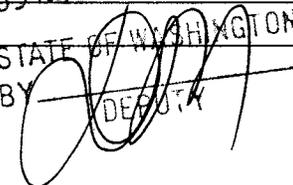


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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

JAMES WALTERS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 06-1-01320-6

BRIEF OF RESPONDENT

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3. Has defendant failed to show that the trial court abused its discretion in denying a mistrial when it was based on a single comment by a witness that she was uncertain if she could say “something” in court without providing any further information? 1

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to provide any evidence that there was perjured testimony in his trial, much less that the prosecutor knowingly suborned perjury?
2. Has defendant failed to show that any of the prosecutor's closing arguments were improper or that the unobjected- to argument created an enduring prejudice that could not be eliminated by a curative instruction?
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proof of identity and his argument is that the appellate court should override the jury's credibility determinations?

7. Should this Court reject defendant's double jeopardy claim when it is contrary to controlling Supreme Court authority?

B. STATEMENT OF THE CASE.

1. Procedure

On March 21, 2006, the Pierce County prosecutor's office filed an information charging appellant, JAMES LEE WALTERS (defendant), with one count of kidnapping in the first degree and one count of indecent liberties in Pierce County Cause No. 06-1-01320-6. CP 1-2. The State alleged that the kidnapping was committed with sexual motivation. *Id.* A corrected information was filed on May 22, 2007, but it did not change the number or nature of the charges. CP 90-91.

The case was initially tried before the Honorable Frank E. Cuthbertson, but it ended in a mistrial when the jury was unable to reach unanimous agreement¹. RP 30. The case was assigned to the Honorable Rosanne Buckner for retrial. RP 2.

The State sought to admit some evidence of a prior rape allegation that had been lodged against the defendant in 1983, and of which he had

¹ Defense counsel indicated that the prior jury was seven to five for acquittal. RP 30. A jury note from the prior trial indicates that the jury was split 5-5-2, with two undecided. CP 102-109.

been acquitted. RP 16-30; CP 11-41, 42-49. The State sought admission under ER 404(b) and RCW 10.58.090. *Id.* The court excluded this evidence from the trial. RP 75-76. None of this information came out at trial.

There were no exceptions or objections to the court's jury instructions by either the defendant or the prosecution. RP 9/25 RP 85-88. Neither party proposed instructions on the lesser degree offense of kidnapping in the second degree. CP 184-213, 226-227.

After hearing the evidence, the jury convicted defendant of kidnapping in the first degree and indecent liberties, and found a sexual motivation finding on the kidnapping count. RP 1091-92

At sentencing on October 24, 2008, the court treated the crimes as the same criminal conduct and imposed a mandatory sentence of life in the Department of Corrections under RCW 9.94A.712, and set the minimum term within the standard range of 68 months on each count. RP 1109-1110; CP 294-309.

Defendant filed a timely notice of appeal from entry of this judgment. CP 362-375. The State filed a notice of cross-review. CP 376-378. The State is voluntarily moving to dismiss its notice of cross-review, and will file a motion to do so contemporaneously with the response brief.

2. Facts

S.L. was 15 years old at the time of trial and had never been married. RP 101-02, 274-76. S.L. lived in Roy, Washington, with her

parents, brother, sister, nephew and her sister's fiancé in a gated development where the roads are not accessible to the general public. RP 101, 120. In 2008, S.L.'s best friend was Shelby Walters, the defendant's daughter, who lived near to S.L. in the same development. RP 102-104, 274-76. She and Shelby would frequently be at each other's houses and would play in the wooded area that was between their houses. RP 104-112.

In 2006, Shelby's mother, Nikki Walters, would pick S.L. up from her house in the morning, then drop her and Shelby at the bus stop. RP 113, 117, 279-80. The bus stop is a mile and a half from S.L.'s home. RP 118, 279. It is a mile from the bus stop to a "Y" in the road; from there it is another half mile to S.L.'s home taking the right fork. RP 282. The defendant's house is about a quarter of a mile down the left fork. RP 282. S.L. and Shelby did not always ride the same bus home from school in the afternoon. RP 117-118. S.L. would take the bus that dropped her off at the bus stop at about 3:00 pm. RP 119, 163, 284. Until her family had car problems in February/March 2006, S.L. was usually picked up at the bus stop by a family member; once the car problems started, usually she would walk home alone as no other kids were dropped off at that stop. RP 119-23, 277-78, 286-87. S.L. testified that the defendant saw her walking one day and gave her a ride home; during that ride he asked why she was walking and she explained that their car wasn't working and that she would be walking home for a while until it was fixed. RP 124-25.

On March 8, 2006, when she was thirteen years old, S.L. got off the school bus and began to walk home, as her mother had been unable to arrange for a ride. RP 102, 126-127, 288. S.L.'s mother had arranged for defendant to pick up S.L.'s younger brother, Ben, when he got off the bus at 4:00 p.m. that day. RP 289. The bus driver recalled dropping S.L. off that day, and that there was no one to pick her up. RP 387- 392. When she was near a fork in the road that led to her house, she heard a branch snap behind her. RP 127. She turned to see a Caucasian man wearing a mask; she thought that it was the defendant because the boots and clothes the man was wearing – a red flannel jacket with elasticized wrists, hiking boots, and worn blue jeans- were ones she had seen the defendant wear and because the man was standing on the defendant's property. RP 127-28, 130-33. The mask looked like a camouflage mask that a hunter might wear. RP 132. Through the facial openings in the mask she could see facial hair similar to the defendant's. RP 171. S.L. testified that she said, "Is that you Jimmy?" but got no response from the masked man. RP 128,133. She then said something to the effect of he shouldn't scare her like that. RP 128, 133. She turned and started to walk home. RP 128,133-34.

