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69005-1

No. 69005-1-I

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

STATE OF WASHINGTON,

Respondent,

vs.

LUIS ANDRE PEREZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY / No. 10-1-00323-8 SEA
The Honorable Beth M. Andrus, Presiding

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW / RAP 10.10

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A. INTRODUCTION

I, Luis Andre Perez, have received and reviewed the "APPELLANT'S OPENING BRIEF" prepared and filed by my Appellate Attorney, Maureen M. Cyr, WSBA 28724. Stated below are the additional grounds for review that are not addressed in my attorney's opening brief. I understand the Court will review this STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW when my appeal is considered on the merits.

B. ADDITIONAL GROUNDS FOR REVIEW

1. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT REFUSED TO PROVIDE AN INFERIOR DEGREE INSTRUCTION FOR RAPE IN THE THIRD DEGREE.

2. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT WHICH DEPRIVED MR. PEREZ OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

3. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. PEREZ OF COUNT III-RAPE IN THE SECOND DEGREE, COUNT V-RAPE IN THE SECOND DEGREE, AND COUNT VI-UNLAWFUL IMPRISONMENT.

4. CUMULATIVE ERROR DEPRIVED MR. PEREZ OF HIS STATE AND FEDERAL DUE PROCESS RIGHTS TO A FAIR TRIAL.

C. ISSUES PERTAINING TO ADDITIONAL GROUNDS FOR REVIEW

1. Did the trial court error and abuse its discretion when it refused to provide an inferior degree instruction for rape in the third degree, when substantial evidence affirmatively raised an inference that the sexual intercourse was "unforced" but still "nonconsensual," distinguishing Mr. Perez's case from State v. Charles and State v. Wright?

2. Did the prosecutor commit multiple instances of flagrant, prejudicial misconduct when he vouched for and bolstered the victim's credibility; when he invited the jury to disbelieve Mr. Perez's testimony by indicating that if they did believe him -- he had a bridge from Brooklyn he could sell them; when he misstated crucial evidence; and when he argued and encouraged the jury to find Mr. Perez guilty for an inappropriate gesture his codefendant, Mr. White, made during the complaining witness's testimony?

3. Did the State violate Mr. Perez's right to due process under Washington Constitution Article 1, section 3, and U.S. Constitutional Amendment 14, when it failed to prove the essential elements of Count III-Rape in the Second Degree, Count V-Rape in the Second Degree, and Count VI-Unlawful Imprisonment?

4. Did cumulative error deprive Mr. Perez of his due process rights to a fair trial?

D. STATEMENT OF THE CASE

1. The Incident.

Mr. Perez has known Troy O'Dell since he was about 13 years old. RP 1156. The two men lived together most of the time and treated each other like brothers. RP 1161, 1346-47. In Jaunary 2010, they were living together in Burien, with Mr. O'Dell's girlfriend, Candice Sanders, and the couple's two young daughters. RP 1168-69.

During January 2010, Mr. O'Dell's cousin, Christopher White, was also staying at the house temporarily. RP 1169.

Elizabeth Crenna has know Mr. O'Dell since he was a teenager. RP 1170, 1752. Ms. Crenna thought of Mr. O'Dell as her little brother. RP 1753. She also thought of Mr. Perez

as her brother. RP 1761.

Ms. Crenna stayed with Mr. O'Dell and the others at the house for about a month beginning in December 2009. RP 1284, 1764. In mid-January, she left the house and lived on the street for about three days, smoking crack cocaine. RP 1766-67. She did not sleep during that time and became a little "paranoid." RP 1768, 1771-72, 1839. She decided to return to the house to get some sleep. RP 1769, 1774.

Ms. Crenna called Mr. O'Dell and asked if she could stay at the house. RP 1288. He told her not to come. RP 1288. Ms. Crenna was not welcome because she had disparaged Ms. Sanders in front of Ms. Sander's mother, complaining she was a bad mother and used drugs in front of her children. RP 1769-71. Mr. O'Dell and Ms. Sanders were concerned Child Protective Services had already begun an investigation into the family. RP 1327, 1449. Also, Ms. Sanders did not want Ms. Crenna around the kids because she had been smoking crack cocaine. RP 1499.

Ms. Crenna knew she was unwelcome but went to the house anyway, arriving at around 2 a.m. on January 20. RP 1254, 1278. Mr. O'Dell, Ms. Sanders, Mr. White and Mr. Perez were all in the house. RP 1368. Ms. Crenna was loud and yelling and obviously intoxicated. RP 1291. Ms. Sanders told her she could not come in but she pushed her way through the doorway. RP 1445-46. Ms. Crenna and Ms. Sanders then engaged

in a physical fight in the entryway. RP 1219-20, 1254, 1292, 1446.

When the fight was over, Ms. Crenna tried to leave the house but Mr. O'Dell grabbed her and prevented her from leaving. RP 1280-82. He did not want the situation to escalate. RP 1280-82. He told Mr. Perez and Mr. White to take Ms. Crenna downstairs and get her "cleaned-up." RP 1242-43, 1461-62. After the three went downstairs, Mr. O'Dell fell asleep on the living room couch and Ms. Sanders went to bed with the kids in the bedroom. RP 1254. They did not hear any further noise or disturbance for the rest of the night. RP 1306, 1515.

The next day, several people came over to the house to make music in the recording studio downstairs. RP 1255. Mr. O'Dell and Ms. Sanders saw Ms. Crenna lying on the couch in Mr. Perez's room downstairs, where she stayed all day. RP 1247-49, 1259, 1463-65. There was a door downstairs through which she could have left the house. RP 1351, 1518. She was not physically restrained. RP 1276, 1518. The next day, Ms. Crenna was gone. RP 1233-34, 1465.

Ms. Crenna went to a neighbor's house. RP 1394-96, 1404. She was crying and said she had been at her brother's house where she was raped and kept against her will. RP 1403. The neighbor drove her to hospital. RP 1402.

At the hospital, Ms. Crenna told medical providers that

she had been beaten in the face and that Mr. Perez and Mr. White anally raped her. RP 942, 948, 963, 1027. Her left eye was swollen and bruised and she had bruises and lacerations on her cheek, lip, and arm. RP 976, 2123-24. The bones under her left eye were fractured. RP 942, 2001. Ms. Crenna was taken to Harborview Medical Center, where a sexual assault exam was performed. RP 2095, 2115.

A police officer interviewed Ms. Crenna at Harborview. RP 684. Police then set up a surveillance of Mr. O'Dell's house and stopped a car as it was leaving the house. RP 709-10. The car contained Mr. O'Dell, Mr. White and Mr. Perez, who were all arrested. RP 709-10. Ms. Sanders was also arrested soon afterward. RP 814.

2. The Charges.

The State charged Mr. Perez and Mr. White jointly with one count of second degree assault, RCW 9A.36.021(1)(a); two counts of first degree rape, RCW 9A.44.040(1)(c); in the alternative, two counts of second degree rape, RCW 9A.44.050(1)(a); and one count of unlawful imprisonment, RCW 9A.40.040. CP 64-67. Mr. O'Dell was charged separately with one count of unlawful imprisonment and one count of misdemeanor harassment and pled guilty as charged. RP 1276-80, 1322-23. Ms. Sanders was charged separately and pled guilty to second degree assault and possession of methadone. RP 1426-28. She

agreed to testify against Mr. White and Mr. Perez in exchange for the State's agreement not to file an additional firearm charge. RP 1428-30.

