

No. 38512-1-II

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DIVISION II OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JAMES LEE WALTERS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 06-1-01320-6

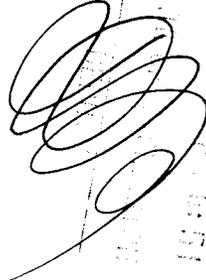
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REPLY BRIEF

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BY:   
DATE: 10/11/06  
FILED: 10/11/06  
COURT: 10/11/06

ORIGINAL

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## STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in his opening brief.

### ARGUMENT

#### **I. PROSECUTORIAL MISCONDUCT.**

As this court is aware, the cumulative effect of errors occurring at trial may support the granting of a new trial, even if none of the errors standing alone would justify a new trial. State v. Mark, 71 Wn.2d 295, 301, 427 P.2d 1008 (1967). Prosecutorial misconduct denies a defendant the right to a fair trial and necessitates a new trial if there is a substantial likelihood that the comments affected the verdict. State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993). If the misconduct implicates the constitutional rights of the defendant, however, reversal is required unless the error is harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Even in the absence of an objection by the defense, reversal is still required if the remarks were so flagrant or ill intentioned that no curative instruction

could have obviated the prejudice. Echevarria, 71 Wn.App. at 597.

Here, the prosecutor suborned perjury, bolstered the veracity and credibility of the State's witnesses and encouraged the jury to disregard jury instructions - referring to them as "a lot of legalese." RP 1005. Because each of these actions implicated either the Due Process Clause of the Constitution or the constitutional right to a fair trial, unless the respondent has shown that the errors are harmless beyond a reasonable doubt, respectfully, Mr. Walters must receive a new trial. See State v. Willis, 67 Wash.2d 681, 689, 409 P.2d 669 (1966); State v. Charlton, 90 Wash.2d 657, 665, 585 P.2d 142 (1978); see also State v. Lord, 117 Wn.2d 829, 867, 822 P.2d 177 (1991); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

A. Subornation of perjury

As this Court is aware, a prosecutor commits reversible error when he or she suborns perjury to obtain a conviction. Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103 (1957). Additionally, the prosecutor's duty not to suborn perjury or to use

evidence known to be false has been "enlarged to place upon the prosecutor an affirmative duty to correct state witnesses who testify falsely." State v. Finnegan, 6 Wn.App. 612, 616, 495 P.2d 674 (1972) (citing Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959)).

The prosecutor in this case suborned perjury when he allowed a witness to testify that she "knew it was Jimmy" Walters who abducted her, when the reality, based on her statements made to police and to the Court during testimony outside the presence of the jury, was that at the time of the abduction, she suspected or thought it was Mr. Walters who abducted her, but it wasn't until she later learned of his "prior offenses" that she "knew" it was him. The prosecutor had a duty to instruct the witness to testify only to the fact that she "thought" it was Mr. Walters.

At trial, the following exchange occurred between the prosecutor and the complaining witness:

Q. Now, you were asked on cross-examination about what you told the deputy that responded about who it was that had done this to you, and I think you testified that you told the

sheriff's deputy that you thought it was Jimmy?

A. Yes.

Q. All right. Were you at all reluctant to tell the deputy that you knew it was Jimmy?

A. No.

Q. *Why did you say that you thought it was Jimmy?*

A. *Because I had no idea of - I'm not sure if I'm allowed to say that.*

Q. Do you know why you told that to the deputy?

A. Yes.

Q. Okay. Let me ask you this. Does it have anything to do with your friendship with Shelby?

A. Yes, somewhat.

Q. How did it have anything to do with your friendship with Shelby?

[Defense Counsel]: Objection, your honor.

RP 249 (emphasis added).

Following this objection, testimony was taken by the prosecutor outside the presence of the jury. S.L.'s testimony clearly shows that S.L.'s knowledge changed when she learned of Mr. Walters' "prior offenses" and that she was being obviously

untruthful about "knowing that it was Jimmy" on the day of the abduction:

Q. Going back two questions, why did you only tell the deputy that you thought it was Jimmy?

A. Well, because I didn't' want to ruin my friendship with Shelby and *because I had no idea of his prior offenses.*

RP 250 (emphasis added).

Respondent's brief contends:

Contrary to the representations made in appellant's brief, the record indicates that S.L.'s two statements to Deputy Mundell occurred close in time on March 8, 2006. RP 381-382. There is nothing in the record to support defendant's claim that S.L. learned of the defendant's prior history between making her two statements to Deputy Mundell. See Appellant's brief at pp 8-9.

Although the trial record suggests that the victim had some awareness of the defendant's past charges of rape at the time of the second trial, there is nothing in the record to establish when the victim learned of this information about the defendant's past. According to the victim, *she was not aware of the defendant's prior history on March 8, 2006, when she was speaking to the responding deputy.* RP 250.

Consequently, that information about his past could not possibly have played a role in why she did not initially identify the defendant as her attacker to the deputy. As the defendant's past history was not information that affected her disclosure decision, that portion of her answer was not relevant to the question posed by the prosecutor.

Because the second half of the victim's answer also alluded to material that had been excluded by the trial court, there was nothing improper in the prosecutor indicating that he was not seeking to adduce that portion of the answer in front of the jury. RP 251. Ironically, defendant is claiming that the prosecutor acted improperly in not seeking to adduce evidence that the trial court had excluded. The defendant's claim that the prosecutor was suborning perjury by only to seeking to [sic] adduce the first part of the victim's answer is meritless.

BOR at 16-18 (emphasis added).

This statement is of little significance. The important fact is that S.L. only made two statements to the police, and in neither statement did she positively identify Mr. Walters. RP 383-84.