The man came up behind her and put a towel over her head and secured it with duct tape that went around her head just below her nose. RP 128, 134-35. He duct taped her hands in front of her body, rubbed her left buttock, then lifted and carried her over his shoulder for a few

minutes. RP 128, 141-42, 146. S.L. believes that she was taken through the horse fence that surrounded defendant's property and down a ravine. RP 136-138. The assailant set her down, but held on to her arm and the back of her neck as he led her through the woods and underbrush. RP 128, 141. S.L. did not scream and was not sure if it was because she was too scared or because she did not think anyone would hear her. RP 141. He led her to a bushy area and had her sit in a depression or hole. RP 128-29. When the assailant took the duct tape off of her hands, she tried to remove the towel covering her head, but the assailant stopped her and re-taped her hands together behind her back. He also taped her ankles together. RP 129. The assailant took the duct tape off the towel and raised the towel so that her mouth was uncovered before he re-secured it with tape; he put duct tape into S.L.'s mouth, then placed duct tape over her mouth. RP 129. The assailant licked a teardrop off of S.L.'s cheek. *Id.*

At that point, the assailant's cell phone rang and S.L. recognized the ring tone. RP 129. S.L. had heard the defendant's cell phone ring numerous times while she over at the Walters' residence. RP 112-113. Defendant's phone always had the same ring tone and she had never heard another cell phone that had the same ring tone as defendant's. RP 112-113. S.L. recognized the assailant's ring tone as being the defendant's. RP 129. S.L. heard the phone open and close and then the assailant stood up and ran away. RP 129. S.L. waited a bit to see if the assailant would

come back, then worked her hands out of the duct tape. RP 129. When she removed the towel from her head, she recognized immediately that she was in the woods behind the defendant's house. RP 129. She removed the duct tape from her ankles and went home avoiding the defendant's home. *Id.* S.L. left the towel and the duct tape in the hole. RP 148. S.L. testified that she is confident that it was the defendant who did this to her. RP 151-152.

S.L.'s mother and father arrived at the entrance to their development about 3:45 pm on March 8, 2006. RP 290-91, 443-44. They had expected to find the defendant there waiting for the 4:00 o'clock bus, but he was not there. RP 444. They waited for the bus and Ben and defendant's son, Justin, both got off of it. RP 291, 444. They drove to defendant's house, and did not pass the defendant or his vehicle during this trip. RP 292, 444-47. Because they could not tell if defendant was home- not being able to see into the garage to see if his truck was there- S.L.'s parents told Justin to call his father to tell him that they had picked up the boys, so that the defendant wouldn't be waiting at the bus stop. RP 292-296, 447. They then went home to discover that S.L. was not home. RP 297, 449. S.L.'s parents starting calling the school and trying to get in contact with her friends to see if they could locate her; S.L. always came home on time and kept her parents informed of any plans. RP 297-98, 449-50. S.L.'s mother called the defendant at his home number and got the answering service. RP 298-299. She left a message asking him to

call, then hung up and called the defendant's cell phone; it rang four times then went to a voice mail center. RP 299. About five minutes later, the defendant called S.L. home phone. RP 299. Defendant told S.L.'s mother that S.L. was not at his house and that he hadn't seen her. RP 300.

S.L. returned home around 4:30 p.m. on foot. RP 302. S.L. was drenched from head to toe and was dirty and muddy. RP 302, 450. She was crying and shaking, very upset. RP 302, 451. She had red marks and what appeared to be duct tape residue around her wrists. RP 303. One of S.L.'s parents called the police, but before they arrived, S.L. and her parents went back out to the hole to where she had been taken, but did not see the towel or any duct tape. RP 150, 304-305, 451. They returned home and waited a few minutes until the deputy arrived. RP 151, 305-306.

Deputy Mundell of the Pierce County Sheriff's Department was dispatched to S.L.'s residence. RP 327-329. He met S.L.'s father at the gate, and obtained some information from him about what S.L. had reported. RP 331, 452. Deputy Mundell went to the hole where S.L. had been taken; he noticed a couple of strips of duct tape in the hole, which he took into evidence. RP 337-38, 367-72. A cursory examination by Deputy Mundell revealed that the duct tape appeared to have fibers on it consistent with the hoodie jacket that S.L. was wearing that day. RP 342. Later forensic testing confirmed that the fibers found on recovered duct tape were consistent with the fibers from the victim's clothing. RP 712-

17. Deputy Mundell went back to the residence to speak with S.L.; he noticed that she had bright red marks on her wrist and what appeared to be duct tape residue. RP 343. S.L. spoke with Deputy Mundell twice that day, the first time she described her attacker and his clothing but did not identify the defendant; upon further questioning she indicated that she thought her neighbor, "Jimmy," had done this to her. RP 344, 382-83. When she identified her attacker as the defendant, she was crying and angry. RP 384. S.L. testified that she was reluctant to identify the defendant because she was afraid that she would lose her best friend, the defendant's daughter. RP 259. Deputy Mundell testified that she was calm initially and, possibly, may have been in shock. RP 382. Deputy Mundell collected S.L.'s clothing and took it into evidence; he also contacted Detective Jane McCarthy to handle the follow-up investigation. RP 346-351.

On March 9, 2006, the day after the incident, S.L. came into the Sheriff's Precinct and gave a statement to Detective McCarthy. RP 501-04. Detective McCarthy and Detective Burris contacted defendant at his home later that day; they told him they were investigating an abduction and wanted to know if he had seen anyone unusual in the area. RP 511. The detectives did not inform him that he was a suspect in the case. RP 511. Defendant was wearing a red jacket with elastic cuffs, blue jeans and hiking boots. RP 496, 510. Defendant indicated that he knew something about the investigation of S.L.'s abduction, because he had spoken to her

parents and to his own daughter. RP 488-89. Defendant told the detectives that he had not seen anybody unusual, and that his animals had not made any noise which alerts him if someone were in the area. RP 511.

Defendant told them that he had arrived home the day before between 2:30 and 2:45 pm, and that no one else was home. RP 490. The defendant showed the deputies the location where he suspected that S.L. had been taken; it was not in the area that S.L. had identified. RP 490-93.

Defendant indicated that he got information about what had happened to S.L. from his daughter. 9/25 RP 80. As the detectives were leaving the area, they were near the bus stop when Detective McCarthy noticed that defendant was walking up to S.L.'s father. RP 516.

