

NO. 49116-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER JACKIN

Appellant.

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

The Honorable Derek Vanderwood, Judge

OPENING BRIEF OF APPELLANT

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Peter B. Tiller, WSBA No. 20835  
Of Attorneys for Appellant

The Tiller Law Firm  
Corner of Rock and Pine  
P. O. Box 58  
Centralia, WA 98531  
(360) 736-9301

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**A. ASSIGNMENTS OF ERROR**

1. Christopher Jackin was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

2. Defense counsel was ineffective for failing to propose instructions on fourth degree assault as a lesser included offense to indecent liberties.

3. The trial court erred in entering a judgment against Mr. Jackin because he was denied effective assistance of counsel.

4. The deputy prosecutor committed misconduct in closing argument, denying the appellant his right to a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Mr. Jackin's defense counsel unreasonably failed to request instruction on the lesser-included offense of assault in the fourth degree. Was Mr. Jackin denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel? Assignments of Error No. 1, 2, and 3.

2. Whether the prosecutor, by appealing to passion and prejudice and by mischaracterizing evidence during closing argument committed prosecutorial misconduct that denied Mr. Jackin a fair trial? Assignment of Error No. 4.

**C. STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

For her birthday, Chris Jackin took his long term girlfriend Acacia Kirkland to see a concert by alternative rock band Smashing Pumpkins at Red Rocks near Denver Colorado. 3Report of Proceedings (RP) <sup>1</sup> at 303. Mr. Jackin lived with Ms. Kirkland and their four children in Spokane. 3RP at 302-03. Mr. Jackin arranged to leave their children with Ms. Kirkland's sister, J.M., and her fiancé, Dan Nelson, at their house in Battle Ground, Washington. 3RP at 302-03. They arranged for J.M. and Mr. Nelson to watch their children for several days while they flew from Portland to Denver on July 11, 2015. 3RP at 303. The family of six drove in their van to Battle Ground and arrived on July 10, 2015. 3RP at 261. The two couples barbequed in the back yard that night while the children played in the yard. 2RP at 185. Mr. Nelson and J.M. drank alcohol during the barbeque and later that evening they smoked marijuana. 2RP at 186, 187, 188, 3RP at 263-64. At about 10 p.m. the adults started to go to sleep. 3RP at 306. Mr. Jackin the first to go to sleep and the children later went to sleep. 2RP at 189. Mr. Nelson when to sleep in the master bedroom, leaving Ms. Kirkland and J.M. and her three year old son, I, in the living room. J.M.'s son was on the floor watching television. 3RP at 266-67.

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP—July 16, 2015 (first appearance), July 16, 2015, July 23, 2015 (arraignment), July 24, 2015, August 27, 2015 (omnibus hearing), January 14, 2016, May 19, 2016 (readiness hearing), May 23, 2016 (*voir dire*); 2RP—May 23, 2016 (jury trial); and 3RP—May 24,

Ms. Kirkland went to sleep following by J.M. at approximately midnight or 1:00 a.m. 2RP at 195. Mr. Jackin went to sleep on an L shaped sectional couch in the living room, 2RP a 192. J.M. went to sleep in a rocking chair in the living room and Ms. Kirkland was also on the sectional couch. 2RP at 193. I. fell sleep on the floor where he was watching television. 2RP at 193.

J.M. was wearing shorts with panties under the shorts when sleeping in the rocking chair. 2RP at 194, 195. J.M. testified that she was awakened by Mr. Jackin, who was sitting to her right. 2RP at 195. She stated that Mr. Jackin had his “hands in [her] shorts” and was rubbing her clitoris under her panties. 2RP at 195, 196. She stated that she woke up and said “what are you doing?” and that he said “I was just wanting to get a piece” and that he was apologetic. 2RP at 196. She said that she woke up her sister and then went to her bedroom and woke up Mr. Nelson. 2RP at 200, 201. She said that Mr. Nelson was extremely angry and went to the living room and confronted Mr. Jackin. 2RP at 205. She stated that Mr. Jackin just stated that he was sorry to her and to Ms. Kirkland. 2RP at 205. J.M. said that her sister did not say much and remained hunching over on the couch, crying. 2RP at 204. J.M. and Mr. Nelson confronted Mr. Jackin and Mr. Nelson said he did not want Mr. Jackin in the house. 2RP at 231. After the confrontation, Mr. Jackin went to

sleep outside in the van. 2RP at 206. The following morning J.M. drove the couple to the Portland airport in order to fly to Colorado. 2RP at 207, 234.

