

9  
**RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CLERK'S OFFICE**

Aug 02, 2016, 3:31 pm

**RECEIVED ELECTRONICALLY**

NO. 92771-5

bjh

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

SHACON FONTANE BARBEE,

Appellant.

---

**SUPPLEMENTAL BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DENNIS J. McCURDY  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 477-9497



**ORIGINAL**

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u> .....	7
1. WHEN A DEFENDANT ENGAGES IN ACTS OF PROMOTING PROSTITUTION OF MORE THAN ONE VICTIM, HE MAY BE PROSECUTED FOR MORE THAN ONE COUNT .....	7
a. The Statutes.....	7
b. Unit Of Prosecution Analysis .....	8
c. The State Properly Charged Two Counts Of Promoting Prostitution.....	11
d. Absurd Versus Reasoned Results .....	17
e. Charging And Punishment Considerations.....	18
2. THE SENTENCE ON COUNT 1 EXCEEDS THE STATUTORY MAXIMUM FOR THE OFFENSE .....	21
D. <u>CONCLUSION</u> .....	23

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Bell v. United States, 349 U.S. 81,  
75 S. Ct. 620, 99 L. Ed. 905 (1955).....8

Blockburger v. United States, 284 U.S. 299,  
52 S. Ct. 180, 76 L. Ed. 306 (1932).....16

Washington State:

City of Kennewick v. Fountain, 116 Wn.2d 189,  
802 P.2d 1371 (1991).....19

In re Hartzell, 108 Wn. App. 934,  
33 P.3d 1096 (2001).....22

State v. Adel, 136 Wn.2d 629,  
965 P.2d 1072 (1998).....8, 9, 16, 18, 21

State v. Barbee, 2015 WL 9462041 (2015) .....21

State v. Barrington, 52 Wn. App. 478,  
761 P.2d 632 (1988), rev. denied,  
111 Wn.2d 1033 (1989) .....20

State v. Berlin, 133 Wn.2d 541,  
947 P.2d 700 (1997).....14

State v. Bobic, 140 Wn.2d 250,  
996 P.2d 610 (2000).....14

State v. Brush, 183 Wn.2d 550,  
353 P.3d 213 (2015).....21

State v. Calle, 125 Wn.2d 769,  
888 P.2d 155 (1995).....19

<u>State v. Contreras</u> , 124 Wn.2d 741, 880 P.2d 1000 (1994).....	17
<u>State v. Elliott</u> , 114 Wn.2d 6, 785 P.2d 440 (1990).....	14, 15, 17, 18
<u>State v. Fenter</u> , 89 Wn.2d 57, 569 P.2d 67 (1977).....	15
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	16
<u>State v. Graham</u> , 153 Wn.2d 400, 103 P.3d 1238 (2005).....	11
<u>State v. Hughes</u> , 166 Wn.2d 675, 212 P.3d 558 (2009).....	9
<u>State v. Judge</u> , 100 Wn.2d 706, 675 P.2d 219 (1984).....	20
<u>State v. K.R.</u> , 169 Wn. App. 742, 282 P.3d 1112 (2012).....	9
<u>State v. Kier</u> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	10, 15
<u>State v. Leyda</u> , 157 Wn.2d 335, 138 P.3d 610 (2006).....	9, 16
<u>State v. Mason</u> , 31 Wn. App. 680, 644 P.2d 710 (1982).....	12-16
<u>State v. McGee</u> , 122 Wn.2d 783, 864 P.2d 912 (1993).....	10, 17
<u>State v. McReynolds</u> , 117 Wn. App. 309, 71 P.3d 663 (2003).....	18
<u>State v. Ose</u> , 156 Wn.2d 140, 124 P.3d 635 (2005).....	9, 16, 18

<u>State v. Riofta</u> , 166 Wn.2d 358, 209 P.3d 467 (2009).....	10
<u>State v. Root</u> , 141 Wn.2d 701, 9 P.3d 214 (2000).....	12
<u>State v. Smith</u> , 124 Wn. App. 417, 101 P.3d 158 (2004), <u>aff'd</u> , 159 Wn.2d 778 (2007) .....	10
<u>State v. Song</u> , 50 Wn. App. 325, 748 P.2d 273 (1988).....	13, 14, 15, 18
<u>State v. Tili</u> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	10

Statutes

Washington State:

