SUPREME COURT NO. 91175-4
COA NO. 69516-9-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JERRY TOWNSEL,

Petitioner.

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

The Honorable Dean S. Lum, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Jerry Townsel asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Townsel requests review of the decision in State v. Jerry Townsel, Court of Appeals No. 69516-9-I (slip op. filed November 17, 2014), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether the first degree assault and first degree kidnapping convictions violate double jeopardy because they are the same in law and fact?

D. STATEMENT OF THE CASE

R.O. was a long time methamphetamine addict. 9RP[1] 16-18, 25, 115. She was diagnosed with drug-induced schizophrenia. 9RP 24-25. She hears voices, hallucinates and becomes paranoid, believing people are trying to kill her. 9RP 25-27, 49, 106-07, 109-10. Meth makes her psychotic. 9RP 124. Townsel was also a drug addict. 11RP 118. The two were homeless when they met at a park in October 2011. 9RP 28-29;

[1] The verbatim report of proceedings is referenced as follows: 1RP - 6/19/12; 2RP - 6/20/12; 3RP - 6/21/12; 4RP - 6/25/12; 5RP - 6/26/12; 6RP - 6/27/12; 7RP - 6/28/12; 8RP - 7/2/12; 9RP - 7/3/12; 10RP - 7/5/12; 11RP - 7/9/12; 12RP - 7/10/12; 13RP - 7/11/12; 14RP - 7/16/12; 15RP - 9/28/12.

10RP 110. They developed a routine of smoking meth together and having consensual sex. 9RP 28-31. R.O. believed they were in a relationship. 9RP 32.

Another homeless man named Jones invited Townsel and R.O. to squat at a vacant house in the Capitol Hill area of Seattle. 11RP 13-14. They went to the house on November 2, where they smoked meth. 9RP 47, 50; 11RP 15-16. At some point, Townsel and R.O. went into the bathroom. 9RP 52-53; 11RP 16, 18. Townsel told her that he thought she was trying to kill him and that he would have to kill her. 9RP 54. R.O. pleaded with him to leave the bathroom. 9RP 55-56, 86-87. He said no. 9RP 56. He told her to turn around and pull her pants down. 9RP 57. Townsel penetrated her vagina with his penis. 9RP 59.[2]

A lengthy and violent altercation followed as R.O. tried to escape, during which time Townsel struck R.O. about the head, gouged her eyes and lacerated her wrist.[3] 9RP 61-74, 160.[4] Townsel eventually brought R.O. into a bedroom, where she slept for a day. 9RP 85, 89, 92, 95. The

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[2] Townsel denied having sexual intercourse with her at the house, but testified he had sex with her earlier that morning. 11RP 31, 68-69, 71.

[3] When R.O. mentioned being hit in the face previously (9RP 61), she was referring to an incident that took place near a bus stop the day before. 9RP 36, 39. The State did not charge Townsel in relation to that event.

[4] Townsel testified that, after taking the drugs and dozing off, he thought he was being attacked and inflicted injuries in self-defense. 11RP 22-25, 29, 117-20, 123, 145.

two lay down next to one another in a sleeping bag. 9RP 92-93. Townsel told her she was not leaving. 9RP 156-57. From start to finish, Townsel never left her alone. 9RP 90, 98.

On November 4, the property owner noticed Jones in front of the vacant house, went inside, and saw Townsel and R.O. lying there. 5RP 101-02, 104-05. She looked badly beaten. 5RP 105. R.O.'s injuries included heavy bruising on her face and body, orbital fractures, conjunctival hemorrhage, fractures to both sides of her jaw, and a wound on her forearm that exposed the tendons. 7RP 149-50; 8RP 31-32, 38-39, 43, 46-47, 124-32, 149, 160-62, 166-70, 173, 182.

The State charged Townsel with first degree kidnapping, first degree assault, felony harassment, and second degree rape. CP 33-36. A jury convicted Townsel of first degree kidnapping and first degree assault, acquitted Townsel of harassment, and was unable to reach a verdict on the rape charge. CP 159-61. The court sentenced Townsel to a total of 286 months in confinement, running the two offenses consecutively. CP 171.

On appeal, Townsel raised several issues, including the argument that his convictions for both kidnapping and assault violate double jeopardy. Amended Brief of Appellant at 41-50; Reply Brief at 9-13. The Court of Appeals held there was no double jeopardy violation because the

elements of first degree kidnapping and first degree assault differ and the offenses were not the same in fact. Slip op. at 21-23.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW IS APPROPRIATE BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH PRECEDENT AND WHETHER THE CONVICTIONS FOR FIRST DEGREE KIDNAPPING AND FIRST DEGREE ASSAULT VIOLATE DOUBLE JEOPARDY IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The Supreme Court has not addressed whether convictions for first degree assault and first degree kidnapping violate double jeopardy. There is no published decision on the issue. Review is warranted under RAP 13.4(b)(4) because the issue involves a significant question of constitutional law.

The Court of Appeals failed to consider the definition of the "abduct" element in the kidnapping offense in wrongly concluding each offense contained an element that the other did not. That approach conflicts with Supreme Court precedent. In conducting a double jeopardy analysis, courts must look to the definitional level of the elements in comparing the elements of two crimes. Review is warranted under RAP 13.4(b)(1) because the Court of Appeals decision conflicts with this Court's precedent.

a. The "Same Evidence" Test For Determining Double Jeopardy Is At Issue.

