not cross-admissible to prove the financial crimes. Under these circumstances, the error was not harmless and reversal is required.

3. The trial court erroneously admitted out-of-court statements by S.E., Ms. Klein, and Ms. Waller, as statements by co-conspirators to the offense of leading organized crime, when they were victims of that offense and they did not agree to cause or engage in conduct that resulted in the commission of the offense.

a. Because S.E., Ms. Klein, and Ms. Waller were victims of the offense of leading organized crime and they did not agree to assist in the commission of the offense, their out-of-courts statements were inadmissible as statements by co-conspirators.

Pursuant to ER 801(d)(2)(v), the trial court admitted out-of-court statements by S.E., Ms. Klein, and Ms. Waller as statements of co-conspirators to the offense of leading organized crime.[15] 8/1/2013 RP 103-06; 8/15/13RP 97. ER 801(d)(2)(v) provides:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if—
>
> (2) Admission by Party-Opponent. The statement is offered against a party and is ... (v) a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy.

RCW 9A.28.040(1) provides:

> A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

[15] Although the court specifically admitted the statements as co-conspirators to leading organized crime, the court did not give the jury a proper limiting instruction.

A trial court's evidentiary ruling is reviewed for abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Id.*

The trial court abused its discretion here. S.E., Ms. Klein, and Ms. Waller were not co-conspirators because they did not agree to engage in or cause conduct that constituted leading organized crime by promoting prostitution. A person is guilty of promoting prostitution if he profits from or advances prostitution. RCW 9A.88.070(1), .080(1). By definition, however, for purposes of promoting prostitution, a person acting as a prostitute can neither advance nor profit from prostitution. RCW 9A.88.060(1), (2).

In *Gebardi v. United States*, a man and a consenting woman were convicted of conspiracy to violate the Mann Act,[16] which criminalized the transportation across state lines of a woman or girl for immoral purposes. 287 U.S. 112, 115-16, 53 S.Ct. 35, 77 L.Ed. 206 (1932). The Court overturned the convictions on the grounds that the woman could not be convicted of conspiring to violate the Mann Act where she could not be convicted of violating the Mann Act itself. 287 U.S. at 119. The Court noted:

---

[16] Former 18 U.S.C. § 398.

> It is not to be supposed that the consent of an unmarried person to adultery with a married person, where the latter alone is guilty of the substantive offense, would render the former an abettor or a conspirator, ... or that the acquiescence of a woman under the age of consent would make her a co-conspirator with the man to commit statutory rape upon herself.

Id. at 123.

Similarly here, where Mr. Barbee alone committed the offense of leading organized crime by promoting prostitution, S.E., Ms. Klein, and Ms. Waller could not be charged as co-conspirators with the person who prostituted them.

The State's characterization of the victims of commercial sexual abuse as co-conspirators in that abuse is contrary to legislative intent and public policy. Specifically as to S.E., the Legislature has declared a victim of promoting commercial sexual abuse of a minor is a "sexually exploited child." RCW 9.68A.001; RCW 13.32A.030(17). As Detective Banks and Detective Taylor testified, prostitutes are victims. 8/14/13 RP 47; 8/18/13 RP 66. Detective Banks specifically testified that juvenile prostitutes are victims and most adult prostitutes started working in the sex trade when they were juveniles. 8/14/13 RP 47.

These victims, S.E., Ms. Klein, and Ms. Waller were not co-conspirators to their own abuse and exploitation. The trial court's admission of their out-of-court statements as statements by co-conspirators

was an abuse of discretion.

b. The proper remedy is reversal and remand for a new trial.

The erroneous admission of the out-of-court statements, including advertisements, by S.E., Ms. Klein, and Ms. Waller requires reversal. Erroneous admission of evidence requires reversal unless the error was harmless. *State v. Garcia*, 179 Wn.2d 828, 849, 318 P.3d 266 (2014). In this context, improper admission of evidence is harmless only where, within reasonable probability, the error did not materially affect the outcome of the trial. *Id.*

The error here was not harmless. The victims' out-of-court statements, including the extensive advertisements, were admitted to prove the truth of the matter asserted, and comprised the cornerstone of the State's case against Mr. Barbee. Reversal is required.

4. The trial court erroneously admitted evidence obtained from a warrantless search of the Sutton Suites motel registry.

a. Information in a motel registry constitutes a private affair that may not be searched in the absence of authority of law.

