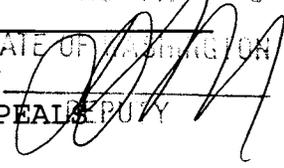


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STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,

Respondent,

vs.

JAMES LEE WALTERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 06-1-01320-6

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Mr. Walters was the victim of numerous instances of prosecutorial misconduct.

2. The trial court erred when it failed to grant the defense motion for mistrial following the alleged victim's admissions that she now "knew" who had abducted her.

3. Mr. Walters did not receive a fundamentally fair trial - a violation of the Federal and State Constitutions.

4. Mr. Walters was subjected to "double jeopardy" when he was convicted of both Indecent Liberties and Kidnapping in the First Degree.

5. There was insufficient evidence to support the conviction.

6. Mr. Walters was denied effective assistance of counsel when counsel failed to consistently object to any and all instances of perjury, the subornation of perjury and references to perjured testimony.

7. Mr. Walters was denied effective assistance of counsel as counsel did not request a

lesser-included instruction for Kidnapping in the
Second Degree.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Walters was the victim of numerous instances of prosecutorial misconduct? (Assignments of error #1).

2. Whether the trial court erred when it failed to grant the defense motion for mistrial following the alleged victim's admissions that she now "knew" who had abducted her? (Assignments of error #2)

3. Whether Mr. Walters received a fundamentally fair trial - a violation of the Federal and State Constitutions? (Assignments of error #3).

4. Whether Mr. Walters was subjected to "double jeopardy" when he was convicted of both Indecent Liberties and Kidnapping in the First Degree? (Assignments of error #4).

5. Whether there was insufficient evidence to support the conviction? (Assignments of error #5).

6. Whether Mr. Walters was denied effective assistance of counsel when counsel failed to consistently object to any and all instances of

perjury, the subornation of perjury and references to perjured testimony? (Assignments of error #6).

7. Whether Mr. Walters was denied effective assistance of counsel as counsel did not request a lesser-included instruction for Kidnapping in the Second Degree? (Assignments of error #6).

III. STATEMENT OF THE CASE

A. Procedural History

1. Incident from 1983

In 1983, when James "Jimmy" Walters was 16 years old, he was charged with and acquitted of rape. RP 29. Since that time, the alleged victim from the 1983 case has recanted and stated that Mr. Walters did not rape her (this evidence was introduced in a police report relating to the 2008 case). RP 33.

2. 2006 Mistrial

In June of 2006 Mr. James Lee Walters had his first trial in this case. Mr. Walters was charged with kidnapping in the first degree and indecent liberties. The 2006 trial ended in a mistrial because the jury was unable to reach a verdict. RP 30. The jurors were deadlocked 7-5 in favor of acquittal. Id.

3. 2008 Trial

On September 26, 2008, James Lee Walters was convicted of Kidnapping in the First Degree with sexual motivation and indecent liberties.

Despite the acquittal in the 1983 matter and the recantation by the alleged victim, the State,

based on what it believed to be similarities between the facts in that crime and the abduction of S.L., attempted to have evidence from the 1983 case introduced as evidence of a "common scheme or plan" in the 2008 trial. RP 29. While the Court did not allow this evidence to be introduced, S.L. was eventually told about the prior accusations. RP 76, 250-51. It wasn't until S.L. learned about the 1983 accusations - and the similarities between that case and her case - that she changed her belief, and ultimately her testimony, from that of someone who "thought it was Jimmy" who abducted her, to someone who "knew it was Jimmy." RP 249-50. The testimony relating to the 1983 case was as follows:

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

A. Yes.

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

A. No.

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

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

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

A. Yes.

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

A. Yes, somewhat.

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

[Defense Counsel]: Objection, your honor.

RP 249.

Following this objection testimony was taken by the prosecutor outside the presence of the jury. S.L.'s testimony outside of the presence of the jury clearly shows that S.L.'s knowledge changed and that she was being untruthful about "knowing that it was Jimmy" on the day of the abduction:

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

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

RP at 250.

It was after this testimony that it became apparent that it wasn't S.L.'s fear of losing her friendship with Shelby that kept her from definitively identifying Mr. Walters as the person who had abducted her, rather it was the fact that, until she learned about the 1983 allegations, S.L. really wasn't sure that Mr. Walters was the person wearing the mask. RP 250-51. The responding officer, Deputy Mundell, confirmed that S.L. told two versions of what had happened - one the day of the incident - and another sometime later:

Q. Your first opportunity to really interview [S.L.] occurred after you came back from the area where the hole was, right?

A. Correct.

Q. And [S.L.] gave you an explanation about what had occurred to her, correct?

A. Correct.

Q. Okay. She didn't identify Mr. Walters at that point in time, did she?

A. No.

Q. Okay. She didn't identify anybody, did she?

A. She did not.

RP 382.

S.L.'s mood and demeanor also changed after she learned about the 1983 accusations:

Q. What was her demeanor the first time you spoke to her?

A. Very calm and distant.

Q. The second time that you spoke to her when she indicated who it was that did this to her, what was her demeanor?

A. She was crying and angry.

RP 345.