Mr. Jackin denied that he and Ms. Kirkland were drinking or that either of them smoked marijuana, but stated that Mr. Nelson and J.M. “were both drinking pretty heavily.” 3RP at 302. He went to sleep on the L-shaped sectional couch, which was large enough for two adults to sleep comfortably. 3RP at 304. Mr. Jackin was awakened by J.M.’s son I. who was sleeping on his feet. 3RP at 309. He got up and went to the kitchen to get a glass of water and then was going to wake up Ms. Kirkland to ask her what to do because I. was sleeping where Mr. Jackin expected to sleep. 3RP at 309, 310. While walking across the living room, J.M. woke up and looked at him asked him what he was doing. 3RP at 310. He told her that he was awakened by her son I., and that he was getting a glass of water and asked her if she was going to be moving her son. 3RP at 310. J.M. did not respond and got up and went to try to wake up Ms. Kirkland. 3RP at 311. After she was awake, J.M. said that Mr. Jackin put his hands on her vagina. 3RP at 313. He said that J.M. yelled for ten minutes and also yelled at Ms. Kirkland. 3RP at 315. He stated that Ms. Kirkland asked him to sleep in the van and he agreed. 3RP at 315. Later, Ms. Kirkland went to the van make sure he was all right, but did not stay because there was not enough room for two people to sleep there. 3RP at 316. He said

he asked her if she wanted to cancel the trip because “things kind of went bad in a hurry.” 3RP at 316. They agreed, however, to continue with the trip as planned. 3RP at 316.

The following morning, Ms. Kirkland went out to the van to get him up and for him to come inside to have coffee. 3RP at 316. He sat on the sofa and had coffee made by J.M., and stated that there was no mention of the alleged incident. 3RP at 318. He did not see Mr. Nelson in the house. 3RP at 318. J.M. drove them to the airport. 3RP at 319. He said that Ms. Kirkland talked with her sister while they were at the hotel. 3RP at 319. They returned to Portland on July 14. He stated that J.M. picked them up at airport and he talked with her about the trip and everyone seemed calm and relaxed. 3RP at 320. When they approached the house, however, he was taken into custody. 3RP at 320.

Mr. Nelson said that J.M. did not want to call the police because she did not want her sister’s birthday to be ruined. 3RP at 276. He said that she eventually agreed to call the police and report the alleged incident. 3RP at 276; 2RP at 209. Law enforcement arranged to arrest Mr. Jackin after he and Ms. Kirkland returned from Colorado. 2RP at 209.

On July 14, 2015, J.M. picked up Mr. Jackin and Ms. Kirkland from the Portland airport. 2RP at 210. She drove them back to her house in Battle

Ground where their van was parked. 2RP at 210. Police were waiting near the house and took Mr. Jackin into custody. 2RP at 211.

Mr. Jackin was charged by the Clark County Prosecutor's Office with one count of indecent liberties. Clerk's Papers (CP) 2; RCW 9A.44.100(1)(b).

The matter came on for jury trial on May 23 and 24, 2016, the Honorable Derek Underwood presiding.

At trial, defense counsel did not ask the court to instruct the jury on the lesser included offense of assault in the fourth degree. 3RP at 345, Defendant's Proposed Instructions, (CP 42).

Defense counsel moved for an instruction pursuant to Washington Pattern Instruction 6.41 regarding out of court statements allegedly made by Mr. Jackin to Ms. Kirkland, which were subsequently reported to police. 2RP at 253. The trial court, citing *State v. Smith*, 36 Wn.App. 133, 672 P.2d 759 (1983), ruled that WPIC 6.41 was available only when the accused challenges the voluntariness of the statement. The court noted that Mr. Jackin made the statement to Ms. Kirkland, according to the State, and did not challenge the voluntariness of the alleged statements. The court denied the motion to give the instruction. 2RP at 253, 255.

