IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 64861-6-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	PUBLISHED IN PART OPINION
	)	
DESHAWN C. CLARK,	)	
	)	
Appellant.	)	FILED: August 20, 2012

Schindler, J. — A jury convicted DeShawn C. Clark of human trafficking in the second degree of T.G., promoting prostitution in the first degree of T.G., unlawful imprisonment of T.G., promoting commercial sexual abuse of H.R. and N.S., and conspiracy to commit promoting prostitution in the first degree. The jury also found that Clark committed the crime of conspiracy to commit promoting prostitution with the intent to benefit, profit, or otherwise advantage a criminal street gang. Clark argues insufficient evidence supports the convictions of commercial sexual abuse of N.S. and human trafficking of T.G. In the alternative, Clark claims that either the convictions for human trafficking and promoting prostitution violate double jeopardy, or the convictions for unlawful imprisonment and human trafficking or promoting prostitution violate double jeopardy. We remand for resentencing. In all other respects, we affirm.

FACTS

West Side Street Mobb (WSSM) is a criminal street gang in West Seattle. "Mobb" is an acronym for "Money Over Broke Bitches" that means "money first before you talk to bitches." The primary objective of WSSM gang members was to make money from drug dealing, bank fraud, and prostitution.

DeShawn "Cash Money" Clark, Thomas "Mario" Foster, Donte "Tay" Walters, Gamata "G Bez" Abdullah, Elijah "E Pill" Cane, Jeffrey "Little Pill" Knox, Desmond "Goldie" Manago, and Mycah Johnsen were members of WSSM and were engaged in promoting prostitution. Clark, his older brother Shawn Clark, Mycah Johnsen, Gerald Jackson, and Jewan Spinks also identified themselves as members of Crime Fam.

When Clark and 18-year-old T.G. began dating in August 2007, she had a job at Kentucky Fried Chicken and was living in an apartment. Approximately two months later, T.G. had lost her job and was evicted from her apartment. In October, T.G. and Clark were living with Clark's mother. At Clark's urging, T.G. agreed to work as a prostitute to earn money.

> A. When I lost my job and didn't have anywhere to stay, it was the option that [Clark] gave me.
> Q. What do you mean it was the option that he -- he gave you?
> A. He told me that that's how I could get money.
> Q. All right. And would it be fair for me to say the [sic] at first that was something you were willing to do?
> A. Yes.

In October 2007, 15-year-old H.R. was working as a prostitute for Gamata and staying in a motel on Pacific Highway South. H.R. said that one day when she came

back from "walking the track," Gamata and Clark were in the motel room with T.G. H.R. testified that Gamata and Clark told her to "go take [T.G.] out and show her how" to prostitute. H.R. said that Gamata and Clark told H.R. and T.G., "Just go out there and make some money." H.R. and T.G. wanted to walk the track together, but Gamata and Clark told them to split up so they could make more money.

> Me and [T.G.] decided we would -- we came up with this thing where we can, you know, both of us can walk side by side together, you know, to avoid cops to avoid, you know, maybe we'll make some more money walking both of us down, you know, by each other or whatever.
>
> So -- and then when we weren't really making that much money they told us, Well, just split up, you go on one side of the street and you go on the other side of the street.

Later that same month, H.R. left Gamata and went to work as a prostitute for Clark. H.R. said that she earned between $500 and $800 a day, and gave the money to Clark. H.R. testified that she worked for Clark for approximately two weeks before she left and returned home.

T.G. said that when she worked as a prostitute in 2007, she worked most days and earned between $500 and $1000 a day. T.G. said that when she did not work and "didn't bring any money back," Clark did not "beat [her] up for it."

In late November, Clark, T.G., Walters, and F.S., the 16-year-old girl working for Walters, went to Las Vegas for approximately a week and a half to stay with WSSM member Roosevelt "City Red" Johnson. On December 5, Clark accused T.G. of hiding money from him and told her, "You're not going to keep anything from me. You're not going to hide money from me." T.G. said that Clark forced her to strip naked in front of Walters and City Red, and hit her on "[m]y face, my head, my arms, my legs, just

kicking and hitting."

The next day, T.G. went to the emergency room of a hospital in Las Vegas. T.G. said the injuries were the result of "a fight with somebody." T.G. testified that she did not tell the truth because she was scared that she would "go to jail" for engaging in prostitution.

After returning to Seattle, T.G. left Clark and turned off her cell phone. T.G. testified that in early January 2008, Clark came to her grandmother's house and threatened to kill her because she "turned the text messaging off" on the phone and did not respond to his text messages. T.G. said that she "caught the first bus that left [town]" and went to stay with her mother in Wisconsin.

Around the same time that T.G. went to Wisconsin, 16-year-old N.S. started working for Clark as a prostitute. After N.S. ran away from home, her mother often went to Pacific Highway South to hand out missing person fliers. N.S.'s mother testified that on one occasion, Clark approached her and said that he had N.S. "wound up so tight she would never come home."

T.G. testified that after she left Seattle in January 2008, she "cut off communication [with Clark] entirely." Nonetheless, Clark continued to try to contact T.G. Because she still loved him, T.G. eventually talked to Clark. Clark repeatedly told T.G. that he loved her. Clark promised that if she returned, they would be together, "things were going to be okay again," and "he wasn't going to hit [her] anymore." T.G. believed Clark, and on June 18, 2008, she returned to Seattle.

T.G. testified that at first, Clark fulfilled his promise. But within the first week that

she started working as a prostitute, Clark treated her harshly and was violent.

At Clark's direction, T.G. stayed in hotels and posted advertisements for sex on Internet web sites. T.G. said that "[m]ost of the time [Clark] stayed in the hotel" room, but when she had a date, he would leave and sit in the car. T.G. testified that Clark kept "tabs" on her by requiring her to text him to report about customers and the money she was making. T.G. said that Clark told her she was "not allowed to talk to any males unless it was for money." Clark made T.G. refer to him as her pimp, call him "Daddy," and forced her to get a tattoo of a money bag on her stomach.

T.G. described a typical day as follows:

> Get up around 1 o'clock in the afternoon. Then [Clark] would tell me to post some ads, post some ads, and just sit and wait for calls. I wasn't allowed to eat until I made some money that day. If I didn't make any money, then it would be, if I was lucky, get to eat once that day.
>
> I would work until he decided that it was enough or until it reached anywhere from 3, 4 o'clock in the morning, and even after that, if a call came in with a substantial amount of money, he would make me take it.

T.G. testified that Clark berated her and beat her if she did not follow his rules. T.G. said that Clark would also punish her by putting her "to sleep," or choking her until she lost consciousness. From June to November 2008, N.S., H.R., A.B., and a girl named "Ice" also worked as prostitutes for Clark. But T.G. was the only one that he "beat up."

T.G. said that she complied with Clark's demands because "of what he . . . was capable of doing to me" and the fear of getting "beat up."

> It was more of what he, himself, was capable of doing to me and being hit all the time and punched all the time. It scared me into just doing what he told me to do. I did it, no ifs, ands, or buts about it. If I didn't do what he told me to do, I would get beat up, so I just started following the rules.

In late summer 2008, Clark, his brother Shawn, and Gerald Jackson took T.G., J.Z., and S.A. to Portland, Oregon to engage in prostitution. Clark paid for the hotel suite. T.G., J.Z., and S.A. posted advertisements on the Internet and used the hotel room for customers. Meanwhile, Clark, Shawn, and Jackson went to the shopping mall.

T.G. said that she did not contact the police because "I was scared . . . knowing that there's so many . . . people from [WSSM] that could come after me." But on October 30, 2008, T.G. called 911 after Clark choked her until she lost consciousness and hit her head on the bathroom wall. Tukwila Police Officer Todd Bisson responded to the 911 call. Officer Bisson said that T.G. was crying and had "a very large welt on her left eye that was purple," but did not want to talk about what happened. T.G. repeatedly said she should not have called the police, and lied about what happened.

In 2008, Seattle Police Department (SPD) Detective Todd Novisedlak and Detective Bill Guyer worked in the Vice Unit. The SPD Vice Unit works with the Federal Task Force and Federal Bureau of Investigation (FBI) to combat juvenile prostitution.

