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No. 64861-6

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

**DESHAWN CLARK,**

Appellant.

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

The Honorable Douglass North

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REPLY BRIEF

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## A. REPLY ARGUMENT

### 1. THE PROSECUTOR'S BATSON CHALLENGES WERE NOT SHOWN TO BE NON-DISCRIMINATORY.

Respondent State of Washington contends that the trial court did not abuse its discretion in ultimately holding that the State's peremptory dismissals of Jurors 17 and 54 had withstood the defendant's Batson motions. BOR at 14-16.

For the most part, the Respondent's arguments on appeal merely re-utter the very same mischaracterizations of the peremptorily challenged jurors' *voir dire* statements as were advanced below by the trial prosecutor, which the appellant believes he has already shown to be objectively contrary to the facts and statements actually elicited from these jurors in *voir dire*. AOB at 12-19. The latter circumstance defeats a trial prosecutor's claim that reasons given for peremptory excusal of a juror were race-neutral. See McClain v. Prunty, 217 F.3d 1209, 1220 (9<sup>th</sup> Cir. 2000).

**Juror 17.** According to the prosecution at trial, Juror 17 was excused by peremptory challenge because he had said in *voir dire* that his sister would be at fault for provoking any assault on her by her boyfriend. 4RP 714. The State also said that this juror's sister was in a street gang, and had "flashed [gang hand] signs." 4RP

715.

If the first characterization were correct, this would have been a race-neutral – indeed a strong reason -- for excusal in a case involving abuse of women, and if the second characterization were correct and complete, it would similarly have been a race-neutral reason. But the State cannot make up things that the juror is claimed to have said, or mischaracterize things said by the juror that were in fact demonstrative of a *favorable* stance toward the prosecution in the criminal case, and by such means avoid a successful Batson challenge.

First, as to the question of this juror blaming his sister if her male boyfriend treated her violently in a fight, the Respondent on appeal offers the following claim: that Juror 17 “placed blame on his own sister for being the victim of felony assaults by her boyfriend.” BOR at 15-16. This is simply false, and repeating it again and again does not make it true. This same claim was offered as a race-neutral reason for the excusal below. The State ignores the fact that the trial prosecutor’s characterizations of Juror 17’s statements were simply contrary to the record, and then argues that since “opinions may differ” as to whether someone will be a good juror, the Batson claim below necessarily had to fail. BOR at 15-16.

But a trial prosecutor's objective mischaracterization of a juror's statements in *voir dire* for purpose of a peremptory challenge cannot be saved or erased by the remark that "opinions may differ." The trial prosecutor in this case mischaracterized juror 17's statements in *voir dire*, and also failed to excuse jurors (in particular here, Juror 4, as to which the Respondent offers no counter-argument) who said remarkably the same things that Juror 17 actually did say in jury selection.

If Juror 17 did not even say the things the prosecutor claims he said in *voir dire*, the claim fails to be race-neutral because it is not correct. And if the juror's *actual* statements were essentially the same as uttered by a non-black juror (for example, here, 4), who was not peremptorily struck, the prosecutor's claimed race-neutral reason must doubly fail.

Juror 17 in fact stated during *voir dire* that provocation by a female victim does not condone or justify violence against her. 4RP 718. This was the correct description of Juror 17's comments, when he said that provocation or invitation does not give a man "any right to do what he did." 3RP 511. Juror 17 in fact sensitively noted that when a couple has children, this can make the woman reluctant to report abuse because she may be afraid to leave. 3RP

496-97. Juror 4, who was not struck by the State, made similar statements. 3RP 496. The Respondent in its Brief completely fails to contest the fact or the import of this crucial circumstance – the failure of the State to strike a non-black juror (4) who said the same things as the black juror (17) who was struck.

Deshawn Clark's disagreement on appeal with the accuracy of the State's description of Juror 17's *voir dire* statements was, very remarkably, shared by the trial court itself. The court pointed out that Juror 17 had merely said that people can do things that provoke confrontations, but that he, Juror 17, did not excuse violent behavior toward a woman on this ground. 4RP 715.