While the prosecutor argued that he was only seeking to elicit the testimony related to S.L. losing her friendship, defense counsel moved for a mistrial arguing the unfairness of allowing S.L. to now definitively identify Mr. Walters. Counsel argued that this testimony was impossible to rebut or impeach without eliciting S.L.'s knowledge about the prior offense - and thus informing the jury of the prior accusations. RP 251-52. In addition to the fact that this testimony had changed and was un-impeachable, was the fact that the prosecutor used the "losing of the best friend" story as a means of covering up the actual reason for the change in testimony. Id. It was following argument, outside the presence of the

jury, that defense counsel moved for a mistrial based on the above statements. RP 256. The motion was denied. Id.

During closing arguments, the prosecutor spent a great deal of time playing up the story of the little girl who "knew" her assailant but wouldn't tell who it was because it would cost her her best friend:

She gets home. And when she gets home, when she arrives at the house, she is faced with the situation that no child should ever be faced with. You can either keep your best friend, or you can tell the whole truth. That was the decision that [S.L.] had to face when she arrived back at her house. [S.L.] decided to tell the whole truth, and she has lost her best friend. [S.L.] was lucky. She returned to the house that day, but she has never yet come home.

RP 1003.

a. Prosecutorial Misconduct

During his closing argument, the prosecutor made numerous improper comments regarding his evidence and witnesses, such as:

"Sarah is a credible witness."

RP 1006.

"These details, these little details, have a ring of truth."

RP 1007-08.

"Sarah is incredibly detailed, and that speaks volumes about her credibility. Sarah is also credible because everything that she tells you is corroborated either by the physical evidence or by other witnesses."

RP 1008.

"Her credibility is solid."

RP 1011.

"Mr. Leyda is telling the truth."

RP 1074.

"Sarah is the victim in this case. This was done to Sarah. Sarah deserves justice. She deserves a verdict that represents the truth, ladies and gentlemen, and when you look back on this case years from now, and you will, you will want to be able to tell yourselves, I reached a verdict that represented the truth. I held him accountable for what he did and for what he tried to do in this courtroom, for the stories he tried to foist on you in this courtroom. I'm asking you to return a verdict that represents the truth. The truth is that man committed these crimes."

RP 1083.

Regarding Mr. Walters' witnesses and evidence, the prosecutor made the following statements:

"Justin can't tell you a credible story because it's not the truth."

RP 1078.

"A straight story isn't difficult to retell over and over. These are not complicated facts to tell over and over. But when it isn't the truth, when it's not the truth, you can't keep those details correct. [Mr. Walters'] entire defense rests upon his son, and it's not true."

RP 1080.

Despite the prosecutor's direct knowledge that S.L. was not able to definitively identify Mr. Walters until learning of the 1983 incident, the prosecutor made the following argument in his closing statement:

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

RP 1020-21.

The prosecutor also made arguments intended to persuade the jury to disregard the jury instructions:

Now, jury instructions are written by lawyers for lawyers, okay, and I won't

bother to read it. You guys have the instructions. You can read them yourselves, the definition of abduct, the definition of restrain. It's a lot of legalese.

RP 1005.

Finally, during her direct examination, S.L. testified that the bus always dropped her off at 3:30. RP 151. The prosecutor recognized that this statement was inconsistent with previous statements and informed the Court. RP 155. The prosecutor then attempted to "correct" S.L.'s testimony and was able to help her remember that the bus usually dropped her off at 3:00. RP 163. While "correcting" the testimony was the right thing to do, in his closing statement, the prosecutor didn't acknowledge that S.L. had to be corrected during the trial and used the "3 o'clock" "corrected" testimony as evidence of S.L.'s consistency - a misstatement of the evidence. The prosecutor stated:

Think about it. The story starts off. Sara tells you that the bus arrives at 3 o'clock. Well, guess what? We bring in the bus driver. The bus driver says, Yes, the bus arrives at 3 o'clock.

RP 1008.

b. Jury Instructions

At trial, defense counsel made only one objection to the State's proposed jury instructions. Defense counsel did not request an instruction for kidnapping in the second degree.

B. Facts

The alleged victim in this case, S.L., was, prior to this incident, best friends with Mr. Walters' daughter, Shelby. On March 8, 2006, S.L. was walking home from her bus stop around three o'clock in the afternoon. RP 163, 1014. Shelby, who sometimes rode the bus with S.L., was not with her that day and S.L. was walking home alone. RP 125. While S.L. was walking, she heard a noise from behind her and turned around. RP at 127. S.L. testified that, "I turned around, and I saw someone standing there. I couldn't really tell who it was because they were wearing a mask, but I knew that they were white because they weren't wearing any gloves and I could see their skin." RP 127. S.L. described the mask: "It was camouflage, like something someone would wear hunting." RP 132. When asked if there were holes in the mask, S.L. testified that, "[y]eah, for his eyes, and I think there was one around his mouth." RP 132.