At the beginning of November 2008, Detective Novisedlak and Detective Guyer interviewed L.J. about the abduction and assault that occurred on November 3. Mario Foster is the father of L.J.'s two young children. L.J. said that in October, Foster made her work as a prostitute. L.J. told the Detectives that she did not want to work as a prostitute, but she "was more afraid of what [Foster] would do to her if she didn't do it." After L.J. told Foster "she couldn't do it anymore," he left a message on October 30 threatening "to come over and shoot up the whole house. . . . I got something for all you

motherfuckers. . . . That's all right. I got something for all y'all."

When Foster saw L.J. at a McDonald's on November 3, he ordered her to get into Clark's green Lexus. L.J. said that while Clark was driving, Foster got into the backseat and yelled at her, demanding money, and hitting her in the face.

> Foster . . . went into the backseat and grabbed her by the throat and started choking her. He headbutted her in the left eye with his forehead and started yelling at her, You think this is some fucking game, bitch?
>
> He then hit her three times in the mouth with his fists hard enough to bleed and swell and asked her if she had any money.
>
> She told him she had just a little bit for the baby's diapers and things and he ordered her to give him the money. And when she told him no, he started going through her pockets and took $150 from her pants, her back pants pocket. He also took her cell phone and -- and told her, Bitch, you're going back on the track.

When Clark arrived at a motel on Pacific Highway South, Foster gave L.J. a dollar and told her to "go hit the track." L.J. took the money and left. L.J. told the Detectives that Clark owned the green Lexus and T.G. worked for him as a prostitute.

In an effort to locate Foster and Clark, Detective Guyer posed as a customer and answered an Internet advertisement posted by T.G. Detective Guyer arranged a date with T.G. for November 7 at the Hilton in SeaTac. When Detective Guyer and Detective Novisedlak arrived, they told T.G. they wanted to talk to her as part of the investigation into the abduction and assault of L.J. Detective Novisedlak said T.G. was afraid to talk to them.

> She was very afraid. It was -- it was odd in that we were secure in the room, everybody in the room had identified themselves, we -- we assured her no harm was coming to her. But she was very nervous, very afraid.

T.G. lied to the Detectives, and told them that Desmond "Goldie" Manago was her pimp and Clark was "the errand boy for him." T.G. said that she lied because she was

scared.

On November 12, T.G. went to stay at a Travel Lodge "to hide my money and computer . . . so I could leave." Clark went to the Travel Lodge, tore the room apart, and took the laptop computer. When they were in the parking lot, Clark smashed the computer on the ground and punched T.G. in the face so hard it "just exploded with blood." T.G. said that after she fell to the ground, Clark picked her up, put her in the back of his El Camino, and drove away.

Hotel clerk Eric Noel testified that he saw Clark grab the laptop from T.G. and smash it on the ground. Noel saw Clark punch T.G. with a closed fist and "hit her . . . directly in the face." Noel said that when T.G. fell to the ground, she was moaning. Noel testified that Clark was "standing over her" and yelling at her before he picked T.G. up and put her in the back of the El Camino "like a box or something." Noel called 911.

T.G. testified that when Clark slowed down at a stop sign, she got out of the El Camino and ran back to the Travel Lodge. The medics took T.G. to Highline Hospital. T.G. called Detective Novisedlak from the hospital. Detective Novisedlak made arrangements for T.G. to stay in a secure shelter after she was released from the hospital.

The next day, the police executed a warrant to search Shawn Clark's apartment. The police seized a large quantity of marijuana and several cell phones, and arrested Clark and his brother Shawn. Clark was released the next day.

Detective Novisedlak interviewed T.G. on November 18 and 21. During the

interviews, Detective Novisedlak learned that Clark was a member of WSSM, and that he forced T.G. to work for him as a prostitute. On November 20, 2008, the State charged DeShawn C. Clark and Thomas L. Foster with promoting prostitution in the first degree, domestic violence assault in the second degree, and malicious mischief.

After the interview on November 21, T.G. made three "frantic" phone calls to Detective Novisedlak. In the first call, T.G. told the Detective that Mario Foster confronted her in the bus tunnel and "relayed a threat [t]hat Cash was going to kill her." In the second call, T.G. said that a dark colored "Honda Civic-type vehicle" approached her as she was walking down the street, somebody yelled out, "Street Mobb, bitch," and "shot [her] in the head" with a BB. In the third call, T.G. was "frantic" because Mario and Gamata were standing outside the secure shelter.

> The last phone call that day, again, frantic, she had just been dropped off at the secure shelter in Seattle. And pulling up she noticed Thomas Foster and another individual that she knew as Gamata or G Bez standing outside the shelter.

Detective Novisedlak immediately went to the shelter. Detective Novisedlak documented her injuries and "scramble[d]" to locate another secure shelter for T.G.

On February 2, 2009, the FBI, King County prosecuting attorneys, King County deputies, and SPD Detective Novisedlak conducted a lengthy joint interview of T.G.

On March 20, 2009, the State filed a second amended information charging DeShawn C. Clark, Thomas L. Foster, Shawn S. Clark, Gerald N. Jackson, Mycah M. Johnsen, and Desmond T. Manago with human trafficking, promoting prostitution, assault, and violation of the Uniform Controlled Substances Act during the period of time intervening between June through December 2008, and promoting commercial

sexual abuse of a minor in 2007.

In May, the U.S. Attorney issued subpoenas to a number of witnesses to testify before a grand jury about bank fraud, prostitution, and WSSM. In June, Mycah Johnsen pleaded guilty to the state court charges and agreed to testify on behalf of the State. In exchange, the U.S. Attorney agreed to not file federal charges against Johnsen.

In his written plea agreement, Johnsen admits he is a member of WSSM and that beginning in June 2008, C.D. worked for him as a prostitute. Johnsen described how WSSM members "work together to sell drugs, commit bank fraud, run guns, use violence to increase the gang's influence, or pimp out girls." Johnsen identified Clark, his brother Shawn Clark, Mario Foster, and Gerald Jackson as pimps and members of WSSM or Crime Fam.

Johnsen states that Clark "showed me how to pimp. He would tell me where I should have CD work and would explain how to use Craigslist to post ads [and] I was to keep all of [the money]." Johnsen states Clark instructed him about how to "sell the dream" by convincing a girl he was in love with her so that she eventually would do anything for him, including working as a prostitute. Johnsen said that T.G. "worked for 'Cash.' " Johnsen also states that Clark "beat [T.G.] when she either disobeyed him or did not make him enough money."

On August 4, Desmond Manago pleaded guilty to the charges in state court. On August 27, Shawn Clark, Mario Foster, and Gerald Jackson pleaded guilty. Shawn Clark admitted that in 2008, A.R. and J.Z. worked for him as prostitutes, and he was a

member of Crime Fam and "an associate" of WSSM. Shawn pleaded guilty to felony violation of a no-contact order, witness tampering, promoting prostitution, and the aggravating factor of committing the crime of promoting prostitution to benefit WSSM.

Foster pleaded guilty to promoting prostitution of A.W. and L.J., assault in the second degree of L.J., and the aggravating factor of committing the crime of promoting prostitution to benefit WSSM. Jackson pleaded guilty to promoting prostitution in the first degree of S.A., and the aggravating factor of committing the crime to directly or indirectly benefit the criminal street gang WSSM.

The State filed an amended information charging Clark with human trafficking in the second degree of T.G. between June 15, 2008 and December 1, 2008, Count I; human trafficking in the second degree of N.S. from June 15, 2008 through March 31, 2009, Count II; promoting prostitution in the first degree of T.G. between June 15, 2008 and December 1, 2008, Count III; promoting commercial sexual abuse of H.R. (date of birth November 15, 1991) and N.S. (date of birth August 8, 1991), Count IV and Count V; assault in the second degree by strangulation of T.G. on October 30, 2008, Count VI; unlawful imprisonment of T.G. on November 12, 2008, Count VII; possession with intent to deliver marijuana in violation of the Uniform Controlled Substances Act on November 13, 2008, Count VIII; and criminal conspiracy to promote prostitution in the first degree from June 15, 2008 through September 30, 2009, Count IX. The State also alleged as an aggravating factor that Clark committed the crimes with the intent to benefit or advantage a criminal street gang under RCW 9.94A.535(3)(aa).