LAWS of 1975, 1st Ex. Sess., ch. 260, § 9A.88.070 .....	15
LAWS of 1975, 1st Ex. Sess., ch. 260. § 9A.88.080 .....	15
LAWS of 2007, ch. 368, § 13 (eff. July 22, 2007) .....	15
LAWS of 2008, ch. 207, §§ 3-4.....	9
LAWS of 2010, ch. 289, § 14 (eff. June 30, 2010) .....	22
LAWS of 2011, ch. 336, § 413 (eff. July 22, 2011) .....	15
LAWS of 2012, ch. 141, § 1 (eff. June 7, 2012) .....	15
RCW 9.68A.040.....	12
RCW 9.68A.101.....	22
RCW 9.94A.411.....	20
RCW 9.94A.510.....	8, 18, 21

RCW 9.94A.515.....8, 18  
RCW 9.94A.530.....20  
RCW 9.94A.535.....2, 21  
RCW 9.94A.589.....20  
RCW 9A.20.021.....22  
RCW 9A.56.160.....15  
RCW 9A.88.060.....8, 11  
RCW 9A.88.070.....15  
RCW 9A.88.080.....7, 8, 13, 15

**A. ISSUES PRESENTED**

1. Do Barbee's two convictions for Promoting Prostitution in the Second Degree (counts 4 and 5), constitute a single "unit of prosecution" where each count involved a different victim?

2. The court imposed a 420-month exceptional sentence on count 1, a conviction for Promoting Commercial Sex Abuse of a Minor (PCSAM). At the time Barbee committed the acts that supported that charge, PCSAM was a Class B felony with a 10 year (120 month) statutory maximum penalty. The State concedes that the court was limited to imposing a 120-month sentence on count 1.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

A jury found Barbee guilty of the following crimes:

- Count 1:** Promoting Commercial Sex Abuse of a Minor  
Victim: SE DOV: 1/1/10 through 8/31/10
- Count 2:** Promoting Commercial Sex Abuse of a Minor  
Victim: SE DOV: 9/1/10 through 12/31/10
- Count 4:** Promoting Prostitution in the Second Degree  
Victim: BK DOV: 1/1/10 through 12/31/10
- Count 5:** Promoting Prostitution in the Second Degree  
Victim: CW DOV: 5/10/10 through 8/1/10
- Count 6:** Leading Organized Crime
- Count 7:** Theft 1
- Count 8:** Theft 1
- Count 9:** Theft 2

CP 307-09, 311-16.<sup>1</sup> The jury also found the “pattern of sexual abuse of a minor” aggravating factor in count 1. CP 308; RCW 9.94A.535(3)(g).

Barbee’s offender score was 21.5 on the greatest offenses, counts 1 and 2, with a standard range of 240 to 318 months. CP 325, 331. The court found the “free crimes” aggravating factor, that multiple current offenses and high offender score results in some current offenses going unpunished. CP 332-33; RCW 9.94A.535(2)(c). Holding that each aggravating factor provided a substantial and compelling reason to impose an exceptional sentence, the court imposed a 420-month sentence on counts 1 and 2 – concurrent with each other and the remaining counts, with a total term of confinement of 420 months. 30RP 21-24; CP 323-33.

## 2. SUBSTANTIVE FACTS

In February of 2010, just 16 years old, bipolar, and with an awful family life, SE began prostituting herself for Barbee, who she had met in a shopping mall. 18RP 8, 14-15, 23, 133. Barbee convinced SE that he cared about her and that they would spend the rest of their lives together. 18RP 16. SE believed she was in love with him. 18RP 16. Things changed.

SE testified that she was constantly working and no matter how tired she was, she could not go to bed unless Barbee gave his okay. 18RP 40.

There were days when SE would work in-calls all day at a motel and then be

---

<sup>1</sup> Counts 3 and 10 were dismissed at the request of the State when the victim pertaining to those counts could not be located for trial. 28RP 22.

forced to work the "tracks" (high volume areas of prostitution) of Seattle and Pacific Highway South until 6 or 7 in the morning, sometimes in freezing weather while wearing skimpy outfits. 18RP 15-16, 59, 65-66. All of Barbee's "girls" were required to work until he was happy and with an expectation that each would make at least a thousand dollars a night for him. 18RP 66-67.

On December 3, 2010, Barbee took SE to a motel to meet a client. 17RP 109; 18RP 93, 127. Unbeknownst to Barbee, the "client" was a detective working undercover. 19RP 121-24, 136. After a short car chase, Barbee was placed under arrest. 20RP 126-28. Barbee's iPhone was taken into evidence and a warrant obtained to check its contents. 21RP 16, 19, 30. The phone contained over 12,000 text messages. 25RP 23-25, 31-35. Using the numbers from the iPhone, and cross-referencing the numbers with on-line sex ads, detectives were able to track down and contact victims BK and CW, the two victims that are the subject of Barbee's unit of prosecution challenge. 21RP 52-56.