At this point, S.L. testified that she had begun to walk away when the person in the mask came from behind her, put a towel over her head, and secured the towel with duct-tape. RP 134-35. At some point her hands were also duct-taped. RP 139. The abductor then carried and guided S.L. several hundred yards through thick, wooded terrain to an area in the woods described as a "depression" or hole in the ground where children would often play. RP 144-46. It took about a half-hour to get to this spot. RP 216. S.L. stated that at one point the man in the mask licked a teardrop off of her cheek and "rubbed my butt." RP 146. When asked about how the licking of the cheek was possible, given that the abductor was wearing a mask and her head was wrapped in a towel, S.L. testified:

Q. In addition to the towel, was there anything else covering your head when you were in the hole?

A. At some point while we were walking, he put a mask over my head.

Q. Before or after you arrived at the hole or after?

A. Before.

Q. Was that mask still on your head when he licked your cheek?

A. I don't think so.

RP 146.

Later during cross-examination, S.L.'s story changed:

Q. So you didn't identify it as a towel until you were able to get away later at the hole where you were taken?

A. Yes.

Q. Okay. And that was the first time that you figured that this was probably what was used to cover your eyes?

A. Yes.

Q. But you don't know for a certainty, do you?

A. Yes, I do, because he had never taken it off.

Q. So it was still on you?

A. Yes.

RP 204-05.

It was while S.L. and the abductor were in this hole that the abductor's cell phone rang and S.L. recognized the ring tone as the same as Mr. Walters' phone. RP 147. After the phone rang once, S.L. heard the phone open and close and then

heard the abductor running off. RP 147. S.L. was able to free herself at this point, and go straight home - leaving the towel and duct tape in the hole. RP 148. S.L.'s abductor never said anything to her during the entire episode. RP 148.

Upon arriving home, S.L. told her parents about being abducted, but did not state anything about who she believed abducted her. Prior to calling the police, S.L.'s parents had her show them where the abductor had taken her - however when they arrived, "the towel and the duct tape and everything was gone." RP 150, 167, 218, 243.

IV. ARGUMENT

A. MR. WALTERS WAS THE VICTIM OF NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT.

The cumulative effect of errors occurring at trial may support the grant of a new trial, even if none of the errors standing alone would justify a new trial. State v. Mark, 71 Wn.2d 295, 301, 427 P.2d 1008 (1967). Prosecutorial misconduct denies a defendant the right to a fair trial and necessitates a new trial if there is a substantial likelihood that the comments affected the verdict. State v. Echevarria, 71 Wn.App. 595, 597, 860 P.2d

420 (1993). If the misconduct implicates the constitutional rights of the defendant, however, reversal is required unless the error is harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Even in the absence of an objection by the defense, reversal is still required if the remarks were so flagrant or ill intentioned that no curative instruction could have obviated the prejudice. Echevarria, 71 Wn.App. at 597.

In this case, no fewer than eleven separate instances of prosecutorial misconduct during closing and rebuttal argument materially affected Mr. Walters' right to a fair trial. Specifically, the prosecutor made numerous comments bolstering the veracity and credibility of the State's witnesses while also making personal judgments about the untruthfulness of witnesses who testified on Mr. Walters' behalf.

1. Subornation of Perjury.

It is never permissible to encourage or suggest to a witness that he or she testify falsely, or even to allow false or misleading testimony to stand uncorrected. State v. Floyd,

11 Wn.App. 1, 4, 521 P.2d 1187 (1974); Napue v. Illinois, 360 US. 264, 79 S.Ct. 1173 (1959); State v. Finnegan, 6 Wn.App. 612, 616, 495 P.2d 674 (1972).

The prosecutor suborned perjury when he presented S.L.'s testimony that the only reason she did not immediately identify Mr. Walters was because she was afraid of losing her best friend - despite S.L.'s testimony outside the presence of the jury that she was unsure of his identity at first "because I had no idea of his prior offenses." RP 250.

Additionally, the prosecutor's remarks aimed at persuading the jury to disregard the jury instructions were improper. Finally, the prosecutor misstated the evidence when, in his closing, he argued that S.L. had been perfectly consistent in her testimony related to when the bus dropped her off - even though S.L. originally testified that she was dropped off at 3:30 and had to have her testimony "corrected" by the prosecutor.

2. Bolstered Credibility.

It is improper for a prosecutor personally to vouch for the credibility of a witness. State v. Sargent, 40 Wn.App. 340, 344, 698 P.2d 598 (1985).

A prosecutor may not impart to the jury his belief that a government witness is credible. Such improper vouching may occur in at least two ways. The prosecutor may either place the prestige of the government behind the witness or . . . indicate that information not presented to the jury supports the witness's testimony. When the credibility of witnesses is crucial, improper vouching is particularly likely to jeopardize the fundamental fairness of the trial.

United States v. Edwards, 154 F.3d 915, 921 (9th Cir. 1998) (quotations and citations omitted).

