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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

No. 47121-3-II

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DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON, Respondent

v.

JOSHUA JONES, Appellant

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APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE EDMUND MURPHY, JUDGE

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BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. Appellant's convictions for promoting commercial sexual abuse of a minor and second degree promoting prostitution violate double jeopardy.
- B. Appellant received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

- A. Mr. Jones was convicted on two counts of promoting commercial sexual abuse of a minor and two counts of promoting prostitution in the second degree during the same time period on the same two alleged victims. Do the convictions for both crimes violate double jeopardy?
- B. Did Mr. Jones receive ineffective assistance of counsel where rather than make a motion to sever, counsel asked for continuances for over a year ?
- C. Did Mr. Jones receive ineffective assistance of counsel where defense counsel opened the door to highly prejudicial information, to Mr. Jones' detriment?

II. STATEMENT OF CASE

Pierce County prosecutors charged Joshua Jones by amended information with two counts of promoting commercial

sexual abuse of a minor (PCSAM) and two counts of second degree promoting prostitution based on allegations and events that occurred between June 5, 2013 and June 10, 2013. The complainants O.L. and T.C., were both minors. The State also charged Mr. Jones with rape of a child third degree, attempted witness tampering, and violation of a protection order. (CP 42-45).

Mr. Jones testified that on June 6, 2013, his friend Xavier Henderson sent him a text, inviting him over to his apartment. 11RP 835<sup>1</sup>. When he arrived J.H. and O.L. were there. This was the first time he met O.L. 11RP 838. O.L. told him she was 19, and he had no reason to doubt her age. 12RP 934. J.H. and O.L. left the apartment to go home, and Mr. Jones stayed the night. 11RP 839.

The following day, Henderson, Samuel Miles-Johnson, Mr. Jones and O.L. and T.C. and J.H. all met at a motel. 11RP 845. He did not know T.C.'s age and did not ask. 12RP 940. Mr. Jones reported that based on the conversations he overheard between Miles-Johnson and Henderson, he knew there was going to be

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<sup>1</sup> The hearings will be referenced as follows for each of the dates: 1RP 9/15/14; 2RP 9/16/14; 3RP 9/17/14; 4RP 9/18/14; 5RP 9/22/14; 6RP 9/23/14 and 9/24/14 a.m.; 7RP 9/24/14 p.m.; 8RP 9/25/14; 9RP 9/29/14; 10RP 9/30/14; 11RP 10/1/14; 12RP 10/2/14; 13RP 10/6 and 10/7/14; 14RP 12/19/14.

prostitution. 11RP 846. He decided to stay with the group because he did not have his bankcard, had less than twenty dollars cash, and nowhere else to go. 11RP 845;12RP 889.

O.L. testified she told her mother she was going to Wild Waves for the day with friends. She later called her mother to let her know she missed the bus to get home. When she did not return the following day, her mother reported her as a runaway. 6RP 510-511. On the second day she was gone from home, O.L. and her friend, J.H., went to Henderson's home and eventually to a motel to drink, along with Henderson, Samuel Miles-Johnson, and Joshua Jones. 7RP 518-519. O.L. invited T.C. to join them and T.C. agreed because she did not want to go home. 6RP 455-56. T.C.'s mother testified she also reported T.C. as a runaway. 6RP 439.

T.C. testified when they got to the motel Miles-Johnson took pictures of her posing and told her he was going to put the photos on a website. 6RP 461-62. He explained and she understood that individuals would call him and arrange for her to perform sexual acts with them. 6RP 463; 7RP 479. She reported that Miles Johnson spoke to or texted the customers and she handed over all the money she made to him. 7RP 473;477. She stated she had

had sexual contact with 4 strangers. 7RP 471. However, in her police interview, shortly after her arrest, she told the officer she only had 3 customers over the course of the three days. 9RP 706. By contrast, O.L. testified that T.C. had 10 customers in one night. 7RP 531.

T.C. testified that Mr. Jones did not take pictures of her and was not involved with posting them online at the backpage.com website. She testified he did not use her phone to talk or text customers, and she never talked with him about prostituting herself. 7RP 462;479;488; 504-505.

