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REC'D
OCT 22 2013
King County Prosecutor
Appellate Unit

COA NO. 69516-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JERRY TOWNSEL,

Appellant.

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

The Honorable Dean S. Lum, Judge

AMENDED 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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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct violated appellant's due process right to a fair trial.

2. Defense counsel provided ineffective assistance in failing to object to prosecutorial misconduct.

3. The court violated appellant's right to counsel under the Sixth Amendment of the United States Constitution in failing to appoint new counsel.

4. The convictions for assault and kidnapping constitute double jeopardy.

Issues Pertaining to Assignments of Error

1. Whether the prosecutor committed prejudicial misconduct in equating the reasonable doubt standard with an everyday decision, disparaging defense counsel and right to present a defense, appealing to emotion, and expressing a personal opinion on appellant's credibility?

2. Whether counsel was ineffective in failing to object to prosecutorial misconduct where no legitimate reason justified the failure?

3. Whether the court erred in failing to appoint new counsel due to inadequate inquiry into the extent of appellant's conflict with his attorney and a breakdown in communication?

4. Whether the assault and kidnapping convictions violate double jeopardy because the evidence required to support a conviction of one crime was sufficient to warrant a conviction upon the other?

B. STATEMENT OF THE CASE

a. Procedural Facts

The State charged Jerry Townsel with first degree kidnapping (count I), first degree assault (count II), felony harassment (count III), and second degree rape (count IV), all designated as domestic violence offenses. CP 33-36. The State further alleged a deliberate cruelty aggravator for counts I and II and an ongoing pattern of abuse aggravator for all counts. CP 33-36. Co-defendant Daryl Jones was tried together with Townsel as an accomplice to the kidnapping charge. CP 33.

The jury found Townsel guilty of first degree kidnapping and first degree assault. CP 159-60. The jury acquitted Townsel of harassment and was unable to reach a verdict on the rape charge. CP 161; 14RP[1] 11-12. The jury did not agree on any of the special verdicts. 14RP 11. The court sentenced Townsel to a total of 286 months confinement. CP 171. This appeal follows. CP 180-90.

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[1] The verbatim report of proceedings is referenced as follows: 1RP - 6/19/12; 2RP - 6/20/12; 3RP - 6/21/12; 4RP - 6/25/12; 5RP - 6/26/12; 6RP - 6/27/12; 7RP - 6/28/12; 8RP - 7/2/12; 9RP - 7/3/12; 10RP - 7/5/12; 11RP - 7/9/12; 12RP - 7/10/12; 13RP - 7/11/12; 14RP - 7/16/12; 15RP - 9/28/12.

b. O'Keefe's Testimony

Roxanne O'Keefe is a long time methamphetamine addict. 9RP 16-18, 25, 115. She was diagnosed with drug-induced schizophrenia. 9RP 24-25. Meth makes her psychotic. 9RP 124. She hears voices, hallucinates and becomes paranoid, believing people are trying to kill her. 9RP 25-27, 49, 106-07, 109-10.

Come October 2011, O'Keefe was homeless. 9RP 28. She met Townsel at a park and the two started smoking meth together. 9RP 29, 31. They had consensual sex. 9RP 30. Townsel introduced O'Keefe to Jones. 9RP 33. They went to a vacant house at about 11 p.m. on November 2, where they smoked meth. 9RP 47, 50. O'Keefe started rapping and believed Townsel wanted to kill her to steal her material. 9RP 51, 130-31.

Townsel told her to go into the bathroom. 9RP 52-53. Once there, Townsel told her that he thought she was trying to kill him. 9RP 54. O'Keefe was scared and nervous that he was going to kill her. 9RP 55. She decided to put on makeup and hairspray. 9RP 55, 131. She pleaded with him to leave the bathroom. 9RP 56, 86-87. He said no. 9RP 56. He told her to turn around and pull her pants down. 9RP 57. Townsel penetrated her vagina with his penis. 9RP 59.

Townsel hit her in the face while in the bathroom. 9RP 61-62. She tried to crawl away and he grabbed her. 9RP 62-63. She managed to get to the kitchen, where he tried to gouge her eyes out. 9RP 62-65.

She wound up back in the bathroom, fighting and wrestling with him. 9RP 67-68. Overall, she tried to leave the bathroom a number of times but Townsel stopped her. 9RP 74, 160. O'Keefe broke the bathroom mirror tried to stab Townsel in the neck in an effort to protect herself. 9RP 68, 72. She tried to stick screws in his eyes. 9RP 151. She scratched his face. 9RP 172. At some point they fought over a hammer. 9RP 132. He pushed her against a wall. 9RP 168.

Townsel told her the only way out was for her to strangle him and told her to do so. 9RP 69-70. She tried to strangle him with a pair of pants that he handed her. 9RP 70-71. He bit her on the wrist. 9RP 72-73. When she woke up, he was gnawing on her head. 9RP 73, 90, 144. He told her he wanted to taste her blood. 9RP 73. He told her to fill up the bathtub, get in, and give him a cup of bloody water. 9RP 73-74. She did so and he drank it. 9RP 74. He got into the tub with her and cut his wrists. 9RP 79. She thought he was a vampire. 9RP 78. She put a crucifix in her vagina. 9RP 81-82.

When the sun came up, Townsel directed her to clean up the bathroom. 9RP 89. Townsel brought her into the bedroom, where she

slept for a day. 9RP 85, 89, 92, 95. The two lay down next to one another. 9RP 92-93. Townsel told her she was not leaving. 9RP 156-57. From start to finish, Townsel never left her alone. 9RP 90, 98.

c. Townsel's Testimony

Townsel was a drug addict. 11RP 118. Heroin, his drug of choice, has a sedative effect on him. 10RP 108, 120, 122. He was homeless during the latter half of 2011. 10RP 110. Jones invited Townsel and O'Keefe to squat at a house he knew about in the Capitol Hill area of Seattle. 11RP 13-14. They smoked meth at the house and Townsel also did heroin. 11RP 15-16. O'Keefe followed Townsel to the bathroom. 11RP 16, 18. She smoked some more meth and he did some more heroin. 11RP 18, 21.

O'Keefe talked about being set up and said "this is a bloodbath for witches." 11RP 21. Townsel started nodding off, feeling the effects of the heroin. 11RP 22-23. O'Keefe told him there was a hit out on him. 11RP 22. Townsel nodded off again. 11RP 23. When he came to, she was strangling him with a cord. 11RP 23-24, 33. In his confusion, Townsel initially thought Jones was strangling him. 11RP 24. Townsel banged around the bathroom and the house with the person on his back. 11RP 24. He did whatever he could to get the attacker off. 11RP 119-20. He eventually backed into a wall and realized it was O'Keefe when she

grunted. 11RP 24. The injuries he caused were the result of him trying to get her off his back. 11RP 123.

O'Keefe told him "You're going to die, mother fucker." 11RP 24. Townsel shook her off his back. 11RP 24. She ran at him and hit him in the chest with the fork end of a hammer. 11RP 24-25. Townsel grabbed the hammer and threw it aside. 11RP 25. She ran for the hammer and Townsel tackled her. 11RP 25. He held onto her, telling her to stop and that she was high. 11RP 25-26. He nodded out again. 11RP 26.

