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No. 71164-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

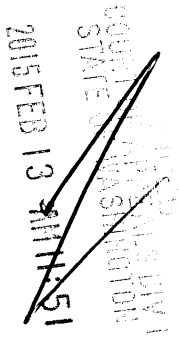
STATE OF WASHINGTON,

Respondent,

v.

SHACON F. BARBEE,

Appellant.



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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The two counts of promoting commercial sexual abuse of a minor encompassed a single unit of prosecution, as did the two counts of promoting prostitution and the two counts of theft from the Social Security Administration.

The constitutional prohibition of double jeopardy protects a defendant from multiple convictions under a single statute for committing a single unit of the crime. *Brown v. Ohio*, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *State v. Bobic*, 140 Wn.2d 250, 261, 996 P.2d 610 (2000); U.S. Const. amend. V; Const. Art. I, § 9. "The first step in the unit of prosecution inquiry is to analyze the criminal statute." *State v. Adel*, 136 Wn.2d 629, 635, 965 P.2d 1072, 1075 (1998); *accord State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007); *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). If the statute does not clearly and unambiguously identify the unit of prosecution, the rule of lenity requires resolving the ambiguity in favor of a single unit of prosecution. *State v. Hall*, 168 Wn.2d 726, 730, 230 P.3d 1048, 1050 (2010).

a. The artificial division of a year-long enterprise involving S.E. into two units of prosecution violated the prohibition against double jeopardy.

Mr. Barbee's convictions for two counts of promoting commercial sexual abuse of a minor encompassed a single unit of prosecution. Where, as here, the evidence indicates on-going instances of advancing

prostitution of a minor, the unit of prosecution for promoting commercial sexual abuse of a minor is the single on-going enterprise. *See State v. Gooden*, 51 Wn. App. 615, 620, 754 P.2d 1000 (1988). The definition of "advances commercial sexual abuse of a minor" includes several plurals, such as "customers," that indicates the Legislature's intent that multiple acts constitute a single unit of prosecution. *See* RCW 9.68A.101(3)(b). In addition, the definition includes the phrase "act or enterprise." *Id.* A statute is to be interpreted so that no words are meaningless or surplusage. *State v. Nam*, 136 Wn. App. 698, 704, 150 P.3d 617 (2007). To give meaning to both "act" and "enterprise," the statute must be interpreted as including both single acts and multiple acts, depending on the circumstances of the case.

The State does not analyze the statute. Instead, the State argues an on-going enterprise may constitute a continuing course of conduct for purpose of a unanimity instruction. Br. of Resp. at 28-32 (citing *State v. Gooden; State v. Barrington*, 52 Wn. App. 478, 761 P.2d 632 (1988); *State v. Elliott*, 114 Wn.2d 6, 785 P.2d 440 (1990)). In each of these cases, however, the defendant was charged with one count of promoting prostitution for each victim. By contrast, Mr. Barbee was charged with two counts of promoting commercial sexual abuse of a minor, each count

involving the same minor. CP 159-160. The State's argument is therefore misdirected.

The State argues the on-going enterprise ended when S.E. went out of town in the fall of 2010, on the grounds that S.E. did not intend to continue working for Mr. Barbee. Br. of Resp. at 32. S.E.'s intent is irrelevant. Mr. Barbee's intent that S.E. continue to work for him was clearly established by his on-going calls to her and his purchase of her airplane ticket to return to Seattle. 8/27/13RP 24, 80, 110, 114-16.

The State further argues "no actions of the defendant" met the elements of the offense between August and December 2010. Br. of Resp. at 32-33. The statute prohibits, *inter alia*, "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). Again, throughout the fall of 2010, S.E. and Mr. Barbee remained in contact and Mr. Barbee continued to encourage S.E. to work for him. 8/27/13RP 24, 80, 110, 114-16. Thus, Mr. Barbee's actions fell within the statutory catch-all phrase "any other conduct." The State's argument is unsupported by the record and should be disregarded.

One of Mr. Barbee's convictions for commercial sexual abuse of a minor must be vacated due to the double jeopardy violation.

b. The two convictions for promoting prostitution encompassed a single unit of prosecution, in further violation of the prohibition against double jeopardy.

