69516-9

69516-9

NO. 69516-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JERRY UVARIUS TOWNSEL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE DEAN LUM

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court abuse its discretion in denying Townsel's motion to substitute counsel made on the eve of trial?

2. Did the prosecutor commit such egregious misconduct in closing that this Court should excuse Townsel's failure to object and should reverse his conviction?

3. Do Townsel's convictions for first-degree assault and first-degree kidnapping violate double jeopardy?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Jerry Townsel, and co-defendant, Deryl Jones, were charged with a number of criminal acts committed against RO, a mentally-ill, drug-addicted, homeless young woman. CP 33-37. In count I, both defendants were charged with first-degree kidnapping with the aggravating factors that the crime was a crime of domestic violence, constituted an ongoing pattern of abuse and was committed with deliberate cruelty. CP 33. Townsel was charged individually with first-degree assault, felony harassment, and second-degree rape, with aggravating factors. CP 34-36.

The defendants were tried by jury in a joint trial. The jury acquitted Jones. CP 254-55. The jury found Townsel guilty of first-degree kidnapping and first-degree assault, while rejecting all other charges,

including lesser included offenses of second-degree kidnaping, unlawful imprisonment and second-degree assault. CP 159-61, 235-39, 288-94.

With nine prior felony convictions, Townsel received a standard range sentence of 386 months. CP 168-78.

2. SUBSTANTIVE FACTS

In November of 2011, the house located at 1812 12th Avenue in Seattle was vacant and awaiting being turned into apartments. 6/26/12 RP 95-96. On November 4, the owner of the property, Doctor Kelton Johnson, was informed that individuals had been observed entering the home. Id. at 101. Johnson confronted Jones outside the home and told him that he had to leave the premises. Id. at 101-02. Johnson then entered the residence and found the place trashed, with blood everywhere. Id. at 102-03, 109. On the floor in one of the bedrooms Johnson found Townsel and RO wrapped in a sleeping bag together on the floor. Id. at 104. RO had been badly beaten, with both eyes swollen shut and her face battered. Id. at 105. Johnson left the residence and called 911. Id. at 106.

RO was 20 years old at the time of this incident. 7/3/12 RP 12, 31. She had led a difficult life beginning with having never met her father, to living out of a car at the age of six with her crack-addicted mother and three siblings. Id. at 13-15. RO began using drugs at age 13 and gravitated quickly to everyday meth use. Id. at 16-17. By the time she turned 18, RO

was living on the streets. Id. at 18, 20. She had twice been convicted of theft and false reporting. Id. at 20-21, 23-24.

RO suffers from schizophrenia, although whether it is caused by her extensive drug use or stems from separate mental health reasons, is unknown. Id. at 24-25. RO testified that sometimes she would have audio hallucinations when she was high on meth, hallucinations that at the time would seem real. Id. at 25-26. On one occasion, on October 27, 2011, RO was at a municipal court when she heard a voice that she thought was her little brother. Id. at 24, 27. The voice told her to go into the men's bathroom and get something out of the trash. Id. at 25. Officers had to restrain her. 7/5/12 RP 91-94, 100-04.

During the month of October, RO was living on the streets. 7/3/12 RP 28-29. This is when she first met the 43-year-old defendant, Jerry Townsel. 7/5/12 RP 107. She was sitting on a park bench when Townsel approached her and asked if she had a pipe. 7/3/12 RP 29. Ultimately, RO followed Townsel to a motel room where they smoked drugs and had sex. Id. at 29-30. This became a regular occurrence, with RO testifying that she really liked Townsel, that he was funny, muscular and she thought that he would protect her. Id. at 30-31. She believed they were in a relationship. Id. at 32. The relationship, however, was not free of violence.

One day RO and Townsel were riding a bus to a motel where Townsel had a room. Id. at 34. RO recognized a friend of hers and talked with him while on the bus. Id. at 35-36. When RO and Townsel got off the bus, Townsel slugged RO in the face, drug her behind a fence and threatened to could kill her. Id. at 36. Townsel called RO stupid and then took her across the street to his motel room.[1] Id. at 37.

The next day, RO went to Harborview to have her jaw checked out. Id. at 39. Surveillance video confirmed that she was at Harborview on November 2 at approximately 2:45 p.m. Id. at 41. Townsel ordered RO not to tell anyone that he had assaulted her, RO complied. Id. at 42. After two hours of waiting, RO left the hospital met up with Jones and Townsel. Id. at 44-46. RO had met Jones through Townsel. Id. at 32-33. Jones then drove the three of them to the vacant house on 12th Avenue. Id. at 47.

Once at the house, the three of them started smoking drugs in the bedroom. Id. at 50. RO remembers listening to the radio and rapping along with the songs while making up her own words. Id. at 51. Then for no apparent reason, Townsel ordered RO to go into the bathroom. Id. at 54. Townsel followed RO into the bathroom where he accused her of trying to kill him. Id. at 54. When RO proclaimed that she had no idea what he was talking about, Townsel said that he would have to kill her. Id. at 54.

[1] Later, RO was able to show the detective the exact location where the assault occurred, the bus stop, with the nearby fence, and the motel room. 7/2/12 RP 61-62, 65.

RO remembers being scared and then deciding to put on some makeup and hairspray with the idea of leaving a trace of her behind if she was murdered. Id. at 55. RO pled with Townsel to let her go but he refused, assaulting her in the process. Id. at 56. Townsel then stopped to do a line of meth, after which he had RO do some meth. Id. at 56. Townsel then ordered RO to turn around, pull down her pants and bend over. Id. at 57-58. RO complied. Townsel put his penis inside her vagina. Id. at 59. Townsel ultimately ejaculated and stopped. Id. at 59, 61.

Shortly thereafter, Townsel assaulted RO again, punching her in the face multiple times. Id. at 61. At one point, Townsel tried to gouge her eyes with his fingers while she was pinned to the floor.[2] Id. at 61. At one point, RO was able to crawl out of the bathroom, only to have Townsel drag her back to the bathroom. Id. at 62, 67. RO testified that her jaw was "just hanging there" after being hit so many times. Id. at 63.[3]

Back in the bathroom, the assault continued. At one point, the mirror was broken by RO's elbow. Id. at 68. RO attempted to stab Townsel with a shard of glass but succeeded only in cutting her own finger. Id. at 72.

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[2] RO suffered an orbital blowout fracture—the shattering of the orbital bones that hold the eyes in place, a serious condition that can cause blindness. 7/2/12 RP 66-67.

[3] RO was correct. RO suffered complete through and through fractures to both sides of her jaw, leaving nothing but supportive tissue holding her jaw in place. 7/2/13 RP 175.

At another point (RO was not clear as to the sequence of events), Townsel told RO that the only way out was for her to strangle him. Id. at 69. Townsel was sitting on the floor in the bathroom at the time. Id. at 69. RO recalls wrapping a pair of pants around Townsel's neck but being unable to strangle him.[4] Id. at 70.

At another point, RO was lying prone on the floor when Townsel bit her on the arm removing a large chunk of tissue.[5] Id. at 73. RO remembers screaming loudly, but also to just giving up.[6] Id. at 73. RO recalls losing consciousness and then coming to with Townsel "kind of gnawing" at her head.[7] Id. at 73. Townsel told her that she had died and that he had brought her back to life. Id. at 143-44.

Townsel also made RO climb into the bathtub, fill up a cup of bloody water and give it to him.[8] Id. at 73-74. Townsel drank the water.

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[4] A bloody pair of pants was recovered from the bathroom. 6/27/12 RP 170.