When the trial court noted that this was what the juror really said, the prosecutor disagreed – erroneously -- with the court's recollection, then shifted tactics and claimed to rely instead for the excusal on the fact that this Juror's sister was in a gang. 4RP 715-16. But Juror 17 merely noted that he could tell his sister was in a gang by the way she behaved, and in fact he then remarked that it caused her to drop out of school. 4RP 613-14. His statements about gangs reflected an understanding of their negative effects, not any sympathy toward gang members or the defendant as a gang member.

To the extent that juror 17 made comparatively more extensive remarks about gang-related topics, this was of course because he was questioned extensively about the topic by the trial prosecutor. Such questioning, focused on a black juror, may perhaps eventually elicit a statement from him providing race-neutral grounds for a proper peremptory challenge. But here, that effort was not successful, even assuming it is a tactic that can pass without rebuke or without affect on the analysis. The State cannot successfully avoid a Batson challenge by relying on inaccurate assertions of what the juror in question said, including incorrect assertions that the juror made comments showing a pro-defendant stance.

The requirement of a “race neutral” reason for excusal does not mean that the State can spout mistruths about what the juror said in *voir dire*, and thereby succeed against a Batson motion simply because the fabricated reasons are race-neutral. Here, the State was not successful in eliciting, or locating, a race-neutral basis for excusal of Juror 17, who was indeed quite pro-victim, and who of course also stated that he could be impartial, and would not give more weight to either side. 4RP 719; 3RP 512.

Deshawn’s raising of the Batson matter below, and here on

appeal, must not be construed as an accusation of racial prejudice on the part of the State. Rather, Batson and its progeny simply recognize that the understandably zealous party plaintiff in a criminal case may have a purely strategic motive in excusing persons whose sympathy may be feared to align with the defendant's, in the interest of winning the case.

But this Court's solemn interest in preventing race-based excusal of jurors, and the Washington and federal case law providing the structure by which such excusals may be detected and contested, are far too sophisticated to allow chicanery of this sort to outwit the requirement of providing a race-neutral ground. The proffered ground must be race-neutral, but it must, in the first place, be based on some reasonably accurate semblance of truth as to what attitudes or characteristics the potential juror possessed or displayed. Here, the State's claimed neutral reasons for excusing Juror 17 by peremptory challenge were inaccurate, and contrary to the record of *voir dire*, and must fail.

**Juror 54.** The prosecutor at trial said Juror 54 "has friends and cousins that are in gangs" and stated the State struck him because it was "concerned about undue sympathy that this – this juror would have towards the defendant." 4RP 716.

But Juror 54 in fact remarked in *voir dire* on the negative effect of gangs and gang culture on mainstream society, disparaging people who wear gang-type clothing without understanding how others may perceive them. 4RP 616. Juror 54 stated he listened to rap music -- but he recognized that it “glorifies the more [sic] gang life and drug life things,” and as he had gotten older, he stopped being influenced by it. 4RP 611. Juror 54 also recognized that female victims of abuse might not only need physical protection, but also therapy, to help them not follow an ingrained pattern of staying with or returning to their abusers. 3RP 503.

The State’s proffered reasons for excusal of Juror 54 – awareness of gangs in his neighborhood that somehow amounted to prejudice in favor of gang members like Deshawn -- fly in the face of the record. May a prosecutor attempt to circumvent a Batson challenge by mischaracterizing what a juror said, and succeed simply because the trumped-up characterization is facially “race-neutral”? Federal and Washington case law, abundantly cited in the Appellant’s Opening Brief, indicates that a prosecutor absolutely may not do this.

Finally, the Respondent casually dismisses the trial court’s

expressed concern about the tactic of removing certain jurors on the proffered ground that they had knowledge of, or relatives in, gangs. BOR at 14. The Respondent describes the Court's concern as being merely one regarding the ultimate racial make-up of the selected petit jury – a “result” that the State correctly notes cannot in and of itself be complained of.

