

71164-4

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NO. 71164-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHACON F. BARBEE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Do the defendant's two convictions for promoting prostitution in the second degree (counts IV and V), and his conviction for leading organized crime (count VI), violate double jeopardy?

2. Do the defendant's two convictions for promoting commercial sexual abuse of a minor (counts I and II), violate principles of double jeopardy?

3. Do the defendant's two convictions for promoting prostitution in the second degree (counts IV and V), violate principles of double jeopardy?

4. Do two of the defendant's convictions for theft in the first degree (counts VII and VIII), violate principles of double jeopardy?

5. Did the trial court properly exercise its discretion in denying the defendant's motion to sever counts VII, VIII and IX (the counts of theft), from the rest of the charged crimes? Additionally, has this issue been preserved for appeal?

6. Did the trial court properly deny the defendant's motion to suppress the fact that he was listed in the motel registry for a room that was being used for prostitution?

7. Did the trial court properly exercise its discretion in admitting certain out-of-court statements under ER 801(d)(2)(v), statements by a coconspirator made in the course and in furtherance of the conspiracy?

8. Does the defendant need to be resentenced for what he alleges was an error by the trial court in not sentencing him in accordance to the law in effect at the time he committed his crimes?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

A jury found the defendant guilty of the following crimes:

Count I: Promoting Commercial Sex Abuse of a Minor
Victim: SE

Date of Violation: 1/1/10 through 8/31/10

Count II: Promoting Commercial Sex Abuse of a Minor
Victim: SE
Date of Violation: 9/1/10 through 12/31/10

Count IV: Promoting Prostitution in the Second Degree¹
Victim: BK
Date of Violation: 1/1/10 through 12/31/10

Count V: Promoting Prostitution in the Second Degree
Victim: CW
Date of Violation: 5/10/10 through 8/1/10

Count VI: Leading Organized Crime
Date of Violation: 1/1/10 through 12/31/10

Count VII: Theft I
Victim: Social Security Administration
Date of Violation: 1/1/09 through 8/31/09

Count VIII: Theft I
Victim: Social Security Administration
Date of Violation: 9/1/09 through 12/1/10

Count IX: Theft 2
Victim: Department of Social and Health Services
Date of Violation: 1/1/09 through 12/30/10.

CP 307-09, 311-16. The jury also found a sentencing aggravator charged in count I that the offense was part of an ongoing pattern of sexual abuse of a minor. CP 308; RCW 9.94A.535(3)(g). Counts III and X were

¹ This was a lesser included offense of the charged crime of promoting prostitution in the first degree. CP 278, 280-81.

dismissed at the request of the State because the State was unable to produce the victim of those counts for trial. 28RP² 22.

With 11 prior felony convictions, the defendant's offender score was 21.5 on the greatest offenses, counts I and II. CP 323-33. The trial court found the sentencing aggravator that the defendant committed multiple current offenses and his high offender score results in some of his current offenses going unpunished. CP 332-33; RCW 9.94A.535(2)(c). The court then found that both the jury's finding of an aggravating factor, and the court's finding, provided substantial and compelling reasons to impose an exceptional sentence. 30RP 21-23. The court then imposed an exceptional sentence of a total of 420 months on counts I and II -- concurrent, with a total term of confinement on all counts of 420 months. 30RP 24; CP 323-33.

2. SUBSTANTIVE FACTS

The defendant met 13-year-old SE while she was hanging out at a shopping mall. 18RP 8, 133. Bipolar, and with a poor family life, SE moved to Alaska at age 15 to live with her aunt. 18RP 12-14. By age 16, she had moved back to Seattle and was working for the defendant as a

² The verbatim report of proceedings is cited as follows: 1RP—11/30/12, 2RP—1/17/13, 3RP—2/21/13, 4RP—4/9/13, 5RP—7/2/13, 6RP—7/25/13, 7RP—7/31/13, 8RP—8/1/13, 9RP—8/12/13, 10RP—8/13/13, 11RP—8/14/13, 12RP—8/15/13, 13RP—8/19/13, 14RP—8/20/13, 15RP—8/21/13, 16RP—8/22/13, 17RP—8/26/13, 18RP—8/27/13, 19RP—8/28/13, 20RP—8/29/13, 21RP—9/3/13, 22RP—9/4/13, 23RP—9/5/13, 24RP—9/9/13, 25RP—9/10/13, 26RP—9/11/13, 27RP—9/12/13, 28RP—9/16/13, 29RP—9/17 & 9/18/13, and 30RP—11/15/13.

prostitute. 18RP 14-15. This was in February of 2010. 18RP 23. At the time, SE believed the defendant actually cared about her and that they would spend the rest of their lives together. 18RP 16. She believed she was in love him. 18RP 16.

When SE first started working for the defendant, she would use his computer and his credit card to post sex ads on webpages like Backpage and TNABoard. 18RP 17-20. The defendant would take naked photos of SE to post with the ads. 18RP 68-69. He taught SE the proper way to talk to clients on the phone, told her what to wear, what men liked, what color to dye her hair and how to best walk the tracks – the high prostitution areas of Seattle and South King County. 18RP 68-69, 148-49. SE would also do “in-calls” with clients at the Motel 6 where the defendant had put her up. 12RP 105. SE testified that the defendant had two storage units where he kept lingerie and clothing for the girls who worked for him. 18RP 130.

The defendant required that SE text him as soon as she received a call and set up an appointment with a client. 18RP 71. She was also required to get the money immediately when the client showed up and to then text a “K” to the defendant letting him know she had obtained the money. 18RP 71. SE, and the other girls working for the defendant, used a code to indicate how much money they received, for example, texting

3:00 would indicate that the girl had just received \$300 from a client.

18RP 71. The defendant would either pick up the money after each client left or at the end of each night. 18RP 70.

SE would charge \$100 for a half-hour in-call, and \$150 for a half-hour out-call. 18RP 33. Prices increased substantially for an hour or more. 18RP 33. As her “pimp,” all of the money she made went to the defendant. 18RP 16, 21. The defendant also had a number of rules that had to be followed, such as SE was not allowed to sit in the front seat of the car with the defendant, and if she had a good month financially, she could earn the position as his bottom bitch; meaning she could be his main girl. 18RP 21-22. If SE ever talked back to the defendant, he would hit her hard in the face. 18RP 24-25. She was also not allowed to leave the motel room without the defendant’s permission. 18RP 107.

The whole time SE worked for the defendant, she stayed in motel rooms paid for by the defendant, two different Motel 6 motels and the Sutton Suites motel. 18RP 26. The defendant had a separate apartment where he stayed, richly furnished with leather couches, two large-screen TVs, and speakers all around. 18RP 27, 48-49. The apartment was very clean because SE was required to clean it once or twice a week. 18RP 76. At the time, the defendant owned at least two cars, a Mercedes Benz and a

Jaguar. 18RP 51. He also spent lavishly on himself, buying Italian chairs, car rims, expensive bottles of booze and items from Gucci. 18RP 75.

SE testified that she was always working. 18RP 40. Even if she was tired, she could not go to bed unless the defendant said it was okay. 18RP 40. At times, the defendant had SE work the tracks in the Denny area of Seattle and along Pacific Highway South. 18RP 59, 65. SE testified there were days when she would work in-calls all day³ and then be forced to work the strip until 6 or 7 in the morning, sometimes in freezing weather with just a top on. 18RP 15-16, 65-66. While there was no actual quota, all of the defendant's girls were required to work until the defendant was happy and with an expectation that each would make at least a thousand dollars a night for the defendant. 18RP 66-67.

On March 24, 2010, the defendant was driving his Mercedes Benz when he was pulled over for a traffic stop while leaving a Motel 6 off of Pac Highway. 15RP 113-16. There was a young female wearing a low cut dress cowering in the back seat. 15RP 116-17. The girl was SE.

³ SE testified that she would post ads every day, sometimes multiple times a day. 18RP 83. A number of exhibits were admitted showing ads posted by SE, and the other girls who worked for the defendant. These notebooks contained hundreds and hundreds of ads from various web sites and included all of the victims listed in each of the charged counts. See e.g., Exhibits 50-53. Evidence showed that the ads were paid for by the defendant. 12RP 102. Notebooks containing the defendant and girls phone records, including text messages, were also admitted into evidence and showed the coded communications between the girls and the defendant. See e.g., Exhibit 57-58, 60, 61A. Three full binders of records from Backpage.com were introduced showing multiple sex ads having been placed on the web site using the defendant's user name. 20RP 5-36.

15RP 117. The defendant told the officer that he had been to a friend's room at the motel and that he was just taking the girl home. 15RP 117. Although the defendant told the officer he was unemployed, a pat-down search revealed the defendant had a large amount of cash in his pocket. 15RP 119-20.

SE worked for the defendant through the summer of 2010. 18RP 79. She then left the state for a couple of months with the intent of never working for the defendant again. 18RP 79-82, 111. However, in late November of 2010, the defendant persuaded SE to return to Washington and to work for him again, promising her that things would be different and that she would be his bottom bitch. 18RP 80-82, 114.