Here, S.L.'s credibility was obviously critical to the outcome of the trial. Accordingly, the State improperly vouched for her credibility during closing argument, and attempted to induce the jury to feel sympathy for her. Additionally, the prosecutor's comments imparted to the jury that the prosecutor believed S.L.'s testimony, and additionally placed the imprimatur of the Pierce County Prosecuting Attorney's Office on the testimony of S.L. This misconduct was particularly prejudicial in light of the critical

role that S.L.'s testimony played in the outcome of the trial.

Moreover, the improper vouching, in effect, turned the prosecutor into an unsworn witness at the trial. It is misconduct for the prosecutor to make "prejudicial allusions to matters outside the evidence", or to argue to the jury "'facts' not in evidence." State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); see also State v. Stith, 71 Wn.App. 14, 22, 856 P.2d 421 (1993) (reversing conviction where prosecutor argued that justice system's "incredible safeguards" would not allow a case to go to trial if police acted improperly). Without being subject to cross-examination, the prosecutor in Mr. Walters' case "testified" during closing argument that "we" prosecutors believe that S.L.'s story has "the ring of truth." Here too, Mr. Walters' Fifth, Sixth, and Fourteenth Amendment rights were violated.

Finally, the State appealed to the passions and sympathies of the jurors when telling them:

Sarah deserves justice. She deserves a verdict that represents the truth, ladies and gentlemen, and when you look back on this case years from now, and you will, you will want to be able to tell yourselves, I reached a verdict

that represented the truth. I held him accountable for what he did and for what he tried to do in this courtroom, for the stories he tried to foist on you in this courtroom.

Appellate courts have consistently condemned such appeals to the passions and prejudices of the jury. *See, e.g., Echevarria*, 71 Wn.App. at 598-99 (conviction reversed based on prosecutor's repeated references in opening statement to the war on drugs; defense counsel's failure to object did not preclude review); *Belgarde*, 110 Wn.2d at 506-10, 755 P.2d 174 (1988) (murder conviction reversed due to prosecutor's appeals in closing argument to jury's passion and prejudice; defense counsel's failure to object did not preclude review); *State v. Powell*, 62 Wn.App. 914, 918-19, 816 P.2d 86 (1991), *rev. denied*, 118 Wn.2d 1013 (1992) (improper for prosecutor in child sex case to argue that acquittal would be equivalent to "declaring open season on children"); *State v. Bautista-Caldera*, 56 Wn.App. 186, 195, 783 P.2d 116 (1989), *rev. denied*, 114 Wn.2d 1011 (1990) (improper in statutory rape case to exhort jury to send a message to society about problem of child sexual abuse); *Brown v. United States*, 370 F.2d

242, 246 (D.C. Cir. 1966) (conviction for assaulting police officer reversed where prosecutor argued that if jury acquitted defendant, "you might as well have martial law"); Hance v. Zant, 696 F.2d 940, 950-53 (11th Cir.), cert. denied, 463 U.S. 1210, 77 L.Ed.2d 1393, 103 S.Ct. 3544 (1983) (prosecutor's "dramatic appeal to gut emotion has no place in the courtroom"; death sentenced reversed); United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir. 1991) ("prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking"); United States v. Johnson, 968 F.2d 768 (8th Cir. 1992) (reversing drug conviction based on prosecutor's inflammatory appeal to jurors as the conscience of the community).

This was obviously a close case, and the evidence of guilt on which the State prevailed was hardly overwhelming. It is worth mentioning that this was a re-trial after a previous jury had deadlocked 7-5 in favor of Mr. Walters. The misconduct in closing argument materially affected Mr. Walters' right to a fair trial, and this Court

should reverse the conviction and grant a new trial.

B. MR. WALTERS DID NOT RECEIVE A
FUNDAMENTALLY FAIR TRIAL - A
CLEAR VIOLATION OF THE
WASHINGTON STATE CONSTITUTION.

Criminal defendants have a right to a fair trial, measured by reasonable standards. State v. Willis, 67 Wash.2d 681, 689, 409 P.2d 669 (1966). Only a fair trial is a constitutional trial. State v. Charlton, 90 Wash.2d 657, 665, 585 P.2d 142 (1978). Under the due process clause of the Fourteenth Amendment and Washington Constitution Article I § 3, prevailing notions of fundamental fairness also require that a defendant have a meaningful opportunity to present a complete defense. State v. Lord, 117 Wn.2d 829, 867, 822 P.2d 177 (1991). Errors that deny the defendant a fair trial are per se prejudicial. State v. Davenport, 100 Wash.2d 757, 762, 675 P.2d 1213 (1984).

Here, in addition to the numerous instances of prosecutorial misconduct, there were several reasons that Mr. Walters' trial was fundamentally unfair. First and foremost, he was being accused by a 15-year old girl who "knew" that he was the

one who abducted her, based solely on the fact that she had been presented with information relating to allegations made against Mr. Walters 23 years before (that were recanted). Of course, Mr. Walters' counsel could not impeach S.L., because to do so would inform the jury of the prior allegation - information that had been specifically excluded by the trial court. Because a defendant has a constitutional right to present a meaningful defense, Mr. Walters did not receive a fair trial.