[5] Doctors documented that a chunk of flesh had been removed from RO's forearm, exposing her tendons. 6/26/12 RP 130. The surgeon who repaired the wound did not opine as to the cause of the injury. Id. at 125. Medical Examiner Richard Harruff, viewing photographs of the injury, testified that he could not observe wound characteristics that he would expect to find if the injury had been caused by a bite. 7/2/13 RP 160.

[6] Although she did not call the police, a neighbor heard voices, screams and thumping throughout the night coming from the house. 6/28/12 RP 108-16. The screams, the neighbor testified, were from a woman, as were statements heard in the morning saying "I've got to get out of here," and "never mind, never mind I'll stay." Id. at 111-13.

[7] A defect/laceration on RO's scalp was documented, but photographs were not of sufficient detail for Doctor Harruff to opine as to the cause. 7/2/13 RP 158.

[8] When police arrived, the tub was full of bloody water and the cup used by Townsel was found in the bathroom. 6/27/12 RP 164, 169 173; 7/3/12 RP 77.

Id. at 74. RO admitted that at the time, she believed Townsel was a vampire. Id. at 78.

During the assault, Townsel ripped RO's necklace off. Id. at 82. On the necklace was a crucifix. Id. at 80. In part because she wanted to go to heaven and in part because she did not want Townsel to steal it, RO hid the crucifix in her vagina.[9] Id. at 81-83. Many hours later, Townsel took RO into the bedroom and laid her in the corner. Id. at 75, 84.

RO believed she had slept for a full day when Townsel had Jones go to the store for some groceries – including some Ensure for RO.[10] Id. at 84, 88. When the sun came up, Townsel instructed RO to wipe up the blood. Id. at 89. Townsel then had RO lay down on the sleeping bag, which is where the property owner found her. Id. at 93, 96. While lying on the sleeping bag, Townsel told RO that he had AIDS. Id. at 96.

RO admitted to being medicated at the time of trial for her mental health issues. Id. at 100. She testified that she had gone to treatment and was drug free. Id. at 99. In regards to her injuries, she said that her mouth and lips were crooked, her chin numb, her vision blurry at times, and psychologically, she had PTSD and sometimes believed that random people were out to kill her. Id. at 98-101, 108.

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[9] Detectives found the crucifix in the bathtub. 6/28/12 RP 72.

[10] A receipt and Ensure were found in the home 6/27/12 RP 162; 6/28/12 RP 56-57.

RO was interviewed at least four times, including an interview by detectives right after the incident while she was still in the ER and heavily medicated. Id. at 140, 168. She admitted that during this first interview, she told the detectives things that she did not know if they were true, including that there were dead bodies in Seattle, that Townsel was a member of the Taliban, that she heard other voices in the house and thought they were going to sacrifice her, and that Townsel took her to a cave on Capitol Hill that had bloody buckets.[11] Id. at 149-52, 174.

When RO was transported to Harborview, it was noted that her body was bruised and battered literally from head to toe.[12] 6/27/12 RP 122, 129-30, 138-45. It was difficult for hospital staff to document all of her injuries because of the sheer magnitude of the damage.[13] Id. at 140. Her orbital bone fractures, nasal facture, facial fractures and crushed jaw all had to be surgically repaired, as did the lacerations with exposed severed tendons on her forearm and fingers. 6/26/12 RP 119, 124, 129-30; 7/2/12 RP 166-76.

After surgery, RO was transferred to the psychiatric unit at Harborview where she was described as being in bad shape. 6/27/12 RP 14.

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[11] Detective Wright testified that there were times during the interview (recorded and played for the jury), where RO was not fully conscious, times when she would mumble inaudibly and times when she would just fall asleep. 7/5/12 RP 50-53; Exhibit 57.

[12] Many of her hand wounds were consistent with defensive wounds. 7/2/12 RP 159-60.

[13] One of the patrol officers testified that she remembered the case very well because she had never seen anybody more beat up than RO. 7/2/12 RP 134.

Her treating doctor noted that in August of 2010, RO had been involuntarily committed after a possible suicide attempt. Id. at 16. RO was diagnosed at that time with amphetamine addition and was having psychotic symptoms that can distort perceptions and can cause auditory and visual hallucinations. Id. at 16-18. Meth users, she added, can exhibit symptoms similar to symptoms exhibited by persons with schizophrenia, and in some cases the symptoms persist even after the drug use has stopped. Id. at 19.

While at Harborview, RO developed an insight into her psychosis. Id. at 22, 27. She expressed fear of being called a snitch, but said that her boyfriend who assaulted her was in jail. Id. at 39, 46. RO did have one auditory hallucination where she believed she heard a man's voice talking to her through a microphone. Id. at 98. Of note, a toy megaphone -- wherein a person can flip a switch and change their voice to sound like an alien or a monster, was found in the bathroom of the house. 6/28/12 RP 31-32.

A rape examination was performed on RO. 6/27/12 RP 131-34. DNA testing was done on genetic material found under her fingernails and on a vaginal swab – with the results matching Townsel. 6/28/12 RP 96, 100-02. Spermatozoa were observed in the vaginal swab. Id. at 98.

When Townsel was arrested, he had some superficial wounds on his face, arms and chest. 7/2/12 RP 26-27. The injuries were not bleeding and

did not require medical attention. Id. at 28. Doctor Harruff opined that some of the injuries appeared to have been self-inflicted. Id. at 147, 153.

Townsel testified in his own defense. Townsel said that in November of 2011 he was homeless, squatting in vacant houses, or staying in motel rooms when he had the money. 7/5/12 RP 108, 110. A daily drug user, Townsel said his drug of choice was heroin. Id. at 108, 111.

Townsel testified that sometime in October, he and a few friends were at a park and decided to take the bus to his motel room to get high. Id. at 113. RO tagged along with them. Id. at 113. Townsel thought RO was a friend of one of his friends, but he found out that she was just following them. Id. at 113. Despite her acting "wild" on the bus, when RO asked if she could hang out with them, Townsel agreed. Id. at 114.

The group then got high in Townsel's motel room. Id. at 114-16. After his friends left, Townsel and RO had sex. Id. at 115-16. Townsel claimed that the next time he saw RO was three to four weeks later when RO hurt her jaw. Id. at 118; 7/9/12 RP 5-9. Townsel claimed RO had been in a fight with some "bitches" and hurt her jaw. 7/9/12 RP 9-10. They had sex that night at a motel and then went to Harborview the next day. Id. at 10-11. Later that evening, they hooked up with Jones. Id. at 12-13.

Townsel said that Jones told him he had a place where they could go and drove them to the vacant house where they all smoked drugs. Id. at

13-16. Asked if RO started rapping, Townsel said no, that she just started saying "her pussy was hot," over and over. Id. at 16. Townsel got up to leave the room because he thought RO was hitting on Jones, but RO followed him into the bathroom. Id.

The two smoked drugs in the bathroom and Townsel said he was pretty high because he also had a fentanyl patch on his shoulder. Id. at 19-20. Townsel said that RO started trippin', saying that someone in the house was going to get them and that the house was a blood bath for witches. Id. at 21. Townsel said that he started nodding off because of the drugs. Id. at 22. RO then told him that there was a "hit" out for him. Id. at 22. He then nodded off while sitting on the toilet. Id. at 22-23.

When Townsel came to, he said a person he thought was Jones was on his back and strangling him with a cord. Id. at 24, 33. Struggling to get the cord off, he backed into a wall and heard a grunt that sounded like RO, who was now saying "you're going to die mother fucker." Id. at 24. After a struggle in which Townsel said he tackled RO, he claimed he nodded out again because of the drugs. Id. at 25. The next thing he knew, Jones was telling him they had to get up and leave the house. Id. at 25. He said he was unaware that RO had been hurt. Id. at 27.

