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

1. Whether the defendant waived the issue of severance by failing to renew his pre-trial motion to sever during or after trial as required by CrR 4.4.
2. Whether, assuming *arguendo*, that defendant did not waive the issue of severance, he failed to show that the trial court abused its discretion in denying his motion to sever because all factors weighed in favor of a joint trial and denial of that motion.
3. Whether the defendant has failed to show ineffective assistance of counsel.
4. Whether defendant's claim that the trial court abused its discretion in failing to grant him bail pending this appeal should be dismissed as moot where, by the time the Court renders a decision in this case, it can provide no effective relief as to the denial of bail pending that decision.

B. STATEMENT OF THE CASE.

1. Procedure

On January 23, 2009, Davon Valtino Jones, hereinafter referred to as Defendant, was charged by information with unlawful delivery of a

controlled substance, to wit: cocaine, in count III, and unlawful possession of a controlled substance with intent to deliver, to wit: cocaine, in count VII. CP 1-2. Counts I, II, and IV to VI, pertained solely to codefendants whose cases were filed on the same date, but resolved prior to the defendant's trial. *See* CP 1-2, RP.

An amended information was filed on May 6, 2008, which added school-zone and community-custody sentence enhancements to count III, and a community-custody sentence enhancement to count VII. CP 8-9; 04/14/09 RP 4-5.

The case was called for trial on April 14, 2009. 04/14/09 RP 1. The defense attorney moved in limine to exclude evidence pertaining to drug transactions beyond the June 7 and January 22 incidents charged in the amended information, and the State appeared to stipulate to that. 04/14/09 RP 5-6.

The defense attorney also moved to exclude any evidence regarding the defendant's community custody status. 04/14/09 RP 6-7

Lastly, the defense moved to sever counts III and VII for trial. 04/14/09 RP 8-11. The State opposed severance, arguing that the witnesses it intended to call to prove both counts were largely the same, and that evidence of the delivery charge would be admissible to show the

element of intent in the possession with intent to deliver charge. 04/14/09

RP 9-10. The court denied the motion:

Right now it would appear that we are dealing with same officers, same lab person. And the jury's going to be instructed that they have to decide each count separately and their verdict on one count should not control their verdict on the other. And I have to believe that they will follow that.

I don't think that Mr. Jones will be so overly prejudiced by trying these cases together that severance is required. So I will deny the request.

04/14/09 RP 11-12.

The court conducted a hearing pursuant to Criminal Rule (CrR) 3.5, at which the State took the testimony of Tacoma Police Officer Kenneth Smith, 04/14/09 RP 15- 37, and Tacoma Police Officer Dan Bowers, 04/14/09 RP 37-50. The court thereafter held that the defendant's statements to officers were admissible at trial. 04/14/09. RP 54-56.

Jury selection was begun on April 14, 2009. 04/14/09. RP 57-58; 78-150. However, on April 15, 2009, the defense attorney discovered a conflict of interest and moved to withdraw. 04/15/09 RP 59-7; CP 41. The court then declared a mistrial. 04/15/09 RP 71-75; CP 39, 41. A new trial date was later set for October 13, 2009. CP 489.

The defense attorney moved, among other motions in limine, to exclude evidence of "any activity that the defendant was involved in other

than on June 7, 2007, and January 22, 2008,” absent a prior offer of proof outside the presence of the jury, and the court granted this motion. RP 32-37.

The defense attorney again moved to sever, 18-21, 28-29, and the State again opposed this motion, RP 21-28. The court, finding that any prejudice to the defendant from a joint trial was outweighed by considerations of judicial economy denied the motion to sever for a third time. RP 29-30.

On October 14, 2009, after that motion to sever was heard and denied, a jury was selected and empanelled. RP 30-31. The jury was then instructed and the parties gave their opening statements. RP 37.

The State called Tacoma Police Officer Kenneth Bowers, RP 38-131, Tacoma Police Detective Barry McColeman, RP 135-46, and Maude Kelleher of the Tacoma School District, RP 146-49.

The State was then prepared to call Jennifer J.M.R., however J.M.R. disclosed to the deputy prosecutor that she had used heroin at about 7:00 to 7:30 that morning. RP 153-59. The court heard argument of both parties and conducted a competency hearing pertaining to Ms. J.M.R.’s competency to testify as a witness. RP 155-65. Based on that hearing and argument, the court determined that J.M.R. was competent to testify and

that she was not intoxicated or under the influence of heroin at the time.  
RP 165-66.

The State then called J.M.R., RP 167-194, 200-20, Pierce County Sheriff's Deputy William Brand, RP 221-41, and Officer Kenneth Smith, RP 242-65. The State rested. RP 267.

The defense called David Jones, RP 269-83, and the defendant testified. RP 295-322. The defense then rested. RP 322.

The parties discussed jury instructions, RP 286-93, 322-24, and the court instructed the jury. RP 325. The parties then gave their closing arguments. RP 325-46 (State's closing), 347-73 (Defendant's closing), 373-87 (State's rebuttal).

On October 21, 2009, the jury returned verdicts of guilty as charged to both counts III and VII. RP 391-92. CP 370-72. The jury also returned a special verdict with respect to count III, finding that the defendant delivered a controlled substance within 1,000 feet of a school bus stop designated by a school district. RP 392.

On November 13, 2009, the defendant was sentenced on counts III and VII to concurrent terms of twelve months and one day, plus 24 months, for the school bus zone sentence enhancement for a total of 36 months and one day in total confinement. The defendant was also

sentenced to twelve months in community custody and legal financial obligations. RP 404-05. CP 406-19.

He timely filed his notice of appeal the same day. RP 405-06. CP 403.

The defendant then asked the court to allow him bail pending appeal. RP 406. The court initially “deni[ed] the appeal bond because of the [defendant’s prior] conviction for bail jumping.” RP 407. However, based on argument of defense counsel, the court subsequently set bail at \$100,000. RP 407. At a motion to reconsider, the court, citing CrR 3.2(h) and the defendant’s “recent conviction for bail jumping,” revoked the bail. RP 428-29.