Townsel thought O'Keefe was trying to kill him for drugs. 11RP 54, 139-40. He claimed self-defense. 11RP 93. He told a detective that she was as strong as him plus one more guy. 11RP 105. He believed she had been smoking sherm. 11RP 105, 109-10.

At some point, O'Keefe said several times "I've gotta get out of here" and then "no" while she was smoking meth. 11RP 30-31. Townsel told her to chill out or leave. 11RP 31, 113. He denied having sexual intercourse with her at the house. 11RP 31, 68-69, 71. He had sex with her earlier that morning. 11RP 71. He denied gouging her eyes, biting her, or sucking her blood. 11RP 28-29. He also denied punching her, but he head butted her when she was on his back and he swung back at her several times. 11RP 29. He did not intend to harm O'Keefe, but believed he caused some of her injuries. 11RP 117, 123, 145. When he woke up

from his drug-induced sleep and saw O'Keefe, he felt scared because he had not known she had been harmed to such an extent. 11RP 26-27, 148.

d. Neighbor Observations and Owner Intervention

In the early morning hours, a person next door heard male and female voices, a woman's screams followed by conversation, and thumping or banging noises. 7RP 106-11, 123-24. At around 5 a.m., she heard a woman loudly saying "I've got to get out of here. I've got to get out of here" and then "Never mind, never mind, it's okay, I'll stay. I'm staying." 7RP 113, 119, 124, 129-30.

On November 4, 2011 at 3 p.m., Mr. Johnson, the property owner, noticed Jones in front of the vacant house. 5RP 101-02. The owner went inside the house and saw Townsel and O'Keefe lying awake in a sleeping bag. 5RP 104-05. She looked badly beaten. 5RP 105.

e. Investigation and Aftermath

Police arrived to find Townsel, Jones and O'Keefe inside. 6RP 111-12. There was blood in the bathroom and kitchen. 6RP 166-74; 7RP 24-34, 73. A wallboard was damaged and the bathroom mirror was broken. 6RP 173-74; 7RP 42-43. A hammer was found. 7RP 40-41.

O'Keefe's face was swollen and bruised. 7RP 149. She had additional bruising on many parts of her body. 7RP 149-50; 8RP 38-39, 43. Her arms had multiple lacerations. 7RP 150. Her eyes displayed

conjunctival hemorrhages. 8RP 31, 46-47, 173. She had a broken jaw and loose or missing teeth. 8RP 32, 47, 149, 170. She sustained a nasal fracture and subtle orbital fractures. 8RP 166-69, 169. The top of her head was bleeding. 8RP 132. There was a wound to the forearm, with a tendon exposed. 5RP 128-31; 8RP 43. It was produced by a sharp object, but probably not teeth. 8RP 160-62, 182. Surgery was performed to repair two lacerated tendons on O'Keefe's right hand. 5RP 124-27.

Townsel had lacerations on the side of his neck and face and scratches on his wrist. 8RP 27, 29. A medical examiner described the cuts as superficial. 8RP 146-47, 149-51, 154, 184.

In a police interview at the hospital, O'Keefe referred to vampires, the house being haunted, voices upstairs that were going to get her, Townsel being a member of the Taliban, Keanu Reeves breaking a mirror, dead bodies in Capitol Hill restaurants, blood baths on Capitol Hill, and Townsel taking her to a cave where there was a bucket of blood. 8RP 34-35, 79-81. She was diagnosed with psychosis and methamphetamine dependence. 6RP 16-17, 20. Meth can cause people to experience symptoms associated with paranoid-type schizophrenia. 6RP 19.

f. Defense Theory

The defense theory was that O'Keefe was an unreliable witness due to her severe drug and mental health problems. 13RP 8-11, 16-23, 26-31,

34-37, 42. The defense argued and received instruction on self-defense to the assault charge. 13RP 31-34, 40-42; CP 120, 122-24. In addition, the defense received instructions on the lesser charges of second degree kidnapping and second degree assault. 13RP 40; CP 110-15, 125-29.

C. ARGUMENT

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

Prosecutorial misconduct violates the due process right to a fair trial when there is substantial likelihood the prosecutor's misconduct affected the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. The prosecutor misstated the beyond a reasonable doubt standard, denigrated defense counsel and Townsel's right to present a defense, appealed to the emotions and sympathy of the jury, and expressed a personal opinion on Townsel's credibility. Even in the absence of objection, reversal of the convictions is required because the cumulative effect of the misconduct was prejudicial and incurable by instruction. In the alternative, counsel was ineffective in failing to object to the misconduct and seek curative instruction.

a. The Prosecutor Diminished The Burden Of Proof By Comparing The Jury's Decision To Decisions Made In Everyday Life.

During closing argument, counsel for co-defendant Jones explained the standard of proof beyond a reasonable doubt was not the same as the kind of decisions made in everyday life. 13RP 53-56, 61-65. In rebuttal, the prosecutor argued as follows:

> She said it's not like your everyday experience. But I guess I would counter that. It depends somewhat on what type of person you are. But for most of us, *we have a kid, and we think our kid did something bad, we're not going to punish our child for it, unless and until we know that they, indeed, did something bad beyond any doubt that's reasonable*.
>
> *If there is a reasonable doubt that your son did something, you're not going to ground him because you'd be worried. No. What if I am grounding him unjustly?*
>
> Reasonable doubt is a doubt that exists after fully and fairly considering the evidence. It's not some foreign, scientific, lofty term, that can only exist in the hallowed halls of academia, or in the temples of justice. *It's a standard that we have to apply every time we're trying to make a decision about what the best choice is.*
>
> And if we can rule out any doubts that are reasonable, we've reached beyond a reasonable doubt. It's certainly higher than more likely than not. But the truth is if that there's no doubt that's reasonable, then you're beyond reasonable doubt. I know it sounds like we're talking in circles, but it's important that we don't make this such a lofty goal, that it's impossible to reach.

13RP 67-68 (emphasis added).

The prosecutor's argument on what the reasonable doubt standard meant improperly diluted the State's burden of proof. The prosecutor's

arguments in State v. Anderson also discussed the reasonable doubt standard in the context of everyday decision making, such as choosing to have elective surgery, leaving children with a babysitter, and changing lanes on the freeway. State v. Anderson, 153 Wn. App. 417, 425, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010). The Court of Appeals held the prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision making were improper because they "minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden." Anderson, 153 Wn. App. at 431. Such argument "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case" against the accused by comparing the certainty required to convict with the certainty people often require when they make everyday decisions. Id.