But this is not what the trial court said. Rather, the court's concern was that using the fact that jurors know of friends or family in gangs could be used in the present case as an effective pretext for excusing jurors based on race. 4RP 723. Deshawn Clark maintains in this Reply, as he did in his Opening Brief, that this was a case in which the prosecutor's tactics improperly overcame the trial court's deep, troubled, and repeatedly expressed concern that jurors were being excused on the basis of race.

By careful evaluation of the State's claims in the Batson hearing below, in an appeal which permits this Court to conduct a sober review of the entire matter unhindered by the constant pressure below to keep the case moving and a trial court's understandable reluctance to find that excusals were strategic based on race, the trial court's well-honed instinct that the excusals were indeed being perpetrated for such advantage can be shown to

be well-founded.

**2. THE MOTION TO DISMISS THE ENTIRE PANEL AFTER THE JURORS OBSERVED “GANG UNIT” POLICE OFFICERS SHOULD HAVE BEEN GRANTED WHERE THE RECORD SHOWS MANY MORE JURORS THAN THOSE SPECIFICALLY CHALLENGED ROSE THEIR HANDS WHEN ASKED IF THEIR ABILITY TO BE FAIR WAS NEGATIVELY AFFECTED, AND SUCH DISMISSAL OF THE ENTIRE PANEL IS AN *ADDITIONAL* REMEDY AVAILABLE EVEN WHERE SPECIFIC JURORS HAVE BEEN EXCUSED FOR CAUSE.**

There would be no reason for the existence of the doctrine allowing dismissal of an entire jury panel based on a prejudicial irregularity, if selective removal of particular jurors could always cure the matter. The State argues in response, *inter alia*, that the defendant’s specific challenges to certain jurors after the “gang unit officers” incident were granted, and that this therefore shows there was no basis to dismiss the panel.

However Mr. Clark’s argument was that dismissal was required even after dismissing specific jurors, under the doctrine of taint of the entire pool. If taint of the entire pool was a matter that could be cured by the questioning and removing of particular jurors, there would be no need for the doctrine of panel dismissal at all, but yet it exists. Dismissal of an entire panel following an irregularity is an *additional* remedy for the defense following a tainting incident, beyond the remedy of removal of specific jurors for cause. See

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000); State v. Brett, 126 Wn.2d 136, 158, 892 P.2d 29 (1995).

As noted in the Opening Brief, the question of dismissal of the panel has been decided using a mistrial “irregularity” analysis derived from CrR 6.4’s provisions regarding “material departures” from the *regularity* of jury selection, and also relying on cases involving jurors and their consideration of extrinsic evidence. See, e.g., Roberts, at 518; United States v. Tegzes, 715 F.2d 505, 509 (11th Cir.1983).

Some irregularities during selection are so prejudicial to choosing of a fair jury that excusal of individual jurors is inadequate and the entire panel must be dismissed. See CrR 6.4(a); United States v. Holman, 680 F.2d 1340, 1344 (11th Cir.1982); United States v. Corey, 625 F.2d 704, 707 (5th Cir.1980), cert. denied, 450 U.S. 925, 101 S.Ct. 1377, 67 L.Ed.2d 354 (1981). The touchstone of the analysis is prejudice.

This was a disturbing and frightening incident that was of such impact on the jury panel that the occurrence – itself not in any way “brief” -- ripened into an entire ongoing episode. More happened here than just the gang officers appearing at the courtroom. Members of the panel took it upon themselves to raise

the disturbing matter to the court and *sua sponte* express its impact on their ability to be fair. This was remarkable.

The violence-based reason for the appearance of the gang officers was drilled into the jurors' heads when the trial court unfortunately read the gang "aggravator" charge to the jury separately, right after the incident, having inadvertently neglected to read it previously along with all the substantive charges. 3RP 486-87. It then turned out that most every member of the jury venire, if not the entire pool then being questioned, had seen, and been deeply impacted by the Gang Unit officers' show of authority both outside and inside the courtroom, and the fact that they were plainly tracking African-American males just like the defendant Deshawn.

Indeed, this was more serious than an incident such as, for example, an attorney reporting that jurors saw a shackled defendant. Before bringing the matter to the court's attention the jurors had talked about the frightening matter amongst themselves, including making tainting remarks, as when Juror 69 noted he had told the other jurors that he "appreciated what [Gang Unit officers] did." 4RP 691.