## 2. Facts

On June 7, 2007, Officer Kenneth Bowers, a member of the Tacoma Police Department Special Investigations Division, was conducting a “narcotics investigation” of the defendant, who went by the name “Mod,” and his brother, David Jones, who went by the name “Fresh.”<sup>1</sup> RP 39-50.

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<sup>1</sup> Due to the similarity in name between the defendant and his brother, David Jones, the latter will hereinafter be referred to by his nickname, “Fresh.” No disrespect is intended to Mr. Jones.

On that day, officers participated in a “controlled buy” of cocaine in the parking lot of the K and G clothing store, located at 3706 South Pine in Tacoma, Washington. RP 50. They used J.M.R., a confidential informant. RP 50. Officers first searched her and found no contraband or cash in her possession. RP 52. *See* RP 175-76. They then “completed audio intercept paperwork,” and obtained J.M.R.’s consent to be recorded. RP 51, 176. They had her make a phone call to David Jones, during which David Jones agreed to sell her a quarter ounce of crack cocaine at the K and G parking lot. RP 51-52. Officers withdrew cash for the controlled buy, outfitted J.M.R. with a listening device, and drove her to the location of the buy. RP 53-54, 176-78. J.M.R. was never out of sight of officers. RP 53, 111.

Once officers were in place, J.M.R. was allowed to exit Officer Bowers’ vehicle. RP 56, 179-80. She walked from that vehicle to the northeast corner of the store, around the building, and to a Suburban sitting in the parking lot along the wall that borders South Pine. RP 57 180. J.M.R. testified that David Jones “usually” arrived in the defendant’s vehicle, which was the Suburban, “or one of his.” RP 202.

According to Officer Bowers, J.M.R. made contact with a man sitting inside that vehicle, stood there for a few moments, and then walked back to the vehicle in which Officer Bowers was located. RP 57-58.

According to J.M.R., when she got to the Suburban, she found David Jones sitting in the back passenger seat and gave him the money for

the drugs. RP 181. The defendant was in the driver's seat of the Suburban at the time. RP 182. David Jones told the defendant that he did not have "enough of the rock." RP 182. The defendant then took out crack cocaine, counted out some rocks of cocaine, and handed them to David Jones, who in turn handed them to J.M.R.. RP 182, 203. J.M.R. testified that she took the crack cocaine she had so purchased back to Bowers and gave it all to him. RP 183-84.

Bowers testified that J.M.R. came back to his vehicle and gave him approximately two grams of apparent crack cocaine, which later field-tested positive for cocaine. RP 58-59, 184. Officers recovered the recording device from J.M.R.. RP 59. They then searched her for money, drugs, and paraphernalia and found none. RP 59-60, 184. J.M.R. completed a handwritten statement as to what happened, and was transported out of the area and released. RP 60, 187.

The crack cocaine purchased by J.M.R. in that controlled buy was admitted into evidence. RP 61-62. Defendant stipulated that the substance purchased by J.M.R. was tested by the Washington State Patrol Crime Lab and found to be cocaine. RP 266.

J.M.R. testified that she was not under the influence of any drug on June 7, 2007. RP 184-85. The defense attorney cross-examined J.M.R. on her non-compliance with drug treatment and her shoplifting convictions. RP 206-08, 215-16.

J.M.R. testified that she was working for Bowers as a result of an earlier arrest for delivery of a controlled substance. RP 170-71. She subsequently pleaded guilty to two counts of unlawful delivery of a controlled substance and entered into a contract by which she was to participate in “investigations that will culminate in the arrest and investigation of three individuals for one ounce of drugs each,” in exchange for a recommendation of an exceptional sentence downward. RP 65, 171-72. J.M.R. completed thirty to forty controlled buys and successfully completed this contract. RP 67-68, 173.

Officer Bowers measured the distance from the location of the controlled buy to the nearest school bus stop and found that distance to be about 567 feet. RP 74-79.

Maude Kelleher, the lead routing specialist for Tacoma Public School District’s transportation department, testified that, on June 7, 2007, there were two school bus stops within one thousand feet of the K and G store located at 37<sup>th</sup> and South Pine Streets in Tacoma, Washington. RP 147-48. One stop, for Foss High School was located at 36<sup>th</sup> and Pine, and the other, for Reed Elementary School, was located at South 36<sup>th</sup> and Nevada. RP 148.

On January 22, 2008, Officer Kenneth Smith stopped the defendant while the defendant was driving a white Dodge Intrepid in the 2000 block of South Fawcett Street, and arrested him on probable cause for the June 7, 2007, unlawful delivery of a controlled substance. RP 79-

82, 96, 247-49. Officer Smith read the defendant the *Miranda* warnings, and searched him incident to arrest, finding \$280 in cash in the defendant's pocket. RP 250.

After the defendant's arrest, a "narcotics detection dog" was brought to the scene and "alerted" on a portion of the defendant's vehicle, indicating that there were drugs present therein. RP 83, 228-31, 252-53. Officer Bowers subsequently searched that vehicle pursuant to a search warrant, and found six individually-packaged baggies of apparent cocaine in the center console of that vehicle. RP 83-84, 88-93. That apparent cocaine field-tested positive for cocaine and weighed 1.9 grams. RP 90-91. This apparent cocaine was admitted into evidence at trial. RP 92-94. It had been determined to be cocaine after testing by the Washington State Patrol Crime Laboratory. RP 266.

The narcotics detection dog also alerted "on the scent of narcotics on the cash" that was taken from the defendant's pocket. RP 256-57.

When Officer Smith told the defendant's cousin, who was the passenger riding in the Intrepid that the defendant was being arrested, the cousin told the officer that the drugs were his. RP 301. The defendant then stated, "No, let him go. That's all my stuff. He is just saying that because he has nowhere to go. Let him go." RP 255.

"Fresh" testified on behalf of the defendant, that he was convicted of unlawful delivery of a controlled substance for his participation in the June 7, 2007 incident. RP 265-66. He testified that he pleaded guilty to

that charge and was sentenced to thirty months in prison. RP 271. He had completed his sentence and was not on community custody at the time of his testimony at trial. RP 271-72.