Even more unfair for Mr. Walters was the fact that the prosecutor repeatedly emphasized that [S.L.] "knew" Mr. Walters was her abductor and only hesitated in fully identifying him because she was worried about losing her best friend. This presentation by the prosecutor during his closing statement was contrary to the statements S.L. made outside the presence of the jury. The facts were that S.L. may have suspected that it was Mr. Walters, but, because he wore a mask and didn't speak, she was not able to confidently identify him. The fact that she was able to make such conclusive statements on the witness stand,

based on knowledge that could never be presented to the jury, created a trial that was fundamentally unfair to Mr. Walters.

C. BECAUSE "THE INTENT TO FACILITATE INDECENT LIBERTIES" ELEVATED THE CRIME OF KIDNAPPING IN THE SECOND DEGREE TO KIDNAPPING IN THE FIRST DEGREE, MR. WALTERS WAS SUBJECTED TO "DOUBLE JEOPARDY" WHEN HE WAS CONVICTED OF INDECENT LIBERTIES AND FIRST DEGREE KIDNAPPING.

Generally, the State may bring multiple charges in a single proceeding even if the charges arise from the same criminal conduct. State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). However, state and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983); Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); see CONST. Art. I § 9 ("No person shall be ... twice put in jeopardy for the same offense."); U.S. CONST. Amend. V (same quotation). Within constitutional constraints, the legislature has the power to define criminal conduct and assign punishment to it. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d

155 (1995) (recognizing rape and incest as separate offenses). "'Where 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.'" State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005) (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). Because double jeopardy is a constitutional consideration, it is reviewed de novo. Id.

In Mr. Walters' 2008 trial, jury instruction number 13 stated:

A person commits the crime of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion.

See Exhibit A.

Jury instruction number 8 outlined the elements for kidnapping in the first degree:

A person commits the crime of kidnapping in the first degree when he or she *intentionally abducts another person with intent to facilitate the commission of Indecent Liberties* or to inflict extreme mental distress on that person or on a third person.

See Exhibit B.

As this court is aware, Mr. Walters was convicted of both kidnapping in the first degree and indecent liberties. The jury also returned a special verdict form which asked two questions. The first question was: "At the time the defendant committed the crime of Kidnapping in the first degree, did the defendant intentionally abduct S.L. with the intent to facilitate the commission of the crime of Indecent Liberties?" See Exhibit C. The jury answered, "yes." Id. The second question asked: "At the time the defendant committed the crime of Kidnapping in the first degree, did the defendant abduct S.L. with intent to inflict extreme mental distress on S.L. or on a third person? Id. To that question, the jury answered, "no." Id.

Because the jury clearly rejected the possibility that Mr. Walters' conviction was based on the infliction of extreme emotional distress, and because the "intent to commit indecent liberties" was the vehicle for which Mr. Walters was convicted of first degree kidnapping, Mr. Walters was twice punished for the crime of indecent liberties. Because this is a clear

constitutional error, at the very least, Mr. Walters' conviction of kidnapping in the first degree should be reversed.

D. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

As this court is aware, due process requires the state to prove its case beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). When challenging the sufficiency of evidence, this court must determine:

Whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Weisberg, 65 Wn.App. 721, 724, 829 P.2d 252 (1992). See also, State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

In Mr. Walters' trial, the instruction pertaining to indecent liberties stated: A person commits the crime of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion. See Exhibit "A".

The instruction for kidnapping in the first degree stated: A person commits the crime of

kidnapping in the first degree when he or she intentionally abducts another person with intent to facilitate the commission of Indecent Liberties or to inflict extreme mental distress on that person or on a third person. See Exhibit "B".

Here, there was insufficient evidence to conclude that Mr. Walters was guilty of kidnapping in the first degree and indecent liberties. As stated, there was very little evidence in this case. In fact, the first time Mr. Walters went to trial on these charges, the jury was hung in his favor 7-5.

Additionally, there was no direct evidence linking Mr. Walters to the crimes. His DNA was not on any of the evidence recovered, and his son testified that Mr. Walters was at home soon after he arrived around four o'clock. RP 97, 297, 860. There was no other witness evidence, no footprints and no drag-marks in this case. The State's best evidence was S.L.'s testimony that she "knew" it was Mr. Walters who abducted her, however, as has been shown, her "knowledge" was based on an allegation from 1983 that was never proven.

Additionally, at trial, S.L. made numerous

inconsistent statements. In fact, in the middle of S.L.'s testimony, the prosecutor asked to address the Court outside the presence of the jury. RP 154. The prosecutor informed the Court that he believed S.L.'s testimony was inconsistent in two areas: First he believed that S.L. had testified inconsistently about whether her bus dropped her off at 3:00 or 3:30, and second that "she did not immediately tell the responding sheriff's deputy who it was that had abducted her" - despite having just testified that she had. RP 155; RP 151. The prosecutor was citing the following exchange between himself and S.L.:

Q. Was there any doubt at the time you spoke to the police officer who it was that had done this to you?

A. No.

RP 151.