One of SE's tasks was to recruit new girls into the business. 18RP 29. She would peruse websites like Myspace or Facebook looking for girls. 18RP 18-19. One of the girls she recruited was BK. 18RP 28.

BK was a domestic violence victim and unemployed single mother who suffered from depression. 16RP 101, 103-04, 110. In April of 2010,

just prior to BK's 18<sup>th</sup> birthday, SE found BK's Facebook page and started communicating with her. 16RP 105. SE convinced BK to meet her at the Sutton Suites Motel on Pacific Highway where they could "hang out."

16RP 107-08. The very next day, SE introduced BK to Barbee and was told that she would be working for him as an escort. 16RP 113. Barbee told BK that all the money she earned would go to him but that he would provide her with everything she needed to make her life and her daughter's life better. 16RP 114, 136. Barbee told BK that she would post Internet sex ads that he would approve, that he would provide her with a cell phone for the trade, and that she would have to do in-calls and out-calls. 16RP 115, 119-24.

BK received her first in-call at the motel that same day. 16RP 117. Within days, Barbee had SE and BK turning tricks out of the motel room, as well as walking the tracks on Pacific Highway. 16RP 125-29.

On March 25, 2010, the police received a complaint of juvenile prostitutes working out of the motel room. 12RP 62-64; 13RP 43-46, 58. The police found two young provocatively dressed girls inside -- SE and BK. 12RP 86; 13RP 16; 17RP 36. The room was filled with prostitution and pimping related items, lingerie, sex toys, a large bag filled with condoms, handcuffs, a whip, a dildo, lubricant, multiple pairs of stiletto heels, multiple cell phones, a digital camera, and multiple laptop computers,

including one that belonged to Barbee. 12RP 68-71, 80-85; 13RP 17, 23; 18RP 38-39, 42-45.

Upon her release from jail, BK went to her parents' house with the intent to stop working for Barbee. 16RP 145, 154. A few months later, however, Barbee convinced BK to come over to his apartment where he kept her captive and had her walking the tracks again. 16RP 155-60. Finally, one evening (BK believed it was in late October 2010) after Barbee had dropped her off to work the streets, BK fled and stopped working for Barbee for good. 16RP 166; 17RP 41.

Another girl SE recruited for Barbee was CW. 18RP 50. A child of divorced parents, CW had been physically abused by her father, sexually abused by her father's roommate, and suffered from bulimia, PTSD and bipolar disorder. 14RP 9-12. CW once tried to kill herself and ended up undergoing long-term mental health treatment at Fairfax Hospital. 14RP 11.

In April of 2010, just after her 18<sup>th</sup> birthday, CW began receiving e-mails on her Myspace account from SE. 14RP 17-20. "Naïve" and wanting a way out of her unhappy life, CW agreed to meet SE at a Motel 6 on Pacific Highway. 14RP 24, 26. She was then taken to Barbee and instructed that he would be her pimp and that he would provide her with clothing, jewelry, and a nice hotel. 14RP 30-36. CW started working for Barbee the very next day. 14RP 41-42; 18RP 52. Asked why, CW testified

that emotionally, she just wanted to be loved and have someone take care of her. 14RP 38.

CW posted ads on-line with photos taken by Barbee, and she began turning tricks with SE out of the motel. 14RP 42, 50-51; 18RP 52, 58, 67-68. Barbee also set up a Backpage ad for CW and began taking her to out-calls; dropping her off in his Mercedes. 14RP 90-91. Other than out-calls, CW was not allowed to leave the motel room, with the exception of being taken to Barbee's apartment on one occasion so that he and his cousin could have sex with her at the same time. 14RP 104, 109. CW testified that Barbee treated her as if she "wasn't a person." 14RP 114.

On June 9, 2010, CW finally gained the courage to leave. 14RP 30-31. She had her grandmother pick her up, she changed her phone number, and she had no further contact with Barbee. 14RP 30-31, 35, 39.

As discussed above, when Barbee was arrested in the sting operation, detectives tracked down other victims through information on his iPhone. 21RP 52-56. When detectives contacted BK, she led them to two storage units rented by Barbee. 21RP 59-60, 63-64. Inside, detectives found female clothing and lingerie, financial documents, business cards for various motels on Pacific Highway, handwritten sex ads, and a number of DVD's on pimp-related matters, with titles such as 48 Laws of the Game and Pimpology by Pimping Ken. 21RP 118-21; 24RP 100-03. Also

recovered from the storage unit was \$18,300 in cash and a ledger that had a beginning balance of \$40,000. 21RP 127-28.