David Jones testified that, on June 7, 2007, he sold “some drugs” to a “lady named Jennifer.” RP 272-74. He stated that he was in the passenger seat of his brother’s Suburban in the K and G store parking lot, and that J.M.R. got into the backseat of that vehicle. RP 273-74. David Jones testified that he told her to get out of the vehicle so that it would not be obvious and then gave her the drugs. RP 274-75. David Jones then reversed the order of events, testifying that he gave J.M.R. the drugs, and that they then both got out of the vehicle. RP 275. He testified that he pulled the drugs that he gave her from his pants pocket. RP 275.

David Jones also testified that his brother, the defendant, could see what he was doing, but stated that the defendant was trying to keep him out of trouble. RP 274.

When asked if it was “safe to say that you don’t want to see your brother get into trouble,” David Jones testified “Everybody has to suffer they consequence.” RP 279. He also admitted that he had nothing to lose by testifying on his brother’s behalf. RP 276, 279-80.

The defendant testified that, on June 7, 2007, he drove his girlfriend’s Suburban to the K and G store to buy a shirt. RP 296-97. He testified that his brother David Jones was in the passenger seat and that his cousin was in the backseat. RP 297-98. The defendant stated that he got

out of the vehicle and that an unknown woman got into it. RP 298. He testified that he then walked into the store. RP 298.

The defendant testified that, on January 22, 2008, he was driving his sister's Dodge Intrepid when he was pulled over by Officer Smith. RP 299. He denied telling Officer Smith that the cocaine found in that vehicle was his. RP 301.

C. ARGUMENT.

1. THE DEFENDANT WAIVED THE ISSUE OF SEVERANCE BY FAILING TO RENEW HIS PRE-TRIAL MOTION TO SEVER DURING OR AFTER TRIAL.

CrR 4.3(a) allows for the joinder of two or more offenses in a single information if they "are of the same or similar character."

The rule of joinder encourages the "[c]onservation of judicial resources and public funds." *State v. Bythrow*, 114 Wn.2d 713, 723, 790 P.2d 154 (1990), in that

[a] single trial obviously requires one courtroom and one judge. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is significantly reduced.

*Bythrow*, 114 Wn.2d at 723.

Washington has a liberal joinder rule and a trial court has considerable discretion in joining offenses. *State v. Thompson*, 88 Wn.2d 518, 525, 564 P.2d 315 (1977). Separate trials are not favored in

Washington. *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 103 S. Ct. 1205 (1982). The policy was developed in order to minimize the potential burdens on the administration of justice, particularly those burdens placed on the courts and witnesses. *State v. Ferguson*, 3 Wn. App. 898, 906, 479 P.2d 114 (1970), *review denied*, 78 Wn.2d 996 (1991).

Nevertheless, a defendant may challenge the joinder of offenses through a motion for severance, as codified in Criminal Rule 4.4(b):

The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence on each offense.

CrR 4.4(b).

In the present case, defendant sought to sever count III, unlawful delivery of a controlled substance, from count VII, unlawful possession of a controlled substance with intent to deliver. CP 240-46; RP 18-31. The defendant's motion was filed on October 7, 2009, CP 240-46, and heard on October 13, 2009, before a jury was empaneled and trial began on October 14, 2009, all in accordance with Criminal Rule (Cr R) 4.4(a).<sup>2</sup> RP 18-31. At that October 13, 2009 hearing, the trial court denied the motion,

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<sup>2</sup>"A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time." CrR 4.4(a)(1).

finding that application of the relevant law weighed in favor of a single trial for both offenses. RP 29-30.

The defendant now assigns error to this ruling, Brief of Appellant, p3, 11-19, however this issue was not properly preserved below by renewal of his pre-trial motion during or after trial. *See* RP 31-322.

CrR 4.4(a)(2) requires that

[i]f a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. ***Severance is waived by failure to renew the motion.***

(emphasis added). Therefore, a defendant who fails to renew a previously denied pre-trial "motion to sever before the close of trial... waive[s] the issue of severance and cannot raise it on appeal." ***State v. Bryant***, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998), *review denied* 137 Wn.2d 1017 (1999)(citing ***State v. Henderson***, Wn. App. 543, 551, 740 P.2d 329 (1987); ***State v. Ben-Neth***, 34 Wn. App. 600, 606, 663 P.2d 156 (1983)).

Although Defendant's pretrial motion for severance was overruled, RP 29-30, he never renewed that motion before or at the close of trial. *See* RP 31-322. As a result, the defendant waived this issue and cannot raise it on appeal.

2. ASSUMING *ARGUENDO* THAT DEFENDANT DID NOT WAIVE THE ISSUE OF SEVERANCE, HE FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION TO SEVER BECAUSE ALL FACTORS WEIGHED IN FAVOR OF A JOINT TRIAL AND DENIAL OF THAT MOTION.

Even were the issue of severance not waived, the trial court properly exercised its discretion in denying the defendant's motion to sever.

“Defendants seeking severance have the burden of demonstrating that a joint trial ‘would be so manifestly prejudicial as to outweigh the concern for judicial economy.’” *State v. Sublett*, 156 Wn. App. 160, 180, 231 P.3d 231 (2010)(quoting *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990)). “A trial court’s refusal to sever is reviewed for manifest abuse of discretion,” *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998); *Bythrow*, 114 Wn.2d at 717, and the burden is on the defendant to demonstrate such abuse. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

Severance is proper where the defendant will be prejudiced in his ability to present separate defenses on the several counts, or if a single trial invites the jury to cumulate evidence to find guilt or infer a criminal

disposition. *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), *modified by*, 408 U.S. 934, 33 L.Ed.2d 747, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1969).

“In determining whether the potential for prejudice requires severance, a trial court must consider (1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately;[] (4) the admissibility of evidence of the other charges even if not joined for trial”; and (5) “any residual prejudice must be weighed against the need for judicial economy.” *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747, 773 (1994). *See also State v. Bythrow*, 114 Wn.2d 713, 717-718, 790 P.2d 154 (1990); *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

In the present case, each of these factors weighed in favor of a joint trial of counts III and VII, and therefore in favor of denial of the defendant’s motion to sever.

- a. The State’s evidence on each count was equally strong.