On December 3, 2010, while staying at the defendant's apartment, SE posted a sex ad. 18RP 90, 126. In response to a phone call placed to the number in the ad, SE agreed to meet a client at the Hampton Inn Motel. 18RP 93. This was the first client SE had upon returning to Washington to work for the defendant. 18RP 126. What SE did not know was that the call had been placed by an undercover police officer. 19RP 121-24, 136.

The defendant drove SE to the Hampton Inn and waited outside in the car, a Toyoda Avalon, while SE went inside. 17RP 109; 18RP 127. After agreeing to an act of prostitution in the motel room, SE was placed

under arrest. 18RP 127-28; 19RP 139-42; 20RP 121-28. When undercover officers approached the defendant's car, he took off and was pulled over by responding patrol officers a number of blocks away. 20RP 126-28. The defendant had \$270 in cash in his pocket. 17RP 121.

The defendant's I-phone was also taken into evidence and a warrant obtained to check the contents. 21RP 16, 19, 30. By using the defendant's phone records and numbers listed for the girls he employed, detectives were able to find on-line sex adds with those phone numbers listed and were able to track down and contact victims BK and CW – discussed further below. 21RP 52-56. There were over 12,000 text messages on the defendant's phone from May of 2010 through December of 2010 – many of them to BK, CW and SE. 25RP 23-25, 31-35.

One of SE's tasks while working for the defendant was to recruit new girls into the business. 18RP 29. SE contacted a number of girls for this purpose. 18RP 78. She would troll web sites like MySpace or Facebook looking for attractive girls because that is what the defendant wanted. 18RP 18-19. SE would start conversing with the girls, ultimately meet them and then introduce them to the defendant. 18RP 30-31. One of the girls she recruited off of Facebook was BK. 18RP 28.

By the age of 18, BK was a single mother, unemployed, and living on her own. 16RP 101, 110. She suffered from depression and had been

the victim of domestic violence by her baby's father. 16RP 103-04. Just prior to her 18th birthday in April of 2010, a girl started commenting on BK's photos that were on BK's Facebook page. 16RP 105. The girl was SE. 16RP 105. After the two communicated for a while, SE convinced BK to meet her and hang out at the Sutton Suites Motel on Pac Highway where SE was then staying. 16RP 107-08. During the visit, SE convinced BK to try out the idea of being an "escort," something BK testified she knew nothing about. 16RP 109-10.

SE introduced BK to the defendant the very next day and was told she would be working for him. 16RP 113. The defendant explained that all the money would go to him and that over time, their lifestyle would improve, BK could have a life for her daughter, and they would retire with lots of money. 16RP 114. He told BK that he would provide everything she needed; all she had to do was ask. 16RP 114, 136.

The defendant explained that BK would have to post ads and do both in-calls and out-calls. 16RP 115. He then explained the same rules that had been explained to SE. 16RP 116. BK received her first in-call at the motel room the same day. 16RP 117.

As with SE, the defendant had to okay which photos BK used in her ads. 16RP 119. He provided her with a cell phone to use and explained what to say to clients. 16RP 121-24. SE and BK then began

turning tricks out of the same motel room at the Sutton Suites Motel.

16RP 125. Within just a matter of days, the defendant also had BK walking the track on Pac Highway. 16RP 126-29.

On March 10, 2010, BK got arrested by undercover detectives as she was working the track on Pac Highway. 13RP 90-97; 16RP 129-30. Phone records showed text messages back and forth between BK and the defendant during this time period. 13RP 125-27. The defendant bailed her out of jail within two hours. 13RP 140-42; 16RP 131. Afterwards, BK continued to work for the defendant. 16RP 140. On Friday and Saturday nights, the defendant would have her work the tracks with the goal of making a thousand dollars a night. 16RP 140-42.

On March 25, 2010, the police received a complaint of juvenile prostitutes inside a hotel room at the Sutton Suites Motel. 12RP 62-64, 13RP 43-46, 58. Police ultimately entered the room and found two young girls inside provocatively dressed, SE and BK, who had been doing in-calls every day out of the room. 12RP 86; 13RP 16; 17RP 36. The room was filled with prostitution and pimping related items, lingerie, sex toys, a bag filled with condoms, handcuffs, body spray, a whip, a dildo, lubricant, multiple pairs of stiletto heels, multiple cell phones, a digital camera, SD cards, a printer, and multiple laptop computers, including one that belonged to the defendant. 12RP 68-71, 80-85; 13RP 17, 23;

18RP 38-39, 42-45. This was the computer that SE used to post ads for herself and BK. 18RP 42. This was also when the defendant first came to the attention of a police task force. 13RP 67-68, 75.

SE and BK ended up getting released. 16RP 145. BK went to her parents' house and stopped working for the defendant. 16RP 154. A few months later, however, the defendant convinced BK to come over to his apartment. 16RP 155. He then convinced BK that she should work for him again, that they could make a life together. 16RP 156. Instead, he kept BK captive. When he would leave the apartment, he would set the alarm so that she could not leave. 16RP 158-59. He also took her car, a Toyota Avalon, and made her sign over the title to him. 16RP 158-59. 16RP 158-59. He would take BK to the tracks in Seattle to work on Friday and Saturday nights. 16RP 158, 160. Finally, one evening (BK believed it was in late October 2010) after the defendant had dropped her off at the track to work, BK called someone to come pick her up and she stopped working for the defendant. 16RP 166; 17RP 41.

Another girl SE recruited for the defendant off of MySpace was CW. 18RP 50. CW was 21 years old at the time of trial. 14RP 6-7. Along with her parents being divorced, CW had a difficult childhood, moving to different cities and having been sexually abused by her father's roommate and being physically abused by her father. 14RP 9-11. She

suffered from bulimia, PTSD and bipolar disorder. 14RP 12. At one point she tried to kill herself and ended up undergoing long-term mental health treatment at Fairfax Hospital. 14RP 11.

Just after CW turned 18 and while living with a friend in Bellingham, CW began receiving e-mails on her MySpace account from SE. 14RP 17. This was in late April or early May of 2010. 14RP 19-20. SE enticed CW to visit her in Seattle with the idea of being an escort, something she described as being very exciting, with hot dates and lots of money. 14RP 20-22. "Naïve" and wanting a way out of her unhappy life, CW agreed to meet SE at a Motel 6 on Pac Highway. 14RP 24, 26.

After meeting with CW, SE took CW to meet with the defendant as he instructed. 14RP 30-31; 18RP 52. SE told CW the defendant was her pimp and she could trust him. 14RP 33. CW was told that the defendant would get her clients, lots of money, and buy her clothing, jewelry, nice cars and provide a nicer motel to stay at. 14RP 34-36. The defendant told CW that initially she would be doing in-calls and that he would help her set up web site sex ads and help her take photos for the ads. 14RP 37.

CW started working for the defendant immediately. 14RP 41; 18RP 52. Asked why, CW testified that emotionally, she just wanted to be loved and that she wanted someone to take care of her. 14RP 38. The

defendant took photos of CW to post on-line the very next day. 14RP 42, 50-51; 18RP 67-68. She worked with SE out of the room at the Motel 6. 14RP 42; 18RP 52, 58. The defendant provided CW with clothing for work and drove her to get her nails done. 14RP 43-44, 46, 50. Both girls were required to sit in the back seat with CW sitting directly behind the defendant in his Mercedes Benz, and SE, being the bottom bitch, sitting in the back seat across from the defendant. 14RP 45.

CW had all of the same rules and requirements as SE and BK. 14RP 51-59, 79. There was one exception to the standard rules. When the defendant had sex with CW he did not wear a condom, explaining to her that she was required to have clients wear a condom, but not him. 14RP 63.

After a while, the defendant began taking CW to out-calls. 14RP 90. The defendant set up a Backpage ad and would take her to clients in his Mercedes. 14RP 90-91. When CW obtained the money from the client, she was required to immediately text the defendant. 14RP 93. Other than out-calls, CW was not allowed to leave the motel room.⁴ 14RP 104. However, she was taken to the defendant's apartment on one occasion so that the defendant and his cousin could have sex with her at

⁴ Text messages were introduced that showed CW asking the defendant if she could leave the motel room and the defendant responding that she could not. 15RP 29.

the same time.⁵ 14RP 109. CW testified the defendant treated her as if she “wasn’t a person.” 14RP 114. She was just a way for him to make money. 14RP 114.

CW continued working for the defendant in the hopes that things would get better. 14RP 115. But once she finally realized things were not going to change, she left. 14RP 115. On June 9, 2010, CW texted the defendant that she did not want to put her family through this and that she was leaving. 14RP 30-31. She had her grandmother pick her up, she changed her phone number, and she had no further contact with the defendant. 14RP 31, 35, 39.

As discussed above, when the defendant was arrested in the Hampton Inn sting operation, detectives were able to track down other victims of the defendant through information in his I-phone. 21RP 52-56. When detectives contacted BK, she told them about two storage units rented by the defendant. 21RP 59-60. She led the detectives to the storage units and a search warrant was obtained. 21RP 60, 63-64. One of the lockers contained a large amount of female clothing and lingerie, financial documents from a credit union used by the defendant, Gucci clothing and receipts, business cards for various motels on Pac Highway,

⁵ Text messages were introduced that showed the defendant telling CW that she was going to be subject to a “train,” “where multiple guys fuck you in every which way.” 15RP 19.

handwritten sex ads, a letter from DSHS addressed to the defendant, and a number of DVD's on pimp-related matters, with titles such as 48 Laws of the Game and Pimpology by Pimping Ken. 21RP 118-21; 24RP 100-03. There was also a safe inside the storage unit that contained \$18,300 in cash and a ledger that had a beginning value listed as \$40,000. 21RP 127-28.