Mr. Barbee's convictions for two counts of promoting prostitution encompassed a single unit of prosecution. Where, as here, the evidence indicates on-going instances of advancing prostitution, the unit of prosecution for promoting prostitution is the single on-going enterprise. *State v. Mason*, 31 Wn. App. 680, 687, 644 P.2d 710 (1982), *superseded by statute on other grounds in RCW 9.94A.400*. "The apparent evils the legislature sought to attack were 'advancing prostitution' and 'profiting from prostitution.' A person is equally guilty of either of those evils whether he has only one prostitute working for him or several." *Id.*

Contrary to the State's contention, *Mason* was not overruled by *State v. Song*, 50 Wn. App. 325, 748 P.2d 273 (1988) or *Elliott.* Br. of Resp. at 31. In *Song*, although this Court noted its disapproval of *Mason*, a case from Division Two, one division of the Court of Appeals cannot overrule a decision from another division. *Song*, 50 Wn. App. at 328. In *Elliott*, the petitioner was sentenced for two counts of promoting prostitution in the second degree based on advancing prostitution of two women that occurred after the decision in *Mason* but before this Court's decision in *Song.* 114 Wn.2d at 8. On appeal, the petitioner argued the

sentence violated the prohibition against *ex post facto* laws, and that she should have been sentenced pursuant to *Mason* and not pursuant to *Song*. *Id.* at 18. The Court disagreed and stated, "We ... conclude that her claim of *ex post facto* violation is without merit." *Id.* at 19. The Court further noted, "*Mason* was not decided under the sentencing reform act. It is therefore not applicable to petitioner's sentence which is governed by the Act, RCW 9.94A." *Id.* at 16. The petitioner in *Elliott* did not challenge the unit of prosecution and the Court did not overrule *Mason*, but only noted that the method of calculation of the defendant's offender score was superseded by the Sentencing Reform Act. Thus, the ruling in *Mason* that promoting prostitution of one or more women encompasses a single unit of prosecution was not overruled.

One of Mr. Barbee's convictions for promoting prostitution must be vacated due to the double jeopardy violation.

c. The artificial division of an on-going scheme to defraud the Social Security Administration into two units of prosecution also violated the prohibition against double jeopardy.

Mr. Barbee's convictions for two counts of theft from the Social Security Administration (SSA) encompassed a single unit of prosecution. The unit of prosecution for a series of thefts during an on-going scheme is the aggregated theft. "[W]here the successive takings are the result of a

single, continuing criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time that may elapse between each taking." *State v. Vining*, 2 Wn. App. 802, 808-09, 472 P.2d 564 (1970).

The State contends the adjustment to the dollar threshold for theft in the first degree constituted a change in the elements of the offense. Br. of Resp. at 36-39. This is unsupported by the Legislative history. The dollar threshold was adjusted in 2009 in Senate Bill 6167. Laws of 2009, ch. 431, § 7(1)(a). Testimony at the Senate Ways and Means Committee hearing on the bill, held on April 18, 2009, repeatedly referred to the increase in the dollar threshold as an "adjustment" to match inflation, not a change in the elements of the offense.[1] It may be noted, the State did not also artificially divide the charge of theft in the second degree from the Department of Social and Health Services into two separate offenses, even though the dollar threshold for that offense was similarly adjusted during the charging period. CP 247.

The State does not cite any authority to support its contention that an adjustment in a dollar threshold creates a new crime. Rather, the State cites to *State v. Aho*, in which the defendant was charged with child

[1] www.tvw.org/index.php?option=com_tvwplayer&eventID-2009040143A.

molestation spanning a period of time both before and after the statute was enacted. 137 Wn.2d 736, 739, 975 P.2d 512 (1999). Thus, in *Aho*, the statute did not exist during part of the charging period, whereas here, the Legislature merely adjusted the dollar threshold of an existing statute. The State's reliance on *Aho* for this contention is misplaced.

The State further contends that the division of the on-going scheme fell within its discretion to charge separate counts or to aggregate the values to obtain a conviction for a greater degree of theft, citing S*tate v. Kinneman*, 120 Wn. App. 327, 84 P.3d 882 (2003), *State v. Barton*, 28 Wn. App. 690, 626 P.2d 509 (1981), and *State v. Lewis*, 115 Wn.2d 294, 797 P.2d 1141 (1990). Br. of Resp. at 40-41. In *Kinneman* and *Lewis*, the State charged each taking separately. 120 Wn. App. at 338; 115 Wn.2d at 299. In *Barton*, the State aggregated several takings into a single count. 28 Wn. App. at 694. However, none of the cases involved the hybrid situation here where the State seeks to aggregate some, but not all, alleged takings. Therefore, the cases are not instructive.

