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COA NO. 69516-9-I

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

RECD
MAR 31 2014
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JERRY TOWNSEL,

Appellant.

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

The Honorable Dean S. Lum, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. PROSECUTORIAL MISCONDUCT DEPRIVED TOWNSEL OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

The State claims the prosecutor did not trivialize the burden of proof by comparing the reasonable doubt standard to everyday decision-making. Brief of Respondent (BOR) at 35-36. The State is mistaken. The case law cited by Townsel in the opening brief, which the State does not address, leaves no doubt on the matter. See Brief of Appellant (BOA) at 10-13.

The State argues that if the prosecutor committed misconduct in this regard, it is excusable because the prosecutor is entitled to make a fair response to defense counsel's argument. BOR at 35.

First, it is important to note that Townsel's counsel did *not* make this argument. Defense counsel for co-defendant Jones made the argument. 13RP 52-56, 61-65. The State cites no authority for the proposition that the fair response doctrine applies to a defendant when that defendant's counsel did not make the argument.

In any event, defense counsel for co-defendant Jones explained in closing argument that the standard of proof beyond a reasonable doubt was not the same as the kind of decisions made in everyday life. 13RP 52-56, 61-65. That was a correct statement of the law. State v. Anderson,

153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010); State v. Walker, 164 Wn. App. 724, 732, 265 P.3d 191 (2011), remanded for reconsideration on other grounds, 164 Wn. 724, 295 P.3d 728 (2012), affirmed on remand, 173 Wn. App. 1027 (2013), review denied, 177 Wn.2d 1026 (2013). Contrary to the State's allegation, counsel did not tell jurors that they could not understand the instructions or that the standard was unattainable. 13RP 53-56, 61-65. Counsel rightly told the jurors that the reasonable doubt standard, while attainable, did not equate with everyday experience, which is why the jury needed to take care in deliberations: "So you see, it is very important for us, for Mr. Flora and me, to take time to remind you of this, to be extremely cautious and not to rush to judgment, and not to rush to judgment that you employ every day." 13RP 55.

Defense counsel did not misstate the law. The prosecutor did. That is why the prosecutor's argument was not a fair response. A prosecutor's remarks made in direct response to defense argument may not go beyond what is necessary to respond to the defense. State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 756 (2005), review denied, 156 Wn.2d 1004, 128 P.3d 1239 (2006). Improper remarks provoked by defense counsel are still grounds for reversal if the remarks are not a pertinent reply. State v. Jones, 144 Wn. App. 284, 299, 183 P.3d 307 (2008). It is not necessary

or pertinent to respond to defense counsel's proper closing argument with an improper argument. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984) (response was improper despite being invited by adversary in closing argument because it exceeded scope of provocation).

In regards to the State's other contentions on the prosecutorial misconduct issue, Townsel stands by the argument made in his opening brief. BOA at 9-26.

2. THE COURT ERRED IN DENYING TOWNSEL'S REQUEST FOR NEW COUNSEL IN THE ABSENCE OF ADEQUATE INQUIRY.

The State claims the trial court's inquiry was adequate because Townsel never articulated an adequate reason for needing new counsel. BOR at 15. In support, the State contends Townsel only relied on his letter addressing the prosecution's acquisition of his medical records and his trial counsel's response to it as the sole basis for his motion for new counsel made on June 11. BOR at 17 (citing RP 3 (6/11/12 - morning).

But Townsel also told the court during that June 11 hearing "there are several other things where we're in conflict." RP 5 (6/11/12 - morning). The court did not follow up on what those "other things" were.

The State also complains Townsel did not request new counsel until the eve of trial. BOR at 28. Townsel made his first request for new

counsel on June 11. The trial was not due to start until June 19. CP 323. His first request did not come on the eve of trial.

The State even goes so far as to claim Townsel made no request for new counsel on June 20, but rather only requested a hearing to determine whether he was willing to waive a known conflict of interest. BOR at 27. In context, it is obvious Townsel requested new counsel. 2RP 5-7, 11. The trial court understood Townsel to be making such a request and denied it on the basis that there had been no showing of a conflict. 2RP 9-11. Townsel's inarticulate written request for a "Garcia" hearing does not change that fact.

In regard to his second request made on June 20, the trial court did not reject the request for any reason of timeliness. Moreover, even where a request is made on the eve of trial (the jury was to be selected on June 21), the trial court must still consider "the length of continuance needed for a new attorney to prepare, the degree of inconvenience the delay would cause, and why the motion to substitute counsel was not made earlier." United States v. Nguyen, 262 F.3d 998, 1005 (9th Cir. 2002). The court made no inquiry into the length of time needed for a new attorney to prepare, while Townsel did in fact make a motion to substitute counsel earlier in connection with the June 11 hearing.

