

64861-6

64861-6

NO. 64861-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

DESHAWN CLARK,

Appellant.

2012 APR 15 PM 1:55

CLERK OF COURT

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ANDREA R. VITALICH  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

## TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
1. PROCEDURAL FACTS .....	3
2. SUBSTANTIVE FACTS .....	5
C. <u>ARGUMENT</u> .....	12
1. CLARK'S <u>BATSON</u> CLAIM SHOULD BE REJECTED BECAUSE THE JURORS WERE EXCUSED FOR RACE-NEUTRAL REASONS THAT WERE SUPPORTED BY THE RECORD .....	12
2. NO PREJUDICE RESULTED FROM THE DENIAL OF CLARK'S CHALLENGE FOR CAUSE, AND THE TRIAL COURT EXERCISED SOUND DISCRETION IN DENYING CLARK'S MOTION TO DISMISS THE ENTIRE VENIRE .....	17
3. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT FINDING CLARK GUILTY OF HUMAN TRAFFICKING.....	27
4. HUMAN TRAFFICKING AND PROMOTING PROSTITUTION ARE SEPARATE OFFENSES FOR DOUBLE JEOPARDY PURPOSES .....	33
5. PROMOTING PROSTITUTION, HUMAN TRAFFICKING, AND CONSPIRACY ARE NOT CONCURRENT STATUTES, AND THE CLAIM IS WAIVED IN ANY EVENT.....	40

6.	CLARK'S CONVICTIONS FOR HUMAN TRAFFICKING AND PROMOTING PROSTITUTION WERE BASED ON A CONTINUING COURSE OF CONDUCT; NO UNANIMITY INSTRUCTION WAS REQUIRED.....	45
7.	FALSE IMPRISONMENT IS ALSO A SEPARATE OFFENSE FOR DOUBLE JEOPARDY PURPOSES.....	49
8.	THE STATE CONCEDES THAT HUMAN TRAFFICKING IS THE SAME CRIMINAL CONDUCT AS PROMOTING PROSTITUTION IN THIS CASE, BUT UNLAWFUL IMPRISONMENT IS A SEPARATE OFFENSE .....	51
9.	<u>STATE V. BASHAW</u> DOES NOT REQUIRE REVERSAL OF THE SPECIAL VERDICT BECAUSE CLARK INVITED THE ERROR BY PROPOSING THE INSTRUCTION THAT HE NOW CLAIMS WAS ERRONEOUS .....	54
10.	SUBSTANTIAL EVIDENCE SUPPORTS THE GANG AGGRAVATOR FOR THE CRIME OF CONSPIRACY .....	58
11.	THE TRIAL COURT PROPERLY ALLOWED THE STATE TO AMEND THE INFORMATION PRIOR TO RESTING ITS CASE BECAUSE THERE WAS NO PREJUDICE SHOWN BY THE DEFENSE.....	60
12.	THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT AND REBUTTAL WERE REASONABLE INFERENCES DRAWN FROM EVIDENCE INTRODUCED AT TRIAL WITHOUT OBJECTION .....	65
13.	CLARK'S CLAIM REGARDING THE DEFINITIONAL INSTRUCTION FOR PROMOTING PROSTITUTION IS BARRED BY THE INVITED ERROR DOCTRINE AND WITHOUT MERIT .....	73

14. SUBSTANTIAL EVIDENCE SUPPORTS THE  
JURY'S VERDICT FINDING CLARK GUILTY OF  
PROMOTING THE COMMERCIAL SEXUAL  
ABUSE OF N.S..... 75

D. CONCLUSION ..... 77

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Albernaz v. United States, 450 U.S. 333,  
101 S. Ct. 2221, 67 L. Ed. 2d 275 (1977) ..... 33, 34

Batson v. Kentucky, 476 U.S. 79,  
106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) ..... 1, 12, 13, 16, 17

Blockburger v. United States, 284 U.S. 299,  
52 S. Ct. 180, 76 L. Ed. 2d 306 (1932) ..... 34, 50

Hernandez v. New York, 500 U.S. 352,  
111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) ..... 13

United States v. Batchelder, 442 U.S. 114,  
125, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) ..... 44

Washington State:

City of Kennewick, v. Fountain, 116 Wn.2d 189,  
802 P.2d 1371 (1991) ..... 44

City of Seattle v. Patu, 147 Wn.2d 717,  
58 P.3d 273 (2002) ..... 56, 74

In re Dependency of K.R., 128 Wn.2d 129,  
904 P.2d 1132 (1995) ..... 55, 74

State v. Allyn, 40 Wn. App. 27,  
696 P.2d 45, rev. denied,  
103 Wn.2d 1039 (1985) ..... 61, 62

State v. Bailey, 114 Wn.2d 340,  
787 P.2d 1378 (1990) ..... 55

State v. Bashaw, 169 Wn.2d 133,  
234 P.3d 195 (2010) ..... 54, 55, 56, 57

<u>State v. Bland</u> , 71 Wn. App. 345, 860 P.2d 1046 (1993).....	46
<u>State v. Branch</u> , 129 Wn.2d 635, 919 P.2d 1228 (1996).....	13
<u>State v. Brisebois</u> , 39 Wn. App. 156, 692 P.2d 842 (1984), <u>rev. denied</u> , 103 Wn.2d 1023 (1985).....	62
<u>State v. Brown</u> , 74 Wn.2d 799, 447 P.2d 82 (1968).....	61
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	66, 67
<u>State v. Calle</u> , 125 Wn.2d at 769, 888 P.2d 155 (1995).....	33, 34, 35, 37
<u>State v. Carpenter</u> , 52 Wn. App. 680, 763 P.2d 455 (1988).....	44
<u>State v. Chase</u> , 134 Wn. App. 792, 142 P.3d 630 (2006), <u>rev. denied</u> , 160 Wn.2d 1022 (2007).....	41, 42
<u>State v. Crider</u> , 72 Wn. App. 815, 866 P.2d 75 (1994).....	41
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	67
<u>State v. DeBolt</u> , 61 Wn. App. 58, 808 P.2d 794 (1991).....	62, 64
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	28, 58, 76
<u>State v. Dunaway</u> , 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987).....	52
<u>State v. Enstone</u> , 137 Wn.2d 675, 974 P.2d 828 (1999).....	61

<u>State v. Escalona</u> , 49 Wn. App. 251, 742 P.2d 190 (1987).....	21
<u>State v. Fiallo-Lopez</u> , 78 Wn. App. 717, 899 P.2d 1294 (1995).....	47
<u>State v. Finlayson</u> , 69 Wn.2d 155, 417 P.2d 902 (1986).....	19
<u>State v. Fire</u> , 145 Wn.2d 152, 34 P.3d 1218 (2001).....	18
<u>State v. Forler</u> , 38 Wn.2d 39, 227 P.2d 727 (1951).....	62
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	37, 38, 39
<u>State v. French</u> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	53
<u>State v. Garman</u> , 100 Wn. App. 307, 984 P.2d 453 (1999), <u>rev. denied</u> , 141 Wn.2d 1030 (2000).....	46
<u>State v. Gooden</u> , 51 Wn. App. 615, 754 P.2d 1000, <u>rev. denied</u> , 111 Wn.2d 1012 (1988).....	47, 48
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	45
<u>State v. Haddock</u> , 141 Wn.2d 103, 3 P.3d 733 (2000).....	52
<u>State v. Handran</u> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	47
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	55, 74
<u>State v. Hicks</u> , 163 Wn.2d 477, 181 P.3d 831 (2008).....	13

<u>State v. Hopson</u> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	20
<u>State v. Hughes</u> , 118 Wn. App. 713, 77 P.3d 681 (2003), <u>rev. denied</u> , 151 Wn.2d 1039 (2004).....	66
<u>State v. James</u> , 108 Wn.2d 483, 739 P.2d 699 (1987).....	61
<u>State v. Johnson</u> , 124 Wn.2d 57, 873 P.2d 514 (1994).....	19, 20
<u>State v. Joy</u> , 121 Wn.2d 333, 851 P.2d 654 (1993).....	28, 58, 76
<u>State v. Lewis</u> , 15 Wn. App. 172, 548 P.2d 587, <u>rev. denied</u> , 87 Wn.2d 1005 (1976).....	55
<u>State v. Lewis</u> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	19, 20
<u>State v. Love</u> , 80 Wn. App. 357, 908 P.2d 395, <u>rev. denied</u> , 129 Wn.2d 1016 (1996).....	47
<u>State v. Luvene</u> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	13
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	19, 20
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	53
<u>State v. Nunez</u> , ___ Wn. App. ___, (No. 28259-7-III, filed Feb. 15, 2011).....	57
<u>State v. Pelkey</u> , 109 Wn.2d 484, 745 P.2d 854 (1987).....	61, 62

<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	46, 47, 49
<u>State v. Ryan</u> , ___ Wn. App. ___ (No. 64726-I, filed April 4, 2011).....	55
<u>State v. Salinas</u> , 119 Wn.2d 192, 929 P.2d 1068 (1992).....	28, 58, 76
<u>State v. Schaffer</u> , 120 Wn.2d 616, 845 P.2d 281 (1993).....	61
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	44
<u>State v. Shriner</u> , 101 Wn.2d 576, 681 P.2d 237 (1984).....	41
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	66
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	72
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	28, 58, 76
<u>State v. Vladovic</u> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	35
<u>State v. Weber</u> , 159 Wn.2d 252, 159 P.2d 246 (2006).....	39
<u>Other Jurisdictions:</u>	
<u>State v. Spangler</u> , 38 Kan. App. 2d 817, 173 P.3d 656 (2007).....	64

## Statutes

### Washington State:

RCW 9.94A.515 .....	39
RCW 9.94A.535 .....	59
RCW 9.94A.537 .....	56, 57
RCW 9.94A.589 .....	52
RCW 9A.28.040 .....	43
RCW 9A.40.040 .....	50
RCW 9A.40.100 .....	35, 39, 42, 50
RCW 9A.88.060 .....	36, 43
RCW 9A.88.070 .....	35, 39, 42, 50
RCW 69.50.435.....	56

## Rules and Regulations

### Washington State:

CrR 2.1.....	61, 63
CrR 6.4.....	19
RAP 2.5.....	44, 45

## Other Authorities

13 Wash. Prac. § 4006 (3d ed. 2004) .....	19
Sentencing Reform Act .....	52
WPIC 48.11.....	74, 75

**A. ISSUES PRESENTED**

1. Whether Batson v. Kentucky requires reversal in a case where the trial court's ruling that the State's reasons for excusing two jurors were race-neutral is fully supported by the record.

2. Whether reversal is required because a juror should have been excused for cause and the entire venire should have been dismissed where the juror in question was an alternate who did not deliberate, and dismissing the venire was not necessary because the biased jurors were excused.

3. Whether insufficient evidence supports Clark's conviction for human trafficking in a case where ample evidence proves that Clark recruited, harbored, transported, provided or obtained the victim knowing that she would be beaten, threatened, and coerced into forced labor or involuntary servitude during the charging period.

4. Whether convictions for both human trafficking and promoting prostitution violate double jeopardy where the two crimes have different elements and are not subject to merger.

5. Whether human trafficking, conspiracy, and promoting prostitution are concurrent where both trafficking and conspiracy can be committed without also committing promoting prostitution.

6. Whether Clark's right to jury unanimity was violated when his convictions for human trafficking and promoting prostitution were based on a continuing course of conduct.