The first factor is the strength of the State’s evidence on each count. “When the State’s evidence is strong on each count, there is no necessity for the jury to base its finding of guilt on any one count on the strength of the evidence of another.” *Bythrow*, 114 Wn.2d at 721-22.

In the present case, the evidence supporting counts III and VII was equally strong. With respect to count III, there was an eye-witness to the delivery itself. Ms. J.M.R. testified that she saw the defendant take out crack cocaine, count out some rocks of such cocaine, and then hand them to his brother, who in turn handed them to her. RP 182, 203. J.M.R. had completed her contract and, by the time of her testimony, had already reaped the reward of that contract, a reduced sentence. RP 63-68, 173.

She therefore, had nothing to gain by falsely implicating the defendant. Moreover, Richard's testimony was corroborated by the video introduced in this case, which showed her walking to the Suburban, standing outside of it, and then returning to the officer's vehicle, exactly as she described, rather than entering the Suburban, as the defendant and his brother testified. RP 135-46, RP 273-74, RP 298. In other words, the State's evidence included eye-witness testimony that the defendant delivered cocaine, which was corroborated by video evidence.

With respect to count VII, the possession with intent to deliver charge, a drug detection dog alerted on the car that the defendant was driving when he was stopped, indicating the presence of illicit drugs within. RP 83, 228-31, 252-53. Officer Bowers subsequently searched that vehicle pursuant to a search warrant and found six individually-packaged baggies of cocaine in its center console. RP 83-84, 88-93. The

defendant himself admitted to the arresting officer that these individually packaged baggies of cocaine were his. RP 255.

Thus, with respect to count III, there was eye-witness testimony, corroborated by video evidence, that the defendant delivered cocaine, and with respect to count VII, the defendant admitted to possessing cocaine, which was packaged in a way consistent with an intent to deliver it. As a result, the evidence of both counts was equally strong and the jury would have “no necessity... to base its finding of guilt on any one count on the strength of the evidence of another.” *Bythrow*, 114 Wn.2d at 721-22.

Therefore, the first factor cut in favor of a joint trial and denial of the defendant’s motion to sever.

- b. The defenses raised to each count were consistent, and therefore there was little likelihood that the jury would be confused.

“The second factor to consider is whether the clarity of defenses to each count was prejudiced by joinder.” *Russell*, 125 Wn.2d at 64. The concern addressed by this factor is for a defendant who wishes to establish inconsistent defenses for different offenses. “The likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on each charge.” *Russell*, 125 Wn.2d at 64-5. Although “mutually antagonistic defenses may on occasion be

sufficient to support a motion for severance, the burden is upon the defendant to demonstrate undue prejudice resulting from a joint trial.”

*Bythrow*, 114 Wn.2d at 720.

In the present case, the defendant’s defense to count III was general denial, and his defense for count VII was unwitting possession. These defenses are not conflicting or mutually antagonistic. In fact, they are consistent. A general denial to count III denies the defendant’s involvement in the June 7, 2007 delivery of cocaine, while a claim of unwitting possession to count VII, denies any knowledge that there was cocaine in the vehicle the defendant was driving. Given these facts, the possibility that the jury would be confused by these similar and consistent defenses is very minimal.

Although the defendant argues that “[t]here is no way that a jury’s assessment of Mr. Jones’ defense to the June 7 charge would not be in any way influenced or confused by his defense to the January 22 charge where he admitted possession,” Brief of Appellant, p. 15, he is mistaken. The mere fact of possession is, obviously, insufficient to confer culpability. In fact, the defendant’s claim that he was unaware that there was cocaine in his vehicle on January 22 is in no way inconsistent with his claim that he did not deliver cocaine on June 7. Rather, these claims are perfectly consistent.

Therefore, the likelihood that joinder would have caused the jury to be confused as to his defenses is very small, if nonexistent, and the second factor strongly favored denial of the defendant's motion to sever.

c. The trial court properly instructed the jury to consider each count separately

“The third factor to consider is whether the court properly instructed the jury to consider each count separately.” *Russell*, 125 Wn.2d at 66.

In the present case, the court included the following in its instructions to the jury:

Instruction 4

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 374-401. This instruction properly informed the jury of the need to consider each count on its own. *See Russell*, 125 Wn.2d at 66.

Although the defendant now argues that this instruction was improper because it “*does not* instruct the jury not to consider *evidence* from one charge when determining the verdict in the other,” Brief of Appellant, p. 15-16, he did not object to this instruction 4 or propose any alternative to it at trial. RP 286-93, 322-24, *see* RAP 2.5(a). Moreover, his argument is without merit. The court is not required to instruct that the jury consider only evidence of one charge when determining its verdict on

the other. It need only instruct that the jury “consider each count separately.” *Russell*, 125 Wn.2d at 66. Indeed, evidence may be cross admissible under ER 404(b). *Id.*

In the present case, the court did exactly what it should and properly instructed the jury that it “must decide each count separately,” and that its “verdict on one count should not control [its] verdict on any other count.” CP 374-401.

Although the defendant argues that the deputy prosecutor undercut this instruction in her closing, Brief of Appellant, p. 15-16, this was not a factor before the trial court when it denied the pre-trial motion to sever, nor is it a factor to be considered in determining such a motion. It is therefore irrelevant to a consideration of the propriety of that ruling.

Moreover, the defendant is simply mistaken. In fact, the State reminded the jury of this instruction in its closing argument. The deputy prosecutor began that argument by telling the jury that counts III and VII are “[t]wo separate charges for you to consider separately.” RP 325. The deputy prosecutor then analyzed these issues separately, one after the other. *See* RP 326-38 (count III), 338-344 (count VII).

Because the trial court properly instructed the jury that it “must decide each count separately,” and that its “verdict on one count should

not control [its] verdict on any other count,” CP 374-401, factor three also weighed in favor of denying the defendant’s motion to sever.

- d. The evidence of each count may have been cross-admissible under ER 404(b).

The fourth factor “is whether evidence of each count would be cross admissible under ER 404(b) if severance were granted.” *Russell*, 125 Wn. 2d at 66.