Townsel said he never punched or hit RO. Id. at 28-29. He said that it was possible he head-butted her when he was trying to get the cord off his

neck. Id. at 29. He denied having sex with RO, claiming that it was not possible when he was on heroin. Id. at 31. He testified that he tried to masturbate in the bathroom but it did not work. Id.

Townsel's tone and testimony changed dramatically during cross-examination. Townsel admitted that he gave a taped statement to Detective Wright and that at that time he felt it was important to tell the truth and to get his side of the story out. Id. at 34-35. However, when he was impeached with his prior statement, Townsel claimed that just before the police arrived, he had stuffed all his heroin up his nose and therefore many of the things had said were not true. Id. at 36, 54, 67, 72.

Contrary to his testimony, Townsel admitted that he told the detective that RO and he used to hang out together. Id. at 50. When asked about the fact that he did not tell the detective that he could not have sex while on heroin, and that he told the defendant that he successfully masturbated in the bathroom, Townsel responded that he was on drugs when he gave the statement and that "you're not looking for justice, you're looking for a win." Id. at 67, 71-72. Townsel also admit that he never told the detective that RO was saying that her "pussy was hot." Id. at 75.

Townsel was further confronted with a host of contradictions from the story he told Detective Wright and the story he told the jury, including, among other things, that he had stayed at the house three or four other times

and that a guy named Greg had taken him there, versus claiming he had never been to the house before and that it was Jones who took him there (Id. at 75), that he was taking a nap when RO attacked him and that it occurred in the kitchen or dining room, not the bathroom (Id. at 93, 95-96, 107), that he was strangled with a cord versus a shirt (Id. at 97-98), and that RO was twice as strong as him and had drug him across the floor (Id. at 102, 105).

Townsel was then confronted with the fact that he testified that he had not even looked at RO when he woke up and the landlord had come over, but that he had told Detective Wright that when he saw her face in the morning, it was so messed up that he had tried to get her to go to the hospital. Id. at 123, 125-26. At this point, Townsel lost control, ranting:

> I mean, you talk about my integrity. Let's talk about yours also. I mean, we know that you'll do everything that you can to get a win, right? I mean, right? You knowingly violated my constitutional rights, you know protocol, but yet you went around it. I mean, let's go ahead and get for real man. You got to understand that this is my life and I know that you're willing to do whatever you can to convict me because it doesn't matter whether -- who's right or wrong. You just need the win on your record. That's how it is man. You know.

Id. at 127-28. The prosecutor returned to questioning Townsel about his prior statement, to which Townsel then proclaimed that RO had been injured fighting six girls and that she was blaming it on him. Id. at 131. The following then 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 all 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.

A: Oh, come on, man. Come on. You just said seven of them, so that should be easy, if there's 1,200 of them, show me the seven of them, that I've changed the story seven times.

Q: Mr. Townsel –

A: Can you show me that, though? Show the jury.

Q: I'm showing everybody right now.

A: Well, right now you're not showing nothing, besides what was started on this day and what was started with my attorney. Come on, man.

Q: You're right, I'm not showing anything, you are.

A: You're not showing anything, and what I'm showing is that you're not proving it, man. You need to show them because I don't know. What I'm saying is show me, because I don't know. I was at -- high, okay, so I didn't even know -- I hadn't even realized that I had gave a statement until my attorney told me when I did come to. So why don't you show me and show the jury, so I know the seven different statements I made. I would like to know.

Q: Let's keep going.

A: Come on, man. This is bogus. I'm trying to figure it out. I know I probably said a whole lot of things, but what you're [saying] is seven different things, so can you please at least inform me, show me where they're at? You said you could. So show me and the jury, please.

Q: Stick around for closing and you'll see them all, okay?

Id. at 132-33.[14] Townsel concluded by claiming that RO was looking to kill him and get paid by the drugged-out gay community on Capitol Hill that had all the meth tied up. Id. at RP 139-40.

In rebuttal, the State played the DVD of the Townsel's police interview. Id. at 166, 168; Exhibit 66. Jones did not testify. Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED TOWNSEL'S REQUEST TO SUBSTITUTE COUNSEL.

Townsel contends that the trial court abused its discretion in denying his request to substitute counsel. Townsel's claim is without merit. Townsel never articulated an adequate reason necessitating that he be appointed new counsel, a request that was not made until the eve of trial.

a. The Relevant Facts.

Charges were filed on November 9, 2011. CP 1-9. On November 14, 2011, longtime defense attorney Mark Flora entered a notice of

[14] This exchange will be referred to in section C 2 under Townsel's claim that the prosecutor was improperly expressing his personal opinion.

appearance. CP 256-57.[15] As can be seen by the number of motions filed over the next eight months, Flora worked diligently in preparing for trial and attempted to interview all of the State's witnesses. CP 38-44, 62-64, 191-92, 258-74, 277-78. Trial was set for June 19, 2012. CP 323.

Upon his arrest, Townsel told detectives that he had acted in self-defense and that much of the blood found inside the house was his. CP 279-87. Expecting a self-defense claim at trial, the prosecutor, Tomás Gahan, asked an SPD detective to obtain a search warrant in order to obtain Townsel's King County Jail medical records that would have documented whether Townsel had any physical injuries at the time he was booked. Id.

When the medical records were obtained, Gahan began looking through them and quickly recognized that the records contained materials beyond the scope of what he was looking for and legally entitled, specifically, the records contained mental health information about Townsel. CP 17, 279-87. The extraneous portion of the medical records was provided by the jail because the language in the warrant was overly broad. CP 19-20. The scope of the warrant should have been limited to documentation of the physical injuries that existed at the time Townsel was booked.

When Gahan recognized the problem, he stopped reading the records and handed them over to Senior Deputy Prosecutor Susan Storey of the

[15] Flora has more than 25 years of experience. See https://www.mywsba.org/LawyerDirectory/LawyerProfile.

Special Operations Unit, who had no involvement in Townsel's case. CP 279-87. Storey notified Flora of the situation. Id. Flora secured a medical release from Townsel and obtained the records. CP 17.

There is no indication that those portions of the medical records that would have fallen under the overbroad portion of the warrant played any role in the case. Still, the fact that the State initially obtained the records apparently infuriated Townsel. Townsel wrote a letter to the Honorable Judge Ronald Kessler complaining about both the prosecutor and Flora. CP 28-31. The letter was postmarked June 5, 2012. Id. The court provided the parties with a copy of the letter on June 7, 2012. Id.

In his letter, Townsel asserted that Flora had failed to inform him that the State had obtained the records by way of a "subpoena" and that Flora had failed to object. CP 30. He claimed this created an "ongoing conflict" that could only be remedied by appointing new counsel. Id.

Judge Kessler heard Townsel's motion to substitute counsel on the morning of June 11, 2012. Townsel relied on his letter as the sole basis for his motion. 6/11/12 (morning) RP 3. Judge Kessler specifically asked Townsel if there was anything else he wanted to add beyond what was stated in the letter. Townsel responded, "[t]hat's it." Id.

The State explained that contrary to Townsel's belief, the records were not obtained by way of a subpoena, that they were obtained by way of

the search warrant via SPD that contained overly broad language resulting in records being provided that should not have been provided. Id. at 3-4. The State and Flora both indicated that the defense was not aware that the State was seeking to obtain the records until after they were obtained. CP 16-17, 279-87. Flora had then filed a motion to dismiss. CP 16-27. Flora's motion was to be heard that afternoon. 6/11/12 RP 5-6.

