

COA NO. 69516-9-I

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

REC'D
OCT 02 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JERRY TOWNSEL,

Appellant.

2013 OCT -2 PM 4:03
[Handwritten initials]

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

The Honorable Dean S. Lum, Judge

BRIEF OF APPELLANT

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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.

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 the emotions of the jury, and expressing a personal opinion on appellant's credibility?

2. Whether trial counsel was ineffective in failing to object to prejudicial 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?

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; 14RP¹ 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.

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.

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.

9RP 24-25. Meth makes her psychotic. 9RP 124. She heard voices and hallucinated when she was high. 9RP 25-27, 49, 106-07. She is paranoid, believing people are trying to kill her. 9RP 107, 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 at some point. 9RP 33. They went to a vacant house at about 11 p.m. on November 2. 9RP 47. The three of them smoked meth. 9RP 47, 50. O'Keefe was high and she started rapping. 9RP 51, 130-31. She believed Townsel wanted to kill her because she was a good rapper and he wanted to steal her material. 9RP 131.

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. She felt scared and threatened. 9RP 87. 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 was trying

to get to the front door. 9RP 66-67. She somehow managed to get to the kitchen. 9RP 62. He tried to gouge her eyes out on the kitchen floor. 9RP 64-65.

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 in an effort to protect herself. 9RP 68. She tried to stab Townsel in the neck. 9RP 72. She cut her finger. 9RP 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. She tried to pick the hammer up to use it for self-defense, but denied hitting him with it. 9RP 165. At some point he pushed her against a wall. 9RP 168.

The two used meth in the bathroom. 9RP 56. 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. She made no efforts to leave the bedroom. 9RP 92. 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. He met O'Keefe at a park a few weeks prior to the incident for which he stood trial. 10RP 113. They hung out and had consensual sex. 11RP 6-8, 45.

Jones invited them 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 was high and started dancing around saying her "pussy was so hot." 11RP 16-17. O'Keefe followed Townsel to the bathroom. 11RP 16, 18. She smoked meth while Townsel was on the toilet. 11RP 18. Townsel did more heroin in the bathroom. 11RP 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 asked why she had not told him earlier, but then 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. The injuries he caused were the result of him trying to get her off his back. 11RP 123. He did not intend to harm her. 11RP 123.

He eventually backed into a wall and realized it was O'Keefe when she grunted. 11RP 24. 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 in the living room. 11RP 24-25. She again mentioned being set up and "this is going to be a bloodbath for witches." 11RP 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 biting her, sucking her blood or drinking bloody bath water. 11RP 28. He denied gouging her eyes. 11RP 29. He denied punching her, but had headbutted her when she was on his back and he swung back at her several times. 11RP 29. He believed he caused some of her injuries. 11RP 117, 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

At about 1 a.m., a person next door heard a male and female voices and thumping noises. 7RP 106-10. At around 3 a.m., she heard a woman's screams and banging around. 7RP 111. She heard screaming three or four times throughout the night, followed by conversation. 7RP 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. She

believed the woman was indecisive. 7RP 124. She did not call the police because she believed the people were high on drugs. 7RP 126.

On November 4, 2011 at 3 p.m., the property owner noticed Jones in front of the vacant house. 5RP 101-02. The owner went inside the house and saw blood on the kitchen floor and in the bathroom. 5RP 103, 109. He opened the door to one of the rooms and saw Townsel and O'Keefe lying awake in a sleeping bag. 5RP 104-05. She looked badly beaten. 5RP 105. The owner called 911. 5RP 106.

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. There was damage to the wallboard at the kitchen threshold. 7RP 42-43. A broken mirror was in the bathroom. 6RP 173-74. 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 no trauma to her vagina. 6RP

131. 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. There were sharp force injuries to her fingers. 8RP 183.

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. Townsel was bigger than O'Keefe. 8RP 75; 9RP 71; 11RP 54.

In a police interview at the hospital, O'Keefe said odd things that did not make sense, referring 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. O'Keefe exhibited various psychotic symptoms before being transferred to the psych unit. 6RP 75. O'Keefe had a history of mental health problems. 6RP 16. 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 in closing argument misstated the beyond a reasonable doubt standard and misled the jury as to its proper role. The prosecutor committed further misconduct in denigrating defense counsel and Townsel's right to present a defense, appealing to the emotions and sympathy of the jury to secure convictions, and expressing 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 to the jury that the standard of proof beyond a reasonable doubt was not the same as the kind of decisions made in everyday life and that the jury could not convict unless it had no reasonable doubt. 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).

As in Anderson, Walker, Johnson, and Lindsey, the prosecutor in Townsel's case likewise conveyed to the jury a diminished standard of proof beyond a reasonable doubt 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. "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.

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. That type of argument undermines the presumption of innocence. The prosecutor in Townsel's case did this 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

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.