ER 404(b) provides:

**Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[E]vidence of prior crimes, wrongs, or acts must be closely scrutinized and admitted only if it meets two distinct criteria. First, the evidence must be shown to be logically relevant to a material issue before the jury. We have expressed the test as “whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged.” Second, if the evidence is relevant, its probative value must be shown to outweigh its potential for prejudice.

*State v. Thomas*, 68 Wn. App. 268, 273, 843 P.2d 540 (1992)(quoting

*State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)).

In *Thomas*, the defendant was charged with unlawful possession of a controlled substance with intent to manufacture or deliver. *Thomas*, 68 Wn. App. at 269-70. The Court found that evidence of the defendant's prior drug sales was properly admitted under ER 404(b) as evidence of what the defendant "intended to do with the cocaine he possessed when he was arrested." *Id.* at 272-74.

In the present case, evidence of unlawful delivery of cocaine, charged in count III, may, as in *Thomas*, have been admissible in a separate trial of unlawful possession with intent to deliver charged in count VII, to prove the element of intent to deliver.

- e. Even were the evidence of each count found not to be cross-admissible, the jury could be expected to compartmentalize the evidence.

When evidence of the other crime is not admissible, the Court's "primary concern is whether the jury can reasonably be expected to 'compartmentalize the evidence' so that evidence of one crime does not taint the jury's consideration of another crime." *Bythrow*, 114 Wn.2d at 721. "When the issues are relatively simple and the trial lasts only a couple of days, the jury can be reasonably expected to compartmentalize the evidence," and "[u]nder these circumstances, there may be no

prejudicial effect from joinder even when the evidence would not have been admissible in separate trials.” *Id.*

The present case involved simple factual determinations: whether the defendant delivered a controlled substance in count III and whether he possessed it with the intent to do so in count VII. Moreover, the incidents underlying these counts occurred on different dates. The trial itself involved only six witnesses for the state and lasted only four days. Under these circumstances, the jury can be reasonably expected to compartmentalize the evidence. As a result, there can “be no prejudicial effect from joinder even if the evidence would not have been “admissible in separate trials.” *Bythrow*, 114 Wn.2d at 721.

f. Considerations of judicial economy outweighed any residual prejudice.

“Finally, the court must weigh any prejudice to the defendant resulting from joinder against the need for judicial economy.” *Russell*, 125 Wn.2d at 68.

In the present case, the trial court found that any prejudice from joinder “d[id] not outweigh the consideration of judicial economy,” RP 30, and the defendant has failed to demonstrate otherwise.

Indeed, as illustrated in the argument above, the State’s evidence on each count was equally great, the defendant’s defenses to the two counts were consistent, the court properly instructed the jury to consider

each count separately, and the jury could be reasonably expected to compartmentalize the evidence of each count. Therefore, there was little, if any, prejudice to the defendant from the joint trial.

On the other hand, given that the incidents underlying the counts at issue were part of the same continuing investigation and involved the same defendant, the same group of police officers, and the same drug and manner of sale, separate trials would have required duplication of virtually all of the testimony. Indeed, given the record, nearly all of the State's witnesses would have testified in each trial, instead of once in a joint trial. Two juries would have been required instead of one, and the transcript would have almost assuredly doubled.

Therefore, the need for judicial economy outweighed any prejudice to the defendant resulting from joinder, and this final factor weighed in favor of denial of the defendant's motion to sever.

Because each of the five factors weighed against severance and in favor of a joint trial, the defendant has failed to show that the "trial court's refusal to sever" was a "manifest abuse of discretion," *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998); *Bythrow*, 114 Wn.2d at 717. See *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

Therefore, the trial court's ruling denying the defendant's motion to sever should be affirmed.

3. THE DEFENDANT HAS FAILED TO SHOW  
INEFFECTIVE ASSISTANCE OF COUNSEL.

“Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X).” *State v. Yarbrough*, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009); *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. *Yarbrough*, 151 Wn. App. at 89.

“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.” *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001) (citing *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27. “Surmounting *Strickland’s* high bar is

never an easy task,” *Padilla v. Kentucky*, 599 U.S. \_\_\_, \_\_\_ (2010)(slip op. at 14), and a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); *In Re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Specifically, “[t]o establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness.” *Johnston*, 143 Wn. App. at 16. “The reasonableness of trial counsel’s performance is reviewed in light of all the circumstances of the case at the time of counsel’s conduct.” *Id.*; *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). “Competency of counsel is determined based upon the entire record below.” *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969).

“To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective.” *Yarbrough*, 151 Wn. App. at 90. This presumption includes a strong presumption “that counsel’s conduct constituted sound trial strategy.” *Rice*, 118 Wn.2d at 888-89. “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *Yarbrough*, 151 Wn. App. at 90 (citing *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

“In order to show that counsel was ineffective for failing to object to the remarks of the prosecutor, the defendant must show that the objection would have been sustained.” *State v. Johnson*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). “Counsel’s decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions,” and “[o]nly in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” *Johnson*, 143 Wn. App. at 19.

An ineffective assistance of counsel claim must not be allowed to “function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve.” *Harrington v. Richter*, 562 U.S. \_\_\_ (2011). “It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence.’” *Id.* (quoting *Strickland*, 466 U.S. at 689). “*Strickland* does not guarantee perfect representation, only a ‘reasonably competent attorney.’” *Id.* (quoting *McMann v. Richardson*, 397 U.S. 759, 770 (1970)). “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Id.* (quoting *Strickland*, 466 U.S. at 690). There are “countless ways to provide effective assistance in any given case.” *Id.*

With respect to the second prong, “[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Cienfuegos*, 144 Wn.2d at 229.

The defendant here argues that he was denied effective assistance of counsel as a result of seven discrete instances during the course of his four-day trial. Brief of Appellant, p. 23. *See Id.* at 19-26. However, he fails to meet his burden of proving both deficient performance in and prejudice from these instances, either individually or collectively. As a result, his claim of ineffective assistance of counsel must fail and his convictions should be affirmed.