Courts following Anderson continue to condemn prosecutorial argument that similarly misstates and trivializes the State's burden of proof. See State v. Walker, 164 Wn. App. 724, 732, 265 P.3d 191 (2011) (prosecutor committed misconduct in arguing the reasonable doubt standard "is a common standard that you apply every day" and comparing it to having surgery and leaving children with a babysitter); remanded for reconsideration on other grounds, 164 Wn. 724, 295 P.3d 728 (2102),

affirmed on remand, 173 Wn. App. 1027 (2013), review denied, 177 Wash.2d 1026 (2013); State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010) (prosecutor's arguments discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle trivialized the State's burden and improperly focused on the degree of certainty the jurors needed to act), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011); State v. Lindsay, 171 Wn. App. 808, 288 P.3d 641, 652 (2012) (misconduct to equate reasonable doubt standard to everyday decision like walking across a street or completing a puzzle), review granted, 177 Wn.2d 1023, 303 P.3d 1064 (2013).

The prosecutor in Townsel's case likewise conveyed to the jury a diminished standard of proof in equating the burden of proof with an everyday decision like whether to ground a child or, more broadly, "trying to make a decision about what the best choice is." 13RP 67-68. Furthermore, by focusing on the degree of certainty the jurors would have to be *willing* to act, rather than that which would cause them to *hesitate* to act, the prosecutor confused the jury's duty to find Townsel not guilty unless the State proved its case against him beyond a reasonable doubt with the idea that it should convict him unless it found a reason not to. Anderson, 153 Wn. App. at 432. The prosecutor thereby undermined the presumption of innocence by equating an abiding belief in guilt beyond a

reasonable doubt with determining whether to punish a child for doing something wrong. 13RP 67-68.

b. The Prosecutor Committed Misconduct In Disparaging Defense Counsel And Townsel's Right To Present A Defense.

In closing, the prosecutor argued

> Everything that's within the scope of sanity, that Ms. O'Keefe tried to narrate to us, is bolstered by the physical evidence. But she's psychotic, defense has been telling us from the start, she's crazy, she's like that shower curtain, because you know there's something about that shower curtain.[2]
>
> It was admitted into evidence, but you don't get it. It's one of those pieces of evidence that's so bloody, you're probably grateful, right? You don't get it when you go back in to deliberate, *because it's a biohazard. That's what the defense was trying to do to Roxy. Let's grind her into the ground enough, let's make her become as untouchable as that shower curtain or that bathroom floor*, and let's blend her in with all these drug addicts that can't be trusted. It's hell on earth, and let's let him walk, because it's just too bloody and it's too much of a mess. Let's just keep saying she's crazy, she's psychotic, she's a drug addict, and she'll merge into the rest of this bloody mess.
>
> *She loses her humanity and stops being a person,* she'll be easy to dismiss, and we can disregard her, and we can start debating a myriad of defenses raised by Jerry Townsel.

12RP 89-90 (emphasis added).

Townsel had the due process and Sixth Amendment right to present a defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); Crane

[2] A bloody shower curtain was found on the floor of the bathroom. 6RP 174. O'Keefe testified she pulled down the shower curtain. 9RP 77-78.

v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI and XIV; Wash. Const. art. 1, §§ 3, 22. "In our adversarial system, defense counsel is not only permitted but is expected to be a zealous advocate for the defendant." Walker v. State, 790 A.2d 1214, 1218 (Del. 2002). No prosecutor may employ language that "limits the fundamental due process right of an accused to present a vigorous defense." Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990).

In keeping with that principle, it is misconduct for a prosecutor to disparagingly comment on defense counsel's role in putting on that defense. State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983). A prosecutor's comments demeaning defense counsel's integrity are improper. Lindsay, 288 P.3d at 651 (citing State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011)).

In accusing the defense of treating O'Keefe like an untouchable biohazard and denying O'Keefe her humanity, the prosecutor commented on defense counsel's role in putting on a defense and impugned counsel's integrity. 12RP 89-90. Defense counsel vigorously cross-examined O'Keefe, which Townsel had every right to do. 9RP 103-154, 171-73. The defense was that O'Keefe was an unreliable and inaccurate reporter of events because she had mental health problems induced or exacerbated by

drug addiction. 13RP 8-11, 16-23, 26-31, 34-37, 42. That defense was legitimate. The prosecutor crossed the line in accusing counsel of treating O'Keefe like a bloody shower curtain and destroying her humanity.

In context, the prosecutor's comment of "Let's grind her into the ground enough" unmistakably refers to the defense counsel's cross-examination of O'Keefe. The prosecutor followed up on his comment by rhetorically asking then jury "How long did defense examine her for? Half a day?" 12RP 90. Such statements invite the jury to punish the defendant for making the alleged victim of the crime go through the ordeal of cross-examination, which the defendant has every right to do. Walker, 790 A.2d at 1219.

c. The Prosecutor Committed Misconduct In Appealing To The Emotions Of The Jury.

At the beginning of closing argument, the prosecutor alluded to defense counsel's reference in opening statement to "This is hell on earth" and described counsel as adding the caveat that "It deals with people whose . . . real only purpose, is to use drugs." 12RP 36. The prosecutor proceeded to comment, "We're talking about lives that are bereft of the normal measures of human dignity, lives that maybe for some of us are beneath the law itself. So if that's true, if that's what we're dealing with, why should we care?" 12RP 36.

The prosecutor continued with this theme, asking why the jury should not let Townsel "walk" or "throw him a bone and give him some of those lesser included convictions that you heard about, and we can get back to our lives." 12RP 37-38. The prosecutor told the jury "it's tempting to see someone like Roxanne O'Keefe as underserving of justice because of who she is, because she made stupid choices, because she's addicted to drugs, because she's mentally ill, and because she's fundamentally a broken human being." 12RP 38.

The prosecutor later returned to the theme of why the jury should care. 12RP 93. From his standpoint, one of the frustrating things about the case was that it would be over if it involved a dog, but because O'Keefe was a person, "we get to pick her apart." 12RP 94. The prosecutor assured the jury that he embraced his burden to prove guilt beyond a reasonable doubt, but exhorted the jury to remember that O'Keefe was still a person, that people have weaknesses and do stupid things, "[b]ut it shouldn't deny them their humanity." 12RP 94.

The prosecutor again asked "So why should we care? Not just because Townsel, Jones, need to be held accountable, but for us, too. We should still – the law should still matter for people that we usually ignore. It's got to uphold the rights of human beings at both ends of the spectrum, because of victims like Roxy, that don't represent the way we expect them

to on the stand, that don't have a stable job, that have addiction issues, don't have any rights, don't have access to justice, then the whole system itself crumbles. We've all heard of that expression, right? No one is above the law, but no one's beneath it, either." 12RP 94-95.

A prosecutor, as a quasi-judicial officer, has the duty to ensure that a defendant receives a fair and impartial trial, which means a verdict free from prejudice and based on reason. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). Inflammatory comments that deliberately appeal to the jury's passion and prejudice are improper. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). "A prosecutor may not properly invite the jury to decide any case based on emotional appeals." In re Detention of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998).

The prosecutor injected emotion and sympathy into the deliberation process by creating the theme of why the jury should care about O'Keefe. That constitutes an appeal to the passions of the jury. The jury's duty is to decide whether the State proved all the elements of the charged crimes beyond a reasonable doubt based on the evidence produced at trial, not whether the victim deserves to be cared about.