Q. Did you immediately tell the police who it was that had done this to you?

A. Yes.

RP 152.

S.L.'s inconsistencies continued during cross-examination:

Q. Okay. Sheriff's deputy shows up?

A. (The witness nods head.)

Q. You don't exactly tell him everything at the beginning, do you?

A. No.

Q. You withheld information?

A. Yes.

Q. You didn't tell them that it was Jimmy Walters, did you?

A. No. I told him it was Jimmy.

Q. Didn't you actually tell him that you thought it was Jimmy based on the clothing?

A. Yes.

Q. Okay. So you didn't tell them that it was Jimmy Walters. You thought it might be?

A. Yes.

Q. Fair to say?

A. Yes.

RP 243-44.

Despite the prosecutor's belief that S.L. was only inconsistent in two areas, a review of her testimony reveals several other inconsistencies worthy of examination. Regarding her testimony in previous hearings (the first trial), S.L. testified to the following:

Q. Okay. So this man comes out of the trees, and you think it's Jimmy?

A. Yes.

Q. And you think it's Jimmy because you think you recognize the red jacket?

A. Yes.

Q. Okay. But you are not certain now, are you?

A. I'm certain.

Q. Do you remember in the last hearing saying that you weren't certain at that time?

A. Yeah, I guess.

RP 204.

Further inconsistent statements included the following: S.L. testified that on the day of the abduction, she did not accompany the responding officer to the "hole." RP 245. The responding officer, Deputy Mundell testified that indeed, S.L. and her father did take him to this area. RP 333.

Additionally, regarding when she usually arrived home after being dropped off at three o'clock, S.L. testified that it usually took her about 30 minutes to walk from the bus-stop to her home. RP 122. S.L. then testified that she

usually arrived home around 3:50 or 3:55. RP 127.
S.L. later testified that she would normally
arrive home at 3:30, 3:45. RP 168.

Regarding whether she had ever been to the
"depression" or hole before, S.L. first testified
that she had never been there before. RP 170.

Then, during cross-examination, the story changed:

Q. Okay. When was the last time
that you had played with your
brother or any of the Walters'
children in this particular
area?

A. Several months before.

Q. Several months?

A. Yeah.

RP 225.

Lastly, as stated, S.L. was inconsistent in
her testimony about whether her head was covered
with the bath towel during the entirety of the
abduction, whether the towel was removed and a
mask was put on her, and whether it was a mask or
a towel that was over her head when the abductor
allegedly licked her cheek. Because the evidence
in this case was insufficient, the conviction
should be reversed.

E. DEFENDANT RECEIVED INEFFECTIVE
ASSISTANCE OF COUNSEL.

Both the Sixth Amendment to the United States Constitution and Art. I § 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. Strickland, 466 U.S. at 687-88. Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78 (citing State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn.App. 348, 359, 743 P.2d 270 (1987). Additionally, "counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." Sanders v. Ratelle, 21 F.3d 1446, 1456

(9th Cir. 1994) (citing Strickland, 466 U.S. at 691).

1. Mr. Walters was denied effective assistance of counsel when counsel failed to consistently object to any and all instances of perjury, the subornation of perjury and references to perjured testimony.

While Mr. Walters counsel did at one point move for a mistrial based on S.L.'s changed testimony that she "knew all along" that Mr. Walters was the one who had abducted her, counsel did not strenuously object to this point. Given that the first trial had ended in a hung-jury, it was surely S.L.'s definitive testimony that she "knew" Mr. Walters had abducted her that gave the jury the confidence to convict. As stated consistently throughout this appeal, S.L. suspected Mr. Walters, but she never "knew" it was him until she was informed of the 1983 allegations. Once she heard about the 1983 allegations - and perhaps after the first trial ended with a hung jury - S.L. very obviously altered her testimony from someone who "suspected" it was Mr. Walters to someone who "knew" it was Mr. Walters. This was clearly untrue, perjured testimony, and the State repeatedly emphasized it.

While defense did object, his objection, to some degree, lacked clarity and cogency, and the objection focused more on the "losing of the best friend" story and less on S.L.'s perjury and the subornation of perjury on the part of the State.

As stated, S.L.'s abductor wore a mask and never spoke - and because there was no physical evidence linking Mr. Walters to the crime - the State had very little evidence to convict. Mr. Walters attorney should have objected every time S.L. testified untruthfully, and every time the prosecutor argued that S.L. "knew" who her abductor was. By not emphasizing this point on the record, counsel's performance fell well below an objective standard of reasonableness, and Mr. Walters should be granted a new trial.