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

The prosecutor in Townsel's case commented on defense counsel's role in putting on a defense and impugned counsel's integrity in accusing the defense of treating O'Keefe like an untouchable biohazard and denying O'Keefe her humanity. 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 report 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, which was not even argued to the jury before the prosecutor made his closing argument, was legitimate. The prosecutor had no business casting defense counsel as a villain intent on destroying O'Keefe's humanity by treating her like a bloody shower curtain.

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. The prosecutor crossed the line between legitimate argument and denigration of counsel and Townsel's right to present a defense.

The prosecutor committed further misconduct along the same lines in arguing "the defense went after her hard, and he twisted and he added words and he changed things around, and he still, after all of that, hoping that maybe she would bend or deviate from the truth[.]" 12RP 87-88. The accusation that defense counsel twisted and added words amounts to accusing defense counsel of being a dishonest advocate for his client. See Warren, 165 Wn.2d at 29 (improper for prosecutor to describe defense counsel's argument as a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing"); State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (improper for prosecutor to argue that defense counsel is being paid to twist the words of a witness), review denied, 123 Wn.2d 1030, 877 P.2d 695 (1994).

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.

Towards the end of closing argument, the prosecutor 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 "found like that," 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 (emphasis added).

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). "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). 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). Improper appeals to passion or prejudice include arguments intended to incite feelings of fear, anger, or desire for revenge and that otherwise prevent calm and dispassionate appraisal of the evidence. State v. Elledge, 144 Wn.2d 62, 85, 26 P.3d 271 (2001).

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 it cares about the victim.

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. A prosecutor cannot express his or her personal belief as to the veracity of a witness. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). "Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact." Thorgerson, 172 Wn.2d at 443.

The prosecutor is 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 expression of opinion on the credibility of a defendant is particularly 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. It may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to

which the defendant is entitled." United States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985).

The prosecutor, during cross-examination of Townsel, 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. A prosecutor's 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). The prosecutor's trivialization of the reasonable doubt standard in Townsel's case must therefore be considered flagrant and ill-intentioned. 13RP 67-68.

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; Elledge, 144 Wn.2d at 85; 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; Ish, 170 Wn.2d at 196.

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. Even though the jury is presumed to follow the instructions of the trial court, prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt).

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.

The misconduct here was not the type to be remedied by a curative instruction. 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; see also Washington v. Hofbauer, 228 F.3d 689, 700 (6th Cir. 2000) ("a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty.").

There is a substantial likelihood that the misconduct affected the jury verdicts in Townsel's case. There is no question O'Keefe sustained severe injuries. The jury, however, was given 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, which included O'Keefe's use of a hammer. 11RP 23-25, 29, 33, 119-20, 123. The jury also heard O'Keefe tried to stab him in the neck with a shard from a broken mirror and tried sticking screws in his eyes. 9RP 137, 151. Townsel testified he did not intend to harm her. 11RP 123.

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. Substantial 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) (criminal defendant entitled to jury instruction on his theory of the case if substantial evidence supports it).

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 the defendant. 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, it follows that a rational trier of fact could have reached a conclusion consistent with those theories. A rational trier of fact 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 prosecutor's remarks in this case were not accidental and were designed to win conviction. Trained and experienced prosecutors presumably do not risk appellate reversal of hard-fought convictions by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. Fleming, 83 Wn. App. at 215; see also Thorgerson, 172 Wn.2d at 452 (improper arguments planned in advance are deemed ill-intentioned).

The case was closer than the prosecutor wished it to be, as shown by the fact that the jury acquitted Townsel of the felony harassment charge 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 or would not 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.

The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, 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). 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 under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. 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). 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. Deficient performance is that which falls

below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Reasonable attorney conduct includes a duty to know the law. Kylo, 166 Wn.2d at 862; State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). As this Court recognized in Neidigh, "defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." Neidigh, 78 Wn. App. at 79. There was no legitimate reason supporting 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 curative 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 instruction from the court that the improper comments should be disregarded and play no role in deliberations.

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 under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Although indigent defendants do not have an absolute right to counsel of their 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. Supp CP __ (sub no. 60, Correspondence From Townsel, 6/7/12). Supp CP __ (sub no. 62, Motion, 6/11/12). In that motion, 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, 2012, defense counsel filed a motion to dismiss the case based on the State's subpoena of Townsel's medical records. CP 16-27. The court thereafter denied Townsel's motion to discharge counsel. Supp CP __ (sub no. 64, Clerk's Minutes, 6/11/12). The court later denied the motion to dismiss the case. CP 61.

On June 20, 2012, 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 complained "we haven't even any amount of time together to prepare . . . any type of 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 even the person involved in several of the previous criminal cases that were apparently relevant to the alleged aggravators. 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

³ A Garcia hearing is based on the case of United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), abrogated on other grounds by Flanagan v. United States, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984), 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).