S.L.'s father testified that in the afternoon, the day after the incident, that defendant came up to him at the bus stop and started telling him what he had been doing when S.L. had been abducted. RP 459. The defendant told S.L.'s father that he had been working on a truck on his property at the time of S.L.'s abduction. S.L.'s father testified that he had driven by the spot defendant indicated he was at twice while in the process of dropping Justin at his home and that had not seen the defendant working on his truck either time. RP 460-61. S.L.'s parents each testified that neither had spoken to the defendant about what had happened to S.L. from the point that she came home until defendant spoke to S.L.'s father at the bus stop. RP 638 -39. S.L. testified that she had not spoken to anyone

in the defendant's household about being abducted on either March 8th or 9th. RP 640.

The defendant's daughter, Shelby, testified that she did not ride the bus home with S.L. on March 8, 2006, because she had a doctor's appointment after school that her mom took her to. RP 779-89. When she got home from the appointment, her dad told her that S.L. had been kidnapped. RP 791, 799-802. Shelby did not talk to S.L. until a couple of days later. RP 803. She had had no contact with any of S.L.'s family prior to that, and did not know the details of what had happened to S.L. RP 800-03.

The defendant's son, Justin, testified that he did not see his father working on any cars when he was dropped off at his house by S.L.'s parents on March 8, 2006. RP 848-49. His father was not home when he got there. RP 854-56. Justin called his dad to ask him where he was, but his father did not answer. RP 856-58. He went out to the garage and saw his dad's truck was there. RP 858.

On March 20, deputies searched defendant's home pursuant to a warrant. RP 351. Detectives recovered several camouflage "cowl sleeves" or hoods used by hunters, duct tape, a cell phone, and several pairs of boots. RP 524, 539, 570-78. During the search, the defendant arrived home and was taken in to custody. RP 351-356. There were three red coats, a cell phone, and a camouflage cap in his vehicle; these were taken into evidence. RP 535, 580-84. Also recovered from the vehicle

was some camouflage face paint and another camouflage hood. RP 585-86. His shoes were taken into evidence and he was transported to the Pierce County jail. RP 359-63. Deputies also recovered additional duct tape in the woods that day. RP 153, 465-67, 621-29, 34, 588-89. A forensic specialist was present to document the search with photographs and to take recovered items into evidence. RP 732-743, 757-70. This same forensic specialists processed three of the recovered pieces of duct tape with superglue so that any fingerprints would be preserved prior to the items being submitted to the crime lab for DNA analysis. RP 743-744. She later processed these items for latent fingerprints but did not recover anything of evidentiary value. RP 748-754.

William Dean, a Washington State Patrol Crime Lab forensic specialist in DNA comparison, tested the duct tape recovered from the scene. RP 85-94. Another forensic scientist, Michael Dornan, had done some preliminary testing and recovered some mixed DNA profiles from the duct tape recovered from the defendant's property. RP 656-68. Mr. Dornan was able to find DNA consistent with S.L.'s DNA on one piece. RP 668. Mr. Dornan could not test this sample against the defendant's DNA because he did not have a reference sample from the defendant at the time of his testing. RP 672-73. Although Mr. Dean recovered a mixed DNA sample from one piece of tape, he was unable to link it to the defendant. RP 94-95. One of the profiles in the predominately male mixed sample was consistent with the profile belonging to another

laboratory analyst from the Crime Lab. *Id.* There was insufficient genetic information in the remainder of the mixed sample for comparison. RP 95. Mr. Dean testified that exposure to the elements can make it more difficult to recover DNA, as rain will wash the genetic material away and the ultraviolet rays in sunlight can break up DNA strands. RP 95-96.

Records pertaining to defendant's cell phone showed that he received a call at 3:59 pm on March 8, 2006, from number 360-458-3143 which lasted six seconds and another call at 4:06 pm from number 360-458-5857, lasting approximately nine seconds. RP 682-87. These calls went to voice mail or may have been mobile forwarded another number. RP 687-88. Defendant's cell phone received an incoming call at 4:59 from 253-208-2315 that lasted 28 seconds. RP 687-89. The number 360-458-3143 is one of the land lines from the defendant's house. RP 830-32. The number 360-458-5857 belongs to the victim's family residence. RP 939.

Detective Dawson testified² that he examined the defendant's cell phone in an effort to capture the sound of the ring tone but was unsuccessful in this endeavor. RP 721-30.

In the defense case, defendant called two investigators who took several pictures of the defendant's property, house, and the roadway into his house. RP 946-77; 9/25 RP 4-48. He also called his wife to the stand who testified that the defendant's cell phone

² Due to medical reasons, Detective Dawson was unavailable at the time of trial. His former testimony was read to the jury. RP 650-55, 719-20.

had three different ring tones. 9/25 RP 65. On cross-examination she acknowledged that she assumed that he had three ring tones because she examined the phone that a friend had which was the same model and that was how that phone was set up. 9/25 RP 73.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THE PROSECUTOR COMMITTED MISCONDUCT OR THAT THERE WAS ANY RESULTING PREJUDICE THAT COULD NOT HAVE BEEN ELIMINATED BY A CURATIVE INSTRUCTION HAD ONE BEEN REQUESTED.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996).

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

- a. The defendant fails to meet his burden in showing the prosecutor suborned perjury as the record indicates the prosecutor properly sought to limit a witness's answer to admissible and relevant evidence; defendant provides no proof of perjurous testimony.

The United States Supreme Court has held that it is reversible error for the prosecution to suborn perjury to obtain a conviction. *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L.Ed.2d 9 (1957). The prosecutor's duty not to suborn perjury or to use evidence known to be false was further enlarged so as to place on the prosecutor an affirmative duty to correct state witnesses who testify falsely. *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959). Generally, the case law casts this type of action as a form of prosecutorial misconduct since the use of perjured or false testimony severely undermines the stature of the judicial system. *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967) (petitioner in habeas corpus proceeding showed that a pair of shorts admitted at his trial that appeared to be stained with blood were actually stained with paint and that prosecutor knew this at the time of trial, yet repeatedly referred to them as stained with blood).