One of Mr. Barbee's convictions for theft from the SSA must be vacated due to the double jeopardy violation.

2. The two convictions for promoting prostitution merged into the conviction for leading organized crime by promoting prostitution.

Because proof of leading organized crime by promoting prostitution necessarily proved the predicate offense of promoting prostitution, Mr. Barbee's convictions for promoting prostitution merged into the greater offense of leading organized crime by promoting prostitution. For purposes of the prohibition against double jeopardy, offenses merge when proof of one offense is necessary to prove an element or a degree of another offense, and if one offense does not involve an injury that is separate and distinct from the other. *State v. Vladovic*, 99 Wn.2d 413, 419-21, 622 P.2d 853 (1983). In the absence of an anti-merger provision[2] or other indication of legislative intent to separately penalize the predicate offense, the convictions for the predicate offense of promoting prostitution merged into the offense of leading organized crime by promoting prostitution.

The State contends the merger doctrine applies only when the degree of one crime is elevated by proof of a predicate offense. Br. of Resp. at 23. The doctrine, however, is not always so rigidly applied. *See, e.g., State v. Michielli*, 132 Wn.2d 229, 237-38, 937 P.2d 587 (1997)

[2] *See, e.g.*, the burglary anti-merger statute, RCW 9A.52.050: Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.

(defendant charged with three counts of trafficking in stolen goods in the first degree and two counts of theft in the second degree court argue at sentencing that the trafficking charges merged into the theft charges). Moreover, similar to offenses that have varying degrees, RCW 9A.82.060 authorizes increased punishment depending on the manner in which the offense was committed.

> (1) A person commits the offense of leading organized crime by:
> (a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity; or
> (b) Intentionally inciting or inducing others to engage in violence or intimidation with the intent to further or promote the accomplishment of a pattern of criminal profiteering activity.
>
> (2)(a) Leading organized crime as defined in subsection (1)(a) of this section is a class A felony.
> (b) Leading organized crime as defined in subsection (1)(b) of this section is a class B felony.

The State's contention should be rejected.

In *State v. Harris*, Division Two considered whether the defendant's convictions for money laundering, solicitation to commit murder, and drug charges merged into his conviction for leading organized crime, and concluded, "The 1984 Final Legislative Report stated that the legislature intended to create '[n]ew crimes' because the legislature did not intend for the predicate crimes to merge with the new crime of leading

organized crime." 167 Wn. App. 340, 357, 272 P.3d 299 (2012). The 1984 Final Legislative Report, however, does not use the terms "predicate crimes" or "merger." SSB 4435, Final Legislative Report, 48th Leg., at 197-198 (Wash. 1984). Rather, upon passage of the Washington State Racketeering Act, the report states, "The commission of these new crimes and other serious crimes already in statute is known as 'racketeering.'" *Id.* at 198. In context, the report actually implies "other serious crimes" merge into the greater offense of "racketeering." The court's conclusion is contrary to the language of the final report.

Mr. Barbee's convictions for promoting prostitution must be vacated due the double jeopardy violation.

3. The out-of-court statements by victims were improperly admitted as statements by co-conspirators.

Because S.E., Ms. Klein, and Ms. Waller were acting as prostitutes, the trial court abused its discretion in admitting their out-of-court statements as statements by co-conspirators to the offense of leading organized crime by promoting prostitution. 8/1/13 RP 103-106.[3] A person is guilty of promoting prostitution if he profits from or advances prostitution. RCW 9A.88.070(1), 9A.88.080(1). By statute, a person acting

[3] The "co-conspirator" statements were "statements made by SE to recruit CW and AM into the pimping operation" and "statements made by SE, CW and BK to discuss the operation and update Barbee on its progress." Supp. CP __, sub. no. 124 at 38 (State's Trial Memorandum).

as a prostitute can neither advance nor profit from prostitution. RCW 9A.88.060(1). Therefore, given that S.E., Ms. Klein, and Ms. Waller could neither advance nor profit from prostitution, their statements could not be those of co-conspirators to commit leading organized crime by promoting prostitution.