Both the Fifth Amendment of the United States Constitution and Article 1, section 9 of the Washington Constitution prohibit double jeopardy. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); United States v. Dixon, 509 U.S. 688, 695-96, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). One of the purposes of the double jeopardy clause is to prevent multiple punishments for the same offense. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Where a defendant's act supports charges under two criminal statutes, a court must determine whether, in light of legislative intent, the charged crimes constitute the same offense. In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Courts first analyze whether the plain language of the statutes explicitly authorizes multiple punishment for the same conduct. Orange, 152 Wn.2d at 816. When it does not, the inquiry follows the "same evidence" test, also known as the "same elements," "same facts" or Blockburger[5] test. Id. at 816; State v. Hughes, 166 Wn.2d 675, 682 n.6, 212 P.3d 558 (2009).

That is the test at issue in Townsel's case. Under this test, "where *the same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two

[5] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

offense or only one, is whether each provision *requires proof of a fact* which the other does not." Freeman, 153 Wn.2d at 772 (quoting Orange, 152 Wn.2d at 817) (internal quotation marks omitted). The legislature presumably does not intend to punish criminal conduct twice when "*the evidence* required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other." Freeman, 153 Wn.2d at 776 (quoting Orange, 152 Wn.2d at 820). "Accordingly, if the crimes, as charged and proved, are the same in law and in fact, they may not be punished separately absent clear legislative intent to the contrary." Freeman, 153 Wn.2d at 777.

Townsel's convictions for both first degree kidnapping and first degree assault are the same in law and fact. The multiple punishments therefore violate the prohibition against double jeopardy.

b. The Kidnapping And Assault Offenses Are The Same In Law.

First degree kidnapping required an intentional abduction of R.O. with intent to "inflict bodily injury" or "inflict extreme mental distress." CP 33, 108; RCW 9A.40.020 (1)(c), (d). To "abduct" means to "restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1). The term "deadly force" is not defined in

chapter 9A.40 RCW, but has been construed as a force or means capable of causing death or serious injury. State v. Majors, 82 Wn. App. 843, 846-47, 919 P.2d 1258 (1996), review denied, 130 Wn.2d 1024, 930 P.2d 1230 (1997). "Restrain," meanwhile, means to "restrict a person's movements without consent." RCW 9A.40.010(6). Restraint is "'without consent' if it is accomplished by physical force, intimidation, or deception." RCW 9A.40.010(6)(a).

First degree assault requires the assault be committed with "intent to inflict great bodily harm" and "by a force or means likely to produce great bodily harm or death." CP 34, 119; RCW 9A.36.011(1)(a). "Great bodily harm" means "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." CP 118; RCW 9A.04.110(4)(c).

"Intent to inflict great bodily harm" in the first degree assault offense necessarily proves the "intent to inflict bodily injury" prong of the first degree kidnapping offense. Both offenses require intent to inflict harm, with "bodily injury" subsumed within "great bodily harm." The Court of Appeals acknowledged that both offenses require the intent to inflict bodily harm. Slip op. at 22.

But it concluded the two offenses were not the same "in law" because "only assault in the first degree requires proof of an actual battery" and "only the kidnapping charge requires proof of an abduction." Id. The Court of Appeals could only reach that conclusion by ignoring what "abduction" means under the kidnapping statute. The Court of Appeals misapplied the law in refusing to look at the definition of the elements.

Courts look at the definitional level of elements to determine whether two offenses are the same "in law." State v. Land, 172 Wn. App. 593, 600, 295 P.3d 782 (2013) (comparing definitions of "sexual contact" and "sexual intercourse" in determining child rape and child molestation were the same in law and fact) (citing Hughes, 166 Wn.2d at 682-84 (convictions for second degree rape and rape of a child were the same offense: "Although the elements of the crimes facially differ, both statutes require proof of nonconsent because of the victim's status.").

The Supreme Court has considered the definitional meaning of a kidnapping element in addressing whether convictions for robbery and kidnapping violate double jeopardy. In State v. Vladovic, this Court looked to definition of "abduct" and its "deadly force" aspect in deciding whether the kidnapping and robbery were the same "in law." State v. Vladovic, 99 Wn.2d 413, 423-24, 662 P.2d 853 (1983); accord In re Pers.

Restraint of Fletcher, 113 Wn.2d 42, 50, 776 P.2d 114 (1989) (kidnapping not same in law as robbery; kidnapping required proof of use or threatened use of deadly force, which is not an element of robbery, while robbery charge required proof of taking personal property, which is not an element of kidnapping).

Townsel asked the Court of Appeals to consider the "deadly force" aspect of the "abduct" definition. The Court of Appeals refused to do so. Its double jeopardy analysis therefore conflicts with Vladovic.

Both the assault and the restraint are accomplished by means of force. RCW 9A.36.011(1)(a); RCW 9A.40.010(1); RCW 9A.40.020 (1)(c). As charged and proven here, the abduction was accomplished through the use of an actual battery. Use of "a force or means likely to produce great bodily harm or death" in the first degree assault offense will always satisfy restraint through use of "deadly force" in the kidnapping offense. RCW 9A.36.011(1)(a); RCW 9A.40.010(1). Townsel could not have restricted R.O.'s movements through the use of deadly force, thereby committing the crime of kidnapping, without also committing an assault by a force or means likely to produce great bodily harm or death, i.e., an actual battery. Conversely, the assault against R.O. by a force or means likely to produce great bodily harm or death also constituted restraint of

her movements through the use of deadly force under the kidnapping statute.

The evidence required to support a conviction for first degree assault would have been sufficient to warrant a conviction for first degree kidnapping. Absent clear legislative intent to the contrary, the constitutional prohibition against double jeopardy is violated when "the evidence required to support a conviction [of one crime] would have been sufficient to warrant a conviction upon the other." Freeman, 153 Wn.2d at 772.