C. **ARGUMENT**

1. **WHEN A DEFENDANT ENGAGES IN ACTS OF PROMOTING PROSTITUTION OF MORE THAN ONE VICTIM, HE MAY BE PROSECUTED FOR MORE THAN ONE COUNT**

Count 4 charged Barbee with promoting prostitution of BK between January 1, 2010 and December 31, 2010. CP 246. Count 5 charged Barbee with promoting prostitution of CW between May 10, 2010 and August 1, 2010. CP 246. Despite the fact that each charge pertained to a separate victim, Barbee contends that he committed a single "unit of prosecution" because the offenses overlapped in time. This argument should be rejected. The legislature did not intend that a defendant who prostitutes an unlimited number of victims be punished the same as a defendant who promotes prostitution of a single victim.

a. **The Statutes**

A person is guilty of promoting prostitution in the second degree if he or she knowingly (a) profits from prostitution; or (b) advances prostitution.

RCW 9A.88.080(1)(a) and (b).

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 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.

RCW 9A.88.060(1) (emphasis added).

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(2) (emphasis added).

Second degree promoting prostitution is a Class C felony offense with a seriousness level of III. RCW 9A.88.080(2); RCW 9.94A.515. The standard range for a first offense is 1 to 3 months. RCW 9.94A.510.

**b. Unit Of Prosecution Analysis**

The double jeopardy provisions of both the state and federal constitutions prohibit multiple convictions if the defendant has committed just "one unit of the crime." State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998). When a defendant has been convicted of violating one statute multiple times and a "unit of prosecution" double jeopardy challenge is made, a reviewing court must answer two questions. First, the court must determine what act or course of conduct the legislature intended as the punishable act under the specific criminal statute. Id. at 633-34; Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). Second,

once the court has determined the legislatively-created “unit of prosecution” for the crime, the court must perform a factual analysis to determine whether the defendant committed just one or multiple crimes. State v. K.R., 169 Wn. App. 742, 748-49, 282 P.3d 1112 (2012).

The legal question of what act or course of conduct the legislature has created as a unit of prosecution is a question of statutory interpretation and legislative intent. Adel, 136 Wn.2d at 634. Intent may be shown by the specific language of the statute at issue. See, e.g., State v. Ose, 156 Wn.2d 140, 124 P.3d 635 (2005) (the statutory language shows that each possession of an access device is one “unit of prosecution,” and thus, a defendant possessing multiple access devices faces multiple counts). Legislative intent may also be determined by reviewing the “legislative history, the structure of the statutes, their purpose, or other sources.” State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009).

In addition, an appellate court may have already determined the unit of prosecution for a particular crime or previously interpreted similar language. See, e.g., State v. Leyda, 157 Wn.2d 335, 346 n.9, 138 P.3d 610 (2006) (relying on Ose, supra, in determining the unit of prosecution for identify theft), superseded by statute, LAWS of 2008, ch. 207, §§ 3-4. If the unit of prosecution has already been determined, *stare decisis* requires a reviewing court adhere to the earlier decision unless the opposing party

demonstrates that the prior decision is “incorrect and harmful.” State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (refusing to overrule prior double jeopardy determination regarding robbery and assault where not shown prior decision was incorrect and harmful).

Along these same lines, the legislature is presumed to be familiar with prior court decisions regarding double jeopardy, and the failure of the legislature to take any subsequent action demonstrates legislative acquiescence in the judicial interpretation of the statute. Kier, 164 Wn.2d at 805 (Court found legislative acquiescence even though only three years had passed since judicial decision finding convictions for first degree robbery and second degree assault violate double jeopardy).

Finally, only if a reviewing court is unable to determine the proper unit of prosecution *from any means* will the court apply the rule of lenity and construe a truly ambiguous statute in favor of the defendant. State v. Smith, 124 Wn. App. 417, 432, 101 P.3d 158 (2004), aff’d, 159 Wn.2d 778 (2007).<sup>2</sup>

---

<sup>2</sup> A statute is “not ambiguous merely because different interpretations are conceivable.” State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). After all, the fundamental objective is to carry out the legislature’s intent. State v. Riofta, 166 Wn.2d 358, 365, 209 P.3d 467 (2009). A court will not reject “an available and sensible interpretation in favor of a fanciful or perverse one.” State v. McGee, 122 Wn.2d 783, 789, 864 P.2d 912 (1993). Rather, a court will adopt the interpretation that is most consistent with the legislative purpose. Id. at 790. Lenity applies only as a last resort if “the language and structure, legislative history, and motivating policies” of the statute leave the court with a reasonable doubt as to the statute’s meaning. Id. at 795.