The defendant's credit union records were introduced at trial and showed multiple debit amounts starting in February of 2010 for various web sites like Backpage.com, Vibe Media and Craigslist. 26RP 35-39, 44-47. The debits continued through late June of 2010. 26RP 47. The records also showed a number of deposits from cashed government checks. 26RP 52. Beginning in early 2009, the records also showed that the defendant repeatedly brought in large amounts of small denomination bills and exchanged them for bills for larger denominations. 26RP 57-60. The credit union noted over \$28,000 in such cash exchanges. 26RP 73.

During the charging period, the defendant was receiving government funds from two different programs, cash from the Supplemental Security Income Program (SSIP) for persons who are destitute and disabled, and food and medical assistance from the Department of Social and Health Services (DSHS), both under the Social Security Administration (SSA). 26RP 77, 80-81, 100; 27RP 61. Under

the two programs, a person must be disabled as defined, unable to work and be below a specific level of income and assets. 26RP 82-85; 27RP 71. The amount of payment and benefits a person would receive was based on their need after a review of the person's financial situation. 26RP 89. For example, there is an asset cap of \$2,000, excepting one car and one home. 26RP 89-90.

The determination of eligibility was based primarily on the person's self-reporting. 26RP 87. In addition, a claimant is required to report any and all assets, as well as any financial changes or income received within ten days after the end of the month any income or resources are received by the claimant. 26RP 91-92, 102.

The defendant did not report his ownership of his Mercedes Benz or his Jaguar, the Toyoda Avalon he obtained from BK, the nearly \$20,000 found in his storage unit, or any of the money he received from his prostitution enterprise. 26RP 99-100; 27RP 22, 40. When he initially applied for benefits, he listed his expected monthly income as zero. 27RP 89-90. The State presented evidence from the SSA that the defendant received financial assistance from the two programs each month all the way through the charging period listed in counts VII, VIII and IX, until he was jailed on the current charges. 27RP 10-18, 65-75, 87-92, 115-18, 122-26.

The defendant did not testify. Additional facts are included in the sections below they pertain.

C. ARGUMENT

1. CONVICTIONS FOR PROMOTING PROSTITUTION AND LEADING ORGANIZED CRIME DO NOT VIOLATE DOUBLE JEOPARDY

The defendant argues that his convictions for promoting prostitution (counts IV and V) merge into his conviction for leading organized crime (count VI), i.e., that being convicted of all three offenses violates the prohibition against double jeopardy. They do not. As the court found in State v. Harris,⁶ the legislature clearly intended that persons convicted of leading organized crime should be punished for both the underlying crime(s) they commit, as well as the offense of leading organized crime.

In many cases, a defendant's single act may violate more than one criminal statute. In such a situation, it is not a double jeopardy violation for a defendant to receive punishment under both statutes where the punishment has been authorized by the legislature. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (finding no double jeopardy violation where a single act of intercourse violated both the rape statute and the incest statute and the defendant received punishment under both

⁶ 167 Wn. App. 340, 272 P.3d 299, rev. denied, 175 Wn.2d 1006 (2012).

statutes). After all, subject to constitutional constraints, it is the legislature, not the court, that possesses the power to define criminal conduct and assign punishment. Calle, 125 Wn.2d at 776. In other words, a double jeopardy violation does not exist simply because the same facts may have been used to obtain convictions under two separate statutes. See State v. Vladovic, 99 Wn.2d 413, 419-20, 662 P.2d 853 (1983). Double jeopardy is implicated only when the sentencing court exceeds its legislative authority by imposing multiple punishments where multiple punishments are not authorized. Calle, at 776. Thus, “[w]here a defendant’s act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.” State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005).

In Calle, the Court set forth a three-part test for determining whether multiple punishments were intended by the legislature. The first step is to review the language of the statutes to determine whether the language expressly permits or disallows multiple punishments. Should this step not result in a definitive answer, the court turns to the two-part “same evidence” or Blockburger test.⁷ This test asks whether the offenses are the same “in law” and “in fact.” Failure under either prong creates a

⁷ Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

strong presumption in favor of multiple punishments, a presumption that can be overcome only where there is “clear evidence” that the legislature did not intend for the crimes to be punished separately. Calle, at 778-80.⁸

Here, there is clear evidence that the legislature intended that when a defendant is convicted of leading organized crime, he should be punished for that crime, and for any other criminal act he may have committed. See Harris, 167 Wn. App. 340 (finding defendant’s conviction for leading organized crime did not merge with any of his underlying convictions).

In 1984, the legislature created the crime of “leading organized crime.” See RCW 9A.82.060. Citing directly to the legislative reports, the court in Harris noted that the legislature was acutely aware that the “community faces a greater peril from collective criminal activity than it does from criminal activity by one individual.” Harris, at 357. To address the problem of organized crime, the legislature clearly “intended additional punishment for the societal harm of leading organized crime,

⁸ Calle represented an affirmation of the rejection of the fact-based analysis used by some courts for a brief period ending in the early 1990’s. In 1993, the United States Supreme Court specifically overruled the “same conduct” fact-based analysis for determining double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, the Washington Supreme Court did the same. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995). This rejection of a fact-based analysis makes sense when considering that the question is one of legislative intent of which the facts of a particular case tell us nothing. See State v. Vaughn, 83 Wn. App. 669, 924 P.2d 27 (1996) (recognizing rejection of the “same conduct” test in finding no double jeopardy violation for kidnap and rape convictions), rev. denied, 131 Wn.2d 1018 (1997).

a punishment separate and distinct from any underlying predicate crimes.” Id. The “legislature did not intend for the predicate crimes to merge with the new crime of leading organized crime.” Id. (citing Final Legislative Report, 48th Leg., at 197-98 (1984)).

This clear legislative intent resolves the issue here because the tests as outlined in Calle, are merely tools intended to help discern legislative intent when the legislative intent is not clear or obvious, as it is here. In any event, even if there were not this clear legislative intent, the defendant’s double jeopardy argument would fail under the test articulated in Calle.

Under the “same evidence” or Blockburger test, to constitute the same offense for double jeopardy purposes, the offenses must be the same “in law” and “in fact.” Offenses are the same “in fact” when they arise from the same act. Offenses are the same “in law” when proof of one offense would always prove the other offense. Calle, at 777. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Calle, at 777.

Here, the defendant’s convictions are not the same “in law” because each charge required the State to prove elements not included in the other.

As charged, to prove second degree promoting prostitution, the State was required to prove that an act of prostitution occurred and that the defendant either profited from that act or that he aided in that act.⁹ To prove leading organized crime, the State was not required to prove that an act of prostitution occurred or that the defendant profited from an act of prostitution.

As charged, to prove leading organized crime, the State was required to prove that the defendant intentionally organized, managed, directed, supervised, or financed three or more persons with the *intent* to engage in a pattern of criminal behavior.¹⁰ Promoting prostitution does

⁹ A person is guilty of promoting prostitution in the second degree if he or she knowingly (a) profits from prostitution; or (b) advances prostitution. RCW 9A.88.080(1)(a) and (b).

A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, he or she causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution. RCW 9A.88.060(1).

A person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he or she accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity. RCW 9A.88.060(2).

¹⁰ A person commits the offense of leading organized crime by (a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity; or (b) Intentionally inciting or inducing others to engage in violence or intimidation with the intent to further or promote the accomplishment of a pattern of criminal profiteering activity. RCW 9A.82.060(1)(a) and (b). The defendant was charged under subsection (1)(a) of the statute. CP 246, 288.

In pertinent part "criminal profiteering" "means any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred." RCW 9A.82.010(4).

not contain the element of organizing *et al.*, three or more persons to engage in criminal activity.

With each charge having elements not contained in the other, the two offenses fail the same “in law” prong of the “same evidence” test. It makes no difference if they are the same “in fact. Because the offenses are not the same “in law,” the defendant’s convictions must be punished separately unless “there is a clear indication of contrary legislative intent,” of which there is not. Calle, at 780.

Despite the legislative intent to the contrary, and the failure to meet the “same evidence” test, the defendant still argues that his convictions violate double jeopardy. He does so by misapplying the merger doctrine.

The merger doctrine is another method used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. Vladovic, 99 Wn.2d at 419 n.2. However, the merger doctrine is limited to a specific situation – a situation that does not exist here.

The merger doctrine:

only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State *must* prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by

an act [that] is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).^[11]

State v. Eaton, 82 Wn. App. 723, 730, 919 P.2d 116 (1996) (citing Vladovic, 99 Wn.2d 413) (emphasis added). Thus, merger applies only when one crime is elevated by proof of another crime. Freeman, 153 Wn.2d at 772-73. The premise being that the legislature intended the elevated crime to constitute the sole punishment for the single act that violates both statutes. Id.; State v. Esparza, 135 Wn. App. 54, 60, 143 P.3d 612 (2006), rev. denied, 161 Wn.2d 1004 (2007).