O.L. testified that Mr. Jones talked to her about making money prostituting herself. 7RP 520; 7RP 470. She said he told her about posting photos he took of her on a website. 7RP 523;515. Over the course of three days, O.L. and T.C. said they met with customers at various motels in Tacoma, Fife, and SeaTac. 6RP 528; 531; 8RP 477;482. She also reported that when the officer arrested her he said, "Shut up, you ho or shut up you slut" and kicked her in the foot and arrested her. 8RP 485. The officer denied making the comment or kicking her. 11RP 811.

At the time of trial, both O.L. and T.C. were plaintiffs in a civil lawsuit against backpage.com, Voice Media, Village Voice, New Times, Joshua Jones and Miles-Johnson. 8RP 550.

By contrast, Mr. Jones testified that it was not he who talked with O.L. about prostitution, but rather Henderson, who also took pictures of her. 11RP 850; 12 RP 937. He said Henderson used Jones' phone to take the pictures and he saw O.L. give the money she earned to Henderson. 12RP851; 880;937. He reported that it was Henderson who was "pimping" O.L. 12 RP 941. He denied ever having any phone conversations with the individuals who responded to the online ad, and he did not respond to any text messages. 12RP 886-87.

Two weeks into the trial, defense counsel asked for a recess to obtain phone records between Henderson and Mr. Jones. 10RP 753. Counsel reported that he was "having trouble getting Mr. Henderson to appear in court....There have been attempts to try and contact him to serve him.... he has kind of disappeared. ...I need to make an additional attempt to try to get him served." 10 RP 753. Upon further questioning by the court, it was clarified that defense counsel had given a phone number to someone to make contact with Henderson, but had never served with a subpoena.

10RP 758. The court ruled defense counsel could attempt to get the phone recordings and serve Henderson, but the trial would not be placed in recess. 10RP 760-61. Mr. Henderson did not testify and no phone records were introduced as part of the defense case.

A jury convicted Mr. Jones on two counts of promoting commercial sexual abuse of a minor, two counts of promoting prostitution second degree, and one count of violation of a protection order. CP 110-114. He was found not guilty of the other charges. CP 110-114.

## 2. Pretrial Motions and Court Rulings

### a. Trial Continuances

On the date Mr. Jones was arrested, June 11, 2013, the court set a scheduling order, designating an omnibus hearing for July 19, 2013 and a jury trial on August 1, 2013. CP 5. About two weeks later, the parties agreed to continue the trial with a new omnibus hearing set for August 9, 2013. CP 7. The stated reason was the need for "additional time needed for investigation and negotiations and to accommodate co-defendant's counsel's vacation schedule." CP 7. The trial date moved forward to September 17, 2013. Id. On August 2, 2013, a new scheduling order was made, listing the omnibus date as August 16 and

keeping a jury trial date of September 17, 2013. CP 8. Mr. Jones did not sign the new scheduling order and his attorney was to be notified by email. Four days later, the omnibus hearing was moved to August 23, 2013. CP 9. Again, Mr. Jones did not sign the order, and the notation is the defense attorney approved the change of date by email. CP 9.

On August 23, 2013, both parties asked for a continuance to provide time for additional investigation and negotiation. The case was 73 days old. The trial date was continued to December 9, 2013, with an omnibus hearing for October 18, 2013. CP 10. On October 18, 2013, a new order continuing the trial to January 28, 2014 was entered. CP 11. The stated reason for the continuance was "codefendant's counsel in process of preparing mitigation package on codefendant and is starting murder trial on unrelated matter." CP 11. The case was 126 days old.

On January 10, 2014, the case was 213 days old, with 3 prior continuances. CP 13. Again the parties asked for a continuance because "additional time needed for negotiation; codefendant counsel is working on mitigation package for his client." The trial date was continued to March 31, 2014, with an expiration date of April 30, 2014. CP 13.

On March 28, 2014, the case was 290 days old, with 4 prior continuances. CP 20. The parties again requested a continuance, because “state in trial on another matter. Counsel needs additional time to review discovery received on 3/21/14 re: 404(b); and codefendant counsel needs time regarding 3 strike issue.” CP 20. The trial was continued to June 3, 2014. Id.

On May 22, 2014, the case was 345 days old, with 5 prior continuances. Both parties requested a continuance because “defense needs to interview co-defendant and get transcript of plea.” CP 23. The new trial date was set for July 8, 2014. Id.

The following month, on June 27, 2014, the case was 381 days old, with 6 prior continuances. CP 24. This time the defense counsel requested the continuance because “Defendant’s investigator is trying to arrange time to interview co-defendant with his counsel and it has not happened yet. Also defense counsel is gone from July 21 – August 5.” CP 24. The trial was continued to September 8, 2014. CP 24.