More than that, the prosecutor placed the jury in the position of returning guilty verdicts to uphold the integrity of the judicial system itself. 12RP 94-95. The prosecutor told jurors they should care because "the law

should still matter for people that we usually ignore" and that "the whole system itself crumbles" when the "rights" of victims like "Roxy" are denied. Id. The prosecutor's message is clear: find Townsel guilty in order to vindicate the rights of the downtrodden in society. The prosecutor in substance asked the jury to act as the conscience of the community. A prosecutor commits misconduct by asking a jury to return a guilty verdict in order to send a message to the community or to act as the conscience of the community. See State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (prosecutor's statement to let the victim and the "children know that you're ready to believe them and enforce the law on their behalf" was improper exhortation of the jury to send a message to society about the general problem of child abuse), review denied, 114 Wn.2d 1011, 790 P.2d 169 (1990); State v. Powell, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991) (improper to argue jury should consider message sent to children if victim not believed), review denied, 118 Wn.2d 1013, 824 P.2d 491 (1992).

d. The Prosecutor Committed Misconduct In Expressing A Personal Opinion About Townsel's Credibility.

During the prosecutor's cross-examination of Townsel, the following exchanged occurred:

> Q: How many changes do we have in your story right now, Mr. Townsel?
> A: As far as I know, probably two.
> Q: *I'm looking at at least seven.*
> A: No. Tell me those seven.
> Q: Let's just keep going.
> A: Come on now, tell me those seven, so I can see what you're talking about, because I know of this and I know of what I told my attorney. So tell me the seven.
> Q: *When I'm talking about this, I don't consider this one lie, I consider this 500 lies.*

11RP 132 (emphasis added).

The prosecutor then engaged in a tête-à-tête with Townsel about whether the prosecutor could show Townsel's story had changed seven times, with the prosecutor winding up by saying "Stick around for closing, and you'll see them all, okay?" 11RP 132-33.

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness in the form of an explicit opinion. Warren, 165 Wn.2d at 30; State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). The prosecutor is therefore forbidden from expressing an explicit personal opinion about the credibility of a defendant's testimony. Lindsay, 288 P.3d at 654. A prosecutor's personal opinion on credibility is problematic because "[a] jury is especially likely to perceive the prosecutor as an 'expert' on matters of witness credibility, which he addresses every day in his role as representative of the government in criminal trials." United States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985).

The prosecutor chose to express his unmistakable personal opinion that Townsel had lied. 11RP 132. Instead of acting as a dispassionate advocate for the State, the prosecutor chose to engage in a chest-thumping contest with Townsel about whether and how many times Townsel had lied. Such statements "suggest not the dispassionate proceedings of an American jury trial," and "cannot with propriety be used by a public prosecutor." Lindsay, 288 P.3d at 654 (quoting State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984)).

e. Reversal Of The Convictions Is Required Because The Cumulative Misconduct Was Prejudicial And Impervious To Curative Instruction.

Defense counsel did not object to the prosecutor's improper comments and arguments. In the absence of objection, appellate review is not precluded if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (quoting Walker, 164 Wn. App. at 737).

"When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the

gravity of the standard and the jury's role." Lindsay, 288 P.3d at 652. This is not a new principle of law. It was established well before Townsel's trial took place that trivializing the burden of proof is misconduct. Anderson, 153 Wn. App. at 431; Walker, 164 Wn. App. at 732. Disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997).

A prosecutor's misconduct is similarly flagrant and ill-intentioned where case law and professional standards are available to the prosecutor and clearly warned against the conduct. Glasmann, 175 Wn.2d at 707. As set forth above, case law in existence before Townsel's trial took place clearly warned against arguments that denigrate defense counsel and the right to put on a defense (Warren, 165 Wn.2d at 29-30; Thorgerson, 172 Wn.2d at 451), improper appeals to emotion and to act as the conscience of the community (Case, 49 Wn.2d at 70-71; Gaff, 90 Wn. App. at 841; Belgarde, 110 Wn.2d at 507; Bautista-Caldera, 56 Wn. App. at 195; Powell, 62 Wn. App. at 918-19), and a prosecutor's explicit expression of personal opinion about a witness's credibility. Warren, 165 Wn.2d at 30.

Prejudicial error will be found if it is "clear and unmistakable" that counsel is expressing a personal opinion. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing State v. Sargent, 40 Wn. App. 340, 344,

698 P.2d 598 (1985)). The prosecutor's direct comments to Townsel during cross-examination qualify. 11RP 132.

Again, the cumulative effect of misconduct may be so flagrant that no instruction can erase its combined prejudicial effect. Glasmann, 175 Wn.2d at 707. The prosecutor's additional misconduct of disparaging defense counsel, denigrating Townsel's right to put on a defense (12RP 87-88, 89-90) and appealing to the emotion of jurors (12RP 36-38, 93-95) adds to the cumulative prejudicial force of the other misconduct.

There is a substantial likelihood that the misconduct affected the jury verdicts in Townsel's case. Statements made during closing argument are intended to influence the jury. Reed, 102 Wn.2d at 146. Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. Case, 49 Wn.2d at 70-71.

O'Keefe sustained severe injuries. The jury, however, received self-defense instructions covering the first degree assault, which the State had the burden of disproving beyond a reasonable doubt. CP 120, 122-24. Townsel testified that he awoke to find someone strangling him and that he acted in response to the attack without intending to harm her. 11RP 23-25, 29, 33, 119-20, 123. O'Keefe attacked him with a hammer, tried to stab him in the neck with a shard from a broken mirror and tried sticking screws in his eyes. 9RP 137, 151; 11RP 24-25.

Moreover, the jury was given the option of finding Townsel guilty of the lesser offenses of second degree kidnapping and second degree assault. CP 110-15, 125-29. Evidence supported the lesser offense and self-defense theories of the case as recognized by the judge who gave the instructions and the State who did not object to them. See State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979) (defendant entitled to instruction on theory of case where supported by substantial evidence).

To prove first degree assault, the State needed to prove Townsel's state of mind — that he *intended* to inflict "great bodily harm," as opposed to recklessly inflict such harm. CP 119. To prove first degree kidnapping, the State needed to prove Townsel abducted O'Keefe with the *intent* to inflict bodily injury or extreme emotional distress, as opposed to abducting her without such intent. CP 108. There was circumstantial evidence of such intent for both charges. But reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict. Glasmann, 175 Wn.2d at 710. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. Id. at 711.

Because substantial evidence supported the defense theories, a rational trier of fact could have reached a conclusion consistent with those theories. A juror could conclude the State had not met its burden of proof

beyond a reasonable doubt on the greater offenses of first degree kidnapping and first degree assault. The probability of that happening was lessened, however, by the State's misconduct. See Glasmann, 175 Wn.2d at 712 (reversing convictions due to prosecutorial misconduct because reviewing court "cannot say that the jury would not have returned verdicts for lesser offenses, or even acquittal").