There is only one degree of leading organized crime; it is not elevated by proof of any other crime. Thus, the merger doctrine does not apply.

Next, the defendant argues that his case is “indistinguishable from Harris v. Oklahoma,” a case that involves “felony murder.”¹² Def. br. at 32. The Harris case has no application here.

Harris was convicted of robbery and murder under Oklahoma’s “felony murder” statute, a law that required the State to prove that in the course of a homicide, the perpetrator was “engaged in the commission of

¹¹ To be convicted of first degree rape, a perpetrator must engage in sexual intercourse by forcible compulsion and, as a *requirement of the statute* the perpetrator must either (1) kidnap or (2) inflict serious injury upon the victim. RCW 9A.44.040. It is the statutorily required kidnapping and assault that elevates second degree rape to first degree rape.

¹² 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977).

any felony.” See Harris v. State, 555 P.2d 76, 80-81 (Okl.Cr.App. 1976) (citing 21 O.S. 1971, s 701 (since repealed)) (“Proof of the underlying felony is needed to prove the intent necessary for a felony murder conviction.”). The United States Supreme Court held that where conviction of a greater crime (murder) cannot be had without conviction of the lesser crime (robbery), the double jeopardy clause bars prosecution for the lesser crime. Harris, 433 U.S. at 682-83.¹³

The rationale of Harris is inapplicable here because the leading organized crime statute does not require the actual commission or attempted commission of any underlying crime. The kidnapping statute provides a good example.

A person is guilty of first degree kidnapping “if he or she intentionally abducts another person *with intent* ... to facilitate commission of any felony.” RCW 9A.40.020(1)(b) (emphasis added). The Supreme Court has held that first degree kidnapping committed in conjunction with a robbery does not violate double jeopardy because proof

¹³ This is the same result under Washington’s felony murder statute. See State v. Williams, 131 Wn. App. 488, 497-500, 128 P.3d 98 (2006), remanded on other grounds, 158 Wn.2d 1006 (2006). Under Washington’s felony murder statute, a person is guilty of first degree murder if “[h]e or she *commits or attempts to commit* the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants.” RCW 9A.32.030(1)(c) (emphasis added).

of first degree kidnapping requires only “*the intent*” to commit robbery, not the completion of a robbery. State v. Louis, 155 Wn.2d 563, 571, 120 P.3d 936 (2005). The same is true under the leading organized crime statute. The statute requires only that the perpetrator have “*the intent* to engage in a pattern of criminal profiteering activity.” Thus, the State is not required to prove any underlying crime and the rationale of Harris does not apply.

2. THE “UNIT OF PROSECUTION” FOR PROMOTING PROSTITUTION, PROMOTING COMMERCIAL SEXUAL ABUSE OF A MINOR, AND FIRST DEGREE THEFT

The defendant contends that he committed only a single “unit of prosecution” of promoting commercial sexual abuse of a minor (counts I and II), second degree promoting prostitution (counts IV and V), and first degree theft (counts VII and VIII). This claim should be rejected. In each case, the defendant committed more than one unit of each crime.

The double jeopardy provisions of both the state and federal constitutions prohibit multiple convictions if the defendant has committed just “one unit of the crime.” State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998). When a defendant has been convicted of violating one statute multiple times and a “unit of prosecution” double jeopardy challenge is made, a reviewing court must answer two questions. First,

the court must determine what act or course of conduct the legislature intended as the punishable act under the specific criminal statute. Adel, 136 Wn.2d at 633-34; Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). Second, once the court has determined the legislatively created “unit of prosecution” for the crime, the court must perform a factual analysis to determine whether the defendant committed just one or multiple units of prosecution. State v. K.R., 169 Wn. App. 742, 748-49, 282 P.3d 1112 (2012).

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

In addition, an appellate court may have already determined the unit of prosecution for a particular crime. See e.g., State v. Leyda, 157 Wn.2d 335, 346 n.9, 138 P.3d 610 (2006) (relying on Ose, supra, in

determining the unit of prosecution for identify theft), superseded by statute, Laws of 2008, ch. 207, §§ 3-4. In such a situation, *stare decisis* requires a reviewing court adhere to precedent unless the opposing party demonstrates that the prior decision is “incorrect and harmful.” State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (refusing to overrule prior double jeopardy determination regarding robbery and assault).

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

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

a. Promoting Commercial Sexual Abuse Of A Minor

Count I charged the defendant with promoting commercial sex abuse of a minor, SE, during the period between January 1, 2010 and

August 31, 2010. CP 244. Count II charged the defendant with promoting commercial sex abuse of a minor, SE, during the period between September 1, 2010 and December 31, 2010. CP 245. The defendant contends that because the offenses involved the same victim, he committed but a single “unit of prosecution” that spanned an entire year. He is incorrect.

In support of his argument, the defendant claims that the “unit of prosecution” issue has already been decided by State v. Gooden, 51 Wn. App. 615, 754 P.2d 1000, rev. denied, 111 Wn.2d 1012 (1988). Def. br. at 21. While the State agrees the issue has already been decided, the defendant has misinterpreted Gooden and has failed to cite other relevant case law.

In Gooden, “W,” and her best friend “V,” both 16 years of age, ran away together and were prostituted by Gooden. As a result, Gooden was convicted of two counts of first degree promoting prostitution -- one count for each girl. The statute provided that a person is guilty of first degree promoting prostitution if he knowingly “[a]dvances or profits from prostitution of a person less than eighteen years old.” Former RCW 9A.88.070(1)(b).¹⁴ Gooden argued that he was denied his right to a

¹⁴ The State agrees with the defendant that Gooden, a promoting prostitution case, is directly applicable to the issue he raises involving commercial sex abuse of a minor because in 2007, the legislature removed subsection (1)(b) from the promoting

unanimous verdict on each count because the State did not elect which specific act it was relying on for each count, and the jury was not instructed that all 12 jurors had to agree that the same underlying criminal act had been proven. Gooden, at 618 (citing State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984)).¹⁵ The court rejected Gooden's claim, holding that the State did not need to elect any specific act, and the jury did not need to be provided with a "Petrich instruction," because promoting prostitution could be charged as a "continuing course of conduct." Id. at 620.

The defendant interprets Gooden's holding to mean that the "unit of prosecution" for promoting prostitution (and thus commercial sexual abuse of a minor) is this "continuing course of conduct." It is not.

prostitution statute, and reenacted the provision almost verbatim in the commercial sexual abuse of a minor statute, RCW 9.68A.101. See Laws 2007, ch. 368, § 13. Essentially, commercial sexual abuse of a minor is what used to be promoting prostitution under subsection (1)(b).

¹⁵ Where the State charges a single count but presents evidence of more than one criminal act that could support the charge, there is a risk that a conviction may not be based on a unanimous jury finding that the defendant committed any one particular act. See State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Where such a situation exists -- where there are multiple acts that could support the charge -- to ensure jury unanimity, the State must elect a single act upon which it will rely for conviction, *or* the jury must be instructed that all 12 jurors must agree as to what act or acts were proved beyond a reasonable doubt. Petrich, at 569, *overruled in part on other grounds by*, Kitchen, *supra*. Such an instruction is commonly referred to as a "unanimity" or Petrich instruction. The current WPIC "Petrich" instruction, WPIC 4.25, provides as follows:

The State alleges that the defendant committed acts of _____ [name of crime] on multiple occasions. To convict the defendant [on any count] of _____, one particular act of _____ [name of crime] must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of _____ [name of crime].

Gooden involved the State's ability and the State's discretion to charge a "continuing course of conduct," instead of charging each individual distinct act that could support the charge. See Gooden, at 618 (citing Petrich, at 571). This is a different legal concept and analysis than a unit of prosecution concept and analysis. As the court discussed, "[t]o determine whether one continuing course of conduct *may* be charged, the facts must be evaluated in a commonsense manner." Id. (emphasis added). For example, while the Supreme Court has defined the unit of prosecution for rape as any single act of penetration, where there are multiple penetrations over a short span of time, instead of charging each individual act of penetration, the State may permissibly charge a continuing course of conduct. See State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999) (each penetration is a separate unit of prosecution); State v. Mutch, 171 Wn.2d 646, 665, 254 P.3d 803 (2011) (five distinct episodes of sexual assault, with each episode including oral and vaginal intercourse, each episode properly charged as a separate count); State v. French, 157 Wn.2d 593, 612, 141 P.3d 54 (2006) (multiple acts of penetration could support each count of rape).