"[T]he information contained in a motel registry – including one's whereabouts at the motel – is a private affair under our state constitution, and a government trespass into such information is a search." *State v.*

Jorden, 160 Wn.2d 121, 130, 156 P.3d 893 (2007). Article I, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." "Private affairs" are those "interests which citizens of this state have held, and should be entitled to hold, safe from government trespass." S*tate v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

A warrantless search is *per se* unreasonable unless it falls within one of Washington's recognized exceptions to the warrant requirement. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). The recognized exceptions are consent, exigent circumstances, searches incident to arrest, inventory searches, plain view, and investigative *Terry*[17] stops. *Id.* at 71. These exceptions to the warrant requirement "must be jealously and carefully drawn, and must be confined to situations involving special circumstances." *State v. Boyce*, 52 Wn. App. 274, 279, 758 P.2d 1017 (1988); *accord State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d. 1266 (2009).

b. <u>The officers did not have authority of law to search the motel registry and to view Mr. Barbee's registration information</u>.

After officers arrested S.E. and Ms. Klein in a room at the Sutton Suites, the officers searched the motel registry and learned the room was

[17] *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

registered to Mr. Barbee. CP 130-34. Although the officers obtained a search warrant for the room, they did not have a warrant to search the motel registry and none of the narrowly drawn exceptions to the warrant requirement applied. CP 135-39. Mr. Barbee did not consent to the search and the desk clerk lacked authority to consent to a search of Mr. Barbee's information. *State v. Mathe*, 102 Wn.2d 537, 544, 688 P.2d 859 (1984); *State v. Davis*, 86 Wn. App. 414, 419, 937 P.2d 1110 (1997). The search did not fall within the search incident to arrest exception, which is limited to a warrantless search of an arrestee's person or the area within the arrestee's immediate control. *State v. Valdez*, 167 Wn.2d 761, 769, 224 P.3d 751 (2009). The search was obviously not an inventory search and the information was not in plain view but instead was obtained from the desk clerk. The *Terry* exception also did not apply because an officer's viewing of a motel registry constitutes a search, not a stop or seizure. *Jorden*, 160 Wn.2d at 130.

The exigent circumstances exception also did not apply. Courts have catalogued five circumstances that could be termed exigent: 1) hot pursuit, 2) fleeing suspect, 3) danger to arresting officer or to the public, 4) mobility of the vehicle, and 5) mobility or destruction of the evidence. *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983) and cases cited therein. None of the above circumstances arose in the present case. In fact,

the officers secured the motel room, applied for a search warrant for the room, and waited at the room until the warrant was obtained. CP 131-39; Ex. 4.

Mr. Barbee recognizes a similar argument was rejected in *In re Pers. Restraint of Nichols*, in which a confidential informant reported possible drug activity was occurring in a specific motel room. 171 Wn.2d at 371. Based on that report, officers conducted a warrantless search of the motel registry provided by the desk clerk and learned the room was registered to the defendant. *Id.* at 372. The officers obtained information via a computer that the defendant's driver's license was suspended. *Id.* Shortly thereafter, the officers observed the defendant drive into the motel parking lot and he was arrested for driving while license suspended. *Id.* A search incident to his arrest yielded illegal drugs and cash, including prerecorded police "buy money," and the defendant was charged with two counts of violation of the Uniform Controlled Substances Act. *Id.* In a personal restraint petition, the defendant challenged the legality of the warrantless search on the grounds the registry was a private affair and circumstances of the search did not establish an exception to the warrant requirement. *Id.* at 376. The Court disagreed, and retreated from its holding in *Jorden*, *supra*, that a motel registry is a private affair. "A fair reading of our opinion in *Jorden* is that motel registries are "private

affairs" only to a limited extent." *Id.* at 377. The Court then concluded a warrantless search of a motel registry may be conducted where the officers have individualized suspicions regarding a particular guest. *Id.*

In a well-reasoned dissent, Justice Fairhurst recognized the problematic analysis of the majority opinion:

> By allowing individualized and particularized suspicion alone to diminish the privacy interest in motel registry information, the lead opinion effectively creates an exception to the warrant requirement. Under this new exception, an individualized and particularized suspicion gives officers authority of law to search an individual's private affairs for purely investigatory purposes despite a complete lack of need for immediate action. This exception threatens to swallow the rule.

171 Wn.2d 381.

The officers here were in the process of obtaining a warrant to search the motel room at the very time fellow officers were conducting the warrantless search of the motel registry under circumstances that did not constitute an exception to the warrant requirement. As Justice Fairhurst noted, the existence of individualized and particularized suspicion alone is not an exception to the warrant requirement of Article I, section 7. Accordingly, Mr. Barbee requests this Court reject the majority in Nichols and find the warrantless search of the motel registry was in violation of Mr. Barbee's constitutional right to privacy.

c. The proper remedy is suppression of the wrongfully obtained evidence from the motel registry.