The case was closer than the prosecutor wished it to be, as shown by the fact that the jury acquitted Townsel of felony harassment and was unable to reach a verdict on the rape charge. CP 161; 14RP 11-12. The prosecutor's improper comments may have swayed jurors to convict Townsel of first degree kidnapping and first degree assault where they otherwise would not have done so. Reversal is appropriate where, as here, the reviewing court is unable to conclude from the record whether the jury would have reached its verdicts but for the misconduct. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

f. In The Alternative, Counsel Was Ineffective In Failing To Object To The Misconduct Or Request Curative Instruction.

In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice, then defense counsel was ineffective in failing to take such action. Every criminal defendant is guaranteed the right to the effective assistance of counsel. Strickland v.

Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const., art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kyllo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). This Court has recognized "defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995). No legitimate reason supported the failure to object and request curative instruction given the prejudicial nature of the prosecutor's improper comments.

If a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. Cf. Warren, 165 Wn.2d at 26-28 (prosecutor's misstatement of the burden of proof and presumption of innocence during closing argument did not require reversal only because the court gave a strongly worded curative instruction). When a reviewing court decides misconduct occurred and instruction could have cured the prejudice resulting from that misconduct, it necessarily recognizes the presence of prejudice that was susceptible to cure. No legitimate strategy justified allowing the

prosecutor's prejudicial comments to fester in juror's minds without court instruction that the improper comments should be disregarded.

Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument). A new trial is required here because defense counsel was ineffective in failing to object to the prosecutorial misconduct and request curative instruction.

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

Criminal defendants have the right to assistance of counsel. U.S. Const. amend. VI; Wash. Const., art. I, § 22. Although indigent defendants do not have an absolute right to counsel of choice, substitution of counsel is required where there is a conflict of interest, an irreconcilable conflict or a complete breakdown in communication between the attorney and the defendant. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001); State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The trial court abused its discretion in failing to appoint new

counsel because it failed to conduct an adequate inquiry into the nature and extent of the conflict and complete breakdown in communication.

a. Townsel Attempted To Inform The Court About His Concerns, But The Court Did Not Probe Into The Matter.

Townsel sent a handwritten "Motion to Remove and Replace Appointed Counsel" to the court, postmarked June 5. CP 28-32. Townsel contended he had an ongoing conflict with his appointed attorney, complained that his attorney had not objected to the State's subpoena for his medical records, and that he had lost faith in his attorney's representation. Id. On June 6, counsel filed a motion to dismiss based on the State's subpoena of Townsel's medical records. CP 16-27. The court thereafter denied Townsel's motion to discharge counsel. CP 193.

On June 20, Townsel addressed the court regarding what he described as a conflict with his attorney. 2RP 2. He handed up what he called a "Garcia" motion, in which he requested an evidentiary hearing on a potential conflict of interest.[3] CP 50-57; 2RP 4-5, 8-9. Townsel said "we haven't even any amount of time together to prepare . . . any type of

[3] A Garcia hearing is based on the case of United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), where the Fifth Circuit held a defendant may waive his right to conflict-free counsel after the defendant has a thorough consultation with the trial court and knowingly, intelligently, and voluntarily waives that right. United States v. Garcia–Jasso, 472 F.3d 239, 243 (5th Cir. 2006).

effective argument for my case. He's told me many times that he would come and see me, and he never has." 2RP 5. In addition, his attorney had not given him "the rest of discovery" or gone over evidence that was to be used against him. 2RP 5, 7. Townsel said he was not the person involved in several of the previous criminal cases alleged by the prosecutor. 2RP 5. Further, Townsel gave counsel several names of potential witnesses but they were not followed up on. 2RP 5-6. Townsel noted he had a Sixth Amendment right to effective assistance of counsel and that his counsel had not taken the time to prepare a defense with Townsel's input: "I didn't even know what the defense was, you know. And the only thing I'm seeing is that I'm fixing to be railroaded here." 2RP 6. He wanted a hearing on the matter. 2RP 7.

Defense counsel gave no response. 2RP 7. At the court's invitation, the prosecutor said he knew defense counsel had reviewed the evidence and discovery, was diligent in his efforts to track down witnesses, and met with the State in an attempt to negotiate. 2RP 7-8.

The court denied Townsel's written motion on the basis that there was no showing for any kind of evidentiary hearing and no showing of a conflict. 2RP 9. The court believed some of Townsel's statements were demonstratively false. 2RP 11. Townsel first said his attorney had not seen him, but then recounted the times he had seen him. 2RP 10. In

addition, the record showed counsel had actively investigated the case and interviewed witnesses. 2RP 10-11.

Townsel asked to address the court. 2RP 11. The court denied his request. 2RP 11. Townsel responded, "I don't want him representing me." 2RP 11. The court noted Townsel had stood up and wished to depart the courtroom. 2RP 11. Townsel said, "Yes, because I don't want him representing me." 2RP 11. Townsel clarified that his reference to counsel not seeing him was in the context of counsel not coming to see him when he said he would, not that he had completely failed to see him. 2RP 11. The court noted Townsel's anger and wanted to give him a chance to cool off. 2RP 11-12. A recess was taken. 2RP 12. Townsel returned to court for the scheduled CrR 3.5 hearing. 2RP 12-13. He again expressed his desire to leave, stating "I'm not going to participate in any of these proceedings. I don't have him as an attorney. He's not my attorney, regardless of what they are saying. I don't want him representing me." 2RP 13-14. The court expressed uncertainty about the law applicable to a defendant that did not wish to be present, noting "We're not in a situation where the gentleman is disruptive. The gentleman sat quietly through the witnesses yesterday and the motions in limine." 2RP 15. Townsel agreed to remain for the CrR 3.5 hearing. 2RP 16.

The next day started off with a discussion about whether Townsel could absent himself or at which points of the trial process he could do so. 3RP 3-7. Defense counsel objected to his client being forced to be in court, stating "He's instructed me not to talk to him, and so I'm not going to be able to talk to him. I'll try and see what happens." 3RP 7. Counsel maintained "Clearly we have a breakdown of communication between myself and Townsel. . . . He's simply not communicating with me, and, in effect, ordering me not to talk to him." 3RP 8. The court noted Townsel seemed lucid and made a decision not to cooperate. 3RP 8. The court asked counsel to attempt to convince Townsel that it was in his interest to cooperate. 3RP 8-9. Following a recess, Townsel voluntarily returned to court, reiterating "I said I don't want this guy representing me." 3RP 11. Townsel insisted counsel was not doing his job. 3RP 11-12.

After the prosecutor started going through when Townsel would be required to be present and the procedure for properly absenting himself at other times, Townsel said "I'm fixing to start being disruptive from here on out. You can put a gag on me. I'm not having this cat represent me. I'm not going quiet." 3RP 15. He further commented that counsel had "not even looked at the charges this cat is bringing against me, and if he would

have looked at the booking pictures, he would have known it wasn't me.[4] How is this effective counsel? How is it effective counsel? Come on. You know that it is not. This guy's overworked, and he can't do his job, not representing me. And that seems like it's a conflict of interest, with no doubt." 3RP 16. Townsel said he was going to be disruptive if forced to attend the trial. 3RP 22. He then started being disruptive, which the court found tactical and purposeful. 3RP 25-27. Townsel was escorted out of the courtroom. 3RP 26.

