

NO. 47121-3-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA JONES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 13-1-02361-1

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. As a conviction for promoting the commercial sexual abuse of a minor requires proof of an element not required for a conviction for second degree promoting prostitution and thus the two are not the same in law, has defendant failed to demonstrate that his convictions for these crimes violate double jeopardy?..... 1

2. Where defendant has failed to show a motion for severance would have been granted, and where he was ultimately tried separately from his co-defendant, has defendant failed to show either the deficient performance or resulting prejudice necessary to succeed on a claim of ineffective assistance of counsel? 1

3. Where defense counsel tactically chose to introduce ER 404(b) evidence to try to minimize any adverse effect before the prosecutor adduced the evidence, and the jury was properly instructed on their role, has defendant failed to prove both the deficient performance and prejudice necessary for the claim of ineffective assistance of counsel? 1

B. STATEMENT OF THE CASE.2

1. Procedure2

2. Facts.....4

C. ARGUMENT.....10

1. DEFENDANT’S CONVICTIONS FOR PROMOTING THE COMMERCIAL SEXUAL ABUSE OF A MINOR AND SECOND DEGREE PROMOTING PROSTITUTION DO NOT VIOLATE DOUBLE JEOPARDY BECAUSE EACH REQUIRES PROOF OF AN ELEMENT NOT REQUIRED BY THE OTHER AND THUS ARE NOT THE SAME IN LAW.10

2.	DEFENDANT HAS FAILED TO SHOW COUNSEL WAS INEFFECTIVE BECAUSE HE CANNOT SHOW COUNSEL ACTED UNREASONABLY OR WITHOUT LEGITIMATE TRIAL TACTICS. FURTHER, DEFENDANT HAS FAILED TO PROVE THE REQUISITE PREJUDICE FOR EACH CLAIM.....	16
D.	<u>CONCLUSION</u>	24

Table of Authorities

State Cases

<i>Garcia v. Providence Medical Center</i> , 60 Wn. App. 635, 641, 806 P.2d 766 (1991)	21
<i>State v. Brett</i> , 162 Wn.2d 136, 198, 892 P.2d 29 (1995)	16
<i>State v. Calle</i> , 125 Wn.2d 769, 772, 888 P.2d 155 (1995).....	10
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	20
<i>State v. Clark</i> , 170 Wn. App. 166, 188, 283 P.3d 1116 (2012)	10, 11
<i>State v. Dent</i> , 123 Wn.2d 467, 484, 869 P.2d 392 (1994).....	17, 18
<i>State v. Eaves</i> , 39 Wn. App. 16, 19, 691 P.2d 245 (1984).....	18
<i>State v. Emery</i> , 174 Wn.2d 741, 755, 278 P.3d 653 (2012).....	17, 23
<i>State v. Foxhaven</i> , 161 Wn.2d 168, 174–75, 163 P.3d 786 (2007).....	22
<i>State v. Garrett</i> , 124 Wn.2d 504, 519, 881 P.2d 185 (1994).....	17, 21
<i>State v. Grisby</i> , 97 Wn.2d 493, 506, 647 P.2d 6 (1982), <i>cert. denied</i> , 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 446 (1983).....	17, 18
<i>State v. Iniguez</i> , 167 Wn.2d 273, 288–292, 217 P.3d 768 (2009)	20
<i>State v. Makela</i> , 66 Wn. App. 164, 170, 831 P.2d 1109 (1992)	21
<i>State v. McFarland</i> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)	16, 17, 21
<i>State v. Melton</i> , 63 Wn. App. 63, 67, 817 P.2d 413 (1991).....	18
<i>State v. Standifer</i> , 48 Wn. App. 121, 125, 737 P.2d 1308 (1987)	17
<i>State v. Thomas</i> , 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987)	16
<i>State v. Vladovic</i> , 99 Wn.2d 413, 423, 662 P.2d 853 (1983)	11

Federal and Other Jurisdictions

Albernaz v. United States, 450 U.S. 333, 338, 101 S. Ct. 1137,
67 L. Ed. 2d 616 (1975)..... 11

Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574,
91 L. Ed. 2d 305 (1986)..... 17, 18