The Court of Appeals is correct that it is insufficient to show merely that the two offenses share the element of intent to inflict harm. Slip op. at 23. But Townsel did not ask the Court of Appeals to apply the abandoned "same conduct" test. He has consistently advocated for the Blockburger ("same evidence") test. He applied that test before the Court of Appeals and continues to do so before this Court. The Blockburger test inquires whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy is violated. Dixon, 509 U.S. at 696. The first degree assault statute requires actual battery. That required fact is also found in the first degree kidnapping statute because abduction, defined as restraint, occurs when deadly force is

used. The elements of first degree assault are contained in the first degree kidnapping offense.

c. The Two Offenses Are The Same In Fact.

Offenses are the same in fact when they arise from the same act or transaction. Hughes, 166 Wn.2d at 684; State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). The continuous restraint by means of deadly force and the continuous assault occurred at the same time. R.O. was restrained by means of the assault. 9RP 61-68.

The Court of Appeals did not believe R.O. was restrained by means of the assault because "the State elicited testimony and presented evidence to prove that the kidnapping preceded and was separate from the assault." Slip op. at 21. The Court of Appeals cited nothing in the record to support its assertion that the kidnapping preceded the assault.

R.O. willingly went to the vacant house with Townsel. 9RP 47, 50; 11RP 15-16. When R.O. initially asked to leave the bathroom and was refused (9RP 56), the conduct at issue was at most unlawful imprisonment. See RCW 9A.40.040(1) (a "person is guilty of unlawful imprisonment if he or she knowingly restrains another person."). It was not until Townsel began beating her that the crime of first degree kidnapping took place: restraint through the use of deadly force as she tried to escape. 9RP 61-74, 160, 168.

The Court of Appeals' contrary position withers in light of the trial prosecutor's argument to the jury. The prosecutor invited the jury to treat the kidnapping and assault as based on the same facts. The prosecutor argued the abduction/restraint element of kidnapping was proven by the use of force: "'Question, how do we know she was held -- how do we know that her liberty was restrained by force?' Well, the force is an easy one, right? I don't think defense is going to get up here and say there wasn't force. We've seen the injuries, maybe we've seen too much of the injuries, but we've seen them. It's not just the injuries, it's the house itself. There's clear signs of a struggle." 12RP 43. The prosecutor argued R.O. wanted to get away but was pulled back into the bathroom. 12RP 46-47. "[I]f she didn't want to stay, someone stopped her from leaving, and that's kidnapping, especially if you do it when you're beating her up and you keep her there to beat her up. That's kidnapping in the first degree." 12RP 50. And later: "She couldn't get out, because the defendant was beating her, and he was keeping her there to beat her, and he was keeping her somewhere but for this coincidence with [the property owner], nobody would have found her. That's kidnapping in the first degree." 12RP 52.

Courts looks to the entire trial record when considering a double jeopardy claim, including arguments made by the trial prosecutor to the jury. State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011). The

prosecutor's argument in this case leaves no room for doubt that the prosecution relied on the same act or transaction to obtain convictions for both assault and kidnapping. The two offenses are the same in fact.

d. Even If There Is Ambiguity Regarding What The Jury Relied On To Convict, The Rule Of Lenity Operates In Townsel's Favor.

Assuming arguendo there is some ambiguity about the conduct that the jury relied on to convict Townsel for kidnapping, the rule of lenity acts in Townsel's favor in determining whether a double jeopardy violation occurred. See State v. Taylor, 90 Wn. App. 312, 317, 950 P.2d 526 (1998) (under rule of lenity, ambiguity in which act jury relied upon to convict for kidnapping would be construed in favor of defendant in considering double jeopardy claim).[6]

[6] See also State v. Kier, 164 Wn.2d 798, 811-13, 194 P.3d 212 (2008) (rule of lenity required the merger of Kier's second degree assault conviction into his first degree robbery conviction because it was unclear from the jury's verdict whether the assault was used to elevate the robbery to first degree); State v. DeRyke, 110 Wn. App. 815, 823-24, 41 P.3d 1225 (2002) (rule of lenity required merger of the lesser kidnapping conviction because there was no way to determine the jury had not treated the kidnapping as the elevating act as opposed to the use of a deadly weapon), aff'd, 149 Wn.2d 906, 73 P.3d 1000 (2003); State v. Lindsay, 171 Wn. App. 808, 846, 288 P.3d 641 (2012) (in finding double jeopardy violation: "We do not know, however, to which felony the jury referred when it found Lindsay guilty of assault with the intent to commit a felony. An ambiguity in the jury's verdict under the rule of lenity must be resolved in the defendants' favor."), rev'd on other grounds, 180 Wn.2d 423, 326 P.3d 125 (2014).

e. The Remedy For The Double Jeopardy Violation Is To Vacate The Conviction For The Less Serious Offense.

The remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense, i.e., the conviction that carries the shorter sentence and lesser seriousness level. Hughes, 166 Wn.2d at 686 n.13. The lesser offense here is the first degree kidnapping because first degree assault carries a longer confinement term and has a higher seriousness level. See RCW 9.94A.515 (first degree assault has seriousness level of XII, first degree kidnapping has seriousness level of X); RCW 9.94A.510 (sentencing grid).

F. CONCLUSION

For the reasons stated above, Townsel requests that this Court grant review.