The prosecutor wanted Townsel to be present when the jury was sworn in. 3RP 28. Defense counsel, anticipating further disruptive behavior, did not think it was necessary to inject prejudice into the case in that manner. 3RP 32-33. Counsel reiterated there was a complete breakdown in communication between himself and Townsel. 3RP 33. Townsel had formed an attitude that there was something amiss in what counsel was doing. 3RP 33. As of the day before, counsel was able to get Townsel to answer questions. 3RP 33. It had now reached the point where Townsel was not listening to anything counsel said to him. 3RP 33.

Counsel moved to substitute counsel. 3RP 33-34. The court denied the motion for new counsel, finding Townsel had "engaged in

[4] This was in apparent reference to the criminal history alleged by the State, which was relevant to the charged domestic violence aggravator. 3RP 17-18.

tactical -- intentional tactical misconduct, designed to obtain what he wants. It's inappropriate under any measure." 3RP 36.

b. The Standard Of Review And Requisite Factors In Determining Whether Trial Court Abused Its Discretion.

A trial court has the discretion to grant or deny a motion for substitution of counsel. Stenson, 142 Wn.2d at 733. Constitutional considerations, however, provide a check on the exercise of this discretion. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002). The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel. Bland v. Cal. Dep't of Corrections, 20 F.3d 1469, 1475 (9th Cir. 1994), overruled on other grounds by Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000). In reviewing a trial court's refusal to appoint new counsel for error, three factors are considered: (1) the adequacy of the trial court's inquiry; (2) the timeliness of the motion; and (3) the extent of the conflict. Stenson, 142 Wn.2d at 724 (adopting test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

c. Extent Of Inquiry

The court failed to conduct a sufficient inquiry into Townsel's request for new counsel. Before ruling on a motion to substitute counsel, the court must "examine both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on

the representation the client actually receives." Stenson, 142 Wn.2d at 723-24. An adequate inquiry "must include a full airing of the concerns (which may be done in camera) and a meaningful inquiry by the trial court." State v. Cross, 156 Wn.2d 580, 610, 132 P.3d 80 (2006). The court's inquiry should be such "as might ease the defendant's dissatisfaction, distrust, and concern." United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001). The inquiry must also provide a "sufficient basis for reaching an informed decision." Adelzo-Gonzalez, 268 F.3d at 777 (quoting United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986)). With this goal in mind, the trial court should question the attorney and defendant "privately and in depth" about the extent of the conflict. Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160).

Here, the court's inquiry was insufficiently searching. As a result, the court was not in a position to make an informed decision on the matter. The court did not ask Townsel any questions regarding the basis for his complaints about his attorney. 2RP 7-11. The court gave counsel an opportunity to speak, but counsel declined to make any substantive response and the court did not ask him any questions. 2RP 7.

Meanwhile, what Townsel did say took place in open court with the prosecutor present. The court did not question Townsel and his attorney in private. This was inappropriate because neither a defendant

nor defense counsel are able to speak candidly and thereby give the requisite "full airing" of concerns when to do so might violate attorney-client confidentiality or allow the prosecutor to obtain information that may later be used against the accused at trial. See State v. Thompson, 169 Wn. App. 436, 462, 290 P.3d 996 (2012) (duty of inquiry satisfied where three judges each held at least one ex parte hearing with the prosecutor absent, to allow defendant and attorney "to fully articulate the extent of their conflict and the breakdown in communication."), review denied, 176 Wn.2d 1023, 299 P.3d 1172 (2013); Hamilton v. Ford, 969 F.2d 1006, 1012-13 (11th Cir. 1992) (trial court inadequately investigated possibility of conflict by questioning defense counsel in open court, where in order to adequately respond counsel would need to disclose client confidences and breach attorney/client confidentiality).

Without asking any questions about the claimed conflict, the court believed there was no showing of a conflict warranting further action. 2RP 9. It seized upon Townsel's inarticulate statement that counsel had never seen him as false, although Townsel clarified he meant that counsel had not kept some scheduled appointments to speak with him. 2RP 10-11. The court also pointed out the pre-trial briefing showed counsel had actively investigated the case and interviewed witnesses. 2RP 10-11. But there were no questions directed at whether the witnesses counsel had

interviewed included the witnesses that Townsel believed to be important to his defense. 2RP 5-6.

"[A] conflict over strategy is not the same thing as a conflict of interest." Cross, 156 Wn.2d at 607. But ineffective assistance of counsel is not a legitimate trial strategy. Counsel is constitutionally deficient when he fails to conduct appropriate investigations to determine what matters of defense are available, such as by failing to be adequately acquainted with the facts of the case by interviewing witnesses and in failing to subpoenaing them. State v. Jury, 19 Wn. App. 256, 263-64, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978).

"A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom." People v. Marsden, 2 Cal.3d 118, 123, 465 P.2d 44 (Cal. 1970). When inadequate representation is alleged, such issues upon which inquiry must focus include "whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from

inadequate preparation rather than from unwise choice of trial tactics and strategy." Marsden, 2 Cal.3d at 123-24 (quoting Brubaker v. Dickson, 310 F.2d 30, 32 (9th Cir. 1962)).

To get to the bottom of things, the trial court needed to question Townsel and defense counsel in private, outside of the presence of the prosecutor. Such inquiry should have included the whether counsel had adequately investigated the case in relation to the witnesses Townsel believed were important to his case. Marsden, 2 Cal.3d at 123-24.

The court further failed to follow up on Townsel's complaint about not receiving the entire discovery or having an opportunity to go over the evidence that could be used against him. 2RP 5, 7. These are legitimate concerns worthy of adequate follow up. Cf. Thompson, 169 Wn. App. at 460-61 (court did not err in denying motion for new counsel where defendant complained discovery was not provided to him because discovery was in fact provided). Townsel also claimed he was not even the person involved in several of the previous criminal cases that were apparently relevant to the alleged aggravators, and that anyone looking at the booking photos could see it. 2RP 5; 3RP 16. This concern was ignored. Townsel was worried that he did not "even know what the defense was." 2RP 6. This raises a red flag about the extent of communication between Townsel and his attorney, but again the court

made no inquiry on the point. The court erred in failing to conduct an adequate inquiry.

d. Timeliness

An untimely motion for new counsel weighs against finding error in its denial. Stenson, 142 Wn.2d at 732. Judges have broad latitude to deny a motion for substitution of counsel on the eve of trial when the request would require a continuance. Nguyen, 262 F.3d at 1003. This discretion, however, must be properly balanced against the defendant's Sixth Amendment right to counsel. Id. at 1003, 1004. The court did not specify untimeliness as a factor in denying Townsel's request for new counsel. Further, the fact that the jury pool was scheduled for selection one day after Townsel made it clear he wanted a new attorney does not automatically outweigh Townsel's Sixth Amendment right. Id. at 1004.