Defendant alleges that the prosecutor knowingly suborned perjury by seeking to adduce only a portion of an answer proffered by the victim. His only evidence of perjury is a citation to the report of proceedings at RP 250. This portion of the transcript presents an offer of proof from the

victim, S.L.. On cross examination, defense had brought out that on March 8, 2006, S.L. had spoken to the responding sheriff's deputy twice about what had happened to her that day. RP 381-382. The first time she did not name the defendant as the suspect, but the second time she did. *Id.* On redirect, the State was attempting to ask the victim why she had not identified the defendant initially to the deputy, which led to an offer of proof outside the presence of the jury. In her subsequent offer of proof, S.L. states that it was because she didn't want to ruin her friendship with the defendant's daughter, and because she had no idea of his prior offenses. RP 250. This reference to "prior offenses" is not elaborated upon, but apparently refers to the defendant's prior trial on rape charges, which resulted in an acquittal. RP 17-29, 250-251. The prosecution had tried to get evidence of this prior offense admitted under ER 404(b) or RCW 10.58.090, but the court had ruled the evidence inadmissible. RP 75-76. After the offer of proof, the prosecutor indicates to the court that he is not trying to adduce the second part of her answer, only the first. RP 251. Based upon nothing but this exchange, defendant contends that the prosecutor was suborning perjury; he argues:

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 "knew it was Jimmy."

Appellant's Brief at p.6. Contrary to the representations made in appellant's brief, the record indicates that S.L.'s two statements to Deputy Mundell occurred close in time on March 8, 2006. RP 381-382. There is nothing in the record to support defendant's claim that S.L. learned of the defendant's prior history between making her two statements to Deputy Mundell. *See* Appellant's brief at pp 8-9.

Although the trial record suggests that the victim had some awareness of the defendant's past charges of rape at the time of the second trial, there is nothing in the record to establish when the victim learned of this information about the defendant's past. According to the victim, she was not aware of the defendant's prior history on March 8, 2006, when she was speaking to the responding deputy. RP 250. Consequently, that information about his past could not possibly have played a role in why she did not initially identify the defendant as her attacker to the deputy. As the defendant's past history was not information that affected her disclosure decision, that portion of her answer was not relevant to the question posed by the prosecutor. Because the second half of the victim's answer also alluded to material that had been excluded by the trial court, there was nothing improper in the prosecutor indicating that he was not seeking to adduce that portion of the answer in front of the jury. RP 251. Ironically, defendant is claiming that the prosecutor acted improperly in not seeking to adduce evidence that the trial court had excluded. The

defendant's claim that the prosecutor was suborning perjury by only to seeking to adduce the first part of the victim's answer is meritless.

Additionally, defendant provides this court with no affidavits or proof to support his claim that the victim's testimony constituted perjury, or that the prosecutor knew that he was presenting perjurous testimony. Such evidence could be submitted in a contemporaneously filed personal restraint petition. *See, e.g., State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Juries decide the credibility of witnesses, resolve conflicts in the evidence, and determine the persuasiveness of evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). An appellate court does not review those decisions on appeal. *Thomas*, 150 Wn.2d at 875. The jury apparently found the victim's testimony credible. The defendant's bald assertion that her testimony was perjurous is insufficient to meet his burden in proving that his trial was infected by perjury. He also has no evidence to support his assertion that the prosecutor was *knowingly* presenting perjured testimony. This claim is without sufficient factual basis in the record to warrant any appellate review.

- b. The prosecutor properly argued credibility to the jury based upon the evidence in the case and not his personal opinion; as there were no objections to the challenged arguments, defendant fails to meet his high burden of showing enduring prejudice that could not have been neutralized by an instruction.

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998).

In closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), *cert. denied*, 532 U.S. 1008 (1998). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87. Consequently, prosecutorial remarks, even if they are improper, are not grounds for reversal if invited or provoked by defense counsel, or if they are a pertinent reply to defense counsel's arguments. *Russell*, 125 Wn.2d at 86. Thus, in evaluating a prosecutorial misconduct claim, the court must examine the prosecutor's remarks in context with defense counsel's closing argument.

If defense counsel fails to object to an improper remark, it waives the error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.* at 86. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark meets this heightened standard. *Id.*

As the jury must determine the credibility of the witnesses, counsel may comment on witness credibility as long as he or she does not express it as a personal opinion and does not argue facts outside the record. *State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985); *State v. Sargent*, 40 Wn. App. 340, 698 P.2d 598 (1985). Attorneys may argue credibility and draw inferences from the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied* 516 U.S. 1121 (1996). A prosecutor arguing credibility only commits misconduct when it is ‘clear and unmistakable’ he is expressing a personal opinion rather than arguing an inference from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006); *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983), *overruled on other grounds by State v. Davis*, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984). As noted by that court:

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence.

Mckenzie, 157 Wn.2d at 53-54, quoting *Papadopoulos*, 34 Wn. App. at 400.

Defendant cites to the record at RP 1006, 1007-08, 1011, 1074, 1078, and 1080, as examples of the prosecutor improperly vouching for the State's witnesses. None of these arguments provoked an objection in the trial court. *Id.* Read in context, it is clear that the prosecutor was making arguments about credibility of witnesses based upon the evidence presented in the case, and the inferences that flowed from this evidence. This is not improper. None of the challenged statements were phrased in terms that indicated the personal opinion of the prosecutor.

Moreover, the jury was instructed that it was the "sole judge of the credibility of each witness" and that the lawyer's remarks were not evidence and any remark unsupported by the law or evidence should be disregarded. Instruction No 1, CP 228-251. Under these instructions, the jury would disregard any statement by the prosecutor about credibility that was not supported by evidence and would not value the prosecutor's assessment of credibility above its own. Finally, defendant fails to show

that any challenged comment by the prosecutor was so blatant and ill intentioned that any prejudice could not be eliminated by a curative instruction. Consequently, defendant has failed to show that there was any improper argument that constitutes reversible error.

- c. The prosecutor did not engage in argument designed to improperly appeal to the passions and prejudices of the jury, nor did the prosecutor encourage the jury to disregard the court's instructions.

In *State v. Belgarde*, the Supreme Court held that a prosecutor's statements during closing argument were improper when the prosecutor argued that the defendant was prominent in a group which the prosecutor described as "a deadly group of madmen" made up of "butchers that kill indiscriminately." The prosecutor compared the group to Kadafi and Sinn Fein. The court explained that the prosecutor was not permitted "to call to the attention of the jury matters or considerations which the jurors have no right to consider." *State v. Belgarde*, 110 Wn.2d 504 508, 755 P.2d 174 (1988).