DATED this 17th day of December 2014.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JERRY UVARIUS TOWNSEL, Appellant.	)	NO. 69516-9-I DIVISION ONE UNPUBLISHED OPINION FILED: November 17, 2014

LEACH, J. — Jerry Townsel appeals his convictions for kidnapping in the first degree and assault in the first degree. He alleges prosecutorial misconduct and challenges the court's denial of his motion to substitute counsel. He also contends that his convictions violate the constitutional prohibition against double jeopardy. Although the prosecutor acted improperly in several instances, Townsel did not object at trial and does not show the challenged conduct to be so ill intentioned and flagrant that any prejudice could not have been cured by a jury instruction. Townsel does not show that the court abused its discretion by denying his motion to substitute counsel, and his convictions do not subject him to double jeopardy because each crime requires proof of a fact the other does not. We affirm.

FACTS

R.O., age 20, and Jerry Townsel, age 43, met in a Seattle park in October 2011. Homeless, methamphetamine addicted, and schizophrenic, R.O. had auditory hallucinations when she used methamphetamine. After Townsel asked her if she had a pipe, R.O. followed him to a motel room, where they smoked methamphetamine together and had consensual sex. This became a "routine," and R.O. believed that they were in a relationship. At about 11:00 p.m. on November 2, 2011, R.O., Townsel, and Deryl Jones went to a vacant house, where they smoked methamphetamine. At some point, Townsel and R.O. went into the bathroom. A lengthy and violent altercation followed. Later the next day, hospital personnel documented R.O.'s extensive injuries: heavy bruising on her face and body, orbital fractures, conjunctival hemorrhage, fractures to both sides of her jaw, and a wound on her forearm that exposed the tendons. At his arrest, Townsel had lacerations on his neck and face and scratches on his wrist.

The State charged Townsel with kidnapping in the first degree, assault in the first degree, felony harassment, and second degree rape, all designated as domestic violence offenses. The State also alleged a deliberate cruelty aggravator for the kidnapping and assault charges and an ongoing pattern of abuse aggravator for all counts.

Twice before trial, Townsel moved to substitute counsel, asserting that he had "lost faith" in his attorney's representation and alleging conflict of interest and breakdown in communication. The court denied the motions.

A jury convicted Townsel of first degree kidnapping and first degree assault. The jury acquitted Townsel of harassment, was unable to reach a verdict on the rape charge, and did not agree on any of the special verdicts.

Townsel appeals.

ANALYSIS

Townsel alleges prejudicial prosecutorial misconduct "impervious to curative instruction." He also contends that because the trial court did not conduct an adequate inquiry, the court abused its discretion in denying his motion to substitute counsel. Finally, he argues that his convictions for both kidnapping in the first degree and assault in the first degree subject him to double jeopardy. We consider these claims in the order described.

Prosecutorial Misconduct

Because Townsel did not object to any of the alleged prosecutorial misconduct at trial, he must demonstrate that any misconduct was so flagrant and ill intentioned that it caused prejudice incurable by a proper jury instruction.[1] A defendant claiming prosecutorial misconduct bears the burden of establishing

[1] State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

that the challenged conduct was both improper and prejudicial.[2] Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict."[3] We review misconduct claims in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions.[4]

Townsel contends first that by comparing the jury's decision to choices made in everyday life, the prosecutor "improperly diluted the State's burden of proof." The prosecutor stated in closing argument that he expected the jury to understand its instructions, which are "written for our citizenry to apply the law":

> [F]or most of us, we have a kid, and [if] we think our kid did something bad, we're not going to punish our child for it, unless and until we know that they, indeed, did something bad beyond any doubt that's reasonable.
>
> If there is a reasonable doubt that your son did something, you're not going to ground him because you'd be worried. No. What if I am grounding him unjustly?
>
> Reasonable doubt is a doubt that exists after fully and fairly considering the evidence. It's not some foreign, scientific, lofty term, that can only exist in the hallowed halls of academia, or in the temples of justice. It's a standard that we have to apply every time we're trying to make a decision about what the best choice is.
>
> And if we can rule out any doubts that are reasonable, we've reached beyond a reasonable doubt. It's certainly higher than more likely than not. But the truth is if that there's no doubt that's

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[2] State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

[3] State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); see also State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011).

[4] State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

> reasonable, then you're beyond a reasonable doubt. I know it sounds like we're talking in circles, but it's important that we don't make this such a lofty goal, that it's impossible to reach.

A prosecutor may not misstate or shift the State's burden to prove the defendant's guilt beyond a reasonable doubt.[5] Here, the prosecutor misstated the reasonable doubt standard by characterizing it as "a standard that we have to apply every time we're trying to make a decision about what the best choice is." Though his illustration contained language from the jury instructions,[6] by likening the reasonable doubt standard to the one used for everyday decisions, the prosecutor improperly "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case."[7] But because Townsel does not show that this misstatement was so flagrant and ill intentioned that any prejudice could not be cured by proper instruction, he does not establish prosecutorial misconduct.

Townsel also alleges that the prosecutor committed misconduct and violated Townsel's right to present a defense by disparaging defense counsel during closing. Defense counsel challenged R.O.'s credibility because of her

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[5] State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014).

[6] This instruction provides in pertinent part: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence."

[7] State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

drug addiction and mental health problems. In closing, the prosecutor discussed a bloody shower curtain recovered from the crime scene:

> It was admitted into evidence, but you don't get it. It's one of those pieces of evidence that's so bloody, you're probably grateful, right? You don't get it when you go back in to deliberate, because it's a biohazard. That's what defense was trying to do to [R.O.]. Let's grind her into the ground enough, let's make her become as untouchable as that shower curtain or that bathroom floor, and let's blend her in with all these drug addicts that can't be trusted. . . .She loses her humanity and stops being a person.

Townsel contends that the prosecutor "crossed the line in accusing counsel of treating [R.O.] like a bloody shower curtain and destroying her humanity." Townsel also alleges that with these remarks, the prosecutor "injected emotion and sympathy into the deliberation process by creating the theme of why the jury should care about [R.O.]. That constitutes an appeal to the passions of the jury."