3. Trial.

Mr. O'Dell testified he saw Ms. Crenna and Ms. Sanders fight by the door. RP 1220, 1254. He did not say that he saw Mr. White or Mr. Perez hit Ms. Crenna. When he saw Ms. Crenna downstairs the next day, she looked fine. RP 1276.

Ms. Sanders testified she and Ms. Crenna fought in the doorway. RP 1446. According to Ms. Sanders, when she and Ms. Crenna stopped fighting, Mr. White hit Ms. Crenna twice and Mr. Perez hit her once. RP 1448-51. The next morning, Mr. White came upstairs and Ms. Sanders heard him say "we fucked her." RP 1467.

Ms. Crenna's testimony followed. She said that she left Mr. O'Dell's house two or three days before January 20, 2010. RP 1776-67. While she was away, she smoked a couple of grams of crack cocaine and hadn't slept in three days. RP 1767, 1772, 1839. She admitted that smoking the crack made her a little paranoid, but denied that it affected her memory. RP 1768, 1771-72, 1839. It also intensified everything, including her vision and hearing. Id.

Ms. Crenna returned to Mr. O'Dell's house knowing that both Mr. O'Dell and Ms. Sanders were mad at her, and she entered

the home with an understanding she would have to fight Ms. Sanders. RP 1770-73. From her perspective, it would just be another fist fight and, whether she won or lost, she would wake up to a new day and, like their fights in the past, they would go back to being a family again. RP 1773-74. After fighting with Ms. Sanders a little, she tried to leave through the backdoor, but Ms. Sanders, Mr. O'Dell, Mr. White and Mr. Perez pulled her back in. RP 1775-76. She couldn't remember exactly what was said, but indicated they all pulled her back and wouldn't let her leave because they thought she would call the police. RP 1776.

Ms. Crenna and Ms. Sanders continued to fight. RP 1776-77. As she was fighting with Ms. Sanders, Mr. White and Mr. Perez both punched her, but she could not remember who hit her first. RP 1777. When this happened, she heard Mr. O'Dell say "don't hit her again" or "stop, don't hit her." RP 1777. After Mr. White and Mr. Perez punched her, the blows made her dizzy so she sat down. RP 1777-78. When she sat down, she heard Mr. O'Dell say "Liz, you're going to die." RP 1778. She also heard Mr. O'Dell tell Mr. White and Mr. Perez, "take my sister downstairs and get her cleaned up." RP 1781, 1784. Because she was dizzy and could barely walk, Mr. White and Mr. Perez helped her down the steep stairs. RP 1781, 1785, 1889. She never testified that Mr. White or Mr. Perez forced

her to go downstairs.

Once downstairs, Mr. White and Mr. Perez showed her to the bathroom and provided her with clean clothes. RP 1785. She tried to close the bathroom door but they made her leave it open while they watched her change. RP 1785. She was scared because they wouldn't let her out of their sight, she knew they had a history of carrying guns, and she thought they were cleaning her up to kill her. RP 1785-90.

After exiting the bathroom, Ms. Crenna thought they were going to let her go to sleep, instead they said Mr. O'Dell said they were supposed to kill her. RP 178990, 1867, 1901. She testified that Mr. White initiated the rape by saying "if you let us fuck you, then we will not kill you." RP 1790. She asked "why?" and advised him she was on her period, but Mr. White said "well, we'll fuck you in the ass." RP 1790. She said "no" and "please don't" but they asked "come on," at which time she agreed and said "well, at least just use a condom." RP 1791. She then provided Mr. White and Mr. Perez with condoms from her purse and "made them" were a condom before having anal sex with her. RP 1792-93.

Ms. Crenna testified that Mr. White went first, then Mr. Perez, and then Mr. White again. RP 1791. Mr. Perez went once only, briefly, and then stopped. RP 1791, 1890. After Mr. White encouraged Mr. Perez to go again, she testified that

Mr. Perez said "no, he didn't want to, no more," but that Mr. White kept trying until she was finally tired of it and told him "no more." RP 1791, 1901. After she told Mr. White "no more," he threatened to punch her in the face again and she said "I don't care anymore, no more." RP 1791-92, 1884, 1901-02. After she laid down on the couch, they told her she could not leave that they were not supposed to let her out of their sight. RP 1792-93.

Ms. Crenna testified that she thought they would kill her if she did not have sex with them. RP 1791. She said "they made me feel like this is my chance not to lose my life." RP 1901. Related to specifically to Mr. Perez and whether or not he threatened Ms. Crenna while they were downstairs, she said he had a serious look on his face, but that he did not physically gesture at her -- that it was only Mr. White who threatened to punch her in the face after she said "no more." RP 1901-02.

Forensic scientists testified they did not detect any DNA from either Mr. White or Mr. Perez on the anal swabs taken from Ms. Crenna during the sexual assault exam, or on any of Ms. Crenna's clothing or the sanitary pad she was wearing. RP 1687-88, 1704-08, 1719-23. The anal swabs and examination also did not indicate any trauma. RP 2125.

Mr. Perez testified and admitted he was lying when he

told police he had consensual anal sex with Ms. Crenna. RP 2296. He said he gave a false confession because Sergeant Hall told him if he said the sex was consensual, the charges would be dropped. RP 2296, 2302-03. Mr. Perez testified that he did not rape Ms. Crenna and did not see anyone else rape her. RP 2298. Mr. White did not testify.

4. Jury Instructions.

On December 15, 2011, the trial court instructed the jury on First, Second and Third Degree Rape. Instruction Nos. 31, 32, 34, 35, 36, 38A, 39, 40, 42, 43, 45, 47A, 50, 55. CP 97-133; RP 2450-93, 2441.

The State objected to the court instructing the jury on third degree rape, arguing that it was not supported by the evidence. RP 2427-33. Defense counsel argued that the issue of lack of consent was expressed by words and conduct. The evidence showed that Ms. Crenna provided a condom from her purse and made Mr. Perez wear it, RP 2429, and that she did not sustain any physical injuries during the alleged rape. RP 2433.

The trial court allowed the instruction reasoning that there were "numerous different stories ... from different witnesses" and the "jury could pick and choose which version of events, or even which version of which part of the event to believe, and they jury could basically disbelieve Ms.

Crenna." RP 2429. The court noted that Ms. Crenna testified that there was "non-consensual anal sex, and that the jury could believe that, and the jury could disbelieve her testimony about the physical threats, the forcible compulsion." RP 2430, 2433. Over the State's objection, the trial court included an instruction for rape in the third degree. RP 2433, 2438.

The following day, December 16, 2011, and prompted by the State, the trial court revisited the rape three instruction and withdrew it after reviewing State v. Charles, 126 Wn.2d 353, and State v. Wright, 152 Wn.App. 64. The court concluded that "a rape three instruction should not be given in a case where there is no affirmative evidence that intercourse was unforced but non-consensual." RP 2500. The court revised its instructions to the jury and gave an additional instruction related to the changes. CP 138-163; RP 1501, 2505, 2506-07.