If the "continuing course of conduct" and the "unit of prosecution" for promoting prostitution were the same, there would have been no Petrich issue in Gooden. In other words, Gooden stands for the opposite

of what the defendant claims it stands for. The unit of prosecution is each act of promoting prostitution, although it is permissible for the State to charge a single count as a continuing course of conduct where there are multiple closely related acts. As the Gooden court found, “the statute regarding promoting prostitution in the first degree *permits convictions for each distinct act*, it also contemplates a continuing course of conduct.” Gooden, at 618, accord, State v. Barrington, 52 Wn. App. 478, 761 P.2d 632 (1988) (three month period of promoting a single prostitute properly charged as a single count under a continuing course of conduct theory), rev. denied, 111 Wn.2d 1033 (1989).¹⁶

The rationale of Gooden and Barrington was reaffirmed by the Supreme Court in State v. Elliott, 114 Wn.2d 6, 785 P.2d 440 (1990). In Elliott, the Court specifically stated that under the definition of “advancing prostitution,” a charge of promoting prostitution “could be based upon separate specific acts or upon a continuing offense.” Elliott, 114 Wn.2d at 12. In affirming Elliott’s conviction, the Court stated that Elliott “was properly charged with two counts of promoting prostitution in the second

¹⁶ See also State v. Furseth, 156 Wn. App. 516, 233 P.3d 902 (2010) (Under the Supreme Court’s ruling that regardless of the number of images of child pornography a defendant possesses, this constitutes but a single unit of prosecution, there is thus only a single “act” committed when a defendant possesses multiple images and Petrich is not implicated (citing State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009), which overruled State v. Gailus, 136 Wn. App. 191, 147 P.3d 1300 (2006)), rev. denied, 170 Wn.2d 1007 (2010), a case that had held that each depiction was a separate unit of prosecution).

degree, consisting of one count for each of two persons whose prostitution she [Elliott] allegedly promoted.” Id. at 15.¹⁷

While the above cases definitely hold that each act that could support a charge of promoting commercial sexual abuse of a minor can be charged separately as a single unit of prosecution, and thus, there is no double jeopardy violation here, even if the defendant were correct that the crime is a continuing offense, under the facts of this case, there still would be no double jeopardy violation.

The facts show that SE worked for the defendant steadily from early 2010 until the end of August 2010. 18RP 10, 23-24. SE then stopped working as a prostitute for the defendant, left the State, and did not have any intent of working as a prostitute for the defendant again. 18RP 24, 79-82, 110-11. It was only some months later, in late November, that the defendant was able to convince SE to return to Washington wherein he helped SE engage in a single act of prostitution that occurred on December 3rd. 18RP 90-91, 93. This was the incident where SE and the defendant were arrested at the Hampton Inn.

Between August and December, there were no actions of the defendant that met the elements of the crime. The defendant did not

¹⁷ Elliott promoted one of the women for approximately one year, the other for approximately one month, and with each victim there were multiple acts that could support a charge of promoting prostitution.

receive any compensation from SE for acts of prostitution, he did not obtain customers for her, he did not post any ads on her behalf, and he did not provide her housing to engage in acts of prostitution. Both SE and the defendant believed that their working relationship was over, evidenced by the defendant's attempt to get her back. Thus, even if the crime is a continuing offense, in August of 2010, the offense came to an end. When SE went back to work for the defendant in December, this was a new, separate and chargeable offense.

b. Promoting Prostitution In The Second Degree

Count IV charged the defendant with second degree promoting prostitution of BK between January 1, 2010 and December 31, 2010. CP 246. Count V charged the defendant with second degree promoting prostitution of CW between May 10, 2010 and August 1, 2010. CP 246. The defendant contends that even though these offenses involved separate victims, he committed but a single "unit of prosecution" because the offenses overlapped in time and this was the legislative intent. He is incorrect. To support his argument, the defendant asserts that "[t]his issue is controlled by State v. Mason."¹⁸ Def. br. at 23. It is not. Mason has been effectively overruled.

¹⁸ 31 Wn. App. 680, 644 P.2d 710 (1982).

Mason was the proprietor of a steam bath, an illegal front for prostitution. She was convicted of promoting as prostitutes three of her employees. Mason argued that under a unit of prosecution theory, she could only be convicted of a single count. Thus, the court was tasked with determining the legislative intent, i.e., what unit of prosecution did the legislature create. Contrary to the defendant's claim here, the court in Mason did not find that the legislature intended that when a defendant promotes multiple victims as prostitutes, the person can only be convicted of a single count. Rather, the court ruled in favor of Mason based upon the rule of lenity and the court's belief that the statute was ambiguous. Mason, 31 Wn. App. at 686-87.

Six years later, in State v. Song,¹⁹ this Court ruled contrary to Mason. Song was convicted of one count of promoting prostitution and two counts of attempted promoting prostitution for acts involving three different persons. Relying on Mason, Song argued that he could be convicted of but a single count. This Court specifically stated that "we disagree with its [Mason's] rationale. The rule of lenity comes into play only where a statute is ambiguous. RCW 9A.88.080 is not ambiguous. There is simply no indication of legislative intent to impose only a single punishment." Song, at 328 (citation omitted). In upholding all three

¹⁹ 50 Wn. App. 325, 748 P.2d 273 (1988).

convictions, this Court stated that the legislature made “a person’s simultaneous promotion of prostitution on the part of more than one prostitute a criminal act as to each, liable to cumulative punishment.” Id.

Two years later, the Supreme Court decided State v. Elliott, supra. Elliott was convicted of two counts of promoting prostitution involving separate victims, for acts that occurred after Mason was decided but prior to the Song decision. Thus, Elliott argued that she should be sentenced in accord with the Mason decision. The Supreme Court disagreed, holding that “[t]he State properly charged petitioner with two counts of promoting prostitution in the second degree in the language of the statute RCW 9A.88.080(1)(a) and (b).” Elliott, 114 Wn.2d at 19.

The legislature is presumed to be familiar with prior judicial construction of its statutes. State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000). The failure of the legislature to amend a statute to change the statute’s judicial construction is reflective of legislative acquiescence in the court’s interpretation. State v. Berlin, 133 Wn.2d 541, 558, 947 P.2d 700 (1997). This is particularly true where, like here, a considerable period of time has passed since the judicial construction of the statute²⁰ or

²⁰ See e.g., State v. Fenter, 89 Wn.2d 57, 569 P.2d 67 (1977) (relying on a period of five years to find legislative acquiescence). Here, over 25 years have passed since the Song decision.

where the legislature has amended the statute since the judicial construction but has taken no action in response to the judicial decision.²¹

Reviewing courts “do not lightly set aside precedent.” Kier, at 804. The burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful. Id. No attempt has been made to meet that burden here.²²

c. Theft In The First Degree

Count VII charged the defendant with first degree theft during the period between January 1, 2009 and August 31, 2009. CP 247. Count VIII charged the defendant with first degree theft during the period between September 1, 2009 and December 1, 2010. Id. The victim on each count was the Social Security Administration (SSA). Id. Due to a legislative amendment to the theft statute, the elements of the crime of first degree theft after July of 2009 were different than the element of the

²¹ See e.g., Kier, 164 Wn.2d at 804 (legislature’s amendment of the assault statute after a prior judicial interpretation of the statute, without a change in response to the court’s prior interpretation, indicative of legislative acquiescence). Both the first and second degree promoting prostitution statutes have both been amended since the Song and Elliott decisions, without a response to those decisions. See 2012 c 141 § 1, eff. June 7, 2012; 2007 c 368 § 13, eff. July 22, 2007; 1975 1st ex.s. c 260 § 9A.88.070; and 2011 c 336 § 413, eff. July 22, 2011; 1975 1st ex.s. c 260 § 9A.88.080.

²² In addition, a contrary interpretation would lead to an unlike and absurd result. Constructions which lead to unlikely or absurd results are to be avoided. State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994). Under the defendant’s interpretation of the statute, whether a defendant was prostituting a single girl, two girls, or one hundred girls, is of no moment in terms of his punishment. But the societal harm, and the harm to the girls, is clearly greater where more young girls are coerced into a life of prostitution. It would be a strange, unlikely and absurd result to believe the legislature did not intend for greater punishment when the harm invoked increases substantially.

crime up until July 26, 2009.²³ The defendant contends that even though the elements of the first degree theft statute changed in July of 2009, the State was required to aggregate acts of theft that occurred prior to the statutory change, with acts of theft that occurred after the statutory change, and that when the acts of theft are aggregated, the defendant committed but a single “unit of prosecution.” He is incorrect. First, a unit of prosecution analysis is inapplicable to the situation that exists here, where the elements of the two convictions are different. Second, the defendant’s unit of prosecution theory would violate due process. And third, even if the statute had not been amended, the defendant’s claim that he committed but a single act or unit of prosecution fails because he unlawfully obtained government funds each month by failing to report the proceeds he obtained each month from his prostitution enterprise.

There are two distinct tests for double jeopardy, the same evidence or Blockburger test and the unit of prosecution test. Each applies to a different situation. The same evidence or Blockburger test, discussed supra, is the test used to determine statutory intent when an act violates

²³ Prior to July 26, 2009, third degree theft applied to the theft of property up to \$250 in value, second degree theft applied to property over \$250 and up to \$1,500 in value, and first degree theft applied to property over \$1,500 in value. Post July 26, 2009, third degree theft applies to the theft of property up to \$750 in value, second degree theft applies to property over \$750 and up to \$5,000 in value, and first degree theft applies to property over \$5,000 in value. RCW 9A.56.030; 2009 c 431 § 7; RCW 9A.56.040; 2009 c 431 § 8; RCW 9A.56.050; 2009 c 431 § 9.