A prosecutor "is entitled to make a fair response to the arguments of defense counsel"[8] and has "wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury."[9] But "[i]t is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity."[10] Here, defense counsel sought to undermine R.O.'s credibility by emphasizing and eliciting testimony

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[8] State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

[9] State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997) (Stenson I).

[10] State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011).

about R.O.'s mental health, drug abuse, and sometimes bizarre prior statements. In opening statement, the prosecutor first introduced the theme that R.O. was "one of our city's discarded children." While defense counsel characterized the circumstances of the case as "hell on earth . . . a couple of lives where that's the only purpose, drugs," counsel also told the jury, "[T]his isn't a case where you have to not feel sorry for [R.O], but this is a case where you have to consider the source, all of it, put it in context, as you're evaluating this evidence." Likewise, in closing argument, defense counsel stated,

> [R.O] is a person who engenders sympathy. There's no reason for any of us not to consider the life that she's had, and hope that the rest of her life is a whole heck of a lot better.
>
> This isn't a case about trying to cast her in a bad light or anything like that. It's okay for all of us . . . to feel pretty bad for her circumstances.
>
> . . . .
>
> . . . . [But] we're here for you to decide if these allegations are actually true.

Defense counsel elicited testimony about R.O.'s drug addiction and psychosis to cast doubts on her sense perceptions. This was appropriate defense strategy where R.O. was the State's primary witness and her addiction and mental illness were not in dispute. Defense counsel did not "grind her into the ground" or make her "untouchable" by doing so. While the prosecutor's

arguments may not have directly impugned defense counsel's integrity[11] or prevented Townsel from presenting a defense, they mischaracterized the defense strategy.

The prosecutor's language here also improperly appealed to the emotions of the jury. He told the jury that he was frustrated because if this case involved a dog, "it would be over. . . . He'd be up the river. But because it's a person, with the context and a history and a background, . . . we get to pick her apart." He referred to R.O. as "just a little kid" for whom the State was "asking for justice." He told the jury that they should care because

> the law should still matter for people that we usually ignore. It's got to uphold the rights of human beings at both ends of the spectrum, because of victims like [R.O.], . . . [otherwise] the whole system itself crumbles. We've all heard of that expression, right? No one is above the law, but no one's beneath it, either.

A prosecutor may not invite a jury to decide a case on the basis of emotional appeals.[12] Although proper argument may include references to the nature of the crime and its effect on the victim and "'[a] prosecutor is not muted

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[11] See Thorgerson, 172 Wn.2d at 450-51 (misconduct where prosecutor referred to defense's case as "bogus" and "sleight of hand," implying wrongful deception or dishonesty); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (improper to call defense counsel's argument "'a classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing'"); Lindsay, 180 Wn.2d at 438 (holding prosecutor's characterization of defense's closing argument as "a crock" impermissibly impugned counsel's integrity).

[12] In re Det. of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998).

because the acts committed arouse natural indignation,'"[13] the weight of the prosecutor's argument here was an exhortation to the jury to decide the case because they cared about R.O. and other "victims like [R.O.]." This was improper, as was the further implication that the jury should decide the case for the sake of the "discarded" members of the community or to keep the justice system itself from "crumbl[ing]."[14] Although improper, the prosecutor's remarks here do not constitute "irrelevant and inflammatory matter" that "has a natural tendency to prejudice the jury against the accused."[15] Because Townsel does not show prejudice incurable by proper instruction, he does not establish prosecutorial misconduct.

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[13] State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006) (quoting State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968) and holding prosecutor's repeated questioning about witnesses' emotional reaction to events and description of charges as "horrible" in closing statement were not improper appeal to jurors' passion and prejudice).

[14] See State v. Powell, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991) (misconduct to tell jurors that a not guilty verdict in child molestation case would "'declar[e] open season on children'" and send message that adults won't believe children who report abuse); State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (misconduct to exhort jury to "'[l]et [the victim] and children know that you're ready to believe them and [e]nforce the law on their behalf'") (final alteration in original).

[15] State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968) (improper and prejudicial to admit hearsay evidence alleging a plan by defendants to perpetrate a robbery like the one with which they were charged); see also State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988) (improper and prejudicial to describe American Indian defendant as a leader of a "'deadly group of madmen'" and "'butchers that kill indiscriminately'"); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984) (improper and prejudicial to read "'vivid and highly inflammatory'" poem by anonymous rape victim to jury during closing argument).

Finally, Townsel contends that the prosecutor committed misconduct by expressing a personal opinion about Townsel's credibility. During cross-examination, the prosecutor confronted Townsel with contradictions between the account he gave a detective after his arrest and his trial testimony. In an angry outburst, Townsel accused the prosecutor of violating his constitutional rights and doing whatever he could to convict him, stating, "You just need the win on your record." After the prosecutor resumed questioning Townsel, the following exchange occurred:

Q: How many changes do we have in your story right now, Mr. Townsel?

A: As far as I know, probably two.

Q: I'm looking at at least seven.

A: No. Tell me those seven.

Q: Let's just keep going.

A: Come on now, tell me those seven, so I can see what you're talking about, because I know of this and I know of what I told my attorney. So tell me the seven.

Q: When I'm talking about this, I don't consider this one lie, I consider this 500 lies.

A: Oh, come on, man. Come on. You just said seven of them, so that should be easy, if there's 1,200 of them, show me the seven of them, that I've changed the story seven times.

The prosecutor responded, "Stick around for closing, and you'll see them all, okay?" Townsel argues that the prosecutor expressed an "unmistakable personal opinion that Townsel had lied."