If judged under the mistrial "irregularity" standard, this ongoing episode below carried multi-faceted prejudicial effect on

the jury panel's ability to sit fairly at that time, which is the question for analysis, and which is when the defendant timely raised the matter.

Importantly, much of the information about taint of the panel was elicited during the court's alternative procedure of questioning individual jurors rather than dismissing the panel. Defense counsel had expressed concerns that this alternative procedure of conducting questioning to see if any particular jurors were now unable to sit fairly would only cause additional, exacerbated taint of the panel. The court rejected that argument and Mr. Clark's repeated concerns and motion to strike the entire pool. 4RP 706-12.

Yet there can be no question that the panel was tainted, a prejudicial impact that is more than the sum of individual jurors who articulated prejudice. During the special *voir dire* questioning about the incident, when juror after juror after juror said they all saw the incident, the defense then asked, "Did everybody see that?" and the transcript reports the group's answer as follows:

THE JURORS: Yeah.

4RP 687. Counsel would also later point out that many jurors nodded their heads when asked if the incident would impact their

ability to sit fairly, but did not raise their juror cards. The State claims that defense counsel did not place this fact in the record. BOR at 25-26. Of course this is plainly wrong – counsel noted this important fact during his argument to the trial court on the motion. 4RP 686.

In sum, the dramatic impact of this episode could not be cured by individual removal of jurors. The force of the residual prejudice cannot be gainsaid in these circumstances where multiple jurors found the incident so disturbing that they brought it to the court's attention unprompted. Their revelations shows taint of the entire pool. Juror 18, who was literally "shaking," stated,

Yeah, they were all out there. All the jurors were out there.

4RP 629. Before juror 19 was excused, he confirmed Juror 18's statement that everyone in the pool had seen what happened, because they were all lined up "in a row" in the hallway as the incident unfolded before their eyes. 4RP 635.

Multiple separate prejudicial incidents continued forward, and made this a deeply concerning episode, far more so than, for example, the view of a defendant in shackles during *voir dire* where he was unshackled during the trial that followed. See State v. Early, 70 Wn. App. 452, 462, 853 P.2d 964 (1993). Although the

analysis is the taint of the potential pool at the time of the episode, it led to a totally improper theme throughout the entire trial, continued in what the appellant argues was closing argument misconduct, that too much tried the case based on drama in the courtroom caused by legitimate public presence, not calm rational analysis of past facts by the jury as shown or not shown by the trial evidence.

The taint of this incident infected the entire pool and went beyond a problem of individual juror's lack of impartiality that could be cured by striking individual jurors. Whether intimidated by the presence of gang members, or concerned for the danger of a fracas between law enforcement and the young men, or frightened by the paramilitary appearance of the gang officers, or just generally now more genuinely fearful of gangs - a sentiment expressed repeatedly -- this pool was tainted in its entirety, requiring dismissal of the venire.

The State notably fails in its Brief to rebut the appellant's comparison of the present case to Mach v. Stewart, 137 F.3d 630 (9th Cir.1998), where the defendant was charged with sexual conduct with a minor under age 14, and a prospective juror who was a social worker said during *voir dire* that she had never become aware of a case in which a child had lied about being

sexually assaulted. Mach, 137 F.3d at 631-32. The district court removed her for cause after questioning her before the entire jury pool. Mach, 137 F.3d at 632.

But the Ninth Circuit reversed the defendant's conviction, holding that the juror's comments were so prejudicial that they irreparably tainted the entire jury pool. Mach, 137 F.3d at 634 ("The error in this case, the jury's exposure during *voir dire* to an intrinsically prejudicial statement made four times by a children's social worker, occurred before the trial had begun and severely infected the process from the very beginning). The tainting remark in Mach pales in comparison to the taint caused by the lengthy episode below in the present case. A new trial is warranted.