The defendant first argues that his trial counsel was ineffective by “elicit[ing] evidence of [his] prior criminal record.” Brief of Appellant, p. 23. He seems to be referring to the following exchange, which occurred during counsel’s direct examination of the defendant:

Q So Officer Smith pulled you over. Then what happened, sir?  
A He told me to get out of the car because I was being arrested. I asked him what for. He said for driving suspended license and no interlock device.  
Q You were required to have the interlock device on the vehicle?  
A Yes.  
Q Why was that?  
A From a previous DUI I had gotten on New Year’s 2005.  
Q For the sake of argument, have you ever been arrested for or convicted of a drug crime?  
A For possession of marijuana. I was probably convicted in 2005, but it occurred in 2004.  
Q So Officer Smith pulls you over and arrests you. Then what happened, sir?

RP 300. *See* Brief of Appellant, p. 10.

The first of counsel’s challenged questions did not call for any testimony regarding any criminal history at all:

Q So Officer Smith pulled you over. Then what happened, sir?

RP 300. The defendant answered this question without referencing his criminal history, by stating

A He told me to get out of the car because I was being arrested.

RP 300. However, the defendant continued to testify, unresponsively and gratuitously:

I asked him what for. He said for driving on suspended license and no interlock device.

RP 300.

The defendant's comment, while perhaps ill-advised, was nevertheless unresponsive to his attorney's question, and therefore, cannot be attributed to his attorney or form the basis for an ineffective assistance of counsel claim.

Nevertheless, when faced with the defendant's gratuitous admission of apparent criminal history, his lawyer had a strategic decision to make: whether to (1) object to her own client's remarks and move to strike them or (2) inquire further with the hope of explaining what might otherwise appear to the jury as serious felony history of the type before it, as simple misdemeanor convictions, unrelated to the conduct at issue.

The decision of when and whether to object is a classic example of trial strategy and cannot form the basis for an ineffective assistance of counsel claim. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); *Johnson*, 143 Wn. App. at 19.

In this case, it must be assumed that defense counsel chose the latter strategy, and did not object, but inquired further to eliminate any lingering doubts in the jury's mind as to the extent and nature of the defendant's criminal history. *Rice*, 118 Wn.2d at 888-89 (there is a strong presumption "that counsel's conduct constituted sound trial strategy."). In so doing, counsel did not have to rely on the bell being un-rung, but could dispel potential juror concerns that the defendant was a felon or had felony drug history of the sort before it.

This tactic was also consistent with trial counsel's apparent overall theory of the case that, while the defendant may have been a one-time drug user, he was not the drug dealer; his brother, "Fresh" was. Moreover, by directly eliciting such criminal history, counsel could show the defendant was forthcoming and honest about his past mistakes, and thereby make his general denial and unwitting possession claims more credible. While counsel's strategy may not have been successful, counsel's performance was not deficient.

The defendant nevertheless contends that examination of this exchange should be controlled by *State v. Saunders*, where this Court found that, in a prosecution for possession of methamphetamine and possession of heroin, “trial counsel was ineffective for eliciting on direct examination [the defendant’s] prior conviction for possession of methamphetamine.” 91 Wn. App. 575, 577, 958 P.2d 364 (1998).

This case, however, differs significantly from *Saunders*. In *Saunders*, trial counsel specifically asked the defendant “if he had any prior convictions for *similar* offenses” and the defendant testified that he was previously convicted of the same charge for which he was presently on trial. *Id.* at 577-78. In that case, “the record reveal[ed] no reasons of tactics or strategy for offering the evidence.” *Id.* at 578. That is not the case here, where counsel made a strategic decision to try to explain and minimize her client’s criminal history rather than objecting and moving to strike her own client’s words and then relying on the jury to ignore them.

Therefore, the defendant has failed to show that his trial counsel’s performance was deficient during this exchange and thus, cannot establish even the first prong of the *Strickland* test.

Nor has the defendant shown the second prong of that test, “that [any] deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687. “The prejudicial effect of a prior drug conviction is viewed against

the backdrop of the evidence in the record.” *Saunders*, 91 Wn. App. at 580.

In the present case, the evidence against the defendant was overwhelming. With respect to count III, there was eye-witness testimony of his delivery of crack cocaine, RP 182, 203, corroborated by video evidence. RP 135-46, RP 273-74, RP 298. The eye-witness, through a confidential informant working on a contract, had completed her contract by the time of her testimony, and had already reaped the reward of that contract, a reduced sentence. RP 63-68, 173. She therefore had nothing to gain by falsely implicating the defendant.

With respect to count VII, the defendant admitted to possessing cocaine, which was found in the car he was driving, packaged in a manner consistent with an intent to deliver it. RP 83-84, 88-93, RP 255. He also had \$280 cash on his person, RP 250, and the drug-detection dog also alerted on that cash, indicating that “the scent of narcotics was on the cash,” as well. RP 256-57.

Against this backdrop, evidence that the defendant had two previous misdemeanor convictions at least four years earlier, would not with any “reasonable probability” have changed “the outcome.”

Therefore, the defendant has also failed to “show that [any] deficient performance prejudiced the defense,” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27, and in fact, he has failed to show ineffective assistance of counsel at all. His convictions should thus be affirmed.

The defendant’s next three claims of ineffective assistance are interrelated and concern evidence of a May 14, 2007, drug transaction.

First, the defendant argues that his trial counsel was ineffective when she “directly elicited evidence of the Tacoma Police Department’s belief that [he] had been involved in prior transactions.” Brief of Appellant, p. 23. Defendant seems to be referring to the following exchange, which occurred during his counsel’s cross-examination of Officer Bowers:

Q: And throughout the entire time for that investigation the only information that you have that Davon Jones was involved in any activity was on June 7<sup>th</sup>, 2007; is that true?

[Deputy Prosecutor]: Objection. I believe this is part of the pretrial rulings.

THE COURT: [Defense Counsel].

[Defense Counsel]: I believe I limited the question and made it possible for the officer to answer with the only known answer in the evidence, Your Honor.

THE COURT: I’ll overrule the objection. Do you want the question repeated?

A: No. It's not correct. His name was mentioned in the initial stages of the investigation as a coconspirator. (By [Defense Counsel]) I understand. But during the course of these buys, the only time he was around, so to speak, that he was seen. That he was alleged transacted with, that day was June 7<sup>th</sup>, 2007?

A: I'll say the only alleged transaction is correct, yes.