Judge Kessler recognized that contrary to what Townsel might have believed, the State's obtaining of Townsel's medical records had nothing to do with any action or inaction by Flora. Id. at 5. The court asked Townsel how his motion involved Flora, to which Townsel responded simply that "Mr. Flora knew about this and did not tell me about this until half a month down...[and] there are several other things where we're in conflict, you know. It's not working and this is my life." Id. Townsel provided nothing more. In failing to identify any actual conflict of interest, Judge Kessler denied Townsel's motion. Id.

After the court ruled, Flora told Townsel that he would see him that afternoon to hear his motion to dismiss. Id. at 5-6. Townsel said he would not appear. Id. Flora then informed the court that Townsel did not want him to go forward with his motion to dismiss. Id. at 6. Townsel added that a conspiracy was afoot, that "him [Flora] and the prosecuting attorney is buddies they going to do what – he believes everything that he says and they

make deals on what they say to each other and I don't want that." Id. at 7. Judge Kessler cautioned Townsel that if he chose not to cooperate with counsel, it would likely be to his own detriment. Id. That afternoon, Flora and Townsel appeared before the Honorable Judge Bruce Heller on Flora's motion to dismiss. 6/11/12 (afternoon) RP. The motion was withdrawn based on Townsel's insistence that the motion not be heard. Id.

On June 19, 2012, the case was assigned to the Honorable Judge Dean Lum for trial. CP 324. The first day of trial was spent on pretrial motions. 6/19/12 RP 3-36. One motion heard was Flora's motion to dismiss that was based on the State obtaining Townsel's medical records. Id. at 75-83. The court denied the motion, finding that the State had a legitimate interest and could lawfully obtain Townsel's medical records, that when the State discovered that the warrant was overly broad and that extraneous materials had been provided, the prosecutor acted appropriately in walling himself off from the future handling of the records. Id. at 84-86; CP 61. The court found there was no prejudice shown by the defense. Id.

When the parties appeared in court the next day, Townsel said that he wanted to address the court. 6/20/12 RP 2. He handed forward a document titled "Motion and Brief for a Garcia Hearing." CP 49-57. Townsel's brief cited a number of cases that discussed the right of a defendant to have conflict-free counsel. CP 51. The brief also contained

conclusory statements that Flora "faces a continued ethical dilemma in his continued representation and participation in this matter," that the conflict of interest is "well documented," and that Flora has "divided loyalties." CP 55-56. Nowhere in his motion, however, did Townsel provide any facts or indicate the nature of any alleged conflict of interest.

According to Townsel, what he sought was "to protect the record on appeal" and have the court hold a Garcia hearing to ensure that his right to conflict-free counsel was not abridged absent an informed waiver.[16] CP 57. Judge Lum told Townsel that he would hear whatever Townsel had to say. 6/20/12 RP 4. Townsel said that Flora had not given him "the rest of the discovery,"[17] had "never" come to see him, and that there was not enough time to prepare an effective defense. Id. at 5. Townsel stated that some of his alleged prior domestic violence convictions were not his, but that they

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[16] Townsel was referring to United States v. Garcia, 517 F.2d 272 (1975). Garcia involved a situation where the trial court found that defense counsel had an actual conflict of interest because counsel simultaneously represented multiple defendants and State witnesses in the same case. The trial court ordered that new counsel be appointed under the mistaken belief that the defendants had no ability to waive the right to conflict-free counsel. Of course, a defendant does this right, and thus, the case was remanded back to the trial court with instructions to determine whether the defendants wished to enter a waiver of the right to conflict-free counsel.

[17] Townsel did not specify what discovery he felt he was entitled, but by rule, a defendant has no right to obtain a copy of discovery. State v. Coe, 101 Wn.2d 772, 785, 684 P.2d 668 (1984). Discovery materials furnished to an attorney "shall remain in the exclusive custody of the attorney." CrR 4.7(h)(3); also State v. Hughes, 106 Wn.2d 176, 206, 721 P.2d 902 (1986) ("discovery material is specifically restricted to the exclusive custody of defense counsel").

had not discussed the matter.[18] Townsel then contradicted himself about not having met with Flora and stated that when Flora and he would meet, the meetings would not be fruitful because Flora was simply too busy with other cases. Id. at 6. He claimed that he was being "railroaded" and that he had a right to effective counsel. Id. at 6. Townsel reiterated that he wanted a "Garcia hearing" so that he could see all the evidence. Id. at 7.

After reading Townsel's motion and hearing what he had to say, Judge Lum indicated that there were no facts before the court. Id. at 9. The court stated that to the extent there was a motion before the court, it was denied. Id. at 10. The court found that there had been no showing that any type of evidentiary hearing was called for and no showing that Flora had any type of conflict of interest. Id. The court also indicated that Townsel's few statements were self-contradictory, for example, Townsel claiming that Flora had never come to see him, but then later describing that he was upset because the meetings had been unproductive. Id. When the court concluded its ruling, Townsel threw a fit. 6/20/12 RP 11-16.

Townsel yelled, "I don't want to do this, man. I'm not doing it. I don't want him representing me." Id. at 11. The court noted that Townsel

[18] The parties had already agreed that the alleged prior convictions would not be admitted at trial. 6/19/12 RP 10-11. Further, defense counsel Matthew Pang had entered a notice of appearance on May 31, 2012. CP 275-76. If Townsel was found guilty and if the jury returned a finding that the current convictions were domestic violence offense, in a second trial on the aggravating factors, to be handled by Pang, the admissibility of the prior convictions would have been addressed. 6/12/12 RP 9-11; 6/21/12 RP 77-78.

had left his seat with the intent of leaving the courtroom. Id. As Townsel continued his tirade, Judge Lum called for a recess to give Townsel a "chance to cool down." Id. Townsel yelled that he would not be "railroaded." Id. at 12. After a recess, the court attempted to conduct a CrR 3.5 hearing but Townsel proclaimed "I'm not going to participate with this...I'm not going to be here." Id. at 13. He said that he would refuse to participate in any court proceeding if Flora was his attorney. Id. at 14.

Before trial resumed the next day, Townsel told Flora not to communicate with him anymore. 6/21/12 RP 2, 8. He also refused to come to court. Id. at 2, 8. A "drag order" was then issued. Id. at 8.

When approached at the jail with the drag order, Townsel agreed to come to court, but he refused to dress in courtroom attire. Id. at 11. Once in the courtroom, Townsel informed the court that he would refuse to be quiet while court was in session. Id. at 11. When the court attempted to inform Townsel of his right to be present during trial, and to explain trial procedures, Townsel interjected, "I'm fixing to start being disruptive from here on out. You can put a gag whatever. I'm not having this cat represent me. I'm not going to be quiet. You can do the gag, you can lock me down, whatever. I'm not going to be quiet, as simple as that." Id. at 15. Townsel continued to be disruptive until the court called for a recess. Id. at 15-26.

The court noted that Townsel's disruptive behavior was clearly "tactical and purposeful." Id. at 26. The court stated that Townsel would intentionally speak over the prosecutor, his own attorney and the judge when he did not like what they were saying, but when he agreed with what they were saying, he would remain quiet. Id. at 27. Townsel then made the decision to voluntarily absent himself from any further proceedings except when he testified. Id. He was brought to court every morning to ensure that he was voluntarily absenting himself and to inform him that he could stay for trial if he so desired. See, e.g., 6/26/12 RP 3-4.

b. The Court's Proper Exercise Of Discretion.

Under the Sixth Amendment, in certain situations, a trial court may be constitutionally required to appoint an indigent defendant new counsel. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). However, an indigent defendant does not possess a right to have the counsel of his choice. Id. Rather, an indigent defendant who is dissatisfied with appointed counsel "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." Id. at 734. "Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." Id.