**3. IF THIS COURT ACCEPTS THE STATE'S SUFFICIENCY ARGUMENT THAT TRAFFICKING OCCURRED WITHIN THE 2008 CHARGING PERIOD, THEN DOUBLE JEOPARDY WAS VIOLATED.**

Appellant Deshawn Clark has argued that if T.G. was "trafficked," this occurred when she was originally recruited into prostitution by Deshawn in 2007, a date well before the charging period. AOB at 32-38. Therefore the evidence of trafficking, charged as committed within the 2008 period, was insufficient.

The State's response (to Deshawn's argument of insufficiency of proof of trafficking in the 2008 period) is to contend

that the defendant was *constantly trafficking* T.G. during the entire 2008 charging period, every time he drove her to motels, arranged sex advertisements for her services, etc, and by every other act in which he effectively provided her for prostitution knowing that he would use force, fear of force, or trickery to compel her to engage and *continue* to engage in prostitutive labor. BOR at 31-32.

However, if this is the State's theory of evidentiary sufficiency of trafficking, then the two offenses of trafficking and promoting prostitution were *precisely* the same as charged and proved, and the twin convictions violate Double Jeopardy. Every act of promoting prostitution as charged and proved in this case also proved trafficking, and vice versa.

Of course, the Respondent argues that the set of statutory elements of the two crimes are each different. Yet the State barely acknowledges modern Double Jeopardy doctrine beyond citing this one test, which fails to accurately represent the complex legal doctrine as expounded in the federal courts or the Washington courts, or any of its nuance. Were the "elements" test this Court's entire doctrine of Double Jeopardy, the issue would fail on appeal. But it is not. The State has failed to deal with that aspect of this Court's case law which examines the question whether the

convictions are the “same” for Double Jeopardy purposes, based on how the crimes were *charged and proved* in the instant prosecution.

The Legislature, attempting to address the cause of the moment, has drafted a statute entitled Trafficking that is so broadly worded, that it potentially covers conduct identical to Promoting Prostitution. And specific to Deshawn’s prosecution, the charging of both crimes here renders the resulting convictions readily subject to Double Jeopardy problems, when Trafficking is paired with Promoting Prostitution of the same victim, in an ongoing factual pattern such as that in the present case. The existence of the Trafficking statute is no proof that the result of Double Punishment is legislatively authorized here – and certainly not given the fact that ambiguity as to legislative intent requires the offenses be punished as a single crime under one statute.

The fact that Trafficking carries more serious punishment than promoting prostitution may arguably show that promoting prostitution is the conviction that must be vacated *as Double Jeopardy remedy* – although appellant holds to his argument that Trafficking in this case was nothing more than proof of the defendant’s successful and completed attemptive steps to promote, or of his mental state during his promoting conduct -- but the

difference in punishment does not defeat the Double Jeopardy argument itself. Appellant does not believe that this Court is prepared to hold that simply “comparing punishment levels” is a tenable short-cut to analysis of a Double Jeopardy claim, as the State in this case wishes it to be.

The State’s attempt to avoid the unwanted result of its sufficiency response appears to be an argument T.G. was “re-recruited” in 2008 when T.G. came back from her temporary reprieve in Wisconsin. Although the argument is somewhat unclear, the Respondent must necessarily be contending that this incident constituted trafficking, but not promoting. This characterization of the facts cannot withstand scrutiny of the record.

T.G.’s 2008 return from Wisconsin and her subsequent continued work as Deshawn’s prostitute was not the result of any trafficking by some act of “re-recruitment” that did not also constitute promoting. Promoting is advancing prostitution by force or threat. Deshawn had been using force and threats of force *since the year 2007* to compel T.G. to engage in prostitution. Respondent appears to briefly contend that Deshawn used “fraud” and not force to obtain T.G.’s return from Wisconsin and continue prostituting, thus the return from Wisconsin was trafficking but was

not also promoting. But the State misreads the statute, which defines trafficking as obtaining a person knowing that fraud or coercion would be used to compel forced labor. Deshawn's use of trickery, if any, does not equal "fraud" that places the Wisconsin matter into the category of "trafficking" and yet not the category of promoting.