The 26-day trial began in October 2009. The transcript of the trial is more than

5,000 pages. A number of witnesses testified on behalf of the State, including T.G., H.R., H.R.'s parents, N.S., N.S.'s mother, L.J., Mycah Johnsen, the hotel clerk who called 911 on November 12, and the SPD Vice Unit Detectives. The court admitted over 200 exhibits, including receipts for hotels, Internet postings, and cell phone text messages.

Mycah Johnsen testified that WSSM members gained respect and status by making money. Johnsen described the "gang lifestyle," and how WSSM members work together to "pimp out girls." Johnsen said that Clark was a very successful pimp respected by WSSM members. Johnsen testified that Clark bragged about the amount of money he made from prostitution, and instructed him on how to succeed as a pimp:

> Just don't fuck her until she give you some money. I mean but at the same time show the bitch that you're gonna be there. You know, sweet talk the bitch and play the nice guy. Tell her what she wants to hear and think about what a bitch could say to you and treat . . . you like to make you come out of their pockets and say and do with the bitch because your mind is stronger than hers. And when you get her so sprung to the point where she is -- can't fucking -- to the point where she can't fucking live without you switch up on the bitch and the kiss. Don't fuck the -- don't fuck her. Cash first, ass last. Simps [(fake pimps)] think with their dick.
>
> Q. So selling a dream. Is that what we're seeing here? Is that what you're telling him?
>
> A. Right. Yeah.

N.S. testified that Mycah Johnsen was her pimp and Clark was her boyfriend. N.S. admitted that she had a tattoo on her thigh that said "Cash," a "bag of money" tattoo on her right ankle, a tattoo that said "Money's all I think about," and a recent tattoo on her chest that said "Daddy's girl." Except for the tattoo on her thigh, N.S. denied that any of the other tattoos referred to Clark. The State impeached N.S. with a number of exhibits that show N.S. worked for Clark as a prostitute, including her

MySpace postings, text messages, and taped conversations while Clark was in jail.

Clark testified that he was not a member of WSSM. Clark said that Crime Fam is a rap group. Clark denied that T.G., H.R., or N.S. worked for him as prostitutes. Clark testified that the first time he learned that T.G. was involved in prostitution was during the trip to Las Vegas. Clark also testified that while they were in Las Vegas, T.G. got into a physical altercation with a woman who was engaged to City Red's father. Clark admitted that he had a sexual relationship with T.G. but said he was involved in "a long-term . . . on-and-off again relationship" with A.B.

Clark testified that T.G. worked as a prostitute for Goldie. Clark admitted that he saw T.G. "all the time" after she returned from Wisconsin in June 2008, and that T.G. gave him money that she made from working as a prostitute. Clark testified that in late summer 2008, he drove his brother Shawn, Jackson, J.Z., S.A., and T.G. to Portland in his green Lexus. Clark admitted that the hotel suite was registered in his name. Clark said he "went down there to go shopping, but my brother and them go down and do what they do. . . . To pimp." Clark denied choking T.G. on October 30.

Clark testified that on November 12, he went to the Travel Lodge to retrieve his laptop computer from T.G. Clark said T.G. was angry about his relationship with A.B. Clark testified that he told T.G. he "wasn't messing with her no more. . . . No sexual relationship, no friends no nothing." Clark said that when he took the laptop and left, T.G. chased after him yelling, "Give me the laptop. I'm, like, No, it's my laptop. And then just to stop it I said, Well, if I can't have it, you can't have it. I just broke it."

Clark testified that when T.G. attempted to hit him, "I swung my hand and I

smacked her in the mouth." Clark said that as he started to drive off, T.G. jumped in the back of the El Camino and he told her to get out. Clark denied that he "picked [T.G.] up and put her in the car, at all, ever," and said the hotel clerk was "coached . . . to say that."

During cross-examination, the State introduced a number of text messages that were sent and received by Clark, including a text message that Clark sent to K.V. on November 12. The text message states, in pertinent part: "I just fired the white bitch. Come fuck with me, mom. I'll show you how -- I'll show you how to be treated." Clark also admitted that he asked N.S. to get someone to talk to T.G. before the trial, and he instructed N.S. to make sure to tell everyone that Johnsen was a "snitch."

The jury found Clark not guilty of human trafficking in the second degree of N.S., Count II; not guilty of assault in the second degree of T.G. by strangulation on October 30, 2008, Count VI; and not guilty of possession of marijuana with intent to deliver on November 13, 2008, Count VII.

The jury found Clark guilty of human trafficking in the second degree of T.G., Count I; promoting prostitution in the first degree of T.G., Count III; two counts of promoting commercial sexual abuse of H.R. and N.S., Count IV and Count V; unlawful imprisonment of T.G., Count VII; and criminal conspiracy to commit promoting prostitution in the first degree, Count IX. The jury also found that Clark committed the crime of conspiracy to promote prostitution with the intent to benefit, profit, or otherwise advantage a criminal street gang.

The court imposed a high-end standard-range sentence with an additional 20

months on the jury finding of the aggravating factor for conspiracy to commit promoting prostitution.

ANALYSIS

Sufficiency of the Evidence

Clark claims insufficient evidence supports his conviction for (1) promoting commercial sexual abuse of N.S. and (2) human trafficking of T.G. in the second degree.

In reviewing sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When challenging the sufficiency of the evidence, the defendant admits the truth of the State's evidence, and all reasonable inferences must be drawn in favor of the State and interpreted strongly against the defendant. Salinas, 119 Wn.2d at 201. We give deference to the finder of fact in resolving conflicting testimony and weighing the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Circumstantial and direct evidence are accorded equal weight. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Promoting Commercial Sexual Abuse of N.S.

Clark asserts insufficient evidence supports his conviction for promoting commercial sexual abuse of N.S. because she testified that Clark was not her pimp. To convict Clark of promoting commercial sexual abuse of N.S., the State had to prove that between June 15, 2008 and August 7, 2009, Clark knowingly advanced or profited from

a minor engaged in sexual conduct. RCW 9.68A.101(1).

Viewing the evidence in the light most favorable to the State, the record supports the conviction of promoting commercial sexual abuse of N.S. There is no dispute that N.S. was born August 8, 1991 and was 15-years-old when she first met Clark. While N.S. denied Clark was her pimp, the evidence contradicted her testimony.

A.R. testified that while she was working as a prostitute for Shawn Clark in 2008, N.S. was working as a prostitute for Clark. A.R. said that N.S. stayed in motel rooms and used A.R.'s computer to post advertisements on Craigslist. A.R. testified that N.S. would call or text Clark each time she had a customer and she saw N.S. give Clark the money she made from prostitution.

S.A. testified that when a customer asked for two prostitutes, Clark drove S.A. and N.S. to the customer. C.D. testified that N.S. worked as a prostitute for Clark. C.D. said that Johnsen and Clark would drive N.S. and C.D. to the track to earn money and pick them up afterwards.

Johnsen testified that N.S. worked as a prostitute for Clark. Johnsen said that he and Clark posted advertisements on-line for N.S. and C.D., that he and Clark drove N.S. and C.D. to the track, and he saw N.S. give Clark the money she made from working as a prostitute.

A number of the exhibits, including text messages, also showed that N.S. worked as a prostitute for Clark.[1] N.S. frequently sent text messages to Clark, calling him

[1] For example, text messages between Clark and N.S. in January 2009 state, in pertinent part:

[N.S.] – I got a jug [A "jug" means a "date," or a customer who will pay money for sex.]
[D.C.] – For how much and wat you need a ride to
[N.S.] – No I was saying I caught one, just lettin you kno I got some money
[D.C.] – Yep lets keep it flowing babe, todays are day
[N.S.] – Alright dad

"Daddy" and telling him about the money she was making. And the taped telephone conversations between N.S. and Clark showed N.S. continued to work for Clark as a prostitute while he was in jail before trial.[2] The evidence supports the jury conviction of promoting commercial sexual abuse of N.S.

Human Trafficking in the Second Degree of T.G.