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984)..... 16, 17

Constitutional Provisions

Article I, section 9, Washington State Constitution 10

Fifth Amendment, United States Constitution 2, 10

Statutes

RCW 9.68A.101 11, 15

RCW 9.68A.101(1)..... 12

RCW 9.68A.101(3)(a) 12

RCW 9.68A.101(5)..... 12

RCW 9.94A.515 15

RCW 9A.44.010(1)..... 13

RCW 9A.44.010(2)..... 12, 14

RCW 9A.88.030(1)..... 13, 14

RCW 9A.88.060 13

RCW 9A.88.080 11, 13, 15

Rules and Regulations

CrR 3.5.....	2
CrR 4.4(c)(1)	18
ER 404(b)	1, 21, 22, 23, 24
ER 609	22

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. As a conviction for promoting the commercial sexual abuse of a minor requires proof of an element not required for a conviction for second degree promoting prostitution and thus the two are not the same in law, has defendant failed to demonstrate that his convictions for these crimes violate double jeopardy?
2. Where defendant has failed to show a motion for severance would have been granted, and where he was ultimately tried separately from his co-defendant, has defendant failed to show either the deficient performance or resulting prejudice necessary to succeed on a claim of ineffective assistance of counsel?
3. Where defense counsel tactically chose to introduce ER 404(b) evidence to try to minimize any adverse effect before the prosecutor adduced the evidence, and the jury was properly instructed on their role, has defendant failed to prove both the deficient performance and prejudice necessary for the claim of ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Joshua Jones (hereinafter “defendant”) by amended information with two counts of promoting the commercial sexual abuse of a minor (PCSAM), two counts of second degree promoting prostitution, third degree rape of a child, attempted tampering with a witness, and violation of a no-contact order. CP 42–45.

There were eight signed orders continuing the trial. CP 7, 10, 11, 13, 20, 23, 24, 41. The first six were brought jointly by the State and defendant. CP 7, 10, 11, 13, 20, 23. The last two were brought by defendant. CP 24, 41. A final motion to continue made by defendant was denied. 1RP 4–5.¹

Defendant called co-defendant, Samuel Miles-Johnson,² for the CrR 3.5 hearing. 5RP 257. Miles-Johnson asserted his Fifth Amendment right³ and did not provide any testimony. 5RP 258. After the CrR 3.5 hearing, statements made by defendant to arresting officers were found admissible. 5RP 280.

¹ Respondent adopts the verbatim report of proceedings numbering outlined in appellant’s opening brief. Br. of App. p. 2.

² Miles-Johnson pleaded guilty to the charges in the present case before the start of defendant’s trial. *See* 5RP 261.

³ The basis for Miles-Johnson’s assertion of his privilege against self-incrimination was the potential for charges being filed in both federal court and King County superior court. 5RP 258.

After the State rested its case-in-chief, the defense called seven witnesses—including defendant—in its case. *See* 11RP 807–13RP 1000. The State called one witness in rebuttal. *See* 13RP 1000.

The jury found defendant guilty of two counts of promoting the commercial sexual abuse of a minor, two counts second degree promoting prostitution, and violation of a no-contact order. CP 110–14; 13RP 1063–64. The jury found defendant not guilty of third degree child rape and attempted tampering with a witness. 13RP 1064.

Before sentencing, defendant moved for a new trial based on an alleged error of law. 14RP 1074–80. The court denied the motion. 14RP 1086. Defendant then moved to merge the convictions for second degree promoting prostitution and promoting the commercial sexual abuse of a minor arguing that the conviction violated double jeopardy. 14RP 1088. The State disagreed as to the merger, but conceded those convictions would be the same criminal conduct. 14RP 1088. The court denied the motion to merge because the crimes each contained an element the other did not. 10RP 1090.

The court imposed a standard range sentence of 236 months: 236 months for both Counts II and III and 16 months for Counts IV and V, all to run concurrently. CP 243; 14RP 1095. Defendant filed timely notice of appeal. CP 238–62.