**c. The State Properly Charged Two Counts Of Promoting Prostitution**

An examination of the language of the promoting prostitution statute and statutory definitions shows that the legislature intended that where a perpetrator promotes the prostitution of separate victims, a separate count may be charged for each victim. Notably, under the applicable statutes, a person “advances prostitution” if “he or she causes or aids *a person* to commit or engage in prostitution.” RCW 9A.88.060(1) (emphasis added). A person “profits from prostitution” if “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(2) (emphasis added). In both cases, the language focuses on a singular person. The legislature certainly could have, but did not, use the phrase “person or persons,” or other language that would denote an intent to limit charging to a single count regardless of the number of victims. See, e.g., State v. Graham, 153 Wn.2d 400, 405, 103 P.3d 1238 (2005) (Court holds that a separate count can be charged for each person put at risk under the reckless endangerment statute that penalizes reckless conduct that “creates a substantial risk of death or serious physical injury to *another person*”).

Similarly, in State v. Root, 141 Wn.2d 701, 9 P.3d 214 (2000), this Court was tasked with determining the unit of prosecution under the sexual exploitation statute, RCW 9.68A.040(1)(b). A person is guilty of sexual exploitation if one “compels, aids, invites, employs, authorizes, or causes a *minor* to engage in sexually explicit conduct, while knowing such conduct will be photographed.” Id. at 708 (emphasis added). Noting the singular nature of the language used, “a minor,” this Court held that the unit of prosecution is per minor, per session. Id. at 710-11. If there are two minors involved in a single photo session, “one unit of crime [can be charged] for each child involved in the session.” Id. at 711. Considering the similar nature of the sexual exploitation statute and promoting prostitution statute, and the singular language used in both, it would be difficult to say how the sexual exploitation statute is per victim and the promoting prostitution statute is not.

Barbee has suggested that this issue is controlled by State v. Mason, 31 Wn. App. 680, 644 P.2d 710 (1982). It is not. The court in Mason relied on a flawed unit of prosecution analysis and it has been effectively overruled.

Yong Mason was the proprietor of a steam bath, a front for prostitution. She was convicted of three counts of promoting prostitution, one count for each of her three employees. Mason argued that under a unit

of prosecution theory, she could only be convicted of a single count. Thus, the court was tasked with determining legislative intent, i.e., what unit of prosecution did the legislature create. The court did not hold that the legislature intended that when a defendant promotes multiple victims as prostitutes, he can only be charged with a single count. Rather, the court ruled in favor of Mason based upon the rule of lenity and the court's misguided belief that the statute was wholly ambiguous. Mason, 31 Wn. App. at 686-87.

Six years later, in State v. Song, 50 Wn. App. 325, 748 P.2d 273 (1988), Division One rejected the reasoning of Mason. Song was convicted of one count of promoting prostitution and two counts of attempted promoting prostitution for acts involving three different victims. Song argued that under Mason she could only be convicted of a single count. In rejecting Song's argument, the court stated that "we disagree with its [Mason's] rationale. The rule of lenity comes into play only where a statute is ambiguous. RCW 9A.88.080 is not ambiguous. There is simply no indication of legislative intent to impose only a single punishment." Song, 50 Wn. App. at 328 (citation omitted). In upholding all three convictions, the court added that the legislature made "a person's simultaneous promotion of prostitution on the part of more than one prostitute a criminal act as to each, liable to cumulative punishment." Id.

Two years later, this Court decided State v. Elliott, 114 Wn.2d 6, 785 P.2d 440 (1990). Elliott ran the Valentine's escort service, a front for prostitution. For acts of promoting as prostitutes two of her employees, Elliott was charged and convicted of two counts of promoting prostitution, with each count naming a separate victim. The sentencing court calculated Elliott's offender score as 1 by considering her conviction on the second count as a "prior offense" under the applicable sentencing statute, thus increasing her standard range from 1 to 3 months to 3 to 8 months. Elliott argued, among other things, that her two convictions violated double jeopardy and that application of the Song decision over the Mason decision was an *ex post facto* violation. This Court rejected all of Elliott's arguments. This Court held that the State properly charged and the jury properly convicted Elliott of two counts of promoting prostitution, and that the sentencing court properly determined her offender score based two convictions. Elliott, 114 Wn.2d at 18-19.