7. Whether unlawful imprisonment constitutes the same offense for double jeopardy purposes when it has different elements than either human trafficking or promoting prostitution, and this conviction was based on a separate, discrete act.

8.a. Whether this Court should accept the State's concession that Clark's convictions for human trafficking and promoting prostitution should have been counted as one offense for sentencing purposes. b. Whether this Court should reject Clark's claim that he received ineffective assistance of counsel because counsel did not argue that unlawful imprisonment was also the same criminal conduct.

9. Whether instructional error regarding the special verdict requires reversal when the error alleged was both invited and harmless beyond a reasonable doubt.

10. Whether insufficient evidence supports the special verdict where the evidence was overwhelming that Clark committed the crime of conspiracy for the purpose of gaining respect and status for and within a gang.

11. Whether reversal is required where the trial court properly allowed the State to amend the information to expand the charging period of one crime by one month prior to resting its case and Clark did not demonstrate prejudice.

12. Whether flagrant, incurable prosecutorial misconduct occurred based on remarks in closing argument that were reasonable inferences based on evidence that was admitted without objection at trial.

13. Whether prosecutorial misconduct occurred based on a jury instruction that Clark proposed jointly with the State and that is a proper instruction in any event.

14. Whether insufficient evidence supports Clark's conviction for sexual exploitation of a minor where almost every witness with firsthand knowledge testified that Clark was the victim's pimp.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Deshawn Cash Money Clark, with the following crimes:

- Count I: Human Trafficking in the Second Degree (victim T.G.);
- Count II: Human Trafficking in the Second Degree (victim N.S.);

- Count III: Promoting Prostitution in the First Degree (victim T.G.);
- Count IV: Promoting Commercial Sexual Abuse of a Minor (victim H.R.);
- Count V: Promoting Commercial Sexual Abuse of a Minor (victim N.S.);
- Count VI: Assault in the Second Degree (victim T.G.);
- Count VII: Unlawful Imprisonment (victim T.G.);
- Count VIII: Possession with Intent to Deliver Marijuana;
- Count IX: Criminal Conspiracy (Promoting Prostitution in the First Degree)

An aggravating factor was alleged as to all charges except counts IV and V that Clark committed these crimes "with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang[.]" CP 174-79.

Clark was tried to a jury in October and November 2009. At the conclusion of the trial, the jury convicted Clark of counts I, III, IV, V, VII, and IX as charged. The jury returned a "yes" verdict on the gang aggravator only as to count IX (conspiracy); the jury answered "no" on every other special verdict form. The jury also acquitted Clark of counts II, VI, and VIII. CP 239-54.

The trial court imposed concurrent standard-range sentences on all counts, plus 20 months consecutive to the base sentence for the aggravating factor. CP 259-71.

## **2. SUBSTANTIVE FACTS**

Westside Street Mobb is a West Seattle-based gang whose primary objective is profit from illegal activities including drug dealing, bank fraud, and prostitution. 7RP 1241-42.<sup>1</sup> "Mobb" is an acronym for "Money Over Broke Bitches." 7RP 1229. Street Mobb is affiliated with the Bloods, and its members wear red clothing and display red bandannas to proclaim this affiliation. 7RP 1212, 1228; 11RP 2049. Crime Fam is a smaller gang set composed mainly of members of Street Mobb. The two groups are closely affiliated. 11RP 2066. Street Mobb and Crime Fam members included Thomas Foster, Donta Walters, Roosevelt "City Red" Johnson, Gerald Jackson, Gamata aka "G-Bez," Hamisi aka "Misi," Jeffrey "Little Pill" Knox, Mycah Johnson, Clark's older brother Shawn, and Clark himself, among others. 11RP 2050-54, 2066-67. Members of Street Mobb gain status and respect by making money. The

---

<sup>1</sup> The verbatim report of proceedings consists of 25 sequentially-paginated volumes.

more girls a Street Mobb member pimps, the more respect he has.  
11RP 2063-64.

Clark had a lot of respect because of his pimping; he was proud of being a pimp because he was good at it. 11RP 2175. Clark taught Mycah Johnson how to pimp, including how to recruit girls by "selling a dream,"<sup>2</sup> and how to lower their self-esteem and keep "in pocket."<sup>3</sup> 11RP 2087-89. Clark, Johnson, and other members of Street Mobb worked together to further their prostitution activities. They gave each other's girls rides to the highway or to motel rooms for dates, they shared computers to advertise their girls on Craigslist and other adult websites, and their girls shared the motel rooms where they had sex with customers. 8RP 1432-33; 9RP 1517-33.

T.G. started dating Clark in 2007. T.G. lost her job at KFC and got evicted from her apartment because Clark was spending her paychecks. 8RP 1389-91. Clark and T.G. started living with Clark's mother, and in October 2007, Clark started beating T.G.

---

<sup>2</sup> "Selling a dream" means creating the illusion that the pimp really loves the girl and that they will have a future together. 5RP 775-78; 8RP 1406.

<sup>3</sup> "In pocket" means that a prostitute is obeying her pimp's rules; "out of pocket" means that she is disobedient. 5RP 761.

8RP 1391-93. T.G. had nowhere else to go and no money. Clark gave her only one option: to begin prostituting for him. 8RP 1394.

T.G. worked for Clark until December 2007. Clark had her walk on the highway and post ads online to get customers, and he took all the money she made. 8RP 1395-97. Clark took T.G. to Las Vegas, along with Donta Walters and his girl F.S., so that the girls could prostitute themselves there. They stayed with "City Red" and his girl, "Kitten." 8RP 1397-1400. While they were in Las Vegas, Clark thought T.G. was hiding money from him. He made her strip naked in front of Walters and City Red, and he beat her. Walters and City Red thought it was funny. 8RP 1407-09.

T.G. left Clark and went to Wisconsin to live with her mother in January 2008, after Clark threatened to kill her in front of her 3-year-old son. 8RP 1418-21. For a while, T.G. succeeded in having no contact with Clark. 8RP 1435. But then Clark began calling her, promising that things would be different if she came back. T.G. believed him because she loved him. 8RP 1436. After several months in Wisconsin, T.G. came back to Seattle because she had left her young son behind. Upon her return, she went back to Clark, and at first things were better, just as he had promised. 8RP 1435-36. But within a week, in June 2008, Clark began

beating T.G. and made her go back to work as a prostitute. 8RP 1436.

Clark punished T.G. if she broke his rules. His preferred punishment was to put her in a choke hold until she passed out. 8RP 1436. He beat her and hit her with a phone charger. 8RP 1471. He beat her until she fell into a bathtub and hit her head. 8RP 1479. Clark made T.G. work every day from the time she woke up until he told her she could stop. Clark would not allow her to eat until she had made money; if she did not make money, Clark allowed her to eat once a day "if [she] was lucky[.]" 8RP 1438-39.

T.G. worked for Clark from June to November 2008. During that time frame, Clark had four other girls working for him as well. 8RP 1442-46. In late summer 2008, Clark took T.G. to Portland to work as a prostitute for a week or two. Clark's brother Shawn, Shawn's girl J.Z., Gerald Jackson, and Jackson's girl S.A. went to Portland as well. 8RP 1466-67. The girls worked in the motel room while the men went to the mall. 8RP 1467-70.

H.R. was one of the girls who worked for Clark at the same time as T.G. H.R. was 15 years old when she was recruited as a prostitute by "G-Bez." 14RP 2697-2702. H.R. decided to work for Clark instead of G-Bez when she shared a motel room with Clark

and T.G. because G-Bez was beating her. 14RP 2704-10. H.R. worked as a prostitute for Clark for approximately two weeks. 14RP 2711. H.R. made 500 to 800 dollars a day for Clark; she gave all of the money she made either directly to Clark or to T.G. to give to Clark. 14RP 2711-12. Although Clark was not physically violent with H.R., he threatened to take her clothes and pull off her fingernails. 14RP 2713. While H.R. was working for Clark, she had several "bad dates" and was stopped by the police a couple of times. 14RP 2714-15. On Halloween 2008, H.R. decided she had had enough; she bought a bus ticket and went to Las Vegas to be with her mother. 14RP 2718.

N.S. also worked for Clark. N.S. was 15 years old when she met Clark and began dating him. 12RP 2321-25. Clark soon began pimping her. 11RP 2105. Mycah Johnson drove N.S. to the highway to work, and he let Clark use his cell phone to keep track of her. 11RP 2118-19, 2124. N.S. sent text messages to tell Clark how much money she was making; Clark responded, "Let's keep it flowing, baby. Today's our day." 11RP 2128-29. When N.S. sent a text stating that she needed to use the restroom, Clark told her to "hold that shit" and keep working. 11RP 2134. Clark bragged to other Street Mobb members about the money N.S. was making.

11RP 2139. Clark ordered her around and physically punished her for breaking his rules. 5RP 853-56; 16RP 3222-23.

N.S. was completely under Clark's control; Clark told N.S.'s mother that she "would never find [her] daughter, that he had her wound up so tight and she would never come home." 13RP 2612. N.S. has several tattoos proclaiming her devotion, including "Money's all I think about" with a money bag on her ankle. 12RP 2331. T.G. has a similar money bag tattoo on her stomach, which she got at Clark's request. 8RP 1474-75. Clark held such sway over N.S. that she testified at trial that Clark was not her pimp, even though it was obvious that he was. 12RP 2370-71; 16RP 3113.

On November 12, 2008, T.G. was in the process of trying to leave Clark. She had hidden some money from him and was staying in a TraveLodge motel, but Clark tracked her down. 8RP 1486-87. Clark ransacked the room and demanded money. He smashed T.G.'s laptop computer on the ground. 8RP 1487-88. Clark punched T.G. in the face so hard her "face just exploded with blood." 8RP 1488. He picked her up and loaded her into the back of his El Camino "like a box or something." 10RP 1949.

The motel desk clerk saw Clark punch T.G. and put her in the vehicle, so he called 911. 10RP 1946-51. T.G. managed to get

out of the vehicle when Clark slowed down for a stop sign. 8RP 1489. T.G. ran back to the motel and the desk clerk put her on the phone with the 911 operator. 8RP 1489. T.G. spoke with the police, went to the hospital, and cooperated with the authorities from that day forward. 8RP 1489-94; 14RP 2820-23.

Seattle Police Vice Detective Todd Novisedlak began to break this case when Thomas Foster's girl, L.J., reported being assaulted in early November 2008 and provided information about Street Mobb. 12RP 2493-96; 20RP 4061. T.G. provided a great deal of information that broke the case as well. 15RP 2985-87; 20RP 4068-75. T.G. provided information that led police to the house where Clark was staying with his brother and their girlfriends. 18RP 3548. A search of the house revealed a large quantity of marijuana. Someone had clogged the toilet trying to dispose of it, creating a "marijuana swamp" in the bathroom. 18RP 3552.

Clark testified in his own defense at trial. He claimed that he was not a member of Street Mobb, that Crime Fam was a rap group, and that he had not pimped T.G., N.S., or H.R. 23RP 4563; 24RP 4741-42, 4778, 4795, 4898, 4934.

Additional facts will be discussed below as necessary for argument.