Clark claims insufficient evidence supports his conviction for human trafficking in the second degree of T.G. because he recruited or "procured" her to work as a prostitute in 2007, and not during the charging period of June 15 to December 1, 2008. The record does not support Clark's argument.

To convict Clark of the crime of human trafficking in the second degree of T.G., the State had the burden of proving that between June 15, 2008 and December 1, 2008, Clark recruited, harbored, transported, or obtained by any means T.G. knowing that force, fraud, or coercion would be used to cause her to engage in forced labor or involuntary servitude. Former RCW 9A.40.100(2)(a)(i) (2003).[3]

[D.C.] – Have you got som more jugs
[N.S.] – Dad I got to leave soon my moms locked out and I got the key
[D.C.] – Okay but did you hit some more jugs
[N.S.] – I told my mom I was on my way tho
[D.C.] – Okay I'll get you home by 8, lets just get like a jug or two
[N.S.] – Alright dad
[D.C.] – We need to hit a few more jugs, I got to come up with 600 by Sunday, so just work
[N.S.] – Alright
[D.C.] – (Later) Did you hit some more jugs
[N.S.] – No but I'll try to get some more
[D.C.] – No tryin, do.

[2] One of the taped jail telephone conversations that took place on April 5, 2009 states, in pertinent part:

> "You ain't got no dough?" N.S. responded, "No, it's been slow . . . I've been going, and, you know, getting the little regulars." . . . On May 1, 2009, N.S. told [Clark] to call back in an hour and she would have more money . . . . [Clark] asked her, "Why? Are you with someone right now?" N.S. replies, "Yeah." [Clark] checked back in with N.S. two hours later and asked how much she made.

T.G. testified that beginning in August 2007, she and Clark were romantically involved and she "willing[ly]" agreed to work as a prostitute to earn money. But after Clark beat her in early December 2007, and then threatened to kill her after she tried to leave him, she left. T.G went to live with her mother in Wisconsin in January 2008.

While T.G. was living in Wisconsin, Clark repeatedly tried to contact her numerous times. At first, T.G. did not have any contact with Clark, but because she still loved him, T.G. eventually agreed to talk to him. Clark repeatedly told T.G. that he loved her and promised T.G. that if she returned, "things were going to be okay again and that he wasn't going to hit [her] anymore." T.G. testified that Clark said "he loved me and that he would be -- he would be with me forever." T.G. believed Clark, and on June 18, 2008, she returned to Seattle to be with him.

T.G. testified that at first, the relationship was fine. However, within a week of returning to work as a prostitute, Clark started treating her harshly and used violence. Clark kept tabs on T.G. and ordered her to post Internet advertisements from the hotel rooms she stayed in. Clark made T.G. work as a prostitute seven days a week from the time she woke up until he decided she could stop working, and he would not let her eat until she earned money. Clark would punish T.G. if she did not follow his rules by beating her or choking her until she passed out.

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences against Clark, sufficient evidence supports the conviction of human trafficking in the second degree of T.G. Clark's success as a pimp and his

[3] The legislature amended RCW 9A.40.100 in 2011 to add "transfers" and "receives" to "[r]ecruits, harbors, transports, provides, or obtains by any means another person." The legislature also added "or a commercial sex act" to "forced labor or involuntary servitude." Laws of 2011, ch. 111, § 1.

status in WSSM was directly related to the money he made from prostitution. Before T.G. left, she earned a significant amount of money working as a prostitute. Clark knew T.G. still loved him and made false promises to her in a concerted effort to persuade her to return to Seattle. The evidence shows that Clark knew that if he was successful in convincing T.G. to return to Seattle, he would use coercion or force to subject T.G. to forced labor or involuntary servitude by engaging in prostitution.[4] The evidence supports the jury conviction of human trafficking in the second degree.

[4] The jury instructions define "forced labor" and "involuntary servitude" as follows:

> "Forced labor" means the labor or services of a person obtained:
>
> 1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person;
> 2) by means of serious harm or threats of serious harm to that person; or
> 3) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person would suffer serious harm or physical restraint.
>
> . . . .
>
> The term "involuntary servitude" means a condition of servitude in which another person is forced to work for the defendant by the use or threat of physical restraint or physical injury.

Double Jeopardy

As a separate and alternative ground to reverse and vacate the conviction of human trafficking in the second degree, Clark claims punishment for the crimes of human trafficking in the second degree and promoting prostitution in the first degree violate double jeopardy because the two crimes are the same in law and fact under Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).

Interpretation and application of double jeopardy is a question of law that we review de novo. Freeman, 153 Wn.2d at 770. The State may charge a defendant with multiple crimes arising from the same criminal conduct. Freeman, 153 Wn.2d at 770. However, the double jeopardy clause of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution protect a defendant against multiple punishments for the same offense. The Fifth Amendment states, in pertinent part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Washington Constitution guarantees that "[n]o person shall . . . be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9. Our court interprets article I, section 9 in the same manner as the Supreme Court interprets the double jeopardy clause of the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

"Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." In re Pers. Restraint of

Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Our supreme court has "repeatedly rejected the notion that offenses committed during a single transaction are necessarily the same offense" for purposes of double jeopardy. State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).[5]

The fact that the same conduct is used to prove each crime is not dispositive. Freeman, 153 Wn.2d at 777. The dispositive question in analyzing whether two convictions violate double jeopardy is whether the legislature authorized multiple punishments. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Subject to constitutional constraints, the legislature has the power to define crimes and assign punishment. Calle, 125 Wn.2d at 776. In determining whether the legislature intended to punish two separate offenses, we first look to the language of the statutes. Calle, 125 Wn.2d at 776.

Where the language of the statutes does not expressly authorize cumulative punishment, we apply the Blockburger or "same evidence" test to determine legislative intent. The Blockburger test is described as follows:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 284 U.S. at 304. The analysis for the same evidence test is described in Calle as follows:

> "If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses."

[5] (Internal quotation marks omitted.)

Calle, 125 Wn.2d at 777 (quoting Vladovic, 99 Wn.2d at 423).

Notwithstanding a substantial overlap in the evidence that establishes the two crimes, " '[i]f each requires proof of a fact that the other does not,' " the Blockburger test and same evidence test is satisfied. Albernaz v. United States, 450 U.S. 333, 338, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981) (quoting Iannelli v United States, 420 U.S. 770, 785, n.17, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)); Vladovic, 99 Wn.2d at 423. In applying the Blockburger and the same evidence test, we must consider the offenses as charged. Freeman, 153 Wn.2d at 772.

The State charged Clark with human trafficking in the second degree of T.G. in violation of former RCW 9A.40.100(2)(a)(i), Count I.[6] Former RCW 9A.40.100(2)(a)(i) states:

> (2)(a) A person is guilty of trafficking in the second degree when such person:
> (i) Recruits, harbors, transports, provides, or obtains by any means another person knowing that force, fraud, or coercion as defined in RCW 9A.36.070 will be used to cause the person to engage in forced labor or involuntary servitude.

The State alleged that during a period of time between June 15, 2008 and December 1,

[6] Although the information charged Clark in the alternative with violation of former RCW 9A.40.100(2)(a)(ii), ("[b]enefits financially or by receiving anything of value" from human trafficking), the court only instructed the jury on the means set forth in former RCW 9A.40.100(2)(a)(i). See State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The "to convict" jury instruction for human trafficking in the second degree states, in pertinent part:

> To convict the defendant of the crime of Human Trafficking in the Second Degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
> 1) That during a period of time intervening June 15, 2008 through December 1, 2008, the defendant recruited, harbored, transported, provided or obtained by any means T.G.;
> 2) That the defendant did such recruitment, harboring, transporting, providing or obtaining knowing that force, fraud or coercion would be used to cause T.G. to engage in forced labor or involuntary servitude;
> 3) That any of these acts have occurred in the State of Washington.

2008, Clark recruited, harbored, transported, provided, or obtained by any means T.G. knowing that force, fraud, or coercion would be used to cause T.G. to engage in forced labor or involuntary servitude.