“two distinct statutory provisions.” Adel, 136 Wn.2d at 633. The test asks whether the offenses are the same “in law” and the same “in fact.” Two convictions under the same statute will always be the same “in law” because the two counts will contain identical elements. Id. At the same time, the two convictions will never be the same in fact because the acts supporting each count would be distinct in time, with one act always preceding the other. Id. Thus, when a defendant is convicted for violating a single statute multiple times, the same evidence test will never be satisfied and it should not be used. Id. Rather, the proper inquiry in a situation where a defendant is convicted of violating one statute multiple times is what “unit of prosecution” has the legislature intended as the punishable act under the specific criminal statute. Id. at 634. Thus, double jeopardy protects a defendant from being convicted twice under the same statute for committing just one legislatively defined unit of the crime. Id.

Here, the defendant attempts to apply a unit of prosecution analysis to a situation it does not apply. The defendant was not convicted twice for violating the same statutory provision. The elements of the crimes charged in counts VII and VIII are different. In count VII, the State was required to prove that the defendant committed theft of property with a value exceeding \$1,500; while in count VIII, the State was required to

prove that the defendant committed theft of property with a value exceeding \$5,000.

Additionally, under the defendant's unit of prosecution theory, acts committed prior to the effective date of the amended theft statute can form the basis for a conviction under the amended statute. This would violate due process. See State v. Aho, 137 Wn.2d 736, 742-44, 975 P.2d 512 (1999) (child molestation conviction cannot be upheld where the jury may have found Aho guilty based upon acts that occurred before the effective date of the statute). The reverse is also true. Acts that occur at a time when a statute no longer exists cannot form the basis for a charge under the old version of the statute. Id.

Finally, the defendant was properly charged. As charged here, "theft" means "to wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof." RCW 9A.56.020(1)(a). This Court has previously ruled that the unit of prosecution for theft is "each unauthorized withdrawal" or "discrete" taking. See State v. Kinneman, 120 Wn. App. 327, 338, 84 P.3d 882 (2003), rev. denied, 152 Wn.2d 1022 (2004).

Kinneman, a lawyer, made 67 withdrawals from his IOLTA account and diverted the proceeds to his own use. He was charged and convicted of 28 counts of first degree theft and 39 counts of second degree

theft. This court held that “[t]he State had the discretionary authority to charge Kinneman with a separate count of theft for each discrete, unauthorized withdrawal he made from his IOLTA account.” Kinneman, 120 Wn. App. at 338.

Separate and apart from a unit of prosecution analysis, by common law and statute, the State *may* aggregate values from a series of thefts if they are part of a common scheme or plan and charge a single count rather than a series of counts. State v. Barton, 28 Wn. App. 690, 694-95, 626 P.2d 509, rev. denied, 95 Wn.2d 1027 (1981); RCW 9A.56.010(12)(c). Thus, the State has broad discretion in deciding the number of counts to charge. State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990).

Here, each month the defendant received money from the SSA through the Supplemental Security Income Program, a program that provides monthly cash benefits for the destitute and disabled. 26RP 80-81. To be eligible, the person must file an application and be approved. 26RP 86. Whether a person qualifies is based mostly on self-reporting. 26RP 87. Once approved, a recipient is required to report any outside income or money received within ten days after the end of the month it is received so that the amount of money the person is to receive can be properly determined. 26RP 92, 102. Thus, each month that the defendant received money from his prostitution operation, he was required

to report it, but he did not. 27RP 40. This affected how much of a benefit he was entitled or if he was entitled to any benefit at all. Thus, each month that the defendant obtained a distinct sum of government money based upon his failure to report his income from his prostitution enterprise was a distinct act of theft and could be individually charged. At the same time, the State had the discretion to aggregate these sums as it did here, charging one count under the old version of the first degree theft statute and one count under the current version of the first degree theft statute. In short, the defendant was properly charged and no double jeopardy violation exists.

3. THE DEFENDANT'S SEVERANCE ARGUMENT IS WITHOUT MERIT AND HAS BEEN WAIVED

The defendant contends that the trial court abused its discretion in refusing to grant his motion to sever counts VII, VIII and IX; three counts of first degree theft for fraudulently obtaining benefits from the Department of Social and Health Services and the Social Security Administration. However, in violation of the court rule and case law, the defendant did not renew his motion to sever before or at the close of all the evidence, and therefore, this issue has been waived. In any event, the defendant fails to show that the trial court abused its discretion.

Criminal Rule 4.4 governs the timeliness of motions to sever offenses and waiver. Generally a motion to sever offenses is made as a pretrial motion at the commencement of trial. CrR 4.4(a)(1). If the pretrial motion to sever offenses is denied, the party may renew the motion “on the same ground before or at the close of all the evidence.” CrR 4.4(a)(2). Per the express language of the rule, and the applicable case law, “[s]everance is waived by failure to renew the motion.” CrR 4.4(a)(2); State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329 (1987) (failure to renew his motion to sever his bail jumping count from his rape and indecent liberties counts constitutes waiver on appeal); State v. Ben-Neth, 34 Wn. App. 600, 606, 663 P.2d 156 (1983) (failure to renew his severance motion in regards to six counts unlawful issuance of checks constitutes waiver); State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998) (waiver found where defendant failed to renew his motion to sever his bail jumping offense from his robbery offense), rev. denied, 137 Wn.2d 1017 (1999).

Here, prior to trial, the defendant moved to sever counts VII, VIII and IX, his three counts of theft, from the remaining counts. 8RP 9-26. The trial court denied the defendant’s pretrial motion to sever. 8RP 27-30. The defendant did not renew his severance motion at trial and therefore the issue has been waived. In any event, the motion is without merit.

Separate trials are not favored in Washington. State v. Herd, 14 Wn. App. 959, 963 n.2, 546 P.2d 1222 (1976), rev. denied, 88 Wn.2d 1005 (1977). Thus, a defendant seeking severance of an offense carries the heavy burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy. State v. Grisby, 97 Wn.2d 493, 506, 647 P.2d 6 (1982). It is not enough to simply allege prejudice; the burden is on the moving party to present sufficient facts to warrant the exercise of discretion in his or her favor. State v. Melton, 63 Wn. App. 63, 68, 817 P.2d 413 (1991), rev. denied, 118 Wn.2d 1016 (1992).

Factors the court considers in deciding whether severance of offenses is appropriate are (1) the strength of the State's evidence on each count, (2) the clarity of the defense as to each count, (3) whether the court properly instructs the jury to separately consider the evidence on each count, and (4) the admissibility of the evidence of the other crimes, even if the counts had been tried separately or never charged or joined (commonly referred to as the cross-admissibility of the evidence). State v. Kinsey, 7 Wn. App. 773, 776, 502 P.2d 470 (1972), rev. denied, 82 Wn.2d 1002 (1973). The absence of one particular factor does not mean that offenses must be severed. For example, "even if evidence of separate counts would not be cross-admissible, severance is not necessarily required." State v.

Sanders, 66 Wn. App. 878, 885, 833 P.2d 452 (1992), rev. denied, 120 Wn.2d 1027 (1993).

Generally, a defendant can be prejudiced by joinder of offenses in one of three ways: (1) the defendant may be embarrassed or confounded in presenting separate defenses, (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

A severance decision is left to the sound discretion of the trial court. Bythrow, 114 Wn.2d at 717, 790 P.2d 154 (1990). Thus, to prevail on appeal, a defendant must prove that “no reasonable person would have decided the issue as the trial court did.” State v. Russell, 125 Wn.2d 24, 78, 882 P.2d 747 (1994).

Here, there was no alibi defense, mental defense, or “some other guy did it” defense. Rather, the defense to all counts was general denial. The trial court instructed the jurors that a separate crime was charged in each count and that each of them must decide each count separately. CP 264. “Your verdict on one count,” the court instructed “should not control your verdict on any other count.” CP 264. Further, the evidence

on the prostitution related charges was equally as strong as the evidence on the theft related charges – in each case the State presented a number of witnesses with direct evidence of the defendant’s guilt, as well as financial documents that supported the witnesses’ testimony. Importantly as well, the evidence of the prostitution enterprise run by the defendant was highly relevant admissible evidence necessary to show that he was defrauding the government in obtaining social security benefits.

The three girls testified that they worked directly for the defendant and that the entirety of all the money they earned each month was given directly to the defendant. They testified that the defendant possessed a Mercedes Benz and that he took as his own BK’s Toyota Avalon. 16RP 159-60. In addition, there was testimony that the defendant possessed two storage units, one full of women’s clothing and lingerie he provided to the girls who worked for him. 16RP 138; 17RP 46; 18RP 130. Inside one of the storage units was a safe with \$18,300 in cash and a ledger that started at \$40,000. 21RP 127-28.

The defendant seems to acknowledge that the evidence of the defendant’s prostitution enterprise was relevant and admissible evidence in proving the theft charges. Def. br. at 36. However, he asserts that the evidence was not “necessary,” that the State could prove the case against the defendant using other evidence. Specifically, he asserts that the State

only needed to provide the defendant's telephone records to show he was not disabled, and his bank account records to show he had additional income. Id. The defendant's argument fails to two reasons. First, the defendant cites no case law that supports an argument that as part of the test for severance a trial court must prohibit the State from admitting highly relevant evidence simply because a defendant claims the State could prove its case with other evidence – presumably evidence chosen by the defendant. Second, simply showing that the defendant had deposits into his bank account, or that he exchanged bills for different denominations, does not show he defrauded the government. It does not show the ownership of the money, the source of the money, nor the actual time of when the money was received (as opposed to when it was deposited). In short, the defendant cannot prove that no reasonable judge would have ruled as the trial court did here in denying his motion to sever counts.