C. **ARGUMENT**

1. **CLARK'S BATSON CLAIM SHOULD BE REJECTED BECAUSE THE JURORS WERE EXCUSED FOR RACE-NEUTRAL REASONS THAT WERE SUPPORTED BY THE RECORD.**

Clark claims that the trial court erred in denying his challenge to the prosecutors' decision to excuse two African-American jurors from the venire. He claims that under Batson v. Kentucky<sup>4</sup> and its progeny, the trial court should have found that the prosecutors' stated reasons for excusing these jurors were a pretext for discrimination. Appellant's Opening Brief, at 10-20. This claim should be rejected. The prosecutors' reasons for excusing the jurors were race-neutral, and Clark cannot show that the trial court erred in ruling that the challenges were proper.

In Batson, the United States Supreme Court held that equal protection requires "a jury whose members are selected pursuant to nondiscriminatory criteria." Batson, 476 U.S. at 85-86. Accordingly, the Court established a three-part approach for cases involving claims of racial discrimination in jury selection. First, a defendant who questions a prosecutor's exercise of a peremptory challenge must establish a prima facie case of discrimination.

---

<sup>4</sup> 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Second, if a prima facie case is established, the burden shifts to the prosecutor to provide a race-neutral reason for exercising the challenge. Third, the trial court determines whether the defendant has established purposeful discrimination. Batson, 476 U.S. at 96. The third step is at issue in this case.

In reviewing a trial court's determination that the reasons for excusing a juror were nondiscriminatory, "[t]he determination of the trial judge is 'accorded great deference on appeal,' and will be upheld unless clearly erroneous." State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (quoting Hernandez v. New York, 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). Such deference is given because the trial court's evaluation of the prosecutors' reasons for excusing a juror necessarily involves a credibility determination. State v. Hicks, 163 Wn.2d 477, 493, 181 P.3d 831 (2008). Appellate courts cannot make credibility determinations because they cannot observe the demeanor of either the prosecutor or the jurors. Id. Thus, the trial court's ruling will be upheld if there is evidence in the record to support it. State v. Branch, 129 Wn.2d 635, 646, 919 P.2d 1228 (1996).

In this case, Clark's counsel challenged the State's use of peremptory challenges against the three African-American jurors in

the venire: Juror 16,<sup>5</sup> Juror 17, and Juror 54. 4RP 712-13. The prosecutor explained that Juror 17 was excused because his sister was the victim of serious domestic violence at the hands of her boyfriend, and he expressed the opinion that his sister had provoked the abuse. Juror 17's sister was also a gang member. 4RP 714-15. The prosecutor explained that Juror 54 was excused because he had several family members who were heavily involved in gangs, and he was concerned that he would be sympathetic to the defendant as a result. Also, the prosecutor stated that because Juror 54 was in his early 20s, he felt he did not have sufficient life experience for this case, although his family's gang ties were the main reason that he was excused. 4RP 716-17, 723-24.

The trial judge struggled with this issue, not because he thought that the State's race-neutral reasons for excusing the jurors were a pretext, but because he was "not happy with the ultimate result" of excusing the African-Americans from the venire. 4RP 724; 5RP 732-33. After thoughtfully considering the issue, the trial

---

<sup>5</sup> The prosecutors excused Juror 16 because they knew her from working at juvenile court, and she had made disparaging remarks about one of them to another prosecutor. 4RP 713-14; 5RP 730. Also, Juror 16 did not disclose during voir dire that her brother had been charged in a case involving pimping. 5RP 731. Clark does not raise any issue regarding Juror 16 on appeal.

court found that the State's reasons were legitimate, credible, and not a pretext for discrimination. 4RP 724; 5RP 732-33, 734-35. This finding is supported by substantial evidence in the record.

The record shows that Juror 17 stated that his sister's boyfriend "would beat her up and pull a gun on her and broke her jaw a couple times." 3RP 511. He then said that "a lot [of] times she would instigate the fight, instigate the arguments." 3RP 511. Juror 17 conceded that his sister's boyfriend did not have "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." 3RP 511. Juror 17 then reiterated that "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." 3RP 512. Juror 17 also said that his sister was in a gang. 4RP 614. The record also confirms that Juror 54 stated that "a lot of family, my cousins and uncles were heavily involved" in gangs. 4RP 613. The record further indicates that Juror 54 expressed concern due to the gang aspects of this case. 4RP 712.

Clark cannot show that the trial court's ruling is clearly erroneous in light of the record. Obviously, a juror who placed blame on his own sister for being the victim of felony assaults by

her boyfriend would have been an undesirable juror for the State in this case for reasons having nothing to do with race. In addition, excusing a juror with several family members who were heavily involved in gangs in a case where gang evidence figured prominently was a legitimate decision as well. In sum, Clark cannot meet his burden of showing a Batson violation on appeal.

Nonetheless, Clark argues that the reasons stated for excusing these jurors were a pretext because 1) Juror 17's statements about domestic violence were not as alarming as Juror 84's, and 2) although Juror 54 had family members who were gang members, he also said that gangs were a problem. Appellant's Opening Brief, at 16-17. These arguments are without merit. Juror 17's remarks were similar to Juror 84's,<sup>6</sup> but the State did not have to use a peremptory challenge to excuse Juror 84 because her number was too high. Thus, this comparison is irrelevant.<sup>7</sup> And although Juror 54 made some negative remarks about gangs, the test under Batson is not whether opinions may differ as to whether

---

<sup>6</sup> Juror 84 stated that a woman who verbally provokes her abuser is at fault for instigating the ensuing physical abuse, although the abuser is also to blame for his actions. 4RP 583-84.

<sup>7</sup> Notably, the State *did* excuse Juror 44, who opined that a victim of domestic violence might stay in an abusive relationship because she likes the abuse, and that she is to blame if she provokes it. 4RP 584-85.

someone would make a good juror for the case or not, but whether the prosecutor's reasons for excusing the juror are race-neutral and not a pretext. Here, the trial court's finding that the reasons were proper is supported by the record, which is what Batson requires.

Clark has failed to show that trial court erred in finding that the race-neutral reasons for excusing Juror 17 and Juror 54 were legitimate, credible, and not a pretext for racial discrimination. This Court should affirm.

**2. NO PREJUDICE RESULTED FROM THE DENIAL OF CLARK'S CHALLENGE FOR CAUSE, AND THE TRIAL COURT EXERCISED SOUND DISCRETION IN DENYING CLARK'S MOTION TO DISMISS THE ENTIRE VENIRE.**

Clark next argues that the trial court erred in denying his challenge for cause regarding Juror 69, and in denying his motion to dismiss the entire venire because they had seen members of the Seattle Police Gang Unit outside the courtroom with some of Clark's Street Mobb associates. Appellant's Opening Brief, at 20-31. These arguments should be rejected. Juror 69 was an alternate and he did not deliberate, and the trial court properly exercised its discretion in ruling that it was not necessary to dismiss the entire venire to ensure that Clark received a fair trial.

Juror 69 was selected as an alternate juror after the trial court denied Clark's challenge for cause.<sup>8</sup> 4RP 700, 706. Although the State moved to dismiss Juror 5 several times during the trial, the trial court denied these motions. 14RP 2742; 17RP 3279-82, 3290-99; 18RP 3390-91; 20RP 3794-3803; 24RP 4815-20; 25RP 4969-72. Thus, the jury remained intact throughout the proceedings; Juror 69 did not take part in the jury's deliberations and had no part in the verdicts that were rendered.

If a defendant cannot show that a juror whom he claims should have been removed for cause actually sat on the jury that decided his case, the defendant's claim fails because there has been no prejudice. State v. Fire, 145 Wn.2d 152, 161-62, 34 P.3d 1218 (2001). Such is the case with respect to Juror 69, and this Court need not consider the issue further.

As for Clark's motion to dismiss the entire venire, the trial court properly exercised its discretion in ruling that this drastic step was not necessary to ensure that Clark received a fair trial.

---

<sup>8</sup> The State does not concede that the trial court erred in refusing to dismiss Juror 69 for cause, as he assured the court that he could be fair and impartial. 4RP 698-99. It is simply unnecessary for the Court to consider the issue because Juror 69 did not take part in deliberations.

As Clark notes, a motion to dismiss the venire due to taint is akin to a motion for a mistrial, as the relevant question is whether the entire venire has been prejudiced such that the defendant will not receive a fair trial.<sup>9</sup> See Brief of Appellant, at 31. Therefore, the legal standards governing a motion for a mistrial should govern in these circumstances.

A trial court's decision to deny a motion for a mistrial is reviewed for manifest abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). An appellate court will find an abuse of discretion only if no reasonable judge would have decided that a mistrial was not necessary. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A mistrial should be granted "only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly." State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). Put another way, the trial court's decision to deny a motion for a mistrial should not be overturned unless the record demonstrates that an

---

<sup>9</sup> Clark also cites CrR 6.4(a), which states that "[c]hallenges to the entire panel shall only be sustained for a material departure from the procedures prescribed by law for their selection." But this rule refers to challenges to the procedures used to assemble the jurors in the first place, not challenges based on allegations that the venire is tainted. See, e.g., State v. Finlayson, 69 Wn.2d 155, 417 P.2d 902 (1986); 13 Wash. Prac. § 4006 (3d ed. 2004).

irregularity has improperly affected the outcome of the trial. See Mak, 105 Wn.2d at 701. Moreover, the reviewing court must give deference to the trial court's judgment, as the trial judge is clearly in the best position to gauge whether such irreparable prejudice has occurred. See Lewis, 130 Wn.2d at 707.

Each case must be decided on its own facts, based on the type of irregularity that prompted the motion in the first place. For example, when reviewing a trial court's decision to deny a motion for mistrial based on a witness's objectionable remarks, appellate courts generally examine three factors: 1) the seriousness of the irregularity; 2) whether the error involved cumulative evidence; and 3) whether the trial court properly instructed the jury to disregard the remarks. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). But even a fairly serious irregularity does not warrant a mistrial if it is relatively insignificant in the context of the entire record. See Hopson, 113 Wn.2d at 284-86 (a witness's remark that the victim met the defendant before "he went to the penitentiary the last time" was not prejudicial in light of the whole record and substantial evidence of guilt). In any case, jurors are presumed to follow the trial court's instructions to disregard inadmissible evidence. Johnson, 124 Wn.2d at 77. Moreover, the issue must

always be examined "against the backdrop of all the evidence" and in light of the record as a whole. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Because this issue must be considered in light of the whole record, it is necessary to discuss the record in this case in some detail.

During voir dire, defense counsel alerted the trial court that some of Clark's young male friends or family members had come to court to observe, and the prosecutor had called the Seattle Police Gang Unit to sit in the courtroom or in the hall. The prosecutor explained that Clark's supporters "were all flying the color red," and that a gang detective was going to sit in the courtroom as a precaution. 3RP 481-82. The trial court agreed that Clark's friends were "conspicuously dressed in red." 3RP 482. After further discussion, the trial court stated that having some officers present would not be a problem, but that large numbers of either officers or Street Mobb members would not be appropriate. 3RP 484-85. Voir dire then continued without apparent further incident.

The following day, it came to the court's attention that several jurors might have seen Clark being escorted in handcuffs during a recess, but an inquiry of these jurors revealed nothing of concern. 4RP 617-26. The court then questioned Juror 18, who

had asked to speak to the court outside the presence of the other jurors. 4RP 626-27.

Juror 18 revealed that she had seen four "boys" and four gang officers outside the courtroom the previous day, and it had made such an impression on her that she felt she would not be able to be fair. 4RP 627-29. Juror 18 was worried about the gang aspects of the case, and stated that she "would have the same feeling" if the gang members were "Skinheads[.]" 4RP 628. Juror 18 also said that the large number of police officers on the witness list made her feel that Clark was guilty. 4RP 628. Juror 18 said that "all" the jurors were outside when she saw the young men and the officers, and she thought Juror 19 had said it was "freaky." 4RP 629. Juror 18 was excused. 4RP 630.

Juror 19 was also questioned individually. Juror 19 said that he had seen the young men and the gang officers, and that he had "a feeling of danger." 4RP 630. He said that he felt as though there may be "some threat involved[.]" 4RP 632. Juror 19 said he was fearful that there could be negative consequences if he found Clark guilty. 4RP 633-34. Juror 19 was also excused. 4RP 634.

At that point, defense counsel suggested that the entire venire should be questioned to determine if there were others who

felt they could not be fair because they had seen Clark's associates and the officers. 4RP 635. The prosecutor suggested that the topic be raised during counsel's questioning. 4RP 636-37.

The prosecutor raised the subject of gangs in general his next round of questioning. 4RP 652. Juror 73 said that rap music made her feel afraid, and that would affect her ability to be fair. 4RP 653-54. Juror 28 stated that "young people walking around with their pants down around their knees" made her want to "give them a spanking." 4RP 654. Another juror said "it sounds like [this case] has to do with gangs and drugs. I would have a hard time not judging a person." 4RP 654. Juror 21 said that gangs involve "people doing very extreme things in the name of something they believe in," that "that kind of influence creates fear for me." 4RP 657. Juror 74 said that gangs made him think of "[g]uns and drugs." 4RP 661. Juror 661 said that gangs meant "[p]eople are committing crimes together." 4RP 661. Juror 52 said gangs involve "drugs and crime and guns." 4RP 662. Several jurors noted that gangs were violent. 4RP 662-63. On the other hand, other jurors expressed their willingness and ability to serve impartially, notwithstanding the subject matter. 4RP 665-70.

Defense counsel began his next round of questioning by following up with the juror who was afraid of rap music and the juror who disliked baggy pants. 4RP 670-74. He continued questioning the venire about gangs in a general way. 4RP 675-85. Defense counsel then asked if the jurors had seen anything coming to and from the courtroom that had impacted them. 4RP 685.

Juror 21 said she had seen some people outside the courtroom and she "wondered if they were involved in a gang in their dress (sic)" because of "all of them having red on[.]" 4RP 686. Juror 34 saw the officers outside the courtroom and saw a "gang squad" patch on one of their uniforms, and assumed they were providing security. 4RP 687. An indeterminate number of other jurors indicated they had also seen the officers, but counsel did not ask these jurors to identify themselves. 4RP 687. Jurors 52, 54, and 74 said they had made a mental connection between the young men and the officers. 4RP 688-89.

Defense counsel then asked if any jurors felt they could be influenced by the sight of the young men and the officers in the hallway. In response, only four jurors (21, 22, 92, and 97) raised their cards. 4RP 690. Defense counsel then asked whether there were any jurors who felt that they could not keep an open mind.

Juror 92 said that both the "red clothing" and his emotional reaction to the earlier discussion of domestic violence would make it difficult for him to be fair. 4RP 692. Juror 81 said she did not "have an issue with the gang," but did "have an issue with an act of violence[.]" 4RP 692. Juror 50 stated that she would have difficulty remaining impartial based on the comments of the other jurors, not based on anything she had seen. 4RP 693. And Juror 69 said he could have difficulty being fair because of his positive views of law enforcement. 4RP 693.

Defense counsel challenged Jurors 21, 50, 69, 81 and 92 for cause. 4RP 693. After further inquiry, Jurors 50, 81 and 92 were excused for cause. 4RP 693-700. The defense exercised a peremptory challenge against Juror 21, and, as noted above, Juror 69 was seated as an alternate. 4RP 702, 706.

After the jury was selected, defense counsel moved to dismiss the entire panel due to the incident in the hallway, although he conceded that most of the jurors had indicated that they could be fair. 4RP 707. The prosecutor argued that very few jurors had said they were affected, and correctly noted that no one said that they could not be fair specifically because they saw young men in red and police officers in the hallway. 4RP 707-08. Defense

counsel countered that some jurors had nodded their heads to indicate they had seen them, but agreed he had failed to make a record of it at the time. 4RP 709.

After hearing from both sides, the trial court denied the motion. Although the court found it "unfortunate" that Clark's supporters had come to court in what "appeared to be gang colors" and that the gang officers were wearing readily identifiable uniforms, the court concluded that the incident ultimately did not have a significant effect, and that the "very limited number of jurors" who indicated it had affected them were not on the jury. 4RP 711-12. The court stated,

. . . 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.

4RP 712.

The trial court properly exercised its discretion, particularly in light of the deference this Court must give to the trial judge's ability to gauge whether the incident had caused irreparable prejudice or

not. As the trial court observed, only a few jurors were impacted by seeing the young men and the officers, and those who felt they could not be fair were excused.

In addition, the record shows that quite a few jurors had strong negative opinions about gangs and gang culture notwithstanding the incident in the hallway. In this respect, the incident arguably assisted Clark in having a fair trial, as it placed focus on a central issue in the case and served to identify jurors who could not be fair and impartial regarding that issue. In sum, the record does not support Clark's claim that the entire venire was tainted to such a degree that a new venire was necessary to ensure a fair trial. Therefore, Clark has not shown that the trial court abused its discretion, and this Court should affirm.

**3. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT FINDING CLARK GUILTY OF HUMAN TRAFFICKING.**

Clark claims that the evidence is insufficient to sustain his conviction for human trafficking with respect to T.G. during the charging period of June 15 through December 1, 2008. He argues that any trafficking occurred in 2007, and that his conduct in 2008 constitutes promoting prostitution, not trafficking. Appellant's Opening Brief, at 32-42. This claim should be rejected because

substantial evidence supports the jury's verdict that Clark was guilty of trafficking during the charging period.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any rational juror could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all reasonable inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 929 P.2d 1068 (1992).

An appellate court considering a sufficiency challenge must defer to the jury's determination as to the weight and credibility of the evidence, and to the jury's resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. In addition, circumstantial evidence is not to be considered any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence supporting a jury verdict. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In sum, under these deferential standards, any question as to the meaning of the evidence should

be resolved in favor of the conviction whenever such an interpretation is reasonable.

The jury was instructed that in order to find Clark guilty of trafficking, it had to find that he "recruited, harbored, transported, provided, or obtained by any means T.G." during the charging period from June 15 through December 1, 2008, with knowledge that "force, fraud, or coercion would be used to cause T.G. to engage in forced labor or involuntary servitude." CP 190.

As Clark notes, T.G. testified that she began prostituting for Clark in 2007, after she lost her job and was evicted from her apartment. 8RP 1389-94. As Clark also notes, T.G. traveled to Las Vegas with Clark, his associates, and the girls they were prostituting in late 2007 for the purpose of working as a prostitute. 8RP 1397-1405. But in January 2008, about a month after returning from Las Vegas, T.G. left the state because Clark threatened to kill T.G. in front of her young son. 8RP 1418-20. After that incident, T.G. left town on the first bus and went to Wisconsin to stay with her mother. 8RP 1421, 1436.

T.G. stayed in Wisconsin for several months. While she was there, Clark called her and promised not to hit her if she came back. 8RP 1435-36. T.G. came back to Seattle in May or June

2008 because she had left her son in Seattle with her grandmother and she wanted to be with him. 8RP 1435. Upon her return, she went back to Clark because she had believed him when he promised "that things were going to be okay again." 8RP 1436. Within a week, Clark became violent again and he had T.G. working for him as a prostitute again. 8RP 1436.

After T.G. began working for Clark again in 2008, she received violent punishments from Clark for even the smallest perceived transgressions. Clark would not allow her to eat until she had made money. 8RP 1438. T.G. stayed with Clark in "pretty much any hotel [they] could find," and Clark made T.G. begin working as soon as she woke up each day. 8RP 1438. T.G. worked every day until Clark told her she could stop. 8RP 1439.

T.G. worked for Clark under these conditions from June to November 2008. 8RP 1442. During that time frame, Clark took T.G. to Portland along with two of Clark's associates and the girls that were working for them. 8RP 1466. The purpose of the trip was for T.G. and the other girls to work as prostitutes. The trip was Clark's idea; he told T.G. they were going, and T.G. did not question him. 8RP 1467. The girls worked as prostitutes while Clark and his friends went to the mall. 8RP 1469.

From June to November 2008, Clark subjected T.G. to numerous beatings. T.G. wanted to call the police, but she felt that it would only make things worse. 8RP 1471-73. On one occasion, when T.G. actually did call the police because Clark had beaten her so badly that she needed to go to the hospital, she lied about what happened because she was afraid. 8RP 1476-84.

The final straw came on November 12, 2008, when Clark confronted T.G. at a TraveLodge, after which T.G. began cooperating with the police. 8RP 1489-94; 14RP 2820-23.

This evidence is more than sufficient to prove that Clark was guilty of trafficking during the time frame between June and December 2008. Clark recruited T.G. when he convinced her to come back to him when she returned from Wisconsin by promising that things would be different than they had been in 2007. He made these promises and played on T.G.'s emotions knowing that he would force her to work for him again. Thus, he obtained T.G.'s labor by fraud. Clark transported and harbored T.G. by taking her to the highway, taking her to Portland, and keeping her in various motel rooms knowing that she would be forced to work. Clark also used force, fraud, and coercion to keep T.G. working under

conditions that constituted forced labor or involuntary servitude.<sup>10</sup>

In sum, the jury had ample evidence from which to conclude that Clark was guilty of human trafficking in the second degree.

Nonetheless, Clark argues that he did not recruit T.G. when she returned from Wisconsin 2008 because she was already his "property" by then, and she returned to Seattle because of her fear of him. Appellant's Opening Brief, at 39. This argument is not consistent with the record. T.G. testified that she cut off all contact with Clark when she first went to Wisconsin, but then Clark began calling her. 8RP 1422-23. Clark told T.G. "that things were going to be okay again and that he wasn't going to hit [her] anymore." 8RP 1436. T.G. believed him and still loved him, so when she returned, she went back to him. 8RP 1436. T.G. did not return to Seattle because she was afraid of Clark; to the contrary, she believed his lies that things would be better. T.G. returned to Seattle because she had left her 3-year-old son behind, not because she was Clark's "property." 8RP 1435.

---

<sup>10</sup> As the jury was instructed, "forced labor" means, among other things, work obtained "by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person would suffer serious harm or physical restraint." CP 194. "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." CP 195.

In sum, substantial evidence proves that Clark recruited T.G. for the second time in 2008, and Clark's arguments to the contrary should be rejected.

**4. HUMAN TRAFFICKING AND PROMOTING PROSTITUTION ARE SEPARATE OFFENSES FOR DOUBLE JEOPARDY PURPOSES.**

Clark argues that his convictions for human trafficking and promoting prostitution with respect to T.G. violate the prohibition against double jeopardy, and as a result, the human trafficking conviction must be vacated. Appellant's Opening Brief, at 42-51. This claim should be rejected. Human trafficking and promoting prostitution are not the same crime in law and in fact; each requires proof of elements that the other does not. Moreover, the human trafficking conviction carries a much higher sentence, which evidences legislative intent that it should not be vacated because it is the more serious offense.