A prosecutor may not express a personal belief about a witness's credibility.[16] But "counsel may comment on a witness' veracity as long as he does not express it as a personal opinion and does not argue facts beyond the record."[17] We examine the challenged comments in context.[18] Because prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility, we do not find prejudicial error unless it is "clear and unmistakable" that counsel is expressing a personal opinion.[19]

The prosecutor's comments, which the State dismisses as nothing more than "somewhat sarcastic retorts to Townsel's continued goading," were improper. While the remarks concerned evidence in the record of Townsel's inconsistent statements and in context cannot be characterized as a "clear and unmistakable" expression of personal opinion,[20] they were an unprofessional

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[16] Warren, 165 Wn.2d at 30.
[17] State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).
[18] McKenzie, 157 Wn.2d at 53.
[19] State v. Allen, 176 Wn.2d 611, 631, 294 P.3d 679 (2013).
[20] Compare Lindsay, 180 Wn.2d at 438 (while a prosecutor's use of words like "preposterous" and "ridiculous" are not, without more, an improper expression of personal opinion, prosecutor's remarks that defendant should not "'get up here and sit here and lie'" and that defendant's testimony was "'the most ridiculous thing I've ever heard,'" along with reference to defense theory as "a crock," impermissibly expressed prosecutor's personal opinion to jury), with

digression from proper cross-examination. Moreover, with the statement, "Stick around for closing and you'll see them all," the prosecutor improperly commented on Townsel's earlier voluntary absences from the courtroom. Here again, because Townsel does not show the prosecutor's improper statements prejudiced him, Townsel does not demonstrate a right to relief.

Townsel further contends "the cumulative misconduct was prejudicial and impervious to curative instruction." But Townsel does not show a substantial likelihood that the prosecutor's cumulative misconduct affected the jury's verdict. Because he does not, he is not entitled to relief. For the same reason, we also reject his alternative argument that counsel provided ineffective assistance by not objecting or requesting a curative instruction.[21]

Denial of Motion To Substitute Counsel

Townsel next challenges the trial court's denial of his motion to substitute counsel. He alleges both an irreconcilable conflict and a complete breakdown in communication, contending that "the court's inquiry was insufficiently searching. As a result, the court was not in a position to make an informed decision on the matter."

Anderson, 153 Wn. App. at 430-31 (in context, not expression of personal opinion where prosecutor's remarks characterized defendant's testimony as "'made up on the fly,'" "'ridiculous,'" and "'utterly and completely preposterous'").

[21] See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (defendant must show both that counsel's performance was deficient and that this deficient performance prejudiced the defense).

When the attorney-client relationship completely collapses, the refusal to substitute new counsel violates the defendant's right to effective assistance.[22] To warrant substitution of counsel, a defendant must show good cause, "'such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication.'"[23] "Generally, a defendant's loss of confidence or trust in his counsel is not sufficient reason to appoint new counsel."[24] To determine if the trial court properly denied Townsel's motion to substitute counsel, we consider (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion.[25] We review a trial court's refusal to appoint new counsel for abuse of discretion.[26] A court abuses its discretion when its decision adopts a view that no reasonable person would take or is based on untenable grounds or reasons.[27]

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[22] State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006).

[23] State v. Thompson, 169 Wn. App. 436, 457, 290 P.3d 996 (2012) (quoting State v. Schaller, 143 Wn. App. 258, 267-68, 177 P.3d 1139 (2007)), review denied, 176 Wn.2d 1023 (2013).

[24] State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004); see also Cross, 156 Wn.2d at 606 ("[T]here is a difference between a complete collapse and mere lack of accord."); State v. Sinclair, 46 Wn. App. 433, 436, 730 P.2d 742 (1986) (defendant's "general discomfort" with attorney's representation did not constitute a valid reason to substitute counsel).

[25] In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001) (Stenson II) (adopting test set out in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

[26] Cross, 156 Wn.2d at 607.

[27] State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

First, we consider the extent of the conflict by examining "the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives."[28] To warrant substitution of counsel, the conflict or breakdown must prevent the attorney from providing effective assistance.[29]

Before trial, Townsel contended that he had an "ongoing conflict" with his defense attorney arising from counsel's failure to "properly inform Defendant of the State's request to subpoena medical (confidential) records" or to object to the release of those records.[30] Townsel stated that he had "lost faith in counsel's representation."

On June 11, the trial court held a hearing on Townsel's motion to substitute counsel. After reading the motion, the court asked Townsel, "Anything else you want to say, sir?" Townsel replied, "That's it, Your Honor." Townsel then told the court that defense counsel "knew about [the search warrant for his records] and he did not tell me about this until half a month down . . . [and] there are several other things where we're in conflict, you know. It's not working and this is my life." Finding no conflict, the court denied Townsel's motion. Townsel

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[28] Stenson II, 142 Wn.2d at 724.

[29] Schaller, 143 Wn. App. at 268.

[30] Townsel faulted defense counsel for not objecting to the prosecutor's securing of Townsel's King County jail medical records via search warrant. The prosecutor sought records related to Townsel's physical injuries at his arrest. Defense counsel was unaware of the search warrant until after its execution.

then told defense counsel that he would not appear for that afternoon's hearing on defense's motion to dismiss. Townsel told the court, "I asked him not to make the motion. We're in conflict of interest," and that defense counsel and the prosecutor "make deals on what they say to each other and I don't want that."