The State asserts substitution of counsel was not required because the court gave Townsel the opportunity to articulate whether a conflict existed and he failed to do so. BOR at 26, 28. But whether a conflict exists that calls for new counsel to be appointed presupposes the trial court has fully informed itself of the conflict at issue. United States v. D'Amore, 56 F.3d 1202, 1205 (9th Cir. 1995); see also State v. Madsen, 168 Wn.2d 496, 505, 229 P.3d 714 (2010) (in context of request to proceed pro se, "the court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met" and then deny the request to proceed pro se).

A general loss of confidence or trust alone is insufficient to substitute new counsel, but attorney-client conflicts justify the grant of a substitution motion "when counsel and defendant are so at odds as to prevent presentation of an adequate defense." State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). Trial strategy is generally left to the attorney and client to work out, but only if there is no actual ineffective assistance of counsel. State v. Cross, 156 Wn.2d 580, 608-09, 132 P.3d 80 (2006).

Here, the trial court's inadequate inquiry renders that determination problematic because the court did not put itself into the position to make

an informed decision on the conflict alluded to by Townsel. When inadequate representation is alleged, such issues upon which inquiry must focus include "whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choice of trial tactics and strategy." People v. Marsden, 2 Cal.3d 118, 123-24, 465 P.2d 44 (Cal. 1970) (quoting Brubaker v. Dickson, 310 F.2d 30, 32 (9th Cir. 1962)). The trial court did not conduct the requisite inquiry.

The State argues there is no remedy for Townsel even if the trial court's inquiry was insufficient. BOR at 37, 41. It cites a Division Three decision for the proposition that a "peremptory denial" of a defendant's request for new counsel is harmless error unless counsel's performance actually violated the defendant's Sixth Amendment right to effective assistance of counsel. State v. Lopez, 79 Wn. App. 755, 904 P.2d 1179 (1995), (quoting United States v. Morrison, 946 F.2d 484, 499 (7th Cir. 1991), cert. denied, 506 U.S. 1039, 113 S. Ct. 826, 121 L. Ed. 2d 696 (1992)), disapproved on other grounds by State v. Adel, 136 Wn.2d 629, 640, 965 P.2d 1072 (1998).

The problem with that approach is that it reduces the denial of new counsel error to an ineffective assistance claim. If the matter simply comes down to showing ineffective assistance of counsel, then the factors

a reviewing court is supposed to assess — extent of inquiry, extent of conflict and timeliness of request — are actually superfluous.

That harmless error approach also lets trial courts off the hook. Under established law, the trial court, when faced with a request for new counsel, has the duty to take it upon itself to conduct the requisite inquiry. See Benitez v. United States, 521 F.3d 625, 634 (6th Cir. 2008) (when placed "on notice of a criminal defendant's dissatisfaction with counsel, the court has an affirmative duty to inquire as to the source and nature of that dissatisfaction").

Inquiry is needed to become informed of whether there is a problem rendering counsel unable to perform effectively. Without full inquiry, the defendant is left to his own devices to articulate why new counsel is needed. The trial court should be more than a potted plant when faced with a request for new counsel. The trial court must be active in probing into the reasons for the request, rather than passively observe while a defendant struggles to articulate his concerns. See United States v. Vargas, 316 F.3d 1163, 1166 (10th Cir. 2003) ("the fundamental requirement is that the [trial] court's inquiry uncover the nature of the defendant's concerns").

Without inquiry, the record may very well be incomplete to establish the extent of the conflict. That is not surprising. It is the natural

outcome of a trial court failing to fulfill its duty. That is why, in such a circumstance, it is a fair remedy to remand for an evidentiary hearing in order for the record to be developed. Schell v. Witek, 218 F.3d 1017, 1027 (9th Cir. 2000) (evidentiary hearing is an appropriate vehicle for developing the facts a court needs to decide whether denial of request for new counsel in absence of inquiry was consequential). The trial court is responsible for conducting the requisite inquiry and if it does not do so, the resulting incomplete record should not be held against the defendant on appeal.

Under RAP 12.2, appellate courts "may reverse, affirm, or modify the decision being reviewed and *take any other action as the merits of the case and the interest of justice may require*." (emphasis added). Appellate courts remand for further development of the record in a variety of circumstances so that a claim can ultimately be fully reviewed on appeal. See, e.g., In re Detention of Ritter, 177 Wn. App. 519, 520-21, 312 P.3d 723 (2013) (remanding for Frye[1] hearing, retaining jurisdiction of case); State v. Walker, 153 Wn. App. 701, 708-09, 224 P.3d 814 (2009) (remanding for fact hearing on whether statute of limitations on criminal charges had expired). If this Court declines to reverse based on the

[1] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

present record, then remand for further factual development is an appropriate step to fairly resolve Townsel's claim.