The legislature is presumed to be familiar with prior judicial construction of its statutes. State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000). The failure of the legislature to amend a statute to change the statute's judicial construction is reflective of legislative acquiescence in the court's interpretation. State v. Berlin, 133 Wn.2d 541, 558, 947 P.2d 700 (1997). This is particularly true where, like here, a considerable period of

time has passed since the judicial construction of the statute<sup>3</sup> or where the legislature has amended the statute since the judicial construction but has taken no action in response to the judicial decision.<sup>4</sup> Kier, at 804.

Reviewing courts “do not lightly set aside precedent.” Kier, 164 Wn.2d at 804. The burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful. Id. Barbee has failed in this task.

It is also worth examining in detail how the Mason court drifted off course.<sup>5</sup> First, the court focused on the “evil” the legislature sought to punish, “advancing prostitution” and “profiting from prostitution.” Mason, at 687. This “evil,” the court said, was equally addressed whether a defendant had one prostitute working for him or several. Id. This rationale is unavailing. In unit of prosecution cases, there will *always* be but a single “evil” because, unlike other double jeopardy doctrines, each conviction pertains to the same statute. For example, under the possession of stolen property statute for access devices (RCW 9A.56.160(1)(c)), the evil addressed by the statute is the possession of stolen access devices, an evil

---

<sup>3</sup> E.g., State v. Fenter, 89 Wn.2d 57, 569 P.2d 67 (1977) (a period of five years showed legislative acquiescence). Over 25 years have passed since the Song and Elliott decisions.

<sup>4</sup> Both the first and second degree promoting prostitution statutes have been amended since the Song and Elliott decisions, without a response to those decisions. See LAWS of 2012, ch. 141, § 1 (eff. June 7, 2012); LAWS of 2007, ch. 368, § 13 (eff. July 22, 2007); LAWS of 1975, 1st Ex. Sess., ch. 260, § 9A.88.070; LAWS of 2011, ch. 336, § 413 (eff. July 22, 2011); and LAWS of 1975, 1st Ex. Sess., ch. 260, § 9A.88.080.

<sup>5</sup> The State has found no published case that has relied on Mason for the proposition that a person can only be charged with a single count of promoting prostitution regardless of the number of separate victims.

that is equally addressed whether a defendant possesses a single or multiple stolen access device. Still, in Ose, this Court upheld Ose's conviction on 25 counts – one count for each access device possessed. 156 Wn.2d at 149.

In focusing on the evil a statute seeks to address, the Mason court confused the unit of prosecution test with the Blockburger<sup>6</sup> or “same evidence” test for double jeopardy. The Blockburger or “same evidence” test is used to determine legislative intent when a defendant commits a single act that violates “two distinct statutory provisions.” Adel, 136 Wn.2d at 633. Under that test, one factor to consider in determining whether two convictions violate double jeopardy is whether the two statutes address the same or different evils. See State v. Freeman, 153 Wn.2d 765, 773, 108 P.3d 753 (2005) (determining if convictions for robbery and assault violate double jeopardy).<sup>7</sup>

---

<sup>6</sup> Referring to Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

<sup>7</sup> Another indication the court confused the two tests is the fact that upon finding a unit of prosecution violation the Mason court noted that “[t]his does not mean, however, that the state cannot charge and attempt to prove multiple counts of promoting the prostitution of the three women,” rather, it “simply means that multiple punishments cannot be imposed,” Mason, at 687. This is an accurate statement where a defendant is charged under two separate statutes, but it is not true when the unit of prosecution is the chargeable act established by the legislature. Unlike other double jeopardy doctrines, a “unit of prosecution” analysis asks whether the State may *charge* multiple counts; not whether multiple punishments may be imposed. See Leyda, 157 Wn.2d at 346 (it is a “constitutional violation” to charge in violation of a defined unit of prosecution).

**d. Absurd Versus Reasoned Results**

In interpreting any statute, a court must avoid constructions that yield unlikely, strange or absurd consequences. State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994). A court must adopt an interpretation that is most consistent with the legislative purpose and intent. McGee, 122 Wn.2d at 789. Barbee's interpretation would lead to absurd results, undercut the legislature's intent and create inequities that would allow a perpetrator to engage in conduct over time, over space and with a vast number of victims while facing minimal consequences, the same consequences as a perpetrator engaging in far less egregious conduct.

Under Barbee's interpretation of the statute, a perpetrator who commits acts involving a single victim over a short period of time faces the exact same number of charges as a perpetrator who commits simultaneous acts involving 10, 50 or 100 victims over a long period of time.

Under Barbee's interpretation, a perpetrator's operation spanning every city and county in the state would face but a single count – the same as a perpetrator committing a single act on a Seattle street corner.