Factors the trial court will consider in deciding to grant or deny a motion to substitute counsel are (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings. Id.

The constitution does not guarantee a happy, completely harmonious or "meaningful relationship" between a defendant and counsel. Morris v. Slappy, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) (After a unilateral falling out with counsel, Slappy refused to participate in his defense – substitution of counsel not warranted).[19] A defendant's general loss of confidence or trust in counsel is not sufficient grounds to warrant the substitution of counsel. Stenson, at 734; State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). It is only where the "relationship between lawyer and client completely collapses, [that] the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel." Stenson, at 722. But there is a difference between a complete collapse and mere lack of accord. Slappy, 461 U.S. at 13-14; State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). Counsel and the defendant must be at such odds as to prevent presentation

[19] The purpose of providing assistance of counsel is to ensure that criminal defendants receive a fair trial, thus, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such. The essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. Stenson, at 725-26 (citing Slappy, 461 U.S. at 3-4).

of an adequate defense. State v. Schaller, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007), rev. denied, 164 Wn.2d 1015 (2008).

Of particular importance, "[i]t is well settled that 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 attorneys." Schaller, at 271 (citing Harding v. Davis, 878 F.2d 1341, 1344 n.2 (11th Cir.1989) ("[A]n accused cannot force the appointment of new counsel by simply refusing to cooperate with his attorney, notwithstanding the attorney's competence and willingness to assist.")).[20]

In determining whether a trial court properly denied a defendant's motion to substitute counsel, a reviewing court will consider (1) the nature and extent of the alleged conflict, (2) the adequacy of the court's inquiry, and (3) the timeliness of the motion. Stenson, at 723-24. Still, the decision as to whether a defendant's dissatisfaction with counsel is meritorious and justifies the appointment of new counsel is a matter within the sound

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[20] Generally, no intentional act by a defendant will require substitution of counsel. For example, the filing of a bar complaint against counsel does not by itself create a conflict sufficient to require substitution . State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986), rev. denied, 108 Wn.2d 1006 (1987). The threat of a lawsuit or the threat to physically harm counsel by itself does not create a sufficient conflict. United States v. Moore, 159 F.3d 1154, 1158 (9th Cir.1998). If intentional acts by a defendant required substitution of counsel, then any defendant could create a conflict requiring substitution at will simply by taking one of these actions. Id.; see also State v. Fualaau, 155 Wn. App. 347, 365, 228 P.3d 771 (the defendant assaulted counsel in open court, insufficient by itself to obtain new counsel), rev. denied, 169 Wn.2d 1023 (2010); State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684 (court rejects argument that new counsel must be appointed when a defendant alleges counsel is ineffective), rev denied, 109 Wn.2d 1003 (1987).

discretion of the trial court. Id. at 733. While reasonable minds may disagree with a trial court's ruling, that is not the standard on review. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, a defendant must prove that no reasonable judge would have ruled as the trial court did. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

The situation here arose out of Townsel's misunderstanding of how his medical records were obtained by the State, and his reaction to the court's ruling on his motion to substitute counsel that occurred on June 11, 2012. In his written motion to substitute counsel, Townsel stated that the medical records situation is what the "ongoing conflict" was all about. CP 30. When his motion was heard on June 11, just a week before trial, Townsel was asked if there was anything else he wanted to add, to which he indicated there was not. 6/11/12 (morning) RP 3. It was then explained to Townsel that his factual assumptions were incorrect, that the State did not obtain his records via a subpoena with Flora's knowledge -- they were obtained without Flora's knowledge via a police warrant. As Judge Kessler found, there was no attorney-client conflict, Flora had nothing to do with the State's actions. The court cannot be considered to have erred because (1) Townsel's claim that Flora had a conflict is not supported by the record and (2) the court gave Townsel the opportunity to articulate whether there was some other conflict that existed. Townsel failed to do so.

To this Court, Townsel does not acknowledge June 11th hearing. Instead, he claims the court erred in denying his motion to substitute counsel that occurred on June 20. There are multiple problems with this claim.

First, Townsel did not make a motion to substitute counsel on June 20; he requested a "Garcia" hearing, a hearing to determine whether he was willing to waive a known conflict of interest, but known existed.

Second, in his "Garcia" hearing request, Townsel asserted that Flora faced an "ethical dilemma," that he had "divided loyalties," and that the conflict of interest was "well documented." However, as the court noted, Townsel provided no facts, just conclusory statements.

Third, any claim based on an alleged breakdown in communication cannot prevail because any breakdown was caused by the intentional and deliberate acts of Townsel himself. Townsel did not get what he wanted on June 11 so he refused to cooperate with his counsel.[21] Despite Townsel's actions, counsel at all times acted professionally and with Townsel's best interests in vigorously trying the case. See Stenson, at 724 (in reviewing an alleged conflict, along with looking at the nature and extent of the breakdown in communication, the court will analyze the breakdown's effect on the representation that the client actually received).

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[21] At sentencing, Townsel admitted that his actions were deliberate and intended to create an appellate issue, stating that "I feel that these were the actions that needed to be taken so that I did have some type of fair trial or at least a chance later on, you know, during your appellate courts." 9/28/12 RP 23.

Fourth, Townsel did not raise a motion to substitute counsel until the eve of trial. Any substitution would have required a lengthy continuance, a problematic proposition considering the fragile nature of RO and the multiple medical personnel that were going to be called as witnesses.

On appeal, Townsel does not identify any specific set of facts demonstrating a conflict of interest that would justify finding that the trial court abused its discretion in denying his motion to substitute counsel. Instead, he suggest that the trial court was required to *sua sponte* conduct a closed-door hearing to hear what grievances Townsel might have had, and because the court did not do so, his conviction must be reversed. This argument fails for multiple reasons.

In determining whether the trial court abused its discretion in denying a defendant's motion to substitute counsel, one of the factors a reviewing court will look at is the adequacy of the trial court's inquiry. Cross, at 607; Varga, at 200. However, there is no requirement that a trial court *sua sponte* conduct a closed hearing. "[A] trial court conducts an adequate inquiry by allowing the defendant and counsel to express their concerns fully...Formal inquiry is not always essential where the defendant states his reasons for dissatisfaction on the record." Schaller, at 271.

While there may be cases where such an inquiry is necessary, the trial court's duty is to conduct an appropriate inquiry based on the facts

before it so that the court has a sufficient basis to reach an informed decision. State v. Thompson, 169 Wn. App. 436, 462, 290 P.3d 996 (2012), rev. denied, 176 Wn.2d 1023 (2013). Summarily denying a defendant's motion to substitute counsel without first informing itself of the facts is an abuse of discretion. State v. Lopez, 79 Wn. App. 755, 766, 904 P.2d 1179 (1995).

Here, the court did not summarily deny Townsel's motion. The court gave Townsel ample opportunity to express the reasons why he wanted new counsel. None was provided.

Finally, if the relationship between counsel and client "completely collapses," the refusal to substitute new counsel violates a defendant's Sixth Amendment right to effective assistance of counsel. Stenson, at 722-23. When this happens, where the breakdown rises to such a level that it amounts to a "complete denial of counsel," no prejudice need be shown. Id. (citing Moore, at 1158). But where the facts do not show a complete denial of counsel, prejudice will not be presumed. Stenson, at 732. After all, the purpose of providing counsel is to ensure defendants receive a fair trial, thus, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer. Stenson, at 725.