The remedy for a violation of Article I, section 7 is suppression of the fruits of the improper search of seizure. *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). "[T]he right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.... [W]henever the right is unreasonably violated, the remedy must follow." *Id.* Thus, the evidence obtained as the result of the search of the motel registry conducted without authority of law was wrongly admitted against Mr. Barbee. His convictions must be reversed and the matter remanded with instructions to suppress the evidence.

5. Mr. Barbee's sentence based on an increased punishment that became effective during the charging period of promoting commercial sexual abuse of a minor violated his right to due process.

As argued *supra*, the two counts of commercial sexual abuse of a minor constituted a single unit of prosecution and, accordingly, Mr. Barbee can be sentenced to only one count based on the combined charging period encompassing the entirety of 2010. Prior to June 10, 2010, promoting commercial sexual abuse of a minor was a class B felony with a seriousness level of VIII. Former RCW 9.68A.101, former RCW 9.94A.515. Effective June 10, 2010, promoting commercial sexual abuse of a minor was elevated to a class A felony with a seriousness level of XII.

Laws of 2010, ch. 289, § 14. Nonetheless, on each count, Mr. Barbee was sentenced based on the classification of the offense as an A felony with a seriousness level of XII. In addition, the court imposed an exceptional sentence based on the judicial finding that a standard range sentence would result in some current offenses going unpunished,[18] and on the jury finding that Mr. Barbee committed an ongoing pattern of sexual abuse of the same minor over a prolonged period of time.[19] CP 308, 332-33.

A court's sentencing authority is derived solely from statute. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). RCW 9.94A.345 provides, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." A defendant's constitutional right to due process is violated when he is sentenced pursuant to a statute that was not in effective at the time of the offense. *State v. Aho*, 137 Wn.2d 736, 744, 975 P.2d 512 (1999). Similarly,

> [w]hen the sentence for a crime is increased during the period within which the crime was allegedly committed, and the evidence presented at trial indicates the crime was committed before the increase went into effect, the lesser sentence must be imposed.

---

[18] RCW 9.94A.535(2)(c).

[19] RCW 9.94.535(3)(g).

In re Pers. Restraint of Hartzell, 108 Wn. App. 934, 944-45, 33 P.3d 1096 (2001).

A sentencing court must first determine the correct standard range sentence before it considers an exceptional sentence outside the standard range. *State v. Parker*, 132 Wn.2d 182, 188, 937 P.2d 575 (1997). "If the sentencing judge were to set an exceptional sentence without first properly calculating the legislatively designated standard sentence she would redesignate the punishment for the crime without reference to the legislative standard to which the court must defer absent exceptional circumstances." 132 Wn.2d at 187-88.

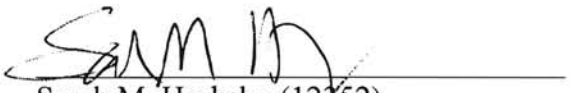
An exceptional sentence based on an improperly calculated offender score requires reversal unless the record clearly indicates the court would have imposed the same sentence regardless. *Parker*, 132 Wn.2d at 192-93. Here, on Counts 1 and 2, the court imposed an exceptional sentence of 102 months above the top end of the miscalculated standard range. 11/15/13RP 24; CP 325, 328. Therefore, the record clearly indicates Mr. Barbee's sentence would not be the same if the top end of the standard range were properly calculated. Reversal and remand for resentencing is required.

E. CONCLUSION

For the foregoing reasons, Mr. Barbee respectfully requests this Court vacate on conviction for Promoting Commercial Sexual Abuse of a Minor, vacate one conviction for Promoting Prostitution, merge the remaining conviction for Promoting Prostitution, and vacate one conviction for theft from the United States Social Security Administration. Mr. Barbee also requests this court reverse his remaining convictions for failure to sever the prostitution-related offenses from the financial crimes and for wrongful admission of out-of-court statements by S.E., Ms. Klein, and Ms. Waller as co-conspirators. Finally, Mr. Barbee requests this Court reverse his sentences on Counts 1 and 2 and remand for sentencing according to a properly calculated standard range.

DATED this 29th day of September 2014.

Respectfully submitted,



Sarah M. Hrobsky (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. SHACON BARBEE, Appellant.	)))))))))	NO. 71164-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF SEPTEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] SHACON BARBEE 779857 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF SEPTEMBER, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710