Defense counsel noted an objection to the court's denial of the WPIC 6.41. 3RP at 343. During rebuttal, the deputy prosecutor argued:

She did not really want to go to the police, but she did. and she came to court and she took the stand and she told you under oath the reality of what happened to her, the reality of what he did in the night while she was vulnerable when he violated her in that way. And maybe he had plans to do something worse, we don't know, but what he did was bad enough.

3RP at 378,

Following testimony by J.M. the Trial Minutes show that three more witnesses testified the afternoon of May 23. The witnesses were law enforcement officer Michael Cooney, Acacia Kirkland, and Deputy Jeremy Brown. CP 60-69. None of the testimony of these witnesses was recorded. 2RP at 239. Jeremy Brown apparently testified regarding an out of court statement allegedly made by Ms. Kirkland that Mr. Jackin said that he touched J.M. As a result of the testimony, the court gave the following instruction to the jury:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of alleged statements Acacia Kirkland made to Deputy Jeremy Brown and may be considered by you only for the purpose of assessing the credibility of Ms. Kirkland. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

3RP at 350; CP 69.

The jury found Mr. Jackin guilty of indecent liberties without forcible compulsion as charged in the information. 3RP at 384; CP 84. The court imposed a standard range sentence of 17.5 months followed by 36 months of

community custody. 3RP at 402; CP 111, 112.

Timely notice of appeal was filed June 22, 2016. CP 127. This appeal follows.

**D. ARGUMENT**

**1. MR. JACKIN WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL**

Mr. Jackin's trial counsel was ineffective for failing to propose an instruction on fourth degree assault as a lesser-included offense of indecent liberties. Counsel's failure to propose a lesser included offense instruction of assault in the fourth degree denied him effective assistance of counsel. Washington case law provides that he was entitled the instruction and that he was prejudiced by counsel's deficient performance. Therefore, Mr. Jackin's indecent liberties conviction should be reversed.

**a. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.**

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense. U.S. Const. Amend. VI. The provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental instructing juries on lesser included offenses “is crucial to the integrity of our criminal justice system and cherished rights” guaranteed by the Constitution. *U.S. v. Salemo*, 61 F.3d 214, 221-22 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance, though it is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130. Any trial strategy “must be based on reasonable decision-making....” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, “[r]easonable conduct for an

attorney includes carrying out the duty to research the relevant law.” *State v. Killo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See e.g. *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of . . . prior convictions has no support in the record.”)

An ineffective assistance claim presents a mixed question of law and fact requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

**b. . Defense counsel provided ineffective assistance by failing to seek instructions on the lesser-included offense of assault in the fourth degree.**

Defense counsel’s failure to seek instruction on a lesser-included offense can deprive an accused of the effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 33-34, 42, 246 P.3d 1260 (2011). Counsel’s failure to request appropriate instruction on a lesser included offense constitutes ineffective assistance of counsel if (1) the accused person is entitled to the instructions and (2) under the facts of the case, it was objectively unreasonable for defense counsel to pursue an “all or nothing” strategy. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). Instructing juries on lesser included

offenses “is crucial to the integrity of our criminal justice system.” *State v. Henderson*, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015). As a result, courts “err on the side of instructing juries on lesser included offenses.” *Henderson*, 182 Wn.2d at 736. Courts should instruct the jury about a lesser included offense if the jury could find that the defendant committed only the lesser included offense. *Henderson*, 182 Wn.2d at 736.

Defendants in Washington are entitled to have juries instructed not only on the charged offense, but also on all lesser included offenses. RCW 10.61.006. Appendix A. It is a violation of due process not to give a requested lesser offense instruction whenever the evidence would support a conviction on the lesser offense. *Ferrazza v. Mintzes*, 735 F.2d 967, 968 (6th Cir. 1984); U.S. Const. amend XIV. RCW 10.61.010 guarantees the “unqualified right” to have the jury consider a lesser-included offense if there is “even the slightest evidence” that the accused person may have committed only that offense. *State v. Parker*, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984), (quoting *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)). Appendix B.

The appellate court views the evidence in a light most favorable to the accused person. *Fernandez-Medina*, 141 Wn.2d at 456. The instruction should be given even if there is contradictory evidence, or if other defenses are presented. *Id.* The right to an appropriate lesser-included offense instruction is

“absolute,” “and failure to give such an instruction requires reversal.” *Parker*, 102 Wn.2d at 166.