Defendant argues the following improperly appealed to the jurors' passions and prejudices:

[S.L.] is the victim in this case. This was done to [S.L.]. [S.L.] 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 1082-83. There was no objection to this argument in the trial court.

The cases upon which defendant relies do not support the conclusion that this is improper argument. The prosecutor did not refer to extraneous matters that had nothing to do with the case before the jury, or use inflammatory language in making this argument. The prosecutor did not engage in name calling. The prosecutor did not encourage the jury to send a message based upon general principles or belief about certain types of crimes as opposed to the evidence presented in the case.

Instead, the prosecutor encouraged the jury to consider the evidence in this particular case and reach a just determination that the jurors could live with for years. This argument echoes the jury instruction on reasonable doubt that tells the jury to fully, fairly and carefully consider the evidence and determine whether they have an abiding belief in the truth of the charge. Instruction No. 3, CP 228-251. This is not improper.

Finally, the jury was instructed not to let emotions overcome its rational thought process and to base the verdict on the law and evidence and not on "sympathy, prejudice, or personal preference." Instruction No 1, CP 228-251. Jurors are presumed to follow the court's instructions.

State v. Greiff, 141 Wn.2d 910, 923, 10 P.3d 390 (2000). Had there been an objection, any prejudice could have been removed by a curative instruction reminding the jury of their duty under the court's instructions.

Defendant contends that the prosecutor encouraged the jury to disregard the court's instructions by referring to them as "legalese." *See*, Appellant's brief at p. 12-13, citing RP 1005. While one might debate the wisdom of such phrasing, the argument taken in context did not invite the jury to disregard the instructions. Rather, the prosecutor noted that the jurors had a copy of the instructions and could read them on their own. RP 1005. While the argument was not improper, it should also be noted that a request for a curative instruction could have eliminated any prejudice flowing from it. As such, there was no reversible error.

2. DEFENDANT FAILS TO SHOW THE COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL.

The grant or denial of a motion for a new trial is within the sound discretion of the trial court and will be reversed only for abuse of that discretion. *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). Generally, the trial court is in the best position to decide whether prejudice results in the context of trial. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A trial court abuses its discretion when the reason for its decision is manifestly unreasonable or based upon untenable

grounds. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

Just prior to the jury being excused so that the prosecutor could make an offer of proof regarding why the victim had not initially disclosed the defendant's name to the responding deputy, there occurred this following exchange between the prosecutor and the victim:

PROSECUTOR: Why did you say that you thought it was Jimmy?

S.L.: Because I had no idea of --

I am not sure if I'm allowed to say that.

RP 249.

After the offer of proof was made, and the prosecutor indicated that he sought to admit only the portion of S.L.'s answer that indicated she was concerned about losing her friendship with the defendant's daughter, defense counsel argued that the State should not be allowed to adduce even that portion. Defense counsel argued that by allowing this portion of the answer the jury would infer that S.L. was fearful of the defendant"

Defense Counsel: And it's going to lead to the simple fact that this witness is going to be professing that she had a fear. She gives a nice innocent reason for it, but it's going to leave the impression that she was scared because Shelby Waters is James Walters'[s] daughter and its fear of retribution. And that is not admissible and should be excluded.

RP 252, *see also* RP 254. The court disagreed that the jury would draw an inference of fear of the defendant from the victim's statement that she was

afraid of losing her friendship with the defendant's daughter. RP 255. The court indicated that it would allow the prosecutor to adduce the victim's fear of jeopardizing her friendship with the defendant's daughter. RP 255. The court noted that the victim had made no reference to the defendant's "prior offenses" before the jury. RP 255. Defense counsel then asked for a mistrial on the basis that the victim had made a comment about what she could not say in front of the jury, asserting that this had happened twice. RP 256. Neither the court or the prosecutor could recall this happening twice. RP 257. Based upon the comment that the court was aware of, it denied the motion for mistrial. RP 258. Defendant fails to articulate why the victim making a comment that she is not certain she can say something before the jury, without mentioning what that "something" pertained to, so infected the proceedings that nothing short of a mistrial could cure the prejudice. The witness's comment did not inject any prejudicial material into the trial. A jury would not necessarily draw any negative inference from such a comment. The trial court did not abuse its discretion in denying the motions for mistrial.

Defendant's argument contends that defense counsel wanted to impeach the victim with the fact that her degree of confidence about the identity of her attacker changed once she learned of the defendant's prior history of being charged with rape. He suggests that defense counsel was faced with the untenable position of not impeaching the victim or adducing evidence of the prior charges, and that being placed in this

position rendered the trial fundamentally unfair. First, there is nothing in the record to support this characterization of defense counsel's argument to the court. RP 250-259. There is nothing in the record to indicate when the victim learned of the defendant's prior history other than it occurred after she had identified the defendant as her attacker to Deputy Mundell on March 8, 2006. What is clear is that defense counsel wanted to keep out any reference to the defendant's prior brush with the justice system. At this he was successful.

Secondly, even though defendant's argument is not supported by the record, he presents no authority that being placed in a position of having to choose between two unpleasant choices renders a trial fundamentally unfair or violates due process. This type of choice is frequently faced by criminal defendants.

The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. (Citation omitted.) Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

McGautha v. California, 402 U.S. 183, 213, 91 S. Ct. 1454, 1470, 28 L.Ed.2d 711 (1971), *vacated on other grounds*, 408 U.S. 941, 92 S. Ct. 2873, 33 L. Ed. 2d 765 (1972); *see also*, *State v. Butler*, 17 Wn. App. 666, 672, 564 P.2d 828, 832 (1977).

Defendant has failed to demonstrate any abuse of discretion in the denial of the motion for mistrial, and failed to demonstrate that his trial violated due process.

3. DEFENDANT HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective

standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge

the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation.

Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant seeks to show ineffective assistance of his trial counsel for his: 1) "failed to consistently object to perjury", and 2) failed to request instruction on the lesser degree offense of kidnapping in the second degree.

- a. Defendant has failed to show that his attorney failed to object to perjury.

When the basis of an ineffective assistance argument is the failure to object to evidence, the appellant must show '(1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted.' *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citations omitted).