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 and met with the State in an attempt to negotiate. 2RP 7. From the prosecutor's perspective, defense counsel had been diligent in his efforts to track down witnesses and "do everything . . . that it's his job to do." 2RP 7-8.

The court reviewed Townsel's handwritten motion, saying it was not "really a motion" but cited propositions regarding ineffective assistance of counsel, divided loyalties and conflicts of interest. 2RP 9. To the extent it was considered a motion, the court denied it 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 to do this, man. Come and lock me up, man. I'm not doing it. I don't want him

representing me." 2RP 11. The court put on the record that Townsel had gotten up and wished to depart the courtroom. 2RP 11. Townsel responded, "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 then 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."⁴ 2RP 15. The court asked Townsel to remain for the CrR 3.5 hearing and Townsel agreed to do so. 2RP 16.

⁴ A portion of the CrR 3.5 hearing involving witness testimony was held the day before. 1RP 63-75.

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, with the prosecutor believing Townsel needed to be present when the jury was sworn in and that a drag order would be appropriate. 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.⁵ 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 not going to be quiet. 3RP 16. He 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 that 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.

⁵ 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.

Counsel moved to substitute counsel. 3RP 33-34. The prosecutor objected to the appointment of new counsel, opining "the reasons for his breakdowns in communication, are rooted in things that no competent attorney would ever do" and for that reason the problem would repeat itself even if another attorney were assigned. 3RP 35-36. The prosecutor also maintained witnesses had been scheduled to testify and there was no reason to delay the case. 3RP 36.

The court denied the motion for new counsel, finding Townsel had "engaged in tactical -- intentional tactical misconduct, designed to obtain what he wants. It's inappropriate under any measure." 3RP 36. During subsequent trial proceedings, Townsel voluntarily appeared when directed to do so and usually waived his presence in court. See, e.g., 4RP 2-4, 10-12, 85-86; 5RP 3-6, 89-92, 98-100, 134-35; 6RP 3-5, 108-10, 115; 7RP 4.

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; cf. State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80 (2006) (issue of whether conflict exists reviewed de novo, with appropriate deference to trial court's determination of underlying facts). 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). A trial court "necessarily abuses its discretion by denying a criminal defendant's constitutional rights." State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

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." Cross, 156 Wn.2d at 610. 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 encompassed 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 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 trial court did not specify untimeliness as a factor in denying Townsel's request for new counsel. And in any event, the mere 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 court in Townsel's case 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 prosecutor

complained that a delay in the trial would inconvenience some of the State's witnesses. The court, however, did not inquire into the degree of inconvenience that delay would cause. 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. Similarly, 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.'" Nguyen, 262 F.3d 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 deliberately 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).

In objecting to the appointment of new counsel, the prosecutor opined "the reasons for his breakdowns in communication, are rooted in things that no competent attorney would ever do." 3RP 35-36. Without an adequate inquiry into the matter, there is no basis to justify such a conclusion.

The trial court's inquiry here was inadequate because it did not fully inform itself of the extent of the conflict. Such a conclusion is in accord with precedent. In Cross, the Supreme Court found sufficient inquiry where the trial court made "careful review" of the extent of the conflict, which allowed the court to become "fully apprised" of the problem at hand. Cross, 156 Wn.2d at 610. The trial court there denied the defendant's motion to discharge counsel only after making repeated inquiries, conducting an "extensive" *in camera* hearing, and reviewing briefs on the subject. Id. at 605-06, 608, 610. Similarly, the Court in Stenson found sufficient inquiry where the trial court considered exhaustively detailed descriptions of the extent of the reputed conflict given at an *in camera* hearing. Stenson, 142 Wn.2d at 726-29, 731. By way of contrast, the court's inquiry of Townsel was nonexistent, and so did not allow for the court to make a fully informed decision on any request to discharge assigned counsel.

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; Marsden, 2 Cal.3d at 126. Townsel's convictions should be reversed and his case remanded for a new trial because the court denied his motion to substitute counsel without conducting an adequate inquiry, without properly balancing the timelines of the motion with the right to counsel, and without fully informing itself of the extent of the conflict.

In the event this Court declines to reverse the convictions, the alternative remedy is remand to the trial court for a hearing on the matter. Schell, 218 F.3d at 1027 (in habeas proceeding, remanding to district court for evidentiary hearing where neither state trial court nor district court conducted appropriate inquiry into extent of deterioration of defendant's relationship with assigned counsel); see 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.").

The reviewing court cannot reach the "extent of conflict" factor where the trial court failed to sufficiently inquire into the extent of the

conflict. Schell, 218 F.3d at 1027. As an alternative remedy, this Court should remand this case for the purpose of 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. Id. at 1027.

D. CONCLUSION

For the reasons set forth, Townsel respectfully requests that this Court reverse the convictions.

DATED this 2nd day of October 2013

Respectfully Submitted,

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**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 2ND DAY OF OCTOBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **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 2ND DAY OF OCTOBER, 2013.

X *Patrick Mayovsky*