The State also charged Clark with the crime of promoting prostitution in the first degree of T.G. in violation of RCW 9A.88.070(1), Count III. The State alleged that during a period of time between June 15, 2008 and December 1, 2008, Clark knowingly advanced prostitution by compelling T.G. by threat or force to engage in prostitution.[7] RCW 9A.88.070(1) states:

> A person is guilty of promoting prostitution in the first degree if he or she knowingly advances prostitution by compelling a person by threat or force to engage in prostitution or profits from prostitution which results from such threat or force.

We conclude that under Blockburger and the same evidence test, the crimes of human trafficking in the second degree and promoting prostitution in the first degree each required proof of a factual element that the other did not.[8] Significantly, the crime of human trafficking in the second degree requires proof of a different mens rea than the crime of promoting prostitution in the first degree.

Promoting prostitution in the first degree requires proof that the defendant actually used force to compel a person to engage in prostitution. Under RCW 9A.88.070(1), a defendant "knowingly advances prostitution by compelling a person by

[7] Under RCW 9A.88.060(1), a person "advances prostitution" if he causes a person to commit or engage in prostitution.

[8] We also reject Clark's argument that the State could only charge him with conspiracy to promote prostitution because the crime of human trafficking and conspiracy to promote prostitution statutes are concurrent. Because the human trafficking statute and the promoting prostitution statute require proof of different elements, Clark cannot establish that the two statutes are concurrent. State v. Chase, 134 Wn. App. 792, 802-03, 142 P.3d 630 (2006).

threat or force to engage in prostitution."[9] By contrast, the human trafficking statute requires the State to prove the defendant knew that force, fraud, or coercion "will be used" in the future to cause another person to engage in forced labor or involuntary servitude by engaging in prostitution. Former RCW 9A.40.100(2)(a)(i).[10] The human trafficking statute requires proof that force, fraud, or coercion "will be used to cause the person to engage in forced labor or involuntary servitude." Former RCW 9A.40.100(2)(a)(i).[11] The human trafficking statue also requires proof that the defendant had knowledge that the victim would be subjected to forced labor or involuntary servitude. Again, no such intent is required to prove promoting prostitution in the first degree.[12]

As charged and proved, the crimes of human trafficking and promoting prostitution are not the same in fact. As the prosecutor pointed out in closing argument, the two offenses required proof of a different mens rea.

> And I would also say -- I'd also point out to you, you're going to look at human trafficking and you're going to say, Well, wait a minute, what's the difference here between human trafficking and promoting prostitution? Here's the difference: when you look at the human trafficking instruction, you will see that there is no requirement for the crime of human trafficking -- that the person who is the human trafficker uses force at the time of recruitment or at the time of transport. He's just got to know that it's going to be used.
>
> And when we talk about promoting prostitution, . . . you'll see that promoting prostitution requires that force be used. And there's a difference there. That's why they are charged different crimes in this case, there is a difference.

[9] (Emphasis added.)

[10] (Emphasis added.)

[11] (Emphasis added.)

[12] In addition, proof that Clark "recruit[ed], harbor[ed], transport[ed], provide[d], or obtain[ed] by any means" T.G. is not required to prove promoting prostitution in the first degree.

In sum, under the Blockburger and same evidence test, the offenses of human trafficking in the second degree and promoting prostitution in the first degree are not the same in law. And as charged and proved, the offenses are not the same in fact. The offense of human trafficking in the second degree requires proof of a different mens rea that promoting prostitution does not.

We also reject Clark's argument that because the two crimes serve the same purpose, the merger doctrine applies. If applicable, the merger doctrine is a tool of statutory construction used to "help determine legislative intent, where the degree of one offense is elevated by conduct constituting a separate offense." State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). In Freeman, the court held that if the greater offense " 'typically carries a penalty that incorporates punishment for the lesser included offence,' " a court vacates the lesser offense for purposes of double jeopardy. Freeman, 153 Wn.2d at 775 (quoting Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 28 (1995)). But the merger doctrine

> "only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime . . . the State must prove not only that a defendant committed that crime . . . but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes."

Freeman, 153 Wn.2d at 777-78 (quoting Vladovic, 99 Wn.2d at 420-21). Even if two convictions appear to merge on an abstract level, we must determine whether there is an independent purpose for each offense. Freeman, 153 Wn.2d at 773. We conclude that because the two crimes serve an independent purpose, and proof of one crime is not necessary to prove the other, the merger doctrine does not apply.

Promoting prostitution in the first degree was enacted as part of the 1975 criminal code to target those participating in and profiting from the business of selling sex for money.[13] Laws of 1975, 1st Ex. Sess., ch. 260. The legislature enacted the crime of human trafficking in 2003. Laws of 2003, ch. 267, § 1. The Washington law is modeled after the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, sections 101 to 113, 114 Stat. 1462 (2000) (codified at 22 U.S.C. section 7101(a)). The legislative history shows that the legislature recognized that Washington had statutes that punished a person for prostitution, but did not have a criminal statute that specifically prohibited human trafficking. Final B. Rep. on Substitute H.B. 1175, 58th Leg., Reg. Sess. (Wash. 2003). As the legislative history notes, "a person may be trafficked for a number of reasons including forced prostitution." Final B. Rep. at 1.

The legislature codified the crime of human trafficking in chapter 9A.40 RCW, "Kidnapping, Unlawful Imprisonment, and Custodial Interference." The crime of promoting prostitution is codified in chapter 9A.88 RCW, "Indecent Exposure—Prostitution." Human trafficking in the second degree is a more serious offense than promoting prostitution in the first degree. Human trafficking in the second degree is a class A felony[14] and a level 12 offense. Promoting prostitution in the first degree is a class B felony[15] and a level 8 offense.

Clark also claims his conviction for unlawful imprisonment of T.G. and the convictions for either human trafficking in the second degree or promoting prostitution

[13] In 2007, the legislature eliminated the provision in RCW 9A.88.070 addressing promoting prostitution of a person less than 18 years old and enacted the separate crime of commercial sexual abuse of a minor. Laws of 2007, ch. 368, §§ 1, 2, 13.

[14] Former RCW 9A.40.100(2)(b).

[15] RCW 9A.88.070(2).

in the first degree of T.G. violate double jeopardy. We disagree.

To convict Clark of the crime of unlawful imprisonment, the State had to prove that Clark knowingly restrained T.G. on November 12. RCW 9A.40.040. Restraint is not an element of either human trafficking or promoting prostitution. Proof of the charge of unlawful imprisonment was based solely on the incident on November 12 when Clark punched T.G. in the face, then forcibly put her in the El Camino and drove away. The crime of unlawful imprisonment that occurred on November 12 did not constitute proof of either human trafficking in the second degree or promoting prostitution in the first degree.

Because the remainder of this opinion has no precedential value, the panel has determined it should not be published in accordance with RCW 2.06.040.

Batson Challenge

Clark contends the trial court erred in allowing the State to use peremptory challenges to excuse two African American jurors, Jurors 17 and 54.[16] Clark argues that under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the trial court erred in concluding the State presented legitimate, nondiscriminatory reasons for excusing Juror 17 and Juror 54.

A prosecutor's use of a peremptory challenge solely on the basis of race violates a defendant's right to equal protection. Batson, 476 U.S. at 89. If the defendant makes out a prima facie case of racial motivation, the burden shifts to the State to "articulate a neutral explanation related to the particular case to be tried." Batson, 476 U.S. at 98;

[16] The State also excused another African American juror, Juror 16, but on appeal, Clark only challenges the dismissal of Jurors 17 and 54.

State v. Luvene, 127 Wn. 2d 690, 699, 903 P.2d 960 (1995). In determining whether a prosecutor's explanation is based on discriminatory intent, courts consider whether the prosecutor has stated a race-neutral explanation for the challenge. State v. Rhodes, 82 Wn. App 192, 196, 917 P.2d 149 (1996). The trial court's determination of a Batson challenge is " 'accorded great deference on appeal' " and will be upheld unless clearly erroneous. Luvene, 127 Wn. 2d at 699 (quoting Hernandez v. New York, 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)).

Juror 17

In response to questions about domestic violence, Juror 17 said that his sister was a victim of domestic violence. Juror 17 said his sister would often "instigate the arguments," and he "talk[ed] to her on managing her anger, to not provoke the fight in the first place."