In assessing timeliness, it is appropriate for the reviewing court to look at whether "the trial judge considered 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." Id. at 1005. The prosecutor complained a delay in the trial would inconvenience some of the State's witnesses. 3RP 36. But the court made no inquiry into the length of time needed for a new attorney to prepare or why the motion to substitute counsel was not made earlier. The

court erred in failing to balance the timeliness of the motion for new counsel against Townsel's constitutional right to counsel.

e. Extent Of Conflict

The third factor to consider is the extent of the conflict between defendant and counsel. Stenson, 142 Wn.2d at 723-24. Where, as here, inquiry into the extent of the conflict is inadequate, there is no way for the reviewing court to fairly determine whether proper grounds existed to justify discharge of counsel. Schell v. Witek, 218 F.3d 1017, 1027 (9th Cir. 2000); Bland, 20 F.3d at 1477.

A simple loss of trust in counsel is generally insufficient reason to appoint new counsel, but substitution is required where that loss of trust stems from an irreconcilable conflict. Varga, 151 Wn.2d at 200. Mere lack of accord is insufficient, but refusal to substitute counsel where there is a complete collapse in the attorney-client relationship violates the defendant's right to counsel. Cross, 156 Wn.2d at 606.

"Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense." Nguyen, 262 F.3d at 1003. "Similarly, a defendant is denied his Sixth Amendment right to counsel when he is 'forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.'"

Id. at 1003-04 (quoting Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970)). An irreconcilable conflict exists where there is a "serious breakdown in communications." Nguyen, 262 F.3d at 1003.

There was a serious breakdown in communication here. Counsel recognized it. Townsel refused to speak with his attorney. 3RP 8, 33. In denying assigned counsel's motion to assign a new attorney based on a breakdown in communication, the court found Townsel's behavior was deliberatively disruptive. 3RP 36. The court lumped Townsel's disruptive courtroom behavior with his refusal to communicate with his attorney, but a refusal to communicate with an attorney does not disrupt courtroom proceedings. Townsel became disruptive on June 20 after the court dismissed his concerns about his assigned attorney, but the breakdown in communication did not materialize from thin air on June 20. Townsel did not "even know what the defense was" heading into June 20. 2RP 6. Townsel's refusal to communicate cannot be fairly described as a deliberate tactic to disrupt the proceedings, but was rather the result of the court refusing to do anything about Townsel's concerns that his assigned counsel was or was about to provide ineffective assistance.

Courts have recognized a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorney. Thompson, 169

Wn. App. at 457-58; State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007), review denied, 164 Wn.2d 1015, 195 P.3d 88 (2008). Such a refusal is insufficient in and of itself to constitute an irreconcilable conflict. Schaller, 143 Wn. App. at 271.

But here, Townsel's refusal to communicate was born out of frustration with the court's lack of adequate inquiry into his concerns. When addressing the extent of conflict, the reviewing court examines the extent and nature of the breakdown in the relationship and its effect on the representation actually presented. Stenson, 142 Wn.2d at 724. An adequate inquiry conducted by the trial court, by augmenting the record on appeal, makes it possible for the reviewing court to fairly evaluate the extent of the conflict. Schell, 218 F.3d at 1027. "Before the [trial] court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a sufficient basis for reaching an informed decision." United States v. D'Amore, 56 F.3d 1202, 1205 (9th Cir. 1995). The trial court's inquiry here was inadequate because it did not fully inform itself of the extent of the conflict.

f. The Remedy Is Reversal Of The Convictions Or, In The Alternative, Remand For An Evidentiary Hearing.

The erroneous denial of a motion to substitute counsel requires reversal. D'Amore, 56 F.3d at 1205 at 1207; Nguyen, 262 F.3d at 1005;

Moore, 159 F.3d at 1161. In the event this Court declines to reverse the convictions, the alternative remedy is remand for an evidentiary hearing to determine (1) the nature and extent of the conflict between Townsel and his attorney, and (2) whether that conflict deprived Townsel of his constitutional right to assistance of counsel. Schell, 218 F.3d at 1027; RAP 12.2 ("The appellate court 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.").

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

Both the Fifth Amendment of the United States Constitution and Article 1, section 9 of the Washington Constitution prohibit double jeopardy. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). Townsel's convictions for both first degree kidnapping and first degree assault violate the prohibition against double jeopardy. Townsel may raise this double jeopardy challenge for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). Double jeopardy claims are reviewed de novo. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

One of the purposes of the double jeopardy clause is to prevent multiple punishments for the same offense. State v. Freeman, 153 Wn.2d

765, 770, 108 P.3d 753 (2005). Where a defendant's act supports charges under two criminal statutes, a court must determine whether, in light of legislative intent, the charged crimes constitute the same offense. In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Courts first analyze whether the plain language of the statutes explicitly authorizes multiple punishment for the same conduct. Orange, 152 Wn.2d at 816. When it does not, the inquiry follows the "same evidence" test, also known as the "same elements," "same facts" or Blockburger[5] test. Id. at 816; Hughes, 166 Wn.2d at 682 n.6.

Under this test, "where *the same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offense or only one, is whether each provision *requires proof of a fact* which the other does not." Freeman, 153 Wn.2d at 772 (quoting Orange, 152 Wn.2d at 817) (internal quotation marks omitted). Under Blockburger, it is presumed the legislature did not intend to punish criminal conduct twice when "*the evidence* required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other." Freeman, 153 Wn.2d at 776 (quoting Orange, 152 Wn.2d at 820). "Accordingly, if the crimes, as

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

charged and proved, are the same in law and in fact, they may not be punished separately absent clear legislative intent to the contrary." Freeman, 153 Wn.2d at 777.

First degree kidnapping required an intentional abduction of O'Keefe with intent to "inflict bodily injury" or "inflict extreme mental distress." CP 33, 108; RCW 9A.40.020 (1)(c), (d). To "abduct" means to "restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1). The term "deadly force" is not defined in chapter 9A.40 RCW, but has been construed as a force or means capable of causing death or serious injury. State v. Majors, 82 Wn. App. 843, 846-47, 919 P.2d 1258 (1996), review denied, 130 Wn.2d 1024, 930 P.2d 1230 (1997). "Restrain," meanwhile, means to "restrict a person's movements without consent." RCW 9A.40.010(6). Restraint is "'without consent' if it is accomplished by physical force, intimidation, or deception." RCW 9A.40.010(6).

First degree assault requires the assault be committed with "intent to inflict great bodily harm" and "by a force or means likely to produce great bodily harm or death." CP 34, 119; RCW 9A.36.011(1)(a). "Great bodily harm" means "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which

causes a significant permanent loss or impairment of the function of any bodily part or organ." CP 118; RCW 9A.04.110(4)(c).

"Intent to inflict great bodily harm" in the first degree assault offense will always satisfy the "intent to inflict bodily injury" prong of the first degree kidnapping offense. Both require intent to inflict harm, with "bodily injury" subsumed within "great bodily harm."