5. State's Closing Argument.

During closing arguments the prosecutor asked the jury to find Mr. Perez guilty of two counts of first degree rape, one count of second degree assault, and one count of unlawful imprisonment. RP 2578. In asking for these verdicts the prosecutor argued:

> "You know, just a few short days ago Liz Crenna took the stand and accounted for you the events of January 20th, 21st, 22nd of 2010. And the person you saw here in court today was markedly different than the woman that I've displayed here in the picture ...

But what Liz did when she came in here in front of you ... is that she braved many things .... She came in and admitted ... her shortcomings as a human being....

... and you can consider the fact that even though Elizabeth doesn't come from Medina or Bellevue or Broadmoore, she is still a person, she's a mom, and what happened to her ... was wrong."

RP 2507-08.

"So when one is tag teaming the other, engaging in anal sex, and then the other is just standing there, or Mr. White's hauling back to hit her in the face, that's working together. Might not be Mr. White at that moment who's engaging in sex with Ms. Crenna, but his presence, his readiness to assist makes him an accomplice to Mr. Perez's rape, and the visa versa is true."

RP 2516.

"Find Mr. Perez ... guilty ... on both counts because what they would do, as you heard, is each time they stopped is tag-team one another. That's a separate crime. It's taking the time to think about it, go back in, and rape her again. And if he's not doing it, then his buddy is, and they're an accomplice to that too. Each of those acts is a separate, distinct crime, and that's why there are two counts of rape."

RP 2578.

"But downstairs when they're threatening to kill her, threatening to beat her if she doesn't have sex, as you'll see in the definition of forcible compulsion, that's rape in the second degree. Well, what do you know, there's forcible compulsion. What does it mean, forcible compulsion, physical force which overcomes resistance or a threat. And a threat can be an expressed threat, I'm going kill you, or an implied threat, reeling back with a fist.... And that's exactly what Liz described to you when she was downstairs being raped by these two men."

RP 2517.

"Ms. Crenna described how the defendants, Mr. White over here, Mr. Perez, told her let us fuck you in the ass."

RP 2525.

"But the evidence that Mr. O'Dell assaulted Liz Crenna comes from one source, one. That guy right there (Mr. Perez). And if you believe this guy's testimony on the stand minimizing his responsibility, if you believe that, I got a bridge that I could sell you from Brooklyn."

RP 2571.

"And if you're going to believe that his fear of Troy O'Dell caused him to admit totally counter-intuitive things, like anal sex with Liz, things that protected him, again I'll remind you of that bridge I have to sell. It's not believable."

RP 2575.

"And when she's testifying about that fear, when she's testifying about what happens to snitches, she of course is here in trial in this courtroom, she walks in ..., and Mr. Perez and Mr. White are here. And what does Mr. White do? He engages her, and he nods. He nods. And why choose those particular moments? Because what she is doing? In the big picture what is she doing? She's snitching. She'll tell on him. She's telling the truth. So those nods over to Liz Crenna are very telling. You didn't see it, as she testified, because you guys were taking notes, but she saw it. She saw it.

And you've got to ask yourself. Why then? Why then, Mr. White? Why then send that message to Liz Crenna? And how real is that fear?"

RP 2529-30.

"Mr. Coe referenced his client's trial conduct, and he said that Mr. White's trial conduct was inappropriate. Those were Mr. Coe's words. I will submit to you, Ladies and Gentlemen, that inappropriate is the understatement of the year.

> What he did as Liz is talking about snitches and then talking about being fearful of being shot by Mr. White and Mr. Perez ..., ... in front of her is brazen, frightening, it's calculated, and it is a clear threat. .... Find them guilty of the rape. Find them guilty of the assault. Find them guilty of unlawful imprisonment."

RP 2571-72; RP 2578.

6. Jury Questions.

On December 19, 2011, the jury submitted an inquiry requesting to review the CD of Mr. Perez's 2nd interview with the police; State's Exhibit No. 210. CP 166-167; RP 2581-82. The trail court provided the jury with a transcript of the interview and allowed the jury to listen to the interview. Id.

On December 20, 2011, the jury submitted an inquiry requesting to review the CD of Mr. Perez's 2nd interview with the police again; State's Exhibit No. 210. CP 164-165; 12/21/2011, RP 2. Again, the trial court provided the jury with a transcript of the interview and allowed the jury to listen to the interview. 12/21/2011, RP 2-4. On this second inquiry, the jury crossed out a question related to whether or not they could convict Mr. Perez of a different degree of rape, or whether both defendants had to be convicted of the same degree of rape. CP 164. Additionally, in the same inquiry, the jury indicated they were confused about the alternative degrees. Id.

7. The Verdicts.

On December 21, 2011, the jury returned verdicts of guilt, finding Mr. Perez guilty of Count I-Assault in the Second Degree, Count III-Rape in the Second Degree, Count V-Rape in the Second Degree, and Count VI-Unlawful Imprisonment. CP 134-137; 12/21/2011, RP 6-9. When polling the jury, juror number six said, "there's just a technical piece that I don't know about," 12/21/2011, RP 13, and juror number seven said, "I think there's confusion is about that alternates for two of the charges." Id.

8. Sentencing.

On March 23, 2012, the trial court sentenced Mr. Perez to a minimum term of 147 months, with a maximum term of life as an indeterminate sentence. CP 200-212; RP 2608-09, 2614.

E. ARGUMENT

1. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT REFUSED TO PROVIDE AN INFERIOR DEGREE INSTRUCTION FOR RAPE IN THE THIRD DEGREE.

Here, the trial court committed reversible error and abused its discretion when it refused to provide an inferior degree instruction for rape in the third degree, when substantial evidence affirmatively raised an inference that the sexual intercourse was "unforced" but still "nonconsensual," distinguishing Mr. Perez's case from State v. Charles, 126 Wn.2d 252, 894 P.2d 558 (1995) and State v. Wright, 152 Wn.App.

64, 214 P.3d 968 (2009).

A trial court may not submit a theory to the jury for which there is insufficient evidence. State v. Munden, 81 Wn.App. 192, 195, 913 P.2d 421 (1996). Court's review the evidence in the light most favorable to the proponent of the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). When a trial court's decision to give an instruction rests on a factual determination, we review the decision for an abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 960 P.2d 883 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Jensen, 149 Wn.App. 393, 399, 203 P.3d 393 (2009).

Mr. Perez contends that Fernandez-Medina controls, because when substantial evidence affirmatively raises an inference that the defendant is guilty of only a lesser degree offense, the trial court must give the instruction, Fernandez-Medina, 141 Wn.2d at 462, and this same rule applies to an inferior degree offense instruction. Id. at 456.

To prove Second Degree Rape, the State had to present evidence that Mr. Perez had sexual intercourse with the victim by forcible compulsion. RCW 9A.44.050(1)(a); CP 152, Instruction No. 40; CP 156, Instruction No. 489. ""Forcible compulsion" means physical force which overcomes resistance,

or a threat, express or implied, that places a person in fear of death or physical injury ...." CP 149, Instruction No. 34. ""Threat" means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened...." CP 149, Instruction No. 35. To be a "threat," a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk. Id.

In comparison, Third Degree Rape requires the State to prove the defendant had sexual intercourse with a person who was not the defendant's spouse, who did not consent to the act, and who clearly expressed lack of consent by words or conduct; it does not require "forcible compulsion" -- only circumstances "not constituting rape in the ... second degree ...." RCW 9A.44.060(1)(a). CP 113, Withdrawn Instruction No. 43; CP 118, Withdrawn Instruction No. 50.