When a single act or transaction violates multiple criminal statutes, double jeopardy prevents multiple punishments if the legislature did not intend the crimes to be treated separately. Albernaz v. United States, 450 U.S. 333, 343-44, 101 S. Ct. 2221, 67 L. Ed. 2d 275 (1977). Double jeopardy in this context is purely a question of legislative intent. State v. Calle, 125 Wn.2d at 769,

776, 888 P.2d 155 (1995). When the legislature authorizes separate punishments, convictions for multiple crimes based on the same act do not violate double jeopardy. Albernaz, 450 U.S. at 343. If the statutes in question do not expressly state that multiple punishments are authorized, courts must turn to statutory construction to determine whether the crimes may be punished cumulatively. Calle, 125 Wn.2d at 777.

The law in this area is not a model of clarity, but rather “a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.” Albernaz, 450 U.S. at 343. For purposes of navigation, however, the applicable test was announced by the United States Supreme Court 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 v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). The Washington Supreme Court has expressed this principle as follows:

In order to be the “same offense” for purposes of double jeopardy the offenses must be the same in law and in fact. 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.

Calle, 125 Wn.2d at 777 (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). If two crimes are not the same in law and in fact under this test, the crimes are different for double jeopardy purposes unless there is clear evidence of legislative intent to the contrary. Calle, 125 Wn.2d at 780.

The elements of human trafficking in the second degree as charged in this case are: 1) recruiting, harboring, transporting, providing, or obtaining another person, 2) with knowledge that force, fraud, or coercion will be used to cause the person to engage in forced labor or involuntary servitude. RCW 9A.40.100(2)(a)(i); CP 190. The elements of promoting prostitution in the first degree as charged in this case are: 1) knowingly advancing prostitution, 2) by compelling a person to engage in prostitution by threat or force. RCW 9A.88.070(1); CP 197. These offenses are not the same in law and in fact, as each requires proof of facts the other does not.

Human trafficking requires proof that a defendant recruited, harbored, transported, provided or obtained another person. No such proof is necessary for promoting prostitution. Promoting

prostitution requires proof that the defendant knowingly advanced prostitution, which means that the defendant "causes or aids a person to commit or engage in prostitution, [or] procures or solicits customers for prostitution, [or] provides persons or premises for prostitution purposes, [or] operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution." RCW 9A.88.060(1); CP 198. No such proof is necessary for human trafficking, which contains no essential element of advancing prostitution.

Promoting prostitution also requires that the defendant actually used force or threat of force to compel another person to engage in prostitution. This is not required for human trafficking; rather, the defendant need only have knowledge that force, fraud or coercion will be used in the future, whether by the defendant or someone else. In addition, trafficking requires knowledge that the victim will be subjected to forced labor or involuntary servitude. A condition of forced labor or involuntary servitude is not required for promoting prostitution, as a single act of prostitution suffices.

In sum, these crimes are not the same because each contains elements that the other does not, and each requires proof

of facts that the other does not. Accordingly, these crimes are presumed to be separate offenses unless there is "clear evidence of contrary [legislative] intent." Calle, 125 Wn.2d at 780. Clark offers no such evidence, because none exists. To the contrary, the two statutes serve different purposes (i.e., punishing those who facilitate the trafficking of human beings, versus punishing those who advance or profit from prostitution), and are they found in different chapters of the criminal code. See Calle, at 780 (statutes in different chapters that serve different purposes are intended to be separate crimes). Therefore, the legislature intends for these crimes to be punished separately, and Clark's claim to the contrary should be rejected.

Nonetheless, Clark argues a double jeopardy violation based on State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005). But the holding in Freeman is based on the merger doctrine, i.e., "when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." Freeman, 153 Wn.2d at 772-73. Based on merger, the court held that second-degree assault merges with first-degree robbery because the assault elevates the degree of robbery. Id.

at 776. There is no argument in this case that the merger doctrine applies, as there is no way to construe the human trafficking and promoting prostitution statutes in such a way as to conclude that proof of one crime elevates the other crime to a higher degree. Therefore, Freeman does not support Clark's position. In fact, Freeman supports the State's position, because Freeman also holds that merger should not apply when the crime that is "merged" carries the higher penalty.

In Freeman, although the court held that *second-degree* assault merges with first-degree robbery, the court reached the opposite conclusion with respect to *first-degree* assault and first-degree robbery. As the court noted, "when a court vacates a conviction on double jeopardy grounds, it usually vacates the conviction for the crime that forms part of the proof of the other" because the crime that merges into the other typically carries a lesser penalty. Freeman, 153 Wn.2d at 775.

On the other hand, the court observed that when the crime that normally would "merge" carries the greater penalty, it would thwart legislative intent to treat the two offenses as one for double jeopardy purposes. Id. at 775-76. Therefore, the court held that first-degree assault and first-degree robbery should be punished

separately because first-degree assault carries a far greater penalty. Id. at 776; see also State v. Weber, 159 Wn.2d 252, 267-69, 159 P.2d 246 (2006) (the "lesser" offense for double jeopardy purposes is the crime with the lowest punishment).

In this case, Clark argues (based largely on Freeman) that his conviction for human trafficking should be vacated because it is a "subset" of his conviction for promoting prostitution. Appellant's Opening Brief, at 51. But human trafficking carries a far greater penalty than promoting prostitution. Human trafficking in the second degree is a Class A felony. RCW 9A.40.100(2)(b). Promoting prostitution is a Class B felony. RCW 9A.88.070(2). Second-degree human trafficking is a level 12 offense, and first-degree promoting prostitution is a level 8 offense. RCW 9.94A.515. In this case, Clark received 184 months for human trafficking, but only 61 months for promoting prostitution. CP 262. As noted in Freeman, the fact that the offense that would be merged into the other carries a far greater penalty is evidence that the legislature did not intend for the two crimes to merge at all. Therefore, Clark's double jeopardy argument is contrary to legislative intent.

In sum, Clark's convictions for human trafficking and promoting prostitution are not the same offense for double jeopardy

purposes because they are not the same in law and in fact, and because they do not merge. The legislature intends for these crimes to be punished separately, even if based on the same series of acts, and to hold otherwise would thwart that intent. This Court should reject Clark's claim, and affirm.

**5. PROMOTING PROSTITUTION, HUMAN TRAFFICKING, AND CONSPIRACY ARE NOT CONCURRENT STATUTES, AND THE CLAIM IS WAIVED IN ANY EVENT.**

Clark also argues that his convictions for human trafficking, promoting prostitution, and conspiracy violate equal protection. More specifically, he argues that second-degree human trafficking, first-degree promoting prostitution, and conspiracy are concurrent statutes, that promoting prostitution is the specific statute and human trafficking and conspiracy are the general statutes, and therefore, both the trafficking conviction and the conspiracy conviction should be reversed. Appellant's Opening Brief, at 51-58. This claim should be rejected for two reasons: 1) the statutes are not concurrent; and 2) the issue is waived, because Clark did not make this argument at trial and controlling authorities hold that this is not a constitutional issue.

As a rule of statutory construction, which means determining legislative intent, "where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute." State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). This rule applies only when "the general statute will be violated in each instance where the special statute has been violated." Shriner, 101 Wn.2d at 580. In other words, if it is "not possible to commit the special crime without also committing the general crime," the statutes are concurrent and the rule applies. Shriner, at 583.

The determining factor is whether it is possible to commit the special crime without also committing the general crime, "*not* whether in a given instance both crimes are committed by the defendant's particular conduct." State v. Crider, 72 Wn. App. 815, 818, 866 P.2d 75 (1994) (emphasis in original); *see also* State v. Chase, 134 Wn. App. 792, 802, 142 P.3d 630 (2006) (it is the elements of the statutes that are compared, not the facts of a

particular case), rev. denied, 160 Wn.2d 1022 (2007).<sup>11</sup> Clark's claim fails this test.

As discussed above, the human trafficking statute requires that the defendant recruited, harbored, transported, provided, or obtained another person, knowing that force, fraud or coercion will be used to cause the person to engage in forced labor or involuntary servitude, or that the defendant benefitted financially from a venture that engaged in such conduct. RCW 9A.40.100(2). Promoting prostitution requires that the defendant knowingly advanced or profited from prostitution by compelling another person to engage in prostitution by threat or by force. RCW 9A.88.070. Advancing prostitution means the defendant engages in any of the following: he "causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute,

---

<sup>11</sup> In Chase, this Court rejected the defendant's argument that under the facts of his case, it was impossible for him not to have violated a special and general statute. This Court stated: "That may be true (that the facts show he violated both statutes), but the question is whether all violations of the first degree theft of leased property statute are necessarily violations of the first degree theft statute." Chase, 134 Wn. App. at 802-03.

aid, or facilitate an act or enterprise of prostitution." RCW 9A.88.060(1). Finally, conspiracy requires an agreement among two or more people to commit a crime, and a substantial step taken by any member of the conspiracy. RCW 9A.28.040(1).

It is possible to commit promoting prostitution without committing human trafficking or conspiracy. For example, if evidence proved that a woman was working for a pimp voluntarily, but she refused to take a particular customer for some reason, and the pimp then threatened her in order to compel her to have sex with that customer, the pimp would be guilty of first-degree promoting prostitution. However, the pimp would *not* be guilty of human trafficking because there is no evidence of forced labor or involuntary servitude, because aside from the dispute over one customer, the woman is otherwise working for the pimp voluntarily. Also, there is no evidence of a conspiracy because there is no agreement between the pimp and another person to promote the act of prostitution. Therefore, because it is possible to commit promoting prostitution without also committing human trafficking and conspiracy, the statutes are not concurrent. Clark's claim fails.

This Court should also reject Clark's claim because the issue has not been preserved for appeal. Rather, this non-constitutional issue has been waived.

An appellate court will not review an alleged error that was not raised at trial unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Although some earlier cases opined that this was an issue of constitutional magnitude under the equal protection clause, these cases have since been overruled. See United States v. Batchelder, 442 U.S. 114, 125, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979) (holding that a prosecutor choosing between concurrent statutes is no different than a prosecutor choosing to charge under similar, but not concurrent statutes, and "does not give rise to a violation of the Equal Protection or Due Process Clause"); City of Kennewick, v. Fountain, 116 Wn.2d 189, 192-93, 802 P.2d 1371 (1991) (recognizing overruling of cases analyzing this issue as an equal protection claim); see also State v. Carpenter, 52 Wn. App. 680, 683-84, 763 P.2d 455 (1988) (claimed error based on concurrent statutes argument was not preserved for review because no objection was raised below).

In this case, although defense counsel argued that human trafficking and promoting prostitution were the same offense, the general/specific crime analysis was never argued. Moreover, no argument was raised with respect to the crime of conspiracy. Accordingly, the trial court never ruled on the issue because the issue was never presented this way. The failure to request a ruling constitutes waiver. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). This Court should hold that Clark has waived this issue by failing to provide an analysis explaining why he should be able to raise this issue under RAP 2.5.

**6. CLARK'S CONVICTIONS FOR HUMAN TRAFFICKING AND PROMOTING PROSTITUTION WERE BASED ON A CONTINUING COURSE OF CONDUCT; NO UNANIMITY INSTRUCTION WAS REQUIRED.**

Clark claims that his convictions for human trafficking and promoting prostitution should be reversed because the jury was not given a unanimity instruction as to these crimes. Appellant's Opening Brief, at 58-61. This claim should be rejected. These crimes were prosecuted based on a continuing course of conduct, and thus, no unanimity instruction was required.

A defendant has a right to a unanimous jury verdict. Accordingly, when a defendant has committed multiple separate

acts, each of which may serve as the basis for the charged offense, the trial court can ensure jury unanimity by instructing the jurors that they must agree on a specific act as the basis for a conviction. This is known as a "Petrich instruction." State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Alternatively, the State may elect to rely upon a single act as the basis for a conviction. This ensures unanimity as well. State v. Bland, 71 Wn. App. 345, 351-52, 860 P.2d 1046 (1993). However, neither a Petrich instruction nor an election is necessary to ensure unanimity when the charge is based on a continuing course of conduct rather than multiple, discrete acts. Petrich, 101 Wn.2d at 571.

To determine whether a defendant's criminal actions constitute a continuing course of conduct, the facts must be evaluated in a commonsense manner. Id. When the evidence "involves conduct at different times and places, or different victims, then the evidence tends to show several distinct acts." State v. Garman, 100 Wn. App. 307, 313, 984 P.2d 453 (1999), rev. denied, 141 Wn.2d 1030 (2000). On the other hand, "evidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts."

State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995) (citing State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989)).

Put another way, a continuing course of conduct is "an ongoing enterprise with a single objective." State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395, rev. denied, 129 Wn.2d 1016 (1996).

The decision whether to charge separate crimes or a single charge is a matter of prosecutorial discretion. Petrich, 101 Wn.2d at 572. With respect to the crime of promoting prostitution, this Court has specifically held that the State has the discretion to charge multiple counts for separate acts, or a single count for a continuing course of conduct when the evidence shows "an enterprise with a single objective," i.e., "to make money." State v. Gooden, 51 Wn. App. 615, 618-19, 754 P.2d 1000, rev. denied, 111 Wn.2d 1012 (1988). Such is the case here for both human trafficking and promoting prostitution.

In this case, the State charged Clark with both human trafficking and promoting prostitution for conduct that occurred "during a period of time intervening between June 15, 2008 through December 1, 2008[.]" CP 174-76. The jurors were instructed in this manner as well. CP 190, 197. The State's theory of the case, which was amply supported by the evidence, was that Clark and his

associates were engaged in a criminal enterprise with a single objective, i.e., to keep their victims working to make as much money as possible. See e.g., 25RP 5012 (prosecutor in closing describes the defendant's and Street Mobb's focus as "money, money, money"); 25RP 5017 (prosecutor argues that human trafficking is committed "when you recruit them, or you drive them to the track or you put them up in a hotel room . . . if you know that you're going to use force to get them out on the street to work").

As discussed in the third argument section above, the evidence showed that Clark engaged in a course of conduct during the charging period that constituted trafficking with respect to T.G. And, as in Gooden, the evidence showed that Clark was engaged in a course of conduct during the charging period that constituted an enterprise of promoting prostitution, as he systematically beat, threatened, and humiliated T.G. to compel her to engage in acts of prostitution.

In sum, the State charged, presented evidence, and argued for conviction on the human trafficking and promoting prostitution charges based on Clark's continuing course of conduct during the charging period. When viewed in a commonsense manner, the facts as presented at trial show that Clark engaged in a continuing

course of conduct with a single objective. Therefore, a Petrich instruction was not required, and Clark's claim fails.

**7. FALSE IMPRISONMENT IS ALSO A SEPARATE OFFENSE FOR DOUBLE JEOPARDY PURPOSES.**

In a claim related to the one discussed in the fourth argument section, Clark argues that his conviction for unlawful imprisonment violates double jeopardy because it is the same offense in law and fact as his convictions for human trafficking and promoting prostitution. More specifically, Clark argues that because the State relied on proof of Clark transporting T.G. in a vehicle to the highway, to motels, and to Portland as evidence of human trafficking and promoting prostitution, and because the unlawful imprisonment charge was based on an incident involving a vehicle, they are the same offenses for double jeopardy purposes. Appellant's Opening Brief, at 61-62. This claim should be rejected, as the elements of these crimes are different, and the act forming the basis for unlawful imprisonment did not constitute proof of either human trafficking or promoting prostitution.

The elements of unlawful imprisonment demonstrate that it is not the same offense as either human trafficking or promoting prostitution. Unlawful imprisonment is committed when the

defendant "knowingly restrains another person." RCW 9A.40.040(1). Restraint is a necessary element of unlawful imprisonment -- indeed, it is the gravamen of the offense -- but it is not a necessary element of either human trafficking or promoting prostitution. RCW 9A.40.100(2); RCW 9A.88.070. Therefore, the Blockburger test shows that these are different crimes.

But even putting the elements aside and examining this issue in a purely fact-specific way, as Clark does, this claim is still without merit. As charged, proved, and argued to the jury, Clark's conviction for unlawful imprisonment stemmed from a single, discrete incident: when he confronted T.G. at the TraveLodge on November 12, 2008, punched her in the face, and picked her up and put her in the back of his El Camino. CP 177-78; CP 216; 25RP 5013 (prosecutor stated in closing that unlawful imprisonment occurred "when the defendant put [T.G.] in the back of his pickup truck"). Unlike the other charges, which were based on a course of conduct that occurred prior to the incident on November 12, 2008, the unlawful imprisonment charge was based on a single act, i.e., putting T.G. in the back of the vehicle "like a box" and driving away with her. 10RP 1949.

When Clark loaded T.G. into the back of his vehicle, there is no evidence that he was advancing prostitution or committing human trafficking. To the contrary, T.G. was in the process of leaving Clark on the day of the incident. 8RP 1486-87. In addition, T.G. managed to get out of the vehicle and escape; that same day, she began cooperating with the authorities, and she never worked for Clark again. 8RP 1489-94; 14RP 2820-23. Therefore, there is no evidence that Clark committed the act of unlawful imprisonment in order to advance prostitution or with knowledge that T.G. would be subjected to forced labor, because this incident marked the end of prostitution and forced labor for T.G.<sup>12</sup>

In sum, this was a single, separate act of unlawful restraint. Thus, Clark's conviction for unlawful imprisonment based on this discrete act does not violate double jeopardy.

**8. THE STATE CONCEDES THAT HUMAN TRAFFICKING IS THE SAME CRIMINAL CONDUCT AS PROMOTING PROSTITUTION IN THIS CASE, BUT UNLAWFUL IMPRISONMENT IS A SEPARATE OFFENSE.**

Clark claims that the trial court erred in finding that his human trafficking conviction was not the same criminal conduct as

---

<sup>12</sup> The fact that the State did not allege a gang aggravator on the unlawful imprisonment charge further confirms that this discrete act was not part of the course of conduct that formed the basis for the other charges.

his promoting prostitution conviction, and that he received ineffective assistance of counsel because his trial attorney did not argue that his conviction for unlawful imprisonment was the same criminal conduct as his convictions for human trafficking and promoting prostitution. Appellant's Opening Brief, at 62-68. The State concedes that on the facts of this case, human trafficking and promoting prostitution are the same criminal conduct. But the unlawful imprisonment charge was based on a separate act entirely, and this argument fails.

Under the Sentencing Reform Act, multiple crimes may constitute the same criminal conduct if they were committed with the same criminal intent, at the same time and place, and against the same victim. If two or more crimes meet these criteria, they are counted as one offense for purposes of the defendant's offender score. RCW 9.94A.589(1)(a). The intent inquiry "focuses on the extent to which the offender's 'criminal intent, as objectively viewed, changed from one crime to the next.'" State v. Haddock, 141 Wn.2d 103, 113, 3 P.3d 733 (2000) (quoting State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987)).

As discussed at length in argument section 6 above, Clark's convictions for human trafficking and promoting prostitution were

based on a continuing course of conduct<sup>13</sup> during the charging period, and they were committed against the same victim, T.G. In addition, also as discussed above, this conduct was performed with an overarching objective, i.e., "money, money, money." 25RP 5017. Although these two crimes could certainly constitute separate conduct in a different case, in this case they constitute the same criminal conduct under the applicable three-part test. Accordingly, as Clark's trial counsel argued at sentencing, these crimes count as one offense for sentencing purposes, and remand for resentencing is necessary.

On the other hand, Clark's trial counsel was not ineffective for failing to argue that unlawful imprisonment is also the same offense for sentencing purposes.

To establish ineffective assistance of counsel, Clark must establish both deficient performance and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Deficient performance means that counsel's performance fell below an objective standard of reasonableness. Id. Prejudice means that

---

<sup>13</sup> In other circumstances, having time "to pause and reflect" between acts can defeat a claim of same criminal conduct. State v. French, 157 Wn.2d 593, 613-14, 141 P.3d 54 (2006). However, this analysis would not logically apply when the crimes in question are continuous.

there is a reasonable probability that the result of the proceedings would have been different. Id. at 335. Clark shows neither.

As discussed at length in argument section 7 above, Clark's unlawful imprisonment conviction is based on a single, discrete act of unlawful restraint that occurred on November 12, 2008. By contrast, Clark's human trafficking and promoting prostitution convictions are based on a continuing course of conduct that took place prior to that date. Accordingly, unlawful imprisonment is a separate offense for sentencing purposes. Therefore, Clark's attorney was not deficient for failing to argue same criminal conduct, and Clark did not suffer prejudice because the trial court would have rejected this argument if it had been made. This claim is without merit.

**9. STATE V. BASHAW DOES NOT REQUIRE REVERSAL OF THE SPECIAL VERDICT BECAUSE CLARK INVITED THE ERROR BY PROPOSING THE INSTRUCTION THAT HE NOW CLAIMS WAS ERRONEOUS.**

Clark claims that the gang aggravator must be reversed because the jurors were improperly instructed under State v. Bashaw<sup>14</sup> that they had to be unanimous either to find or to reject

---

<sup>14</sup> 169 Wn.2d 133, 234 P.3d 195 (2010).

the gang aggravator. Appellant's Opening Brief, at 68-71. This claim should be rejected for three reasons. First, Clark invited the error he alleges because he proposed the jury instruction in question jointly with the State. Second, Bashaw does not apply here because, unlike the school bus stop enhancement at issue in that case, the relevant statute governing exceptional sentence procedures expressly requires jury unanimity for a "no" finding.<sup>15</sup> Third, any possible error is harmless.

The invited error doctrine dictates that a party may not set up a potential error at trial and then claim that the trial court erred on that basis on appeal. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Under the invited error doctrine, a claim of trial court error cannot be raised "if the party asserting such error materially contributed thereto." In re K.R., 128 Wn.2d at 147. Such material contribution may include acquiescence as well as direct participation. See State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990); State v. Lewis, 15 Wn. App. 172, 548 P.2d 587, rev. denied, 87 Wn.2d 1005 (1976). The invited error doctrine bars

---

<sup>15</sup> The State is aware that this Court recently rejected this argument in State v. Ryan, \_\_\_ Wn. App. \_\_\_ (No. 64726-I, filed April 4, 2011); however, the State argues this issue here in order to preserve it for any further review.

a claim even if that claim impacts a constitutional right. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).

In this case, the jury instruction at issue states that "[b]ecause this is a criminal case, each of you must agree for you to return a verdict." CP 229. Clark proposed this instruction jointly with the State. CP 99, 148. Accordingly, the invited error doctrine bars consideration of this claim on appeal.