The fact that the prosecutor allowed her to testify differently during trial - especially after S.L. admitted on the stand that her adamant belief that Mr. Walters was the perpetrator was influenced by something she later learned - constituted the improper prosecutorial action. Surely a prudent prosecutor would have instructed S.L. that she could only testify to what she knew and thought at the time of the abduction. The fact that the prosecutor then told the story that

S.L. only hesitated in telling the full story because she feared she would lose her best friend - when there were clearly other reasons - only magnified the significance of the misconduct. The misconduct was further exacerbated during closing when the prosecutor bolstered the untruthful testimony by stating:

Now, Sarah identified the defendant, and she told you as she sat on the stand that it was the defendant that did this to her. She knows this for a number of reasons. She recognized his jacket, his boots, his facial hair color, the pattern of his facial hair. She is familiar with the defendant. She knows how he moves. And there is just something almost intuitive when you see someone that you know, and you know them well, and you see them moving. You might not be able to see their face, but you can tell, without describing exactly why, but you can tell it's them, you can tell that you know it's them.

RP 1020-21.

This is a case where the complaining witness suspected that her neighbor abducted her, but, because she never saw his face, she couldn't be sure. It was improper for the prosecutor to allow S.L. to testify that she knew Mr. Walters abducted her - based upon her subsequent knowledge of his criminal history - and the prosecutor's decisions

to then bolster this testimony constituted clear, reversible error.

B. Other Misconduct

Rather than directly address the obvious misconduct committed by the prosecutor when he bolstered and expressed personal opinions about the credibility of State witnesses, Respondent argues either (a) because defense counsel didn't object, Mr. Walters cannot meet the necessary standard to obtain a reversal, or (b) that the jury instructions - such as Instruction Number 1 stating that the jury is the "sole judge of the credibility of each witness" - cured any improper prosecutorial remarks. What Respondent fails to address is the fact that the first argument only provides additional proof that Mr. Walters was the victim of ineffective assistance of counsel (see Brief of Appellant pages 34-46) and the second argument might have been true but for the following statement made by the prosecutor during closing argument:

Now, jury instructions are written by lawyers for lawyers, okay, and I won't bother to read it. You guys have the instructions. You can read them yourselves, the definition of abduct,

the definition of restrain. It's a lot of legalese.

RP 1005.

Respectfully, this statement by the prosecutor in his closing argument should, at the very least, negate all Respondent's arguments relating to the curative effect of the jury instructions. Of course, this is assuming that this Court does not conclude that the statement alone does not trigger an automatic reversal of Mr. Walters' conviction. Nonetheless, because the prosecutor committed numerous instances of misconduct - that couldn't be cured by any jury instructions because of the prosecutor's reference to them as "legalese" - respectfully, this Court must grant Mr. Walters a new trial.

## **II. INEFFECTIVE ASSISTANCE OF COUNSEL**

As this Court is aware, a claim for ineffective assistance of counsel requires a defendant to show prejudice such that "but for the deficient performance [of counsel], there is a reasonable probability that the outcome would have differed." State v. Powell, 150 Wn.App. 139, 152, 206 P.3d 703 (2009). In State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), cert. denied, 551

U.S. 1137 (2007), the Court stated that "[c]umulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless." Id. This doctrine of cumulative error is "limited to instances when there have been several trial errors that ... when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, as Respondent has pointed out, defense counsel failed to object to the many instances of prosecutorial misconduct Mr. Walters faced during his trial. This fact, in combination with counsel's failure to specifically object when the State suborned perjury surely warrants reversal in light of counsel's employment of the disfavored "all-or-nothing" strategy.

A. All-or-Nothing Strategies:

As stated in Mr. Walters' opening brief, "deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance." State v. Grier, 150 Wn.App. 619, 208 P.3d 1221 (2009). In determining that trial counsel's decision not to request a lesser-

included instruction constituted ineffective assistance of counsel, the Court in Grier evaluated the following three "themes:" (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial. Id. Here, because each of the themes is so easily satisfied, respectfully, this Court should conclude that trial counsel's performance fell below an objective standard of reasonableness, and Mr. Walters' case should be remanded for new trial.

Rather than address the "themes" set-forth in Grier, Respondent's brief alleges that the Division II holding in Grier was incorrect and that Division I - who has also held that all-or-nothing strategies are disfavored in Washington (see State v. Ward, 125 Wn.App. 243, 104 P.3d 670 (2004); State v. Pittman, 134 Wn.App. 376, 166 P.3d 720 (2006)) - has "recently backed away" from this position. See BOR 33-40. Respondent cites State v. Hassan, 151 Wn.App. 209, 211 P.3d 441

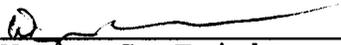
(2009) for this proposition, however, Respondent's argument is untenable. The Court in Hassan specifically evaluated the three "themes" from Ward and Grier and affirmed the conviction because "[n]one of the three Ward factors is present in this case." Hassan, 151 Wn.App. 219. The Court engaged in no further analysis questioning the holdings in Ward, Pittman or Grier and effectively affirmed those holdings by engaging in the same analysis as the Court in those cases. Because Hassan upholds the proposition that analysis of the three "themes" is the only effective way to conclude whether defense counsel's "all-or-nothing" strategy was reasonable, and because Respondent has failed to even engage that analysis, this Court must conclude that Grier is still good law and that Mr. Walters received ineffective assistance of counsel.

CONCLUSION

Based on the facts and authorities herein,  
Mr. Walters respectfully requests that this case  
be remanded for new trial.

RESPECTFULLY SUBMITTED this 15th day of  
January, 2010.

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 15th day  
of January, 2010.

  
Lee Ann Mathews

  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
JAN 15 2010  
COURT CLERK  
COUNTY OF PEARL