In any event, the defendant cannot prove prejudice. In order to support a finding that the trial court abused its discretion in denying severance, the defendant must be able to point to specific prejudice.

Bythrow, 114 Wn.2d at 720 (citing Grisby, 97 Wn.2d at 507).

A defendant seeking severance “must not only establish that prejudicial effects of joinder have been produced, but they must also demonstrate that

a joint trial would be so prejudicial as to outweigh concern for judicial economy.” State v. Kalakosky, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993). He must prove that if he were tried separately, there was a reasonable probability he would have been acquitted. In re Davis, 152 Wn.2d 647, 711, 101 P.3d 1 (2004); State v. Watkins, 53 Wn. App. 264, 273, 766 P.2d 484 (1989). The defendant cannot meet that burden here.

4. POLICE PROPERLY OBTAINED ROOM RENTAL INFORMATION FROM THE SUTTON SUITES MOTEL

The defendant contends that the warrantless obtaining of guest rental information from the management of the Sutton Suites Motel, done after the two girls inside the room were arrested for prostitution, was unlawful.²⁴ The defendant is incorrect. The facts of this case fit squarely within the exception to the warrant requirement as articulated in In re Nichols, 171 Wn.2d 370, 256 P.3d 1131 (2011). The defendant has not shown that Nichols is incorrect and harmful, the standard that must be met to overrule precedent. And in any event, any error was clearly harmless.

²⁴ The defendant asserts that the police searched the motel registry. Def. br. at 42-43. It is not clear from the record that the police actually viewed the registry. What is clear is that the police received information, either from the registry directly or from motel management, that the defendant rented the room. The difference is of no moment. Consent to a search establishes the validity of that search only if the person giving consent has the authority to so consent. State v. Mathe, 102 Wn.2d 537, 540-41, 688 P.2d 859 (1984) (finding a landlord did not have authority to consent to the search of his tenant’s residence). The State will assume for purposes of argument that the motel management did not have authority to consent to release room rental information.

Prior to trial the defendant moved to suppress the fact that the police, without a search warrant, obtained information from the management of the Sutton Suites Motel that he had rented the room in which SE and BK had just been arrested for prostitution activities. The defense put on no evidence to support his motion, and there were no disputed facts. As a factual basis for the motion, the trial court relied on the police reports and affidavit for a search warrant that were attached to the State's briefs. See 8RP 59; CP 124-39.

The trial court denied the defense motion. In short, the trial court found that after the officers had lawfully entered the motel room and discovered that there were two females, one a minor, engaging in acts of prostitution and promoting prostitution in the room; that the case fell directly within the scope of Nichols. The court ruled that the officers had individualized suspicion prostitution activities or promoting prostitution activities were occurring in the room and thus the police could lawfully obtain information from the motel management without a warrant. CP 148-51; 8RP 79-87.

In State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007), the Supreme Court ruled that the police practice of routinely perusing motel registries without a warrant, in the hopes of finding evidence of criminals with warrants, was a "fishing expedition" and was unlawful. In Jorden,

the Pierce County Sheriff's Department engaged in a practice of having officers review motel guest registries on a random basis. The officers would then conduct random criminal checks on the names found in the registries. The program was designed to curtail criminal activity in high crime areas. In ruling the program was illegal, the Court first held that individuals possess a limited right to privacy in motel registrations under article I, section 7 of the Washington State Constitution. Id.²⁵ Second, the Court held that because the searches were completely random, with no individualized suspicion of criminal activity, the random searches violated the limited right to privacy that guests have in a motel registry.

In Nichols, the Court reiterated that motel registries are protected as a private affair to only a "limited extent." Nichols, 171 Wn.2d at 377. The Court held that if the police possess individualized suspicion that criminal activity has taken place in a motel room, the police may examine the motel registry without a warrant to determine who the registered guest is. Id. at 376-78.²⁶ This, the Court said, was consistent with prior rulings

²⁵ This was a contested issue in Nichols because there is no such recognized right under the Fourth Amendment. See United States v. Cormier, 220 F.3d 1103, 1108 (9th Cir. 2000), cert. denied, 531 U.S. 1174 (2001).

²⁶ In Nichols, a CI sought to purchase drugs from a person named Ativalu. Ativalu said he was out of drugs and needed to resupply. The two then drove to a motel whereupon Ativalu went inside a particular room and emerged with cocaine. The CI then informed the police of his observations. The police then went to the front desk and found out that Nichols was the registered guest. The police then ran a criminal records check, found that Nichols' license was suspended, and shortly thereafter, when Nichols was seen

of the Court wherein the Court required individualized suspicion before roadside sobriety checkpoints or school district drug testing programs would be deemed lawful. Id. at 377 (citing Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988) and York v. Wahkiakum School District No. 200, 163 Wn.2d 297, 178 P.3d 995 (2008)).

The defendant does not dispute the court's finding of facts, and those facts fit squarely within the scope of Nichols. Instead, the defendant asks this court to apply Jorden, instead of Nichols, but he fails to show that the ruling in Nichols is "incorrect and harmful," the requirement before precedent can be overturned. In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). In any event, any error in the trial court's ruling was clearly harmless.

The admission of evidence at trial, obtained pursuant to an invalid search, is an error of constitutional magnitude and therefore it is presumed prejudicial. State v. McReynolds, 117 Wn. App. 309, 326, 71 P.3d 663 (2003). Still, reversal is not required if the error is found to be harmless beyond a reasonable doubt. Id. An error is harmless beyond a reasonable doubt if untainted evidence admitted at trial shows that any

driving in his car, he was pulled over and drugs were discovered in his vehicle. The Supreme Court ruled that because the police had individualized suspicion that drug activity had taken place in the motel room, the warrantless examination of the motel registry was lawful. Id.

reasonable jury would have reached the same result without the error.

State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Here, along with the plethora of evidence supporting the charges against the defendant as outlined in the facts section above, there was also a plethora of evidence about this specific fact objected to here, that the defendant rented the room in which SE and BK were arrested.

BK testified she met the defendant in the motel room with SE.

16RP 113. He came into the motel room and explained that she would be engaged in prostitution and that all the money would go to him.

16RP 114. Except when the girls would walk the strip at the defendant's bidding, or he would pick them up at the motel room for outcalls, all the prostitution activity happened out of the room. 16RP 125-27; 17RP 36-37. When SE and BK were arrested in the room, evidence showed many of the items, including a computer, belonged to the defendant. 16RP 145, 152, 154. Further, BK specifically testified that the defendant paid for the room. 17RP 19. SE also specifically testified that it was the defendant who would rent the rooms she worked out of.

18RP 27. This included the room she was staying in with BK when the police arrested the two girls. 18RP 32-33. Thus, not only was the overall evidence of guilt overwhelming, but there was substantial evidence outside of the motel registry that the defendant rented the room and was in

control of what went on in the room. Thus, any error in the trial court's ruling was harmless.

5. OUT-OF-COURT STATEMENTS OF SE, CW AND BK WERE PROPERLY ADMITTED AS COCONSPIRATOR STATEMENTS

Some of the out-of-court statements of SE, CW and BK were admitted at trial pursuant to ER 801(d)(2)(v), the evidence rule making statements by a coconspirator during the course and in furtherance of the conspiracy non-hearsay and admissible. The defendant claims that the trial court ruled incorrectly because, he asserts, "victims" cannot be coconspirators and if a person cannot be convicted of the crimes for which the defendant was convicted, they cannot be coconspirators. The defendant's argument is without merit. The defendant reads into the rule prerequisites to admissibility that do not exist. The trial court properly understood the law and applied the rule to the facts.

Prior to trial, the State sought a ruling under ER 801(d)(2)(v) regarding the admissibility of some of the out-of-court statements of SE, CW and BK. 7RP 45-48; 8RP 94-97. As a factual basis for the motion, the State relied on the facts as contained in the State's trial memorandum and other briefs. 8RP 94; CP 40-97, 124-39; CP ____, sub # 124. The State indicated that under the rule the court needed to find that (1) a conspiracy existed, (2) that SE, CW, BK and the defendant were all part of the

conspiracy, and (3) that SE, CW and BK's statements were made in furtherance of the conspiracy. 8RP 94-97. The parties were in agreement that prior to admitting coconspirator statements, a trial court must find *prima facie* evidence that a conspiracy existed without the court using the statements sought to be admitted as proof of the conspiracy. 8RP 100-01; State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984) overruled on other grounds, State v. Harris, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986).

The court found that the girls' statements were admissible. Specifically, the court found that (1) a conspiracy did exist to engage in a criminal prostitution enterprise, (2) that proof of the existence of the conspiracy was proven by use of the defendant's own statements and thus the existence of the conspiracy was proven by independent evidence, (3) that SE, CW and BK were part of the conspiracy, and (4) that their statements regarding attempts to recruit other young girls, to post ads, and to keep the defendant informed of the money transactions and their prostitution activities, were all made in furtherance of the conspiracy. 8RP 103-06.