Similarly, where the claim is that there has been a "peremptory denial" of a motion for new counsel, the question is whether counsel's

performance actually violated the defendant's Sixth Amendment right to effective assistance of counsel. Lopez, 79 Wn. App. 767 (citing United States v. Morrison, 946 F.2d 484, 499 (7th Cir.1991)). Therefore, under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1964), a defendant "must demonstrate that the performance of the attorney he was saddled with was not within the range of competence demanded of attorneys in criminal cases, and that but for counsel's deficiencies, the result of the proceeding would have been different." Morrison, at 499 (citing Strickland, 466 U.S. at 694); Lopez, at 767.

Townsel's attorney performed admirably, especially considering the difficult position Townsel placed him. Townsel cannot show prejudice from the court's decision to deny his motion to substitute counsel.

2. TOWNSEL HAS FAILED TO PROVE THE PROSECUTOR COMMITTED MISCONDUCT OR THAT HIS CONVICTION SHOULD BE REVERSED.

Townsel contends that the prosecutor committed such flagrant and ill-intentioned misconduct that his conviction must be reversed -- even though he never raised an objection below. Townsel contends the prosecutor committed misconduct by trivializing the burden of proof, denigrating defense counsel and the right to put on a defense, appealing to the jurors' sympathy, and expressing his personal opinion. Townsel's claim is without merit. Townsel cannot show that the prosecutor committed

misconduct, cannot show why his failure to object should be excused, and cannot show prejudice.

The law governing claims of misconduct is well-settled. When a defendant alleges that the prosecutor's arguments prejudiced his right to a fair trial, he bears the heavy burden of establishing both (1) the impropriety of the prosecutor's arguments and (2) that there was a "substantial likelihood" that the challenged comments affected the verdict. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). The prejudicial effect of the prosecutor's alleged improper comments is not determined by looking at the comments in isolation but by placing the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). When there is a failure to object below, a defendant carries an additional burden. Absent a proper objection and a request for a curative instruction, the issue is waived unless the comment was so flagrant or ill-intentioned that no curative instruction could have obviated the resulting prejudice. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), rev. denied, 170 Wn.2d 1002 (2010).

a. The Failure To Prove Prejudice.

Before addressing whether Townsel has actually proven that the prosecutor committed misconduct, this Court can dispose of this issue by

addressing the lack of prejudice. The jury convicted Townsel of first-degree assault and first-degree kidnapping. These charges were supported by substantial evidence and did not particularly depend on a credibility of RO.

RO suffered an incredible number of injuries over her entire body – all documented. Townsel's testimony that it was possible he may have caused RO's injuries by accident or by defending himself is simply not realistic considering the sheer number of injuries, the severity of the injuries, and the location of the injuries on nearly every part of RO's body.[22] For example, a self-defense claim would not explain the injuries to the front, back and sides of RO's legs. Nor would an accidental head-butt explain RP's jaw being broken in two on both sides of her face – such damage could not have been caused recklessly, a *mens rea* of a lesser charge.

At the same time, the jury acquitted Jones and did not find Townsel guilty of felony harassment, second-degree rape, third-degree rape or any aggravating factor – all charges that relied much more heavily on a credibility determination of RO.

Considering these results, Townsel cannot show that there is a "substantial likelihood" that but for the alleged misconduct, the result of trial would have been different. This is especially true when one considers the fact that the jurors were instructed that it was their "duty to decide the

[22] At sentencing, Judge Lum stated that other than homicide victims, he had never seen such savagery and a person beaten as badly as RO. 9/28/12 RP 27.

facts in this case based upon the evidence presented," that they were the "sole judges of the credibility of each witness," that "the lawyers' statements are not evidence," that they "must disregard any remark, statement, or argument that is not supported by the evidence or the law," and that they "must not let your emotions overcome your rational thought process...you must reach your decision based on the facts...[and] not on sympathy prejudice, or personal preference." CP 87-90; see State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993) (jurors are presumed to follow instructions); McKenzie, 157 Wn.2d 44, 57 (the argument taken in context, any prejudice was cured by the court's instruction to disregard counsel's remarks not supported by the evidence).

b. Discussing The Burden Of Proof.

In Jones' closing argument, counsel told the jury that the "beyond a reasonable doubt" jury instruction[23] was beyond their understanding, that only legal practitioners understood the true meaning of the words. 7/11/12 RP 54-56. Counsel said that she was going to use "everyday

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[23] The instruction (CP 92) provides in pertinent part that:

> The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements. A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt. A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence.

words...because we're relying so much on concepts, on theoretical concepts, on structures that you're not familiar with." Id. Counsel said that people do not normally engage in this type of decision making and that it was not enough to find that "[it] must have happened." Id. at 54, 56. "You have to have absolutely not even a shred of reasonable doubt, before you find somebody guilty of this crime." Id. at 56. "[T]he standard of proof is the highest, the highest proof that exists." Id.

In rebuttal, the prosecutor stated that he disagreed with defense counsel, that it was expected that jurors could fully understand the reasonable doubt instruction. Id. at 66.

> [The instructions are] written for our citizenry to apply the law. They're not – there is no presumption that the only one that can understand something as heavy and as complex as beyond a reasonable doubt is a lawyer, or someone trained in legal terms. If that was the case, we wouldn't have juries right? ...She [defense counsel] 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 a 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.

CP 67-68 (emphasis added). Townsel did not raise an objection.[24]

Townsel claims that the prosecutor was trivializing the reasonable doubt standard. See, e.g., Anderson, supra. There are two problems with Townsel's argument.

First, counsel is entitled to make a fair response to opposing counsel's argument. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (remarks of the prosecutor, even if improper, are not grounds for reversal if they were invited or provoked by defense counsel unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective).

Second, the prosecutor did not misstate or trivialize the burden of proof. Opposing counsel argued that the jurors could not understand the instructions and used common language in imply that the standard was virtually unattainable. The prosecutor responded appropriately. Importantly, the prosecutor did not misstate the burden of proof. In fact, the prosecutor incorporated the language of the instruction into his response. He told the jurors that some people, in some situations, do use a reasonable doubt type standard and when doing so, if they can rule out any doubt that is

[24] See Warren, at 24-28 (prosecutor's complete misstatement of the "reasonable doubt" standard was cured by the court's corrective instruction after Warren raised an objection).

not reasonable, they have achieved the appropriate standard. This response neither misstated nor trivialized the burden of proof.

c. The Central Theme Of The Case – Evaluating RO's Testimony.

From the beginning, there was no doubt that this case was about the mental instability of RO and an evaluation of her credibility. In fact, prior to trial, Townsel's counsel informed the court that "[o]ur defense in a nutshell is that RO has a mental illness that's so pronounced that she says and does things that...are inexplicable...[she] acts in a bizarre fashion, says things that don't make any sense...Our defense is that...[RO] was simply describing things that are nonsensical and did not happen." 6/19/12 RP 34.

Then, in opening statement, Townsel's counsel told the jury that:

> What you're going to hear about is hell on earth...What you're going to hear about hard drugs, IV shooting up of drugs, including heroin...a couple of lives where that's the only purpose drugs. And this hell on earth that you're going to hear about is difficult to imagine...But what you're not going to hear is actual convincing evidence... And the reason is that this evidence is coming from somebody who is psychotic...This is a severely mentally ill person. She's delusional, she imagines things, she thinks that they're real, and she's extremely paranoid...She sees a vampire. She sings, and she gets the sense that she's irritating people, and so she thinks that people want to kill her because she's singing...[She sees] dead bodies in restaurants in Seattle...the cave on Capitol Hill that has a bucket of blood in it...the bloodbaths on Capitol Hill...this person does not have a grasp on reality.

6/26/12 RP 23-25 (opening).

During trial, in attempting to discredit RO, counsel questioned the detective about what evidence existed that RO had been raped:

> Defense Counsel: So she verbalized I had sex against my will with the guy that was in the Taliban, and by the way, you need to go check out the dead bodies in the restaurants. You kind of picked and choose the things that you wanted to investigate?
>
> Detective: No....
>
> Defense Counsel: Well, I mean in this case what we've got is a Taliban vampire who was taking big bites out of her, sucking her blood, and I guess raped her, is that right?

7/2/12 RP 86-87.[25]

During cross-examination of RO, defense counsel thoroughly examined RO about her extensive drug use, her mental health problems, her history, and every aspect of her testimony and her prior statements that seemed fanciful, unusual or untrue. 7/13/12 RP 103-152. Counsel also asked her about her claim that a prior boyfriend had been stalking her, "[w]as he really stalking you or did you imagine that?" 7/3/12 RP 125. An objection to the question was sustained. Id.

In closing, defense counsel told the jury that RO is a person who "engenders sympathy" but that "she suffers from psychosis," and the question is are "these allegations actually true. And of course one of the things that you have to take into account is where the allegations are coming

[25] An objection to the argumentative and mocking line of questioning was sustained. Id.

from. Who's saying these things." 7/11/12 RP 3-4. Counsel then expounded on the fact that the main problem with the State's case was RO herself. Id. at 16-17.

In the State's closing, counsel addressed the defense claim that nothing RO said was believable.

> [I]t sort of begs the question, should we care? Defense counsel started off in this trial...with sort of an opening phrase, "This is hell on earth."[26] That was his first shot across the bow. And then he added a caveat. It deals with people whose primary purpose, whose real only purpose, is to use drugs. Remember, that's how we started defense's opening. 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? Why not take [RO] and her whole host of problems and this blood-smeared house and that whole memory of November 2nd and November 4th, why not take the last nearly four weeks of testimony and evidence and chalk it up the to the antics of some drug-crazed street urchins, whose lives never cross our own?

7/10/12 RP 36-37.

> Everything that's within the scope of sanity, that [RO] 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. 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 defense was trying to do to [RO]. 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

[26] This line was used by Townsel in his opening statement. 6/26/12 RP 23 (opening).

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. Psychotic, let's be precise, she suffers from drug-induced symptoms that are psychotic. And she's on medication for them. How long did defense examine her for? Half a day? And in his cross-examination, he made it sound like her psychosis permeated everything, like she was incapable of saying anything coherent, experiencing anything coherent, remembering anything coherent, or relating anything coherent.

And the truth is that out of five statements, he only relied on one. And that was the one that we saw a portion of, when she is beat beyond any recognition. And that's what he's relying on to show us how crazy she is. All right, so when she's really, really, really beat up, and she's on meth, and she's been kidnapped in a house for two days, she says some crazy stuff. Is that edifying? Or is that maybe consistent with anybody in her shoes?

7/10/12 RP 89-90.

I started with a rhetorical question of why should we care? One of the frustrating things about this case, from sort of a prosecutor's standpoint, is if this was a dog, it would be over. If it was a dog that was found like that, we'd be done. He'd be up the river. But because it's a person, with the context and a history and a background, that puts her here with him, and something where in some way we get to pick her apart. And I embrace that right? Because I have a burden to prove it to you beyond any doubt that's reasonable. He starts off with the presumption of innocence. But if we pick her apart, let's remember that she's still a person, and that people have weaknesses and do stupid things. But it shouldn't deny them their humanity.

And she's just a little kid. I don't say that because I want to prey on your emotions. I say that because she's just a little kid and he was 23 years older than her, and his whole thing is she wanted to stay, she wanted to stay, and I tried to get her out, tried to get her out, tried to get her out. Who's in charge? He took advantage of her youth and he took advantage of her vulnerability, and she paid the price for those

> things. And as much as maybe doing drugs at 13 is your own fault, but what happened to her isn't her fault. 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 [RO], 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.

7/10/12 RP 93-95. No objection was made to any of the above statements.[27]

It is a defendant who bears the burden of establishing the impropriety of alleged improper argument. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). It must be "clear and unmistakable" that the argument is actually improper. McKenzie, 157 Wn.2d at 57.

A prosecutor is not a "potted plant" that must sit silently in the corner. Commonwealth v. Hutchinson, 611 Pa. 280, 25 A.3d 277, 325 (2011); LaGrand v. Stewart, 133 F.3d 1253, 1274-75 (9th Cir.1999). Rather, a prosecutor is an "advocate" who in the context of closing argument has "wide latitude in making arguments to the jury" and who is "allowed to draw reasonable inferences from the evidence." Russell, at 87; State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). As an advocate,

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[27] While the absence of an objection waives the issue, it also indicates that the comments did not strike trial counsel or the defendant as improper or prejudicial. State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039, rev. denied, 141 Wn.2d 1005 (2000); State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 513 U.S. 985 (1994).

a prosecutor is fully "entitled to make a fair response to the arguments of defense counsel." Russell, at 87.

In addition, the Supreme Court has held that "[a] prosecutor is not muted because the acts committed arouse natural indignation."[28] State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006) (a child rape case in which the Court held that it was perfectly permissible for the prosecutor to refer to the "horrible" nature of the crime and to the effect that the crime had on the victim). Finally, it is not improper for a prosecutor to attack the defense case and argue that the evidence does not support the defense theory. Russell, at 87.

Here, the prosecutor did nothing improper. RO was a type of person whom most jurors would never have come in contact with. In many jurors' minds, RO could easily be viewed as a person who made incredibly bad choices and was not a person of many redeeming qualities. It would be easy to dismiss or minimize her because of her obvious issues; issues that were the major focus of trial. As the prosecutor made clear, his arguments were not intended to obtain a verdict based on sympathy, rather, his arguments focused on why the jury should view the evidence in a serious light; on

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[28] See also McKenzie, 157 Wn.2d at 57 (calling the defendant a rapist not improper where supported by evidence) (citing State v. Buttry, 199 Wash. 228, 250, 90 P.2d 1026 (1939) (if the evidence indicates that the defendant is a murderer or killer, it is not prejudicial to so designate him).

making sure the jurors seriously considered RO's testimony despite her obvious issues.

Similarly, counsel's discussion of the defense theory of the case did not improperly denigrate defense counsel or prevent the defendant from putting on a defense. Rather, the prosecutor's argument was intended to focus the jurors' attention on the fact that just because RO may have some serious issues, this did not mean her testimony was entirely unbelievable as defense counsel suggested. Along this line, the prosecutor discussed the physical evidence that supported portions of RO's testimony. This was an appropriate argument discussing the weaknesses of both the State's case and the defense case.

d. Townsel's Goading Of The Prosecutor.

Townsel's final claim of misconduct centers on the prosecutor answering his questions during cross-examination. The exchange in question is transcribed in section B 2 above. See 7/9/12 RP 132-33 and footnote 14 above. During cross-examination, Townsel repeatedly asked the prosecutor to respond to him, and the prosecutor finally did. Now Townsel claims this was misconduct – the stating of a personal opinion. This claim has no merit. No objection was raised by Townsel. If Townsel felt that the prosecutor responding to his questions constituted misconduct, he (a) could have asked the judge to instruct the jury to disregard the prosecutor's

responses and/or (b) Townsel could have actually responded to the prosecutor's questions appropriately and therefore the prosecutor's comments never would have been made. See State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961) (Otherwise improper remarks are not grounds for reversal where they are "invited" or "provoked"). Additionally, it is somewhat farfetched to imagine the jurors saw the prosecutor's remarks as anything other than what they were, somewhat sarcastic retorts to Townsel's continued goading and refusal to answer the prosecutor's questions.

e. Townsel's Failure To Object.