Defendant contends that his attorney was ineffective for consistently failing to object to perjured testimony. As discussed in the previous sections on prosecutorial misconduct and the denial of the motion for mistrial, defendant presents no proof that there was perjured testimony in this trial other than his own bald assertion. As he cannot show perjured testimony, he cannot show that his counsel was deficient for failing to object to its admission.

- b. The decision not to request instructions on a lesser degree offense is a matter of trial strategy that will not support a claim of ineffective assistance of counsel.

The decision of whether to request an instruction on a lesser-included offense is a matter of trial strategy. *State v. Hoffman*, 116 Wn.2d 51, 112, 804 P.2d 577 (1991); *United States v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992). Generally, decisions regarding trial tactics are

accorded “enormous deference,” *United States v. Hirschberg*, 988 F.2d 1509, 1513 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 311 (1993), and will not constitute ineffective assistance if, “viewed from counsel’s perspective at the time, [they] might be considered sound trial strategy.” *Kubat v. Thieret*, 867 F.2d 351, 360 (7th Cir. 1989), *cert. denied*, 493 U.S. 874 (1989). There is no claim for ineffective assistance of counsel when the challenged action goes to a legitimate trial strategy or tactic. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The decision not to request a lesser-included instruction will not constitute ineffective assistance when requesting the instruction would conflict with a reasonable trial strategy. *Kubat*, 867 F.2d at 364-65 (seeking lesser-included instruction in kidnapping case would conflict with alibi defense); *see also*, *Moyer v. State*, 620 SE2d 837 (Ga. App. 2005); *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) (a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense).

Presenting the jury with an all-or-nothing choice is generally a reasonable trial strategy because, although it involves a risk, it increases the chances of an acquittal. *See Collins v. Lockhart*, 707 F.2d 341, 345-46 (8th Cir. 1983) (Gibson, J. concurring); *United States ex rel. Sumner v. Washington*, 840 F. Supp. 562, 573-74 (N.D. Ill. 1993); *Parker v. State*, 510 So. 2d 281, 286 (Ala. Crim. App. 1987); *Henderson v. State*,

664 S.W.2d 451, 453 (Ark. 1984); *see also*, ***Heinlin v. Smith***, 542 P.2d 1081, 1082 (Utah 1975) (court noted that counsel's failure to request a lesser included offense instruction was not unreasonable, but a likely tactic involving the idea that an all-or-nothing stance might better lead to an outright acquittal).

In the past, appellate courts have cautioned against speculating on the choices and reasons for strategies the defense pursues. In ***State v. Norman***, 61 Wn. App. 16, 808 P.2d 1159 (1991), the defendant was charged with manslaughter for failing to obtain medical treatment for his diabetic son. The defendant was a member of an extremist religious group. After he was found guilty, he alleged his counsel was ineffective for failing to present a mental defense. The Court of Appeals declined to consider the allegation without additional information:

The contentions now made would require us to make a determination of the truth of defendant's ex parte post trial claims concerning matters occurring out of court. For all we know, an evidentiary hearing would disclose that the defendant's present statements are controverted and that the decisions made concerning trial management were tactical decisions of trial counsel in discharge of his duty to best represent the defendant. If there be a basis for the claims now made in an effort to show that, after considering the entire record, the accused was denied a fair and impartial trial, that basis must be established in a separate proceeding, the merits of which we do not prejudge.

Norman, 61 Wn. App. at 27, quoting ***State v. Humburgs***, 3 Wn. App. 31, 36-37, 472 P.2d 416 (1970). Inquiry into counsel's conversations with the

defendant may be critical to a proper assessment of counsel's handling of a case, including trial decisions. *Strickland v. Washington*, 466 U.S. at 691. The record on direct review is unlikely to contain any information regarding defense counsel's private discussions with the defendant. Consequently, an appellate court lacks the necessary record to properly assess the reasonableness of counsel's actions in not requesting instruction on a lesser included offense when it is limited to the trial record.

Here the defendant contended that he was not the person who had attacked S.L. If the jury believed him, he would be acquitted of all crimes. Defendant fails to articulate why seeking a complete acquittal is an unreasonable strategy.

Petitioner relies on the decisions in *State v. Grier*, 150 Wn. App. 619, 208 P.3d 1221 (2009), *State v. Pittman*, 134 Wn. App. 376, 166 P.3d 720 (2006), and *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004), to support his argument that failure to request a lesser included instruction can provide a basis for ineffective assistance of counsel.

In two decisions, Division I of the Court of Appeals has disapproved of "all or nothing" strategies. See *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004), and *State v. Pittman*, 134 Wn. App. 376, 166 P.3d 720 (2006). In *State v. Grier*, 150 Wn. App. 619, 208 P.3d 1221 (2009), Division II reached a similar conclusion, relying heavily on the reasoning in *Ward* and *Pittman*, and on dicta from *Keeble v. United States*, 412 U.S. 205, 212-213, 93 S. Ct. 1933, 36 L. Ed. 2d 844 (1973).

Division I, however, has recently backed away from its holdings in *Ward* and *Pittman*, criticizing them for failing to give enough deference to the strong presumption of the effective assistance of counsel in such cases, and specifically criticizing its prior reliance on the dicta quoted from *Keeble*. *State v. Hassan*, 151 Wn. App. 209, 211 P.3d 441 (2009).