2. Facts

O.L., a 15 year old girl,⁴ met defendant at the house of a mutual friend—Xavier Henderson—in June 2013. 7RP 517–18. After meeting up with her friend, T.C.,⁵ the girls got in a car with defendant, Sam Miles-Johnson, and a woman they could not identify. 7RP 519. As the group drove around trying to find a motel, defendant lectured O.L. about how to get money. 7RP 520. Ultimately, the group ended up at the Rodeway Inn in Tacoma, Washington. 6RP 459; 7RP 519. Defendant and Miles-Johnson warned the girls to stay away from the motel lobby because “they were two men getting a motel and we were two younger girls, and it would just look suspicious.” 7RP 521.

Once inside the motel room, defendant told O.L. about a website they could use to make money, backpage.com. 7RP 522–23. Defendant told O.L. she was “pretty” and “a good source of money” because she could do for men “everything that their wives” could not. 7RP 523.

Defendant and Miles-Johnson then took pictures of O.L. and T.C. 7RP 525. In some of these photos, the girls were only wearing lingerie. 7RP 525. These pictures were used in advertisements that defendant

⁴ O.L.’s date of birth is 6/3/98; she was 16 at the time of trial. 7RP 515.

⁵ T.C.’s date of birth is 6/24/97; she was 17 at the time of trial. 6RP 451.

posted on backpage.com. 9RP 601, 603.⁶ O.L. only saw defendant post advertisements on backpage.com, she never saw Miles-Johnson make any posts. 8RP 481.

Defendant and Miles-Johnson did not let the girls leave the motel room and they took the girls' phones. 7RP 526. Defendant gave his phone to O.L., and Miles-Johnson gave his phone to T.C., so the girls could answer calls and messages responding to the backpage.com ads if the callers wanted to talk to the girls. 7RP 527. Otherwise, defendant would text with the men to make the arrangements. 8RP 564. When one of the girls would get a call and "have a date," the rest of the group would leave the room and wait nearby. 7RP 527. "Have a date" is how the girls referred to men responding to the ads and having sexual intercourse with the girls for money. *See* 7RP 528. At the first motel, O.L. had at least one "date" and T.C. had at least five. 7RP 528.

Before one of her "dates," defendant told O.L. that, "when somebody gets to the room you have to hurry up and do something with them so you know they're not a cop." 7RP 529. O.L. followed this order when a man arrived for a "date." 7RP 529. The man then gave O.L. the \$100 for the hour, and defendant came back to the motel room and took

⁶ The advertisements, later located by law enforcement, were dated June 8 and 9, 2013. 9RP 603.

the money. 7RP 529. Defendant would always immediately take the money paid to O.L. 7RP 531.

Defendant talked to O.L. about oral sex and vaginal sex, and he told O.L. she should engage in anal sex because they would “make more money that way.” 8RP 471. Defendant and Miles-Johnson went to a nearby Hustler Hollywood to buy underwear, lubricant, and lingerie for the girls. 8RP 471–72. Defendant put O.L. on a diet because she was not getting enough calls. 8RP 482.

After the first motel, defendant and Miles-Johnson took O.L. and T.C. to a motel in SeaTac near the airport, which defendant told the girls would get them “more money” because of business travelers. 8RP 472. Defendant told the girls how to “walk the strip” and what to look for before sending them to walk Aurora Avenue looking for “dates.” 8RP 477, 479. Defendant reminded O.L. to make sure potential clients were not cops by performing a sexual act with them before they could say no or leave. 8RP 479. T.C. had “dates” at the SeaTac motel. 7RP 468.

During the night at the SeaTac motel, a security guard—Cameron Vaccarella—saw defendant, Miles-Johnson, and O.L. outside a room. 10RP 766. When the guard realized only one of them was registered to the room, he asked the others to take their identification to the front desk to register. 10RP 768. The security guard later saw defendant and Miles-

Johnson outside the room again talking and drinking alcohol. 10RP 770. Defendant and Miles-Johnson then pulled O.L. from the room and asked the guard if he wanted to have sex with her. 10RP 770. The guard refused. 10RP 770.