Under Barbee's interpretation, a perpetrator would face but a single count for an operation that spanned a decade and involved countless women so long as there was no gap in time between the courses of conduct with each woman. See Elliott, 114 Wn.2d at 12 (promoting prostitution charged

as “a continuing offense”); see also Adel, 136 Wn.2d at 635 (the State cannot skirt double jeopardy protections by breaking a single crime into temporal or spatial units). At the same time that the perpetrator in the above example would face but a single count, a perpetrator engaged in the same acts, i.e., equally culpable, would face multiple charges where there is a gap in time, even a small gap, between his course of promoting different women.

The legislature could not have intended such disparate criminal behavior to be treated equally, as the examples above highlight – 1 to 3 months for a first offense.<sup>8</sup> The interpretation that addresses the evil of promoting prostitution, and holds perpetrators accountable in proportion to the harm caused to their victims and the extent of their culpable behavior, is the interpretation of the statute as recognized in Song and Elliott.

**e. Charging And Punishment Considerations**

In unit of prosecution cases and other double jeopardy cases, there is a tendency to think of double jeopardy as a judicial tool needed to constrain prosecutorial discretion. See, e.g., State v. McReynolds, 117 Wn. App. 309, 335, 71 P.3d 663 (2003) (expressing concern about “overzealous

---

<sup>8</sup> It seems inconceivable that the legislature intended for a person who possesses multiple access devices be punished substantially greater than a person who promotes as prostitutes multiple victims. A first offender for possession of a stolen access device (PSP 2) faces a sentence of 0 to 60 days. RCW 9.94A.510; RCW 9.94A.515. A first offender for promoting prostitution faces a sentence of 1 to 3 months. Id. A person who possesses nine stolen access devices faces a sentence of 22 to 29 months. Id.; Ose, supra. Under Barbee’s interpretation of the statute, a person who promotes as prostitutes nine victims still faces the same 1 to 3 month standard range as a first offender. Id.

prosecutors seeking multiple convictions based upon spurious distinctions between the charges”). This is a valid concern. This Court has recognized that prosecutors do have broad discretion in determining what charges to bring and when to file them. See, e.g., City of Kennewick v. Fountain, 116 Wn.2d 189, 194, 802 P.2d 1371 (1991) (court upholds challenge to the prosecutor’s decision to charge one of two applicable crimes, the crime that carried the harsher penalty).

At the same time, it is important to recognize that subject to constitutional constraints, it is the legislature that possesses the power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). An actual violation of double jeopardy occurs only where the prosecutor or the court has exceeded the authority granted by the legislature in charging an offense or in imposing punishment for a conviction. Id. at 776.

On the most basic level, what governs the number of charges that can be filed against any defendant is the “unit of prosecution” established by the legislature, the number of criminal acts or “units of prosecution” engaged in by a perpetrator, and the quantum of admissible evidence available to prove each act as charged.<sup>9</sup> Acts that could permissibly be

---

<sup>9</sup> The exercise of prosecutorial discretion in charging involves many considerations, including public interest concerns and the strength of the case that can be pursued. State v.

charged separately can also be charged as a single "continuing course of conduct." See, e.g., State v. Barrington, 52 Wn. App. 478, 761 P.2d 632 (1988) (three-month period of promoting a single prostitute properly charged as a single count), rev. denied, 111 Wn.2d 1033 (1989).

Once properly charged, there are an array of controls that help ensure that defendants are punished according to the severity of their criminal acts and their criminal history. See RCW 9.94A.530 (absent substantial and compelling reasons, the length of a sentence is dictated by the severity of the crime and the person's criminal history). In addition, multiple convictions that may be permissible under the double jeopardy clause may not score against each<sup>10</sup> or concurrent sentences may be imposed.<sup>11</sup> In each case, a defendant receives no additional confinement for having committed and been convicted of multiple offenses.

In sum, there are a variety of legal doctrines that serve to limit or ameliorate a prosecutor's filing discretion and potential punishment that any particular defendant may face. In a unit of prosecution case, a reviewing court possesses two important functions. First, if not already determined,

---

Judge, 100 Wn.2d 706, 712-13, 675 P.2d 219 (1984). This also includes legislatively enacted filing and disposition guidelines. See RCW 9.94A.411.

<sup>10</sup> Current crimes that "encompass the same criminal conduct" score as a single point. RCW 9.94A.589(1)(a).