Both the assault and the restraint are accomplished by means of force. Use of "a force or means likely to produce great bodily harm or death" in the first degree assault offense will always satisfy restraint through use of "deadly force" in the kidnapping offense. Townsel could not have restricted O'Keefe's movements through the use of deadly force, thereby committing the crime of kidnapping, without also committing an assault by a force or means likely to produce great bodily harm or death. Conversely, the assault against O'Keefe by a force or means likely to produce great bodily harm or death also formed a part of the kidnapping offense by restricting her movements through the use of deadly force.

The evidence required to support a conviction for first degree kidnapping would have been sufficient to warrant a conviction for first degree assault or vice-versa. Absent clear legislative intent to the contrary, the constitutional prohibition against double jeopardy is violated when "the evidence required to support a conviction [of one crime] would have

been sufficient to warrant a conviction upon the other." Freeman, 153 Wn.2d at 772; see Orange, 152 Wn.2d at 820 ("Under the Blockburger test, the crimes of first degree attempted murder (by taking the 'substantial step' of shooting at Walker) and first degree assault (committed with a firearm) were the same in fact and in law. The two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault.").

State v. Taylor, which held second degree assault and second degree kidnapping did not violate double jeopardy, does not control here. State v. Taylor, 90 Wn. App. 312, 318-19, 950 P.2d 526 (1998). The elements of first degree assault are different than the elements of second degree assault at issue in Taylor. See Taylor, 90 Wn. App. at 318 (second degree assault charged as assault with deadly weapon, with assault accomplished by "putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm").

Moreover, Taylor reached its holding by comparing the elements of those two crimes in the abstract, positing theoretical ways in which one could commit one offense without also committing the other. Id. at 318-19. It is now established that such an analysis is incorrect. Courts should not, as in Taylor, base a double jeopardy analysis on ways that offenses

could have been charged and proven. The reviewing court considers the elements of the crimes as charged and proved, not merely as an abstract articulation of the elements. Freeman, 153 Wn.2d at 777.

As charged and proven, the first degree assault and the first degree kidnapping offenses in Townsel's case are same offense for double jeopardy purposes under the "same evidence" test. The two offenses are the same in law because both share the intent to inflict injury and both require proof of use of deadly force or its equivalent. The first degree assault does not contain a required fact that is not also found in the first degree kidnapping offense. Cf. In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 50, 776 P.2d 114 (1989) (kidnapping not same in law as robbery; kidnapping required proof of use or threatened use of deadly force, which is not an element of robbery, while robbery charge required proof of taking personal property, which is not an element of kidnapping).

The two offenses are also the same in fact. Two offenses are the same in fact if proof of one offense necessarily proves the other. Fletcher, 113 Wn.2d at 47. The evidence of first degree assault necessarily proved the first degree kidnapping 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; cf. Fletcher, 113 Wn.2d at 49 (robbery and kidnapping same in fact because they occurred simultaneously and the

same evidence would be used to prove both crimes; assault not same in fact because it occurred after kidnapping and robbery were completed and therefore different evidence would be used to prove it).

The court looks to the entire trial record when considering a double jeopardy claim, but review is rigorous and strict. Mutch, 171 Wn.2d at 664. There is a double jeopardy violation if it is not clear, after considering the evidence, arguments, and instructions, that no double jeopardy violation occurred. Id. The prosecutor's argument invited the jury to treat the kidnapping and assault as based on the same facts. The prosecutor argued the abduction/restraint element of kidnapping was proven by the use of force: "Well, the force is an easy one, right? I don't think defense is going to get up here and say there wasn't force. We've seen the injuries, maybe we've seen too much of the injuries, but we've seen them." 12RP 43. The prosecutor argued O'Keefe wanted to get away but was pulled back into the bathroom. 12RP 46-47. "[I]f she didn't want to stay, someone stopped her from leaving, and that's kidnapping, especially if you do it when you're beating her up and you keep her there to beat her up. That's kidnapping in the first degree." 12RP 50. And later: "She couldn't get out, because the defendant was beating her, and he was keeping her there to beat her, and he was keeping her somewhere but

for this coincidence with Mr. Johnson, nobody would have found her. That's kidnapping in the first degree." 12RP 52.

The State may contend the kidnapping and assault are not the same offense for double jeopardy purposes because the kidnapping continued in the bedroom after the assault in the bathroom and kitchen ended. That contention fails because, in analyzing double jeopardy, a defendant's course of conduct cannot be broken into segments in this manner. State v. Potter, 31 Wn. App. 883, 886, 645 P.2d 60 (1982). "The 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." Potter, 31 Wn. App. at 886 (quoting Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 2227, 53 L. Ed. 2d 187 (1977)).

Moreover, in addressing double jeopardy claims, the rule of lenity applies in favor of the defendant where it is unclear what evidence or act the jury relied upon to convict. Taylor, 90 Wn. App. at 317; Lindsay, 288 P.3d at 660; State v. Kier, 164 Wn.2d 798, 811-13, 194 P.3d 212 (2008); State v. DeRyke, 110 Wn. App. 815, 823-24, 41 P.3d 1225 (2002), aff'd, 149 Wn.2d 906, 73 P.3d 1000 (2003). The jury may have convicted Townsel of first degree kidnapping based on the assault that took place before the two went to the bedroom. The verdict is ambiguous as to whether the jury relied on the kidnapping that took place via the assault in

the bathroom and kitchen, or the kidnapping that continued in the bedroom after the assault ended. The rule of lenity operates in Townsel's favor. See Taylor, 90 Wn. App. at 317 (under rule of lenity, ambiguity in which act jury relied upon to convict for kidnapping would be construed in favor of defendant in considering double jeopardy claim).

There are different ways to "abduct" a person. Again, to abduct means to "restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1). The jury did not receive a special verdict instruction specifying which prong of abduction it relied upon to convict. In the absence of as special verdict, the rule of lenity requires the reviewing court to assume the jury convicted Townsel of kidnapping based on the use of deadly force aspect of abduction. DeRyke, 110 Wn. App. at 823-24.

The same goes for the two different intents upon which the jury could have convicted Townsel of kidnapping: intent to "inflict bodily injury" or "inflict extreme mental distress." CP 33, 108; RCW 9A.40.020 (1)(c), (d). No special verdict specifies which intent the jury found. Under the rule of lenity, the reviewing court must assume the jury found the intent to inflict bodily injury.

The remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense, i.e., the conviction that carries the shorter sentence and lesser seriousness level. Hughes, 166 Wn.2d at 686 n.13. The lesser offense here is the first degree kidnapping because first degree assault carries a longer confinement term and has a higher seriousness level. See RCW 9.94A.515 (first degree assault has seriousness level of XII, first degree kidnapping has seriousness level of X); RCW 9.94A.510 (sentencing grid).

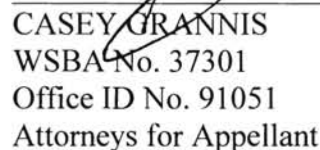
D. CONCLUSION

For the reasons set forth, 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 22nd day of October 2013

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 22ND DAY OF OCTOBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED 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 22ND DAY OF OCTOBER, 2013.

x Patrick Mayovsky