But even considering this claim on the merits, Clark cannot show that the instruction was erroneous because the relevant statute requires jury unanimity for any kind of verdict, whether "yes" or "no." See RCW 9.94A.537(3). Bashaw involved a school bus stop enhancement, and the relevant statute is silent as to whether the jury must be unanimous in order to answer "no." See RCW 69.50.435. Accordingly, while the Bashaw court made a policy decision that a non-unanimous jury can reject a drug crime sentencing enhancement, that decision runs afoul of express statutory language in the context of aggravating factors.

Furthermore, the Bashaw court cited judicial economy and finality as policies furthered by its holding in that case. Bashaw, 169 Wn.2d at 147. But in the case of aggravating circumstances, the legislature has already determined that the imposition of an

appropriate exceptional sentence outweighs any judicial economy concerns, as the statute expressly authorizes a new jury trial on remand on the aggravating circumstances alone if an exceptional sentence is reversed on appeal. RCW 9.94A.537(2). This is further proof that Bashaw does not apply to aggravating circumstances, as the policy underpinnings are completely at odds.

Finally, any possible error is harmless beyond a reasonable doubt.<sup>16</sup> In Bashaw, the court found that the instructional error was not harmless because the court could not discern "what result the jury would have reached had it been given a correct instruction." Bashaw, 169 Wn.2d at 147. But in this case that result is obvious. The jury returned "no" answers to every special verdict except for the one for the conspiracy charge. CP 240, 242, 245, 248, 251, 253. In these circumstances, there is no reasonable probability that the jurors would have reached different results if they had been instructed that they need not be unanimous to answer "no" to the

---

<sup>16</sup> As noted in State v. Nunez, \_\_\_ Wn. App. \_\_\_ (No. 28259-7-III, filed Feb. 15, 2011), the Bashaw court found that the issue presented was not of constitutional magnitude, yet the court applied the constitutional harmless error standard, i.e., whether the error was harmless beyond a reasonable doubt. Bashaw, 169 Wn.2d at 147.

special verdicts, because they answered "no" to every special verdict except one. Clark's claim fails for this reason as well.

**10. SUBSTANTIAL EVIDENCE SUPPORTS THE GANG AGGRAVATOR FOR THE CRIME OF CONSPIRACY.**

Clark also argues that the gang aggravator should be reversed because there is insufficient evidence to support it. Appellant's Opening Brief, at 72-73. This claim is without merit.

As noted above, evidence is sufficient to support a conviction if any rational juror could have found the defendant guilty. Joy, 121 Wn.2d at 338. All reasonable inferences must be drawn in favor of the State. Salinas, 119 Wn.2d at 201. This Court defers to the jurors' determination as to weight and credibility and their resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. Circumstantial evidence and direct evidence are given equal weight. Delmarter, 94 Wn.2d at 638.

In this case, Clark received 20 months due to the gang aggravator for conspiracy to commit promoting prostitution. CP 259-71; 25RP 5127-29. For purposes of this aggravating factor, the jury found beyond a reasonable doubt that Clark "committed the crime with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal

street gang, its reputation, influence, or membership." CP 238; RCW 9.94A.535(3)(aa). Ample evidence supports this finding.

Detective Gagliardi testified that Street Mobb was a street gang whose primary objective was to profit from illegal activities, including prostitution. 7RP 1241-42. In Gagliardi's expert opinion, based on 13 criteria for gang membership, Clark was clearly a member of Street Mobb. 7RP 1252-53. Gagliardi explained that making money enhances the individual gang member's reputation, but also enhances the reputation of the gang as a whole. 7RP 1257. As Gagliardi stated, when a gang member makes money, it "allows the gang, as a whole, to both continue to operate in their criminal enterprises [and] allows them to thrive and grow by recruiting new members in the community." 7RP 1257.

Mycah Johnson testified that a Street Mobb member gained respect by making money. 11RP 2063. He explained that the more girls a Street Mobb member had prostituting for him, the more respect that member had. 11RP 2064. Johnson stated that Clark was respected because of his success as a pimp; Clark told everyone he was a pimp, and he was proud of it. 11RP 2175-76.

This is only a small sample of the gang evidence produced at trial. But even this small sample, standing alone, is more than sufficient to sustain the jury's verdict on the gang aggravator.

Nonetheless, Clark argues that Detective Gagliardi's testimony was subject to a limiting instruction, and that Clark's own testimony did not support the aggravator. Appellant's Opening Brief, at 72-73. These arguments are without merit. Gagliardi's testimony was subject to a limiting instruction as to hearsay statements he relied on, not as to his substantive opinions. 7RP 1284. Further, this Court views the evidence in the light most favorable to the State, and Clark's contrary testimony is irrelevant. Clark's claim fails.

**11. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO AMEND THE INFORMATION PRIOR TO RESTING ITS CASE BECAUSE THERE WAS NO PREJUDICE SHOWN BY THE DEFENSE.**

Clark claims that the trial court erred in granting the State's motion to amend the information prior to resting its case. Appellant's Opening Brief, at 73-75. This claim should be rejected. The trial court properly exercised its discretion to allow the State to amend the charging period for the commercial sexual abuse of H.R.

in accordance with the testimony, and Clark has failed to demonstrate prejudice as required.

Under CrR 2.1(d), the trial court may allow the State to amend the information after trial has commenced "if substantial rights of the defendant are not prejudiced." Prejudice is presumed if the State amends after resting its case. State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987). When the State moves to amend before resting its case, the defendant bears the burden of demonstrating prejudice. State v. Brown, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). To meet this burden, the defendant must show "specific prejudice," such as unfair surprise or the inability to prepare a defense. State v. James, 108 Wn.2d 483, 489-90, 739 P.2d 699 (1987). The trial court's decision to allow an amendment before the State rests its case is reviewed for abuse of discretion. State v. Schaffer, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

Amending the alleged date of an offense "has been held not to be material where, as here, no alibi is claimed." State v. Allyn,

40 Wn. App. 27, 35, 696 P.2d 45, rev. denied, 103 Wn.2d 1039 (1985) (citing State v. Forler, 38 Wn.2d 39, 42, 227 P.2d 727 (1951)). Put another way, "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, 62, 808 P.2d 794 (1991); see also State v. Brisebois, 39 Wn. App. 156, 162-63, 692 P.2d 842 (1984), rev. denied, 103 Wn.2d 1023 (1985). Thus, even if the charging period is amended *after* the State has rested, the amendment is proper absent a showing of prejudice because it is "not a material part of the 'criminal charge.'" DeBolt, 61 Wn. App. at 61-62 (distinguishing Pelkey, 109 Wn.2d at 491).

In this case, Clark was charged with promoting the commercial sexual abuse of H.R. "during a time intervening between October 1, 2007 through December 1, 2008[.]" CP 55 (Count IV). During H.R.'s and her parents' testimony, some confusion arose as to when H.R. had moved to Seattle, when she had run away from home and began prostituting, and when she returned to Nevada to live with her mother. 14RP 2698-2712, 2718, 2733-36, 2747-56. The next morning, the State announced its intention to amend the charging period for the count involving

H.R. to begin one month earlier, on September 1, 2007 rather than on October 1, 2007. 15RP 2829-31.

Two days later, the State reiterated its intention to amend the charging period and argued that Clark would not be prejudiced because his defense was denial. 17RP 3271-72. Defense counsel argued that Clark would be prejudiced because the relevant witnesses had already been cross-examined. 17RP 3273-74. However, defense counsel conceded that recalling H.R. and conducting further cross-examination would not be fruitful. 17RP 3276. The trial court reserved ruling, and asked for authority as to whether an "ah-ha, I got you defense" "really constitutes a substantial right" under CrR 2.1.

The next time the issue was addressed, the State correctly noted that Clark had the burden to demonstrate substantial prejudice. 20RP 3785-87. Clark's counsel argued, contrary to the relevant case law, that amending the charging period constituted "changing the overall substance of the charge." 20RP 3787. Defense counsel also contradicted his earlier position, and asserted that his cross-examination of H.R. would have been different in light of the amendment. 20RP 3788-89. Nonetheless, counsel conceded that he did not want the State to bring H.R. back from

Nevada to provide further testimony because he wanted to argue that the crime did not occur during the charging period. The trial court found that Clark had failed to show prejudice as required, but encouraged defense counsel to notify the State if he decided that H.R. should be recalled. 20RP 3791-93.

The following morning, defense counsel conceded that he had no further questions for H.R. in light of the amended charging period. 20RP 3826. The trial court reiterated its ruling that "the defense has not been able to show any substantial prejudice to the defendant from allowing the amendment." 20RP 3827.

The trial court properly exercised its discretion in allowing the State to amend the charging period. Clark's defense to this charge was denial, not alibi, so the exact time frame during which he was pimping H.R. was not a material aspect of the charge. Amending the charging period in these circumstances "is a matter of form rather than substance," and was properly allowed in the absence of a showing of prejudice. DeBolt, 61 Wn. App. at 62.

Nonetheless, Clark argues that he was prejudiced, citing State v. Spangler, 38 Kan. App. 2d 817, 173 P.3d 656 (2007). Spangler is inapposite. In Spangler, the prosecution amended a conspiracy charge late in the trial in three substantial ways: 1) to

correct a legal deficiency (i.e., to allege specific "overt acts" as required by Kansas law); 2) to change the names of the persons who had committed the overt acts; and 3) to expand the charging period from a single day to a six month period encompassing numerous additional crimes. Id. at 825-28. The amendment in Spangler changed the nature of the crime charged in several material respects, which hampered the defendant's ability to mount a defense. Nothing of the sort occurred in this case, and Clark's claim is without merit.

**12. THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT AND REBUTTAL WERE REASONABLE INFERENCES DRAWN FROM EVIDENCE INTRODUCED AT TRIAL WITHOUT OBJECTION.**

Clark argues that the prosecutor committed misconduct in closing argument and rebuttal by arguing that Clark's Street Mobb associates had attended the trial in order to intimidate T.G. Appellant's Opening Brief, at 76-79. This claim should be rejected. These remarks were based squarely on evidence that was introduced at trial without objection. Moreover, defense counsel used these remarks to his advantage during his closing argument on Clark's behalf. Accordingly, Clark cannot establish flagrant

misconduct resulting in incurable prejudice, and this Court should affirm.

In order to prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's conduct was both improper and prejudicial in light of the entire record and all of the circumstances present at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), rev. denied, 151 Wn.2d 1039 (2004) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who claims prosecutorial misconduct during closing argument "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Moreover, a defendant who did not object at trial has waived any claim on appeal unless the argument in question 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." Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. Stenson, 132 Wn.2d at 727. Also, arguments in rebuttal that would otherwise be improper are nonetheless permissible when they are

a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). The prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561.

Clark did not object to the remarks he now challenges on appeal. Accordingly, he must show that these remarks were so flagrantly improper that they resulted in incurable prejudice. Clark cannot meet this burden because the remarks were reasonable inferences drawn from evidence that was admitted without objection during the trial.