> [PROSECUTOR]: Do you think that given -- actually, did you talk to your sister a lot about it?
>
> [JUROR 17]: Yeah, yeah, I did. I mean, it was obviously more than one time. You know, she was one that would go back. And we talked to her about it, and a lot [of] times she would instigate the fight, instigate the arguments. And I'm not saying that that gave him any right to do what he did, but, you know, we try to talk to her on managing her anger, to not provoke the fight in the first place.
>
> But, yeah, we talked to her all the time about it, about how she shouldn't go back with him but she would because they had a kid together.
>
> [PROSECUTOR]: Do you think that given your relationship with your sister and that experience that you could decide, I guess not knowing anything, really, about this case, that you could decide what happened in this case based upon the facts that you hear in this courtroom rather than based upon your own personal experience?
>
> [JUROR 17]: I think so. I mean everyone's -- obviously everyone has their own personal experiences that are tough to for get [sic] about when you [sic] into a court.
>
> But, actually, I know circumstance is everything. You know, like I said, my sister would instigate it quite often. And I would tell her not that

> that gave him any right to do what he did, but you can't -- you can't do that.
>
> So, I understand that circumstance, doesn't make everything black and white.

During questioning by defense counsel, Juror 17 said that his sister was a member of a "street gang."

> [JUROR 17]: My sister, all through -- all through middle school and then up until she dropped out of high school, she was definitely --
>
> [DEFENSE COUNSEL]: You said she was [involved in street gang activity], you sure?
>
> [JUROR 17]: Yep. Absolutely.
>
> [DEFENSE COUNSEL]: What kind of things made you believe -- helped you reach that determination?
>
> [JUROR 17]: Well, some of the personal conversations I've had with her.
>
> [DEFENSE COUNSEL]: Okay.
>
> [JUROR 17]: Meeting some of the boyfriends that she would bring around the house. Seeing the pictures on her Facebook of, you know, the gang signs she's throwing up.

The prosecutor identified the response about domestic violence and his sister's involvement with a street gang as the reasons to use a peremptory challenge to excuse Juror 17.

> So, Juror No. 17. Juror No. 17 made a -- frankly an astonishing statement when we were having the discussion with respect to domestic violence. He said that his sister would be a [sic] at fault for provoking an assault and that he would blame her.
>
> He also indicated that his sister was in a street gang, that she had -- in her youth had flashed signs. And he made statements in the latter part of the session which, in my estimation were making -- were clearly sympathetic towards someone charged with a crime. He said something -- something along the lines of, Well, you know, people -- people make mistakes and you need to for give [sic] for that or something along those lines that I took as being quite sympathetic, and I thought he would be sympathetic towards the defendant.
>
> I was much more concerned, though, about his statements regarding a domestic violence situation and -- and where words and the like would -- would just -- in my mind, he was saying it would just clarify an assault or a physical assault on an individual. That's the same way I

> excused 44. I heard very similar reasoning --
>
> . . . .
>
> . . . He said his sister had been beaten up by the boyfriend. She would go back to him. He -- let's see, what else did he add? She -- she said -- she shouldn't provoke the fight.
>
> And that was, you know, in a case where there's going to be connotations of domestic violence and particularly with -- with his experience of having a sister in a gang, that was -- that was enough for me to exercise a challenge against him.

Juror 54

In response to defense counsel's questions about street gangs, Juror 54 said that his "cousin and uncles were heavily involved" in a street gang.

> [JUROR 54]: A while ago -- or at least I was in high school, I used to live -- in the high school we had a big problem and [INAUDIBLE].
>
> [DEFENSE COUNSEL]: Well, can I ask you some more questions about it, what -- what kind of things did -- training did you receive or what were you learning?
>
> [JUROR 54]: When I was younger, like fourth grade, it was, like, real basic stuff [INAUDIBLE]. And when we got older and it got more of a problem, just things to watch out for, flags, symbols, signs.
>
> [DEFENSE COUNSEL]: What kind of flags or symbols, that you can recall, that you were told to look out for?
>
> [JUROR 54]: Well, it varies because, like, from different -- different areas and different gangs. Like the real basic ones were the Bloods and Crips and then all those other [INAUDIBLE]. Just real basic things like certain styles of dress.
>
> [DEFENSE COUNSEL]: Okay. And did you know anyone that was in a street gang?
>
> [JUROR 54]: Yes.
>
> [DEFENSE COUNSEL]: Okay. And how many people? Were you close to them, friends, relatives?
>
> [JUROR 54]: Yeah, a lot of family, my cousin and uncles were heavily involved.

The prosecutor explained that the reason to excuse Juror 54 was the concern about his relationship with family members who were admittedly "heavily involved" in a street gang. The prosecutor also stated a concern about Juror 54's age, and pointed

out that the State had used peremptory challenges to excuse other prospective jurors who were under the age of 25.

> So, 54, he has -- he stated on the record that he has friends and cousins that are in gangs. This is a -- this is [a] case that is going to be saturated with gang evidence. I was concerned about undue sympathy that this -- this juror would have towards the defendant because of that relationship with his friends or his cousins. I mean, it's family who's -- who are gang members.
>
> And the other concern I had with him, and -- and this is my general practice in picking jurors, is he's only, I think, 21 years old. And I --
>
> . . . It is -- as a general rule of thumb, I -- I don't like jurors who are that young. I don't think they have enough experience -- life experience. And I think in this case where there's going to be a lot of young people testifying, that it's too close.
>
> But -- but, for me, the primary concern and the primary reason I exercised the challenge is his statement with respect to his friends, his cousins -- and [co-counsel] is reminding, she took more copious notes -- but he also said his uncles were heavily involved. And that was -- that's troubling. I don't want someone like that on a jury where this is a primary focus of this case.

While the court expressed concern about excusing two African American jurors, the court concluded the prosecutor had articulated legitimate, race-neutral reasons to use the peremptory challenges to excuse Juror 17 and Juror 54.

> I guess, while I don't necessarily agree with [the State] on 17 and 54, I think that's a legitimate reason for the State to exercise peremptory is that they have relatives who have been involved in gangs.
>
> If they -- if that's something -- I mean, . . . it could cut either way. You could decide that's a good reason to have him on or a good reason to have him off. I'm not sure which way it cuts. . . .
>
> . . . Well, ultimately, I guess I'm going to deny the Batson challenge because I don't think I can find that it's racially motivated. But it certainly is -- I don't think it was done deliberately on the State['s] part to try and exclude minorities from the jury. I'm certainly not happy with the ultimate result of it.

On appeal, Clark relies on responses from other jurors to argue the reasons the prosecutor gave for excusing Juror 17 and Juror 54 were pretextual. The record does

not support Clark's argument.[17] The record shows the court did not err in concluding there were legitimate, race-neutral reasons to allow the State to use peremptory challenges to excuse Juror 17 and Juror 54.

Challenge for Cause and Motion to Dismiss the Jury Venire

Clark contends the court abused its discretion by denying his motion to strike Juror 69 for cause. Clark also argues the trial court's decision to deny his motion to dismiss the jury venire violated his constitutional right to an impartial jury.

On the first day of jury selection, several spectators were "conspicuously dressed in red." At some point, a detective from the SPD Gang Unit sat in the back of the courtroom, and two other gang unit officers sat on the benches in the hallway outside the courtroom. Later that day, the court informed the jury that Clark was charged with an aggravating factor alleging that he committed several of the crimes for the benefit of a criminal street gang.

The next day, Juror 18 asked to speak to the court and the attorneys outside the presence of the other jurors. Juror 18 told the court that she was concerned about her ability to be fair after seeing gang members dressed in red and the gang unit officers in uniform in the hallway outside the courtroom the previous day. Juror 18 also said that she believed the defendant was guilty because of the number of police officers on the witness list. Before being excused, Juror 18 said that she talked to one other juror, Juror 19, about her concern.

The court and the attorneys then questioned Juror 19 outside the presence of

[17] While Juror 84 also said that the woman in a domestic violence relationship is probably "instigating it," because that juror's number was so high, the State did not need to use a peremptory challenge.

the other jurors. Juror 19 said that he talked to Juror 18 and saw the gang unit officers. Juror 19 told the court that none of the other jurors mentioned seeing anything. But Juror 19 expressed a concern about the consequences of finding a gang member guilty. The court excused Juror 19.