2. Counsel did not prepare a lesser-included instruction for kidnapping in the second degree.

Mr. Walters was denied effective assistance of counsel because trial counsel's conduct fell below the standard of reasonableness and Mr. Walters was prejudiced when defense counsel failed to offer an instruction for kidnapping in the second degree. This is an instruction that is

clearly considered by the law to be a lesser included instruction to kidnapping in the first degree. In fact, the Courts have stated the following as it relates to the instant situation involving lesser included instructions:

Under the Workman test, a defendant is entitled to an instruction on a lesser included offense (1) if each of the elements of the lesser offense is a necessary element of the offense charged (the legal prong), and (2) if the evidence in the case supports an inference that the lesser crime was committed (the factual prong).

State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

Based on the above analysis, Mr. Walters would have been entitled to a jury instruction for kidnapping in the second degree had counsel requested it because second degree kidnapping requires only an "intentional abduction," while kidnapping in the first degree, in Mr. Walters' case, required an intentional abduction with the intent to either (1) facilitate the commission of a felony, or (2) inflict extreme emotional distress. See RCW 9A.40.020; RCW 9A.40.030.

Here, the legal prong of the Workman test is easily met. The factual prong is also met because the only evidence of indecent liberties was a lick of the cheek and a "rubbing of the butt." Because the evidence of indecent liberties was so scant, the jury would have been more comfortable convicting the defendant of kidnapping in the second degree. This is bolstered by the fact that there was inconsistent testimony given by S.L. regarding whether her face was covered with a mask or towel, and whether her abductor's face was covered by a towel or a mask. Additionally, as her abductor had to carry her at times, the "rubbing of the butt" could have just as easily been inadvertent. Had counsel included this instruction, he could have made these arguments while still making his strongest argument of general denial. It appears that counsel for Mr. Walters engaged in the "all-or-nothing" strategy at trial.

"All-or-nothing" trial strategies are disfavored in Washington. See State v. Ward, 125 Wn.App. 243, 104 P.3d 670 (2004); State v. Pittman, 134 Wn.App. 376, 166 P.3d 720 (2006).

Here, defense counsel seemingly believed that a jury would be unable to reach the significant elements of kidnapping in the first degree, and did not want to risk the possibility of a conviction of the lesser offense of kidnapping in the second degree. This constituted ineffective assistance of counsel.

A recently published Division II case is on point. In State v. Grier, 150 Wn.App. 619, 208 P.3d 1221 (2009), the Court cited State v. Pittman, 134 Wn.App. 376, 390, 166 P.3d 720 (2006), for the proposition that "deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance." Id. In determining that trial counsel's decision not to request a lesser-included instruction constituted ineffective assistance of counsel, the Court evaluated the following three "themes:" (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the

defendant, given the totality of the developments at trial. Id. In Grier, the defendant was accused of shooting an aggressive man at short range - however, because the weapon was never found, defense counsel argued (1) that Ms. Grier wasn't the shooter, (2) that if she was involved, she acted in self-defense, and (3) that either way, Ms. Grier did not intend to kill. Because the facts in Grier are so similar to Mr. Walters' case, analysis of the "themes" set forth in Grier is appropriate.

- a. *Because the standard range sentence for kidnapping in the first degree is roughly five times the range for kidnapping in the second degree, there is a significant difference between the penalties.*

In Grier, the defendant was found guilty of second degree murder and thus, faced a sentencing range of 123-220 months in prison. Id. at 33. Had she been convicted of the lesser-included charge of first degree manslaughter (which was not offered), her range would have been 78-102 months. Id. at 33-34. The Court stated that "[t]he difference between the maximum sentences for second degree manslaughter and second degree

murder is 193 months, a significant amount of time." Id. at 34. In its analysis, the Court stated:

In Ward and Pittman, Division One of our court explained the significant difference in penalties for the charged crimes and the omitted lesser-included offenses. Ward was charged and convicted of two counts of second degree assault, for which he faced 89 months incarceration, even though some evidence demonstrated that he was guilty of only unlawful display of a weapon, a gross misdemeanor, for which the maximum sentence was one year of incarceration. Ward, 125 Wn.App. at 247-49. Pittman was charged and convicted of attempted residential burglary, for which he faced 9 to 10 ½ months in prison, even though some evidence tended to show that he was guilty of only attempted first degree criminal trespass, which carried a maximum sentence of 90 days in jail. Pittman, 134 Wn.App. at 380, 389. In both cases, the court explained that such a significant difference in penalties exposed the defendants to an unreasonably high risk. Id. at 388-90; Ward, 125 Wn.App. at 250-51. In both Pittman and Ward, Division One reversed and remanded for new trials, based on counsel's failure to request instructions on lesser-included offenses. Pittman, 134 Wn.App. at 390; Ward, 125 Wn.App. at 250-51.

Similarly here, there is a significant difference between the sentences for second degree murder and for first and second degree manslaughter ... In failing to request lesser-included manslaughter instructions, defense counsel abandoned the chance that Grier would be exposed to a much lower sentencing range...

Grier, 208 P.3d at 33-34.

The standard range for kidnapping in the first degree is 51 to 68 months, while the range for kidnapping in the second degree is 6-12 months. See RCW 94A.510. Because of this, there is clearly a "significant difference between the penalties," and the first "theme" is satisfied.

- b. *Had there been an instruction for kidnapping in the second degree, counsel could have still argued general denial, but also argued that there was no evidence of intent to facilitate indecent liberties or inflict extreme emotional distress.*

Because the abduction of S.L. was short-lived, and because there was very little evidence of any intent beyond the kidnapping, counsel could have easily maintained the position that Mr. Walters was not the person behind the mask, while also making arguments that the State had not met its burden of showing additional intent on the part of the kidnapper. As stated, the evidence of the cheek licking was inconsistent. Also the "rubbing of the butt" evidence lacked specificity and defense counsel could have argued that it was possibly inadvertent or unintentional. Given that

the only difference between first and second degree kidnapping is this additional intent, no argument can be made that the defense strategy at trial would have had to be significantly different.

- c. *Defense counsel's "all-or-nothing" strategy created a significant risk for Mr. Walters, especially when the State improperly maximized S.L.'s ability to say she "knew" it was Mr. Walters who abducted her.*

The final theme concerns "the overall risk to the defendant, given the totality of the developments at trial." Grier, 208 P.3d at 32. In Grier, the Court stated that "the 'all-or-nothing' defense tactic is effective when one of the elements of a crime is highly disputed and the State has failed to establish every element beyond a reasonable doubt; in such a situation, the jury must acquit the defendant based on a reasonable doubt about proof of that element." Grier, 208 P.3d at 35; Ward, 125 Wn.App. at 250 (quoting Keeble v. United States, 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973)). The Grier court theorized that defense counsel was probably hoping for an acquittal - relying on the weak

evidence that the defendant intended to kill the victim, or was even armed, and the strong evidence that the defendant was acting in self defense. Grier, 208 P.3d at 35. Here, defense counsel was seemingly basing his "all-or-nothing" strategy on a lack of evidence while not fully appreciating the damage of S.L.'s testimony. This was very similar to the situation the Grier court considered when it analyzed Pittman and Ward - which both quoted the following from Keeble:

[I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction ... precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory.

Grier, 208 P.3d at 36 (quoting Keeble, 412 U.S. at 212-13); Pittman, 134 Wn.App. at 388; Ward, 125 Wn.App. at 250.

Here, while Mr. Walters' counsel may have been correct that there was no direct evidence that Mr. Walters was involved in the abduction,

there was still the testimony from S.L. that was based on her knowledge of the 1983 charge. Like Grier, Keeble, Pittman and Ward - it was negligent for defense counsel to believe that a jury would not be persuaded by S.L.'s decisive belief that Mr. Walters was her abductor. Additionally, because the final theme in Grier concerns "the overall risk to the defendant, given the totality of the developments at trial," it wrong for counsel to ignore the risk that S.L.'s testimony posed and not request the lesser-included instruction. Mr. Walters was prejudiced by his defense counsel's failure to request a lesser-included jury instruction. Consistent with the analysis set-forth in Grier and Keeble, Mr. Walters' jury was unable to fairly consider all of the evidence that might support a lesser conviction for kidnapping in the second degree because of defense counsel's ineffectively employed the "all-or-nothing" strategy.

V. CONCLUSION

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

VI. APPENDIX

Exhibit "A" - Jury Instruction #13

Exhibit "B" - Jury Instruction #8

Exhibit "C" - Special Verdict Form B

RESPECTFULLY SUBMITTED this 28th day of
August, 2009.

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By: 

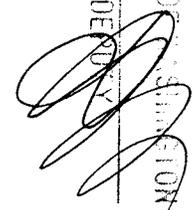
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CERTIFICATE OF SERVICE

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

Kathleen Proctor
Deputy Prosecuting Attorney
946 County-City Building
Tacoma, WA 98402

James Lee Walters
DOC #755724
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

STATE OF WASHINGTON
BY  DEPUTY
09 AUG 28 PM 6:19
COURT OF APPEALS
DIVISION II

Signed at Tacoma, Washington this 28th day of August, 2009.



Lee Ann Mathews

INSTRUCTION NO. 13

A person commits the crime of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion.



INSTRUCTION NO. 8

A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to facilitate the commission of Indecent Liberties or to inflict extreme mental distress on that person or on a third person.





06-1-01320-6 30613489 SVRD 09-29-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-01320-6

vs.

JAMES LEE WALTERS

SPECIAL VERDICT FORM B

Defendant.

We, the jury, return a special verdict by answering as follows:

QUESTION 1: At the time the defendant committed the crime of Kidnapping in the first degree, did the defendant intentionally abduct S.L. with intent to facilitate the commission of the crime of Indecent Liberties?

ANSWER: Yes (Write "yes" or "no" or "not unanimous")

QUESTION 2: At the time the defendant committed the crime of Kidnapping in the first degree, did the defendant abduct S.L. with intent to inflict extreme mental distress on S.L. or on a third person?

ANSWER: No (Write "yes" or "no" or "not unanimous")

[Handwritten Signature]
PRESIDING JUROR