More importantly, whatever the reason that T.G. returned from Wisconsin -- whether because the defendant's violence had a continued hold on her, because she needed to return to her child, because his "sweet talk" compelled her to return, or because she had her own criminal court date -- the undisputed facts are that defendant immediately again used force to continue to make T.G. prostitute for him, which he had been doing ever since 2007, when he first hit her and then used the fear of more hitting to make her commence prostituting.

The fact that T.G. briefly eluded Deshawn's powerful hold over her by traveling to Wisconsin was factually no different than the times she disobeyed him by not wanting to do a certain act of prostitution and had to be convinced to continue, or slipping away to do drugs on her own, or trying to run and being forced into a car by the defendant. The victim's effort to avoid the defendant's grasp for

a period of time, whether for moments or weeks, does not render the subsequent next act of forced prostitution “trafficking” by re-recruitment that is in any way distinguishable from his ongoing promotion of T.G.’s prostitution, that began in 2007 and as to which the prosecutor chose to charge only a window that comprised a period of months within the multi-year span of promotion of prostitution.

Indeed, the State has effectively conceded the Double Jeopardy error. On the one hand the Respondent may be arguing for sufficiency purposes that that every time Deshawn promoted, he also trafficked. Thus the two crimes were the same for Double Jeopardy purposes, as charged and proved. On the other hand, the State may be contending that Deshawn trafficked (but did not promote) when he obtained T.G. for prostitution upon her return from Wisconsin in 2008.

Concededly, the State finds itself forced into making this latter argument, because the prosecutor below failed to modify the charging period when it was realized that the pre-trial theory of the case was formulated based on statements by T.G. claiming she entered Deshawn’s prostitution service only in 2008, which was later discovered to be false.

However, the argument fails. First, if the argument is that Deshawn trafficked T.G. after Wisconsin, in an act that was not also Promoting, the contention fails because it represents a miscomprehension of the Trafficking statute. In its response to the appellant's related specific/general argument (contending, *inter alia*, that violation of the promoting statute is also a violation of the trafficking statute), the State contends as follows below – but in making the quoted argument, the Respondent has, in one fell swoop, (a) demonstrated its miscomprehension of the two statutes; and (b) demonstrated its inaccurate understanding of the manner in which its own agent presented and argued the case at trial below:

It is possible to commit promoting prostitution without committing human trafficking . . . . For example, if evidence proved that a woman was working for a pimp voluntarily, but she refused to take a particular customer for some reason, and the pimp then threatened her in order to compel her to have sex with that customer, the pimp would be guilty of first-degree promoting prostitution. However, the pimp would not be guilty of human trafficking because there is no evidence of forced labor or involuntary servitude, because aside from the dispute over one customer, the woman is otherwise working for the pimp voluntarily.

BOR at 43. However, in the factual scenario posited by the State above, trafficking is indeed committed (assuming solely *arguendo* that the evidence of trafficking was sufficient). If a woman was

working for a pimp voluntarily, but she refused to take a particular customer for some reason, and the pimp then threatened her in order to compel her to have sex with that customer, the pimp has (1) “obtained” or “provided” the woman, with knowledge (and indeed intent) that his threat of violence will be used to compel the woman into forced labor – the doing of the specific prostitutive sexual act against her will. This is beyond cavil, and the State’s convoluted hypothetical therefore carries no value in the analysis. The State has been unable to come up with even a *hypothetical* factual scenario in which promoting a woman’s prostitution is not also trafficking of that same woman.

Of course, for Double Jeopardy purposes, even if the State could come up with such a hypothetical scenario, doing so would still fail completely to defeat the appellant’s demonstration that the two crimes of trafficking and promotion were the same as charged and proved in this case.

Here, when Deshawn used hitting and threats of hitting to make T.G. prostitute for him the first time, in 2007, he promoted her prostitution (he advanced her prostitution by force).

He also trafficked (again, assuming *arguendo* that he trafficked at all). He obtained or provided T.G. for prostitution

purposes, knowing that his hitting and threats of hitting (T.G.'s fear that he would hit her again) would be the motivating force impelling her to do the act of sexual prostitution against her will, which is forced labor. (In fact the hitting started first, it was then used to compel prostitution, and that is only promotion).