As a threshold matter, a court must find the existence of a conspiracy before admitting statements of co-conspirators pursuant to ER 801(d)(2)(v). *State v. Guloy*, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985). For the purpose of ER 801(d)(2)(v), Washington courts have adopted the dictionary definition of conspiracy, that is, "an agreement ... made by two or more persons confederating to do an unlawful act." *State v. Halley,* 77 Wn. App. 149, 154, 890 P.2d 511 (1995) (quoting Webster's Third New International Dictionary 485 (1969); *accord State v. Whitaker*, 133 Wn. App. 199, 223, 135 P.3d 923 (2006). In *Halley* and *Whitaker*, the defendants' confederates could have been charged with the substantive offense. In *Halley*, the defendant and a confederate participated in a drug transaction with a confidential informant. 77 Wn. App. at 150-51. In *Whitaker*, the defendant and at least four other confederates participated in the kidnapping and murder of one of the participant's ex-girlfriend. 133 Wn. App. at 206-09. By contrast here, because S.E., Ms. Klein, and Ms. Waller were statutorily precluded from advancing or profiting from

prostitution, they could not confederate to commit leading organized crime by promoting prostitution.

In *State v. Sanchez-Guillen*, at the defendant's trial for murder, the out-of-court statements of his mother to a third person were admitted as statements by a co-conspirator, the identified conspiracy being the crime of attempt to render criminal assistance. 135 Wn. App. 636, 642-43, 145 P.3d 406 (2006). Here, the identified conspiracy for the out-of-court statements was leading organized crime by promoting prostitution. Again, because S.E., Ms. Klein, and Ms. Waller could not commit that offense, their statements were improperly admitted as statements of co-conspirators.

4. The exceptional sentences for promoting commercial sexual abuse of a minor were based on an improperly calculated standard range.

The court calculated Mr. Barbee's standard range for promoting commercial sexual abuse of a minor as 240 to 318 months, based on an increased punishment that became effective during the charging period for that offense. CP 325. When the punishment for an offense is increased during the charging period, the lesser sentence must be imposed. *In re Pers. Restraint of Hartzell*, 108 Wn. App. 934, 944-45, 33 P.3d 1096 (2001). Prior to June 10, 2010, promoting commercial sexual abuse of a minor was a class B felony with a seriousness level of VIII. Former RCW

9.68A.101; former RCW 9.94A.515. The standard range sentence for a level VIII offense for a defendant with an offender score of '9+' is 108-144 months. RCW 9.94A.510. Effective June 10, 2010, promoting commercial sexual abuse of a minor was elevated to a class A felony with a seriousness level of XII. Laws of 2010, ch. 289, § 14. The standard range sentence for a level XII offense for a defendant with an offender score of '9+' is 240-318, more than double that for a level VIII offense. RCW 9.94A.510.

The State contends resentencing is unnecessary, and argues the court found substantial and compelling reasons to impose an exceptional sentence. Br. of Resp. at 60-61. However, a sentencing court must first determine the correct standard range sentence before it considers an exceptional sentence outside the standard range. *State v. Parker*, 132 Wn.2d 182, 188, 937 P.2d 575 (1997). Assuming the court would have imposed the same exceptional sentence of 102 months above the standard range, Mr. Barbee's sentence for commercial sexual abuse of a minor should have been 246 months, rather than 420 months.

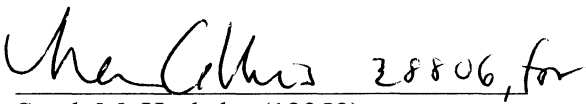
Resentencing is required.

B. CONCLUSION

For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. Barbee requests this Court vacate one conviction for promoting commercial sexual abuse of a minor, vacate one conviction for promoting prostitution, merge the remaining count of promoting prostitution into the conviction for leading organized crime by promoting prostitution, and vacate one conviction for theft from the SSA. Mr. Barbee further requests this Court reverse his remaining convictions due to the wrongful admission of the victims' out-of-court statements admitted as statements by co-conspirators to the conspiracy of leading organized crime by promoting prostitution. Finally, Mr. Barbee requests this Court reverse his sentences on Count 1 and 2 and remand for sentencing according to a properly calculated standard range.

DATED this 12th day of February 2015.

Respectfully submitted,



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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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