Vaccarella returned to the room later that night because of excessive noise. 10RP 772. Vaccarella described the noise as, “moaning, some sort of sexual activity.” 10RP 772. Miles-Johnson answered the door while pulling his pants up, and Vaccarella could see T.C. lying naked on the bed under the clear influence of intoxicants. 10RP 773.

Defendant had bought alcohol for the girls that night and had gotten them intoxicated. 8RP 470. Defendant then began trying to have sex with O.L. 8RP 746. O.L. remembered a sharp pain in her butt, and when she woke up there was an empty bottle of lubricant next to her. 8RP 476. T.C. confirmed what O.L. thought: defendant had anal intercourse with O.L. while she was unconscious from intoxication. 8RP 476. When O.L. confronted defendant, he laughed and confirmed what he had done. 8RP 476.

After the SeaTac motel, on June 9, the group went to a Motel 6 in Fife. 8RP 480–81. That night, O.L. got a call from someone who offered over \$1,000 for the whole night. 8RP 483. Defendant told her she needed to accept the date because it was “big money.” 8RP 483. When the client

arrived, O.L. recognized his eyes, 8RP 484, but she did not realize it was Caraun Vernon, the boyfriend of her aunt. 5RP 320–21. Vernon had agreed to help Johnnie Davis, O.L.’s stepfather, find O.L. and get her home. 5RP 321. Vernon found O.L. on a backpage.com advertisement that had three pictures of O.L. 5RP 324. After arriving at the Motel 6 in Fife, Vernon told O.L. he had to get cash from the ATM and then he called the police. 5RP 328. Vernon saw defendant at the Motel 6 that night. 5RP 330.⁷

Officers Gilbert and Quinto responded to the Motel 6. 5RP 364. As the officers approached the building, they saw two men and one girl walking down the street. 5RP 367. Quinto followed the men, and Gilbert the girl. 5RP 367. One of the men was defendant. 6RP 389. Defendant admitted to Quinto that he was there with the two females who were prostitutes. 6RP 399. Defendant claimed the girls asked him and Miles-Johnson to get them the room, so that the girls could do “business” which defendant clarified meant exchange sex for money. 6RP 400.

After the arrests in June 2013, there was a pre-trial no-contact order preventing defendant from contacting both O.L. and T.C. 12RP 901–02. In March 2014, O.L. received calls from defendant and Miles-Johnson.

⁷ Davis went with Vernon that night, and he too saw defendant at the Motel 6. 5RP 348.

8RP 495. O.L. notified law enforcement right away. 8RP 494. Defendant called O.L. three times—twice using his person identification number (PIN) and once using the PIN of another inmate—while he was in the Pierce County Jail. 8RP 581.

Defendant chose to testify. *See* 11RP 831. According to defendant, Miles-Johnson and Henderson took photos of T.C. and O.L. and explained the plan involving backpage.com. 11RP 849. Defendant was “just watching them.” 11RP 850. Defendant admitted he was aware that prostitution was happening. 12RP 892. Defendant also knew his phone was being used to post ads, but he gave Henderson his phone anyway. 12RP 897. Defendant’s purported reason for staying despite the prostitution was that he was waiting to become involved with an illegal scheme to get money from the bank with Miles-Johnson. 12RP 941. He was not there to prostitute girls. 12RP 941.

In his testimony, defendant admitted that he knew there was a no-contact order in place, but that he had contacted O.L. anyway. 12RP 903. Defendant also admitted to having three prior convictions: second degree promoting prostitution from 2010, forgery from 2011, and first degree promoting prostitution from 2011. 12RP 933. The victims of his two previous convictions were 16 and 17. 12RP 939. Defendant had posted advertisements for those victims on backpage.com. 12RP 945–46.

C. ARGUMENT.

1. DEFENDANT’S CONVICTIONS FOR PROMOTING THE COMMERCIAL SEXUAL ABUSE OF A MINOR AND SECOND DEGREE PROMOTING PROSTITUTION DO NOT VIOLATE DOUBLE JEOPARDY BECAUSE EACH REQUIRES PROOF OF AN ELEMENT NOT REQUIRED BY THE OTHER AND THUS ARE NOT THE SAME IN LAW.

The double jeopardy clauses of the Fifth Amendment to the United States Constitution and Article I, section 9 of the Washington Constitution protect a defendant against multiple punishments for the same offense.