Keeble is the only case cited in the *Ward* decision to refute the prosecution's argument that the decision to request instructions on a lesser included offense is a tactical decision. Reliance on *Keeble* is misplaced as it is not a case assessing deficient performance or ineffective assistance of counsel. *Keeble*, a member of the Sioux Tribe, was charged with assault with intent to commit serious bodily injury. The alleged victim was also a member of the Sioux Tribe, and the crime occurred on the reservation. At the close of trial, *Keeble* requested the jury be instructed on the lesser included offense of simple assault. *Keeble*, 412 U.S. at 206. The court refused because it thought it lacked subject matter jurisdiction over the lesser offense, while the crime charged was covered under the Major Crimes Act of 1885 (18 U.S.C. §1153), simple assault was not. The issue before the Supreme Court was whether an Indian prosecuted under the Major Crimes Act is entitled to a jury instruction on a lesser included offense, where that lesser offense is not one of the crimes enumerated in the Act. *Id.* The Supreme Court held that the Major Crimes Act did not prohibit the trial court from instructing on a lesser included offense not covered by the Act. *Keeble*, at 214. Since *Keeble* asked for the

instructions and was legally entitled to them, it was error not to give the instructions. The Court did not hold that it was ineffective assistance of counsel not to ask for instruction on a lesser offense. The Court in *Keeble* did not address effectiveness of counsel at all. In the course of its decision, the Supreme Court addressed an argument by the government that any error was harmless because the defendant had been in a better position without the instruction. *Keeble*, at 212. If anything, this language in *Keeble*, read in context, reinforces the concept that whether to seek instruction on a lesser offense is a tactical decision. The Court also acknowledged that this part of the opinion was unnecessary to its holding. *Id.*, at 213. In sum, *Keeble* is about the failure of the trial court to instruct on a lesser included offense when that instruction was requested by the defendant and warranted under the law and facts of the case. It is not a case that holds an attorney is ineffective for failing to request instruction on a lesser included offense.

In *Grier*, Division II relied upon *Ward* and *Pittman*, as well as upon the same questionable quote from *Keeble*. *Grier*, 150 Wn. App. at 643. Shortly after Division II filed its opinion in *Grier*, Division I filed a published opinion in *State v. Hassan*, 151 Wn. App. 209, 211 P.3d 441 (2009), retreating from its earlier decisions in *Ward* and *Pittman*. Hassan was charged with possessing marijuana with intent to deliver, based upon observations by a police officer, and a subsequent search of a nearby backpack. At trial, Hassan pursued an “all or nothing” strategy. He denied

selling the marijuana, and possession of the backpack that contained much of the prosecution's evidence. The defense conceded that Hassan possessed marijuana, but challenged the evidence of intent to deliver. The court asked if the defense was going to propose an instruction on the lesser included offense of possession, the defense replied that they were not. The defense went on to urge an acquittal, arguing insufficient evidence of intent to deliver. The jury convicted. In his appeal, Hassan alleged that his attorney was ineffective for failing to seek the lesser included offense.

The Court of Appeals in *Hassan* held that because the decision not to request an instruction on a lesser included offense was strategic or tactical, it was not ineffective assistance of counsel. *Hassan*, at 211. Division I relied upon the Supreme Court's decision in *Hoffman*, 116 Wn.2d at 112, *Hassan*, at 219. While the court distinguished Hassan's case from *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004), it also questioned the validity of the holdings in *Ward* and *Pittman*, and their reliance on the dicta in *Keeble*. *Hassan*, at 221, n. 6.

A defendant has the right to pursue a defense strategy of his own choosing, including acquittal only. Art. I, § 22 of the Washington Constitution guarantees an accused many rights. For example, an accused has the right to represent himself, even despite warnings of the court that it is likely a poor choice. *State v. Vermillion*, 112 Wn. App. 844, 850-851, 51 P.3d 188 (2002). An accused has the right to a public trial, including the right to present a defense. *State v. Maupin*, 128 Wn.2d 918, 924, 913

P.2d 808 (1996). The right to present a defense is limited to admissible, relevant evidence, but by little else. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). The legal system, and the criminal justice system in particular, is an adversarial system. In it, counsel represents and advocates for the defendant. *See generally, Strickland v. Washington*, 466 U.S. at 685. The defense decides trial strategy and how to conduct his case. *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). Except for *clear* instances of ineffective assistance of counsel, the court must defer to the strategic and tactical decisions of the defense. The decisions in *Pittman, Ward*, and *Grier* jeopardize the independence of the defense as these decisions suggest to the trial court that in order to avoid a reversal for ineffective assistance of counsel, the trial court should instruct the jury on a lesser included offense even in the absence of a request. To the extent that these decisions advocate instruction without request by a party, they are in conflict with decisions of the Supreme Court.

Courts do not give, nor is it error to fail to give, instructions which have not been requested or proposed by the parties. *State v. Roberts*, 142 Wn.2d 471, 501, 14 P.3d 713 (2000). Nor are instructions on lesser included offenses required where they are not requested. *State v. Hoffman*, 116 Wn. 2d at 111-112; *State v. Mak*, 105 Wn.2d 692, 747, 718 P. 2d 407 (1986); *State v. Red*, 105 Wn. App. 62, 65, 18 P.3d 615 (2001).

Grier places the trial court in the position of giving instructions that neither party has requested or risking reversal for ineffective

assistance of counsel. This puts the trial court in the difficult position of reviewing trial strategies. Proposing jury instructions is a task generally required of counsel. *See* CrR 6.15. The trial court should intervene only in cases where there appears to be an issue of ineffective assistance of counsel on an issue that goes beyond trial strategy, such as requiring counsel to propose instructions that accurately state the law or sua sponte correcting erroneously worded instructions that are prejudicial to the defendant..

The decisions in *Ward*, *Pittman*, and *Grier* step away from long standing principles set forth in *Strickland* and its progeny. Firstly, the determination of the effectiveness of counsel is always to be assessed by looking at the entire record. Neither the court in *Ward* nor the defendant in this case applied this standard. Instead, they focus on one decision of the attorney below. Case law has held that an appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). Petitioner cannot show that he was effectively denied counsel on the basis of this one mistake. He has failed to articulate why the record, as a whole, demonstrates ineffective assistance of counsel.

This court should reject defendant's claim of ineffective assistance of counsel as failing to properly apply *Strickland*, and for seeking to prove a claim based upon a matter of trial strategy.

4. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT; THE JURY'S CREDIBILITY DETERMINATIONS ARE NOT SUBJECT TO APPELLATE REVIEW.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638,

618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Identity presents “a question or fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.”

State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618, 619 (1974).