Here, defense counsel’s failure to request instruction on assault in the fourth degree deprived Mr. Jackin of the effective assistance of counsel. Mr. Jackin was entitled to the instruction, and it was objectively unreasonable to pursue an “all or nothing” strategy.

**c. Mr. Jackin was entitled to instructions on assault in the fourth degree.**

Courts review whether a defendant is entitled to a lesser included offense instruction under the test announced in *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under the *Workman* test, the defendant is entitled to an instruction when “(1) each of the elements of the lesser offense is a necessary element of the charged offense and (2) the evidence in the case supports an inference that the lesser crime was committed.” *Henderson*, 182 Wn.2d at 742. The first requirement is the “legal prong;” the second requirement is the “factual prong.” *State v. Berlin*, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

To satisfy the legal prong of the *Workman* test, the elements of the lesser crime must be “necessarily” and “invariably” included among the elements of the greater charged offense. *State v. Porter*, 150 Wn.2d 732, 736, 82 P.3d 234 (2004). “Stated differently, if it is possible to commit the greater offense without committing the lesser offense, the latter is not an included crime.” *State v.*

*Harris*, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993). To satisfy the factual prong of the Workman test, the evidence must raise a rational inference that only the lesser offense was committed. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

- d. The crime of indecent liberties incorporates the intent element of assault via the "sexual contact" requirement, and therefore fourth degree assault is a lesser offense of indecent liberties.**

Indecent liberties incorporates the intent element of assault via the "sexual contact" requirement, and therefore fourth degree assault is a lesser offense of indecent liberties. A person is guilty of indecent liberties when he "knowingly causes another person to have sexual contact with him . . . [b]y forcible compulsion." RCW 9A.44.100(1)(a). "Sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

Fourth-degree assault is an assault not amounting to first, second, or third-degree assault. RCW 9A.36.041(1). The statute does not define the term "assault," Washington uses the common law definition. RCW 9A.36.041(1). "A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." RCW 9A.36.041(1). Of the different forms of assault, the one at issue here is an unlawful touching with criminal intent. See *State v.*

*Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006) (setting forth the different kinds of assault).

In *Stevens*, the court noted that molestation does not explicitly include an intent requirement, but “sexual contact” between the defendant and the victim is one element of the offense. Therefore, the State must prove that the defendant acted with a sexual purpose. *State v. Stevens*, 158 Wash.2d at 310–11.

Relying on the definition of “sexual contact” contained in RCW 9A.44.010(2), the *Stevens* Court held that the State must prove that the defendant acted with a sexual purpose and that accordingly, the requirement meant that fourth-degree assault did not require a higher mental state and was a lesser included offense of child molestation. *Stevens*, 158 Wn.2d at 31.

Following the reasoning contained in *Stevens*, Division One recently held that fourth degree assaults is a lesser including charge of indecent liberties. *State v. Bluford*, 195 Wn.App. 570, 379 P.3d 163 (2016). The court held that the legal prong of workman was satisfied because:

Indecent liberties also requires “sexual contact.” And the same definition of “sexual contact” applies to both indecent liberties and child molestation. Thus, the State must prove that the defendant acted with a sexual purpose. Accordingly, fourth-degree assault does not require a higher mental state than indecent liberties.

*Bluford*, 195 Wn.App. at 585 (Footnotes omitted).

The same reasoning applies here. The legal prong test is whether it is

possible to commit the greater offense without committing the lesser offense. *Harris*, 121 Wn.2d at 320. That test encompasses not only the formal elements of the crime but also the definitional requirements of those elements. The intent aspect of "sexual contact" incorporates the intent requirement found in fourth degree assault (unlawful touching with criminal intent). As a result, it is impossible to commit indecent liberties without also committing fourth degree assault. Therefore, the legal prong is satisfied. Under *Stevens* and *Bluford*, Mr. Jackin was entitled to an instruction on the lesser offense of fourth degree assault because the charged crime of indecent liberties could not be committed without also committing fourth degree assault.

The factual prong also was met. Although he did not concede that he touched J.M., the jury could have found that touching did occur while he was walking back from the kitchen in the small living room while returning to the sectional couch in the dark. The jury could have rationally found that Mr. Jackin intentionally touched J.M. without finding that he touched her with the purpose of sexual gratification, that she was harmed or offended, and that fourth degree assault was therefore committed.

Mr. Jackin was entitled to an instruction on fourth degree assault because the facts, when taken in a light most favorable to him, suggest that he was only guilty of the lesser offense. Mr. Jackin did not testify that he touched J.M. A

criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused person's own version of events. *Id.* at 456. For example, a defendant who testifies that he was not present at the scene of a crime is nonetheless entitled to a lesser-included instruction under appropriate circumstances:

If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not to an instruction should be given.

*Fernandez-Medina*, at 456.

**e. It was objectively unreasonable for defense counsel to pursue an all or nothing strategy.**

Reversal is required when a defendant is entitled to instruction on a lesser charge and the trial court fails to give it. *State v. Condon*, 182 Wn.2d 307, 326, 343 P.3d 357 (2015) (citing *State v. Parker*, 102 Wn.2d 161, 163- 64, 166, 683 P.2d 189 (1984)). Here, Mr. Jackin's attorney pursued an "all or nothing" strategy" by failing to propose an instruction for fourth degree assault.

Under the evidence presented, the jury might have had sufficient doubt about indecent liberties, especially if they were given an alternative crime which presented no forensic evidence and which resulted in a textbook "she said/he

said” case, and which the crime was not reported for several days.

Second, although a fourth degree assault conviction could have resulted in a 364 day jail sentence as opposed to the 15 to 20 month standard range on the felony, a felony conviction carries consequences a misdemeanor does not, in particular registration as a sex offender.

Under *Strickland*, an attorney must be familiar with the relevant legal standard and instructions appropriate to the representation. See, e.g., *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). Given the absence of any suggestion counsel made a strategic choice to forgo instructions on assault in the fourth degree, counsel’s failure to propose appropriate instructions must have been based in a misunderstanding of the law or an inaccurate analysis of the facts. Accordingly, Mr. Jackin was prejudiced by counsel’s deficient performance and the conviction for indecent liberties must be reversed.

**2. THE PROSECUTOR, BY APPEALING TO PASSION AND PREJUDICE AND BY MISCHARACTERIZING EVIDENCE DURING CLOSING ARGUMENT, COMMITTED PROSECUTORIAL MISCONDUCT THAT DENIED MR. JACKIN A FAIR TRIAL**

The prosecutor committed misconduct during closing argument that should result in a new trial in this case. “To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both

improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). If the defendant fails to properly object to the misconduct, “a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice engendered.” *State v. O’Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (quoting *State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)).

“Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)). “[B]ald appeals to passion and prejudice constitute misconduct.” *Id.* At 747 (citing *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). “Although reference to the heinous nature of a crime and its effect on the victim can be proper argument, the prosecutor’s duty is to ensure a verdict free of prejudice and based on reason.” *State v. Clafflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984) (internal citations omitted) (citing *State v. Huson*, 73 Wn.2d 660, 662, 440 P.2d 192

(1968)).

A prosecutor must also not argue facts to the jury that are not supported by the record. Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *Thorgerson*, 172 Wn.2d 448, a prosecutor must “seek convictions based only on probative evidence and sound reason.” *State v. Casteneda-Perez*, 61 Wash.App. 354, 363, 810 P.2d 74 (1991); *Huson*, 73 Wn. 2d at 663. “A person being tried on a criminal charge can be convicted only by evidence, not innuendo.” *State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007) (quoting *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950)). “[A] prosecutor who asks questions that imply the existence of a prejudicial fact must be prepared to prove that fact.” *Id.* See also *State v. O’Neal*, 126 Wn. App. 395, 421, 109 P.3d 429 (2005), *aff’d*, 159 Wn.2d 500 (2007) (“A prosecutor improperly comments when he or she encourages a jury to render a verdict on facts not in evidence.”

Here, the prosecutor stated closed his argument on rebuttal by stating:

She didn’t get anything out of this. She didn’t really want to go to the police, but she did. And she came to court and she took the stand and she told you under oath the reality of what happened to her, the reality of what he did in the night while she was vulnerable when he violated her in that way.

And maybe he had plans to do something worse, we don’t know, but what he did was bad enough.

3RP at 378 (emphases added).