The attorneys agreed to question the remaining jurors during voir dire. The State asked general questions about gangs and rap music. Several jurors expressed opinions about the connection between rap music, gangs, crime, and violence. After asking general questions about gangs, defense counsel specifically asked the jurors: "[H]ow many people believe that seeing the gang unit yesterday, outside, impacted the way they -- they may look at this case now? Without even hearing any evidence?" Defense counsel also asked whether the presence of the officers and young men dressed in red had either a positive or negative impact on them. In response, a number of jurors said that they did not see the gang unit officers, and believed that the young men dressed in red were "concerned family and friends."

Defense counsel then asked if any of the jurors felt they could not keep an open mind. At first, only Juror 92 raised his hand. Juror 92 said the red clothing and his strong emotional reaction to the domestic violence discussion would make it difficult to be fair. Juror 81 then said she had no problem with the gang issue, but "I do have an issue with an act of violence. . . . I could not be impartial as a juror." Juror 50 stated that "[b]ased on several of the jurors' comments, I don't feel I could be impartial." Initially, Juror 69 said that it would be difficult to be impartial "because I've worn a uniform." After further questioning, Juror 69 assured the court that he would decide the

case based solely on the evidence presented at trial. However, Jurors 50, 81, and 92 said they could not decide the case based on the evidence. Defense counsel challenged Jurors 21, 50, 69, 81, and 92 for cause. The court excused Jurors 50, 81, and 92 for cause. Clark used a peremptory challenge to excuse Juror 21. Juror 69 was seated as an alternate.

After the jury was selected, Clark made a motion to dismiss the entire venire on the grounds that the jury pool was tainted. The court denied the motion. The court concluded Clark's right to a fair and impartial jury was not violated, and specifically notes that the jurors who expressed any concern about the young men dressed in red and the gang unit officers had been excused.

> I think it's sort of unfortunate that both sides, in essence, I mean we had people coming in, showing what certainly was -- appeared to be gang colors. I don't know for sure that it was, but it certainly caught my eye when the red jacket and hat and so on came in.
>
> And then, of course, we have the -- gang unit showing up. And I think that it would have been better that if the gang unit was going to do that, to have just a couple officers come without things that say gang unit on them. Just to be here and identify who's here and provide additional security if that's necessary. But the whole idea is to not have either side intimidating or, you know, trying to influence the way that things are going.
>
> Nevertheless, I don't think that it had a significant enough impact to significantly effect [sic] the out come [sic] of this trial in any way. There were a very limited number of jurors who indicated that it had an impact on them. They -- I don't think any of those are on the jury. . . . I also felt that after the full discussion that we had of gangs and the importance of deciding things based upon what goes on in the courtroom, I didn't think that -- I thought that the only jurors who indicated that they couldn't confine their decision making to things that were in the courtroom were people that had been excused. And so the folks that were left were folks who did indicate that they could decide based on what was presented in the courtroom.

First, Clark claims the court erred in refusing to excuse Juror 69 for cause. A

juror may be excused for cause when his views " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " State v. Brett, 126 Wn.2d 136, 157-58, 892 P.2d 29 (1995) (quoting State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986)[18]). A trial court's denial of a challenge for cause is reviewed under an abuse of discretion standard. Brett, 126 Wn.2d at 158. The court can deny a challenge for cause if the court determines that the juror can set aside an expressed opinion or personal experience and try the case impartially based on the evidence at trial and the law. RCW 4.44.190.

A defendant must demonstrate prejudice as a result of the court's failure to strike a juror for cause. State v. Fire, 145 Wn. 2d 152, 161, 34 P.3d 1218 (2001). If the challenged juror did not ultimately sit on the jury, the defendant cannot show prejudice. Fire, 145 Wn.2d at 159. Because Juror 69 did not participate in jury deliberations, Clark cannot show prejudice as a result of the denial of his challenge for cause.

Next, Clark asserts that the entire jury pool was irreparably tainted during voir dire when some of the potential jurors saw gang members and gang unit officers outside the courtroom. Clark relies on Mach v. Stewart, 137 F.3d 630 (9th Cir. 1997), to argue the court erred in denying his motion to dismiss the entire jury venire.

A criminal defendant has a constitutional right to be tried by an impartial jury. U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend.10); State v. Davis, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). The court's decision to deny the request to dismiss the jury venire is within the sound discretion of the trial court, and this court will not disturb that decision unless it was an abuse of discretion. State v. Lewis, 130

[18] (Internal quotation marks and citation omitted.)

Wn.2d 700, 707, 927 P.2d 235 (1996). A court abuses its discretion if its decision is manifestly unreasonable, or based on untenable grounds or untenable reasons. State v. Bankston, 99 Wn. App. 266, 268, 992 P.2d 1041 (2000). The trial court is in the best position to determine whether a juror can be fair and impartial based on mannerisms, demeanor, and general behavior. State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

Mach is distinguishable. In Mach, the government charged the defendant with sexual conduct with a minor. Mach, 137 F.3d at 631. One prospective juror had a psychology background and worked for Child Protective Services (CPS). During voir dire, the juror stated that in the three years she had worked for CPS, every single allegation a child had made about sexual abuse was true. Mach, 137 F.3d at 631-32. In response to further questioning, the juror repeated her position and described her experience working with psychologists and psychiatrists. Mach, 137 F.2d at 632. The court struck the juror for cause but denied the defendant's motion for a mistrial. Mach, 137 F.3d at 632. The Ninth Circuit reversed. Mach, 137 F.3d at 634. The Court held that the statements made by the prospective juror were directly connected to guilt, and that "[a]t a minimum, when Mach moved for a mistrial, the court should have conducted further voir dire to determine whether the panel had in fact been infected by [the prospective juror's] expert-like statements." Mach, 137 F.3d at 633.

Here, unlike in Mach, counsel for both sides had an opportunity to extensively question the jurors, and the defense was able to identify jurors who expressed an inability to keep an open mind about the gang issues in the case. The court did not

abuse its discretion by denying Clark's motion to dismiss the entire venire.

Motion to Amend the Information

Clark asserts the trial court abused its discretion in allowing the State to amend the charging date for promoting commercial sexual abuse of H.R. The court granted the State's motion to amend the charging period from October 1, 2007 through December 1, 2008, to September 1, 2007 through December 1, 2008. The amendment was based on the testimony of H.R. and her parents at trial.

The trial court may permit the State to amend the information at any time before verdict or finding if the defendant's substantial rights are not prejudiced. CrR 2.1(d). The burden is upon the defendant to show prejudice. State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). We review a trial court's ruling on a motion to amend an information for an abuse of discretion. State v. Schaffer, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993). The charging period in an information is usually not a material element of a crime and "amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant." State v. DeBolt, 61 Wn. App. 58, 61-62, 808 P.2d 794 (1991).

Below, defense counsel argued that granting the motion to amend was prejudicial because H.R. had already testified. The court granted the motion to amend but expressly allowed the defense the opportunity to make an offer of proof and to recall H.R.

> THE COURT: . . . But it does seem to me that before, you know, I determine that -- that you need to be offered the opportunity to -- to question [H.R.] again, we ought to have some kind of indication from you

> of what it is you would be seeking to elicit from her that wasn't done before.
>
> [DEFENSE COUNSEL]: Give me -- understood. Give me a day to think about exactly what I would ask. I would ask this, though, so what is the clear charging period now? I saw in the jury instructions it's October of 2007?
>
> [PROSECUTOR]: That's what it is currently.
>
> [DEFENSE COUNSEL]: Right.

Because the defense did not make an offer of proof or ask to recall H.R., Clark cannot show substantial prejudice. Accordingly, the court did not abuse its discretion by allowing the State to amend the charging period based on the testimony at trial.

Unanimity Jury Instruction

Clark contends the trial court violated his constitutional rights by failing to give a unanimity instruction for the crime of human trafficking in the second degree and the crime of promoting prostitution in the first degree.