Originally the trial court determined that Mr. Perez met the burden necessary for the giving of third degree rape as an inferior degree offense to second degree rape. RP 2433, 2438. The court reasoned that there were "numerous different stories ... from different witnesses" and the "jury could pick

and choose which version of event, or even which version of which part of the event to believe, and the jury could basically disbelieve Ms. Crenna." RP 2429. The court noted that Ms. Crenna testified that there was "non-consensual anal sex, and that the jury could believe that, and the jury could disbelieve her testimony about the physical threats, the forcible compulsion." RP 2430, 2433.

Viewed in the light most favorable to Mr. Perez, this evidence was reasonably supported by facts not constituting rape in the second degree. Mr. Perez admitted he was lying when he told the police he had consensual anal sex with Ms. Crenna. RP 2296. The defense theory was that Ms. Crenna was sleep deprived and suffering from an "admitted crack cocaine induced paranoia" that intensified everything, especially what she perceived as threats which could have been "in jest or idle talk" amongst Mr. Perez and Mr. White. RP 2560; RP 1766-67, 1768, 1771-72, 1839. Her paranoia and the intensity of everything that happened upstairs, continued with her downstairs -- so her perception of the threats were not what she originally thought. And she later admitted this fact when testifying that "after thinking about everything that happened ... yeah, I think he was just pissed because he would never hurt me." RP 1853. So the death threat Mr. O'Dell gave upstairs was not serious, but at the time she thought it was real and it

continued in her mind downstairs with Mr. Perez and Mr. White -- who didn't talk much but had serious looks on their faces. RP 1866, 1901.

Based on this evidence, the trial court's reasoning for the instruction was sound, "the jury could pick and choose which version of events, or even which version of which part of the event to believe, and the jury could basically disbelieve Ms. Crenna." RP 2429. The "jury could disbelieve her testimony about physical threats, the forcible compulsion." RP 2430, 2433. Essentially, without the alleged threat, which may have been a figment of Ms. Crenna's mind, a fact the jury could have chosen to believe, the facts would not constitute rape in the second degre; therefore, the jury could have believed, absent the threat, that the anal sex was "unforced" but nonconsensual because Ms. Crenna's cocaine induced paranoia prevented her from giving consent.

After giving the rape three instruction, the trial court revisited the issue and withdrew it after reviewing State v. Charles and State v. Wright, supra, reasoning that "a rape three instruction should not be given in a case where there is no affirmative evidence that intercourse was unforced but nonconsensual." RP 2500.

Both Charles and Wright are distinguishable based on the fact that physical force was used against the victims.

Therefore, the trial court refused to give the instruction because the jury would have to disbelieve the defendant's claim that the intercourse was consensual and also disbelieve the victim's testimony that the act was forcible." Charles, 126 Wn.2d at 355-56; Wright, 152 Wn.App. at 66. In sum, neither Charles nor Wright warranted a lesser third degree instruction because both cases lacked affirmative evidence supporting the inference that only unforced, but nonconsesual, intercourse occurred. Furthermore, Fernandez-Medina is both closer factually and 10 years more recent than Charles and thus provides the controlling authority.

Consistent with Fernandez-Medina, neither Charles nor Wright stand for proposition that a parties inconsistent theories of a case warrant automatic denial of a request for an inferior degree instruction. In Charles, the victim testified that Charles forced her to the ground, they struggled, and Charles physically forced her to have sexual intercourse with him. 126 Wn.2d at 354. Charles testified that he and the victim had consensual intercourse. Id. As such, there was no evidence that the sexual intercourse was nonconsensual but not forcible.

The Supreme Court upheld the trial court's refusal to give the lesser offense instruction because (1) there was no affirmative evidence that the intercourse was unforced but

still nonconsensual, and (2) as a result, the jury would have to disbelieve both Charles' claim of consent and the victim's testimony that the act was forcible. Id. 126 Wn.2d at 256. It was the absolute inconsistency with both the victim's and the defendant's testimonys on which the high court based its holding. Id.

Here, the law does not support the trial court's reasoning where the truth, as viewed by the jury, may lie somewhere between the extremes of the victim's and the defendant's seeming mutually exclusive testimonies. In other words, the jury could have found lack of consent without force based on a reasonable inference that Ms. Crenna's self induced cocaine paranoia led her to misperceive the threats.

Division one has also implicitly rejected the proposition posited by the trial court. State v. Ieremia, 78 Wn.App. 746, 755 n.3, 899 P.2d 16 (1995). In State v. Gostol, Division one also noted that a lesser included offense instruction does not always necessarily turn on the argument or theory advanced by a party asking for a lesser included offense instruction. Rather, it turns on whether evidence is presented by either party from which the necessary inference may be drawn. A defendant may argue for acquittal and yet also be entitled to an inferior degree instruction. State v. Gostol, 92 Wn.App. 832, 838, 965 P.2d 1121 (1988).

The only factual prong of the Workman test, whether the facts warranted the inferior degree instruction, is at issue here. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under Workman's factual prong, the analyses for determining the propriety of giving lesser included and inferior degree instructions are identical. See Fernandez-Medina, 141 Wn.2d at 454-55. Therefore, the above quoted language from Gostol, also involving the factual prong of the Workman test, applies with equal persuasiveness here.

Thus, in contrast with Charles and Wright, supporting evidence warranted the trial court's giving an inferior degree instruction for rape in the third degree. Viewed as a whole and in light most favorable to Mr. Perez, the evidence and testimony supports a reasonable inference that the sexual intercourse was not forcibly compelled, but still not consensual. As described above, Ms. Crenna may have misperceived the threats based on the intensity of her crack cocaine induced paranoia and lack of sleep. And based on her paranoid condition, and the definition of "threat," a reasonable person in the position of the speaker, would not "foresee" that the statement would be interpreted as a serious expression or intention to carry out the threat." CP 149. Thus, a rational trier of fact could have disbelieved Ms. Crenna's testimony and reached a conclusion that Mr. Perez committed

only third degree rape, i.e., that the anal sex was unforced, but still nonconsensual because of her paranoid state of mind and lack of sleep. Like the trial court initially reasoned when originally giving the instruction, based on the evidence, a rational jury could have disregarded the forcible compulsion (threat), but still found the sexual intercourse nonconsensual. Based on this inference the evidence reasonably supported facts not constituting rape in second degree, but only rape in the third degree. Therefore, the trial court's decision not to give the inferior degree instruction was manifestly unreasonable and based on untenable grounds. Walker, 136 Wn.2d at 771-72; and Jensen, 149 Wn.App. at 399.

Moreover, this inference is supported by the jury's questions and request to listen to Mr. Perez's 2nd interview with the police, and the second question which they crossed out related to whether or not they could convict Mr. Perez of a different degree of rape. CP 166-167; CP 164-165. Clearly, because Mr. Perez was not the initiator and appeared to take a secondary less aggressive role in the conduct downstairs, the jury may have felt Ms. Crenna imputed Mr. Whites threats to Mr. Perez and explored the possibility of convicting him of a lesser degree offense. When polled, two jurors indicated they were confused about this issue. As such, not giving the inferior degree instruction, when it was supported

by a reasonable inference from the evidence, was particularly harmful in Mr. Perez's case.