RP 109. See Brief of Appellant, p. 10.

Although defendant argues that “[t]here is nothing in the record that suggests a legitimate trial tactic or strategy in eliciting such evidence,” Brief of Appellant, p. 24, he is mistaken.

During the officer's earlier direct examination, the following exchange had occurred:

Q So if we could skip ahead to the day in June, June 7, 2007, on that day, were you working in narcotics investigation?

A Yes.

Q Can you briefly describe who your *targets* were that you were investigating?

A Our *main target* at the time was an individual we identified as David Monroe Jones. He was known by his nickname Fresh.

Q Did you have *any other targets* that were known to you associated with David Jones.

A In the initial stage of the investigation, the informant had advised us that David Jones, or Fresh, had an associate that was suspected to be his brother and he went by the nickname of Mod, which is spelled M-O-D.

Q Were you later able to determine who Mod was?

A Yes.

Q And who is it?

A Davon Valtino Jones.

RP 49(emphasis added). The officer then identified the defendant as Davon Valtino Jones. RP 49-50.

After this exchange, the jury could very well have been left with the impression that the defendant had been involved in drug transactions prior to the first charged incident on June 7, 2007, and thereby became a “target” of investigation. While counsel could have objected to this line of questioning, *see* RP 04/14/09 RP 5-6, 32-37, she made a strategic decision not to do so. *See Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989); *Johnson*, 143 Wn. App. at 19. She instead attempted to undermine the officer’s credibility by showing that “the only information that [he] ha[d] that [the defendant] was involved in any activity was on June 7<sup>th</sup>, 2007,” RP 109, and indeed, this is a fact which the officer initially denied, RP 109, but ultimately admitted, *see* RP 129-30.

Therefore, this line of questioning was the result of a legitimate trial tactic, which arguably undercut the credibility the State’s key witness. Because courts “will not find ineffective assistance of counsel if ‘the actions of counsel... go to the theory of the case or to trial tactics,’” *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)(quoting *State v. Renfro*, 96 Wn. 2d 902, 909, 639 P.2d 737 (1982)), the defendant has

failed to demonstrate that this line of questioning left him with ineffective assistance of counsel. As a result, his convictions should be affirmed.

The defendant next argues that his trial counsel was ineffective because she “failed to object to the State’s presentation of a May 14, 2007 drug transaction at which [the defendant] was believed to have been present.” Brief of Appellant, p. 23. He is mistaken.

It is true that, based on the above exchange, the State argued that the defense “opened the door” to evidence regarding a controlled buy on May 14, 2007. RP 117-18. At the “buy” to which the State referred, Fresh told J.M.R. that he needed to call his brother. RP 118. He then “made a phone call, and a few minutes later, the black-and-gray 2000 Chevrolet Suburban,” “believed to belong to the defendant” and “the exact same vehicle he used in this case,” pulled in. RP 118.

The court held that the State could ask about the May 14 incident. RP 120. During the State’s subsequent re-direct examination of Officer Bowers, the officer testified that, during the May 14, 2007 controlled buy, Fresh

[i]ndicated that he was calling his brother. And minutes later, surveillance units observed a black-over-gray 2000 Chevrolet Suburban bearing Washington license plates 554 DVD.

RP 125. The officer went on to agree that this was “the same black-over-gray Chevrolet Suburban that was involved in the transaction on June 7<sup>th</sup>, 2007.” RP 126-27.

However, on cross-examination, the defense attorney conducted the following relevant re-cross examination:

Q All right. So this black Suburban, this 2000 black-and-gray Suburban, is [the defendant] Davon Jones the registered owner of that vehicle?

A No, ma’am.

Q And the black Suburban that drove around, did you see — did anybody report that they saw who the driver was?

A I think in my report I stated that the tint on the window was so dark that nobody could make out how many people or who was driving the vehicle.

Q And this black Suburban with these dark windows when it pulled into the parking lot at McDonald’s, did anybody get out?

A I don’t recall anybody getting out, ma’am, no.

....

Q And at any time when they were following this black Suburban, were they ever able to identify Davon Jones as the driver of that black Suburban?

A No, ma’am.

RP 129-30.

Therefore, while it is true that his trial counsel chose not to explicitly object to the State’s cross examination on this matter, RP 118-19, she did so for the strategic reason of completing her impeachment of the State’s key witness. Specifically, defense counsel was able to demonstrate that although the officer referred to the defendant as a target

of investigation on June 7, 2007, RP 49-50, there was no basis for that officer to believe that the defendant had ever been involved in drug dealing prior to that date because officers had never so much as seen him at a prior drug transaction. RP 129-30.

This was a legitimate strategic decision that resulted in effective cross-examination. Because courts “will not find ineffective assistance of counsel if ‘the actions of counsel... go to the theory of the case or to trial tactics,” *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)(quoting *State v. Renfro*, 96 Wn. 2d 902, 909, 639 P.2d 737 (1982)), the defendant has failed to demonstrate that this line of questioning left him with ineffective assistance of counsel. As a result, his convictions should be affirmed.

The same response may be given to the defendant’s next argument, that his trial counsel was ineffective because she “offered into evidence a video of the May 14, 2007 transaction which included a black and gray Suburban.” Brief of Appellant, p. 23.

While it is true that the defense attorney did offer into evidence a video of the May 14, 2007 transaction, which included the black and gray Suburban, she did so with the strategic intent of using it during her cross-examination of the confidential informant to “clarify some things.” RP 133-34. The defense attorney played the video for J.M.R. in the presence

of the jury and then clarified with J.M.R. that not only was the defendant not in the car with Fresh that day, but that Fresh was indeed alone in his vehicle. RP 213. In so doing, trial counsel further undercut the credibility of the officer's assertion on direct that the defendant was a target of investigation on June 7, 2007, RP 49-50, because to be a target, police would have had to have known about prior drug transactions of his. This video, therefore, also bolstered defense counsel's theory that the confidential informant was simply implicating the defendant to complete her contract sooner and lessen her sentence. *See* RP 355-61.