Here, the jury was instructed that it must find the following elements to convict defendant of the crime of kidnapping in the first degree:

(1) That on or about the 8th day of March, 2006, the defendant intentionally abducted another person, to wit: S.L.:

(2) That the defendant abducted the person with the intent:
(a) to facilitate the commission of the crime of indecent liberties, or
(b) to inflict extreme mental distress on that person, and

(3) that any of these acts occurred in the State of Washington.
Instruction No 12, CP 228-251. This instruction informed the jury that it need not be unanimous about which alternative 2(a) or 2(b) has been proved as long as each juror found that at least one alternative had been proved beyond a reasonable doubt. *Id.*

The jury was instructed that it must find the following elements to convict defendant of the crime of indecent liberties:

(1) That on or about the 8th day of March, 2006, the defendant knowingly caused S.L. to have sexual contact with the defendant;
(2) That the sexual contact was by forcible compulsion;
(3) That the defendant was not married to S.L. at the time of the sexual contact; and
(4) That the acts occurred in the State of Washington.

Instruction No. 16, CP 228-251. Defendant's sole challenge to the evidence is his contention that there was insufficient evidence to connect him to these crimes. He asserts that the victim's testimony identifying

him as the perpetrator should not have been believed as there were inconsistencies in her testimony. *See* Appellant's brief at pp 29-34.

As noted above, credibility determinations are for the trier of fact and are not subject to appellate review. Here, the victim testified that from the moment she saw the masked man standing on defendant's property she thought it was the defendant trying to scare her. She testified that she recognized the clothes that he was wearing. She further testified that her suspicion as to the assailant's identity was confirmed when her assailant's cell phone rang with the distinctive ring tone she had only heard on the defendant's phone. RP 112-113, 129. She positively identified the defendant as her assailant. RP 151-152.

In addition to the victim's identification, there is considerable circumstantial evidence linking defendant to these crimes. Defendant had access to and familiarity with the property where the crimes occurred. He had information that S.L. would be walking home that day and isolated within the gated development. He had a window of opportunity as his wife and daughter would be going to a medical appointment and would be home late, and his son would not be let off the bus until an hour later. Because S.L.'s parents had asked him to pick up S.L.'s younger brother from the bus stop, he knew that they would not be home. Additionally, defendant was not at the bus stop to pick up his son and S.L.'s younger brother as arranged; nor was he inside his house, yet his truck was in the garage at around 4:00 p.m.. Although he said he was working outside on

another truck, neither S.L.'s father or defendant's son saw defendant at the location where he purported to be. Finally, defendant had knowledge after the fact of S.L.'s abduction that could not be traced to any identifiable source other than his own participation. Defendant seemed to know that S.L. had been taken from the road and into the woods, but this information had not come from his daughter, the detectives, or from S.L.'s family. There was sufficient evidence to connect defendant to these crimes, and the jury clearly found the victim's testimony credible. The jury's verdicts should be upheld.

5. DEFENDANT'S CONVICTIONS FOR KIDNAPPING IN THE FIRST DEGREE AND INDECENT LIBERTIES DO NOT VIOLATE DOUBLE JEOPARDY.

The Washington State Constitution, article I, section 9, and the Fifth Amendment to the federal constitution prohibit multiple punishments for the same offense. *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). The State constitution provides the same protection against double jeopardy as the federal constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Beyond these constitutional constraints, the Legislature has the power to define criminal conduct and to assign punishment. *State v. Louis*, 155 Wn.2d 563, 568, 120 P.3d 936 (2005); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). When a claim of improper multiple punishments is raised, the appellate court must

determine that the lower court did not exceed the punishment authorized by the legislature. See *Calle*, 125 Wn.2d at 776.

“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. 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)). “[T]he merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy.” *State v. Frohs*, 83 Wn. App. 803, 811, 924 P.2d 384 (1996); see also *Freeman*, 153 Wn.2d at 772 (“if applicable, the merger doctrine is another aid in determining legislative intent.”).

The merger doctrine is “a doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions.” *State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983) (citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). The merger doctrine applies solely under the following circumstances:

[W]here the Legislature has clearly indicated that in order to prove a particular degree of crime ... the State must prove not only that a defendant committed that crime ... but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.

Vladovic, 99 Wn.2d. at 420-21.

In *In re the Personal Restraint of Fletcher*, the defendant pleaded guilty to first degree kidnapping, first degree robbery, and first degree assault of one woman. *In re Pers. Restraint of Fletcher*, 113 Wn.2d 42, 44-45, 776 P.2d 114 (1989). In his statement on plea of guilty, Fletcher stated that he and an accomplice kidnapped two women in order to steal their car. *Id.* at 45. In a subsequent collateral attack on these convictions, Fletcher argued that his sentences should be vacated under the merger doctrine. *Id.* at 50. In considering whether the first degree robbery conviction merged into the first degree kidnapping conviction, the Washington Supreme Court stated that the first degree kidnapping statute “only requires proof of *intent* to commit various acts, some of which are defined as crimes elsewhere in the criminal code.” *Id.* at 52 (emphasis in original). The court further noted that the first degree kidnapping statute “does not require that the acts actually be committed.” *Id.* (citing RCW 9A.40.020). The court reasoned:

A reading of the statute makes it clear that the person who intentionally abducts another need do so only with the *intent* to carry out one of the incidents enumerated in RCW

9A.40.020(1)(a) through (e) inclusive; not that the perpetrator actually bring about or complete one of those qualifying factors listed in the statute.

Id. at 52-53 (emphasis in original). The court found that “the Legislature has not indicated that a defendant must also commit another crime in order to be guilty of first degree kidnapping, and therefore the merger doctrine does not apply.” *Id.* at 53. Accordingly, the court concluded that the defendant could be punished separately for the first degree kidnapping and first degree robbery convictions. *Id.* The Supreme Court adhered to the *Fletcher* rule in *State v. Louis*, 155 Wn.2d 563, 570-71, 120 P.3d 936 (2005), holding that the defendant could be separately punished for first degree robbery and first degree kidnapping. The court concluded that “the legislature has not indicated that a defendant must ... commit armed robbery before he or she can be convicted of first degree kidnapping.” *Id.* at 571.

Fletcher and *Louis* are controlling on the instant case. Because the legislature did not require the completion of the crime of indecent liberties in order to be guilty of kidnapping in the first degree, the defendant may be separately punished for his crimes of kidnapping in the first degree and indecent liberties. Defendant’s double jeopardy claim is without merit.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the defendant's convictions and sentence.

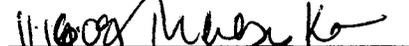
DATED: November 16, 2009.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date Signature

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DIVISION II
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