Additionally, Ms. Crenna's testimony that she said "no" and "please don't" but that they asked "come on," at which point she gave in and said "well, at least just use a condom" (RP 1791-93), would, absent the alleged "threat," constitute "unforced" but nonconsensual sex, i.e., only rape in the third degree. In other words, the evidence would have permitted a rational juror to find Mr. Perez guilty of the inferior degree offense and acquit him of the greater, i.e., second degree rape. Fernandez-Medina, 141 Wn.2d at 456. As a consequence, when the court refused to give the inferior degree instruction, Mr. Perez was unfairly deprived of the ability to present his theory of the case, which denied him a fair trial and violated his state and federal constitutional rights. Wash. Const., Article 1, sections 3, 21 & 22 (amend. 10); U.S. Const. Amends. 6 & 14.

The trial court abused its discretion when it refused to give third degree rape as an inferior degree instruction and reversal is required.

2. THE PROSECUTOR'S FLAGRANT, PREJUDICIAL MISCONDUCT DEPRIVED MR. PEREZ OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Unlike other attorneys, prosecutors are not just lawyers but also "quasi-judicial officers." State v. Huson, 73 Wn.2d

660, 662, 440 P.2d 192 (1968). As such, they are required to refrain from trying to gain convictions at all costs, and must instead act in the interests of justice even if that causes them to "lose" a case. State v. Smith, 71 Wn.App. 14, 18, 856 P.2d 415 (1993).

When a prosecutor fails in this duty and commits misconduct, the prosecutor may deprive a defendant of his constitutional right to a fair and impartial trial. See State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Boehning, 127 Wn.App. 511, 518, 111 P.3d 899 (2005); Wash. Const., Article 1, sections 3 & 22 (amend. 10); U.S. Const. Amends. 6 & 14. Even with no objection below, a prosecutor's misconduct will still compel reversal where it is so "flagrant and illintentioned" that it could not have been cured by an instruction telling the jury to disregard it. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

In this case, the Court should reverse, because the prosecutor committed multiple acts of flagrant, prejudicial misconduct, none of which could have been cured, and the effect of which deprived Mr. Perez of a fair trial.

a. Improper "Theme" and "Vouching"

The prosecutor's "theme" in closing was that Mr. Perez was an admitted lair who would say anything to escape the consequences of assaulting and raping Ms. Crenna, and that

the trial was all about Liz Crenna -- "a mom" who admitted her "shortcomings as a human being," who was "telling the truth," and who could be believed because although she was not from the rich neighborhoods of "Medina or Bellevue or Broadmoore, she is still a person ... and what happened to her ... was wrong." RP 2507-08, RP 2529-30 (She's telling the truth).

Using this opening theme, the prosecutor bolstered and vouched for Ms. Crenna by asserting that she was a poor, unfortunate mother who could be believed despite her shortcomings as a human being, in contrast with Mr. Perez who was an admitted liar. In fact, the prosecutor first bolstered and vouched for Ms. Crenna, and then accused Mr. Perez of minimizing his responsibility and advised the jury, not just once but twice, that if they believed him -- he had "a bridge from Brooklyn" that he could sell them. RP 2571, 2575.

This argument was serious misconduct. First, the arguments violated the prosecutor's sworn duty to seek convictions based upon evidence alone. Huson, 73 Wn.2d at 663; Reed, 102 Wn.2d at 147. A jury's decision must not be made based upon passions, fears or resentments, and it is misconduct for a prosecutor to invite the jury to render a decision which is not "free of prejudice and based on reason." Huson, 73 Wn.2d at 663. Invoking themes or using analogies designed to improperly

inflame passion and prejudice are completely improper and highly prejudicial acts of misconduct. See State v. Echevarria, 71 Wn.App. 595, 598-99, 860 P.2d 420 (1993)(condemning prosecutor's analogizing case to "the war on drugs" as serving no purpose other than improper invocation of passion and prejudice).

Further, by using the "theme," the prosecutor misstated the law and misled the jury about its true role. A criminal trial is not about the unfortunate "poor mom who could be believed despite shortcomings, who was telling the truth, and who was wronged," it is about whether the state has proven every part of its case beyond a reasonable doubt. See State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996); In re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). Worse yet, after the prosecutor bolstered and vouched for Ms. Crenna, he improperly invited the jury to disbelieve Mr. Perez by telling them, if they did believe him, he had a bridge from Brooklyn to sell them. Prosecutorial misconduct does not get much worse than this.

In addition, prosecutor's are not allowed to express personal beliefs about witness credibility, and must refrain from bolstering and vouching for the credibility of their own witness. State v. Sargeant, 40 Wn.App. 340, 344, 698 P.2d 598 (1985). While it is permissible for a prosecutor to argue issues relating to veracity based on facts in the record, it

is not proper for the prosecutor to imply that he or she believes a state's witness more than any other, or to throw the weight of the prosecutor's office behind that particular belief. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

Here, the prosecutor told the jury that Ms. Crenna was more credible because she -- unlike Mr. Perez -- was a poor mom who was wronged, could be believed and was telling the truth. He painted his witness as essentially righteous and more credible for "braving many things." RP 2507-08. In contrast, the prosecutor specifically told the jury that Mr. Perez was an admitted liar that the jury could not believe, and if they did -- well then, he had a bridge from Brooklyn he could sell them. This kind of bolstering of the State's witness, at the expense of Mr. Perez, was clearly improper and highly prejudicial.

More troubling is the impact these comments had on Mr. Perez's constitutional rights. The obvious conclusion the jury was intended to reach was that Ms. Crenna could be believed above and beyond Mr. Perez. Telling the jury he had a bridge to sell them in Brooklyn if they believed Mr. Perez violated his state and federal constitutional right to a fair trial. Wash. Const. Article 1, sections 3, 21 & 22 (amend. 10); U.S. Const. Amends. 6 & 14. These arguments were serious misconduct,

and this Court should so hold.

b. Courtroom Conduct of Co-Defendant-White

During the complaining witness's testimony, Mr. White nodded his head when she said she was afraid that Mr. White and Mr. Perez would kill her because "snitches end up in ditches." RP 1796. Ms. Crenna explicitly described Mr. White's gesture to the jury. RP 1820-21. The prosecutor repeatedly emphasized the gesture in his closing argument, urging the jury to view it as a "calculated" and "clear threat" that was also evidence of motive. RP 2529-30, 2571-72. But the evidence was not relevant or admissible to show Mr. Perez's guilt and improperly encouraged the jury to find him guilty by association.

For the same reasons set forth above, this was clearly flagrant and ill-intentioned prosecutorial misconduct. The prosecutor admitted that Mr. White's conduct was inappropriate and even said that "inappropriate is the understatement of the year." RP 2578. Nevertheless, the prosecutor urged the jury to find Mr. Perez guilty based on this "inappropriate" conduct. Once again, misconduct does not get much worse than this and, in fact, this is probably the worst case of misconduct ever recorded in the State of Washington; at a minimum, it ranks with the worst of the worst. This argument was serious misconduct, and this Court should so hold. (Note: Mr. Perez's

appellate counsel argued Mr. White's inappropriate gesture prejudiced Mr. Perez and required severance and a new trial. Mr. Perez is arguing that the prosecutor committed flagrant, ill-intentioned, and highly prejudicial misconduct that was unfair and deprived him of a fair trial; and his argument should be considered independent from appellate counsel's severance issue).

c. Misstating Crucial Evidence / Unsworn Witness

The prosecutor also committed misconduct by misstating crucial evidence and testifying about facts not in evidence. It is misconduct for a prosecutor to mislead the jury in summarizing evidence during closing argument. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Further, by arguing facts not in evidence, or misstating actual facts, the prosecutor effectively becomes an unsworn witness against the accused -- one not subject to all the limits confrontation rights require. Belgarde, 110 Wn.2d at 507-510. Washington courts have recognized that prosecutors have a duty not to make statements unsupported by the record and which may unfairly mislead the jury. State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991); State v. Grover, 55 Wn.App. 923, 936, 780 P.2d 901 (1989).

i) Tag Teaming One Another

Here, the prosecutor argued that "when one is tag teaming

the other, engaging in anal sex, ... and Mr. White's hauling back to hit her in the face, that's working together...." RP 2516. Also the prosecutor argued "... what they would do, as you heard, is each time they stopped is tag-team one another. ... Its taking the time to think about it, go back in, and rape her again. And if he's not doing it, then his buddy is...." RP 2578.

This argument was misleading and not true. Ms. Crenna testified that Mr. Perez went once only, briefly, and then stopped. RP 1791. After Mr. White encouraged Mr. Perez to go again, she testified that he said "no, he didn't want to, no more," but that it was only Mr. White who kept trying until she was finally tired of it and told him "no more." RP 1791, 1901. Also Ms. Crenna testified that Mr. White penetrated her anus "two to four times." RP 1792. She said that Mr. Perez put his penis "on my anus." RP 1793. Although the conduct was described as "sex," she never testified that Mr. Perez penetrated her anus. Later, on the subject of penetration, she admitted that Mr. Perez "tried to have sex ... one time," and "believed" it was only once. RP 1890-91. As such, it was improper for the prosecutor to assert they were tag teaming the victim back and forth.

ii) Beat Her and Punch Her in the Face

Here, the prosecutor erroneously declared that they were

working together when "Mr. White hauled back to hit her in the face," and "... when they're ... threatening to beat her ... and reeling back with a fist ..." to punch her in the face. RP 2507-08, RP 2517.

This argument was misleading and not true. Mr. Crenna testified that Mr. Perez went once only, briefly, and then stopped. RP 1791, 1890. After Mr. White encouraged Mr. Perez to go again, he said "no, he didn't want to, no more," but that Mr. White continued trying until she finally tired of it and told him "no more." RP 1791, 1901. After she told Mr. White "no more," he threatened to punch her in the face. RP 1791-92, 1884, 1901-02. She explicitly clarified that it was only Mr. White who threatened to punch her in the face after she told him "no more." RP 1901-02. Because Mr. Perez had already disengaged himself from the situation and it was only Mr. White who threatened to beat her and punch her in the face, it was improper for the prosecutor to attribute Mr. White's threats to Mr. Perez.

iii) Let us Fuck you in the Ass

Here, the prosecutor erroneously declared that Ms. Crenna described how "Mr. White ..., and Mr. Perez, told her let us fuck you in the ass." RP 2525.

This argument was misleading and not true. Ms. Crenna testified that Mr. White initiated the rape by saying "if you

let us fuck you, then we will not kill you." RP 1790. She also said that it was Mr. White who siad "well, we'll fuck you in the ass." RP 1790. Again, because Mr. Perez never actually made these statements and it appears clearly on the record that it was Mr. White conversing with the victim, it was improper and highly prejudicial for the prosecutor to attribute the conversation to Mr. Perez.

iv) Unsworn Prosecutorial Testimony

The prosecutor testified that "When she's testifying about fear ... snitches ..., Mr. Perez and Mr. White are here. And what does Mr. White do? He engages her and he nods. He nods. And why ...? Because what she is doing? Snitching. In the big picture ... she's snitching. She's telling on him. She's telling the truth. You guy's didn't see it ..., but she saw it." RP 2529-30. "What he did as Liz is talking .... in front of her is brazen, frightening, it's calculated, and it is a clear threat. .... RP 2571-72.

Here, the prosecutor erroneously testified for and on behalf of the victim. His personal opinion as to why Mr. White nodded was not evidence and it was clearly improper. Moreover, his testimony that Mr. White's conduct was "Brazen, frightening, calculated, and a clear threat," was unnecessary and irrelevant to establish Mr. Perez's guilt. He was clearly expressing an improper opinion about Mr. White's conduct; the effect of

which was unfair and highly prejudicial to Mr. Perez. This was clearly misconduct.

d. Reversal is Required

These acts of misconduct compel reversal, despite counsel's failure to object below. They were flagrant, ill-intentioned, and highly prejudicial misconduct which misstated the evidence on crucial evidentiary points. Additionally, by bolstering and vouching for the victim, the prosecutor played on the jury's passion and prejudice -- a "theme" employed to bolster the victim's credibility, contrasted by disparaging Mr. Perez's credibility by playing on the jury's intelligence and pride, asserting that if they believed him -- he had a bridge from Brooklyn to sell them. All of this misconduct went directly to the heart of the case: Ms. Crenna's credibility vs. Mr. Perez's credibility.

Where, as here, the prosecutor's misconduct affects the defendant's constitutional rights, the state must show that the errors were harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996). A harmless error is one which is "trivial, or formal, or merely academic, ... and in no way affected the final outcome of the case." State v. Jackson, 112 Wn.2d 867, 877, 774 P.2d 1211 (1989). Even misconduct that does not involve constitutional rights compels reversal. Such errors require reversal if there is

a reasonable probability they affected the outcome of the case. State v. Bautista-Caldera, 56 Wn.App. 186, 193, 783 P.2d 116 (1989). Here, there is more than such a probability, and the errors cannot be demmed "trivial," "academic" or harmless beyond a reasonable doubt. Clearly, the State had some serious reservations about the victim's credibility. She was an admitted crack-cocaine user that hadn't slept in several days. She testified that she gets paranoid and the crack intensifies everything. As a consequence, the State must have felt it was necessary to bolster and vouch for her credibility; otherwise the jury may have disregarded her testimony related to threats she perceived in a paranoid state. The prosecutor's misstatements of the evidence on these crucial points, and his other serious misconduct -- bolstering, vouching, testifying, offering to sell the jury a bridge from Brooklyn if they believed Mr. Perez, and urging the jury find guilt based on Mr. White's inappropriate courtroom conduct, clearly had an effect on the decision of this case.

e. Cumulative Effect of Errors Require Reversal

In any event, even if the acts of misconduct are not sufficient to support reversal separately, the sheer weight of misconduct here does, because it had the cumulative effect of depriving Mr. Perez of a fair trial. State v. Torres, 16 Wn.App. 254, 263, 554 P.2d 1069 (1976)(reversal proper based

on cumulative effect of misconduct). This Court should reverse Mr. Perez's conviction and remand for a new trial.

f. Ineffective Assistance of Counsel Requires Reversal

The accused have a state and federal constitutional right to effective assistance of counsel. Wash. Const. Article 1, sections 3 & 22; U.S. Const. Amends. 6 & 14; Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). To prove ineffective assistance, a defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense.. State v. Garrett, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). Although there is a presumption that counsel's performance was adequate, that presumption is overcome by showing that counsel's representation "fell below an objective standard of reasonableness." Garrett, 124 Wn.2d at 581.