Trial counsel's decision to admit video of the May 14, 2007 transaction was, therefore, a strategic decision, which cannot form the basis of an ineffective assistance of counsel claim. *See State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)(quoting *State v. Renfro*, 96 Wn. 2d 902, 909, 639 P.2d 737 (1982)). Because the defendant has failed to demonstrate that trial counsel's introduction of that video left him with ineffective assistance, his claim should be denied and his convictions affirmed.

The defendant's fifth argument is that his trial counsel was ineffective because she "failed to object to the confidential informant's continual reference to Mr. Jones' 'usual' actions," Brief of Appellant, p. 23. Although the defendant does cite to three portions of the record, Brief

of Appellant, p. 10 (citing RP 22, RP 80, and RP 202), it is not entirely clear about which references he is complaining.

There are two page 22's, one is the report of the April 14, 2009 Criminal Rule 3.5 hearing, and one is the report of October 13, 2009 motion to sever. 04/14/09 RP 22; RP 22. J.M.R. did not testify at either hearing and no reference was made to the defendant "sometimes" or "usually" doing anything on either page. *See* 04/14/09 RP 22; RP 22. Page 80 is the report of Officer Bower's direct examination testimony and does not contain reference to J.M.R. or anything that the defendant "sometimes" or "usual[ly]" did. RP 80.

Rather, the exchange about which the defendant seems to complain occurred during the State's direct examination of the confidential informant regarding the video of the June 7, 2007 controlled buy:

Q And who are you expecting to meet when you come around to this parking lot?

A Fresh, David [Jones]

Q I'll go ahead and see if I can fast-forward just a little bit. Who were you with during this time?

A Mr. Bowers and his partner.

Q Is that you?

A Yes.

Q Did you know what vehicle Mr. Jones was supposed to arrive in?

A No. Usually it was his brother's or one of his.

Q That vehicle that's driving in there, do you recognize that vehicle?

A Yes

Q And how do you recognize it?

A It's his brother's vehicle.

Q Who is his brother?

A Mod.

Q Is that the defendant?

A Yes.

RP 202.

The problem with defendant's argument is that the "Mr. Jones" to whom J.M.R. was referring in this exchange was not the defendant, but the defendant's brother, David Jones. Therefore, there is nothing in this statement which inculpates the defendant. In fact, this testimony buttresses the defense theory that Fresh was the dealer, and that the defendant, as his brother, was merely guilty by association, *see* RP 353-54, and trial counsel would have had no reason to object to it. More important, however, there would have been no basis to sustain such an objection.

Because the defendant cannot "show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct" or "(2) that an objection to the evidence would likely have been sustained," much less (3) "that the result of the trial would have been different had the evidence not been admitted," *Saunders*, 91 Wn. App. at 578, he cannot show ineffective assistance of counsel. Therefore, his convictions should be affirmed.

The defendant's sixth argument is that his trial counsel was ineffective because she "failed to object to the State's further cross-examination of Mr. Jones' criminal history." Brief of Appellant, p. 23. His seventh argument is largely the same: that his trial counsel was ineffective because she "failed to object to the introduction of copies of Mr. Jones' plea agreement in [the] prior drug case." Brief of Appellant, p. 23. The defendant is simply mistaken in this regard.

Indeed, his trial counsel argued at some length against such cross-examination, contending that it was more prejudicial than probative and that it should be disallowed under ER 404(b). RP 302-06.

The state limited its initial cross-examination on this topic to four questions, and the defense did not object to these in front of the jury after the court had already overruled its earlier objection outside the presence of the jury. RP 307. Nor was defense counsel required to object. *Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989); *Johnston*, 143 Wn. App. at 19. Further objection in this instance would have been pointless given the court's earlier ruling, and would have called additional attention to the State's line of questioning, thereby highlighting the defendant's criminal history for the jury. The defense attorney made the strategic decision to object once outside the presence of

the jury, and to then rely on the trial court's limiting instruction, which mandated "[y]ou may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose." CP 374-401 (instruction 20).

Because courts "will not find ineffective assistance of counsel if 'the actions of counsel... go to the theory of the case or to trial tactics,'" *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)(quoting *State v. Renfro*, 96 Wn. 2d 902, 909, 639 P.2d 737 (1982)), the defendant has failed to demonstrate that counsel's *choice of when to object* left him with ineffective assistance of counsel.

Therefore, the defendant has failed to show ineffective assistance of counsel and his convictions should be affirmed.

4. DEFENDANT'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT HIM BAIL PENDING THIS APPEAL SHOULD BE DISMISSED AS MOOT BECAUSE, BY THE TIME THIS COURT RENDERS A DECISION IN THIS CASE, IT WILL BE UNABLE TO PROVIDE EFFECTIVE RELIEF AS TO DENIAL OF BAIL PENDING THAT DECISION.

"Generally, the courts will not consider a moot issue." *In Re Res. Of Silas*, 135 Wn. App. 564, 568, 145 P.3d 1219 (2006)(citing *In Re Pers. Restraint of Myers*, 105 Wn.2d 257, 261, 714 P.2d 303 (1986)).

A claim is moot if a court can provide no effective relief. *In Re Det. Of Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983).

In the present case, by the time this Court renders a decision it will be unable to provide any effective relief as to the denial of bail pending that decision. The defendant's claim is therefore moot and should be dismissed as moot.

D. CONCLUSION.

The defendant waived the issue of severance by failing to renew his pre-trial motion to sever during or after trial

Assuming *arguendo*, that defendant did not waive the issue of severance, he failed to show that the trial court abused its discretion in denying his motion to sever because all factors weighed in favor of a joint trial and denial of that motion.

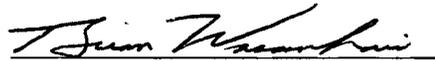
The defendant has also failed to show ineffective assistance of counsel.

Lastly, defendant's claim that the trial court abused its discretion in failing to grant him bail pending this appeal should be dismissed as moot

because, by the time the Court renders a decision in this case, it can provide no effective relief as to the denial of bail pending that decision.

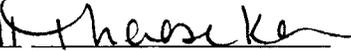
DATED: January 27, 2011.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
Brian Wasankari  
Deputy Prosecuting Attorney  
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by 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.

1-27-11   
Date Signature

COURT OF APPEALS  
JANUARY 27  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY