

NO. 63352-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MUSE MOHAMUD,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL FOX AND CHERYL CAREY

BRIEF OF RESPONDENT

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A. ISSUES

1. The appellant has the burden to provide an adequate record to review issues raised on appeal. Here, Mohamud alleges that the court abused its discretion when it granted the State's motion to continue the trial date. However, he has not specifically identified which continuance of the trial date constituted the alleged error, nor has he obtained an official transcript of the hearing at issue. Is the record insufficient to conduct review?

2. To prevail on a claim of ineffective assistance of counsel based on counsel's cumulative errors, a defendant must show that the alleged errors, either individually or in combination, rendered counsel's performance deficient, and that but for the cumulative effect of these errors, the outcome of the trial would have been different. Here, Mohamud cannot show that counsel's decisions regarding the impeachment of the victim's testimony, and whether to object to the admission of certain evidence or to certain remarks by the prosecutor in closing, were unreasonable. Has Mohamud failed to establish that counsel's performance was so deficient that it prejudiced him?

3. Two crimes do not constitute the same criminal conduct if the objective intents are different. A trial court's determination that two offenses do not constitute the same criminal conduct is reviewed for abuse of discretion. Here, Mohamud strangled the victim in the car until they reached an apartment complex. At that point, Mohamud forced the victim out of the car and into a vacant apartment, where he then strangled the victim again. Has Mohamud failed to show that this was one continuous criminal act and that his intent was the same throughout?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged Muse Mohamud with Kidnapping in the First Degree, Assault in the Second Degree (strangulation), Felony Harassment, and Unlawful Imprisonment. CP 7-9. The victim of each crime was Khadra Jama. CP 7-9. A jury convicted Mohamud of Kidnapping in the First Degree, Assault in the Second Degree and Unlawful Imprisonment. CP 91-93. The jury acquitted him of Felony Harassment. CP 90. The Unlawful Imprisonment

conviction was vacated as a lesser included offense of Kidnapping in the First Degree at sentencing. CP 108-09; 7RP 7-8, 21.¹

The court imposed a standard range sentence of 72 months of confinement for the kidnapping conviction and 14 months of confinement for the assault conviction, to be served concurrently. CP 108-16; 7RP 21. The court denied Mohamud's request for an exceptional sentence below the standard range.² CP 94-101; 7RP 16-21.

2. SUBSTANTIVE FACTS

Seventeen-year-old Khadra Jama moved to Seattle from Ohio in September 2007 to live with her aunt for the school year. 4RP 53. When the school year finished in June, Jama's aunt told Jama that she had to move out of her aunt's home and return to Ohio. 4RP 54. For the remainder of June and the first part of July 2008, Jama lived with her friend Sean.³ 3RP 55, 101-05. Jama

¹ The Verbatim Report of Proceedings consists of seven volumes. The State has adopted the following reference system: 1RP (02/04/09), 2RP (02/05/09), 3RP (02/09/09), 4RP (02/10/09), 5RP (02/11/09), 6RP (02/12/09), and 7RP (04/03/09).

² Mohamud does not assign error to the trial court's refusal to impose an exceptional sentence.

³ There are a few non-testifying witnesses who are referred to in the record by first name only.

believed that she would fly to Ohio on July 23rd but learned shortly before she was to depart that her trip had been delayed. 4RP 57, 105, 134-35. On July 23rd, she spent the day in SeaTac at her friend Yahya's apartment—a man she'd met in the summer of 2007 in Minnesota. 4RP 56-57. Muse Mohamud, whom Jama had not met before, lived with Yahya. 4RP 57, 134. When Yahya came back from running errands that afternoon, he brought Hennessy and Tilt with him for the three of them to drink. 4RP 139-40. Mohamud and Jama began drinking straight shots of the Hennessy and the Tilt. 4RP 140. Sometime between 8:00 p.m. and 11:00 p.m., a male friend of Yahya and Mohamud's picked up the three from the apartment in his car and drove toward downtown Seattle. 4RP 59, 141-42.

On the way, the driver stopped at a store and Mohamud bought a six-pack of Heineken beer. 4RP 59, 143. Jama, who was seated in the backseat with Mohamud, accepted the Heineken he gave her and started drinking it as they drove around. 4RP 58, 60, 144. The driver and Mohamud smoked some marijuana and offered her some as well, but Jama declined. 4RP 59.

While they were on the highway, Jama told the driver that she needed to go to the bathroom. 4RP 59-60, 150. Mohamud

told the driver not to stop the car and that they'd go somewhere to relax. 4RP 60. Jama responded that she really needed to use the bathroom, which angered Mohamud, who called Jama names and yelled at her not to waste his beer. 4RP 60. Mohamud then suddenly started choking Jama. 4RP 61, 152-53. Unable to breathe, Jama attempted to break free by hitting Mohamud in the head with her half-full Heineken bottle. 4RP 61, 153-55; Ex 11. The impact of the bottle broke Mohamud's tooth. 4RP 62, 156; Ex. 11. Mohamud discarded the bottle and resumed choking Jama until they arrived at an apartment complex in South Seattle. 4RP 63-64, 156-57. Jama did not want to get out of the car, but Mohamud pulled her out by her hair, dragged her across the parking lot, and into a vacant apartment. 4RP 64, 91-92, 157, 160. Yahya and the driver followed. 4RP 67.

Jama testified at trial that once inside the apartment, Mohamud took her to the back room and started hitting her in the head with a bottle. 4RP 67. Mohamud also continued to choke Jama. 4RP 67. Jama said that she asked Yahya to help her but he refused to intervene. 4RP 67-68. Mohamud then took Jama into the bathroom where he hit her repeatedly in the head and face,

despite Jama's pleas, in both English and Somali, for him to stop.
4RP 67, 73, 163, 168-69.

Ali Noor, who lived in the apartment above the one that the four entered, stated that he heard voices outside his apartment shortly after 1:30 a.m. 4RP 114. Noor looked outside and saw two men and one woman in the parking lot. 4RP 115. He heard a man's voice say, "Don't beat her" to which the other man responded, "She broke my teeth." 4RP 115. Noor testified that he was not certain if he saw one man punch the woman because he thought they might be joking around. 4RP 119-20. He denied hearing the woman scream, cry, or say, "Don't beat me." 4RP 128-29. Noor also told the jury that he didn't hear the police arrive or knock on the apartment below him. 4RP 130.

Mahad Hasan, who lived next door, testified that his apartment and the vacant apartment shared a thin wall and that no one was supposed to be in the vacant apartment that night. 4RP 28-31. Hasan was sleeping when, around 2:00 a.m., he awoke to hear a girl crying and begging for someone not to "do this." 4RP 32. Hasan also heard other voices coming from inside the vacant apartment. 4RP 32. He told the jury that he heard the woman say, in both Somali and English, "Please don't do this.

There will be DNA.” 4RP 33. Hasan next heard the woman say, “Please don’t do this. I’m Somali girl.” 4RP 33. The woman then said, “God is watching you. Please don’t do this.” 4RP 33. Hasan heard a man respond in a very loud voice, “Fuck God.” 4RP 34. Hasan further stated that he could hear as well as feel someone pushing against or kicking the wall. 4RP 34-35. Hasan told the jury that he thought the two men were going to kill the woman because, in addition to the woman’s comment about the DNA, he heard one of the men say, “We’re going to kill you.” 4RP 36, 38-39. Hasan called 911. 4RP 36-38; Ex. 1.⁴

When Seattle Police Officers Darryl D’Ambrosio and Aaron Johnson arrived at the front door of the apartment, they heard what sounded like an argument and paused for a moment to listen. 4RP 206. They heard a woman, who was obviously upset, say that “[t]his [is] fucked up,” twice. 4RP 206. Officer D’Ambrosio testified that they heard a struggle and things being knocked over, and then the woman inside said, “Get off me. Get off me.” 4RP 207. The officers, concerned for her safety, kicked the front door in with guns drawn. 4RP 208. As he entered, Officer D’Ambrosio saw Jama’s

⁴ A recording of the entire call was played for the jury in open court. 4RP 36; Ex. 1.

legs lying on the floor across the room from him, and Mohamud standing over her holding a green bottle in his hand. 4RP 209-10; 5RP 117-18, 139. No one else was found in the apartment. 5RP 118, 141.

When Officer D'Ambrosio approached Jama, she was still lying on the ground and had blood trickling from her mouth. 4RP 75; 5RP 124, 142. Blood was also on the carpet next to her. 5RP 145, 222, 224, 229; Ex. 13, 19. Officer D'Ambrosio testified that Jama seemed very groggy and was only semi-responsive to Officer Johnson when he spoke to her. 5RP 124-25. He also noted that Jama's voice sounded weak. 5RP 124. Jama told the officers that she'd been kidnapped, choked, and kicked in the head. 5RP 145, 150. Jama was taken to Harborview Medical Center for treatment of her injuries. 4RP 79; 5RP 226, 242-43, 256-57.

Officer D'Ambrosio and another responding officer testified that they had seen Heineken bottles inside the apartment. 5RP 145, 222, 224, 229; Ex. 13, 19. During a search of the car the four had arrived in, another detective retrieved a fully intact Heineken bottle from the center console. 5RP 201-04, 208; Ex. 13, 19.

Detective Jeffrey Spong testified that he took a recorded statement from Mohamud the day after the incident.⁵ 5RP 155; Ex. 11. During the interview, Mohamud denied hitting or choking Jama, but instead claimed that she had been choking herself and banging her head against the car window and the wall of the apartment because she was drunk, upset, and wanting to end her life. 5RP 158; Ex. 11. Mohamud also stated that Jama hit him with a Heineken bottle in the car as they were traveling down the highway, but despite the fact that the impact chipped his tooth, he was not mad about it. Ex. 11. Mohamud further stated to Spong that he had just been trying to be nice to Jama that night. Ex. 11.

During cross examination, Spong testified that he had been assigned to the case because of the sexual assault allegation, and had interviewed Jama the day after the assault, while she was still in the hospital. 5RP 155, 175-76. Spong stated that Jama did not tell him that she had been dragged on her knees into the apartment, did not complain of bruised or bloodied knees, and did not say that she got out of the car on her own. 5RP 175, 183. Jama did tell Spong that Mohamud had choked and kicked her, and

⁵ The recording of the interview was played in its entirety for the jury. 5RP 159; Ex. 11.

had beaten her with a bottle at least 20 times in the head. 5RP 184-85.

During counsel's cross examination of Jama, Jama admitted that she did not tell the detective, the firefighters, the paramedics, or the doctors and nurses at Harborview about the injuries to her knees, but denied making several statements to defense counsel during his interview of her pertaining to her belief that the driver was selling drugs, whom she had been living with, and the timeline of events. 4RP 161-62. Jama stated that she did not know exactly how long she was in the apartment, but thought it was "hours and hours," and told the paramedics that. 4RP 172-74.

Jama denied telling the paramedics and two social workers that she had been assaulted by four men for an entire day and that they "tried to rape her but were unsuccessful." 4RP 177-79. Jama also denied telling Safia Abdulle, who later testified for the defense, that: she didn't remember what happened, that she got injured when she fell a few times, that the bruises were from her lesbian girlfriend, that Mohamud was only trying to prevent her from harming herself, or that she would drop the criminal case if

Mohamud's family would pay her \$15,000 to cover her expenses.⁶
4RP 182-87. Upon further questioning, Jama also denied telling a mutual friend named "Arab" (Jamal Isse) that Mohamud did not hurt her, that she had been drunk that night and did not remember anything, or that she needed money to move to Las Vegas to start a modeling career and would drop the criminal case for \$15,000.
5RP 197-98.

Mohamud called four witnesses to testify on his behalf. Alexis Miller, a social worker who spoke with Jama while she was being treated at Harborview, testified that Jama told her that she had been assaulted by four men who hit her with bottles and their fists, and that they had tried to assault her sexually. 5RP 242-44. Miller also testified that, although Jama initially told her that she had been held in the house all day, Jama later said that she had been held only for an hour. 5RP 245. Tammy Morrill, another social worker who spoke with Jama at Harborview, testified that Jama told her that she had been assaulted by four men. 5RP 260.

⁶ During the prosecutor's re-direct examination, Jama testified that Abdulle had approached her about handling the situation "the Somali way" by Mohamud's family paying her money in exchange for dropping the criminal charges. 4RP 191-92.

Safia Abdulle testified that she had only met Jama once when Jama came to pick up her belongings from Abdulle's house. 5RP 263. While Jama was there, Abdulle asked Jama what happened the night Mohamud was arrested. 5RP 164. Abdulle testified that Jama first told her she did not know what happened besides what the police and medical treatment providers told her, because she blacked out after drinking, taking some pills, and smoking some drugs. 5RP 265, 267. Abdulle stated that Jama next told her that she was throwing bottles on the freeway, that Mohamud had been trying to stop her so she smashed him in the face with a bottle, and that Mohamud had not caused the bruises; rather, it was from a fight that she had with her lesbian girlfriend. 5RP 267-69. Jama also told Abdulle that she could not tell the police what really happened unless Abdulle gave her \$15,000 to cover her expenses. 5RP 269.

During cross examination, Abdulle testified that she spoke with Mohamud, whom she referred to as her nephew, after he had been arrested, and that Mohamud told her that he had been trying to hold Jama down in the car to prevent her from strangling herself and throwing bottles. 5RP 274-75. Abdulle also amended her earlier testimony, stating that Jama had actually told her that her

injuries were caused when four people jumped her, including her lesbian girlfriend's boyfriend. 5RP 275.

Jamal Isse testified that he spoke with Jama, whom he knows from Ohio, a little less than a week after the incident. 5RP 283, 290. Isse stated that Jama told him she had blacked out after drinking and did not know what happened. 5RP 283, 290. Isse also testified that Jama expressed concern over her medical bills because she did not have any insurance, and that she needed \$15,000 to cover her expenses and to become a model. 5RP 291-92. Isse told the jury that he spoke to Jama again in September or October 2008, and that she told him that she still needed \$15,000 to drop the criminal case. 5RP 292-93.

C. ARGUMENT

1. THE RECORD IS INSUFFICIENT FOR REVIEW OF THE COURT'S RULING ON THE STATE'S MOTION TO CONTINUE THE TRIAL DATE.

Mohamud argues that the trial court abused its discretion when it granted the State's request to continue the trial date. Mohamud claims that the record on appeal shows that the prosecutor who requested the continuance was not the prosecutor who ultimately tried the case and that the request was granted over

Mohamud's objection. This claim should be rejected for several reasons.

First, Mohamud does not specifically identify in his brief which continuance of the trial date he challenges. Second, even if this Court presumes, based on the designated clerk's papers, that the continuance request at issue was heard on December 5, 2008, no verbatim report of proceedings has been included in the record on appeal.⁷

The only record before the Court of this hearing is the order continuing the trial date signed by Judge Carey and the clerk's minute entry. CP 125, Supp. CP ____ (Sub No. 27). The order states that the plaintiff moved to continue the trial date and that the court found that the continuance was required in the administration of justice because "state and defense witnesses [were] unavailable [and the] pros[ecutor's] vacation." CP 125. The record before this Court is insufficient to determine whether Judge Carey abused her discretion because the order itself does not contain any information as to the length of the requested continuance, the specific

⁷ Mohamud has filed a contemporaneous personal restraint petition that contains information outside the record, including an unofficial transcript of a hearing that took place on December 5, 2008; however, it is not part of the record on direct appeal.

witnesses that were unavailable or the duration of their unavailability, nor why the new trial date of January 30, 2009 in particular was chosen.

The burden is on appellant to provide an adequate record on appeal. RAP 9.2(b); State v. Jackson, 36 Wn. App. 510, 516, 676 P.2d 517, aff'd, 102 Wn.2d 689 (1984). The trial court's decision must stand if this burden is not met. State v. Slanaker, 58 Wn. App. 161, 791 P.2d 575, rev. denied, 115 Wn.2d 1031, 803 P.2d 324 (1990); accord State v. Rienks, 46 Wn. App. 537, 545, 731 P.2d 1116 (1987), remanded on other grounds, 110 Wn.2d 1021 (1988) (appellant has burden to provide adequate record to review issues raised). Matters not in the record will not be considered by the court on appeal. Rienks, 46 Wn. App. at 545. Because Mohamud has not provided a sufficient record, this claim must be rejected.

2. MOHAMUD HAS FAILED TO SHOW THAT COUNSEL'S PERFORMANCE WAS SO UNREASONABLE THAT IT PREJUDICED HIM.

Mohamud argues that his trial counsel committed three errors that, either individually or in combination, constitute ineffective assistance: failure to properly impeach the alleged

victim, failure to object to the admission of the Heineken bottle into evidence, and failure to object to the prosecutor's inflammatory use of the word "terror" during closing argument because "it cannot be distinguished from terrorism," which is negatively linked to the Islamic religion and by extension Mohamud because of his Islamic name. App. Br. at 26-27. This argument is without merit for several reasons.

First, Mohamud's counsel impeached Jama with her inconsistent statements to five other witnesses multiple times during cross-examination and in Mohamud's case in chief. Second, the Heineken bottle was found inside the car where one of the assaults with a bottle took place; given the testimony that Mohamud purchased and shared with Jama a six-pack of Heineken, it was reasonable to infer that the recovered bottle was identical to the bottles used by Mohamud and Jama to strike each other. Third, the prosecutor's closing argument was proper, had no religious overtones directed at Mohamud or the Islamic religion in general, and contained no references to terrorism.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: 1) that trial counsel's representation was deficient; and 2) that counsel's deficient representation prejudiced

the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong of the test defeats the claim. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

Competency of counsel is evaluated from the trial counsel's perspective at the time of the alleged error and in light of the entire record below. State v. Riofta, 134 Wn. App. 669, 693, 142 P.3d 193 (2006); McFarland, 127 Wn.2d at 335. Counsel's performance is deficient only when it falls below an objective standard of reasonableness. Riofta, 134 Wn. App. at 693. In assessing performance, "the court must make every effort to eliminate the distorting effects of hindsight." State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (quoting In re Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)). A reviewing court engages in a strong presumption that counsel's performance was effective and within the wide range of reasonable professional assistance. McFarland, 127 Wn.2d at 335. Trial conduct that can be characterized as legitimate trial strategy or tactics cannot constitute ineffective assistance. State v. Soonalole, 99 Wn. App. 207, 215-16, 992 P.2d 541, rev. denied, 141 Wn.2d 1028 (2000).