Where multiple acts are alleged as evidence of a single charge, the court must instruct the jury that they must unanimously agree that the State proved beyond a reasonable doubt a single act constituting the charged crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); see also State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984). No election or unanimity instruction is required if the evidence establishes a "continuing course of conduct." Petrich, 101 Wn.2d at 571.

We review the facts in a common sense manner to determine whether criminal acts consist of a continuing course of conduct. Petrich, 101 Wn.2d at 571. Evidence that the defendant engaged "in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct." State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). Here,

the court did not err in failing to give a unanimity instruction for either human trafficking or promoting prostitution.

As to promoting prostitution in the first degree, the court in State v. Gooden, 51 Wn. App. 615, 618, 754 P.2d 1000 (1988), held that the crime of promoting prostitution is a continuing course of conduct that falls within the Petrich exception. As to human trafficking in the second degree, the evidence shows Clark engaged in a continuing course of conduct knowing that force would be used to cause her to engage in prostitution.

Prosecutorial Misconduct

To prevail on a claim of prosecutorial misconduct, a defendant must show the conduct was both improper and prejudicial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

First, Clark argues that the prosecutor committed misconduct by submitting an improper jury instruction defining "advanced prostitution" that omitted the language: "operates or assists in the operation of a prostitution enterprise." The jury instruction

defining "advanced prostitution" states:

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

Because Clark agreed to the jury instruction proposed by the State, the invited error doctrine bars Clark from challenging the instruction for the first time on appeal. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).[19] Nonetheless, the Note on Use in 11 Washington Pattern Jury Instructions: Criminal 48.11, at 898 (3d ed. 2008), expressly states, "Use bracketed material as applicable." The language "operated or assisted in the operation of a house of prostitution or prostitution enterprise" is set forth in brackets. Because the jury instruction was correct, the prosecutor did not commit misconduct.

Clark claims for the first time on appeal that the prosecutor committed misconduct during closing argument by referring to the "fear and intimidation" created by gang members who attended trial. This court views allegedly improper statements in the context of the entire argument, the issues in the case, the evidence, and the jury instructions. Dhaliwal, 150 Wn.2d at 578. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). The prosecutor is permitted to respond to the arguments of defense counsel. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747

[19] Clark also asserts that his counsel was ineffective in failing to object to the instruction. To show that he received ineffective assistance of counsel, Clark must establish (1) that defense counsel's conduct fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced him. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Because the instruction was correct, Clark cannot establish that his counsel's conduct was deficient.

(1994). Where the defense fails to object to allegedly improper remarks during closing argument, error is waived unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

In closing argument, the prosecutor stated, in pertinent part:

> And in turn his fellow gang members helped the defendant. They gave him rides to the track and his girls to the track. They rented rooms for him and his girls, and they threatened [T.G.] once the police got involved in this case. And they showed up here in this courtroom to make their presence known; and they brought fear and intimidation to this place, to this trial.

Clark did not object to the argument. Instead, defense counsel cast the gang members as supportive friends and family unjustly accused of intimidation.

In rebuttal, the prosecutor stated that the gang members who attended trial tried to intimidate T.G. and Johnsen when they testified.

> I spoke earlier about the collaboration amongst the defendant and his fellow gang members. I told you and you saw through the evidence from these witnesses who testified of how they helped each other in their pimping enterprise, that they took -- they agree with each other to sort of grease the skids so they can get their girls out there working, so that they can make the money.
>
> And I'll tell you, ladies and gentlemen, that that cooperation did not stop at simply prostitution and it continued into this trial, into this very room. It continued during the testimony of [T.G.] and on the breaks from that testimony when Jeff Knox, Little Pill, Hamisi, were here watching. And they have a right to be here. Don't get me wrong. They have a right to be here. This is an open courtroom.
>
> But look at whose testimony they decided to come to. And despite what [defense counsel] said, they have been identified as members of Westside Street Mobb not only by Detective Gagliardi, but by Mycah Johnsen and [T.G.] And you've got to ask yourself why here? Why when she testified? Why only then? Why not come to the rest of the trial? What are the chances? What are the chances that those are the days

that they elected to come?

The prosecutor's statements during closing argument about the "fear and intimidation" of gang members was supported by the evidence. Several gang members were present in the courtroom during T.G.'s testimony and in the hallway before and after her testimony. T.G. testified that WSSM gang members threatened her after she began cooperating with the police and someone in a car yelled, "Stop snitching on Street Mobb, bitch," and shot her in the forehead with a BB. T.G. testified that the presence of WSSM gang members at trial frightened her.

Because the statements were based on the evidence and the remarks were not so flagrant and ill-intentioned that any prejudice could not have been neutralized by a curative instruction, we reject the claim of prosecutorial misconduct.

Aggravating Factor

Clark contends the trial court erred in instructing the jury on the aggravating factor in violation of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). But in a recent case, State v. Nunez, Nos. 85789-0, 85947-7, 2012 WL 2044377, at *1 (Wash. June 7, 2012), our supreme court overruled the nonunanimity rule set forth in Bashaw. The court concluded that the nonunanimity rule in Bashaw "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." Nunez, 2012 WL 2044377, at *1. In reaching this decision, the court noted that under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the legislature "intended complete unanimity to impose or reject an aggravator." Nunez, 2012 WL 2044377, at *4 (citing RCW 9.94A.537(3)). The trial court did not err in instructing the jury on the aggravating factor.

In the alternative, Clark asserts insufficient evidence supports the jury finding that Clark committed the crime of conspiracy to promote prostitution with the intent "to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership."[20] We review the jury's findings on an aggravating factor under the clearly erroneous standard. State v. Hale, 146 Wn. App. 299, 307, 189 P.3d 829 (2008). In applying the clearly erroneous standard to the finding of the jury, we must determine whether substantial evidence supports the finding. State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).

Gang membership alone and general statements by law enforcement about gang activity is not sufficient to establish the aggravating factor of intent to benefit a criminal street gang. State v. Bluehorse, 159 Wn. App. 410, 428-29, 248 P.3d 537 (2011). But here, in addition to testimony from Detective Joseph Gagliardi of the King County Sheriff's Office Gang Unit, a number of other witnesses testified that members of WSSM promoted prostitution with the intent to benefit WSSM.

For example, Mycah Johnsen testified that WSSM members gain respect by making money, and explained how WSSM members helped each other to promote prostitution. Johnsen testified that Clark bragged about being a pimp and the money he made. Johnsen said that Clark was respected by WSSM gang members because of his success as a pimp. T.G. and other witnesses also testified about how Clark would help fellow gang members make money from prostitution, such as sharing hotel rooms and allowing them to use his computer to post Internet advertisements. Substantial

[20] RCW 9.94A.535(3)(aa).

evidence supports the jury's finding that Clark committed conspiracy to promote prostitution with the intent to benefit the WSSM.

Same Criminal Conduct

Clark argues that for purposes of sentencing, the trial court erred in concluding that the conviction for human trafficking in the second degree of T.G. and the conviction for promoting prostitution in the first degree of T.G. constitute the same criminal conduct. The State concedes that Clark's convictions for human trafficking in the second degree and promoting prostitution in the first degree are the same criminal conduct, and the trial court erred in counting the crimes as two separate offenses.

Multiple offenses encompass the same criminal conduct if the crimes involve the same (1) objective criminal intent, (2) time and place, and (3) victim. RCW 9.94A.589(1)(a). If any of these three elements are missing, the court must count the offenses separately when calculating a defendant's offender score. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

In determining whether there is the same criminal intent, we look to the extent to which the criminal intent, objectively viewed, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This determination, "in turn, can be measured in part by whether one crime furthered the other." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). Because the crime of human trafficking in the second degree furthered the crime of promoting prostitution in the first degree, we

accept the State's concession.[21]

We remand for resentencing. In all other respects, we affirm.

Schindler, J.

WE CONCUR:

Cox, J.

Grosse, J.

[21] Clark also contends that his attorney provided ineffective assistance of counsel by failing to argue that the crime of unlawful imprisonment was the same criminal conduct as the conviction for human trafficking in the second degree and promoting prostitution in the first degree. To establish prejudice, Clark must show "a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Because the conviction for unlawful imprisonment was unrelated to promoting prostitution or human trafficking, Clark cannot establish ineffective assistance of counsel.