Even if misconduct occurred in this case, reversal is not required if the misconduct could have been obviated by an objection and curative instruction. Russell, at 85. To reverse, this Court would have to find that the misconduct was "so flagrant and ill-intentioned [as to] cause an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). That cannot be done in this case. In every instance cited, Townsel cannot show that a simple objection would not have stopped the alleged improper argument[29] and/or that a curative instruction would not have obviated any prejudice. There simply is nothing about the alleged misconduct that is so prejudicial that it could not be cured.

[29] See McKenzie, 157 Wn.2d at 57 (had defense counsel objected at the first instance of alleged misconduct, the impropriety would not have continued).

In an attempt to circumvent waiver, Townsel claims that counsel was ineffective for failing to object. However, a waived issue of misconduct is not transformed into a successful ineffective assistance claim merely because of a failure to object. A defendant claiming ineffective assistance of counsel must demonstrate (1) that his counsel's performance was so deficient that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that but for counsel's errors, there is a reasonable probability that the outcome of trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The first prong is met by showing that counsel's conduct fell below an objective standard of reasonableness. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Counsel is presumed to have acted effectively; a presumption that can be overcome only by a clear showing of ineffectiveness derived from the entire record. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Failure under either prong ends the inquiry. Hendrickson, at 78.

Here, Townsel must prove that no reasonable attorney would have failed to object, that the failure to object was not a tactical decision, and that in view of the entire record, counsel was constitutionally ineffective, and that the outcome of trial would likely have been different but for counsel's failure to object. But in all other regards, trial counsel acted with complete

competence in zealously acting on Townsel's behalf. Counsel raised a myriad of pretrial motions, interviewed each witness prior to trial, cross-examined all of the State's witnesses with the skill of a seasoned trial attorney, and keenly attacked the State's case. In short, Townsel cannot show that, when viewing the entire record, the failure to object constitutes counsel so deficient that he did not receive counsel proficient enough to satisfy the Sixth Amendment.

Finally, Townsel cannot meet the prejudice prong of the ineffective assistance or prosecutorial misconduct test – as discussed in section 2 a.

3. TOWNSEL'S CONVICTIONS DO NOT VIOLATE DOUBLE JEOPARDY.

Townsel contends that his convictions for first-degree assault and first-degree kidnapping violate double jeopardy. He is incorrect.

Subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). At times, a defendant's conduct, even a single act, may violate more than one criminal statute. When this occurs, a defendant can permissibly receive punishment on each count. Calle, at 858-60 (Supreme Court found no double jeopardy violation when a single act of intercourse violated both the rape statute and the incest statute). Double jeopardy is implicated only when the sentencing court exceeds its

legislative authority by imposing multiple punishments where multiple punishments have not been authorized. Id, at 776.

In Calle, the Supreme Court set forth a three-part test for determining whether multiple punishments were intended by the legislature.[30] The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. Id. at 776. Should this step not result in a definitive answer, the court turns to the two-part "same evidence" or "Blockburger"[31] test. This test asks whether the offenses are the same "in law" and "in fact." Id. at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. Id. at 778-80.

Neither the assault statute (RCW 9A.36.011), nor the kidnap statute (RCW 9A.40.020) expressly allows or disallows multiple punishments for a single act. Thus, the Court must turn to the "same evidence" test.

The "same evidence" test asks whether the offenses are the same "in

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[30] Calle represented an affirmation of the rejection of the fact-based double jeopardy analysis that was being used by some courts prior to the early 90's. In 1993, the United States Supreme Court specifically overruled the "same conduct" fact-based double jeopardy test. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, the Washington State Supreme Court did the same. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995).

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

law" and "in fact." Calle, at 777. Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Id. If each offense includes an element not included in the other, the offenses are considered different and multiple convictions can stand. Id. Townsel's convictions are not the same "in law."

As charged, the State had to prove that a person is guilty of first-degree assault if he "with intent to inflict great bodily harm...assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a); CP 34. Thus, the State had to prove that Townsel intentionally assaulted RO,[32] that he committed an actual battery,[33] that he intended to inflict great bodily harm, and that he committed the assault by force or means likely to produce great bodily harm. CP 34, 117, 119.

As charged, the State had to prove that a person is guilty of first-degree kidnapping if he "intentionally abducts another person with intent...to inflict bodily injury on him or her; or to inflict extreme mental

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[32] "[A]n assault is, by definition, an intentional act." State v. Weiding, 60 Wn. App. 184, 188, 803 P.2d 17 (1991), rev. denied, 118 Wn.2d 1030 (1992).

[33] Washington recognizes three types of assault – an actual battery, an attempted battery, and putting another in apprehension of harm. State v. Byrd, 125 Wn.2d 707, 712, 887 P.2d 396 (1995) see WPIC 35.50. An actual battery – a consummated assault – requires an intentional and actual touching or striking of the victim. State v. Esters, 84 Wn. App. 180, 185, 927 P.2d 1140 (1996), rev denied, 131 Wn.2d 1024 (1997). Here, the jury was instructed that it had to find Townsel committed an actual battery. CP 117, 119.

distress on him [or] her." RCW 9A.40.020(1)(c) and (d); CP 33, 108. Thus, the State had to prove that Townsel intentionally abducted RO,[34] and that when he abducted her, he possessed the intent to either inflict bodily injury[35] or inflict extreme mental distress upon her. Id. As the Supreme Court has noted, 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 that the defendant have the intent to do so. See In re Fletcher, 113 Wn.2d 42, 53, 776 P.2d 114 (1989).

To prove first-degree assault, the State had to prove at least three elements that were not needed to prove Townsel committed first-degree kidnapping. The State had to prove that Townsel committed an actual battery, that he intended to inflict great bodily harm, and that the assault was committed by a force or means likely to produce great bodily harm or death. These are not elements of first-degree kidnapping. In contrast, to prove first-degree kidnapping, the State had to prove that Townsel intended to abduct RO and that he actually did abduct her. Neither element is an element of first-degree assault. With the two crimes each having different

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[34] "Abduct" means to restrain a person by either secreting or holding him or her in a place where he or she is not likely to be found, or using or threatening to use deadly force. RCW 9A.40.010(1). "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. RCW 9A.40.010(6).

[35] "Bodily injury," means physical pain or injury, illness, or an impairment of physical condition. RCW 9A.04.110(4)(a).

elements, there is a failure of the "same evidence" test. Calle, at 780 (failure under either the "same in law" or "same in fact" prong is sufficient).

Townsel's argument that because the crimes "share" some elements, they are the same in law, is misguided. Def. br. at 46. That is not the test for double jeopardy. The question is not whether there are commonalities between the statutes, but rather, as charged and convicted, the statutes require that the State prove at least one different element for each charge. See Calle, supra; State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).

The convictions are also different "in fact." First-degree kidnapping does not require that the additional intended act – the intent to cause harm, actually be carried out. Fletcher, at 49. In other words, once an abduction occurs with a defendant having such an intent, the crime of first-degree kidnapping is complete – the initial crime being complete before the later crime is committed. Id. Thus, the same facts do not prove both offenses.

In failing the same evidence test, the two offenses must be punished separately unless it is shown that there is "clear evidence" that the legislature intended but a single punishment. Here, there is no such evidence. Thus, Townsel's sentence was appropriate.

D. CONCLUSION

For the reasons cited above, this Court should affirm Townsel's conviction and sentence.

DATED this 11 day of February, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. TOWNSEL, Cause No. 69516-9-I, in the Court of Appeals, Division I, for the State of Washington.

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

Name

02-11-14
Date

Done in Seattle, Washington