On June 20, the court heard pretrial motions. Against his attorney's advice, Townsel gave the court a document titled "Motion and Brief for a Garcia Hearing," in which he alleged "divided loyalties as well as conflicts of int[e]rest."[31] The trial court warned Townsel about the risks of speaking contrary to his counsel's advice but said, "I don't want to make it seem like we're shutting you down. . . . If there's something you absolutely have to say, what is it, sir?" Townsel made various allegations of ineffectiveness: that counsel had not given him "the rest of the discovery," come to see him, or adequately prepared for trial. The trial court found that "there's been no showing of a conflict here" and that Townsel's statements about counsel's alleged ineffectiveness were self-contradictory or demonstrably false. The court ruled, "To the extent that this is a motion it is denied." Townsel became upset and got up to leave the courtroom.

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[31] Townsel referred to United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975), abrogated on other grounds by Flanagan v. United States, 465 U.S. 259, 263 n.2, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984). If a defendant chooses to proceed with representation by counsel who has a conflict of interest, a court must conduct what is now known as a "Garcia hearing" to ensure a valid waiver by the defendant of his or her Sixth Amendment right to conflict-free counsel. United States v. Garcia-Jasso, 472 F.3d 239, 243 (5th Cir. 2006).

The judge called a recess to give Townsel time to "cool down." Though after the recess Townsel repeated, "I don't want him representing me," he stayed for the rest of the hearing.

The next day, Townsel initially refused to appear for jury selection.[32] Defense counsel told the court, "Clearly we have a breakdown of communication between myself and Mr. Townsel. . . . He's simply not communicating with me, and, in effect, ordering me not to talk to him." When Townsel arrived in court, he continued to complain about defense counsel, threatening to become disruptive if forced to be present. When he became disruptive, the court noted for the record that Townsel's behavior "appears to be tactical and purposeful" and had deputies remove Townsel from the courtroom. Defense counsel moved to substitute counsel, reiterating that he and Townsel had a "breakdown in communication." But counsel acknowledged that the previous day, Townsel spoke to him and answered his questions. The court denied the motion, finding that Townsel was engaging in "intentional tactical misconduct, designed to obtain what he wants. It's inappropriate under any measure."

"'It is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where

[32] Though the court signed a "drag order" to compel his attendance, Townsel eventually came to court of his own volition.

he simply refuses to cooperate with his attorney[ ]."[33] Townsel does not show how his alleged grievances or general frustration amounted to a conflict of interest or a complete breakdown in communication. The nature and extent of the alleged conflict weighs against finding an abuse of discretion.

Turning to the second factor, the record shows that the court made adequate inquiry. The court heard two motions from Townsel, invited him to state his concerns at two separate hearings, and allowed defense counsel and the State to respond. Because the court allowed Townsel to express his concerns fully, inquired into them appropriately, and concluded properly that there was no conflict or complete breakdown in communication preventing effective assistance, Townsel fails to show that the court's inquiry was insufficient.

Finally, we consider the third factor, the motion's timeliness. To assess the timeliness of a motion to substitute counsel, this court balances the "'resulting inconvenience and delay against the defendant's important constitutional right to counsel of his choice.'"[34] Here, after eight months of representation, Townsel first moved to substitute counsel just over a week before trial. New counsel would have required a continuance in order to prepare adequately. The State

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[33] Thompson, 169 Wn. App. at 457-58 (quoting Schaller, 143 Wn. App. at 271).

[34] Moore, 159 F.3d at 1161 (quoting United States v. D'Amore, 56 F.3d 1202, 1206 (9th Cir. 1995)).

noted that the trial had already been continued twice, medical personnel called as witnesses had adjusted their schedules to testify, and R.O.'s continued availability was uncertain. This factor weighs against finding an abuse of discretion. We hold that the trial court properly exercised its discretion in denying Townsel's motion for substitution of counsel.

Double Jeopardy

Townsel argues that his convictions for both assault in the first degree and kidnapping in the first degree violate the prohibition against double jeopardy. Townsel contends, "The evidence of first degree assault necessarily proved the first degree kidnapping on the facts of this case. The restraint and the assault occurred at the same time. [R.O.] was restrained by means of the assault."

The state and federal constitutions protect against multiple punishments for the same offense. The Fifth Amendment to the United States Constitution provides that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." Similarly, article I, section 9 of the Washington Constitution ensures that "[n]o person shall be . . . twice put in jeopardy for the same offense." Although the State may bring multiple charges arising from the same criminal conduct, "'[w]here a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same

offense.'"[35] A double jeopardy claim presents a question of law we review de novo.[36]

Our Supreme Court has adopted a four-part test to determine if the legislature intended multiple punishments in a particular situation.[37] First, a court considers any express or implicit legislative intent based upon the criminal statutes involved.[38] If this intent is unclear, a court uses the "same evidence" test set forth in Blockburger v. United States[39] to assess if the two offenses are the same in both fact and law.[40] "Offenses are the same in fact when they arise from the same act or transaction. They are the same in law when proof of one offense would also prove the other."[41] Where the degree of one offense is elevated by conduct constituting a separate offense, a third test, the merger doctrine, may help determine legislative intent.[42] Under the merger doctrine, courts presume the legislature intended to punish both offenses through a greater sentence for

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[35] State v. Kier, 164 Wn.2d 798, 803-04, 194 P.3d 212 (2008) (internal quotation marks omitted) (quoting State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

[36] State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

[37] See Freeman, 153 Wn.2d at 771-73.

[38] Freeman, 153 Wn.2d at 771-72.

[39] 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[40] Freeman, 153 Wn.2d at 772.

[41] State v. Martin, 149 Wn. App. 689, 699, 205 P.3d 931 (2009) (citing State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995)).