3. THE CONVICTIONS FOR FIRST DEGREE KIDNAPPING AND FIRST DEGREE ASSAULT VIOLATE DOUBLE JEOPARDY.

The State claims there is no double jeopardy violation because the elements of first degree kidnapping and first degree assault differ and thus the offenses are not the same "in law." BOR at 47-49. The State fails to appreciate that courts may look at the definitional level of an offense to find the offenses to be the same "in law." State v. Land, 172 Wn. App. 593, 600, 295 P.3d 782 (2013) (child rape and child molestation were the same in law and fact) (citing State v. Hughes, 166 Wn.2d 675, 682-84, 212 P.3d 558 (2009) (convictions for second degree rape and rape of a child were the same offense, despite elements that differ facially).

That approach makes sense because the "same evidence" test is concerned with what the State must prove to convict for each offense. State v. Freeman, 153 Wn.2d 765, 772, 776-77, 108 P.3d 753 (2005). The State must prove every element of an offense, and whether an element has been proved depends on the meaning of that element, which is supplied by an element's definition. See State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006) (conclusion that the purpose of sexual gratification is not an essential element of first degree child molestation that must be included

in the "to convict" instruction "does not . . . relieve the State of its burden to show sexual gratification as part of its burden to prove sexual contact."); State v. Gray, 124 Wn. App. 322, 324-25, 102 P.3d 814 (2004) (conviction for third degree assault reversed due to insufficient evidence because State failed to prove assault on a "health care provider" as defined by statute).

Townsel's opening brief correctly reaches down to the definitional level of the elements of first degree kidnapping and first degree assault to show they are the same in law. BOA at 43-46. The State does not engage this argument based on its mistaken belief that courts need look no further than the formal elements of an offense without consideration of what those elements mean. The State's approach is illogical and exalts form over substance. The substance of whether two offenses are the same "in law" turns on what the State needs to prove in order to obtain a conviction, and what the State needs to prove necessarily takes into account what the elements mean via their definitions.

As set forth in the opening brief, an assault occurs every time a person is abducted by means of force. Both offenses require intent to inflict harm, with intent to inflict "bodily injury" in the kidnapping offense subsumed within the intent to inflict "great bodily harm" in the first degree assault offense. BOA at 43-44. In addition, both first degree assault and

the restraint in the kidnapping offense are accomplished by means of force, with use of "a force or means likely to produce great bodily harm or death" in the first degree assault offense always satisfying restraint through use of "deadly force" in the kidnapping offense. BOA at 44.

The State is correct that the commission of first degree kidnapping does not require that actual injury or extreme mental distress be inflicted upon the victim; the statute only requires the defendant abduct with the intent to do so. BOR at 48 (citing In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 53, 776 P.2d 114 (1989). What the State overlooks is that the two offenses both require the intent to inflict injury and that both require proof of use of deadly force or its equivalent, with the deadly force aspect of the kidnapping offense derived from the definition of "abduct."

The State also claims the offenses are not the same "in fact" because the crime of first degree kidnapping is complete once an abduction occurs with the intent to cause harm. BOR at 49. Kidnapping, however, is a continuing crime because it involves the element of unlawful detention, — "it is continuously committed as long as the unlawful detention of the kidnapped person lasts." State v. Dove, 52 Wn. App. 81, 88, 757 P.2d 990 (1988).

The State nonetheless regards Fletcher as its ace in the hole. Fletcher stated the robbery and kidnapping offenses were the same in fact

when "they occurred simultaneously and the same evidence would be used to prove both crimes." Fletcher, 113 Wn.2d at 49 (assault not same in fact because it occurred after kidnapping and robbery were completed and therefore different evidence would be used to prove it).

In Townsel's case, the kidnapping and the assault occurred simultaneously at their inception and continued to take place at the same time: each act of assault also constituted the act of kidnapping. Two offenses are the same in fact if proof of one offense necessarily proves the other. Fletcher, 113 Wn.2d at 47. The evidence for one offense proved the other on the facts of this case. The restraint and the assault occurred at the same time. O'Keefe was restrained by means of the assault. 9RP 61-68.

That being said, the United States Supreme Court recognizes "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

Further, court looks to the entire trial record when considering a double jeopardy claim, including the evidence, the instructions, and the State's argument. State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011). The analysis in Fletcher is constricted and fairly abstract because

the convictions were by way of guilty plea; the State did not lay out its theory of the case in a closing argument directed towards the trier of fact. A jury convicted Townsel. The State's argument in this case shows it treated the assault and the kidnapping as occurring at the same time and as proof of one another. 12RP 43, 46-47, 50, 52. The two offenses are the same in fact.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Townsel respectfully requests that this Court (1) reverse the convictions; and (2) vacate the kidnapping conviction on double jeopardy grounds and remand for resentencing.

DATED this 31st day of March 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 69516-9-I
	)	
JERRY TOWNSEL,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MARCH, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR EMAIL.

[X] JERRY TOWNSEL
DOC NO. 929083
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH, 2014.

X Patrick Mayovsky