The decision to admit evidence lies within the sound discretion of the trial court. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). To prevail on appeal, a defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). The admission of evidence

will be upheld if it is admissible for any proper purpose, even if the basis relied upon by the trial court was improper. State v. Mutchler, 53 Wn. App. 899, 901, 771 P.2d 1168, rev. denied, 113 Wn.2d 1002 (1989).

In addition, a party may only assign error in the appellate court on the specific ground of the evidence objection made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985). An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review. Id. An objection must be sufficiently specific to inform the trial court and opposing counsel of the basis for the objection and to thereby give them an opportunity to correct the alleged error, otherwise the issue has waived. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

Here, because the defendant did not raise the specific objections at trial that he raises on appeal, this issue has been waived. In any event, the trial court was correct in its ruling.

Evidence rule 801 defines certain statements as “not hearsay.” As pertinent here, the rule provides that, “[a] statement is not hearsay if ... [t]he statement is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.” ER 801(d)(2)(v). This coconspirator hearsay exception is a “firmly rooted” exception that is considered exceedingly reliable because

the statements themselves are made by members of the conspiracy, in furtherance of the criminal activity, with the intent that the conspiracy not be discovered. State v. St. Pierre, 111 Wn.2d 105, 118-19, 759 P.2d 383 (1988) (citing Bourjaily v. United States, 483 U.S. 171, 183, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)); accord, State v. Israel, 113 Wn. App. 243, 54 P.3d 1218, rev. denied, 149 Wn.2d 1015 (2002).

The basic requirements of the rule are plain and simple. The rule does not contain the prerequisites to admissibility posited by the defendant. Arguments that conspiracy needs to be charged, that the conspiracy found needs to meet the elements of the criminal conspiracy statute²⁷ or that the conspiracy must be directly related to the crime for which the defendant has been convicted, have all been rejected.

In State v. Halley, the court stated “[w]e hold that, to admit a statement under ER 801, the State need establish no more than the basic dictionary definition of a conspiracy, ‘an agreement ... made by two or more persons confederating to do an unlawful act,’ Webster’s Third New International Dictionary 485 (1969), regardless of the crime charged.” 77 Wn. App. 149, 153-54, 890 P.2d 511 (1995).²⁸ In rejecting the argument

²⁷ RCW 9A.28.040(1).

²⁸ See also State v. Barnes, 85 Wn. App. 638, 664, 932 P.2d 669, rev. denied, 133 Wn.2d 1021 (1997) (A “concert of action, all the parties working together understandingly with a single design for the accomplishment of a common purpose” is sufficient to show a conspiracy) (citing State v. Casarez-Gastelum, 48 Wn. App. 112, 738 P.2d 303 (1987)).

that conspiracy needs to be charged before the rule to apply, the Supreme Court held that “[b]y its terms, ER 801(d)(2)(v) does not restrict its application only to criminal cases in which conspiracy has been charged.” Dictado, 120 Wn.2d at 282-83. And in State v. Sanchez-Guillen, the court held that “[t]he conspiracy supporting the court’s ruling on the evidence need not be integral to the crime charged.”²⁹ 135 Wn. App. 636, 642-43, 145 P.3d 406 (2006).

Finally, the defendant cites to Gebardi v. United States,³⁰ and asserts that SE, CW and BK cannot be coconspirators because they are victims who could not have been convicted of the crimes for which the defendant was convicted. First, the fact that society may consider SE, CW and BK victims of the defendant does not change the fact that they were involved in a conspiracy with the defendant. Second, the plain language of the rule does not include a prohibition to admissibility of statements by a coconspirator who may also be deemed a victim. And third, Gebardi does not stand for the proposition the defendant asserts.

²⁹ By way of example, while Sanchez-Guillen was charged with murder, the conspiracy supporting the admission of the coconspirator’s out-of-court statements had to do with his subsequent attempt to avoid arrest. After the murder and prior to his arrest, Sanchez-Guillen and his mother approached a third person and sought this person’s assistance in secreting Sanchez-Guillen into Mexico. The statements of Sanchez-Guillen’s mother to this third person were properly admitted as coconspirator statements, the conspiracy being the group’s attempt to render criminal assistance, not a conspiracy to commit murder. Sanchez-Guillen, 135 Wn. App. at 642-43.

³⁰ 287 U.S. 112, 53 S. Ct. 35, 77 L. Ed 206 (1932).

In Gebardi, a man and a woman were convicted of conspiracy to violate the Mann Act, an act that made it illegal to transport a woman across state lines for the purposes of prostitution. In Gebardi, the woman charged with conspiracy was the actual prostitute who agreed to be taken across state lines for the purposes of engaging in prostitution. The Court noted that in enacting the Mann Act, Congress did not make it a crime for a woman to simply agree to be taken across state lines for the purpose of prostitution. As the Court put it, Congress chose not “to condemn the woman’s participation in those transportations which are effected with her mere consent.” Gebardi, 287 U.S. at 123. In holding that a woman could not be convicted for conspiracy to commit a violation of the Mann Act under the same circumstances, the Court reasoned that the conspiracy statute and the Mann Act had to be construed together, and that the policy reasons that prohibited the woman from being convicted under the Mann Act also prohibited the woman from being convicted of conspiracy to violate the Mann Act. Id.

The Gebardi case had nothing to do with coconspirator statements or evidence rules. The case stands for nothing more than that Congress chose not to hold criminally liable under the Mann Act and conspiracy to violate the Mann Act, women who voluntarily allow themselves to be transported across state lines to engage in acts of prostitution.

Here, the defendant's legal arguments are not supported by the law and have been rejected by the appellate courts. The trial court understood the rule and applied it correctly. The defendant cannot show that no reasonable judge would have ruled as the court did here.

In any event, any error was harmless. Any error in admitting evidence is harmless unless the court finds that "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). While the defendant does not discuss the specific coconspirator statements that he feels were improperly admitted, what is clear is that SE, BK and CW each testified extensively about the actions they took at the direction of the defendant. This is not hearsay. Further, substantial evidence was admitted substantiating their testimony, including statements and text messages of the defendant. Whatever prejudice can be ascribed to the out-of-court statements admitted solely under the coconspirator rule, it was harmless considering the plethora of evidence against the defendant.

6. THE DEFENDANT DOES NOT NEED TO BE RESENTENCED

The defendant contends that in regards to his convictions of promoting commercial sex abuse of a minor, counts I and II, the trial court incorrectly applied a punishment statute that did not exist at the time he committed his crimes and thus he must be resentenced. For the following reason, he does not need to be resentenced.

The seriousness level and corresponding standard range for promoting commercial sex abuse of a minor increased on June 10, 2010. See RCW 9.68A.101, Laws of 2010, ch. 289, § 14. The serious level went from a level VIII offense to a level XII offense. Id.

In count I, the charging period was for acts committed between January 1, 2010 and August 31, 2010. CP 244-48. In count II, the charging period was for acts committed between September 1, 2010 and December 31, 2010. Id.

“When the sentence for a crime is increased during the period within which the crime was allegedly committed, and the evidence presented at trial indicates the crime was committed before the increase went into effect, the lesser sentence must be imposed.” In re Hartzell, 108 Wn. App. 934, 945, 33 P.3d 1096 (2001) (citing State v. Parker, 132 Wn.2d 182, 191-92, 937 P.2d 575 (1997)).

Here, during the charging period on count I, the seriousness level increased. However, the seriousness level did not increase during the charging period on count II. Assuming, *arguendo*, that Hartzell and Parker apply here where under count I there was equal evidence that the defendant committed acts of promoting SE prior to and after June 10, 2010, sentencing is still not required.

The defendant's offender score on counts I and II was 21.5.³¹ The court imposed an exceptional sentence on each count to be served concurrently, 240 months based on (1) the jury's finding on count I that there was an ongoing pattern of sexual abuse of a minor, and (2) the court's finding on counts I and II that the defendant's high offender score and multiple current convictions resulted in some of his current offenses going unpunished. 30RP 21-24. The court found both were substantial and compelling reasons justifying the exceptional sentence. 30RP 24. Thus, the defendant's exceptional sentence was unaffected by the allegedly incorrect use of a higher seriousness level on count I. See State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) (when an incorrect offender score was used to calculate the standard range, resentencing is not required where the record shows the sentencing court would have

³¹ With a correct seriousness level listed on count II, the defendant's offender score would have to drop from 21.5 to less than 9 before his standard range for the offense would change.

imposed the same sentence); State v. Hooper, 100 Wn. App. 179, 188, 997 P.2d 936 (2000) (when a sentencing court bases an exceptional sentence on an invalid factor, remand is not required where the record indicates that the court would have imposed the same sentence absent the factor) (citing Parker, 132 Wn.2d at 189).


D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's convictions and sentence.

DATED this 30 day of December, 2014.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Sarah Hrobsky at Washington Appellate Project, containing a copy of the Brief of Respondent, in STATE V. BARBEE, Cause No. 71164-4-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.

W Brame

Name

Done in Seattle, Washington

12/31/19

Date