The second prong of the Strickland test requires the defendant to prove that he was so prejudiced by defense counsel's deficient performance that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's actions. Nichols, 161 Wn.2d at 8. "Even deficient performance by counsel 'does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 691-93). "A defendant must *affirmatively prove prejudice*, not simply show that 'the errors had some conceivable effect on the outcome.'" Strickland, 466 U.S. at 693 (emphasis in original).

a. Mohamud's Counsel Presented Ample Impeachment Evidence Of Pretrial Inconsistent Statements Made By Jama To Several Witnesses.

Mohamud argues that his trial counsel failed to properly impeach Jama with her inconsistent statements during the interview conducted by defense counsel. Specifically, Mohamud alleges that counsel "attempted to impeach the star witness based, solely, on the lawyer's own recollection of his interview of Ms. Jama."

App. Br. at 22. Mohamud further asserts that “the record reveals that [trial counsel] failed to have an investigator at his interview of Ms. Jama, and thus, acted as an unsworn witness at trial.” App. Br. at 20. Because there is nothing in the record to indicate whether defense counsel had an investigator present during his interview with Jama, nor what any third party impeachment witness would have testified to at trial, this portion of Mohamud’s argument should be rejected without further argument.⁸

To support his position that an attorney can be deficient when he or she fails to impeach a witness, Mohamud relies on State v. Horton. 116 Wn. App. 909, 68 P.3d 1145 (2003). That case is distinguishable. In Horton, the defendant was charged with raping and molesting a 13-year-old girl over a period of several years. Id. at 910-12. The victim testified that she had never had sexual intercourse with anyone other than Horton. Id. at 913-14. A medical examination revealed evidence of sexual activity. Id. at 911. However, two years earlier, the victim had told a CPS⁹ investigator and a second witness that she had engaged in

⁸ As noted in footnote seven, supra, Mohamud has filed a simultaneous personal restraint petition that contains information outside the record as to this issue; however, that information is not part of the record on direct appeal.

⁹ Child Protective Services.

consensual sexual intercourse with a young boyfriend. Id. at 913. Horton's counsel was not permitted to call either witness to impeach the victim's testimony because counsel had not afforded the victim the opportunity to deny or explain the prior statements as required by ER 613(b). Id. at 913-16. The Horton court concluded that counsel's failure to comply with ER 613(b) could not have been part of a legitimate trial strategy; thus, counsel was ineffective. Id. at 917.

Here, unlike in Horton, Mohamud's counsel did not completely and utterly fail to impeach Jama's testimony. On the contrary, counsel asked numerous questions—without objection—during cross examination that conveyed to the jury that Jama's statements during defense counsel's interview contradicted her testimony. Counsel also established that Jama made several inconsistent statements to medical treatment providers, Spong and two social workers.

Counsel thoroughly cross examined Spong as to the official statement Jama made to him about the incident—much of which contradicted her testimony at trial. 5RP 179-85. The two social workers, Miller and Morrill, testified that Jama told them she had been assaulted by four men. 5RP 244, 248, 260. Jama also told

Miller that the men had attempted to sexually assault her and that they hit her with their fists and with bottles. 5RP 244, 248, 206.

The jury was also informed, by way of stipulation, that Jama told the paramedics that she was punched, kicked, and hit with beer bottles, and that the men tried to rape her but were unsuccessful. 5RP 303-04.

Mohamud's other two witnesses, Abdulle and Isse, testified that Jama had told them she needed \$15,000 from Mohamud's family to drop the criminal case. Abdulle also told the jury that Jama confessed to her that her (Jama's) injuries were not caused by Mohamud, but were inflicted by her lesbian girlfriend's boyfriend, while Isse further stated that Jama told him that she did not remember what had happened that night. 5RP 269, 275, 290.

During closing argument, counsel summarized the inconsistencies in Jama's testimony as well as her out-of-court statements, and argued that the physical evidence did not support Jama's description of a violent and lengthy assault by Mohamud. 6RP 333-35, 339-40, 343-44, 347, 353-54, 357, 362-65.

Given the significant amount of evidence presented through cross examination and the direct testimony of Mohamud's witnesses impeaching Jama's trial testimony, counsel's

performance was not deficient for failing to present extrinsic evidence of Jama's statements during the defense interview, which were cumulative of other inconsistent statements. Mohamud has also failed to show that, had defense counsel presented such evidence, the outcome of the trial would have been different.

b. Mohamud Cannot Establish That His Failure To Object To The Admission Of The Heineken Bottle Was Deficient And Resulted In Prejudice.