The same is true in 2008 -- when Deshawn drew T.G. back from Wisconsin and convinced her to go back onto the streets, he "obtained" her, knowing that hitting or threats of hitting would be used to keep her prostituting for him against her will. And he "promoted" prostitution, by using the ongoing threats of violence in their relationship and the history of his violence against her to cause her to prostitute. The State's attempt to argue that Deshawn's drawing of T.G. back from Wisconsin did not also promote prostitution, because he lied to her with promises in order to get her to come back, but did not specifically use force or threats to draw her back, suddenly ignores their long-standing relationship of violence and the ongoing power of those threats and violence to compel T.G. to do what he wanted, and thus completely fails as an argument that this was not also promoting.

Deshawn may have arguably committed trafficking, and only trafficking, *in the year 2007*, when he first used force to compel T.G.

to begin prostituting for him, although again, Deshawn argues that this too was only promoting – advancing prostitution by force or threat. But certainly, during the charging period window in which the State of Washington chose to frame its case, the pair’s relationship of batterer and batteree had been in existence for many months. Surely, the same State that contended at trial below regarding the powerful hold Deshawn had over T.G. thanks to their ongoing relationship of violence, cannot be the same State that appears now to argue that on this one occasion, when T.G. returned from Wisconsin, she commenced prostituting again solely by virtue of Deshawn somehow singing the virtues of prostitution, divorced from any fear of violence by T.G. This claim, if it is being made, fails utterly.

Within the bounds of Washington case law, the Respondent State of Washington ultimately cannot have it “both ways” on the two issues of (a) insufficiency of the evidence on trafficking; and (b) Double Jeopardy error; given how the case against Deshawn was charged and proved. All of the defendant’s acts in the charging period were “promoting prostitution,” and if they were also “trafficking,” as the State itself conflictingly contends in its Brief of Respondent, then the two ongoing offenses as charged and proved

under the facts of this case are exactly the same. The Respondent has offered no indication of legislative intent that shows that the Legislature intended such result of the one crime automatically constituting the twin offenses in an ongoing course of conduct case involving trafficking and promotion of the same victim.

Ultimately, the State by its arguments in the Brief of Respondent has effectively conceded the Double Jeopardy error. The fact of higher punishment for Trafficking cannot save the State from the consequences of the fact that the crime, under the instant facts, was merely an artificially delineated subset of Promoting.

Deshawn Clark formed a plan to advance T.G.'s prostitution by use of force and threats, he attempted (very successfully) to promote her prostitution, and he did so.

Where the victim is the same and the conduct is ongoing, neither Deshawn's mental state of planning or intending to promote T.G.'s prostitution, or his completed, successful attempt to do so, constitutes another crime, trafficking.

If it does, Double Jeopardy is squarely violated by entry of judgment on this trafficking conviction, just as surely as if the State convicted a defendant of robbery, and then tried to also separately punish the robber's mental state of intent leading to the crime, or to

separately punish his (successful) attempt to commit that robbery, as an additional offense. Under the facts of this particular case, this obvious Double Jeopardy violation is not magically prevented or cured by the fact that this intent and attempt also fit the elements of the newly-enacted "Trafficking" statute passed by the Legislature and assigned a higher seriousness level.

Furthermore, in the face of such a Double Jeopardy error, the remedy is to vacate the trafficking conviction, because the mental state or successful attempt to commit Promoting is a mere subset of the completed crime. If the State convicted a defendant of robbery and attempted robbery, the attempt would be required to be vacated, a remedy that would not magically change if the Legislature chose to assign harsher punishment to attempted robbery compared to robbery.

The Wisconsin return was not "non-promoting" trafficking. T.G. came back from Wisconsin, the defendant advanced prostitution – again – using force or threats of force. (he plainly did not convince her to prostitute by tricking T.G. or selling an idea that she would like it; by then, she well knew from bitter experience that prostitution is no dream. The record shows that after the Wisconsin return, the defendant used violence or threats of violence to get her

to continue prostituting. Appellant argues this was not “trafficking,” just promoting. However, if it additionally was trafficking, Double Jeopardy is violated. There is no instance of trafficking in this case *in the charging period* that was not also Promoting. The two crimes are the same as charged and proved.