State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995); U.S. Cons. amend. V; Wash. Const. art. I, § 9. The legislature has the power—subject to constitutional limitations—to define crimes and assign punishments.

Calle, 125 Wn.2d at 776; *State v. Clark*, 170 Wn. App. 166, 188, 283 P.3d 1116 (2012). To determine if the legislature intended to punish two separate offenses, courts must first look to the language of the statutes.

Calle, 125 Wn.2d at 776. If the statutory language does not expressly authorize cumulative punishment, courts should apply the “same evidence” test to determine legislative intent. *Id.* at 777. Double jeopardy is violated if the defendant is convicted of offenses that are identical both in law and fact. *Id.*

Offenses are not the same in law if there is “an element in each offense which is not included in the other, and proof of one offense would

not necessarily also prove the other.” *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). “*Notwithstanding a substantial overlap in the evidence that establishes the two crimes, if each requires proof of a fact that the other does not, the . . . same evidence test is satisfied.*” *Clark*, 170 Wn. App. at 188–189 (emphasis added) (internal quotations omitted) (citing *Albernaz v. United States*, 450 U.S. 333, 338, 101 S. Ct. 1137, 67 L. Ed. 2d 616 (1975)). The legislative intent to authorize multiple punishments may also be demonstrated by additional factors such as the titles under which the statutes are codified, the severity of the crimes, and the independent purposes of the statutes. *Clark*, 170 Wn. App. at 193.

Defendant contends his convictions for PCSAM, RCW 9.68A.101, and second degree promoting prostitution, RCW 9A.88.080, violate double jeopardy. Br. of App. p. 1. Because neither statute expressly authorizes multiple punishments in light of the other crime, *see* RCW 9.68A.101 and RCW 9A.88.080, a “same evidence” test is required. Under this test, the convictions do not violate double jeopardy because they are not the same in law because each requires proof of an element not required by the other.

A person is guilty of PCSAM if (1) “he or she knowingly advances commercial sexual abuse or a sexually explicit act of a minor,” or (2) profits from a minor engaged in sexual conduct or a sexually explicit act.”

RCW 9.68A.101(1). Under the first prong, the statute defines “advances commercial sexual abuse of a minor” as:

(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, 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.

RCW 9.68A.101(3)(a).

Under the second prong, a person is guilty of PCSAM if he or she profits from a minor engaged in sexual conduct. RCW 9.68A.101(1).

“Sexual conduct” means either “sexual contact” or “sexual intercourse.”

RCW 9.68A.101(5). “Sexual contact” is defined as “any touching of the sexual or intimate parts of a person done for the purpose of gratifying

sexual desire of either party or a third party.” RCW 9A.44.010(2). “Sexual

intercourse” is defined as:

(1) “Sexual intercourse” (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

RCW 9A.44.010(1).

To convict defendant of second degree promoting prostitution, the jury had to find defendant “knowingly (a) profit[ed] from prostitution; or (b) advance[d] prostitution.” RCW 9A.88.080. “Prostitution” is defined as an act where “a person engaged or agreed or offered to engage in sexual conduct with another person in return for a fee.” RCW 9A.88.030(1). The definition for “advances prostitution” and “profits from prostitution” state:

(1) “Advances prostitution.” A person “advances prostitution” if, acting other than as a prostitute or as a customer thereof, he or she 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 assist 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.

(2) “Profits from prostitution.” A person “profits from prostitution” if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, 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 is to participate in the proceeds of prostitution activity.

RCW 9A.88.060.

Under the same evidence test, PCSAM and second degree promoting prostitution each require proof of an element that the other does

not. First, PCSAM requires the State prove that the victim was a minor—an element not required for second degree promoting prostitution. Second, second degree promoting prostitution requires proof that the defendant profited from “prostitution,” or sexual conduct “with another person.” RCW 9A.88.030(1). PCSAM, on the other hand, requires proof a minor engaged in “sexual conduct,” but does not require that the conduct was “with another person.” As defined above, “sexual conduct” can be “sexual contact” or “sexual intercourse.” Sexual contact, unlike prostitution, does not require a sexual act to be performed on or with a third party, but can be the minor’s sexual contact with his or her own body. *See* RCW 9A.44.010(2).

One example of how PCSAM does not necessarily constitute the crime of second degree promoting prostitution is: a person forces a minor to masturbate for a third party in exchange for a fee. The minor has engaged in “sexual contact” only with herself while the third party observed the act. Under these facts, the defendant’s conduct would not constitute promoting “prostitution” because there is no evidence that the minor engaged in sexual conduct “with another person.” Therefore, the State could charge the defendant with PCSAM but it could not pursue

second degree promoting prostitution charges because the sexual conduct was not “with another person.”⁸

It is also evident that the legislature intended these offenses to be separate because the offenses are codified under different titles. PCSAM is codified under chapter 9.68A titled, “Sexual exploitation of children.” Second degree promoting prostitution, on the other hand, is codified under chapter 9A.88 titled, “Indecent exposure—prostitution.” The crimes also differ in both felony classification and offense seriousness. Second degree promoting prostitution is a class C felony with a seriousness level of 3. RCW 9A.88.080 (felony class); RCW 9.94A.515 (seriousness level). Whereas PCSAM is a class A felony with a seriousness level of 12. RCW 9.68A.101 (felony class); RCW 9.94A.515 (seriousness level).

Defendant’s convictions for PCSAM and second degree promoting prostitution do not violate double jeopardy because the offenses are not the same in law. Under the same evidence test, each crime includes an element not contained in the other, so that proof of PCSAM does not necessarily prove second degree promoting prostitution. Further, the enactment of these separate offenses in separate titles of the revised code

⁸ When the victim is a minor, the State is unable to create a hypothetical where second degree promoting prostitution would not necessarily constitute PCSAM.

reflects an intent to punish the crimes separately. Therefore, imposition of punishments for both crimes does not double jeopardy.

2. DEFENDANT HAS FAILED TO SHOW COUNSEL WAS INEFFECTIVE BECAUSE HE CANNOT SHOW COUNSEL ACTED UNREASONABLY OR WITHOUT LEGITIMATE TRIAL TACTICS. FURTHER, DEFENDANT HAS FAILED TO PROVE THE REQUISITE PREJUDICE FOR EACH CLAIM.

To demonstrate ineffective assistance of counsel, a defendant must show two things: (1) defense counsel's representation fell below an objective standard of reasonableness in light of all circumstances, and (2) defense counsel's representation prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show prejudice, defendant must show that, except for counsel's alleged errors, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335.

The burden is on the defendant alleging ineffective assistance to show deficient representation based on the record below. *McFarland*, 127 Wn.2d at 335. There is a strong presumption that counsel's representation was effective. *Id.*; *State v. Brett*, 162 Wn.2d 136, 198, 892 P.2d 29 (1995). The failure of a defendant to show either deficient performance or

prejudice defeats his claim. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). Further, a claim for ineffective assistance of counsel fails if the actions of counsel go to the theory of the case or to legitimate trial tactics. *McFarland*, 127 Wn.2d at 336 (citing *State v. Garrett*, 124 Wn.2d 504, 519, 881 P.2d 185 (1994)).

- a. Defendant's claim of ineffective assistance of counsel based on the failure to move for severance fails because defendant has failed to show severance would have been granted, and he was tried separately from Miles-Johnson; therefore he has not shown either prong of the *Strickland* standard.

In a case where an ineffective assistance of counsel claim is based on the failure to litigate a motion to sever, a defendant must demonstrate that the motion would have been granted. *State v. Standifer*, 48 Wn. App. 121, 125, 737 P.2d 1308 (1987) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). The law does not favor separate trials. *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 446 (1983). "Severance is not mandatory even where a defendant's speedy trial rights are at issue." *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994) (quoting *State v. Melton*, 63 Wn. App. 63, 67, 817 P.2d 413

(1991)).⁹ “While the trial court *should* sever to protect a defendant’s right to a speedy trial, severance is only mandatory under CrR 4.4(c)(1), which protects a defendant from incriminating out-of-court statements by a codefendant.” *State v. Eaves*, 39 Wn. App. 16, 19, 691 P.2d 245 (1984) (citing *Grisby*, 97 Wn.2d at 507). In this case, defendant did not move to sever, but he was nonetheless tried separately from Miles-Johnson after Miles-Johnson pleaded guilty. *See* 5RP 261.

Defendant has failed to show defense counsel’s choice not to move for severance fell below an objective standard of reasonableness. Where a claim of ineffective assistance of counsel is based on the failure to litigate a motion, a defendant must show the motion would have been meritorious. *See Kimmelman*, 477 U.S. at 375. Severance is only *mandatory* to protect a defendant from a co-defendant’s incriminating statements—which does not apply to the present case. Rather, to protect a defendant’s right to a speedy trial, severance is *discretionary*.

⁹ Defendant contends that, “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 [sic] the need for judicial economy.” Br. of App. p. 23–24. Defendant provides no citation for this claim, nor does he fully argue why the Court’s statement that “Severance is not mandatory even where a defendant’s speedy trial rights are at issue” is distinguishable. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). This constitutional argument has not been adequately briefed by defendant and should be summarily rejected.

In this case, defendant cannot show that the motion for severance would have been granted. Although on appeal defendant bases his severance argument on his right to a speedy trial, Br. of App. p. 22, defendant did not assert his right to a speedy trial below. Defendant agreed to every continuance—both those brought jointly by the State and defendant and those brought by defendant. CP 7, 10, 11, 13, 20, 23, 24, 41.¹⁰ In fact, defendant requested a further continuance on the eve of trial—which was denied by the judge in the interest of defendant’s right to a speedy trial. *See* 1RP 4–5. Thus, defendant has failed to show that severance was *necessary* to protect his right to speedy trial. Given that the law does not favor separate trials and defendant agreed to every order continuing his trial, defendant has not shown the motion to sever would have been granted. Defendant has failed to prove that counsel acted deficiently by not raising the non-meritorious motion for severance.

Defendant must also prove the requisite prejudice to succeed on a claim of ineffective assistance of counsel. Defendant cannot show that counsel’s choice not to move to sever his case from Miles-Johnson’s case prejudiced him because defendant was in fact tried separately. Although the co-defendants were tried separately as a result of Miles-Johnson’s

¹⁰ Contrary to defendant’s characterization that “[Defendant] remained in jail as his attorney then asked for even more continuances,” Br. of App. p. 25, defendant himself signed every order continuing trial. *See* CP 7, 10, 11, 13, 20, 23, 24, 41.

guilty plea rather than a motion for severance, the result is the same.

Defendant was tried separate from Miles-Johnson.

Defendant contends he was prejudiced based on the general assertion that “where the State’s case rests largely on eyewitness testimony, the longer the delay between the accusation and trial, the more potential for witnesses becoming unavailable or having fading memories.” Br. of App. p. 26 (citing *State v. Iniguez*, 167 Wn.2d 273, 288–292, 217 P.3d 768 (2009)). Defendant’s argument, however, improperly focuses on the credibility of the witnesses, rather than any alleged “fading memories.” Credibility determinations are for the trier of fact and are not reviewable on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The jury heard about the ongoing civil lawsuit filed by O.L. and T.C. against backpage.com, defendant, and Miles-Johnson, and the jury was able to properly assess the victims’ credibility accordingly, something time or a severance would have no effect on. Defendant also speculates that Xavier Henderson would have been subpoenaed and brought to trial, but he fails to support this claim with any cite to the record below or evidence in the record as to the nature of his testimony. Defendant has failed to show any actual prejudice as a result of defense counsel’s performance.

Failure to show either deficient performance or prejudice defeats defendant's claim of ineffective assistance of counsel. Here, defendant has failed to prove both; therefore, he has failed to prove ineffective assistance of counsel.

- b. It was a legitimate trial tactic for defense counsel to introduce potentially damaging evidence—that had been ruled admissible for the State's rebuttal—to minimize the damaging impact; therefore, defendant has failed to show counsel was ineffective. Further, defendant cannot show prejudice because the jury was properly instructed on its role.

An ineffective assistance of counsel claim fails if the actions of counsel are legitimate trial tactics. *McFarland*, 127 Wn.2d at 336 (citing *Garrett*, 124 Wn.2d at 519). “A party is entitled to [try to] minimize the adverse effect of a decision by raising the damaging testimony first.” *State v. Makela*, 66 Wn. App. 164, 170, 831 P.2d 1109 (1992) (quoting *Garcia v. Providence Medical Center*, 60 Wn. App. 635, 641, 806 P.2d 766 (1991)). In the present case, defense counsel chose to introduce the evidence surrounding defendant's prior convictions himself for legitimate tactical reasons.

ER 404(b) prohibits a court from admitting evidence of other crimes, wrongs, or act to prove the character of a person to show action in conformity therewith. *State v. Foxhaven*, 161 Wn.2d 168, 174–75, 163

P.3d 786 (2007). ER 404(b) evidence may be admissible for another purpose, however, such as proof of plan, motive, identity, or lack of accident. *Id.* at 175. In the present case, the ER 404(b) evidence at issue was defendant's prior convictions for promoting prostitution. *See* Br. of App. p. 27–28. This evidence had been the subject of extensive argument during motions in limine. 5RP 294–305. At that time, the court reserved ruling on the question of admissibility in rebuttal as to lack of mistake or absence depending on the testimony presented. 5RP 308–09.

After hearing such testimony, the trial court ruled the details surrounding defendant's prior convictions were admissible under ER 404(b) for the State's rebuttal case. *See*, 12RP 920–22, 925. The court explained that the fact of the convictions could come in at that point—during the State's cross-examination—under ER 609, but the ER 404(b) details surrounding the convictions could come in during the State's rebuttal case. 12RP 925–26.

On the redirect of defendant, defense counsel elicited the ER 404(b) evidence:

[DEFENSE]: On your – you have convictions for prostitution?

[DEFENDANT]: Yeah.

[DEFENSE]: Do you really want to talk about those?

[DEFENDANT]: Yeah, might as well.

12RP 938. Defendant then testified as to the ages of the victims from his prior convictions and the fact that he pleaded guilty in both those cases.

12RP 938–39. Then, because defense had opened the door, the State cross-examined defendant further on the details of those convictions rather than waiting for the State’s rebuttal case. *See* 12RP 943–48. Given that the court had already ruled the evidence admissible for the State’s rebuttal case, defense counsel made the tactical decision to bring the evidence in front of the jury on his own terms to try to minimize any damaging effect. This was a tactical decision that cannot be the basis for an ineffective assistance of counsel claim.

Defendant further cannot show the requisite prejudice for this ineffective assistance of counsel claim. Although defendant did not request a limiting instruction specific to the ER 404(b) evidence—thus one was not given—the jury was instructed on their proper role as jurors. Jury instruction number one, in relevant part, stated:

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal prejudice. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 71. The jury is presumed to follow the court's instructions. *Emery*, 174 Wn.2d at 766. Defendant has failed to show the jury did not do so in this

case. Therefore, the jury acted impartially and based their decision only on the evidence and law presented as instructed. Defendant has failed to prove he was actually prejudiced by counsel's choice to pre-emptively introduce evidence in an attempt to minimize any damaging effect.

D. CONCLUSION.

Defendant's convictions for promoting the commercial sex abuse of a minor and second degree promoting prostitution do not violate double jeopardy because the offenses are different in law. Defense counsel was not ineffective for choosing not to move to sever defendant's trial and choosing to introduce ER 404(b) evidence before the State in an attempt to minimize any adverse effect. Further, defendant has failed to show he was actually prejudiced by either of these alleged deficiencies of counsel.

For the foregoing reasons, the State respectfully requests this court affirm defendant's convictions.

DATED: October 27, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Jordan McCrite
Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{efile} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/27/15 
Date Signature

PIERCE COUNTY PROSECUTOR

October 27, 2015 - 11:13 AM

Transmittal Letter

Document Uploaded: 2-471213-Respondent's Brief.pdf

Case Name: State v. Joshua Jones

Court of Appeals Case Number: 47121-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

marietrombley@comcast.net