Mohamud asserts that the State did not lay a proper foundation to admit the Heineken bottle recovered from the car, and that his counsel's decision not to object to the admission of this evidence prejudiced him because the bottle was "gratuitous, irrelevant and inflammatory." App. Br. at 24.

The decision of when or whether to object is a classic example of trial strategy. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, rev. denied, 113 Wn.2d 1002 (1989). To establish an ineffective assistance claim on this basis, the defendant must show: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result

of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). “Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.” Madison, 53 Wn. App. at 763.

Mohamud has failed to demonstrate a lack of trial strategy or that an objection would likely have been sustained. In light of the testimony that Mohamud purchased a six-pack of Heineken beer and brought it into the car, and the photo documenting the Heineken bottles found in the apartment, it is a reasonable inference that the bottle retrieved from the car was identical to the bottles Mohamud and Jama struck each other with. This evidence was relevant and likely helpful to the jury in its determination of the credibility of Jama's testimony regarding how she received her injuries, as well as to Mohamud's statement to Spong that Jama chipped his tooth when she struck him with one of the bottles.

More importantly, Mohamud has failed to identify any specific prejudice that he suffered as a result of the admission of the evidence, nor can he show that the outcome of the trial would have been different had the bottle been excluded. Thus, Mohamud

has failed to establish this claim of ineffective assistance of counsel.

c. Mohamud Cannot Establish That His Counsel Was Deficient For Not Objecting During The Prosecutor's Closing, Nor That He Suffered Any Resulting Prejudice.

Mohamud argues that his counsel was ineffective for failing to object to the prosecutor's use of the word "terror" in closing argument because it was an appeal to the jury's biases. Although Mohamud does not assign error to the prosecutor's closing argument, he nevertheless appears to claim that this Court should review a claim of prosecutorial misconduct in his case under a less-stringent standard as part of his ineffective assistance claim. Mohamud's argument is without merit.

When a claim of ineffective assistance is based on counsel's failure to object to an allegedly improper remark during closing argument, the defendant must show that it was not objectively reasonable for his counsel to have remained silent at the prosecutor's remark. As previously discussed, the decision of when or whether to object is a classic example of trial tactics. Madison, 53 Wn. App. at 763.

Prejudice is established only if the defendant demonstrates a substantial likelihood that any misconduct affected the jury's verdict. Id. The absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991).

Here, there was nothing improper about the prosecutor's use of the word "terror." On the contrary, the prosecutor took great care to remind the jury of the word's original meaning, "an intense overpowering fear," in contrast to the politically charged and "overused and abused" meaning that exists in today's media. 6RP 309. There was no mention of the Islamic faith or specific acts of terrorism, nor any attempt to associate Mohamud with the Islamic religion or imply that he was a terrorist. 6RP 309-32. Rather, the prosecutor was describing Jama's feelings on the night that Mohamud assaulted, kidnapped, and threatened to kill her. His remarks were based on Jama's testimony that she had begged Mohamud to stop and not to kill her, and that when he did not stop, she believed that she was going to die. 6RP 310. These remarks also spoke to the elements of the offenses charged, which required

the State to prove that Mohamud had threatened to kill Jama (felony harassment) and had abducted her by the threatened use of deadly force with the intent to cause bodily injury (kidnapping). Counsel cannot be deficient for choosing not to object to proper remarks during the prosecutor's closing.

None of the above-discussed alleged errors individually, nor cumulatively establish that counsel's performance fell below an objective standard of reasonableness such that there is a reasonable probability that, but for these errors, the outcome of the trial would have been different. Thus, Mohamud cannot affirmatively prove prejudice and his convictions should be affirmed. See Nichols, 161 Wn.2d at 8; Strickland, 466 U.S. at 693.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE ASSAULTIVE ACTS AND THE KIDNAPPING DID NOT ENCOMPASS THE SAME CRIMINAL CONDUCT.

Mohamud asserts that the trial court erred when it concluded that the second degree assault and the first degree kidnapping did not encompass the same criminal conduct. This argument should be rejected because the court did not abuse its discretion when it found that the offenses had different criminal intents.

a. Relevant Facts.

At the sentencing hearing, Mohamud asked the court to find that the second degree assault and the first degree kidnapping merged (i.e., double jeopardy), or in the alternative, that they were the same criminal conduct. 7RP 13; CP 94-107. Mohamud argued that because the jury's verdict was ambiguous as to which assaultive act had been committed (strangulation inside the car or strangulation inside the apartment), the defendant should receive the benefit of the presumption that the assault proven was the assault that occurred inside the apartment and that the trial court should conclude that the assault merged into the greater offense of kidnapping, or in the alternative, treat the two crimes as the same criminal conduct. 7RP 13-14.

The State argued that the offenses did not merge and did not encompass the same criminal conduct. 7RP 9-11. Specifically, the prosecutor argued that the two crimes did not share the same intent because kidnapping as charged here required the intent to inflict bodily injury, although completion of the intended act was not necessary, whereas the crime of assault required a specific intent to strangle the victim. 7RP 10-11.

The trial court found that the crimes did not merge and did not constitute the same criminal conduct because the crimes had different intents. 7RP 21, 24.

b. Mohamud's Convictions For Assault And Kidnapping Required Separate Criminal Intents Regardless Of Which Assaultive Act Was The Basis For The Jury's Guilty Verdict.

In determining a defendant's offender score under the Sentencing Reform Act ("SRA"), multiple prior offenses are presumptively counted separately, unless the trial court finds that the offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). Two crimes constitute the "same criminal conduct" only if the crimes (1) required the same criminal intent; (2) were committed at the same time and place; and (3) involved the same victim. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); RCW 9.94A.589(1)(a). Courts narrowly construe the concept of same criminal conduct to disallow most claims. State v. Grantham, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). Failure to meet any one element precludes a finding of same criminal conduct, and the offenses must be counted separately in calculating the offender

score. Vike, 125 Wn.2d at 410. Appellate courts will not disturb a trial court's determination regarding same criminal conduct absent a clear abuse of discretion or misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

A person is guilty of second degree assault if, under circumstances not amounting to first degree assault, he or she assaults another by strangulation. RCW 9A.36.021(g). Strangulation is defined as the compression of a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe. RCW 9A.04.110(26).

A person commits first degree kidnapping if he intentionally abducts another with the intent to inflict bodily injury on that person. RCW 9A.40.020(1)(c). "Abduct" means to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force. RCW 9A.40.010(2). "Restrain" means to restrict a person's movements without consent and without legal authority in a manner that interferes substantially with his liberty. RCW 9A.40.010(1). Restraint is "without consent" if it is accomplished by physical force, intimidation, or deception. RCW 9A.40.010(1)(a). A person who

intentionally abducts another need do so only with the *intent* to carry out one of the actions enumerated in RCW 9A.40.020(1); the person need not actually bring about or complete one of the qualifying factors listed in the statute. In re Fletcher, 113 Wn.2d 42, 53, 776 P.2d 114, 120 (1989).

As a preliminary matter, Mohamud, relying on State v. Taylor,¹⁰ argues that because the jury's verdict is ambiguous as to which assaultive acts constituted the committed offense, this Court must interpret the ambiguity in his favor by concluding that the conviction was based upon the strangulation inside the apartment. 90 Wn. App. 312, 950 P.2d 526 (1998). In Taylor, the jury verdict was ambiguous as to whether the jury found an assault based on Taylor's accomplice's pointing a gun at the victim, or Taylor's action in shooting at the car. 90 Wn. App. 312, 316-17, 950 P.2d 526 (1998). The court held that "principles of lenity require[d]" that the ambiguity be resolved in favor of the defendant. Id. at 317. Thus, the Taylor court assumed that the assault to which Taylor was an accomplice provided the factual basis for his conviction, and began its same criminal conduct analysis from that point. Id. Taylor is

¹⁰ 90 Wn. App. 312, 950 P.2d 526 (1998).

inapposite here, however, where neither of Mohamud's assaultive acts shared the same objective intent as the first degree kidnapping.

In determining whether crimes shared the same criminal intent, courts evaluate two things: 1) whether a defendant's intent, viewed objectively, changed from one crime to the next; and 2) whether one crime furthered the other. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987); Grantham, 84 Wn. App. at 858. As part of this analysis, courts consider whether the crimes are "merely sequential, or whether they form a continuous, uninterrupted sequence of conduct." State v. Price, 103 Wn. App. 845, 858, 14 P.3d 841 (2000). Thus, unless the crimes are continuous, they are not the same course of criminal conduct. Grantham, 84 Wn. App. at 858 (citing Dunaway, 109 Wn.2d at 215).

In State v. Tili, supra, the Washington Supreme Court provided guidance in analyzing whether crimes share the same criminal intent. There, the court determined that the three counts of rape constituted the same criminal conduct. Tili, 139 Wn.2d at 124-25. Tili's three penetrations of the victim were nearly

simultaneous, all occurring within two minutes. Id. at 111-12. The court focused on the "extremely short time frame coupled with Tili's *unchanging* pattern of conduct," and found it unlikely that Tili formed "an independent criminal intent between each separate penetration." Id. at 124 (emphasis added).

In State v. Grantham, the defendant raped the same victim twice, at the same place, within minutes of each other. 84 Wn. App. at 859. Grantham forced anal intercourse on the victim, and then withdrew. Id. at 856. The victim crouched in a corner, while Grantham kicked her, called her names, and threatened her. Id. The victim begged him to stop and take her home. Id. At that point, Grantham forced her to perform oral sex upon him. Id.

In contrast to Tili, the Grantham court held that, although the rapes occurred close in time, they constituted different criminal conduct for two reasons. First, Grantham "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." Id. at 859. Although the second rape had the same general objective intent as the first rape – sexual intercourse – the pause supported a finding that the second rape "was accompanied by a new objective intent." Id. Thus, the "crimes were sequential, not simultaneous or

continuous." Id. Moreover, each sexual act "was complete in itself; one did not depend upon the other or further the other." Id.

Similarly, in State v. Price, the defendant shot the victim while he was standing by her car. 103 Wn. App. at 849. When the victim drove away, Price followed her onto the freeway and shot at her again. Id. at 849-50. In affirming the trial court's determination that the two attempted murder counts did not involve the same criminal intent, the appellate court stressed that each shooting was a complete criminal act in and of itself, the method of the attempted murders changed, and, after the first shooting, Price returned to his car and made the choice to pursue the victim a second time. Id. at 858. This "allowed time for Price to form new criminal intent." Id.

In support of his argument that the assaultive acts and the kidnapping shared the same objective intent, Mohamud relies on State v. Taylor, supra, and State v. Longuskie.¹¹ Both cases are distinguishable. As discussed above, in Taylor, the defendant assaulted the victim, ordered the victim to drive him and an accomplice while the accomplice pointed a gun at the victim, and shot at the car after it dropped the kidnappers at their destination.

¹¹ 59 Wn. App. 838, 801 P.2d 1004 (1990).

90 Wn. App. at 315. Taylor was convicted of kidnapping and assault. The Taylor court concluded that the crimes were the same criminal conduct because the assault did not end until Taylor and his accomplice got out of the victim's car, and that Taylor's objective intent in committing the assault inside the car was to persuade the victim not to resist the abduction. Id. at 321-22.

In Longuskie, the defendant was convicted of attempted first degree kidnapping, first degree kidnapping, and third degree child molestation for the abduction and molestation of one of his former students. 59 Wn. App. 838, 840-42, 801 P.2d 1004 (1990). The Longuskie court sua sponte raised the issue of whether the completed kidnapping and the molestation convictions encompassed the same criminal conduct. Id. at 847. The court found that the two convictions constituted the same criminal conduct because the child molestation was the objective intent and the kidnapping only furthered that crime. Id.

Here, unlike Tili, Taylor, and Longuskie, and similar to Grantham and Price, Mohamud's assaults and kidnapping of Jama were sequential, not simultaneous or a single, continuous act, and did not further each other. While in the car, Mohamud choked

Jama until she hit him in the head with a Heineken bottle. 4RP 61-62. Undeterred, Mohamud resumed strangling Jama until he accomplished his intended result of restricting her ability to breathe. 4RP 62-63. When the car pulled into the parking lot of the apartment complex, Mohamud stopped strangling Jama and got out of the car. 4RP 64. Hence, Mohamud had completed the first assaultive act of strangulation and a sufficient amount of time passed for him to have formed a new criminal intent to kidnap Jama.

Mohamud then pulled Jama out of the car by her hair, hit her, and dragged her across the parking lot and into the vacant apartment. 4RP 64. Thus, Mohamud had completed the crime of kidnapping because he had abducted Jama by threat of deadly force or by secreting or holding her in the apartment where she was not likely to be found, with the new specific intent of causing Jama bodily injury. 4RP 64, 67, 92.

After forcing her into the apartment, Mohamud hit Jama in her face and head with his fists and a beer bottle, kicked her in the stomach, threatened to kill her, and strangled her in the bedroom, bathroom and living room. 4RP 67, 73-74, 77, 88-92. Hence, the second assaultive act by Mohamud with the new and separate

intended purpose of restricting Jama's ability to breathe was then completed.

As in Grantham and Price, each of Mohamud's criminal acts was complete in and of itself; one did not further the other. Moreover, Mohamud's objective intent for each criminal act was different. Therefore, regardless of which act of strangulation the jury found proven beyond a reasonable doubt, Mohamud's convictions do not constitute the same criminal conduct and the trial court did not abuse its discretion in so ruling.

D. CONCLUSION

For the foregoing reasons, the State requests that Mohamud's convictions and sentence be affirmed.

DATED this 3rd day of March, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Aric Bomsztyk, the attorney for the appellant, at Barokas Martin & Tomlinson, 1422 Bellevue Avenue, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MUSE A. MOHAMUD, Cause No. 63352-0-1, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame
Name Wynne Brame
Done in Seattle, Washington

3/3/10
Date