On September 6, 2014, the case was 451 days old with 7 prior continuances. CP 41. The defense counsel again requested a continuance because “prior co-defendant is being transported from DOC and may not be here on 8<sup>th</sup> of Sept. Also, State has

provided additional discovery this week that needs to be reviewed with defendant.” CP 41. The court continued the trial to September 15, 2014. CP 41.

On September 15, 2014, defense counsel again asked for a continuance, seeking more time to get information and evidence. 1RP 4. Over defense objection, the court ruled that because the case was over a year old, trial would begin the following day. Id.

The time between arrest and trial was 460 days. None of the requests for continuances included Mr. Jones’ co-defendant signature or his co-defendant’s attorney’s signature. Miles-Johnson, Mr. Jones’ alleged co-defendant, pleaded guilty to promoting prostitution on May 2 and declined to testify at Jones’ trial, instead, asserting his Fifth Amendment right to not incriminate himself. 5RP 258; 261.

c. ER 404(b) and ER 609 Rulings

Prior to trial, the State made clear it wanted to introduce Mr. Jones’ prior convictions for promoting prostitution first and second degree under ER 404(b), common scheme or plan, or absence of mistake. And, if Mr. Jones testified, the State intended to introduce his prior convictions under ER 609. CP18; 25-39.

In a pretrial hearing, the court conducted an analysis on the record, concluding at that time, the prejudicial value outweighed the probative value regarding common scheme or plan. 5RP 307-08. The court, however, reserved ruling on admissibility to show absence of mistake or accident, which could possibly be admissible in rebuttal. 5RP 308-09. The court stated:

“[[I]f there is evidence presented that would indicate that the defendant is making a claim that he did not believe or understand that these individuals were underage, it would be admissible, the prior incident would be admissible to rebut that argument or claim. Therefore, adding more probative value to the evidence because the State has identified the reason that they wished to have this to show that he knowingly promoted the sexual abuse of minors. Minors being the key issue. I think when it is dealing with the issue of minors, age, his knowledge of the age, it has more probative value.”

Well into trial, during Mr. Jones' testimony, and outside the presence of the jury, the State again raised the ER 404(b) issue. 12RP 920. Arguing that because Mr. Jones testified that he was present but a nonparticipant in the prostitution activity, the *details* of his prior convictions became more probative than prejudicial. 12RP 921. The court ruled the State could question Mr. Jones about the *fact* of the prior convictions under ER 609 on cross-examination; however, questioning about common scheme or plan, or lack of

mistake or accident could be introduced in the rebuttal case if the door was opened. 12RP 921;925.

On cross-examination, the State asked Mr. Jones about the fact of his prior convictions, complying with the court's rule by omitting inadmissible details. 12RP 933. On redirect, however, defense counsel asked Mr. Jones details about the circumstances of his previous convictions for promoting prostitution, the ages of the involved teenagers, his methods for promoting their prostitution, and whether he pled guilty. 12 RP 938-939.

Outside the presence of the jury, the State raised the ER 404(b) issue again. 12RP 943. The court ruled that defense counsel had opened the door by questioning Mr. Jones about the specific facts regarding those cases and allowed the State to question Mr. Jones to establish a common scheme or plan and lack of mistake or accident. 12RP 925-26;943. The State questioned Mr. Jones about each minor female he had promoted previously, their ages, whether he advertised them on backpage.com, whether he drove them between cities to meet customers, and other facts associated with his recruitment of the minors for prostitution. 12RP 942 – 948.

### 3. Jury Instructions

The Court gave the following pertinent jury instructions.

Jury Instruction 7:

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

CP 77.

Jury Instruction 8:

To convict the defendant of the crime of promoting commercial sexual abuse of a minor, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the period between June 5, 2013, and June 10, 2013, the defendant or an accomplice knowingly advanced the commercial sexual abuse or profited from the sexual conduct of O.L.; and
- (2) that O.L. was less than eighteen years old;
- (3) that any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count II. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to either one of elements (1)(2), or (3), then it will be your duty to return a verdict of not guilty as to Count II.

CP 78

The same instruction was given in instruction number 9, with the change of name from O.L. to T.C. CP 79.

Jury Instruction No. 12:

The term "commercial sexual abuse of a minor" means that a person:

- (1) pays a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct with him, or;

- (2) Pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him, or;
- (3) Solicits, offers or requests to engage in sexual conduct with a minor in return for a fee.

CP 82.

Jury Instruction No. 13:

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 purpose 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.

CP 83

Jury Instruction No. 14:

The term "profits from commercial sexual abuse of a minor" means that a person, acting other than a minor receiving compensation for personally rendered sexual conduct or as a person engaged in commercial sexual abuse of a minor, 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 84.

Jury Instruction No. 16 (in pertinent part):

Sexual conduct means sexual contact or sexual intercourse.

CP 86.

Jury Instruction No. 19

A person commits the crime of promoting prostitution in the second degree when he profits from or advances prostitution.

CP 89.

Jury Instruction No. 20:

To convict the defendant of the crime of promoting prostitution in the second degree as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the period between June 5, 2013, and June 10 2013, the defendant or an accomplice knowingly profited form or advanced prostitution of O.L.; and
- (2) that any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements then it will be your duty to return a verdict of not guilty.

CP 90.

The same instruction was given in Instruction number 21, with the substitution of T.C. for O.L. CP 91.

Jury Instruction No. 22:

Prostitution means that a person engaged or agreed or offered to engage in sexual conduct with another person in return for a fee.

The term "advanced prostitution" means that a person, acting other than as a prostitute or as a customer of a prostitute, caused or aided a person to commit or engage in prostitution or procured or solicited customers for prostitution, or provided persons or premises for prostitution purposes, or operated or assisted in the operation of a house of prostitution or prostitution enterprise, or engaged in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.

The term "profited from prostitution" means that a person, acting other than as a prostitute receiving compensation for personally rendered prostitution services, acting other than as a prostitute receiving compensation for personally rendered prostitution services, accepted or received money or other property pursuant to an agreement or understanding with any person whereby he or she participated or was to participate in the proceeds of a prostitution activity. CP 92.

#### 4. Argument of Merger at Sentencing

The State submitted a sentencing memo contending that promoting commercial sexual of a minor and promoting prostitution second degree were distinct crimes and did not violate double jeopardy, conceding however, that the two charges did amount to the same criminal conduct. (CP 125-133). The defense argued that double jeopardy did not apply, but rather, the doctrine of merger, where the status of minor converted a Class C felony of promoting prostitution in the second degree into the Class A felony of promoting commercial sexual abuse of a minor. (CP 120-124). The court ruled the counts amounted to the same criminal conduct, but denied the defense motion to merge and vacate the promoting

prostitution second-degree convictions. 14RP 1090-91. Mr. Jones makes this timely appeal. CP 238-262.

### III. ARGUMENT

#### A. The Convictions For Promoting Commercial Sexual Abuse Of A Minor And Second Degree Promoting Prostitution Violate Double Jeopardy.

##### 1. Standard of Review

A double jeopardy claim is of constitutional proportions and may be raised for the first time on appeal. *State v. Daniels*, 183 Wn.App. 109, 118, 332 P.3d 1143 (2014). Interpretation and application of double jeopardy is a question of law that an appellate court reviews de novo. *State v. Clark*, 170 Wn.App. 166, 187, 283 P.3d 1116 (2012).

The prohibition against double jeopardy is found in the guarantees of the Fifth Amendment to the U.S. Constitution and Article 1, § 9 of the Washington State Constitution, which protect a defendant against multiple punishments for the same offense<sup>2</sup>. Thus, while the State is authorized to *charge* a defendant with multiple crimes arising from the same criminal conduct, courts may

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<sup>2</sup> The Fifth Amendment states 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' Article 1 §9 guarantees that no person shall be twice put in jeopardy for the same offense.

not enter multiple convictions for the same offense without offending double jeopardy. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Additionally, multiple convictions whose sentences are served concurrently may still violate double jeopardy. Double jeopardy is at issue because they arise out of the same acts regardless of concurrent sentences. *State v. Calle*, 125 Wn.2d 769, 773, 888 P.2d 155 (1995).

2. The Statutes Do Not Expressly Authorize Multiple Punishments For The Same Act.

If the defendant's action supports charges under two statutes, the Court must determine whether the Legislature actually intended to authorize multiple punishments for the crimes. *Calle*, 125 Wn.2d at 776. If the Legislature so intended, then double jeopardy is not a factor. *Freeman*, 153 Wn.2d at 772.

Here, the statutory language for promoting prostitution second degree and promoting commercial sexual abuse of a minor do not expressly permit punishment for the same act. See RCW 9.68A.001; RCW 9.68A.101; RCW 9A.88.080. Because the language of the statutes does not expressly authorize cumulative punishment, the Court must continue the analysis under the

*Blockburger*, or “same evidence” test. *State v. Hughes*, 166 Wn.2d 675, 681-82, 212 P.3d 558 (2009).

### 3. Double Jeopardy Analysis

Under Washington law, double jeopardy attaches only if the offenses are identical in both law and fact, which is demonstrated when “the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.” *State v. Reiff*, 14 Wash. 664, 667, 45 P. 318 (1896). In other words, if the “same act... 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 a fact* which the other does not. *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1931). (internal citations committed).

Additionally, even where the elements facially differ, the reviewing court may nevertheless find they both require proof of the same conduct, in this case, promoting or profiting from the prostitution of another. *Hughes*, 166 Wn.2d at 684 (2009).

Mr. Jones was charged with two counts promoting commercial sexual abuse of a minor between the dates of June 5 and June 10, 2013. To convict him of the charges, the State was

required to prove that between those dates, Mr. Jones or an accomplice (1) knowingly advanced or profited from (2) minors engaged in sexual conduct. RCW 9.68A.101(1); *Clark*, 170 Wn.App. at 183. (See CP 77-defining crime of promoting sexual abuse of a minor; CP 78- to convict instruction).

The jury instructions also contained a definitional instruction, which provides in pertinent part "Prostitution means that a person engaged or agreed to engage in sexual conduct with another person in return for a fee." (CP 92). RCW 9A.88.030(1).

To convict for promoting prostitution in the second degree required the State to prove that within the same charging period, Mr. Jones knowingly profited from or advanced prostitution of the named teens. (CP 90-91).

For the purposes of double jeopardy analysis, the two offenses are the same in fact because they arose out of the same acts. The offenses are the same in law, because each requires proof of advancing or profiting from the sexual conduct of another. Both statutes punish the same conduct. Moreover, the only difference between promoting commercial sexual abuse of a minor and promoting prostitution in the second degree as charged is the element of minority. Because there is no minimum age

requirement for a promoting prostitution charge, under the *Blockburger* test there is only one offense because *each provision does not require proof of a fact which the other does not* (*Blockburger v. U.S.*, 284 U.S. at 304). Proof of promoting commercial sexual abuse of a minor is sufficient for proof of promoting prostitution second degree.

In *Hughes*, the Court recognized that the legislature did not intend for a defendant to be convicted of both third degree rape and third degree rape of a child based on the same action. *Hughes*, 166 Wn.2d at 686. Despite the fact that the legislature divided the crimes into statutory subsections, case law continued to describe rape and statutory rape as a single crime. This was affirmed in *Calle*. *Id.* The Court noted that they defined a single crime, with the degree of punishing depending on the underlying circumstances. *Id.*

The circumstances and jury instructions in *Daniels* led this Court to hold that promoting commercial sexual abuse of a minor and promoting prostitution second degree were not the same offense for purposes of double jeopardy. *State v. Daniels*, 183 Wn.App. 109, 118, 332 P.3d 1143 (2014). That decision, however, was based on jury instructions where the State elected to

distinguish between the time period where the defendant did not know the victim was underage and the time period when the defendant was aware she was underage<sup>3</sup>. *Daniels*, 183 Wn.App. at 119.

Because Mr. Jones was charged with promoting prostitution of O.L. and T.C. during the same charging period and because each provision does *not* contain an element that the other does not, there is only one offense. *State v. Lynch*, 93 Wn.App. 716, 724-25, 970 P.2d 769 (1999). The convictions for promoting prostitution in the second degree, the lesser crimes, should be reversed and dismissed.

B. Mr. Jones Received Ineffective Assistance Of Counsel

1. Standard of Review

A criminal defendant's constitutional right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ineffective assistance of counsel is a mixed question of law and fact that is reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). A claim of

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<sup>3</sup> The *Daniels* decision does not address the issue that by statute the lack of knowledge of the minor's is not a defense to promoting commercial sexual abuse of a minor.

ineffective assistance of counsel requires a showing that (1) counsel's performance was deficient, and (2) the performance prejudiced the defendant's case. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

2. Failure to Make A Severance Motion To Protect Mr. Jones' Constitutional Right To A Speedy Trial Was Ineffective Assistance of Counsel.

An attorney can waive a client's CrR 3.3<sup>4</sup> timely trial right over a client's objection and even if it results in a trial beginning beyond the 60-90 day rule, when a continuance is required in the administration of justice and does not prejudice the defendant. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984). The timely trial rule is not of constitutional magnitude. *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989); *State v. Mack*, 89 Wn.2d 788, 793, 576 P.2d 44 (1978). Moreover, where the defense requests the continuance, that continued period does not count towards the 60-day time for trial. *State v. Greene*, 49 Wn.App. 49, 58, 742 P.2d 152 (1987).

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<sup>4</sup> CrR 3.3 provides in part that a defendant who is detained in jail shall be brought to trial within the longer of 60 days after the commencement date with some applicable exclusions of time, including a continuance granted by the court and the bringing of a continuance motion by or on behalf of a party waives that party's objection to the requested delay. CrR 3.3 (b)(1); (e)(3); (f)(2).

Here, the defense and the State requested numerous continuances, well past the 90 day rule, so that Mr. Jones' co-defendant, Miles-Johnson, could negotiate a plea for himself. Washington law disfavors separate trials of jointly charged defendants, and a trial court is not required to grant severance *to protect the rule-based timely trial of one jointly-charged defendant.* *State v. Nguyen*, 131 Wn.App. 815, 820, 129 P.3d 821 (2006). (emphasis added).

CrR 4.4 provides, in pertinent part, a trial court *should* sever defendants' trials only "*if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial ...*" CrR 4.4(c)(2)(i)-(ii). (emphasis added). Thus, CrR 4.4 anticipates that a trial involving a jointly charged defendant may violate another defendant's constitutional right to a speedy trial.

So although under case law the court is not required to grant a severance to protect the *rule based* timely trial, it is clear a criminal defendant's assurance of a speedy trial, guaranteed under the U.S. Constitutional Sixth Amendment and Article 1, §22 of the

Washington State Constitution, outweigh the need for judicial economy<sup>5</sup>.

There is no precedent establishing that an attorney can waive a defendant's constitutional right to a speedy trial.

Constitutional rights are subject to waiver *by an accused* if he knowingly, intelligently, and voluntarily waives them. *State v. Forza*, 70 Wn.2d 69, 71, 422 P.2d 475 (1966). (emphasis added).

The court must indulge every reasonable presumption against waiver of fundamental rights. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984).

Here, there was no such waiver. Mr. Jones was jailed for 15 months (460 days) before he was brought to trial. Beginning with the record on October 18, 2013, defense counsel was aware of and requested continuances so that Mr. Jones' co-defendant could negotiate a plea with the State. Six months later, on May 22, 2014, the record shows Miles-Johnson had accepted the plea offer.

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<sup>5</sup> The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." U.S.Const. Amend.VI. A Sixth Amendment speedy trial claim is reviewed de novo and the analysis is identical with Article 1, §22 of the Washington State Constitution. *State v. Iniguez*, 157 Wn.2d 273, 280, 217 P.3d 768 (2009).

Even knowing Miles-Johnson was working with the State and not intending to go to trial, there is no written record of Mr. Jones' attorney making a motion to sever the cases to protect Mr. Jones' right to a speedy trial. Rather, Mr. Jones remained in jail as his attorney then asked for even more continuances to have time to interview Miles-Johnson. This culminated in a pretrial incarceration of over 450 days, and no interview of or testimony by Miles-Johnson.

Mr. Jones argues this was ineffective assistance of counsel. An attorney's performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322-334-35. 899 P.2d 1251 (1995). It was unreasonable for defense counsel to continue making requests for continuances based on the co-defendant's desire to make a deal with the State.

Mr. Jones' attorney had a duty to Mr. Jones, and bore some responsibility for protecting the constitutional right to a speedy trial. The record in this case reflects no legitimate strategic or tactical reason for Jones' counsel's failure to move for a severance. The trial court would have been well within its authority to grant a

severance under CrR 4.4(c)(2)(i), especially considering that Miles-Jones was not going to trial.

In *Franulovich*, the Court recognized “that counsel does not possess ‘carte blanche under any and all conditions to postpone his client’s trial indefinitely. Counsel’s power in this regard is not unlimited...Nor may counsel effectively waive his client’s rights where the record reveals that the latter was the victim of inadequate representation...” *State v. Franulovich*, 18 Wn.App. 290, 293, 567 P.2d 264 (1977)(internal citation omitted).

Mr. Jones must also demonstrate prejudice. A defendant is prejudiced if there is a “reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In the context of evaluating a violation of the constitutional right to a speedy trial, where the State’s case rests largely on eyewitness testimony, the longer the delay between accusation and trial, the more potential for witnesses becoming unavailable or having fading memories. *State v. Iniguez*, 167 Wn.2d 273, 288-292, 217 P.3d 768 (2009).

Here, over the course of the trial delays, O.L. and T.C. had initiated a civil lawsuit against both Jones and Miles-Johnson, as well as backpage.com and other media entities. Henderson had apparently evaded a subpoena and O.L. and T.C. gave differing accounts of events from one another and from the officer who interviewed them shortly after he took them into custody. Mr. Jones argues that had he been brought to trial earlier, Henderson would likely been subpoenaed and brought to testify and O.L. and T.C. would have had less incentive to make sure Mr. Jones was found guilty. Such a change in evidence could likely have substantiated Mr. Jones' testimony that he was present, but not a participant in the illegal conduct. A jury could have found him not guilty of the charges, as they found him not guilty of third degree rape or attempted witness tampering.

Mr. Jones respectfully asks this Court to reverse his convictions on the basis of ineffective assistance of counsel and to remand for a new trial.

2. Mr. Jones Received Ineffective Assistance of Counsel Where Counsel Opened The Door To Highly Prejudicial Information.

Early on the State alerted the court and defense counsel that it intended to introduce not only the prior convictions of Mr. Jones,

but also wanted to introduce the details of the convictions under ER 404(b). The court ruled the fact of the prior convictions was admissible, but the details surrounding them, to prove common scheme or plan, or lack of mistake or accident under ER 404(b) were not admissible.

Counsel was well aware that Mr. Jones had previous convictions for promoting prostitution. No competent attorney would have opened the door to this evidence. Asking Mr. Jones about the details of the previous convictions opened the door to very damaging evidence that counsel knew the State wanted to have entered. Allowing the prosecutor ability to cross examine Mr. Jones on this information clearly was not tactical or strategic. Counsel performed deficiently. Moreover, counsel did not ask for a limiting instruction.

The resulting prejudice was significant. Under ER 404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith." The evidence would not have been admissible under common scheme or plan. Under *Foxhoven* and *DeVincentis*, the State may offer evidence to show common scheme or plan only if the defendant denies that the alleged crime even occurred. Thus, if

the defendant acknowledges it occurred, but denies being the person who committed the crime, the prior misconduct is inadmissible for that purpose. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007); *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003); Tegland Handbook on Washington Evidence, 2013-14 Edition p. 206.

There is more than a reasonable likelihood this evidence affected the outcome of the trial. When evaluating similar fact evidence, the Supreme Court has noted that a careful and methodical consideration of relevance and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the potential prejudice of prior acts is at its highest. *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). The testimony about the previous convictions raised the distinct possibility that the jury could convict on the basis of character: in other words, although Mr. Jones testified he was there, but not a participant, the jury could have easily convicted based on propensity to engage in the criminal activities. Overestimating the weight or probative value of other bad acts is especially acute where the prior acts are similar to the charged crime. Their introduction "inevitably shifts the jury's attention to the

defendant's general propensity for criminality, the forbidden inference; the normal presumption of innocence is stripped away." *State v. Bowen*, 48 Wn.App. 187, 738 P.2d 316 (abrogated on other grounds by *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995)).

The jury was far more likely to believe O.L. and T.C. once they were aware of the details of Mr. Jones' previous convictions. The otherwise inadmissible evidence contributed to the ultimate verdict. Mr. Jones was denied his right to effective representation when his attorney opened the door to damaging evidence that was otherwise inadmissible. There was no limiting instruction requested by defense counsel and none was given. Mr. Jones' convictions should be reversed and he should receive a new trial.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Jones respectfully asks this Court to reverse his convictions and remand for a new trial. In the alternative, he requests that the matter be remanded to the trial court with instructions to vacate both the convictions for promoting prostitution in the second degree.

Dated this 4<sup>th</sup> day of August, 2015.

Respectfully submitted,  
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CERTIFICATE OF SERVICE

I certify that on August 4, 2015, I served a copy of the brief of appellant by electronic service, by prior agreement between the parties, or by USPS first class mail, postage prepaid, to the following:

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