T.G. testified that she had been subjected to threats and intimidation by Street Mobb members and associates after she began cooperating with law enforcement. 8RP 1494. During one incident, a car pulled up next to her when she was walking near her grandmother's house. Someone in the car said, "Stop snitching on Street Mobb, bitch," and someone shot her in the forehead with a BB gun that looked like a real gun. 8RP 1495. After the police put T.G. in a shelter whose location was supposed to be confidential,

T.G. saw Street Mobb members Thomas Foster and "G-Bez" standing out front. 8RP 1498. On another occasion, T.G. was standing at a bus stop when someone snuck up from behind, put a sharp object against her neck, and told her she "better stop snitching." 8RP 1498. She associated this threat with Clark, who has a knife and the word "cutthroat"<sup>17</sup> tattooed on his neck. 8RP 1500-02. T.G. also had an encounter with L.J.'s half-sister, who had somehow obtained copies of T.G.'s statements to law enforcement and called her a "snitch bitch." 11RP 1815.

The efforts to intimidate and harass T.G. did not end outside of the courtroom. T.G. testified that during a recess, as she was walking from the witness stand to the door, one of Clark's family members told her that "Jesus doesn't love" her and called her a "bitch." 9RP 1617. T.G. also testified that during another recess, there were members of Street Mobb in the hallway and in the gallery, which frightened her. 8RP 1453-54, 1456-57. At the end of T.G.'s redirect examination, the following exchange ensued:

Q: So, [T.G.], the first day you [testified in] this case, I think you told us that there were Street Mobb members in the audience?

---

<sup>17</sup> Due to a typographical error by either Clark or the tattoo artist, Clark's tattoo actually says "cutthoat." 8RP 1502.

A: Yes.

Q: And the second day [you] testified [in] this case, I think you told us that there were Street Mobb members in the audience?

A: Yes.

Q: How about today?

A: Yes.

Q: Who is here?

A: The same people.

Q: The same people. Is that Jeff Knox?

A: Yes.

Q: And does he go by Little Pill?

A: Yes.

Q: And how about Hamisi?

A: Yes.

Q: Is he here today?

A: Yes.

.....

Q: Misi, all right. And has that changed, at all, [T.G.], how that affects you when you testify when they're here?

A: Still scared.

10RP 1823-24. All of this evidence was admitted without objection.

During his closing argument, the prosecutor used this evidence to draw a reasonable inference for the jury that Street Mobb was a criminal street gang whose members were part of a conspiracy:

And look at what the defendant did, himself. And you -- you'll go back, as you sort through all this evidence, he shared motel rooms, he took them to the track, he collected [N.S.'s] money, he collected [T.G.'s] money. He helped his fellow gang members, to take their girls to the track, to rent their girls hotel rooms. He shared his knowledge of pimping with Mycah Johnson, and he had his, regrettably his bottom bitch, [N.S.], facilitate calls to other members of this gang.

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.

25RP 5024.

During closing argument on Clark's behalf, defense counsel argued that the jury should not believe that T.G. "braved fear and everything else to come in here," because "[t]here's some other words that I will use of T.G.: liar, manipulative, and street-savvy in protecting her own ass." 25RP 5038. He then used the State's arguments regarding courtroom spectators to Clark's advantage:

Counsel talked about the -- the myriad of African-American men and women that came in here to pay support to -- or to show support to Mr. Clark. And I think the word he used is that they followed her not only on the street but they followed her into this courtroom. There's absolutely no evidence before you that those young men that came in here, who sat in absolute decorum, watched the trial, never said a thing, are members of any street gang.

This is an open courtroom, and I find it sad and an attempt to win at all costs, that you will comment about people who came into an open, public courtroom and sat politely to show support for their -- for someone that they know.

The way the State will want you to look at this is that every African-American man who dresses baggy, who comes in and sits down politely and publicly, they must be members of gangs, as well.

25RP 5038-39.

During rebuttal, the prosecutor conceded that Clark's friends had the right to attend the trial, but reiterated that members of Street Mobb had attended only T.G.'s testimony in order to intimidate her.

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 Mr. Garrett said, they have been identified as members of Westside Street Mobb not only by Detective Gagliardi, but by Mycah Johnson 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?

25RP 5072-73.

This record does not show flagrant, incurable misconduct. Rather, the record shows that the prosecutor drew reasonable inferences from evidence that was admitted at trial without objection. The fact that defense counsel did not object to the prosecutor's remarks shows that he did not deem the remarks to be unduly prejudicial at the time. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (counsel's decision not to object or request a curative instruction "strongly suggests to a court that the argument . . . did not appear critically prejudicial in the context of the trial"). To the contrary, defense counsel used these remarks to Clark's advantage by using them to bolster his own arguments. Clark cannot show flagrant and ill-intentioned misconduct. In addition, Clark cannot show that these remarks were so prejudicial that an instruction from the court could not have cured them. The fact that the jurors acquitted Clark of three crimes (one of which was alleged to have been committed against T.G.) and five gang aggravators demonstrates that they were not unfairly prejudiced by

these remarks in any event. CP 239-54. In sum, Clark has not met his burden for showing prosecutorial misconduct.

Nonetheless, Clark contends that the prosecutor improperly argued that the jury should decide the case on grounds other than the evidence admitted at trial. Appellant's Opening Brief, at 77-78. But as the record shows, evidence of T.G.'s fear of the Street Mobb members who met her in the hallway and sat in gallery while she testified was admitted at trial without objection. Clark's argument is contrary to the record, and should be rejected.

**13. CLARK'S CLAIM REGARDING THE DEFINITIONAL INSTRUCTION FOR PROMOTING PROSTITUTION IS BARRED BY THE INVITED ERROR DOCTRINE AND WITHOUT MERIT.**

Clark also claims that the prosecutors committed misconduct by "altering" the jury instruction defining "advancing prostitution" for purposes of the crime of promoting prostitution. Specifically, Clark claims that by omitting the language "operates or assists in the operation of a prostitution enterprise," the prosecutors altered the instruction in a manner that deprived Clark of a fair trial. Appellant's Opening Brief, at 79-81. This claim is barred because Clark invited the error he now alleges by proposing this instruction jointly with the State. Moreover, the instruction was proper.

As noted above, the invited error doctrine dictates that a party may not set up a potential error at trial and then claim that the trial court erred on that basis on appeal. In re K.R., 128 Wn.2d at 147; Henderson, 114 Wn.2d at 870-71. Under the invited error doctrine, a claim of trial court error cannot be raised "if the party asserting such error materially contributed thereto." In re K.R., 128 Wn.2d at 147. The invited error doctrine bars review claim even if the claim impacts a constitutional right. Patu, 147 Wn.2d at 720-21.

The parties jointly proposed almost all of the jury instructions used in this case. CP 99-173. Among these jointly-proposed instructions is the definitional instruction that Clark now claims to be the result of an act of prosecutorial misconduct. CP 117, 198. Clark is barred from raising this claim because he invited the error he alleges by proposing the instruction jointly with the State.

But in any event, the instruction was proper. The phrase that Clark claims was omitted due to a deliberate act of prosecutorial misconduct is bracketed material in the standard definitional instruction. The bracketed phrase reads in its entirety: "operated or assisted in the operation of a *house of prostitution or prostitution enterprise*". WPIC 48.11. As is true of bracketed material for any standard instruction, this phrase may be omitted if

it does not apply. See Note on Use, WPIC 48.11. There was no evidence that Clark operated or assisted in operating "a house of prostitution." Therefore, the bracketed phrase was inapplicable.

Nonetheless, Clark omits the "house of prostitution" portion of the bracketed phrase in framing his argument, and asserts that the operative phrase is "operated or assisted in the operation of a prostitution enterprise."<sup>18</sup> Brief of Appellant, at 79-80. Clark cites no authority for the proposition that jury instructions should be parsed in this manner, let alone authority standing for the proposition that the failure to do so constitutes prosecutorial misconduct. Clark's claim is thus both barred and without merit.

**14. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT FINDING CLARK GUILTY OF PROMOTING THE COMMERCIAL SEXUAL ABUSE OF N.S.**

Finally, Clark argues that insufficient evidence supports his conviction for promoting the commercial sexual abuse of N.S. He claims that because N.S. denied that Clark was her pimp, and "no affirmative evidence from any other source established this

---

<sup>18</sup> The instruction that was given stated that a person advances prostitution if the person "engaged in any other conduct designed to institute, aid, or facilitate an act or *enterprise* of prostitution." CP 198. Clark's argument is specious for this reason as well.

offense," this charge should be reversed and dismissed.

Appellant's Opening Brief, at 81-82. This claim is without merit.

As noted above, evidence is sufficient to support a conviction if any rational juror could have found the elements of the crime proved beyond a reasonable doubt. Joy, 121 Wn.2d at 338. All reasonable inferences must be drawn in favor of the State. Salinas, 119 Wn.2d at 201. This Court defers to the jurors' determination as to weight and credibility and their resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. Circumstantial evidence and direct evidence are given equal weight. Delmarter, 94 Wn.2d at 638.

Shawn Clark's girl A.R. testified that N.S. worked for Clark as a prostitute. A.R. shared a motel room with N.S., and she and N.S. both had "dates" in that room. 5RP 846. A.R. saw N.S. give the money she earned to Clark, and she heard Clark refer to N.S. as "my bitch." 5RP 847. S.A. testified that her pimp, Gerald Jackson, called Clark to get a second girl for a customer who wanted two girls, and Clark showed up with N.S. S.A. and N.S. then went to the call together in Clark's car. 6RP 1057-59. T.G. testified that N.S. worked for Clark. 8RP 1447. Mycah Johnson testified that Clark was pimping N.S., and that he had seen N.S. give money to

Clark. 11RP 2105-07. Johnson also identified a series of text messages between Clark and N.S. in which Clark told N.S. to get more "jugs" (dates) and earn more money. 11RP 2124-34.

Johnson heard Clark brag to other Street Mobb members about the money N.S. was making for him as a prostitute. 11RP 2139.

Johnson's girl C.D. testified that it was "obvious" that Clark was N.S.'s pimp. 16RP 3060. C.D. and N.S. often worked the streets or in a motel room together, and C.D. saw Clark threaten and berate N.S. when he thought she was not abiding by his rules. 16RP 3061-67, 3072, 3076-77, 3080, 3085-86, 3105.

In sum, one of the only witnesses who did *not* testify that Clark was N.S.'s pimp was N.S. herself. The other witnesses with first-hand knowledge that Clark was N.S.'s pimp offered ample evidence to sustain the jury's verdict.

**D. CONCLUSION**

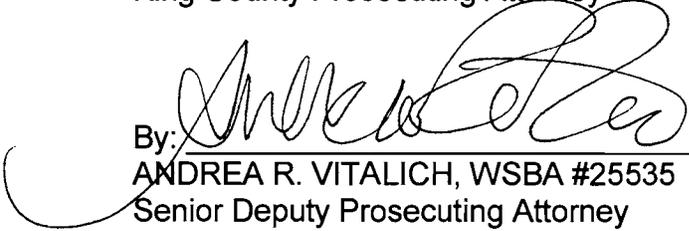
Clark's convictions for human trafficking in the second degree and promoting prostitution in the first degree constitute the same criminal conduct for sentencing purposes. Therefore, this case should be remanded for correction of Clark's offender score

and resentencing. This Court should reject Clark's remaining arguments and affirm in all other respects.

DATED this 15<sup>th</sup> day of April, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

ANDREA R. VITALICH, WSBA #25535  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DESHAWN CLARK, Cause No. 64861-6-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame  
Name  
Done in Seattle, Washington

9/15/11  
Date