In this case, in the unlikely event that this Court finds that the prosecutor's flagrant misconduct could have been cured by instructions, this Court should then reverse, based on ineffective assistance of counsel. As noted above, all the prosecutor's improper arguments in this case are well-known to be misconduct of the most flagrant kind. In fact, some of his misconduct was as worse as it gets. Yet counsel did nothing as he repeatedly bolstered and vouched for the victim

-- stating that "she's telling the truth," as he misstated crucial evidence and basically testified for the victim, and as he offered to sell the jury a bridge from Brooklyn if they believed Mr. Perez. He inflamed the juror's passions and prejudices against Mr. Perez, and asked the jury to draw negative inferences against Mr. Perez and find him guilty for his co-defendant's inappropriate courtroom conduct, and by insinuating that the victim was a poor mom who was wronged and who could be believed despite her shortcomings as a human being and fact that she was not from the rich neighborhoods of Medina, Bellevue, and Broadmoore. These arguments were improper, flagrant, ill-intentioned, and highly prejudicial.

There could be no tactical reason for failing to protect a client's interests by object to this flagrant, prejudicial misconduct. And, as noted above, the misconduct went to the heart of the state's case, making it impossible for Mr. Perez to receive a fair trial. If this Court concludes that the misconduct might potentially have been curable with objection, counsel's failure to object amounted to deficient performance which prejudiced Mr. Perez. See State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989)(failure to object may amount to ineffectiveness if failure goes to the heart of the state's case). This Court should reverse.

3. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. PEREZ OF COUNT III-RAPE IN THE SECOND DEGREE, COUNT V-RAPE IN THE SECOND DEGREE, AND COUNT VI-UNLAWFUL IMPRSIONMENT.

As part of the due process rights guaranteed under both Wash. Const., Article 1, section 3, and U.S. Const. Amend. 14, the State must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358 at 364.

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)(citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, 119 Wn.2d at 201 (citing State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, 100 Wn.2d at 491. Specific criminal intent

may be inferred from circumstances as a matter of logical probability. State v. Zomora, 13 Wn.App. 220, 223, 817 P.2d 880 (1991).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, in not substantial evidence, and does not meet the requirement of due process. State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported my substantial evidence may be attacked for the first time on appeal as a due process violation. Id. "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973)(quoting State v. Collins, 2 Wn.App. 757, 759, 470 P.2d 227 (1970)).

Mr. Perez contends that his right to due process under the state and federal constitutions were violated when the State failed to prove, beyond a reasonable doubt, the essential elements of rape in the second degree and unlawful imprisonment. RCW 9A.44.050(1)(a) and RCW 9A.40.040.

Counts III & V - Rape in the Second Degree

Instruction Nos. 40 & 48 defined the crime of rape in the second degree. CP 152 & 156. The State alleged that Mr. Perez used "forcible compulsion" by means of a "threat" to commit the rapes. RCW 9A.44.050(1)(a). The State also alleged

that Mr. Perez was an accomplice to his co-defendant's rape, a crime committed in the same manner, resulting in the second count of rape - Count V.

Instructions Nos. 34 & 35 defined "forcible compulsion" and "threat." CP 149. Instruction Nos. 13 & 14 defined "accomplice" and "knows or acts knowingly." CP 143.

Thus, to find Mr. Perez guilty of Count III - Rape in the Second Degree, the State had to prove that he forced the victim to have sexual intercourse by means of a threat. To find him guilty of Count V - Rape in the Second Degree/Accomplice, the State had to prove that Mr. Perez aided Mr. White, in using forcible compulsion to rape the victim by means of a "threat," and that his aid was done with knowledge that Mr. White was committing the crime.

Here, the State theorized and argued that the Ms. Crenna was forcibly raped by Mr. Perez and Mr. White because they agreed not to kill her if she allowed them to have sex with her. Ms. Crenna testified that "Mr. White initiated the rape by saying "if you let us fuck you, then we will not kill you." RP 1790. After she told Mr. White she was on her period, he said "Well, we'll fuck you in the ass." RP 1790. She said "no' and "please don't" but they pleaded "come on," at which time she consented and said "well, at least just use a condom." RP 1791. She then provided the condoms from her purse and

"made them" wear a condom before having sex with her. RP 1792-93. She also testified that she "smoked a couple of grams of crack cocaine and hadn't slept in days. RP 1767. And she admitted that smoking the crack made her a little paranoid and intensified everything, including her vision and hearing. RP 1768, 1771-72, 1839. She testified that Mr. White went first, then Mr. Perez, and then Mr. White went again. RP 1791. Mr. Perez when once only, briefly, and then stopped. RP 1791, 1890. After Mr. White encouraged Mr. Perez to go again, she testified that Mr. Perez said "no, he didn't want to, no more." RP 1791, 1901. Ms. Crenna testified that she thought they would kill her if she did not have sex with them. RP 1791. She said "they made me feel like this is my chance not to lose my life." RP 1901. Related specifically to Mr. Perez and whether or not he threatened her downstairs, she said he had a serious look on his face, but that he did not physically gesture at her -- that it was only Mr. White who threatened to punch her in the face after she said "no more."

Viewed in the light most favorable to the State, this evidence fell short of establishing the requisite quantum of proof that Mr. Perez used forcible compulsion. State v. Stevenson, 128 Wn.App. 179, 192, 114 P.3d 699 (2009).

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person

threatened. To be a threat, a statement ... must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk. CP 149; Instruction No. 35.

Here, the state failed to prove "forcible compulsion" beyond a reasonable doubt. Ms. Crenna had just been assaulted upstairs and believed she heard her brother say, "you're going to die." RP 1778. This alleged statement was said after she was punched and became really dizzy. RP 1777-78. This statement remained in her mind after she was helped downstairs by Mr. Perez and Mr. White. RP 1781, 1785. Paranoid and sleep deprived from using crack, she really believed they might kill her because of the statement Mr. White made, "if you let us fuck you, then we will not kill you." But the question is, could Mr. Perez and Mr. White "foresee that the statement would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk" when they had no way of knowing Ms. Crenna was paranoid and took them literally.

She testified, after reflecting back on the incident, that she didn't think Mr. O'Dell was serious when he said she was going to die. RP 1812. Here, the point is, at the time

she was downstairs with Mr. Perez and Mr. White, she was paranoid, therefore, she took Mr. White's statement over-serious when he said let us fuck you and we won't kill you -- because the threat was not real. This fact is illustrated by her testimony that she said "no" and "please don't" but they pleaded and asked "come on," at which point she consented and said "well, at least just use a condom." RP 1791. Then finally, she told Mr. White "no more" and he stopped. Clearly, the phantom threat was negated by consent. In sum, Ms. Crenna's paranoia got the better of her, and neither Mr. Perez nor Mr. White could foresee that Mr. White's statement would be interpreted as a serious expression as opposed to something said in jest.

Viewed in the light most favorable to the State, no reasonable juror could infer that the threat to kill her was real. The statement may have been made, but the threat was a figment of her paranoia; as a consequence, she consented to the encounter after they asked "come on." Although credibility issues are for the finder of fact to decide, the existence of a fact cannot be based on "guess, speculation, or conjecture." State v. State v. Hutton, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). Here, the jury improperly resorted to "guess, speculation, and conjecture" to fill in the blanks for its guilty verdict.

In other words, the threat was not real or serious, but they still wanted to have sex with her so they asked "come on." Because she was paranoid, she took the threat serious. But, when they said "come on," she consented. As a result, both Mr. Perez and Mr. White believed the encounter was consensual; especially after she said "well, at least just use a condom," and then provided condoms from her purse and "made them" wear them. RP 1791-93. Ms. Crenna, on the other hand, believed she was raped. At best, this evidence supported unforced sexual intercourse -- where the consent was questionable because she was sleep deprived and paranoid, so she took the threat serious and consented, but the consent was not actually caused by the threat; it was caused by her vulnerable paranoid and sleep deprived state of mind. As described earlier, this evidence supports only rape in the third degree. RCW 9A.44.060(1)(a).

The State's evidence was insufficient to establish forcible compulsion for both counts of rape in the second degree beyond a reasonable doubt. Green, 94 Wn.2d at 220-21; Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1974). The convictions must be reversed and the charges dismissed.

Count VI - Unlawful Imprisonment

Instruction Nos. 53 & 53 defined the crime of unlawful imprisonment. CP 157 & 158. A person is guilty of unlawful

imprisonment if he knowingly restrains another person. RCW 9A.40.040(1). "Restrain" means to restrict a persons movements without consent and without legal authority in a manner which interferes substantially with his liberty. RCW 9A.40.010(6). Restraint is "without consent" if accomplished by "physical force, intimidation, or deception." RCW 9A.40.010(6)(a). "Substantial interference" with liberty is a "real" or "material" interference with the liberty of another contrasted with petty annoyance, or a slight inconvenience, or any imaginary conflict. State v. Robinson, 20 Wn.App. 882, 884, 582 P.2d 580 (1978), aff'd, 92 Wn.2d 357 (1979).

The State alleged that Mr. Perez knowingly restrained Ms. Crenna movement by threat -- accomplished by a "combination of intimidation and deception." RP 2518. The State argued "they had just threatened to kill her before raping her, and that threat was heavy in the air, and it's why she didn't leave." RP 2518.

Upstairs, after the fight, Ms. Crenna tried to leave the house but Mr. O'Dell grabbed her and prevented her from leaving. Mr. O'Dell testified that he did not want the situation to escalate. RP 1280-82. He pleaded guilty to unlawful imprisonment for this conduct. The next day, several people came over to the house to make music in the recording studio downstairs. RP 1225. Mr. O'Dell and Ms. Sanders saw Ms. Crenna

lying on the couch ... where she stayed all day. RP 1247-49, 1259, 1463-65. There was a door downstairs through which she could have left the house. RP 1351, 1518. She was not physically restrained. RP 1276, 1518. The next day she was gone. RP 1233-34, 1465.

After the alleged rape, Ms. Crenna testified that Ms. Sanders came downstairs and she "felt" that she couldn't leave because Ms. Sanders wouldn't let her go. RP 1796. She also testified that several people visited the house and even came downstairs, but she still "felt" that she couldn't leave or ask them for help. But, when she did leave, no one was home or prevented her from leaving. RP 1798-99.

After Mr. White and Mr. Perez helped her downstairs, Ms. Crenna testified that "there're like, we can't let you out of our sight." RP 1785, 1787, 1900. Again, this made her "feel" like they wouldn't let her leave the room. RP 1792.

Viewed in the light most favorable to the State, this evidence fails to establish that Mr. Perez substantially interfered with Ms. Crenna's movement/liberty. Not letting her out of their sight is insufficient to establish "restraint." Moreover, she testified that she had a means of escape, but was afraid to use it. She was not physically restrained and when she did leave, no one stopped her. Again, the alleged threat -- accomplished by a "combination of intimidation and

deception" was a result of her paranoia and she could have left anytime, like she eventually did. State v. Kinchen, 92 Wn.App. 442, 452 n.16, 963 P.2d 928 (1998). Logically, if Mr. Perez, or any of the others, intended to restrain her, they would not have left the house unattended for her to freely escape. No juror could reasonably infer guilt from a fear of leaving the room or house based upon a threat generated out of her own paranoia.

The State's evidence was insufficient to establish unlawful imprisonment beyond a reasonable doubt. Green, 94 Wn.2d at 220-21; Jackson v. Virginia, supra. The conviction must be reversed and the charge dismissed.

Restraint was Incidental to the Rape

Like Kidnapping, unlawful imprisonment has "restraint" as one of its elements. RCW 9A.40.010(b). The mere incidental restraint and movement of the victim during the course of another crime which has "no independent purpose or injury" is insufficient to establish kidnapping. Likewise, the mere incidental restraint and movement of a victim which occurs during the course of another crime which has "no independent purpose or injury" is insufficient to establish unlawful imprisonment. State v. Washington, 135 Wn.App. 42, 50-51, 143 P.3d 606 (2006), review denied, 106 Wn.2d 1017 (2007).

Here, Mr. Perez's alleged restraint of Ms. Crenna had

no purpose independent of the intent to rape her, and it caused no independent injury. When viewed in the light most favorable to the State, the evidence shows the restraint was part and parcel of the rape. As such, Mr. Perez's unlawful imprisonment conviction should be vacated and the charge dismissed with prejudice. State v. Phuong, ___ Wn.App. ___, 299 P.3d 37 (2013). Mr. Perez, acknowledges that this issue was rejected by the appellate court in Phuong, but he nevertheless raises the issue to preserve the matter should the State Supreme Court grant review and reverse the appellate court.

4. CUMULATIVE ERROR DEPRIVED MR. PEREZ OF HIS STATE AND FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Even if this Court does not grant reversal based upon any one of the individual errors argued above, reversal should nevertheless be granted, because the cumulative effect the errors herein and those raised in appellate counsel's brief deprived Mr. Perez of his constitutional right to a fair trial. See e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The prosecutor mislead the jury about its role, misstated crucial evidence, inflamed the jury against Mr. Perez and bolstered the state's main witness, and told the jury if they believed Mr. Perez he had a bridge from Brooklyn to sell them. Then the state improperly urged the jury to find Mr. Perez guilty based on his co-defendant's courtroom misconduct. All

of these errors clearly compounded one another, including those issues raised in appellate counsel's brief related to severance and the improper court room gesture of Mr. White, admitting evidence of the ski mask, admission of Ms. Crenna's statement to police that she was afraid she would be killed, and admission of Mr. White's out of court statement implicating Mr. Perez. Together, these errors, individually and in combination denied Mr. Perez a fair trial and reversal is required.

F. CONCLUSION

For the reasons stated herein, Mr. Perez respectfully asks this Court to reverse his convictions and remand for a new trial. Finally, Mr. Perez's convictions for Counts III, V, and VI should reversed and dismissed with prejudice because the evidence was insufficient to prove the necessary elements beyond a reasonable doubt.

DATED this 11th day of September, 2013.

Respectfully Submitted,

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