#### **4. DESHAWN’S TRIAL ATTORNEY DID RAISE THE QUESTION OF SPECIFIC/CONCURRENT STATUTES.**

Contrary to the Respondent’s contention, Mr. Clark’s trial counsel did indeed argue that the defendant could not be charged with both Trafficking and with Promoting Prostitution. See BOR at 45. Although the issue and its discussion by the court and counsel was also connected with the defendant’s Double Jeopardy arguments, Mr. Garrett did argue, “I don’t believe that the State can charge him for human trafficking for the exact same conduct and specific conduct in the same time and then also charge him for Promoting in the First for the exactly same conduct in the exact specific time period.” 2RP 234. The court partly treated the matter as a Double Jeopardy argument to be raised at sentencing. 2RP 235. But, perhaps inartfully, counsel was arguing that if the defendant was being charged on the basis of the same conduct, the State was required to charge him with the one offense that specifically matched his alleged behavior. An appellate court may

consider a claimed error following the party's general objection if the specific legal basis for the objection is apparent from the context. State v. Braham, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (citing State v. Pittman, 54 Wn. App. 58, 66, 772 P.2d 516 (1989)).

This Court should reach the merits of the specific/general issue raised by Deshawn on appeal.

**5. THE CONVICTION FOR FALSE IMPRISONMENT OF T.G. VIOLATES DOUBLE JEOPARDY IF PAIRED WITH EITHER THE TRAFFICKING OR THE PROMOTING CONVICTION.**

The prosecutor specifically argued in closing that all Deshawn's acts of force and use of fear against T.G. to facilitate keeping her prostituting, including driving her in his car to places, including places for prostitution she by definition did not want to go to, or anywhere she did not want to go, constituted "trafficking," and also the force used for promoting her prostitution. 25RP 5017, 25RP 5010-11; see 8RP 1489; 10RP 1949, 1955.

The unlawful imprisonment count, involving the defendant's act of forcibly placing T.G. in his vehicle to retain her as his prostitute when she was once again reluctant to continue, violates Double Jeopardy as to the trafficking count or the promoting count.

The Respondent indeed concedes as much when, in arguing that trafficking and promoting were committed constantly and concurrently together throughout the charging period, the State writes that all of the acts Deshawn engaged in to keep T.G. prostituting constituted these crimes, including when Deshawn “transported” T.G. BOR at 31.

Yet the State contends that the unlawful imprisonment count was based on a “discrete act.” BOR at 50. This is incorrect and does not save the Double Jeopardy error either in theory or practice. The State might just as well have charged the defendant with an additional count of unlawful imprisonment for every time he kept T.G. in a hotel room so her prostitution activity could occur. Such charges would be, and the present count of imprisonment is, simply one unremarkable instance of the conduct that the defendant repeatedly used to promote prostitution – it is anything but “discrete” in the sense of being any different or having any different effect than that ongoing conduct. There was nothing about that particular act of facilitating ongoing prostitution by force used to keep the victim “in pocket” that had absolutely any independent purpose or effect from the facts and harm of the larger offenses of conviction.

**B. CONCLUSION**

Based on the foregoing and on his Appellant's Opening Brief, Deshawn Clark respectfully requests that this Court reverse the judgment and sentence of the trial court as argued herein.

Respectfully submitted on 16<sup>th</sup> May, 2011.

Handwritten signature of Oliver R. Davis in black ink, written over a horizontal line. The signature is stylized and includes the number '25228' at the end.

Oliver R. Davis WSBA # 24560  
Attorney for Appellant  
Washington Appellate Project - 91052

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64861-6-I
v.	)	
	)	
DESHAWN CLARK,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF MAY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREA VITALICH, DPA	(X)	U.S. MAIL
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APPELLATE UNIT	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF MAY, 2011.

X \_\_\_\_\_ 

  
2012 MAY 16 10:14:27

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