[42] Kier, 164 Wn.2d at 804.

the greater crime.[43] Finally, even if two convictions appear to merge on an abstract level under this test, they may be punished separately if an independent purpose or effect for each exists.[44]

We consider first any express or implicit legislative intent of separate punishments for related crimes.[45] Here, neither the kidnapping in the first degree statute nor the assault in the first degree statute explicitly addresses legislative intent about separate punishments.[46] Nor do the parties present other evidence of legislative intent.[47] We next consider the "same evidence" test. If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes.[48] We do not simply compare the statutory elements at an abstract level but consider the elements of the offenses as charged and proved.[49] If each offense requires proof of a fact that the other

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[43] Freeman, 153 Wn.2d at 772-73.

[44] Kier, 164 Wn.2d at 804.

[45] An example of such express authorization is RCW 9A.52.050, where the legislature explicitly provided for cumulative punishments for crimes committed during a burglary.

[46] Compare RCW 9A.40.020(1)(c), (d) (kidnapping in the first degree), with RCW 9A.36.011(1)(a) (assault in the first degree).

[47] See, e.g., Calle, 125 Wn.2d at 777-78 (finding legislative intent to punish separately rape and incest arising from same act).

[48] Calle, 125 Wn.2d at 777.

[49] State v. Nysta, 168 Wn. App. 30, 47, 275 P.3d 1162 (2012), review denied, 177 Wn.2d 1008 (2013).

does not, separate punishments do not offend the prohibition against double jeopardy.[50]

To convict Townsel of kidnapping in the first degree, the State had to prove that he intentionally abducted R.O. with intent to inflict bodily injury or extreme mental distress on her.[51] To convict Townsel of assault in the first degree, the State had to prove that he, with intent to inflict great bodily harm, assaulted R.O. "with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death."[52] Kidnapping in the first degree requires intent to inflict bodily injury or extreme emotional distress but, unlike assault in the first degree, does not require proof of an actual battery. Assault in the first degree requires intent to inflict great bodily harm but does not require an abduction. Contrary to Townsel's assertion that R.O. was "restrained by means of the assault," the State elicited testimony and presented evidence to prove that the kidnapping preceded and was separate from the assault. Both an abstract comparison of the statutory elements and consideration of the offenses as charged and proved reveal that each offense required the jury to find an element, and facts supporting that element, that the other offense did not.

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[50] Nysta, 168 Wn. App. at 45; State v. Fuentes, 150 Wn. App. 444, 451, 208 P.3d 1196 (2009) (citing Calle, 125 Wn.2d at 777).

[51] RCW 9A.40.020(1)(c), (d).

[52] RCW 9A.36.011(1)(a).

Though the "same evidence" test "creates a rebuttable presumption that the offenses are not the same," the merger doctrine can rebut this presumption.[53] The merger doctrine is a rule of statutory construction which only applies where the legislature has clearly indicated that to prove a particular degree of crime, the State must prove that the defendant committed not only that crime but also an act defined as a crime elsewhere in the criminal statutes.[54] Here, the jury did not need to find that Townsel committed either offense to elevate the other offense to the first degree. Accordingly, the offenses do not merge.

Townsel argues, "'Intent to inflict great bodily harm' in the first degree assault offense will always satisfy the 'intent to inflict bodily injury' prong of the first degree kidnapping offense. Both require intent to inflict harm, with 'bodily injury' subsumed within 'great bodily harm.'" Therefore, Townsel contends, "The evidence required to support a conviction for first degree kidnapping would have been sufficient to warrant a conviction for first degree assault or vice-versa."

We disagree. Although both offenses require the intent to inflict bodily harm, only assault in the first degree requires proof of an actual battery. And only the kidnapping charge requires proof of an abduction. Thus the evidence adequate to support Townsel's kidnapping conviction would not have also

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[53] In re Pers. Restraint of Francis, 170 Wn.2d 517, 524 n.4, 242 P.3d 866 (2010).

[54] State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983).

supported his assault conviction or vice versa. It is insufficient to show merely that the two offenses share the element of intent to inflict harm. Townsel asks us to apply the "same conduct" test that the United States Supreme Court articulated in Grady v. Corbin[55] but overruled in United States v. Dixon.[56] In Grady, the Court held that the double jeopardy clause bars prosecution of any offense "in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[57] Three years later in Dixon, the Court reaffirmed the Blockburger "same elements" test, rejecting Grady as a "mistake" that contradicted precedent and created confusion.[58] In State v. Gocken,[59] our State Supreme Court likewise rejected the "same conduct" test in favor of the "same elements" test. Under Blockburger and Gocken, Townsel's convictions for kidnapping in the first degree and assault in the first degree do not offend the prohibition against double jeopardy.[60]

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[55] 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990).
[56] 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).
[57] Grady, 495 U.S. at 521.
[58] Dixon, 509 U.S. at 710-11.
[59] 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).
[60] Because neither the "same evidence" test nor a merger analysis indicates that the two convictions constitute double jeopardy, we need not address whether there was "an independent purpose . . . to each." Freeman, 153 Wn.2d at 773.

CONCLUSION

The prosecutor's conduct was improper in several instances, but Townsel does not show prejudice. The trial court did not abuse its discretion by denying Townsel's motion to substitute counsel, and Townsel's convictions do not violate the prohibition against double jeopardy. We affirm.

Leach, J.

WE CONCUR:

Spearman, C.J.

Dwyer, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
vs.	)	COA NO. 69516-9-I
	)	
JERRY TOWNSEL,	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF DECEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR EMAIL.

[X] JERRY TOWNSEL
DOC NO. 929083
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF DECEMBER, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

December 17, 2014 - 3:26 PM

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Court of Appeals Case Number: 69516-9

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