The prosecutor's duties required that he seek conviction in a manner that is fair to the criminal defendant and increased the chances that the jury's verdict was based solely on the facts presented. The prosecutor's reference to "plans to do something worse" was particularly improper, because it encouraged the jurors to think of horrific scenarios of potential crimes in general rather than only focusing on the facts that were presented in this case. By speculating about "plans" to do "worse" things, the prosecutor committed misconduct by arguing facts not in evidence.

There is no evidence that Mr. Jackin had plans to commit any crime other than the touching alleged by the State. The prosecutor encouraged the jury to render a verdict based on facts that were not in the record.

Finally, the prosecutor's misconduct during closing argument "was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered." *O'Donnell*, 142 Wn. App. At 328 (quoting *Munguia*, 107 Wn. App. at 336). The comments was made after defense counsel had already presented argument on Mr. Jackin's behalf, and the prosecutor's statements were the final words the jury heard before returning to the deliberation room. Had defense counsel objected at this time and received a curative instruction, it remains unlikely that the jury would have forgotten or entirely ignored the prosecutor's final argument.

The risk of prejudice is at its highest in sex offenses, and inflaming the passions of the jury with improper argument has an incredibly significant impact on a jury. If the defendant is to now have a criminal record for a sex offense, this Court should ensure that such a conviction only stands upon a fair presentation of facts rather than improper argument by the prosecutor. The only fair and just remedy in this situation is a new trial.

3. **NOTICE OF INTENT TO SUPPLEMENT THE DEFECTIVE RECORD IN THIS CASE IF MERITED.**

A criminal defendant is constitutionally entitled to a "record of sufficient completeness" to permit effective appellate review of his or her claims. *State v. Thomas*, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993) (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962)); *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003); *State v. Atteberry*, 87 Wn.2d 556, 560, 554 P.2d 1053 (1976); U.S. Const. amend. 14.

In Washington, this right has an added dimension in light of a criminal defendant's constitutional right to appeal. Wash. Const. art. 1 § 22; *State v. Larson*, 62 Wn.2d 64, 66-67, 381 P.2d 122 (1963). Where appellate counsel, as here, did not represent the defendant at trial, the record must allow appellate counsel "to determine satisfactorily what errors to assign for purposes of obtaining adequate review on appeal." *Larson*, 62 Wn.2d at 67 (citing *Draper*,

supra). Moreover, in such circumstances, the record must allow appellate counsel to “test the ‘sufficiency of completeness.’” *Larson*, 62 Wn.2d at 67

Washington’s Rules of Appellate Procedure establish a procedure for reconstructing the record when the tape recording of a proceeding has been lost. The usual remedy for a defective record is to supplement the record with affidavits and have the trial judge resolve any disputes. RAP 9.3; RAP 9.4; RAP 9.5; *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). Appellate counsel has not yet supplemented the record, Counsel will move to supplement the record if merited.

#### **E. CONCLUSION**

The appellant respectfully requests that the Court reserve the conviction and remand for retrial with a constitutionally effective counsel.

DATED: December 14, 2016.

Respectfully submitted,

THE TILLER LAW FIRM  


PETER B. TILLER-WSBA 20835  
Of Attorneys for Chris Jackin

CERTIFICATE OF SERVICE

The undersigned certifies that on December 14, 2016, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste.300, Tacoma, WA 98402-4454 , and copies were mailed by U.S. mail, postage prepaid, to the following:

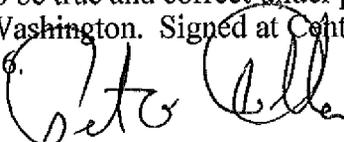
Anne Cruser  
Deputy Prosecuting Attorney  
PO Box 5000  
Vancouver, WA 98666  
[Prosecutor@clark.wa.gov](mailto:Prosecutor@clark.wa.gov)

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

Mr. Christopher Jackin  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

**LEGAL MAIL/SPECIAL MAIL**

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 14, 2016.



PETER B. TILLER

RCW 10.61.006

Other cases—Included offenses.

In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.

APPENDIX A

RCW 10.61.010

Conviction of lesser crime.

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

APPENDIX B

# TILLER LAW OFFICE

**December 14, 2016 - 4:59 PM**

## Transmittal Letter

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Personal Restraint Petition (PRP)

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