<sup>11</sup> With few exceptions, multiple current convictions "shall be served concurrently." RCW 9.94A.589(1)(a).

the reviewing court must determine the unit of prosecution for the crime charged. Adel, 136 Wn.2d at 633-34. This is solely a question of legislative intent. Id. Second, the court must perform a factual analysis to determine whether a defendant has committed just one or multiple crimes. Id. Concerns regarding charging discretion and potential punishment are appropriate but do not change the unit of prosecution for promoting prostitution – Barbee was properly charged with two counts, one for each victim, the unit of prosecution provided by the legislature. Had these two convictions been Barbee’s only offenses, he would have faced 3 to 8 months confinement. RCW 9.94A.510.

**2. THE SENTENCE ON COUNT 1 EXCEEDS THE STATUTORY MAXIMUM FOR THE OFFENSE**

Barbee received a 420-month exceptional sentence on counts 1 and 2, concurrent. The exceptional sentence was based on the aggravating factor that Barbee’s multiple current offenses and his high offender score result in some of his current offenses going unpunished. CP 332-33; RCW 9.94A.535(2)(c).<sup>12</sup> Barbee does not challenge the 420-month exceptional sentence on count 2.

---

<sup>12</sup> Pursuant to State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015), the “pattern of sexual abuse” aggravator was reversed for jury instruction error. State v. Barbee, 2015 WL 9462041 (2015).

Count 1 was scored using an incorrect seriousness level and standard range. In short, the acts in count 1 occurred prior to an amendment to the promoting commercial sex abuse of a minor statute, a change that increased the seriousness level from a level VIII to a level XII. See RCW 9.68A.101, LAWS of 2010, ch. 289, § 14 (eff. June 30, 2010). Under In re Hartzell, 108 Wn. App. 934, 945, 33 P.3d 1096 (2001), the court should have used the lower seriousness level which would result in a standard range of 108 to 144 months instead of 240 to 318 months.<sup>13</sup> Despite the incorrect sentence on count 1, the Court of Appeals ruled that Barbee did not need to be resentenced because the sentencing court indicated that the imposition and length of sentence would remain the same so long as one of the two bases for imposing the exceptional sentence remained.

This Court accepted review on the issue of the exceptional sentence imposed on count 1. The State concedes error but for a different reason. Overlooked by the court and the parties, along with the change in the seriousness level of the crime, the amendment to the statute changed the crime from a Class B to a Class A felony. A Class B felony carries a maximum penalty of 10 years (120 months). RCW 9A.20.021. Thus, the sentencing court cannot impose an exceptional sentence. The court can impose no more than 120 months, which is within Barbee's standard range.

---

<sup>13</sup> The standard range for count 2 was correctly calculated to be 240 to 318 months.

D. CONCLUSION

This Court should affirm Barbee's conviction and remand the case to the trial court to address the illegal sentence on count 1.

DATED this 2 day of August, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DENNIS J. McCURDY, WSBA #21975  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the petitioner, Maureen Cyr at Washington Appellate Project, containing a copy of the Supplemental Brief of Respondent, in STATE V. BARBEE, Cause No. 92771-5, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington

08-02-16  
Date

## OFFICE RECEPTIONIST, CLERK

---

**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Tuesday, August 02, 2016 3:33 PM  
**To:** 'Ly, Bora'  
**Cc:** McCurdy, Dennis; 'Maureen@washapp.org' (Maureen@washapp.org); 'wapofficemail@washapp.org'  
**Subject:** RE: Shacon Fontane Barbee/92771-5

Received 8/2/16.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:

[http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/clerks/](http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/)

Looking for the Rules of Appellate Procedure? Here's a link to them:

[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.list&group=app&set=RAP](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP)

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

**From:** Ly, Bora [mailto:Bora.Ly@kingcounty.gov]  
**Sent:** Tuesday, August 02, 2016 3:31 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** McCurdy, Dennis <Dennis.McCurdy@kingcounty.gov>; 'Maureen@washapp.org' (Maureen@washapp.org) <Maureen@washapp.org>; 'wapofficemail@washapp.org' <wapofficemail@washapp.org>  
**Subject:** Shacon Fontane Barbee/92771-5

Good afternoon,

Attached for filing in the above-referenced case, please find the **MOTION FOR LEAVE TO FILE OVER-LENGTH BRIEF and SUPPLEMENTAL BRIEF OF RESPONDENT.**

Please let me know if you should have difficulties opening the attachments.

Thank you,

Bora Ly  
Paralegal  
Criminal Division, Appellate Unit  
King County Prosecutor's Office  
W554 King County Courthouse  
516 Third Avenue

Seattle, WA 98104  
Phone: 206-296-9489  
Fax: 206-205-0924  
E-Mail: [bora.ly@kingcounty.gov](mailto:bora.ly@kingcounty.gov)

For

Dennis McCurdy  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent