

No. _____

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

IN RE THE PERSONAL RESTRAINT OF
SHAMARR PARKER,

Petitioner.

BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

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A. ASSIGNMENTS OF ERROR RELATING TO THE PETITION

1. Petitioner Shamarr Parker is under restraint as a result of convictions and sentences entered after a jury trial.

2. The restraint Parker is suffering is unlawful under RAP 16.4(c)(5), because the convictions were obtained in violation of his due process rights to a fair trial under the Sixth and Fourteenth Amendments and Article I, § 22.

3. The restraint Parker is suffering is unlawful under RAP 16.4(c)(5), because Parker's Sixth Amendment and Article I, §22, rights to effective assistance of appointed counsel on appeal were violated and he remains in custody as a result.

4. The restraint Parker is suffering is unlawful under RAP 16.4(c)(2) and (b)(5), because the convictions were obtained only after a trial at which the prosecutor committed serious, prejudicial misconduct which deprived Parker of his due process rights to a fair trial and further implicated his confrontation clause rights.

5. The restraint Parker is suffering is unlawful under RAP 16.4(c)(2), because the trial court repeatedly, improperly admitted bolstering evidence which was inadmissible under the rules of evidence.

6. The unlawful restraint Parker is suffering compels reversal because petitioner was actually and substantially prejudiced by the

violations of his important constitutional rights.

7. The unlawful restraint Parker is suffering compels reversal because the nonconstitutional errors in this case reveal a fundamental defect which has inherently resulted in a complete miscarriage of justice.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is Parker under restraint as defined in RAP 16.4(b) when, as a result of his convictions after trial, he is currently in custody and further will suffer future disabilities if ever released?

2. At trial, the prosecutor repeatedly told the jury to imagine the “terror” the victim must have felt, compared being a victim of the crimes to what she went through on the stand, told the jury that justice was “due” to the victim and told the jury to convict because “it’s no longer reasonable to doubt that the defendant is guilty.” Is the restraint Parker is suffering unlawful because the serious misconduct deprived him of his due process rights to a fair trial, involved comment on his rights to confrontation and prejudiced his case? Further, was appointed counsel on appeal prejudicially ineffective and is Parker further entitled to relief because she failed to raise these issues on direct review and Parker remains restrained as a result?

3. Over defense objection, the court allowed the alleged

victim's mother to testify at length about what her daughter had said occurred. The court also allowed a nurse to testify about what the victim had said during a forensic interview, even letting her read a lengthy "verbatim" into the record of the events the victim said had occurred. None of these statements was admissible under either the theory of a prior inconsistent statement or as statements made for the purposes of medical diagnosis or treatment. Is the restraint Parker is suffering as a result of the trial unlawful where the admission of the evidence was not harmless? Further, was appellate counsel again ineffective and is Parker further entitled to relief because she failed to raise these serious issues on direct appeal and Parker remains in custody as a result?

6. Has Parker shown that he was actually and substantially prejudiced by the violations of his important constitutional rights where he has shown that he was deprived of effective assistance of appellate counsel in the direct review, that his due process rights to a fair trial were violated, that improper comment on his rights to confrontation occurred and the evidence against him was far from strong?

7. Has the petitioner shown that the nonconstitutional errors in this case reveal a fundamental defect which has inherently resulted in a complete miscarriage of justice where those errors, separately and together with the constitutional errors, went directly to the crucial issue in the case,

directly impacting Parker's ability have the jury properly evaluate credibility and likely swaying jurors in this close case?

C. STATEMENT OF THE CASE

1. Procedural facts

Shamarr Parker, petitioner, was charged by second amended information filed in Pierce County Superior Court with first-degree kidnaping with sexual motivation, first-degree rape and first-degree robbery, all with deadly weapon enhancements. See Second Amended Information (attached to Personal Restraint Petition (PRP) (filed herewith) as Appendix D). Pretrial and trial proceedings were held before the Honorable Judge Bryan E. Chuschcoff on April 1, 5, 8, 12-14, and 19-21, 2010. See RP 1, 79, 89, 218, 361, 538, 637, 784, 806, 2RP 634.¹ The jury was unable to agree on the rape charge and that count was dismissed without prejudice. See Order (attached to PRP as Appendix G). The jury was also unable to agree that the kidnaping was with sexual motivation, but convicted Parker of the kidnaping and robbery, both with deadly

¹The verbatim report of proceedings was prepared in the direct appeal under cause number 40793-1-II. A motion to transfer the transcript from that cause number to this proceeding is being filed herewith. The volumes of the transcript will be referred to as follows:

the 10 chronologically paginated volumes containing the proceedings of April 1, 5, 8, 12, 13, 14, 20, 21 and 22, and May 28, 2010, as "RP;"

the separately paginated proceedings of April 19, 2010, numbered 634-765, as "2RP."

weapon special verdicts. Verdict forms (attached to PRP as Appendix F).

On May 28, 2010, Judge Chuschcoff ordered Parker to serve 246 months in prison, consisting of 198 months on the kidnaping, 171 months for the robbery, and another 24 months for each offense of “flat time” for “deadly weapon” sentencing enhancements. See Judgment and Sentence (attached to PRP as Appendix A). Parker appealed. See Notice of Appeal (attached to PRP as Appendix H). On January 31, 2012, this Court affirmed in an unpublished opinion. Unpublished Opinion (attached to PRP at Appendix I).

Parker filed a Petition for Review, which was denied, and the Mandate issued on July 11, 2012. See Mandate (attached to PRP as Appendix J).

Mr. Parker is currently in custody for these offenses at Coyote Ridge Corrections Center. See PRP (filed herewith) at O, P.

2. Facts relating to offenses

On December 19, 2008, A.W., then 17 years old, arrived home later than she was supposed to and told her mother that she had been raped. RP 94. After talking to her husband and someone else about the claims, Miller called police to report what her daughter had said. RP 94-102. A.W. was taken to the hospital and told her story to police officers, a doctor and a forensic nurse. RP 130-37, 172, 249. There was a mark on

her left breast which A.W. said came from the assailant's mouth. RP 195.

A swab taken from that spot was never tested to see if DNA from the saliva could point to - or eliminate - a particular assailant. RP 723-40.

The version of events which came out that night was that A.W. had been with a friend on the bus and ended up waiting at a bus stop alone when a man drove by a couple of times. RP 178-81. A.W. said the man offered her a ride, but she declined. RP 180-87. A.W. then walked away - not towards - the well-lit nearby store, ending up somehow in an alley where, she said, she was grabbed from behind and forced into the back of a car at knifepoint. RP 181-94. A.W. also said her hands were tied behind her, possibly with zip ties. RP 183. From where she lay in the backseat of the car, she said, she saw some kind of plastic beads hanging from the rear-view mirror. RP 495-96.

It had snowed that day, and A.W. lay on her side in the backseat as the driver of the car drove through the snow for awhile, then parked in an open area, like a field. RP 196-97. There, the man went through her purse and then while displaying the knife, he ordered her to climb into the front seat, removed the tie from her hands and raped her. RP 189, 194. After that, A.W. said, the man told her the "least" he could do was give her a ride home, so she gave him a fake address and he dropped her off a few blocks from there. RP 198-202.

A.W. then approached people she saw, asking for money to be able to call her mom. RP 274. She never told anyone the reason was that she had just been robbed and raped and needed help. RP 270-74. No one gave her money so she just made her way home. RP 270-74.

A.W. said she had never seen her assailant before but she gave police a license plate number she had written on her hand, saying it was the license plate of the man involved. RP 190-96, 201-202.

When A.W. arrived home, she was about an hour and a half late and her mom, Miller, was “waiting to hear what her excuse would be” for being so late. RP 139. A.W. admitted that she knew she was breaking her curfew by being out past dark but nevertheless did not call her mom to let her know she would be late. RP 286-87. Because of what A.W. told her mom had happened, her mom did not punish A.W. and A.W. got into no trouble for being so late. RP 165.

That morning, A.W. had told her mother that she was going to go spend some time with friends, which was a lie. RP 132, 172, 249. Instead, A.W. went to spend time with her much-older, unemployed boyfriend, smoking marijuana and having unprotected sex. RP 171-92. A.W. admitted that her parents did not want her seeing that boyfriend, Justin Lyons, and A.W.’s mom would testify at the later trial that she had made it clear that she did not approve. RP 140, 283, 440. A.W. had taken

the bus to visit Lyons and said Lyons did not come to her house because he did not want to run into her parents. RP 283. That day, A.W. got into a fight with Lyons because he had promised to give her a ride home but then declined, which was why she ended up on the bus. RP 286-87.

Based on the license plate A.W. gave police, within a few hours of the report from Miller a car had been impounded. RP 485, 640-46. The car was registered to Marcella Brooks. RP 640. Officers tracked the vehicle and seized it, after which the officers decided to do a photographic montage including Brooks' son, Shamarr Parker. RP 640. One of the officers opined that Parker's physical description was similar to the description A.W. had given of her assailant. RP 641. She later identified Parker. RP 646.

In the back seat of the car was secured a child car seat. RP 710. If she had been laying as she said in the back seat, A.W. would have laid on it or right next to it but she never said anything about it. RP 530-25, 712-13. She also never said anything about lying on an umbrella or paper or other things, all of which were on the seat when it was impounded just hours after she said she was in the back. RP 530-35, 712-13. Clumps of blonde hair and some black hair was found in the car but officers never tested any of them to see if they belonged to A.W. or could be linked to the crime. RP 709-710.

In the car, under the front seat, was a knife. RP 651. Parker's mom, Brooks, testified that it was in the car because she worked late at night, it was snowing, and she had lost or broken her last "scraper" but needed something to use to get the ice off her car. RP 748.

When shown the knife found in the car, A.W. did not think it was the knife she saw that night. RP 655. Instead, the knife that night was "long," like the kind "used to cut fish," and the one found in the car also looked "shorter." RP 183-88, 241. Parker's fingerprint was only on a tip area of the knife and it was unknown when that print was put on the knife, which Brooks identified as one from her home. RP 612, 726.

Although A.W. said she was careful to press her fingers against the glass of the window of the car during the assault, none of her fingerprints were found there or anywhere in the car. RP 505-509.

A "rape kit" was done and the semen and sperm found did not match that of Parker. RP 661. Instead, it matched that of Lyons, the man A.W. was seeing behind her parents' backs. RP 661. Police confronted A.W. when they got the results in early May, and it was only then that A.W. told police that she had sex with Lyons earlier on the day of the incident. RP 662, 728. Lyons later gave a sample and was positively identified as the source of the sperm found by the "kit." RP 666.

A.W. admitted that she lied to the police, hospital staff and her

mother about what happened when she told them her version of events the night of the incident. RP 137, 172, 249. Her version of events would change again at the defense interview, when she then said she had also been in possession of marijuana at the time, which the assailant had taken from her, too. RP 190, 208, 331.

The amounts of the drugs changed, too. First, A.W. said she had been carrying only two small bags. RP 332. By the time of trial, however, A.W. was describing what she possessed that day as four bags of the drug. RP 190, 332.

A.W.'s failure to tell the police and her mom the whole truth extended to failing to tell them she had also been high that day, a fact she did not disclose until much later. RP 141, 208.

In fact, at trial, one of the lead officers was asked when he learned that A.W. had been carrying marijuana in her purse and he said he had not been made aware of that fact at all. RP 732.

At trial, A.W. was sure the man had cut the ties off her hands. RP 183. Later, she amended that to saying he had untied the ties, which was apparently what she had said before. RP 189. Only one cord which could be used as a tie was found in the car, on the driver's side in a pocket. RP 522-24.

A.W. testified that, as he was driving her "home," the man asked

what her name was and she was “just silent.” RP 199. When officers spoke to Parker, however, they ended up confronting A.W. about whether she had known the man involved. RP 715. An officer cautioned her to tell the truth and she assured him she had done so. RP 715.

At the time she was making that declaration, however, A.W. was still lying about having been with “friends” that day and had not said anything to anyone about having unprotected sex with her boyfriend just before she said she was raped by another man. RP 715-16. She also had not said anything about having any marijuana with her that day or being robbed of it, either. RP 715-16.

A.W. admitted that she had gone on a “shoplifting” spree several times in the past and would “hit” multiple stores in the same day, usually stealing alcohol. RP 250, 264-66. She and her friends also stole food in addition to beer. RP 264-66. A.W. minimized this activity, admitting she knew it was dishonest but saying it was not always her that was “the one doing” the stealing. RP 166.

Miller, who claimed she had an “open” relationship with A.W. and knew everything except about the relationship with Lyons continuing, was surprised to find out not only that her daughter had been with Lyons and high that day but also that A.W. admitted to smoking marijuana essentially every day and that A.W. had shoplifted more than the once about which

Miller knew. RP 175, 244, 167,

Dacia Birka, who had a 6-year old in common with Parker, testified that Parker had showed up on her front door that night and seemed “[s]hook up.” RP 542-43. According to Birka, Parker told her he had “hit a lick,” trying to get some “easy money for Christmas,” so he “got some girl for some weed.” RP 544. Birka claimed he told her he had a “knife to do it” and got “two zips,” apparently meaning several big bags. RP 545. Birka did not think that Parker said anything about knowing the girl before. RP 546.

Birka said that either Parker or his cousin had gotten marijuana from the girl before so they knew they could get drugs from her that night. RP 555-56. According to Birka, Parker had called and made arrangements to buy drugs, they had met as scheduled, the girl had given him the drugs and Parker had said, “[t]his is a lick, bitch,” telling the girl to get out of the car. RP 557. The girl had not wanted to get out of the car and he “had to basically pull the knife to force her out of the car.” RP 557. He also said he could not remember the girl’s name. RP 559.

Birka said Parker cleaned the place up that day. RP 547. He was wearing a black jacket and he washed it, although Birka said it was not unusual for him to do laundry. RP 550, 566. Birka herself also wore that jacket and had gotten it dirty building rabbit cages around that time, too.

RP 566.

According to Birka, Parker also said he was moving and getting out of town. RP 548. He wanted to go to Arizona but Birka said he was just on break for school, where he was studying to be an electrician. RP 549. Birka was clear, however, that she never told an officer that Parker had decided not to go to Arizona “because it was just a little robbery and the police weren’t going to spend that much time on it.” RP 567. She said, “that’s never been said.” RP 568. An officer who actually interviewed Birka “at some length” disputed that claim, saying that Birka had told the officer that Parker had decided not to leave the area because it was “only a case of petty theft.” RP 696-97.

A used car dealer who had a field outside the city limits of Tacoma testified that he was “pretty sure” he went to his property to check on the caretaker the day after a “big snow around December of 2008.” RP 574. The car dealer said he could see that someone had driven onto the property and turned around a little. RP 571-75. He thought it looked like the tires had “spun out” a little. RP 575.

He was not really able to remember the date, however, and was not really clear on the number of snowfalls in the winter of 2008/2009. RP 578. He also did not call anyone to report “trespassers” because “people drive in there all of the time” and it was a very common issue with the

property. RP 579. People also used it to turn around in and sometimes dump things there, too. RP 580. There are no stores in the area. RP 582.

When an officer took her to the lot where officers thought the incident had occurred, A.W. said, “[t]his is it.” RP 657. She got upset so they did not walk around for more than two or three minutes. RP 657, 677. An officer testified that there was a condom wrapper at the lot several months later when he went there with a forensic “tech” but the officer never directed the tech to take a photo, or document location, or seize it, explaining he believed it was not relevant to Parker’s case. RP 684-85.

A detective who spoke to Birka testified that Birka reported having looked at Parker’s phone records and deleted a name and telephone number. RP 695. The detective specifically recalled Birka saying that the name and number Birka had deleted from Parker’s phone “belonged to a girl named Ashley.” RP 695. The officer said that, although Birka had access to the phone records and was asked for them multiple time, Birka did not give them to police and the officer made no other efforts to get those records to see if what Birka was saying was true. RP 696. For her part, Birka thought the name she had deleted was something other than “Ashley.” RP 560-64.

Officers did not ask at the Shell station or the nearby Walgreens

whether there were any video cameras which might show the street or the bus stop. RP 703-36.

Even after it was established that it was not Parker's sperm in the vaginal swabs, the officer still decided not to have A.W.'s underwear examined or test any of the other items found in the car any further. RP 729. A thorough forensic vacuuming had been done, with separate bags for each area of the car. RP 712-13. That evidence, however, was not sent for testing, either before or after police started to get evidence inconsistent with A.W.'s original claims. RP 530-35.

Birka also claimed that, at some point between December 19 and January 6, when Parker was arrested, she heard a conversation where Brooks said she had found some "weed" and did not want it in the house so she was flushing it into the toilet. RP 553-54. Parker supposedly said, "[d]on't flush it," to give it to his brother so "he can make some money" and that it was "flushing money." RP 554.

Counsel's theory was that, while Parker had committed a robbery, the prosecution could not prove kidnap or rape. RP 754. The jury hung on the rape charges after several days of deliberation.

D. ARGUMENT

1. THIS COURT HAS THE AUTHORITY TO
GRANT PETITIONER RELIEF FROM UNLAWFUL
RESTRAINT RESULTING FROM THE CONVICTIONS

In this petition, Shamarr Parker is asking this Court to grant him relief from the unlawful restraints he is suffering as a result of the convictions entered after trial and the resulting sentences. Under RAP 16.4, a petitioner is entitled to relief from a conviction when he is suffering restraint and the restraint is unlawful. RAP 16.4(b) and (c). A petitioner collaterally challenging a conviction must also meet court-imposed "threshold" requirements. Personal Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). Those requirements are that a petitioner alleging constitutional error must show "actual and substantial" prejudice, and a petitioner alleging nonconstitutional error must show "a fundamental defect which inherently results in a complete miscarriage of justice." 114 Wn.2d at 812.

The burden of proof is on the petitioner and is it is the very low standard of "preponderance of the evidence." See In re Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). If a petitioner can show that he is suffering unlawful restraint and meets the "threshold" requirements, he is entitled to relief.

2. PETITIONER IS ENTITLED TO RELIEF

In this case, this Court should grant petitioner the relief he requests, because he is under restraint from the conviction and the restraint is unlawful. Further, petitioner meets the additional "threshold" requirements for relief because he has suffered actual and substantial prejudice as a result of the violations of his state and federal constitutional rights and there has been a complete miscarriage of justice resulting from the fundamental defects revealed by the nonconstitutional errors which occurred in this case. Thus, as argued herein, petitioner meets both the RAP 16.4(b) and (c) requirements and the court-imposed requirements and is entitled to relief.

a. Relief is proper

As a threshold matter, this Court is not precluded from granting petitioner's request for relief by RAP 16.4(d). That rule provides that relief may not be granted in a proceeding by way of personal restraint petition if there are other remedies available which are adequate under the circumstances. RAP 16.4(d). Further, the rule provides that relief is limited by the provisions of RCW 10.73.090, .100 and .130. RAP 16.4(d).

None of those limits applies here. First, other remedies are inadequate under the circumstances. Petitioner has previously sought relief by way of direct appeal, but no relief was granted. See Opinion

(PRP App. I). Further, his Petition for Review was denied. See Mandate (PRP App. J). He has thus exhausted the direct appeal process and collateral relief is the only option.

Second, relief is authorized under RCW 10.73.090, .100 and .130. RCW 10.73.130 provides the offenses for which RCW 10.73.090 and .100 apply, while .090 and .100 provide specific time limits for bringing personal restraint petition. RCW 10.73.170; see RCW 10.73.090; RCW 10.73.100. Under RCW 10.73.090, a personal restraint petition is timely and this Court may grant relief where the petition is brought not more than a year after the judgment became final. RCW 10.73.090. Where, as here, the case has previously been appealed, the judgment becomes “final” on the day the Mandate was issued - here, July 11, 2012. See RCW 10.73.090(3)(b); Mandate (PRP App. J). This petition is being timely filed under RCW 10.73.090.

RCW 10.73.100 similarly does not apply. That statute waives the one-year time limit of RCW 10.73.090 in certain circumstances. But such waiver is only required if the one-year time limit has passed; as it has not passed here, RCW 10.73.100 does not apply. Further, as this is Parker’s first PRP, the prohibitions against successive petitions brought on the same grounds do not apply. See RCW 10.73.140; Personal Restraint of Johnson, 131 Wn.2d 558, 563, 933 P.2d 1019 (1997).

Thus, this Court is not precluded from granting petitioner's request for relief, if he shows by a preponderance of the evidence that he is under restraint, the restraint is unlawful, and he meets the additional court-imposed threshold requirements for relief.

In addition, the issues presented herein are properly before the Court. In his direct appeal, the only issue raised on Parker's behalf by his appointed counsel was the issue of whether there was sufficient evidence to support the kidnaping conviction when the only testimony of "restraint" related to a rape for which Parker was not convicted and the restraint was "incidental." See Brief of Appellant ("BOA"), attached to PRP as Appendix Q; Brief of Respondent ("BOR"), attached to PRP as Appendix R.

Further, as the Supreme Court has recently reiterated, "it is well-established that a constitutional issue can be raised for the first time in a PRP if the Petitioner demonstrates actual prejudice." In re Personal Restraint of Nichols, 171 Wn.2d 370, 374, 256 P.3d 1131 (2010). And the Court has unequivocally rejected "the notion that failure to address an issue on appeal bars addressing that same issue in a PRP." In re Adolph, 170 Wn.2d 556, 243 P.3d 540 (2010). Instead, the Court has simply imposed the above-noted "threshold requirements" for such issues when raised by way of PRP. Adolph, 170 Wn.2d at 558-59.

b. Petitioner is suffering restraint

A petitioner is under "restraint" when he "has limited freedom because of a court decision. . . in a criminal proceeding," is confined or is under a disability as a result of a judgement and sentence in a criminal case. RAP 16.4(b); see also State v. S.M.H., 76 Wn. App. 550, 553, 887 P.2d 903 (1995). In this case, there can be no question that Mr. Parker is under a restraint as a result of the convictions and sentences, because he is confined as a result. See Judgment and Sentence (PRP App. A); see also, RAP 16.4(b).

Indeed, even if he were not confined, Mr. Parker would be entitled to relief, because restraints such as collateral consequences of a conviction, being subject to the post-custody supervision process, the potential effect of a conviction on future minimum sentences, and difficulties with reestablishing oneself in society are also restraints from which a petitioner may request relief. In re Powell, 92 Wn.2d 882, 887, 602 P.2d 711 (1979).

c. The restraint is unlawful

The second requirement of RAP 16.4 is that petitioner must show that the restraint he is suffering is unlawful. Restraint resulting from a conviction is unlawful under RAP 16.4(c) when:

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding. . .in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

...

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding. . . [.]

In this case, petitioner is entitled to relief, because his convictions were unlawful under both of these subsections.

- 1) The restraint is unlawful because the convictions were obtained in violation of petitioner's state and federal due process rights and his rights to confront and cross-examine witnesses as the prosecutor committed serious, prejudicial misconduct. Further, Parker was deprived of his constitutional right to effective assistance of appointed counsel in his direct appeal in failing to raise these issues

The prosecutor is a quasi-judicial officer who bears a duty to ensure that the accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). It is her duty both to ensure a fair trial and to refrain from engaging in conduct likely to “produce a wrongful conviction.” See, e.g., State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985); State v. Reeder, 46

Wn.2d 888, 892-93, 285 P.2d 884 (1955). Further, the words of a prosecutor carry great weight with a jury because of the prosecutor's role, so that misconduct of the prosecutor may not only violate the prosecutor's duties but also deprive the accused of the due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

In this case, Petitioner is suffering unlawful restraint, because the convictions were obtained at a trial at which the prosecutors committed multiple, serious and prejudicial acts of misconduct, most of it over defense objection, some of it in violation of his rights to confrontation and to have the prosecution meet its burden of proof and all of it in violation of Parker's due process rights to a fair trial. Further, Parker was deprived of his state and federal constitutional rights to effective assistance of counsel because counsel failed to raise the issue on direct appeal.

a) Relevant facts

Repeatedly in closing argument, the prosecutors exhorted the jurors to put themselves in A.W.'s position and imagine her "terror" and what she had suffered during the incident. RP 671 (imagine her "terror curled up in that car, not knowing whether she was going to live or die, not knowing where she was going to be taken, not knowing whether or not she would ever see her friends or family ever again"), 672 ("[i]magine her

terror sitting there next to naked in this empty field”), 686, 779. Counsel objected when the prosecutor described the incident as A.W.

“experiencing a waking nightmare - - “ but the objection was overruled.

2RP 686. Counsel also objected, “[c]ounsel keeps referring to terror and fear, basically, playing to the prejudices and the passions of the jury as opposed to the facts of the case.” 2RP 672. The court overruled, and the prosecutor then repeated, “[a]gain, imagine her terror, nowhere to run, nowhere to go for help, nobody to call.” 2RP 672.

The prosecutor then compared what A.W. went through during the crimes to having “been forced to tell her story over and over and over.” 2RP 678. The prosecutor said the crimes were not “just something that ends when she gets home” and instead “[i]t continues. It continues.” 2RP 678. The prosecutor then noted how many officers, nurses and others - including defense counsel - A.W. had to talk to, characterizing that as A.W. being “forced to relieve it.” 2RP 678.

At that point, the prosecutor again focused on A.W. having to come to trial, noting that, “she comes in here and she has to tell it to a room full of strangers,” so that “[w]hat happened to A[.] W[.] on December 19, 2008[,] didn’t end on December 19th, 2008. It kept going.” 2RP 678.

The prosecutor later returned to this theme of “violation,”

declaring:

A[.] W[.] has weathered two storms. What she suffered at this man's hands and what she suffered on the stand - -

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

[PROSECUTOR]: - - to carry a truth to you[.]

2RP 780.

Also in closing argument, the prosecutor told the jurors, "Justice Benjamin Cardoza was a former United States Supreme Court Justice," and that Cardoza:

aid something that is powerful and resonates. He said that justice, though due the accused, is due to the accuser as well. In this case, justice - -

[COUNSEL]: Objection, Your Honor; this is improper argument. It shifts the burden.

THE COURT: Overruled.

[PROSECUTOR]: Justice in this case is holding the defendant accountable for the waking nightmare that he foisted upon Ashley Weeks on December 19th, 2008[.] . . .

Ladies and gentlemen, **it's no longer reasonable to doubt that the defendant is guilty[.]**

2RP 713 (emphasis added). Counsel again objected that the argument was improper and "shifts a burden to the defendant," but that objection was

overruled. 2RP 713. The prosecutor then again repeated, “[i]t is no longer reasonable to doubt that the defendant is guilty” of the robbery and while armed with a deadly weapon. 2RP 713.

- b) The arguments were misconduct and counsel on direct appeal was ineffective in failing to raise the issues

In making these arguments, the prosecutors committed serious misconduct. First, it is serious misconduct for the prosecutor to tell the jurors to place themselves in the position of the victim and exhort them to decide the case based on the resulting passions and prejudices. See Claflin, 38 Wn. App. at 850-52 (serious, reversible misconduct when prosecutor read poem about how rape victim felt).

Second, and more egregious, the prosecutor’s comments about what A.W. had to suffer through as part of the prosecution *and on the stand during trial* were improper comment on Parker’s exercise of his state and federal rights to trial and to confrontation. Parker had a constitutional right to go to trial if he so chose. See State v. Montgomery, 105 Wn. App. 442, 446, 17 P.3d 1237, as amended, 22 P.3d 279 (2001). Further, both the state and federal constitutions guarantee the accused in a criminal case the right to confrontation, which is primarily ensured through cross-examination. See State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998); Sixth

Amend.; Art. I, § 22. It is constitutionally offensive misconduct for the prosecutor to comment on the exercise of a constitutional right by inviting jurors to draw a negative inference from the defendant's exercise of that right. See State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984).

Here, the prosecutor's comments invited the jury to draw a negative inference from Parker's decision to go to trial by comparing A.W.'s having to tell her story to police and others (including defense counsel) to being raped, robbed and kidnaped that night. Further, in telling the jury that A.W. had suffered "on the stand" the same as she had suffered when allegedly raped, robbed and kidnaped, the prosecutor was clearly telling the jury it should draw a negative inference from Parker's exercise of his right to cross-examine witnesses. See State v. Gregory, 158 Wn.2d 759, 807, 147 P.3d 1201 (2006).

Gregory, supra, is instructive. In Gregory, the defendant argued that the victim was claiming that she had been raped because she was angry that the defendant refused to pay her for sex and because his condom broke. 158 Wn.2d at 806-807. At trial, the prosecutor argued that the victim would not have put herself through having to testify at trial for such a reason. 158 Wn.2d at 807. On appeal, Gregory argued that the prosecutor had chilled his rights to confrontation by making the argument but the Supreme Court disagreed, noting that the argument and questioning did not

focus on the exercise of the rights but instead were focused on pointing out the credibility of the witness. 158 Wn.2d at 807-808.

Here, unlike in Gregory, the prosecutors focused on the experience of trial and having to be “on the stand” as being victimized all over again. Further here, unlike in Gregory, the comments came after the prosecutor had already incited the jurors’ passions and prejudices and sympathies for A.W. and against Parker, by repeatedly describing the incident as “terror” and telling jurors to put themselves in A.W.’s shoes and imagine what she felt.

This misconduct was only exacerbated by the misconduct in shifting the burden of proof to Parker. Both the state and federal due process clauses mandate that the prosecution bear the burden of proving every element of the crimes charged, beyond a reasonable doubt. See State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). Further, the defendant bears no burden of disproving the prosecution’s case in any way. Id.

Yet the prosecutor effectively told the jury to the contrary when the prosecutor first declared that “justice, though due the accused, is due to the accuser as well,” and then, once counsel’s objection was overruled, told the jury that “justice” required holding Parker “accountable for the waking nightmare that he foisted upon A[.]W[.]” followed by telling the jury it

was “no longer reasonable to doubt that the defendant is guilty.” 2RP 713. And the prosecutor repeated that argument once counsel’s objection that it shifted a burden was overruled, again stating, “[i]t is no longer reasonable to doubt that the defendant is guilty” of the robbery and while armed with a deadly weapon. 2RP 713.

With this argument, the prosecutor turned the concept of reasonable doubt on its head. The question the jury had to answer was *not* whether it was “reasonable to doubt” guilt - it was whether the prosecution had met its burden of proving that guilt, beyond a reasonable doubt. See, e.g., State v. Venegas, 155 Wn. App. 507, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010). By focusing on whether it was “reasonable to doubt” guilt, the prosecutor effectively told jurors they should convict unless they thought it “reasonable” to doubt that Parker had committed the crimes. That is far less than the constitutionally mandated burden the prosecution should have shouldered. See, e.g., State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010).

Even given the “wide latitude” prosecutors enjoy in making closing argument, no attorney is permitted to mistate the law and thus mislead the jury. See State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

In addition, Parker is entitled to relief because appointed counsel was ineffective in failing to raise this issue in the direct appeal. Both the

state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). To show ineffective assistance, a defendant must show that, despite a presumption of effectiveness, counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Counsel's performance is deficient if it falls below an "objective standard of reasonableness" and was not sound strategy. See In re PRP of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992). That performance prejudices the defense when there is a reasonable probability that, but for counsel's deficient performance, the result would have been different. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996), overruled in part and on other grounds by, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). A "reasonable probability" is one which is "sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Here, had counsel raised these issues in the direct appeal, Parker would likely have won. First, for the comments on Parker's constitutional rights, the constitutional harmless error standard of review would have applied. See, e.g., State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808

(1996). That standard *presumes* prejudice and compels reversal unless and until the prosecution can meet the heavy burden of proving, beyond a reasonable doubt, that the jury would necessarily have reached the same result if the excluded evidence had been admitted. See Maupin, 128 Wn.2d at 929. Further, the constitutional harmless error standard is far different than the much more forgiving and deferential standard used for errors such as a claim of sufficiency of the evidence. See, e.g., State v. Romero, 113 Wn. App. 779, 783-85, 54 P.3d 1255 (2002). And the constitutional harmless error standard requires the prosecution to prove the error harmless, while the defendant bears the burden of proof under the sufficiency standard. See id.

Thus, where the constitutional harmless error standard applies on direct appeal, even if the prosecution's theory of guilt is supported by significant evidence, if there is disputing evidence the error cannot be deemed constitutionally "harmless" because the evidence does not "overwhelmingly establish" guilt." See State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). And here, there is clearly disputing evidence, as the jury's inability to convict on the rape or find sexual motivation shows.

Nevertheless, appellate counsel failed to raise these serious, prejudicial errors in Parker's direct appeal. See AOB (PRP App. Q). Thus,

Parker was deprived of this extremely forgiving standard of review. Instead, he has been forced to seek collateral review, with its far less favorable standards.

Further, even for the nonconstitutional misconduct, counsel deprived Parker of a more favorable standard of review by failing to raise the issues on direct review. Where, as here, trial counsel objects below, reversal and remand for a new trial is required if there is a substantial likelihood the misconduct affected the verdict. See State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). This is a far less difficult standard of review to meet than the standard which applies if counsel stands mute at trial. See, e.g., State v. Jackson, 150 Wn. App. 877, 882-83, 209 P.3d 553, review denied, 167 Wn.2d 1008 (2009). And it is far less difficult to meet than the standard Parker is forced to meet on collateral review, of showing a complete miscarriage of justice for nonconstitutional error.

Had counsel raised the misconduct issues on the direct appeal, there is more than a reasonable probability this Court would have reached a different result. The misconduct in this case was so egregious that counsel objected, over and over. Further, the evidence against Parker was slim. The jury clearly did not believe A.W.'s version of events completely, or it would have also convicted Parker for the rape A.W. claimed had occurred.

With the misconduct, the prosecutors here first repeatedly incited the jury's passions and prejudices against Parker and for A.W., repeatedly invoked the "terror" A.W. had felt, implied that having to testify and be cross-examined by Parker's counsel was like raping her all over again and then told the jury that it should convict because it was "no longer reasonable to doubt" guilt, thus shifting the burden of proof on its head. Had appellate counsel brought these issues before this Court on direct appeal, Parker would likely have received relief. Counsel's failure to do so left Parker in the unenviable position of having to file a collateral attack to vindicate his rights, when he should have received relief by way of direct review. This Court should so hold and should grant Parker relief from the unlawful restraints he is suffering as a result.

- 2) The restraint is unlawful because the trial court improperly allowed witnesses to present hearsay testimony bolstering A.W.'s credibility and appointed counsel was again ineffective on direct appeal

Parker is also entitled to relief because the restraint he is suffering is unlawful, as the convictions were the result of a trial at which the crucial state's witness' version of events was improperly bolstered. Further, again, appointed counsel on direct appeal failed in her duties to Parker and Parker's rights to effective assistance were violated.

a) Relevant facts

Repeatedly when Miller was testifying, the prosecutor asked her to tell the jury what A.S. had told Miller about what she claimed happened that night. RP 121-30. Counsel's objections that this was hearsay were overruled. RP 121. As a result, at trial, Miller was allowed to give a detailed account of A.W.'s version of events as told to police and others that night. RP 121-24.

Also at trial, over defense objection, the court allowed the forensic nurse who had examined A.W. after she had been seen by the treating doctor that night to testify, at length, about what A.W. said had occurred, including such things as being at the bus stop, the car driving by and other matters unrelated to the physical injuries A.W. had suffered. RP 365-75. That nurse, Cheryl Killen, testified that she was one of a few "sexual assault nurse examiners" who have specialized training to "perform the sexual assault exams on patients." RP 365. After a treating physician does a medical screening, Killen engages in her job, which includes taking information about what the person said occurred and also collecting "evidence from the patient's body" using a specific kit for that purpose. RP 368.

During Killen's testimony, counsel objected that the statements were not admissible under ER 803(a)(4) as statements made for the

purposes of medical treatment or diagnosis, because they were made during “evidence collection.” RP 374. With the jury out, the court said that the issue was whether the question which preceded the information was “a reasonable question for any health care provider to ask under the circumstances.” RP 380. The court also dismissed counsel’s concern that Killen had asked A.W. to describe “what happened” and had then taken down a “verbatim report” of A.W.’s claims, stating that was clearly not for medical purposes but for evidence. RP 381.

Killen was then allowed to testify at length about A.W.’s version of events, including more than three transcript pages of straight monologue from the witness of “verbatim” of what A.W. had said, starting with “I got off the bus at 38th and Pacific” and going through the entire incident. RP 381, 391-95.

- b) The court erred in admitting the improper evidence and appellate counsel was again ineffective

By allowing this evidence to be admitted, the trial court allowed improper bolstering of the version of events given by A.W. and, by extension, A.W. herself. First, the court erred in allowing A.W.’s mom to recite at length what she heard A.W. say about the incident to Miller and others. In general, “the testimony of a witness cannot be bolstered by showing that the witness has made prior, out-of-court statements” that are

similar to or the same as her statements on the stand. See Thomas v. French, 99 Wn.2d 95, 103, 650 P.2d 1097 (1983), overruled in part and on other grounds by, Gaglidari v. Denny's Rests., 117 Wn.2d 426, 445, 815 P.2d 1362 (1991). There is a limited exception allowing admission of “prior consistent statements” of a witness to be admitted to rebut a claim that the witness had recently “fabricated” his story. See ER 801(d)(1)(ii); State v. Pendleton, 8 Wn. App. 573, 574-75, 508 P.2d 179, review denied, 82 Wn.2d 1007 (1973).

The exception, however, did not apply. A statement is not admissible as a “prior consistent statement” under ER 801(d)(1)(ii) unless the defendant has challenged that witness as having recently fabricated her story, so that the fact that the witness had given a similar story prior to when she had a motive to fabricate would be relevant to whether such fabrication had occurred. See State v. Smith, 82 Wn. App. 327, 332, 917 P.2d 1108 (1996), review denied, 130 Wn.2d 1023 (1997), overruled sub silentio in part and on other grounds by, Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000).

Further, merely challenging the veracity of a witness is not the same as claiming that the witness had recently fabricated the claims. See State v. Harper, 35 Wn. App. 855, 858, 670 P.2d 296 (1983), review denied, 100 Wn.2d 1035 (1984). Unless the requirements for admission are met, prior

consistent statements are not admissible and are improper, because they serve only to bolster the witness' testimony in a false way. See Smith, 82 Wn. App. at 332.

Put another way, as the Supreme Court has noted, “mere repetition does not imply veracity,” so that the fact that a witness has maintained a consistent story is not relevant or admissible. See State v. Purdom, 106 Wn.2d 745, 749-50, 725 P.2d 622 (1986). This is because “[e]vidence which merely shows that the witness said the same the on other occasions when his motive was the same does not have much probative force.” 106 Wn.2d at 750 (citations omitted). In addition, such evidence is not only legally irrelevant to any issue at trial, it is likely to hold sway in jurors' minds. Harper, 35 Wn. App. at 858.

Here, there was no claim of “recent fabrication” - the claim was that A.W. was not telling the truth from the very start. What she told her mom and what her mom heard A.W. tell others was not relevant to anything except bolstering A.W. about what she said had occurred. It was error for the court to admit the evidence over Parker's repeated objections at trial.

Similarly, the “verbatim” and other testimony from the nurse about what A.W. said had occurred was inadmissible and bolstering. Statements given in this context are examined to determine if they are statements made “for the purposes of medical diagnosis or treatment” under ER 803(a)(4).

Such statements are admissible if they are

made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4). The bulk of the statements here, however, were not describing the symptoms A.W. was suffering or even the cause of those symptoms but rather her version of events. See, e.g., State v. Williams, 137 Wn. App. 736, 154 P.3d 322 (2007). Aside from the description of the actual alleged attack, the testimony of the nurse included such things as where A.W. said she went that night, how many times the car drove by, etc. - the circumstances of the crimes, not description of the injuries or explanation of their nature. See RP 368. Especially egregious was admission of the “verbatim,” which the nurse elicited by asking, “can you tell me what happened” and which the nurse said was a “verbatim of what [the] patient said, in quotes[.]” RP 392. That statement started with A.W. talking about crossing the street to catch a bus, then went on, using the personal pronoun “I” throughout (i.e. “I turned right,” “I saw him pass me again,” etc.). RP 392-95. This lengthy monologue was *not* all about A.W. trying to get treatment but was clearly elicited for prosecution purposes, given that it contained very little about the alleged physical assault but

reiterated for the jury, once again, A.W.'s version of events.

Once again, counsel on direct appeal was ineffective for failing to raise these issues on appeal. In general, a trial court's decision to admit evidence is subject to abuse of discretion standard on direct review. See, State v. Catellanos, 132 Wn.2d 94, 935 P.2d 1353 (1997). A trial court abuses its discretion if it bases its decision on an erroneous view of the law or applies an improper legal standard. See State v. Kenneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005). Reversal is required if, within reasonable probabilities, the outcome of the trial would have been materially affected. See State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997).

Here, there is more than such a reasonable probability. The main issue at trial was whether the jury should believe the first, second or third variation of A.W.'s version of events. Having two of the state's witnesses repeat the allegations from A.W. over and over, thus bolstering that version of events, could not help but have an impact on the jury. This is especially so given the fact that the jury clearly did not believe all of A.W.'s claims, as it was unable to convict on the rape.

Once again, appellate counsel failed to raise a serious, prejudicial error on behalf of her client on direct appeal. See AOB (PRP App. Q). And once again, that failure amounted to ineffective assistance. Had the errors in admitting the evidence and thus impermissibly bolstering A.W.'s

version of events been raised on direct appeal, this Court would likely have reversed. Given the significant problems in the prosecution's case and the fact that A.W.'s credibility was the crucial issue, the repeated introduction of the improper, bolstering evidence clearly could have had an effect and swayed the jury to improperly convict on the kidnapping count. Appellate counsel should have raised the issue and in failing to do so, committed ineffective assistance. This Court should so hold.

d. The "threshold" requirements have been met

As noted above, a petitioner seeking relief by way of a personal restraint petition alleging constitutional error must show "actual and substantial" prejudice, and a petitioner alleging nonconstitutional error must show "a fundamental defect which inherently results in a complete miscarriage of justice" in order to be entitled to relief. In re Cook, 114 Wn.2d at 812. The burden of proof is the forgiving standard of "more likely than not" or the "preponderance of the evidence," a "51%" standard. See In re Hagler, 97 Wn.2d 818, 826, 650 P.2d 1103 (1982). This burden and these threshold requirements have been placed upon Petitioner and those like him by the Supreme Court in order to balance competing considerations of finality with the justice system's reluctance "to shut the courthouse doors to potentially meritorious challenges to convictions[.]" See In re Grantham, 168 Wn.2d 204, 211, 227 P.3d 285 (2010).

Applying the proper standards to this case, Petitioner has amply demonstrated that his case meets those requirements for all of the issues he has raised. There is more than a preponderance of the evidence that the constitutionally offensive misconduct caused actual and substantial prejudice to Parker's due process rights to a fair trial, especially coupled with the prosecutor's shifting the burden of proof, exhorting the jury to consider the "terror" A.W. went through and effectively inviting the jury to draw a negative inference from Parker's exercise of his rights to go to trial and to confront and cross-examine witnesses. There is also more than a preponderance of the evidence that the trial court's error in admitting the improper, bolstering evidence of A.W.'s "consistent" statement over and over caused substantial prejudice to Parker's ability to receive a fair trial before an impartial jury, and that the errors resulted in a complete miscarriage of justice.

Finally, there is more than a preponderance of the evidence that Parker has suffered actual and substantial prejudice to his state and federal rights to effective assistance of counsel, based on appointed counsel's failure to raise both the serious, prejudicial misconduct and the improper introduction of the bolstering evidence at trial. All of these issues were litigated at trial, with counsel repeatedly objecting and setting up a more than sufficient record and favorable standards of review for the misconduct

by doing so. Yet appointed counsel failed to raise these important issues on Parker's behalf, despite their obvious impact on his ability to have a fair trial before an impartial jury.

For the constitutionally offensive misconduct and violations of Parker's due process rights to a fair trial, the errors could not have been deemed "harmless" under the constitutional harmless error standard, which should have been applied and would have if counsel on appeal had been effective. Where, as here, credibility is a major issue at trial and there is conflicting evidence, even if the prosecution presents strong evidence of guilt, it is not possible to deem the constitutional error "harmless" if the improperly excluded evidence "could have" had an effect on the jury's verdict and its determination of credibility and on the verdict. See Romero, 113 Wn. App. at 794.

Here, the only issue was whether A.W. was telling the truth about what she said occurred and Parker was thus guilty of kidnapping, rape and robbery. There was no physical evidence linking Parker to the crimes. The semen was not his, nor was his saliva or hair or anything similar found to link him to the crimes. Indeed, the jury was unconvinced by A.W.'s claims of rape and did not convict Parker of that count. See Order (PRP App. G).

Without the errors, there is more than a reasonable probability a jury examining the evidence could have found the prosecution failed to meet its

burden of proof.

Further, fundamental defects in the proceeding from the prosecutor's repeated misconduct and the repeated, improper bolstering resulted in a complete miscarriage of justice because petitioner sits in prison based on convictions which were gained by the prosecutor only after flagrant, prejudicial misconduct. And again, this resulted in actual and substantial prejudice to Parker's due process rights to a fair trial.

This Court should grant the petition, reverse the convictions and order a new, fair trial in order to redress the unlawful restraint Parker is suffering. The convictions were gained in violation of his' rights, as well as fundamental principles of fairness. On direct review, counsel failed to raise the serious errors discussed herein, thus depriving Parker of the more forgiving standards of review applicable on direct review and requiring him to seek collateral relief in order to receive justice. This Court should so hold.

E. CONCLUSION

Petitioner respectfully asks this Court to grant him the relief to which he is entitled.

DATED this 11th day of July, 2013.

Respectfully submitted,

/s/ Kathryn Russell Selk
Kathryn Russell Selk, No. 23879
Counsel for Petitioner
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

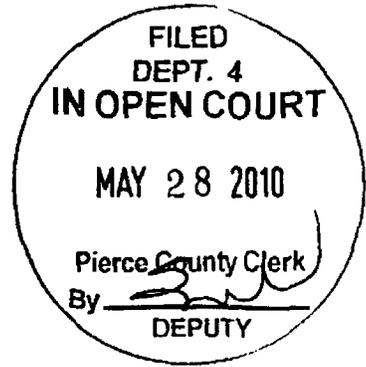
CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Brief to opposing counsel and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows, to Mr. Shamarr Parker, DOC 752439, Coyote Ridge CC., P.O. Box 769, Connell, WA. 98326-0769, and to the Pierce County Prosecutor's Office, via e-filing this date.

DATED this 11th day of July, 2013.

/s/Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

APPENDIX A



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 08-1-06144-4

VS

SHAMARR DERRICK PARKER,

WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other Custody

Defendant.

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

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[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 5/28/10

By direction of the Honorable
[Signature]
JUDGE

CLERK

By: _____
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date _____ By _____ Deputy

STATE OF WASHINGTON

County of Pierce ss:

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

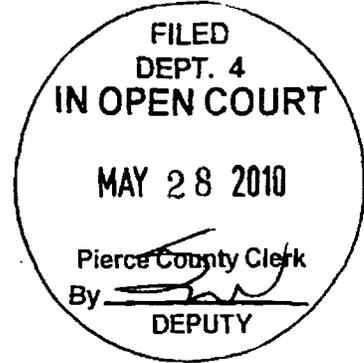
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____.

KEVIN STOCK, Clerk
By: _____ Deputy

tm c



08-1-06144-4



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-06144-4

vs.

JUDGMENT AND SENTENCE (FJS)

SHAMARR DERRICK PARKER

Defendant.

- Prison RCW 9.94A.712 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Breaking The Cycle (BTC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

SID: WA16225014
DOB: 07/21/1975

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on April 22, 2010 by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	KIDNAPPING IN THE FIRST DEGREE (F2)	9A.40.020(1)(b) 9.94A.030 9.94A.125 9.94A.030 9.94A.602 9.94A.310 9.94A.510 9.94A.370 9.94A.530	(D) (SM)	12/19/08	TPD 083541060

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III	ROBBERY IN THE FIRST DEGREE, AAA1	9A.56.190 9A.56.200 (1)(a)(i) 9.94A.125 9.94A.602 9.94A.310 9.94A.510 9.94A.370 9.94A.533	DWSE 24 MONTHS	12/19/08	TPD 083541060
-----	-----------------------------------	---	-------------------	----------	---------------

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the SECOND AMENDED Information

- A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) I. RCW 9.94A.602, 9.94A.533.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): Count I & Count III
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	ASSAULT 2	07/22/96	Pierce Co., WA	06/05/94	A	NV
2	ASSAULT 2	07/22/96	Pierce Co., WA	06/05/94	A	NV
3	ASSAULT 2	07/22/96	Pierce Co., WA	06/05/94	A	NV
4	UPOF	04/07/00	Pierce Co., WA	12/23/99	A	NV
5	UPFA 1	09/26/03	Pierce Co., WA	04/09/03	A	NV
6	CONSP TO POSS CON SUB W/ INT DEL	02/05/08	Pierce Co., WA	08/07/07	A	NV
7	CONSP TO POSS CON SUB	02/05/08	Pierce Co., WA	08/16/07	A	NV
8	NVOL		Tacoma Muni., WA	07/10/92	A	NV
9	NVOL		Tacoma Muni., WA	01/23/93	A	NV
10	FAIL TO COMPLY		Tacoma Muni., WA	01/23/93	A	NV
11	NVOL		Tacoma Muni., WA	03/09/93	A	NV
12	NVOL		Pierce Co Dist Ct, WA	10/05/93	A	NV
13	INT W/ POLICE OFFICER		Pierce Co Dist Ct, WA	10/05/93	A	NV
14	CRIM TRESPASS 2		Lakewood Muni., WA	04/07/00	A	NV

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

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2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	10	XII	149-198 MONTHS	24 MONTHS	173-222 MONTHS	LIFE/ \$50,000
II	10	IX	129-171 MONTHS	24 MONTHS	153-195 MONTHS	LIFE/ \$50,000

2.4 **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence:

within below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defend's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows:

III. JUDGMENT

3.1 The defendant is **GUILTY** of the Counts and Charges listed in Paragraph 2.1.

3.2 The court **DISMISSES** Counts _____ The defendant is found **NOT GUILTY** of Counts _____

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OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$ 2841.00 TOTAL

The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for _____

RESTITUTION. Order Attached

Restitution ordered above shall be paid jointly and severally with:

NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-\$)
RJN			

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ Per CCO per month commencing. Per CCO RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b **ELECTRONIC MONITORING REIMBURSEMENT.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____

4.2 **DNA TESTING.** The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

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[] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT

The defendant shall not have contact with Anna 9/19A (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for Life years (not to exceed the maximum statutory sentence).

[X] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

<u>Abide by formal NCO</u>
<u>Have abiding behavior</u>
<u>Keep financial obligations, including any restitution - if any</u>
<u>Follow all conditions of Community Corrections Officer</u>
<u>Resister on kidnapping offender per statute</u>

4.4a BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

192 months on Count 1 months on Count

171 months on Count 3 months on Count

months on Count months on Count

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

24 months on Count No 1 months on Count No

24 months on Count No 3 months on Count No

months on Count No months on Count No

Sentence enhancements in Counts shall run

[] concurrent [X] consecutive to each other.

Sentence enhancements in Counts shall be served

[X] flat time [] subject to earned good time credit

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Actual number of months of total confinement ordered is: 246 months

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 507 days

4.6 [] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

[X] COMMUNITY CUSTODY is ordered as follows:

Count 1 for a range from: 30 months to _____ Months;

Count 3 for a range from: 18 months to _____ Months;

Count _____ for a range from: _____ to _____ Months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offense not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

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On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories, or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor, or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC, and (8) for sex offenses, submit to electronic monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

Defendant shall have no contact with: see journal NCO

Defendant shall remain within outside of a specified geographical boundary, to wit: _____

Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8))

The defendant shall participate in the following crime-related treatment or counseling services: see CCO

The defendant shall undergo an evaluation for treatment for domestic violence substance abuse mental health anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: see CCO

Other conditions may be imposed by the court or DOC during community custody, or are set forth here:

see CCO

For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

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4.7 [] WORK ETHIC CAMP. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 RESTITUTION HEARING.

[] Defendant waives any right to be present at any restitution hearing (sign initials): _____

08-1-06144-4

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3 **5.5 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

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5 **5.6 FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

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7 **5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200.

8 **1. General Applicability and Requirements:** Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW) where the victim is a minor defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

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11 **2. Offenders Who Leave the State and Return:** If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three (3) business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within three (3) business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

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15 **3. Change of Residence Within State and Leaving the State:** If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

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19 **4. Additional Requirements Upon Moving to Another State:** If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

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23 **5. Notification Requirement When Enrolling In or Employed by a Public or Private Institution of Higher Education or Common School (K-12):** If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

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6. **Registration by a Person Who Does Not Have a Fixed Residence:** Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

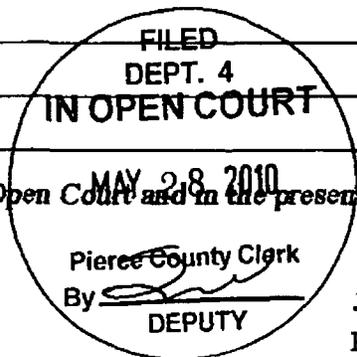
7. **Reporting Requirements for Persons Who Are Risk Level II or III:** If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least five years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

8. **Application for a Name Change:** If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

5.8 [] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 OTHER: _____



DONE in Open Court and in the presence of the defendant this date: 5/28/10

JUDGE [Signature]
Print name BRYAN CHUSHCOFF

[Signature]
Deputy Prosecuting Attorney
Print name: Angelica Meeba
WSB # 36673

[Signature]
Attorney for Defendant
Print name: Leslie Tolzin
WSB # 20172

[Signature]
Defendant
Print name: Shemoor

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4 **VOTING RIGHTS STATEMENT:** RCW 10.64.140. I acknowledge that my right to vote has been lost due to

5 felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be

6 restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued

7 by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate

8 sentence review board, RCW 9.96.050, or d) A certificate of restoration issued by the governor, RCW 9.96.020.

9 Voting before the right is restored is a class C felony, RCW 92A.84.660.

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Defendant's signature: Refused to sign

08-1-06144-4

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 08-1-06144-4

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

Court Reporter **Katrina Smith**

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

- (I) The offender shall remain within, or outside of, a specified geographical boundary: _____
- (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: See formal NCO & per CCO
- (III) The offender shall participate in crime-related treatment or counseling services;
- (IV) The offender shall not consume alcohol; _____
- (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections, or
- (VI) The offender shall comply with any crime-related prohibitions.
- (VII) Other: Any conditions per CCO

08-1-06144-4

IDENTIFICATION OF DEFENDANT

SID No. WA16225014
(If no SID take fingerprint card for State Patrol)

Date of Birth 07/21/1975

FBI No. 929588TA3

Local ID No. PCSO158668

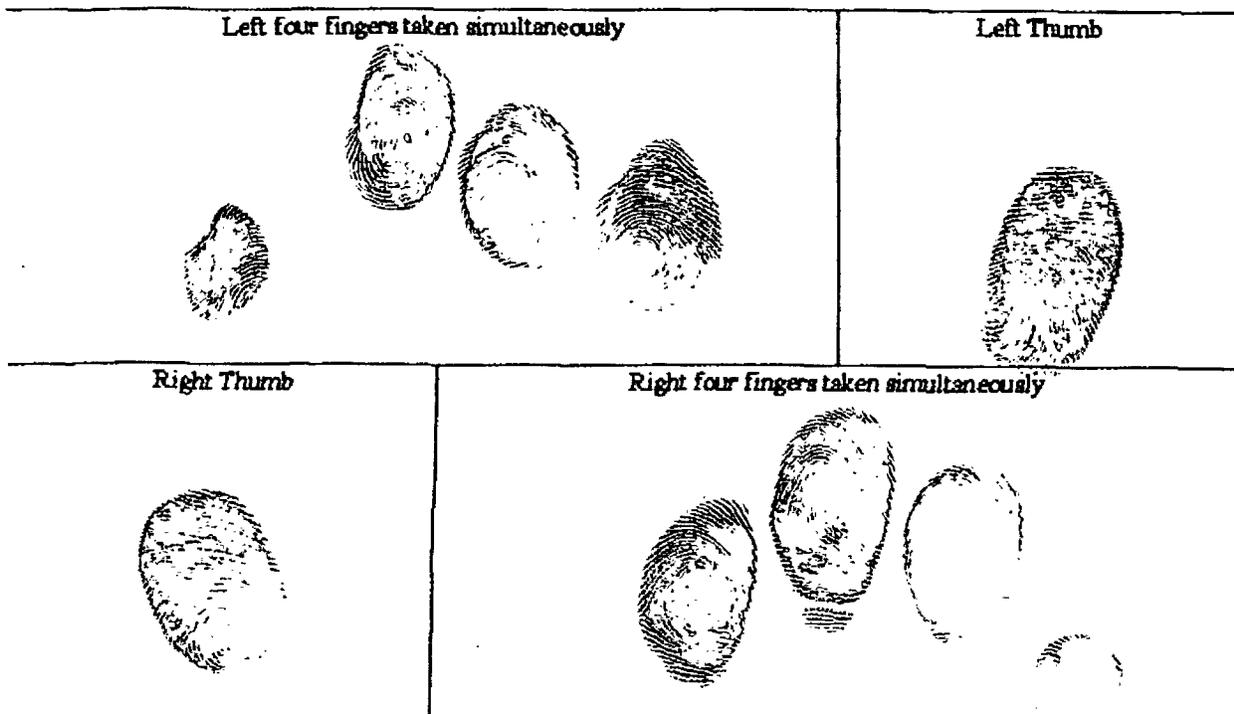
PCN No. 539671561

Other

Alias name, SSN, DOB: _____

Race:	<input type="checkbox"/> Asian/Pacific Islander	<input checked="" type="checkbox"/> Black/African-American	<input type="checkbox"/> Caucasian	Ethnicity:	<input type="checkbox"/> Hispanic	Sex:	<input checked="" type="checkbox"/> Male
	<input type="checkbox"/> Native American	<input type="checkbox"/> Other: :		<input checked="" type="checkbox"/> Non-Hispanic	<input type="checkbox"/>	<input type="checkbox"/>	Female

FINGERPRINTS



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, Susan Wimmer Dated: 5-28-10

DEFENDANT'S SIGNATURE: Refused to sign

DEFENDANT'S ADDRESS: _____

APPENDIX B

December 31 2008 11:27 AM

KEVIN STOCK
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-06144-4

vs.

SHAMARR DERRICK PARKER,

INFORMATION

Defendant.

DOB: 7/21/1975

SEX : MALE

RACE: BLACK

PCN#:

SID#: 16225014

DOL#: WA PARKESD250M1

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of KIDNAPPING IN THE FIRST DEGREE, committed as follows:

That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 19th day of December, 2008, did unlawfully and feloniously, with intent to facilitate commission of a felony, to-wit: rape and/or robbery and/or assaultor flight thereafter, intentionally abduct AW, contrary to RCW 9A.40.020(1)(b), and in the commission thereof the defendant, or an accomplice, was armed with a deadly weapon, other than a firearm to-wit: a knife, that being a deadly weapon as defined in RCW 9.94A.125/9.94A.602, and invoking the provisions of RCW 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.533, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of RAPE IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or

INFORMATION- 1

1 so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
2 one charge from proof of the others, committed as follows:

3 That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 19th day of
4 December, 2008, did unlawfully and feloniously engage in sexual intercourse with AW, by means of
5 forcible compulsion and where the defendant or an accessory uses, or threatens to use a deadly weapon or
6 what appears to be a deadly weapon, contrary to RCW 9A.44.040(1)(a), and/or did unlawfully and
7 feloniously engage in sexual intercourse with AW, by means of forcible compulsion and where the
8 defendant or an accessory kidnaps the victim, contrary to RCW 9A.44.040(1)(b), and in the commission
9 thereof the defendant, or an accomplice, was armed with a deadly weapon, other than a firearm to-wit:
10 knife, that being a deadly weapon as defined in RCW 9.94A.125/9.94A.602, and invoking the provisions
11 of RCW 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence as provided in
12 RCW 9.94A.370/9.94A.533, and against the peace and dignity of the State of Washington.

13 DATED this 31st day of December, 2008.

14 TACOMA POLICE DEPARTMENT
15 WA02703

16 GERALD A. HORNE
17 Pierce County Prosecuting Attorney

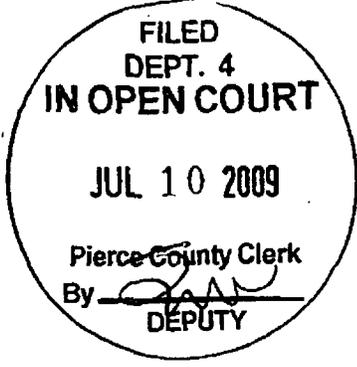
18 mer

19 By: /s/ MARY E. ROBNETT
20 MARY E. ROBNETT
21 Deputy Prosecuting Attorney
22 WSB#: 21129
23
24

APPENDIX C



08-1-06144-4 32417391 AMINF 07-10-09



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-06144-4

vs.

SHAMARR DERRICK PARKER,

AMENDED INFORMATION

Defendant.

DOB: 7/21/1975
PCN#:

SEX : MALE
SID#: 16225014

RACE: BLACK
DOL#: WA PARKESD250M1

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of KIDNAPPING IN THE FIRST DEGREE, committed as follows:

That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 19th day of December, 2008, did unlawfully and feloniously, with intent to facilitate commission of a felony, to-wit: rape and/or robbery and/or assault or flight thereafter, intentionally abduct AW, contrary to RCW 9A.40.020(1)(b) with sexual motivation as defined in RCW 9.94A.030, and in the commission thereof the defendant, or an accomplice, was armed with a deadly weapon, other than a firearm to-wit: a knife, that being a deadly weapon as defined in RCW 9.94A.125/9.94A.602, and invoking the provisions of RCW 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of RAPE IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or

AMENDED INFORMATION- 1 * ORIGINAL *

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
2 one charge from proof of the others, committed as follows:

3 That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 19th day of
4 December, 2008, did unlawfully and feloniously engage in sexual intercourse with AW, by means of
5 forcible compulsion and where the defendant or an accessory uses, or threatens to use a deadly weapon or
6 what appears to be a deadly weapon, contrary to RCW 9A.44.040(I)(a), and in the commission thereof the
7 defendant, or an accomplice, was armed with a deadly weapon, other than a firearm to-wit: a knife, that
8 being a deadly weapon as defined in RCW 9.94A.125/9.94A.602, and invoking the provisions of RCW
9 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence as provided in RCW
10 9.94A.370/9.94A.533, and against the peace and dignity of the State of Washington.

8 IN THE ALTERNATIVE

9 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
10 authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of RAPE
11 IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same
12 conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or
13 so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
14 one charge from proof of the others, committed as follows:

15 That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 19th day of
16 December, 2008, did unlawfully and feloniously engage in sexual intercourse with AW, by means of
17 forcible compulsion and where the defendant or an accessory kidnaps the victim, contrary to RCW
18 9A.44.040(I)(b), and in the commission thereof the defendant, or an accomplice, was armed with a deadly
19 weapon, other than a firearm to-wit: a knife, that being a deadly weapon as defined in RCW
20 9.94A.125/9.94A.602, and invoking the provisions of RCW 9.94A.310/9.94A.510 and adding additional
21 time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and
22 dignity of the State of Washington.

18 COUNT III

19 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
20 authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of
21 ROBBERY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on
22 the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
23 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
24 proof of one charge from proof of the others, committed as follows:

That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 19th day of
December, 2008, did unlawfully and feloniously take personal property belonging to another with intent
to steal from the person or in the presence of AW, the owner thereof or a person having dominion and

1 control over said property, against such person's will by use or threatened use of immediate force,
 2 violence, or fear of injury to AW, said force or fear being used to obtain or retain possession of the
 3 property or to prevent or overcome resistance to the taking, and in the commission thereof, or in
 4 immediate flight therefrom, the defendant was armed with a deadly weapon, to-wit: a knife, contrary to
 5 RCW 9A.56.190 and 9A.56.200(1)(a)(i), and in the commission thereof the defendant, or an accomplice,
 6 was armed with a deadly weapon, other than a firearm to-wit: a knife, that being a deadly weapon as
 7 defined in RCW 9.94A.125/9.94A.602, and invoking the provisions of RCW 9.94A.310/9.94A.510 and
 8 adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.533, and
 9 against the peace and dignity of the State of Washington.

10 COUNT IV

11 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
 12 authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of
 13 KIDNAPPING IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based
 14 on the same conduct or on a series of acts connected together or constituting parts of a single scheme or
 15 plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to
 16 separate proof of one charge from proof of the others, committed as follows:

17 That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 6th day of
 18 May, 2006, did unlawfully and feloniously, with intent to facilitate commission of a felony, to-wit: rape
 19 and/or orbbery and/or assault or flight thereafter, intentionally abduct RC, contrary to RCW
 20 9A.40.020(1)(b) with sexual motivation as defined in RCW 9.94A.030, and in the commission thereof the
 21 defendant, or an accomplice, was armed with a deadly weapon, other than a firearm to-wit: a knife, that
 22 being a deadly weapon as defined in RCW 9.94A.125/9.94A.602, and invoking the provisions of RCW
 23 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence as provided in RCW
 24 9.94A.370/9.94A.530, and against the peace and dignity of the State of Washington.

COUNT V

18 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
 19 authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of RAPE
 20 IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same
 21 conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or
 22 so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
 23 one charge from proof of the others, committed as follows:

24 That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 6th day of
 May, 2006, did unlawfully and feloniously engage in sexual intercourse with RG, by means of forcible
 compulsion and where the defendant or an accessory uses, or threatens to use a deadly weapon or what
 appears to be a deadly weapon, contrary to RCW 9A.44.040(1)(a), and in the commission thereof the

1 defendant, or an accomplice, was armed with a deadly weapon, other than a firearm to-wit: a knife, that
 2 being a deadly weapon as defined in RCW 9.94A.125/9.94A.602, and invoking the provisions of RCW
 3 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence as provided in RCW
 4 9.94A.370/9.94A.533, and against the peace and dignity of the State of Washington.

5 IN THE ALTERNATIVE

6 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
 7 authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of RAPE
 8 IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same
 9 conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or
 10 so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
 11 one charge from proof of the others, committed as follows:

12 That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 6th day of
 13 May, 2006, did unlawfully and feloniously engage in sexual intercourse with RG, by means of forcible
 14 compulsion and where the defendant or an accessory kidnaps the victim, contrary to RCW
 15 9A.44.040(1)(b), and in the commission thereof the defendant, or an accomplice, was armed with a deadly
 16 weapon, other than a firearm to-wit: a knife, that being a deadly weapon as defined in RCW
 17 9.94A.125/9.94A.602, and invoking the provisions of RCW 9.94A.310/9.94A.510 and adding additional
 18 time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and
 19 dignity of the State of Washington..

20 COUNT VI

21 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
 22 authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of
 23 ROBBERY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on
 24 the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
 proof of one charge from proof of the others, committed as follows:

That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 6th day of
 May, 2006, did unlawfully and feloniously take personal property belonging to another with intent to steal
 from the person or in the presence of RG, the owner thereof or a person having dominion and control over
 said property, against such person's will by use or threatened use of immediate force, violence, or fear of
 injury to RG, said force or fear being used to obtain or retain possession of the property or to prevent or
 overcome resistance to the taking, and in the commission thereof, or in immediate flight therefrom, the
 defendant was armed with a deadly weapon, to-wit: a knife, contrary to RCW 9A.56.190 and
 9A.56.200(1)(a)(i), and in the commission thereof the defendant, or an accomplice, was armed with a
 deadly weapon, other than a firearm to-wit: a knife, that being a deadly weapon as defined in RCW

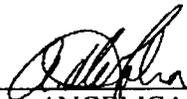
1 9.94A.125/9.94A.602, and invoking the provisions of RCW 9.94A.310/9.94A.510 and adding additional
2 time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.533, and against the peace and
3 dignity of the State of Washington.

4 DATED this 9th day of July, 2009.

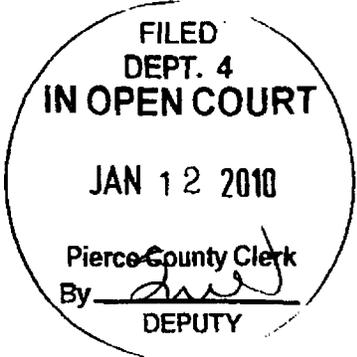
5 TACOMA POLICE DEPARTMENT
6 WA02703

GERALD A. HORNE
Pierce County Prosecuting Attorney

7 ajm

8 By: 
9 ANGELICA MCGAHA
10 Deputy Prosecuting Attorney
11 WSB#: 36673
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APPENDIX D



08-1-06144-4 33603441 AMINF2 01-20-10

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,	
Plaintiff,	CAUSE NO. 08-1-06144-4
vs.	
SHAMARR DERRICK PARKER,	SECOND AMENDED INFORMATION
Defendant.	

DOB: 7/21/1975	SEX : MALE	RACE: BLACK
PCN#:	SID#: 16225014	DOL#: WA PARKESD250M1

COUNT I

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of KIDNAPPING IN THE FIRST DEGREE, committed as follows:

That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 19th day of December, 2008, did unlawfully and feloniously, with intent to facilitate commission of a felony, to-wit: rape and/or robbery and/or assault or flight thereafter, intentionally abduct A.W., contrary to RCW 9A.40.020(1)(b) with sexual motivation as defined in RCW 9.94A.030, and in the commission thereof the defendant, or an accomplice, was armed with a deadly weapon, other than a firearm to-wit: a knife, that being a deadly weapon as defined in RCW 9.94A.125/9.94A.602, and invoking the provisions of RCW 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and dignity of the State of Washington.

COUNT II

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of RAPE IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or

1 so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
2 one charge from proof of the others, committed as follows:

3 That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 19th day of
4 December, 2008, did unlawfully and feloniously engage in sexual intercourse with A.W., by means of
5 forcible compulsion and where the defendant or an accessory uses, or threatens to use a deadly weapon or
6 what appears to be a deadly weapon, contrary to RCW 9A.44.040(1)(a), and in the commission thereof the
7 defendant, or an accomplice, was armed with a deadly weapon, other than a firearm to-wit: a knife, that
8 being a deadly weapon as defined in RCW 9.94A.125/9.94A.602, and invoking the provisions of RCW
9 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence as provided in RCW
10 9.94A.370/9.94A.533, and against the peace and dignity of the State of Washington.

11 IN THE ALTERNATIVE

12 And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
13 authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of RAPE
14 IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same
15 conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or
16 so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
17 one charge from proof of the others, committed as follows:

18 That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 19th day of
19 December, 2008, did unlawfully and feloniously engage in sexual intercourse with A.W., by means of
20 forcible compulsion and where the defendant or an accessory kidnaps the victim, contrary to RCW
21 9A.44.040(1)(b), and in the commission thereof the defendant, or an accomplice, was armed with a deadly
22 weapon, other than a firearm to-wit: A.W., that being a deadly weapon as defined in RCW
23 9.94A.125/9.94A.602, and invoking the provisions of RCW 9.94A.310/9.94A.510 and adding additional
24 time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.533, and against the peace and
dignity of the State of Washington.

COUNT III

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse SHAMARR DERRICK PARKER of the crime of
ROBBERY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on
the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
proof of one charge from proof of the others, committed as follows:

That SHAMARR DERRICK PARKER, in the State of Washington, on or about the 19th day of
December, 2008, did unlawfully and feloniously take personal property belonging to another with intent
to steal from the person or in the presence of A.W., the owner thereof or a person having dominion and

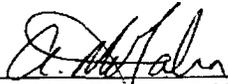
1 control over said property, against such person's will by use or threatened use of immediate force,
2 violence, or fear of injury to A.W., said force or fear being used to obtain or retain possession of the
3 property or to prevent or overcome resistance to the taking, and in the commission thereof, or in
4 immediate flight therefrom, the defendant was armed with a deadly weapon, to-wit: a knife, contrary to
5 RCW 9A.56.190 and 9A.56.200(1)(a)(i), and in the commission thereof the defendant, or an accomplice,
6 was armed with a deadly weapon, other than a firearm to-wit: a knife, that being a deadly weapon as
7 defined in RCW 9.94A.125/9.94A.602, and invoking the provisions of RCW 9.94A.310/9.94A.510 and
8 adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.533, and
9 against the peace and dignity of the State of Washington.

DATED this 11th day of January, 2010.

TACOMA POLICE DEPARTMENT
WA02703

MARK LINDQUIST
Pierce County Prosecuting Attorney

ajm

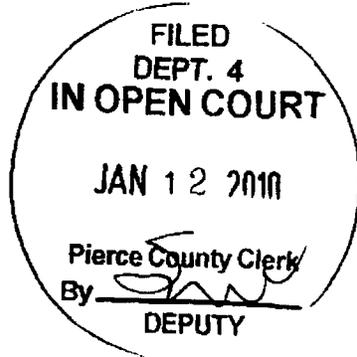
By: 
ANGELICA MCGAHA
Deputy Prosecuting Attorney
WSB#: 36673

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APPENDIX E



08-1-06144-4 33603446 STPATTY 01-20-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-06144-4

vs.

SHAMARR DERRICK PARKER,

PROSECUTOR'S STATEMENT
REGARDING AMENDED
INFORMATION

Defendant.

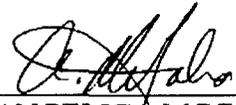
The State requests the Court to consider accepting a plea to the filing of an Amended Information pursuant to RCW 9.94A.431 for the following reasons: During the initial law enforcement investigation in 2006 for this, the victim, R.G., identified the defendant's cousin. Based on identification issues, the State elected not to file charges. Several years later the defendant is charged with kidnapping, rape, and robber in a separate incident, involving A.W., that is markedly similar to the incident involving R.G. Based on the similarities and new information obtained during the 2008 incident, the State filed charges for the incident involving R.G. During the defense interview of R.G. that occurred on Dec. 30, 2009, R.G. was unable to recall any specific details due to both the lapse of time and that she still suffers from post-traumatic stress disorder, among other mental health issues.

During the 2006 investigation a rape kit was done. However, there was no penile penetration because the defendant was unable to maintain an erection. The victim was not able to describe any instances of penetration that could have potentially left DNA. In conferring with

the crime lab, it is highly unlikely with the current technology that any DNA would be found.

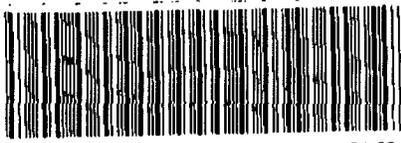
Also during the defense interview, R.G. was adamant that the person she identified during the photo montage in 2006 was the individual who raped her. Given the lack of physical evidence linking the defendant to the scene and the victim's inability to describe the incident, the State cannot proceed to trial on the 2006 incident. The State has notified R.G..

1/11/2010
Date

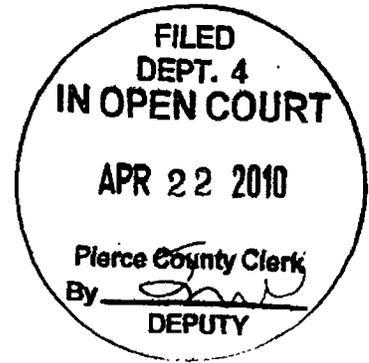

ANGELICA MCGAHA
Deputy Prosecuting Attorney
WSB # 36673

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APPENDIX F



08-1-06144-4 34175086 VRD 04-23-10



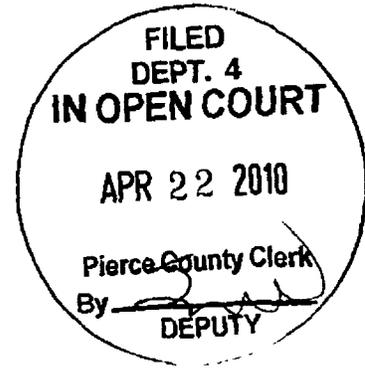
SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
SHAMARR DERRICK PARKER
Defendant.

CAUSE NO. 08-1-06144-4
VERDICT FORM – COUNT I

We, the jury, find the defendant Guilty (“Not Guilty” or
“Guilty”) of the crime of KIDNAPPING IN THE FIRST DEGREE as charged in Count
I.

Angela Kelatte
PRESIDING JUROR



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
SHAMARR DERRICK PARKER
Defendant.

CAUSE NO. 08-1-06144-4
INTERROGATORIES - COUNT I

We, the jury, answer the following questions submitted by the court:

QUESTION 1: Did you unanimously agree that the defendant intentionally abducted A.W. to facilitate the commission of the crime of rape?

ANSWER: NO
(Write "yes" or "no")

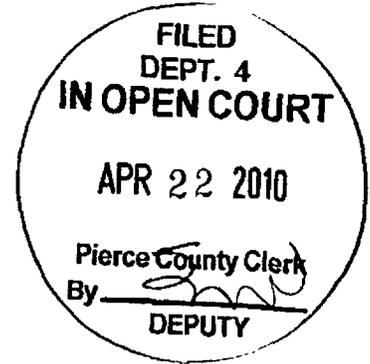
QUESTION 2: Did you unanimously agree that defendant intentionally abducted A.W. to facilitate the commission of the crime of robbery?

ANSWER: YES
(Write "yes" or "no")

Angela Delotto
PRESIDING JUROR



08-1-06144-4 34175098 SVRD 04-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

SHAMARR DERRICK PARKER

Defendant.

CAUSE NO. 08-1-06144-4

**SPECIAL VERDICT FORM
COUNT I - SEXUAL MOTIVATION**

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

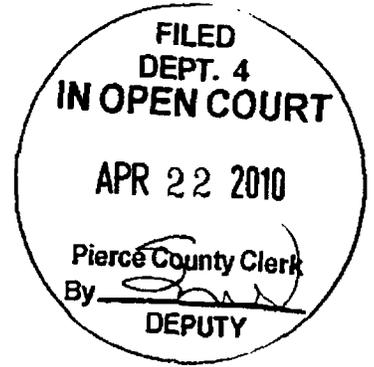
QUESTION: Was the defendant acting with "sexual motivation" at the time of the commission of the crime in Count I?

ANSWER: _____
(Write "yes" or "no")

PRESIDING JUROR



08-1-06144-4 34175099 SVRD 04-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

SHAMARR DERRICK PARKER

Defendant.

CAUSE NO. 08-1-06144-4

SPECIAL VERDICT FORM
COUNT I - DEADLY WEAPON

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

QUESTION: Was the defendant armed with a deadly weapon at the time of the
commission of the crime in Count I?

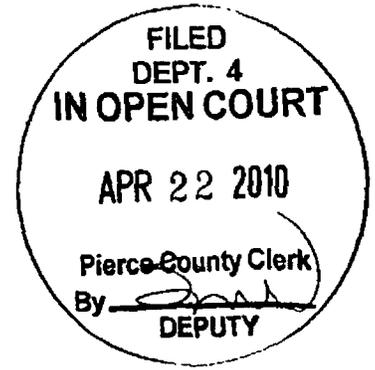
ANSWER: yes

(Write "yes" or "no")

[Signature]
PRESIDING JUROR



08-1-08144-4 34175101 VRD 04-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

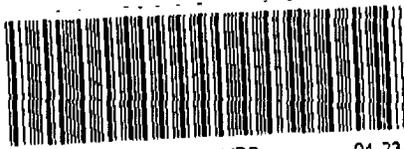
STATE OF WASHINGTON,
Plaintiff,
vs.
SHAMARR DERRICK PARKER
Defendant.

CAUSE NO. 08-1-06144-4

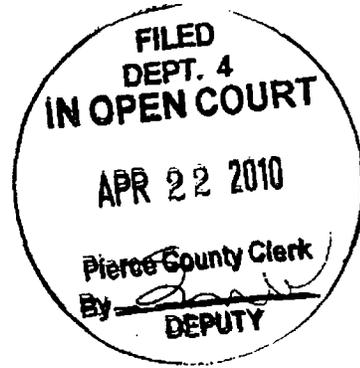
VERDICT FORM - COUNT II

We, the jury, find the defendant _____ (“Not Guilty” or
“Guilty”) of the crime of RAPE IN THE FIRST DEGREE as charged in Count II.

PRESIDING JUROR



08-1-06144-4 34175106 VRD 04-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
SHAMARR DERRICK PARKER
Defendant.

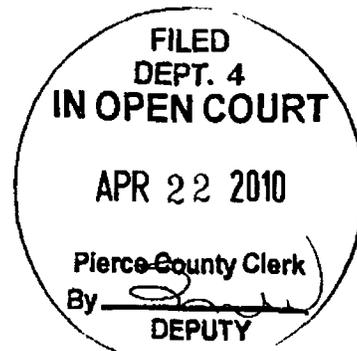
CAUSE NO. 08-1-06144-4
VERDICT FORM COUNT II - A

We, the jury, having found the defendant not guilty of the crime of Rape in the First Degree in Count II as charged, or being unable to unanimously agree as to that charge, find the defendant _____ ("Not Guilty" or "Guilty") of the lesser included crime of Rape in the Second Degree.

PRESIDING JUROR



08-1-06144-4 34175112 SVRD 04-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SHAMARR DERRICK PARKER

Defendant.

CAUSE NO. 08-1-06144-4

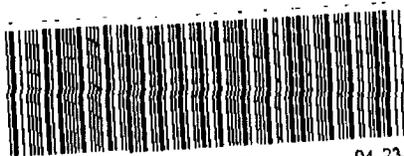
**SPECIAL VERDICT FORM
COUNT II – DEADLY WEAPON**

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

QUESTION: Was the defendant armed with a deadly weapon at the time of the commission of the crime in Count II?

ANSWER: _____
(Write "yes" or "no")

PRESIDING JUROR

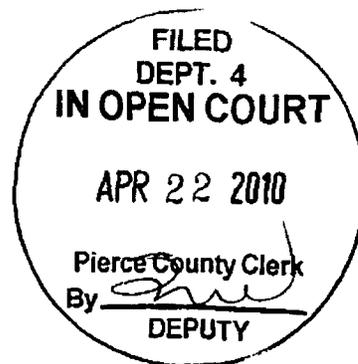


08-1-06144-4

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04-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SHAMARR DERRICK PARKER

Defendant.

CAUSE NO. 08-1-06144-4

INTERROGATORIES - COUNT II

We, the jury, answer the following questions submitted by the court:

QUESTION 1: Did you unanimously agree that the defendant threatened to use a deadly weapon or what appeared to be a deadly weapon during the commission of the crime of rape?

ANSWER: _____
(Write "yes" or "no")

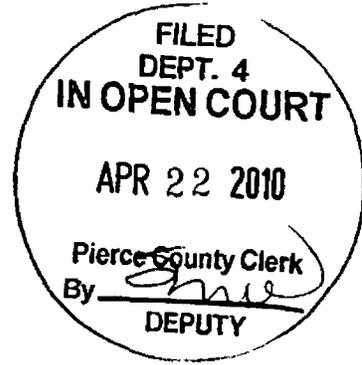
QUESTION 2: Did you unanimously agree that the defendant kidnapped A.W. during the commission of the crime of rape?

ANSWER: _____
(Write "yes" or "no")

PRESIDING JUROR



08-1-06144-4 34175128 VRD 04-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

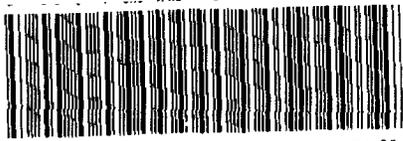
SHAMARR DERRICK PARKER
Defendant.

CAUSE NO. 08-1-06144-4

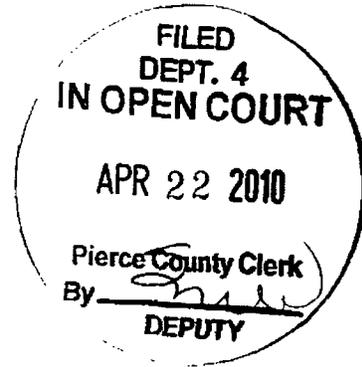
VERDICT FORM - COUNT III

We, the jury, find the defendant Guilty ("Not Guilty" or "Guilty") of the crime of ROBBERY IN THE FIRST DEGREE as charged in Count III.

Mingela Delatte
PRESIDING JUROR



08-1-06144-4 34175156 VRD 04-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

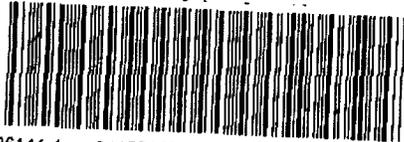
SHAMARR DERRICK PARKER
Defendant.

CAUSE NO. 08-1-06144-4

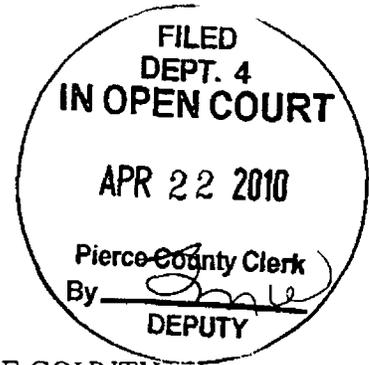
VERDICT FORM COUNT III - A

We, the jury, having found the defendant not guilty of the crime of Robbery in the First Degree in Count III as charged, or being unable to unanimously agree as to that charge, find the defendant _____ ("Not Guilty" or "Guilty") of the lesser included crime of Robbery in the Second Degree.

PRESIDING JUROR



08-1-06144-4 34175165 SVRD 04-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
SHAMARR DERRICK PARKER
Defendant.

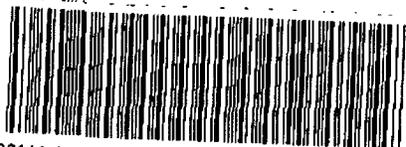
CAUSE NO. 08-1-06144-4
SPECIAL VERDICT FORM
COUNT III - DEADLY WEAPON

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

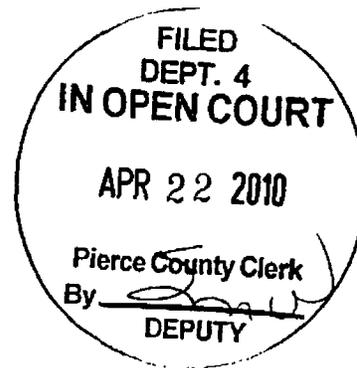
QUESTION: Was the defendant armed with a deadly weapon at the time of the commission of the crime in Count III?

ANSWER: Yes
(Write "yes" or "no")

Shirley DeLotto
PRESIDING JUROR



08-1-06144-4 34175176 INT 04-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SHAMARR DERRICK PARKER

Defendant.

CAUSE NO. 08-1-06144-4

INTERROGATORIES - COUNT III

We, the jury, answer the following questions submitted by the court:

QUESTION 1: Did you unanimously agree that the defendant was armed with a deadly weapon during the commission of the crime of robbery or in immediate flight therefrom?

ANSWER: no
(Write "yes" or "no")

QUESTION 2: Did you unanimously agree that the defendant displayed what appeared to be a firearm or deadly weapon during the commission of the crime of robbery or in immediate flight therefrom ?

ANSWER: yes
(Write "yes" or "no")

[Signature]
PRESIDING JUROR

APPENDIX G



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SHAMARR DERRICK PARKER,

Defendant.

CAUSE NO. 08-1-06144-4

ORDER DISMISSING COUNT II WITHOUT PREJUDICE FOLLOWING MISTRIAL

THIS MATTER came on for trial before the Honorable Bryan Chushcoff beginning the 1st day of April, 2010. The defendant was charged as follows: Count I: Kidnapping in the First Degree, Count II: Rape in the First Degree, and Count III: Robbery in the First Degree. All three counts were deadly weapon enhanced. Closing arguments concluded on April 13, 2010. The jury began deliberations on April 14, 2010. At approximately 3:45 pm on April 15, 2010, the jury sent out a note indicating it had reached a verdict as to two of the counts and inquired as to the appropriate procedure if it was unable to reach a verdict as to the remaining count. In the note, the jury did not indicate on which counts it had reached verdicts.

The defendant requested that the court inquire of the jury foreperson as to whether additional deliberations would result in a verdict on all counts. The court brought the jury into the courtroom and read WPIC 4.70 to the jury foreperson. The jury foreperson's response indicated

08-1-06144-4

additional time would not be helpful. The jury was then excused to return to the jury deliberation room. After consulting with the defendant, defense counsel requested that the court take the verdict. The State did not object to defense counsel's request. The court brought the jury into the courtroom to render its verdict. The jury found the defendant guilty of Count I - Kidnapping in the First Degree, deadly weapon enhanced, and Count III - Robbery in the First Degree, deadly weapon enhanced. The jury was hung on Count II - Rape in the First Degree. After taking the verdicts, the court declared a mistrial as to Count II - Rape in the First Degree.

THIS MATTER came on for sentencing before the Honorable Bryan Chushcoff on May 21, 2010. The State moves this court for an order dismissing Count II without prejudice, subject to further proceedings in this court, for the reason that the defendant has been sentenced on Count I and Count III to 246 months incarceration in the in the Department of Corrections. Given the prison sentence the defendant received, the State is electing not to utilize further resources on the remaining count at this time, subject to further proceedings in this court.

From the above findings of fact, the court hereby enters the following orders:

IT IS HEREBY ORDERED that the State's motion to dismiss Count II without prejudice is granted

This order was signed in open court in the presence of the defendant this 28 day of MAY May, 2010.

[Signature]
DEPT. 4
IN OPEN COURT
JUDGE BRYAN CHUSHCOFF
MAY 28 2010
Pierce County Clerk
By *[Signature]*
DEPUTY

Presented by:

[Signature]
ANGELICA McGAHA
Deputy Prosecuting Attorney
WSB #36673

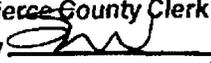
Approved as to form:

[Signature]
LESLIE TOLZIN
Attorney for Defendant
WSB #

APPENDIX H



08-1-06144-4 34396052 NACA 06-01-10

FILED
DEPT. 4
IN OPEN COURT
MAY 28 2010
Pierce County Clerk
By 
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON)

Plaintiff,)

vs.)

SHAMARR DERRICK PARKER,)

Defendant.)

NO. 08-1-06144-4

NOTICE OF APPEAL
TO COURT OF APPEALS
DIVISION II

Defendant seeks review by the Court of Appeals of the State of Washington,
Division II, of the judgement and sentence, and every part thereof, entered on May 14, 2010
in Pierce County Superior Court.

DATED this 21st day of May, 2010.

Respectfully submitted,

LESLIE E. TOLZIN, WSB# 20177
Attorney for Defendant

Attorney for Plaintiff: Angelica McGaha, WSB#
Pierce County Prosecuting Attorney

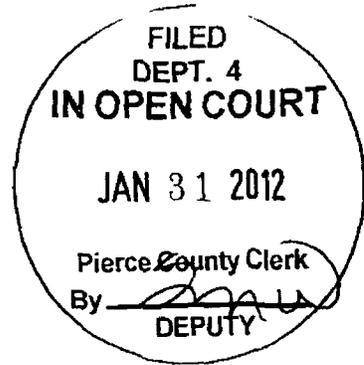
Name and Address of Defendant: Shamarr Parker
C/o Pierce County Correctional facility
905 Tacoma Ave. S.
Tacoma, WA 98405

LESLIE E. TOLZIN
ATTORNEY AT LAW
901 SOUTH 1st STREET, SUITE 201
TACOMA, WASHINGTON 98405
(253) 274-9441
Fax 272-9220

APPENDIX I



08-1-06144-4 37920965 CPOPN 02-01-12



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff

vs

PARKER, SHAMARR DERRICK,
Defendant

Cause No. 08-1-06144-4

UNPUBLISHED OPINION

FILED
COURT OF APPEALS
DIVISION II

12 JAN 31 AM 9:08
STATE OF WASHINGTON

BY _____
CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SHAMARR DERRICK PARKER,

Appellant.

No. 40793-1-II

UNPUBLISHED OPINION

ARMSTRONG, P.J. – Shamarr Derrick Parker appeals his first degree kidnapping conviction, arguing that the evidence was insufficient to support convictions of both first degree kidnapping and first degree robbery because the victim’s restraint during the kidnapping was incidental to the robbery. Finding sufficient evidence to support a separate kidnapping conviction, we affirm.

FACTS

In December 2008, T.M.¹ called 911 to report that her 17-year-old daughter A.W. had been raped at knifepoint. The State eventually charged Parker with first degree kidnapping while armed with a deadly weapon, first degree robbery while armed with a deadly weapon, and first degree rape while armed with a deadly weapon.

A.W. testified that she was waiting for a Tacoma bus to take her home when a brown car drove by. A heavy snow had fallen that day. Parker, the driver of the brown car, asked A.W. if she wanted a ride and pulled into a nearby parking lot. A.W. became nervous and began walking toward a different bus stop. When Parker drove by a second and third time, A.W. decided to cut through an alley.

¹ T.M. is referred to by her initials for the purpose of anonymity.

No. 40793-1-II

When A.W. did so, Parker drove into the alley, got out of his car, and grabbed her by the arm. A.W. testified that he held a knife to her throat and said he would not harm her if she kept quiet and cooperated. He pushed A.W. toward his car, tied her wrists behind her back with plastic bindings, and shoved her into the backseat so that she was lying on her side, facing the driver's seat.

A.W. testified that Parker drove for about a half hour to an open area without nearby buildings. Parker then untied her bindings and told her to remove her jacket. He went through A.W.'s jacket and purse, removing four small bags of marijuana and some cash. He again showed A.W. the knife and told her to cooperate in what was just a robbery. After searching through the rest of her things and inside her underwear for money, Parker forced A.W. to disrobe. She testified that he then engaged in vaginal intercourse while holding a knife to her throat, during which she stared at Mardi Gras beads hanging from the rearview mirror.

Afterward, Parker asked A.W. where she lived so he could drive her home, and she gave him an address several blocks away. As he tried to leave, he got temporarily stuck in the snow. When Parker dropped A.W. off, she wrote his license plate number on her hand and walked home.

Within hours, officers found the license plate on a brown sedan with beads hanging from its rear view mirror. After the car's impoundment, they found a knife under the front passenger seat; an expert testified that Parker's fingerprint was on the knife. Officers also found plastic cords in the driver's side door pocket. A.W. identified Parker from a photo montage but was not sure whether the knife from the car was the one he had used. She denied knowing Parker or meeting him to sell drugs.

No. 40793-1-II

Parker's ex-girlfriend testified that he arrived at her home on the night of the robbery, looking disheveled. He told her he had used a knife to take marijuana from a girl. She denied telling a detective that she deleted A.W.'s first name and number from Parker's phone.

Detective Brad Graham eventually took A.W. to an open lot outside the city limits where officers believed the robbery had occurred. A.W. became upset when they arrived and said, "This is it." 7 Report of Proceedings at 657. The property owner testified that after a large snowstorm in December 2008, he had noticed tire marks in the snow that looked as though a car had been stuck before gaining traction. A.W. also identified the alley in which Parker grabbed her.

Testing of sperm samples gathered from A.W. revealed the source to be her boyfriend but not Parker. A.W. admitted spending the morning and afternoon before the robbery with her boyfriend.

Officers established that the brown sedan belonged to Parker's mother and that Parker sometimes drove it. After Parker's mother testified that she used the knife under the seat to scrape ice from the windshield, Detective Graham testified that Mrs. Parker could not explain the knife's location in her car when he interviewed her.

The defense argued during closing that A.W. made up the rape charge because she was mad at Parker for taking her drugs and because she had violated her curfew and wanted to deflect her mother's anger. During deliberations, the jury informed the court that it could not reach a unanimous verdict on all counts. The jury convicted Parker of first degree kidnapping and first degree robbery and found by special verdict that he was armed with a deadly weapon during the commission of each offense. The jury could not reach a unanimous verdict on the rape charge,

No. 40793-1-II

however, and the trial court declared a mistrial on that count. Parker received concurrent high-end sentences on each conviction and consecutive 24-month deadly weapon enhancements, for a total confinement period of 246 months.

Parker now challenges the sufficiency of the evidence supporting his first degree kidnapping conviction.

ANALYSIS

Parker argues that the evidence was insufficient to support his kidnapping conviction because the jury rejected A.W.'s rape allegation and her remaining testimony described only a restraint that was incidental to the robbery.

Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction. *State v. Elmore*, 154 Wn. App. 885, 901, 228 P.3d 760, review denied, 169 Wn.2d 1018, 238 P.3d 502 (2010); see also *State v. Brett*, 126 Wn.2d 136, 166, 892 P.2d 29 (1995) (incidental restraint and movement of victim during course of another crime which has no independent purpose or injury is insufficient to establish kidnapping). Whether the kidnapping is incidental to the commission of another crime is a fact-specific determination. *Elmore*, 154 Wn. App. at 901. "Where there are sufficient facts to support a charge of two crimes, we cannot say as a matter of law that one charge is incidental to the other." *State v. Stirgus*, 21 Wn. App. 627, 631, 586 P.2d 532 (1978).

To convict Parker of first degree robbery, the jury had to find (1) a taking of personal property, (2) from the person or in another's presence, (3) by the use or threatened use of force, violence or fear of injury, (4) such force or fear being used to obtain or retain the property, (5) while armed with or displaying what appeared to be a deadly weapon. See *State v. Allen*, 94

No. 40793-1-II

Wn.2d 860, 863, 621 P.2d 143 (1980), *abrogated on other grounds by State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983). The kidnapping charge required the jury to find an abduction to facilitate the commission of rape or robbery, with that abduction involving (1) a restriction of a person's movement, (2) without consent, by (3) secreting or holding the victim in a place where she is not likely to be found, or by (4) using or threatening to use deadly force. *See Allen*, 94 Wn.2d at 863.

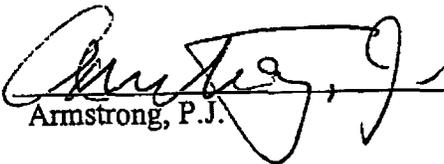
The kidnapping began when Parker grabbed A.W., tied her wrists, and forced her to lie down in the back of his car. A.W. testified that Parker drove about a half hour before stopping, and the location she identified as the scene of the robbery was outside the city limits. Once there, Parker untied A.W.'s wrists before robbing her at knifepoint.

Parker argues that the jury discredited A.W.'s testimony when it rejected her rape allegation and that the remaining evidence supports a robbery but no independent restraint or abduction. We disagree that the jury's inability to agree on the rape charge constituted a complete rejection of A.W.'s testimony. Physical evidence supported her testimony that she was bound, secreted, and driven to a remote location before the robbery began. *See State v. Korum*, 120 Wn. App. 686, 707, 86 P.3d 166 (2004) (restraint was solely to facilitate robberies and not kidnapping partly because victims were not transported from their homes to remote spot where they were not likely to be found), *reversed in part on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006); *Stirgus*, 21 Wn. App. at 631 (trial court correctly decided that transporting victim for a distance of four to six miles raised a jury question as to whether the kidnapping was incidental to a rape).

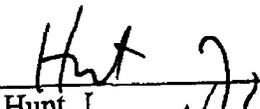
Here, the kidnapping and robbery occurred as separate events even though close in time. During the kidnapping, Parker used force to abduct A.W. by secreting her where she was not likely to be found; i.e., lying in the back seat of a car, and by taking her to a remote location. During the subsequent robbery, Parker used the threat of additional force to obtain A.W.'s personal property. *See Allen*, 94 Wn.2d at 863-64 (describing separate robbery and kidnapping under similar facts). Parker's movement and restraint of A.W. during her kidnapping was not incidental to her subsequent robbery, and the evidence was sufficient to support a separate kidnapping conviction.

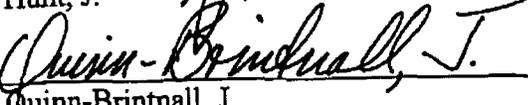
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


Armstrong, P.J.

We concur:


Hunt, J.


Quinn-Brintnall, J.

APPENDIX J

July 17 2012 1:56 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEVIN L. STOK
COUNTY CLERK
NO: 08-1-06144-4

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

SHAMARR DERRICK PARKER,
Appellant.

No. 40793-1-II

MANDATE

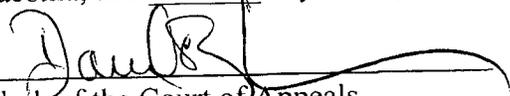
Pierce County Cause No.
08-1-06144-4

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on January 31, 2012 became the decision terminating review of this court of the above entitled case on June 5, 2012. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

Judgment Creditor: State of Washington \$7.34
Judgment Creditor: AIDF \$5773.26
Judgment Debtor: Shamarr Derrick Parker \$5780.60

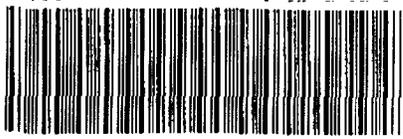
IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this _____ day of July, 2012.


Clerk of the Court of Appeals,
State of Washington, Div. II



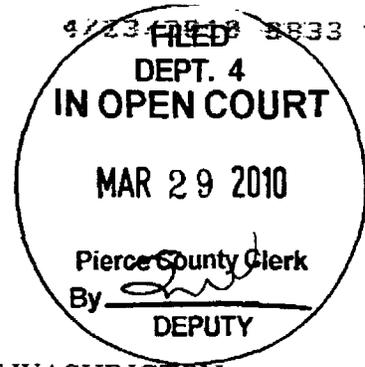
Cc: Hon. Bryan E. Chushcoff
Kathleen Proctor
Rebecca Wold Bouchey

APPENDIX K



08-1-06144-4 34174879 TRMM 04-23-10

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON

Plaintiff,

vs.

SHAMARR DERRICK PARKER,

Defendant.

NO. 08-1-06144-4

DEFENDANT'S TRIAL
MEMORANDUM

FACTS

A.W. has alleged that she was raped by the Defendant. On December 19, 2008, A.W. lied to her parents about where she was going, it was a Friday and A.W. was skipping school to be with her 22-years old boy friend-Justin Lyons. A.W. had to lie to her parents because they did not approve of her relationship with Mr. Lyons. During the day A.W. had engaged in sexual intercourse with Mr. Lyons and smoked marijuana. By her own admission A.W. smokes pot quite often. By quite often she means every day. (Later in the day, when interviewed by police and hospital staff, A.W. denied consensual intercourse or using any drugs on that day) Coming home late after curfew, knowing her mother would be angry, and seeing the anger in her mother's face as she was getting ready to scream, A.W. told her mother she had been raped.

At the time A.W. was a Junior at Lincoln High School. She dropped out of Lincoln High School shortly after these allegations. She began her high school career at Mt. Tahoma High School, where she was suspended. Rather than accept the suspension, Ms. Weeks transferred Lincoln High School. She started her sophomore year at Clover Park High

DEFENDANT'S TRIAL
MEMORANDUM - 1

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ORIGINAL

1 School but transferred to Curtis. She attended Curtis High School until she was expelled for
2 carrying a knife and drug paraphernalia (including a tin campus used to hold marijuana) on
3 campus. After being expelled from Curtis, A.W. stayed out of school for a while. Later, she
4 tried summer school at Wilson High School, but did not get any credit because she skipped
5 too many classes. The following year she returned to Lincoln High School where she started
6 skipping and her grades began to slip because she didn't feel like doing her work and
7 gradually she just stopped going. The following summer she tried the Oakland alternative
8 high school but dropped out of that program as well. Currently she is not in school, nor is
9 she working.

10 Although she no steady source of income, and admits too heavy (daily) use of
11 marijuana, A.W. claims she never needs to pay for it. She does admit selling marijuana at
12 Mt. Tahoma High School. She also admits to often shoplifting beer and other items.

13 During her initial interview with the police she denied knowing her assailant,
14 speaking to him, or giving him any personal information about herself. She also claimed
15 that prior to being assaulted he robbed her of ten dollars. The police eventually developed
16 information that led them to suspect the defendant. Detective Graham contacted Mr. Parker
17 by phone and they spoke on December 26, 2008. According to Detective Graham's report
18 Mr. Parker stated: he's been in the system before and he knows that these cases can take a
19 long time to deal with and he didn't know if he wanted to talk to a lawyer before talking to
20 me. Parker indicated that he was concerned because the girl A.W. had not called him. Mr.
21 Parker stated he would call back in 45 minutes. Mr. Parker never called back. Mr. Parker
22 was eventually arrested on January 7, 2009. When he was advised of his Miranda warnings,
23 Mr. Parker refused to waive his rights or make any statements. He was not

24 After his conversation with Mr. Parker, Det. Graham then called A.W. and stressed
25 to her how important it was that he know the absolute truth about everything, and A.W.

1 assured him she had indeed been completely truthful with him. Det. Graham then asked
2 A.W. if she had given her assailant her name. A.W. admitted she had. She denied giving
3 her assailant her phone number, and that she had never met her assailant prior to the alleged
4 assault. She denied having a cell phone.

5 A DNA profile was developed from sperm found on the vaginal swabs taken from
6 A.W.. That profile was compared to Mr. Parker. It was not his DNA. After receiving the
7 report indicating that the sperm was not Mr. Parker's, Detective Graham contacted A.W..
8 This time A.W. admitted having sexual intercourse with her boyfriend Justin Lyons prior to
9 the alleged assault. Because her mother did not approve of the relationship and if her
10 mother knew she had been with Justin earlier that evening, she would have gotten in trouble,
11 she lied and told her mother and the police she had been with a friend before the assault.

12 II. DEFENDANT'S REPLY TO THE STATE'S MOTIONS IN LIMINE

- 13 1. Exclude Witnesses: No objection.
- 14 2. Reference to Punishment: Defense counsel is aware of the jury instruction commonly
15 read regarding punishment. Defense counsel does not intend to argue the fact of
16 punishment, except insofar as it may tend to make the jury careful, as instructed by the court.
- 17 3. Character Evidence: Rules of Evidence apply to all parties in a trial. To the extent
18 that character evidence is offered by either party the court should apply the proper rules of
19 evidence and make an appropriate ruling.
- 20 4. Other Suspect Evidence: If the State wishes to exclude specific evidence it should
21 make a motion to do so, and advise the court and Defense what evidence it is seeking to
22 exclude.
- 23 5. Prior Convictions: Admissibility of Juvenile adjudications is governed by ER 609(d).
24 A.W. could not recall the outcome of arrests. The State has not provided the defense with a
25

1 copy of her criminal record as required CrR 4.7(a)(1)(vi).

2 6. Reputation Evidence: Again, if the State has specific evidence it wishes to exclude,
3 it should indicate what that evidence is.

4 7. Self-serving Hearsay: There is not court rule regarding self-serving hearsay.
5 Statements are either hearsay, or they are not. If the statement is hearsay, the court should
6 exclude the statement unless the statement may be admitted under one of enumerated
7 exceptions to hearsay. If the State is seeking to suppress a specific statement, the State
8 should identify the Statement and why they believe it is hearsay. The defendant will then
9 respond as is necessary.

10 8. Prior Bad Acts of A.W.: The defendant has a constitutional right to cross examine his
11 accuser and to present evidence as to her credibility and motive to lie.

12 The sixth amendment to the United States Constitution states:

13 In all criminal prosecutions, the accused shall enjoy the right to a speedy and
14 public trial, by an impartial jury of the State and district wherein the crime
15 shall have been committed, which district shall have been previously
16 ascertained by law, and to be informed of the nature and cause of the
17 accusation; **to be confronted with the witnesses against him**; to have
18 compulsory process for obtaining witnesses in his favor, and to have the
19 Assistance of Counsel for his defense. (Emphasis added.)

20 The main purpose of the confrontation clause is to secure for the defendant the right of cross
21 examination. Davis v. Alaska, 415 U.S. 308, 315-316, 94 S.Ct. 1105, 39 L.Ed.2d 347
22 (1974).

23 Cross-examination is the principal means by which the believability of a
24 witness and the truth of his testimony are tested. Subject always to the broad
25 discretion of a trial judge to preclude repetitive and unduly harassing
26 interrogation, the cross-examiner is not only permitted to delve into the
27 witness' story to test the witness' perceptions and memory, but the
28 cross-examiner has traditionally been allowed to impeach, i.e., discredit, the
witness. One way of discrediting the witness is to introduce evidence of a
prior criminal conviction of that witness. By so doing the cross-examiner
intends to afford the jury a basis to infer that the witness' character is such
that he would be less likely than the average trustworthy citizen to be truthful
in his testimony. The introduction of evidence of a prior crime is thus a

1 general attack on the credibility of the witness. A more particular attack on
 2 the witness' credibility is effected by means of cross-examination directed
 3 toward revealing possible biases, prejudices, or ulterior motives of the
 4 witness as they may relate directly to issues or personalities in the case at
 5 hand. The partiality of a witness is subject to exploration at trial, and is
 6 'always relevant as discrediting the witness and affecting the weight of his
 7 testimony.' 3A J. Wigmore, Evidence s 940, p. 775 (Chadbourn rev. 1970).
 8 We have recognized that the exposure of a witness' motivation in testifying is
 9 a proper and important function of the constitutionally protected right of
 10 cross-examination. *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400,
 11 1413, 3 L.Ed.2d 1377 (1959).
 12 Id.

13 "Where a case stands or falls on the jury's belief or disbelief of essentially one
 14 witness, that witness' credibility or motive must be subject to close scrutiny." *State v.*
 15 *Roberts*, 25 Wn.App. 830, 611 P.2d 1297 (1980), citing to: *State v. Wilder*, 4 Wn.App. 850,
 16 486 P.2d 319 (1971); *State v. Peterson*, 2 Wn.App. 464, 469 P.2d 980 (1970); *State v. Tate*,
 17 2 Wn.App. 241, 469 P.2d 999 (1970). See also *State v. Wilson*, 70 Wn.2d 638, 424 P.2d 650
 18 (1991). The charges against Mr. Parker stand or fall on credibility of A.W. and that
 19 credibility must be subject to close scrutiny.

20 (A) ***THE DEFENDANT SHOULD BE GIVEN WIDE LATITUDE TO CROSS***
 21 ***EXAMINE A.W. WITH SPECIFIC INCIDENCES OF DISHONEST***
 22 ***CONDUCT***

23 ER 608(b) states:

24 Specific instances of the conduct of a witness, for the purpose of
 25 attacking or supporting the witness' credibility, other than conviction of
 26 crime as provided in rule 609, may not be proved by extrinsic evidence. They
 27 may, however, in the discretion of the court, if probative of truthfulness or
 28 untruthfulness, be inquired into on cross-examination of the witness (1)
 concerning the witness' character for truthfulness or untruthfulness, or (2)
 concerning the character for truthfulness or untruthfulness of another witness
 as to which character the witness being cross-examined has testified.

Conduct involving fraud or deception is generally allowed. In *State v. Wilson*, 60 Wn.App.
 887, 808 P.2d 754 (1991) the trial court properly allowed the State to impeach a witness
 with her own admission that she had once made a false statement under oath. A.W. has

DEFENDANT'S TRIAL
 MEMORANDUM - 5

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1 admitted stealing and lying. And those admissions are probative of A.W.'s truthfulness or
2 untruthfulness and the court should allow the defense to impeach her.

3 In State v. McSorley, 128 Wn.App. 598, 116 P.3d 431 (2005) the court ruled that the
4 defendant should have been allowed to cross examine a witness to show a willingness to
5 mislead strangers. A.W.'s habit of skipping school also is probative of her willingness to
6 mislead other people. It is inherent in the act of skipping class that the student misleads the
7 parents into believing they are indeed attending class, at least until they caught. Even after
8 this alleged assault A.W. continued to skip class. Her skipping class is probative of her
9 character for truthfulness or untruthfulness.

10 **(B) ER 404(B) APPLIES ONLY TO SUBSTANTIVE EVIDENCE, NOT**
11 **IMPEACHMENT EVIDENCE.**

12 ER 404(b) states:

13 Evidence of other crimes, wrongs, or acts is not admissible to prove the
14 character of a person in order to show action in conformity therewith. It may,
15 however, be admissible for other purposes, such as proof of motive,
16 opportunity, intent, preparation, plan, knowledge, identity, or absence of
17 mistake or accident.

18 Generally, the purpose of Er 404(b) is to prevent the state from arguing that the
19 defendant is a dangerous person or a "criminal type and therefore likely to have committed
20 the crime charged. Tegland, Courtroom Handbook on Washington Evidence, 2008-2009
21 Edition, p. 235. Yet the State is relying upon ER 404(b) to attempt to exclude evidence of
22 the bad acts of a witness offered for purposes of impeachment, yet the State's reliance is
23 misplaced, ER 404(b) governs the admissibility of substantive evidence only, and cannot be
24 used to exclude evidence offered for purposes of witness impeachment State v. Laureano,
25 101 Wn.2d 745, 766, 682 P.2d 889 (1984), *overruled in part by* State v. Brown, 113 Wn.2d
26 520, 782 P.2d 1013, 787 P.2d 906 (1989); Wilson, 60 Wn.App. 887, at 891-892.

27 Impeachment evidence affects the witness's credibility but is not probative of the

28 DEFENDANT'S TRIAL
MEMORANDUM - 6

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1 substantive facts encompassed by the evidence. State v. Johnson, 40 Wn.App. 371, 377, 699
 2 P.2d 221 (1985). Substantive evidence is offered to prove a fact in issue, as opposed to
 3 evidence given for the purpose of discrediting a witness Black's Law Dictionary, 5th ed.
 4 1979. Testimony regarding A.W.'s behavior, her stealing, her lying, stealing, drug use, her
 5 claim that people just give her marijuana for free, on a daily basis, are all probative of
 6 credibility.

7 Any rule which prohibits a defendant from presenting a complete defense violates the
 8 defendants constitutional right to a fair trial, "(w)hether rooted directly in the Due Process
 9 Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation
 10 Clauses of the Sixth Amendment. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct.
 11 1727 (2006). In Holmes the U.S. Supreme Court struck down a rule prohibiting the
 12 defendant from presenting evidence that another suspect may have committed the offence.
 13 Here the State intends to admit evidence that Mr. Parker admitted that he robbed A.W.
 14 However, as part of that complete story the allegations' A.W. was selling marijuana must be
 15 admitted. The fact that A.W. has admitted to selling marijuana in the past, using marijuana
 16 the day of the alleged assault, and, that Mr. Parker had indeed stolen some marijuana from
 17 her (in contradiction to her to her original statements to the police, and her promise to Det.
 18 Graham that she had been completely truthful).

19 Applying ER 4040(b) to the impeachment evidence to exclude testimony that A.W.
 20 was lying, stealing, and skipping classes, using marijuana on a daily basis and occasionally
 21 selling marijuana prevents the defense from presenting a complete defense, and allows the
 22 State to paint an incomplete, inaccurate portrait of A.W. as a sweet innocent child with no
 23 motive to lie.

24 9. Admission of the 911 tape. There are foundational requirements for the admission of a
 25 911 tape. The court should not rule on the admission of evidence until the foundation for

1 that evidence has been established. The Defendant is not stipulating to the admission of the
2 911 tape.

3
4 **III. DEFENDANT'S MOTION IN LIMNE**

5 1. Assertion of his constitutional rights: On December 26, 2008, the defendant spoke to
6 Detective Graham. At that time the Defendant indicated he was not sure if he should speak
7 to Graham without consulting an attorney. After that conversation, Mr. Parker did not call
8 Det. Graham back. The exercise of a constitutional right is not admissible. State v. Lewis,
9 130 Wn.2d 700, 927 P.2d 235 (1996); State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996)
10 The fact that the defendant asserted his right or contemplated asserting his right has no
11 relevance and must be suppressed.

12 2. ER 404(b): The statement by the defendant that he had "been in the system before"
13 has no relevance and should be excluded. Likewise, the fact that the defendant has been
14 charged by the state with another sexual assault, along with any reference to the facts of that
15 case, which the State has dismissed for insufficient evidence should also be excluded.

16 **CONCLUSION**

17 For the reasons set forth above the Court should grant the defendant's motions in
18 limne, and allow the defendant the right to adequately present his defense and confront the
19 witnesses against him.

20 Dated this 29 day of March, 2010.

21
22 
23 _____
24 Leslie E. Tolzin, WSB# 20177
25 Attorney for the Defendant, Shamarr Parker.

APPENDIX L



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Leslie Eugene Tolzin

Contact Member

Contact this member

WSBA Number: 20177
Admit Date: 11/15/1990
Member Status: Active
Public/Mailing Address: 901 S I St Ste 201
 Tacoma, WA 98405-4593
 United States
Phone: (253) 274-9441
Fax: (253) 272-9220
TDD:
Email: les@tolzinlaw.com
Website:

Practice Information

[Back to top](#)

Firm or Employer: None Specified
Firm Size: Solo in Shared Office or Suite
Practice Areas: Criminal
Other Languages Spoken: None Specified

Liability Insurance

[Back to top](#)

Private Practice: Yes
Has Insurance? No - [Click for more info](#)
Last Updated: 01/02/2013

Committees

[Back to top](#)

Member of these committees/boards/panels:
 None

Disciplinary History

No Public Disciplinary History

Only active members of the Washington State Bar Association, and others as authorized by law, may practice law in Washington

The discipline search function may or may not reveal all disciplinary action relating to a lawyer. The discipline information accessed is a summary and not the official decision in the case. For more complete information, call 206-727-8207.

[Disclaimer +](#)

APPENDIX M

June 10 2010 3:21 PM

KEVIN STOCK
COUNTY CLERK
NO: 08-1-06144-4



Washington State Court of Appeals Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

June 10, 2010

Kathleen Proctor
Pierce County Prosecuting Atty. Office
930 Tacoma Ave S Rm. 946
Tacoma, WA, 98402-2171

Rebecca Wold Bouchey
Attorney at Law
PO Box 1401
Mercer Island, WA, 98040-1401

CASE #: 40793-1-II

State of Washington, Respondent v. Shamarr Derrick Parker, Appellant

**Re: Court of Appeals No. 40793-1-II. USE THIS NUMBER ON ALL FILINGS
Pierce County No. 08-1-06144-4
Case Manager: Christina**

THIS WILL BE THE ONLY NOTICE THAT YOU WILL RECEIVE CONCERNING DUE DATES. A DOCUMENT FILED PRIOR TO OR AFTER ITS DUE DATE MAY AFFECT ALL SUBSEQUENT DUE DATES. THE PARTIES ARE RESPONSIBLE FOR DETERMINING ADJUSTED DUE DATES BY REVIEWING THE APPROPRIATE RULES OF APPELLATE PROCEDURE.

Counsel:

We have received a Notice of Appeal filed **May 28, 2010**. **Counsel was appointed on June 10, 2010**. The time periods for compliance with the Rules of Appellate Procedure are as follows:

1. The designation of clerk's papers should be filed with the trial court by **July 12, 2010**. A copy of the designation should be served and must be filed with the appellate court. RAP 9.6(a).
2. The statement of arrangements should be filed in this court by **July 12, 2010** and a copy served on all parties and all named court reporters. **The statement should include the name of each court reporter, the hearing dates and the trial court judge. Revised RAP 9.2(a)**. If counsel does not intend to file a verbatim report of proceedings, counsel should so notify this court, in writing, by that date. RAP 9.2(a).
3. The verbatim report of proceedings must be filed with the trial court clerk within 60 days after the statement of arrangements is filed. Revised RAP 9.5(a).
4. Appellant's opening brief, accompanied by proof of service, should be filed in this court 45 days after the filing of the report of proceedings with the trial court. RAP 10.2(a) & (h).

Service should include the defendant in a criminal appeal. Pursuant to RAP 10.2(a), if the record on review does not include a report of proceedings, the brief of appellant should be filed within 45 days after the party seeking review has filed the designation of clerk's papers and exhibits at the trial court.

5. Respondent's opening brief, accompanied by proof of service, should be filed in this court 60 days after service of the appellant's brief to all parties. RAP. 10.2(b) or (c)

In the Court of Appeals, Division Two, a party may file a Motion on the Merits in lieu of the respondent's brief. The motion is due, however, the same date as the respondent's brief. If the motion is denied, respondent's brief is due 30 days after the date of the order. See RAP 18.14 for motion procedure.

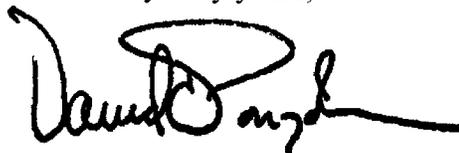
6. Appellant's statement of additional grounds for review, if any, is due 30 days after the clerk notifies appellant of the substance of RAP 10.10. If appellant requests a copy of the verbatim report of proceedings from appellant's counsel, it should be mailed by counsel and proof of mailing filed in this court within 10 days after the request is received. RAP 10.10(e); Division II General Order No. 03-01.

7. A reply brief, if any, is due 30 days after service of respondent's brief. RAP 10.2(d).

8. Pursuant to RAP 5.3(c), the attorney for defendant must provide the court clerk with the defendant's address and keep the clerk advised of any changes in defendant's address.

Counsel's failure to timely comply with the Rules of Appellate Procedure may result in the imposition of sanctions pursuant to RAP 18.9. Any request for an extension of time must be made by way of written motion and affidavit showing good cause accompanied by proof of service. The request for additional time should specify a definite date. The granting of an extension request will change all subsequent due dates.

Very truly yours,

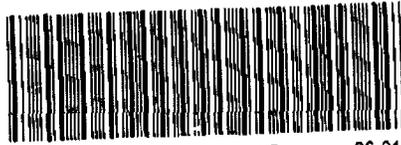
A handwritten signature in black ink, appearing to read "David C. Ponzoha". The signature is fluid and cursive, with a large loop at the top and a long horizontal stroke at the bottom.

David C. Ponzoha,
Court Clerk

DCP:cm

cc: Pierce County Clerk

APPENDIX N



08-1-06144-4 34386190 ORIND 06-01-10

DEPT. 4
IN OPEN COURT
MAY 28 2010
Pierce County Clerk
By [Signature]
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON

Plaintiff,

vs.

SHAMARR DERRICK PARKER,

Defendant.

NO. 08-1-06144-4

ORDER OF INDIGENCY

THIS MATTER having come on regularly before the undersigned judge upon the motion of the defendant for an order authorizing the defendant to seek review at public expense and the Court having considered the records and files herein, now therefore,

IT IS HEREBY ORDERED that the defendant shall be allowed

(x) To appeal from the certain judgment and sentence and every part thereof in the above-entitled cause, entered on May 21, 2010, at public expense -- to include the following:

- 1.) All filing fees;
- 2.) Attorney fees and the cost of preparation of briefs (including copying costs);
- 3.) Costs of preparation of the statement of facts which shall contain the verbatim report of the following proceedings, all of which are necessary for review:

<input checked="" type="checkbox"/>	Pre-Trial Hearings	Date(s) Judge	<u>all as indicated by appellate counsel</u>
-------------------------------------	--------------------	------------------	--

<input checked="" type="checkbox"/>	Trial (all proceedings except voir dire and opening statements)	Date(s) Judge	<u>all Chuscraft</u>
-------------------------------------	---	------------------	--------------------------

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()	Hearing on Post-Trial Motions	Date(s)	_____
		Judge	_____
<input checked="" type="checkbox"/>	Sentencing Hearing	Date(s)	<u>5-28-10</u>
		Judge	<u>Chuschoff</u>
()	Other	Date(s)	_____
		Judge	_____

4.) Cost of a copy of the above record for the joint use of defendant's counsel and the prosecuting attorney; and

5.) Costs of the preparation of necessary clerk's papers.

IT IS FURTHER ORDERED that counsel on appeal, or his/her representative, is authorized to remove the clerk's file from the Clerk's Office for the purpose of reproducing clerk's papers and designating the record for review.

AND IT IS FURTHER ORDERED that trial counsel is allowed to withdraw and that counsel on appeal be appointed by the Court of Appeals pursuant to RAP 15.2. Payment for expenses of this appointment is authorized under contract with the Office of Public Defense.

DONE IN OPEN COURT this 28 day of May, 2010.

Bryan Chuschoff
JUDGE BRYAN CHUSCHOFF

Presented by:

Leslie E. Tolzin
LESLIE E. TOLZIN, WSBA# 20177
Attorney for Defendant



LESLIE E. TOLZIN
ATTORNEY AT LAW
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APPENDIX O

In re the Personal Restraint of Shamarr Parker, No. _____

STATEMENT OF FINANCES:

1. I do do not _____ ask the court to file this without making me pay the filing fee because I am so poor and cannot pay the fee.

2. I have \$ 0 in my prison or institution account.
(NOTE: you must complete #2 of this statement even if the information is contained on the prison account summary you submit)

3. I am _____ am not employed. My salary or wages amount of \$ 0 a month. My employer is none

4. During the past 12 months I did _____ did not get any money from a business, profession or other form of self-employment. (please identify type of self-employment here none) and the total income I received was \$ 0

5. During the past 12 months I:

I did _____ did not receive any rent payments, if so, the total I received was \$ 0

I did _____ did not receive any interest. If so, the total I received was \$ 0

I did _____ did not receive any dividends. If so, the total I received was \$ 0

I did _____ did not receive any other money. If so, the total I received was \$ 0

I do _____ do not have any cash except as said in question 2 of this statement of finances. If so the total amount I have is \$ 0

I do _____ do not have any savings or checking accounts. If so, the total amount in all accounts is \$ 0

I do _____ do not own stocks, bonds or notes. If so, their total value is: \$ 0

6. List all real estate and other property or things of value that belong to you or in which you have an interest. Tell what each item or property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing that you or your family need:

ITEMS	VALUE
<u>none</u>	<u>\$0</u>

7. I am _____ am not X married. If I am married, my wife or husband's name and address is: _____

8. All of the persons who need me to support them are listed below:

NAME & ADDRESS	RELATIONSHIP	AGE
<u>none, Do to my incarceration i am unable to support anyone. Before my incarceration</u>		
<u>marcella Brooks, Shamara Parker.</u>		
<u>family</u>	<u>- mom, daughter</u>	<u>- 57, 9</u>

9. All the bills I owe are listed here:

Name & Address of Creditor	Amount Owed
<u>Lfo's, cost of incarceration, child support</u>	<u>unlimited</u>

I hereby declare under penalty of perjury under the laws of the State of Washington that this Declaration of my finances is true and correct to the best of my ability. I am also attaching a copy of my DOC statement of account, dated within the last 20 days.

DATED this 26 day of June, 2013.

Shamarr Parker
Petitioner Shamarr Parker

Signed at Coyote Ridge (name of facility)

Location: Connell, Washington
(city)

APPENDIX P

06/25/2013

Department of Corrections

PAGE: 01 OF 01

MJZWICKY

COYOTE RIDGE CORRECTIONS CENTER

OIRPLRAR

10.2.1.18

**PLRA IN FORMA PAUPERIS STATUS REPORT
FOR DEFINED PERIOD 11/30/2012 TO 05/31/2013**

DOC# :	0000752439	NAME :	PARKER SHAMARR	ADMIT DATE :	06/03/2010		
DOB :	07/21/1975			ADMIT TIME :	10:45		
	AVERAGE MONTHLY RECEIPTS		20% OF RECEIPTS		AVERAGE SPENDABLE BALANCE		20% OF SPENDABLE
	55.90		11.18		10.20		2.04

APPENDIX Q

FILED
10/20/07 11:31 AM '07
BY ca

NO. 40793-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SHAMARR DERRICK PARKER, Appellant.

APPELLANT'S BRIEF

Rebecca Wold Bouchey
WSBA #26081
Attorney for Appellant

P.O. Box 1401
Mercer Island, WA 98040
(206) 275-0551

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Mr. Parker of first degree kidnapping without evidence sufficient to convince a fair-minded jury of his guilt beyond a reasonable doubt.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is there sufficient evidence to support the kidnapping conviction where the jury specifically rejected the victim's testimony and the only testimony of "restraint" related to the victim's story of alleged rape, and described only incidental restraint?

III. SUMMARY OF THE ARGUMENT

This case arises from allegations of rape, which were rejected by the jury. Although the prosecution's witness, Ashley Weeks, testified that she was abducted and raped by Shamarr Parker, the jury ultimately did not believe her testimony and did not convict Mr. Parker of rape. From the beginning, Mr. Parker had admitted that he had committed theft by taking from Ms. Weeks her stash of marijuana. The jury accepted this concession and convicted Mr. Parker of first degree robbery. However,

the jury went further and convicted Mr. Parker of first degree kidnapping. Without Ms. Weeks' testimony, there is insufficient evidence of kidnapping in this case. The jury rejected Ms. Weeks testimony when it refused to return a guilty verdict on the charge of rape. Therefore, there is also insufficient evidence of first degree kidnapping in this case.

IV. STATEMENT OF THE CASE

On December 19, 2008, Tracy Miller called 9-1-1 to report that her then seventeen year old daughter, Ashley Weeks, had told her she had been raped. RP 94.

The story Ms. Weeks told was that she had been waiting at the bus stop when Mr. Parker drove by a couple of times. Ms. Weeks said she walked away, but met up with Mr. Parker in an alley, where she said he grabbed her, tied her hands and forced her into the back of the car. RP 181, 183-84. Then, Ms. Weeks said Mr. Parker drove through deep snow to an unknown remote location, where he went through her clothes, took money, and raped her. RP 189, 194. Ms. Weeks claimed that Mr. Parker had threatened her with a knife. RP 183. She said she had never met Mr. Parker before. RP 186. Ms. Weeks had written down the license number of the car, which she gave to the police. RP 200.

Ms. Weeks was taken to the hospital and a rape exam was performed. RP 372. Testing of the samples gathered from Ms. Weeks

during the rape exam established the presence of semen, but DNA testing established a match to Justin Lyons, not Shamarr Parker. RP 661.

Ms. Weeks admitted that she lied to police, hospital staff and her mother about several pertinent facts. On the day she said she was raped, Ms. Weeks had actually not been with girlfriends as she told her mother and police, but had spent the day with her boyfriend, having sex and smoking marijuana. RP 137, 172, 249. Jason Lyons, Ms. Weeks' boyfriend testified that he had dropped her off at a bus station in Puyallup, not ridden with her on the bus as she had initially told police her "friend" had done. RP 446. Ms. Weeks did not admit to police that she had sex with Mr. Lyons that day until she was confronted by the detective with DNA results showing the sperm recovered did not match Mr. Parker. RP 208, 328. Moreover, Ms. Weeks did not admit that she had possessed marijuana or that it had been stolen until confronted at the defense interview. RP 190, 208, 331. Even then, at first, Ms. Weeks said she only had two small bags. RP 332. At trial, she testified she had four bags of marijuana. RP 190, 332.

Mr. Parker told his ex-girlfriend, Dacia Birka, on December 19, 2008, that he took marijuana from a girl that night. RP 544. Ms. Birka told police about this conversation during an interview following Mr. Parker's arrest. RP 560. Mr. Parker told her that his cousin had bought

marijuana from the girl before. RP 556. So, he called her and arranged to buy from her. RP 557. They met up as arranged and she got in the car and gave him the marijuana. RP 557. Mr. Parker said he took “two zips.” RP 545. Then, he told her he was not going to pay and ordered her out of the car. RP 557. Mr. Parker said when she refused to leave the car, he threatened her with a knife to make her leave. RP 557. Ms. Birka told police that she looked through Mr. Parker’s cell phone and found an entry for a girl named Ashley and phone calls made to the number. RP 560, 695. Ms. Birka also told them that Mr. Parker decided he did not need to leave town because he did not think police would be too concerned about a case of “petty theft.” RP 697.

Police established that the car matching the license number belonged to Mr. Parker’s mother and that Mr. Parker frequently drove it. RP 481-82, 543. Police found a knife in the car, but Ms. Weeks could not say that it matched the knife she described as a “fillet knife” with a light wood handle. RP 315, 340, 493, 494, 656. The front seat of the car matched Ms. Weeks’ description—there were beads hanging from the rearview mirror. RP 496, 711. But, the back seat of the car contained a child seat that had signs of having been in place for some time. RP 534-35. Ms. Weeks had never mentioned a child seat in the back seat. RP 710.

If Ms. Weeks had been lying across the back seat as she had said, she would have been pushed up against the child seat. See RP 183-84, 736.

Police identified what they believed was the location of the rape. RP 259. Although Ms. Weeks could not say the route that was taken and remembered little detail about it, she told police this was the location of the rape. RP 259, 657. No evidence was found at that location that linked it to Mr. Parker. The property owner said they had problems frequently with strangers driving onto the property. RP 579.

At trial, Mr. Parker's counsel conceded that he was guilty of robbery, but argued that there was insufficient evidence of kidnapping or rape. RP 754, 757.

After two days of deliberation, the jury reached agreement on two of the three charges. The jury convicted Mr. Parker of first degree robbery and first degree kidnapping. RP 798-799. In specific interrogatories completed by the jury, it specifically rejected rape as the underlying motive for kidnapping, selecting robbery instead. RP 798. The jury returned a special verdict for a deadly weapon used in the kidnapping. RP 799. The jury also returned a deadly weapon special verdict for the robbery, but could only agree that it "appeared to be" a deadly weapon, and could not agree that it actually was a deadly weapon. RP 799-800.

At sentencing, the parties agreed on the offender score and sentencing range. RP 809-810, 817. They also agreed and the court found that the two convictions constituted the same criminal conduct. RP 817, 826-27, CP 98. The sentences were run concurrently with the two enhancements consecutive to the underlying sentence and each other. RP 826-27, CP 102.

This appeal timely follows.

V. ARGUMENT

ISSUE 1: IS THERE SUFFICIENT EVIDENCE TO SUPPORT THE KIDNAPPING CONVICTION WHERE THE JURY SPECIFICALLY REJECTED THE VICTIM'S TESTIMONY AND THE ONLY TESTIMONY OF "RESTRAINT" RELATED TO THE VICTIM'S STORY OF ALLEGED RAPE, AND DESCRIBED ONLY INCIDENTAL RESTRAINT?

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Mr. Parker was charged with violating RCW 9A.40.020(1)(b) and the jury was instructed that: "A person commits the crime of Kidnapping in the First Degree when he intentionally abducts another person with

intent to facilitate the commission of rape or robbery or flight thereafter.”

CP 58. The definition given to the jury for “abduct” was “to restrain a person by either secreting or holding the person in a place where that person is not likely to be found or using or threatening to use deadly force.” RP 60. The jury was told that “[r]estraint or restrain means to restrict another person’s movements without consent and without legal authority in a manner that interferes substantially with that person’s liberty.” RP 60.

This case is unique because it is obvious from the jury’s failure to reach a verdict on the rape charge that the jury did not believe Ms. Weeks’ testimony that she was raped. The problem is that Ms. Weeks’ testimony about being taken to another location is inextricably intertwined with her rape story—which was rejected by the jury. If the rape is rejected, then there is also insufficient evidence of kidnapping because without Ms. Weeks’ testimony, there is absolutely no evidence that she was restrained beyond what was incidental to the robbery.

Mr. Parker’s statements to Ms. Birka support the first degree robbery conviction, but there is nothing in these statements to support evidence of restraint or abduction. According to those statements, Ms. Weeks voluntarily got into Mr. Parker’s car to sell marijuana, but refused

to leave without being paid. Far from being restrained by force, Mr. Parker brandished the knife to get her to leave.

There was no physical evidence to support the claim of abduction or restraint. No evidence at the alleged scene of the rape (which was dismissed by the jury) linked Mr. Parker or his car to the location. To the contrary, the day of the alleged crime, the roads were treacherous from snow and it would have been difficult for Mr. Parker to have driven Ms. Weeks away from their meeting place and back.

Moreover, to the degree that the jury might have used Ms. Weeks' testimony of the transport to another location, rejected the rape, but believed that was where she was robbed, this is also insufficient to support an abduction finding because the restraint is merely incidental to the robbery.

“The mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish a kidnapping.” *State v. Brett*, 126 Wn.2d 136, 166 892 P.2d 29 (1995); *See also State v. Green*, 94 Wn.2d 216, 227, 616 P.2d 628 (1980) (kidnapping merges into first degree rape); *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948, 100 S.Ct. 2179, 64 L.Ed.2d 819 (1980) (kidnapping merges into first degree rape).

A case that is illustrative on the concept of incidental restraint is *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979), *overruled in part* by *State v. Sweet*, 138 Wn.2d 466, 476-79, 980 P.2d 1223 (1999). Although *Johnson* analyses “incidental restraint” in the since-overruled a merger analysis, courts have since applied this same analysis to a standard for finding sufficient evidence to support a kidnapping conviction. *State v. Green*, 94 Wash.2d 216, 225-28, 616 P.2d 628 (1980), applied what was then a new sufficient-evidence standard to hold that evidence of restraint (necessary to prove kidnapping) was insufficient under the facts of that case to prove kidnapping because that same restraint was incidental to an attempted rape. *Green* borrowed the “incidental restraint” concept from *Johnson* and incorporated this concept into a new standard for determining sufficiency of evidence on appeal. *Green*, 94 Wn.2d at 225-26.

In *Johnson*, two girls voluntarily went with Johnson to his home. 92 Wn.2d at 672. He summoned one girl to the bathroom where he declared his intention to rape her, held a knife to her neck, and bound her hands and mouth with adhesive tape. *Johnson*, 92 Wn.2d at 672. He then similarly restrained the other girl, and raped both victims. *Johnson*, 92 Wn.2d at 672-73. Johnson left to buy cigarettes, came back, and then took one of the girls to a wooded area where he raped her again. *Johnson*, 92 Wn.2d at 673. The *Johnson* Court found that the kidnapping was not

separate and distinct from, but was merely incidental to the rape. *Johnson*, 92 Wn.2d at 681.

Like *Johnson*, the alleged abduction in this case was merely incidental to the robbery. The jury found that Mr. Parker “abducted Ms. Weeks to facilitate the commission of the crime of robbery.” Supp. CP, Interrogatories, Count I. Because the jury did not believe that Ms. Weeks was raped, her remaining testimony amounts to this: she was forced into the car, taken to another location, robbed, and returned to her home. Thus any restraint was for the purpose of robbery and was ended when the robbery was complete. This testimony, if believed, is at best a description of “mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury.” She was taken to another location to rob her—the incidental restraint is not sufficient to support an independent charge of kidnapping.

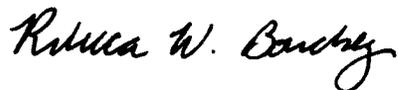
Although it is true that a court reviewing a claim of sufficiency does not delve into credibility, *State v. Mines*, 163 Wn.2d 387, 179 P.3d 835 (2008), in this case, the jury itself made the credibility determination when it rejected Ms. Weeks’ testimony that she was raped. Without testimony about the alleged rape, which is part and parcel of Ms. Weeks’ whole story of being abducted, there is not sufficient evidence to support a conviction for first degree kidnapping because there is no evidence of

abduction or restraint beyond that incidental to the robbery. Moreover, even if the court does give credence to Ms. Weeks' remaining testimony, the abduction and restraint she testified to was merely incidental to the robbery and therefore insufficient to support a separate kidnapping charge. For these reasons, the kidnapping conviction must be reversed.

VI. CONCLUSION

Without the discredited testimony of Ms. Weeks, there is no evidence in this case that she was abducted or restrained and therefore there is insufficient evidence of kidnapping in the first degree. Furthermore, Ms. Weeks' testimony is insufficient to establish sufficient evidence of abduction and restraint separate from what was incidental to the robbery charge. The kidnapping conviction must therefore be reversed.

DATED: December 17, 2010



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CERTIFICATE OF SERVICE

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APPENDIX R

NO. 40793-1-II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHAMARR DERRICK PARKER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan E. Chushcoff

No. 08-1-06144-4

Brief of Respondent

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

1. Whether the State adduced sufficient evidence to support the jury's verdict finding defendant guilty of kidnapping?

B. STATEMENT OF THE CASE.

1. Procedure

On December 31, 2008, the Pierce County Prosecuting Attorney's Office charged SHAMARR PARKER hereinafter "defendant," with one count of kidnapping in the first degree and one count of rape in the first degree. CP 122-123. On January 12, 2010, the State filed a second amended information adding one count of robbery in the first degree. CP 1-3.

The case was assigned to the Honorable Bryan Chushcoff for trial. The jury began hearing the evidence on April 8, 2010. 3RP 93.¹ Upon hearing the evidence and deliberating on it, the jury found defendant guilty of kidnapping in the first degree and robbery in the first degree. CP 124, 130. By special verdict, the jury found defendant was armed with a deadly weapon during the commission of the kidnapping and the robbery. CP 126, 132. The jury informed the court they could not reach a

¹ The Verbatim Report of Proceedings is contained in 11 volumes. The State will refer to the proceedings in the following manner: Volume 1 – 1RP; Volume 2 – 2RP; Volume 3 – 3RP; Volume 4 – 4RP; Volume 5 – 5RP; Volume 6 – 6RP; Volume 7 – 7RP; Volume 8 – 8RP; Volume 9 – 9RP; Volume 10 – 10RP; Volume 11 – 11RP.

unanimous decision as to the rape charge. CP 133. After taking the jury's verdict for the kidnapping and robbery, the court declared a mistrial as to the rape charge. CP 90-91. The court subsequently granted the State's motion to dismiss the rape charge without prejudice. *Id.*

The trial court sentenced defendant to 198 months for the kidnapping conviction, and 171 months for the robbery conviction, to run concurrent with each other. CP 95-111. Both sentences fell in the middle of defendant's standard range. *Id.* Defendant received an additional 24 months on each conviction for the deadly weapon enhancements to run consecutive to the kidnapping conviction and to each other. This resulted in a total confinement period of 246 months. *Id.* From entry of this judgment, defendant filed a timely notice of appeal. CP 112.

2. Facts

In the evening of December 19, 2008, A.W.² waited at a bus stop at 38th and Pacific Avenue while on her way home. 3RP 173. A heavy snowstorm had hit the area that day, delaying buses. RP 95, 171. While waiting for the bus, a small, four-door, brown car drove by A.W.. 3RP 175-176. As the car drove by, the driver yelled at A.W., asking if she wanted a ride. *Id.* After passing A.W., the car pulled into a nearby parking lot. 3RP 177. Nervous, A.W. began walking away from the car towards a different bus stop. *Id.* As A.W. walked away, the brown car

² Because the victim was a minor when the crime occurred, the State will refer to her by her initials, A.W.

circled around and drove by her again. 3RP 179. Once again, the driver yelled out at A.W. as he passed her. *Id.* A.W. became nervous and began walking faster. 3RP 180. She noticed the car a third time and decided to cut through an alley to avoid the driver. 3RP 181.

Shortly after entering the alley, A.W. heard a car driving towards her. 3RP 181. She soon recognized the car as the same brown car from earlier. *Id.* A.W. testified the driver, later identified as defendant, got out of the car and grabbed her by the arm. 3RP 182. Defendant had a knife in his free hand that he held to A.W.'s throat. 3RP 183.³ Defendant told A.W. he would not stab her if she cooperated. *Id.* He pushed A.W. towards his car and tied up her arms with plastic bindings. *Id.* He then pushed A.W. into the backseat of the vehicle. 3RP 184.

Defendant shut the car door, got into the driver's seat, and began driving. 3RP 185. A.W. testified defendant drove for an unknown amount of time before coming to a stop. *Id.* When the car finally stopped, defendant told A.W. to move to the front seat. *Id.* At that point, A.W. noticed several police cars and firetrucks in the area. 3RP 186. Because her hands were tied, A.W. could not open the door or window to call for help. 3RP 187. Defendant began driving again before coming to a stop for the second time. *Id.* A.W. described the area as open with no buildings nearby and covered in snow. 3RP 196-197.

³ At trial, A.W. was unable to positively identify a knife retrieved from defendant's car as the knife used during her kidnapping. RP 241.

At this point, defendant untied the bindings on A.W.'s arms and told A.W. to remove her jacket. 3RP 189. While A.W. took off the jacket, defendant went through her purse. *Id.* Defendant removed four one-gram bags of marijuana and money from A.W.'s purse. 3RP 190. Defendant then searched through her jacket. *Id.* While searching through A.W.'s items, defendant showed her the knife and said, "This is nothing but a robbery. Don't make me use this. Just cooperate." *Id.*

Defendant continued searching through A.W.'s items. 3RP 190. At one point, he asked her if she kept money in her bra or underwear. *Id.* Despite replying in the negative, A.W. testified defendant felt inside her bra and underwear for money. *Id.* Defendant then had A.W. remove her shoes, pants and underwear. 3RP 194.

A.W. testified defendant proceeded to engage in vaginal intercourse with her while holding a knife to her throat. 3RP 194.⁴ She testified that during the intercourse, she stared at Mardi Gras beads hanging from defendant's rearview mirror. *Id.*⁵

After the robbery and rape, defendant asked where A.W. lived where so he could drive her home. 3RP 196. According to A.W., defendant said he did not want to leave her at their current location and "the least he could do was give [A.W.] a ride home." 3RP 197. A.W. did

⁴ The trial judge declared a mistrial on the rape charge as the jury was unable to reach a unanimous verdict. CP 90-91.

⁵ At trial, A.W. identified Plaintiff's Exhibit No. 2 as the beads she saw hanging from defendant's rearview mirror. Plaintiff's Exhibit No. 2; RP 246.

not want to tell defendant where she actually lived. *Id.* Rather, she told him she lived on 56th and Puget Sound, approximately 15 to 20 blocks from her actual house. *Id.* As defendant began to drive away, his car got temporarily stuck in the snow. 3RP 198. Eventually defendant's car gained traction and he drove away from the area. *Id.*

Defendant dropped A.W. off a few blocks away from the requested intersection and said, "Maybe this will teach you not to walk around by yourself at night." 3RP 200. Defendant then left the area in his vehicle. *Id.* As defendant drove away, A.W. focused on his license plate number, found a pen, and wrote the number down on her hand. *Id.*; Plaintiff's Exhibit No. 30.

Based on the license plate number provided by A.W., the Tacoma Police Department located defendant within hours of the crime. 5RP 481, 483. Officer Eric Scripps testified he checked the license plate number against Department of Licensing records and found a vehicle registration and address matching the license plate number. 5RP 481. The number matched a vehicle registered to Marcella Brooks. 5RP 482. Marcella Brooks is defendant's mother. 6RP 542. Officer Scripps reported to the address matching the registration and saw a "brownish sedan" with beads hanging from the rearview mirror. 5RP 483. No one answered the door at the address. 5RP 484.

Due to the seriousness of the crime, officers at the scene impounded the car and towed it to Tacoma Police Department headquarters. 5RP 485. Officers obtained a search warrant for the vehicle and Lisa Rossi, a crime scene technician with Tacoma Police Department, searched the vehicle at headquarters. 5RP 492-493. Rossi testified that during the search she located a knife under the front passenger seat of the vehicle. 5RP 494. Rossi checked the knife for fingerprints and lifted latent prints from the knife's blade. 5RP 509-510. Timothy Taylor, a latent fingerprint examiner for Tacoma Police Department testified the prints lifted from the blade matched defendant's fingerprints. 6RP 595. In addition to the knife, Rossi testified she found plastic cords in the driver's side door pocket and plastic beads hanging from the rearview mirror. 5RP 495-496.

Dacia Birka testified she knew defendant since middle school and has a child with defendant. 6RP 542. Birka testified that on December 19, 2008, defendant showed up at her house looking disheveled. 6RP 543. Defendant told her he was looking for some easy money for Christmas so he took marijuana from a girl. 6RP 544. Defendant told Birka he had a knife while taking the marijuana. 6RP 545.

On January 10, 2009, A.W. accompanied Detective Graham to an open lot at 4200 Waller Road East, in Pierce County, where officers believed the robbery occurred. 4RP 259; 6RP 571, 656. Detective

Graham testified A.W. became emotional when she saw the property and said, "This is it." 7RP 657. Bart McMacken, the owner of the property testified he visited the property the day after a large snow storm in December 2008. 6RP 574. While at the property he noticed tire marks in the snow. *Id.* McMacken testified the marks looked as if a car had been stuck in the snow with the tires spinning out before gaining traction. 6RP 575. A.W. also identified for Detective Graham an alley between Fawcett and Tacoma Avenue where she believed defendant initially grabbed her. 4RP 261; 7RP 659.

A.W. denied ever meeting defendant before December 19, 2008. 3RP 202. She also denied meeting defendant on the day in question to sell him drugs. 3RP 261.

Defendant did not testify at trial. Defendant called his mother, Marcella Brooks, to testify on his behalf. 7RP 747. Brooks testified the knife found in the car belonged to her. 7RP 748. She further testified that she kept the knife in the car to scrape ice off her windshield. *Id.* Defendant called no other witnesses at trial.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF KIDNAPPING.

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, 489, 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 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. 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. As such, 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, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Defendant claims the jury did not have sufficient evidence to convict him of kidnapping. A person commits the crime of kidnapping in the first degree when he intentionally abducts another person with intent to facilitate the commission of rape or robbery or flight thereafter. CP 49-87 (Jury Instruction No. 7); *See also* RCW 9A.40.020. To convict the defendant of kidnapping, the jury had to find beyond a reasonable doubt that:

- 1) on or about December 19, 2008 defendant intentionally abducted A.W;
- 2) defendant abducted A.W. with intent to facilitate the commission of rape or robbery; and
- 3) any of these acts occurred in the State of Washington.

CP 49-87 (Jury Instruction No. 10). Defendant specifically challenges the sufficiency of the evidence proving defendant abducted and therefore restrained A.W. Brief of Appellant at 6. Additionally, defendant argues

that even if this court finds sufficient evidence to prove restraint occurred, any restraint used was merely incidental to the robbery. *Id.* at 8.

The court instructed the jury that “abduct” means to “restrain a person by either secreting or holding the person in a place where that person is not likely to be found or using or threatening to use deadly force. CP 49-87 (Jury Instruction No. 9). The court instructed the jury that “restraint” means to restrict another person’s movements without consent and without legal authority in a manner that interferes substantially with that person’s liberty. *Id.*

In the case at bar, the State adduced sufficient evidence to prove defendant abducted A.W. First, A.W. testified about several physical items which were subsequently recovered from defendant’s car that support the restraint element. Officers impounded defendant’s car within hours of A.W.’s abduction. 5RP 482.

A.W. told the jury, police officers, and hospital staff defendant tied her arms behind her using a plastic feeling cord. 3RP 184; 4RP 246; 5RP 389. Rossi testified she found a plastic cord in a driver’s side door pocket when executing a search warrant on defendant’s vehicle. 5RP 495. No evidence showed A.W. went anywhere near the driver’s side door. She therefore would not have known about the plastic cord in the door without having come in contact with the cord in some other way. That contact

occurred when defendant used the cord to tie up A.W.'s arms. A.W.'s testimony about having her arms tied with a plastic cord matches the physical evidence retrieved from the vehicle and supports a conclusion that defendant restrained A.W. by restricting her movements without consent. *See* CP 49-87 (Jury Instruction No. 9).

A.W. also testified she remembered Mardi Gras beads hanging from the rearview mirror of defendant's car. 3RP 195. Rossi and Officer Scripps testified they found plastic bead necklaces hanging from the rearview mirror of defendant's car. 5RP 483, 495. The final piece of physical evidence mentioned by A.W. was the knife defendant brandished when forcing A.W. into his car and when robbing her. 3RP 183, 190. Rossi found a knife below the front passenger seat of defendant's car. 5RP 494. Fingerprints lifted from the knife matched defendant. 6RP 595. Additionally, Birka testified defendant told her he used a knife while taking marijuana and money from A.W. 6RP 544-545. Defendant held the knife to A.W.'s throat and threatened A.W. by saying "Don't make me use [the knife]." 3RP 183, 190. A.W. testified she cooperated with defendant's demands because she did not want to give him any reason to use the knife against her. 3RP 191.

By holding the knife to A.W.'s throat, keeping the knife in A.W.'s sight, and threatening to use the knife against her, defendant threatened to

use deadly force as a way to get and keep A.W. in his car. Even ignoring evidence that defendant tied her arms behind her back, defendant's threatened use of deadly force to keep A.W. in his car supports a finding that defendant restrained A.W. See *State v. Medina*, 112 Wn. App. 40, 43, 48 P.3d 1005 (2002) (defendant restrained victim in car without use of ties or bindings); *State v. Mines*, 163 Wn.2d 387, 398, 179 P.3d 835 (2008) (defendants used verbal threats of deadly force to restrain victim in back of van).

Viewing this evidence in the light most favorable to the State, defendant tied A.W.'s arms behind her back using plastic cords. This restrained A.W.'s movements without A.W.'s consent. Defendant also brandished a knife and threatened deadly force against A.W. if A.W. did not comply with defendant's demands. These actions kept A.W. in the car against her will, thereby further restraining her movements. This evidence is sufficient to prove defendant restrained A.W.

In addition to the physical evidence of A.W.'s abduction presented at trial, the jury heard that A.W. identified the field where defendant robbed her as being a property at 4200 Waller Road East. 4RP 260; 7RP 656-657. A.W. testified defendant's vehicle initially got stuck in the snow when trying to leave the Waller Road property after her robbery. 6RP 575. The owner of the Waller Road property visited the property the day

after a large snow storm in December and saw tracks on the property indicating someone had driven onto the land and become stuck in the snow. 6RP 576, 582. While the owner could not remember the day of the large snow storm, he testified no other snowstorms hit the area between when he saw the tracks and when he spoke with a Tacoma Police Office detective.

Drawing all reasonable conclusions in favor of the State, this evidence shows defendant transported A.W. from the alley where she was abducted to the Waller Road property before robbing her. A.W. identified the Waller Road property as the site of the robbery. The owner confirmed the presence of a vehicle at the property the night of the snowstorm. By transporting A.W. to the property in his car, defendant further restricted A.W.'s ability to move freely.

Viewing all the evidence in the light most favorable to the State and drawing all inferences in favor of the State, the State adduced evidence showing defendant tied A.W.'s arms behind her back using a plastic cord, forced A.W. into his car, threatened A.W. with a knife, and transported A.W. to the Waller Road property. This evidence is sufficient

to prove defendant restrained A.W. and therefore to prove defendant kidnapped her.⁶

This evidence is also sufficient to prove the restraint used against A.W. was not incidental to committing the robbery. Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction. *State v. Elmore*, 154 Wn. App. 885, 901, 228 P.3d 760 (2010); *State v. Saunders*, 120 Wn. App. 800, 817-817, 86 P.3d 232 (2004). While incidental restraint is rooted in the merger doctrine, courts reviewing incidental restraint as it pertains to kidnapping make fact-specific determinations akin to a sufficiency of the evidence analysis. *Elmore*, 154 Wn. App. at 901.

In looking at the facts used to prove restraint, the court must view the totality of the circumstances. *Saunders* 120 Wn. App at 817; *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). Courts review “the facts and circumstances surrounding the crime and the nature of the acts and their

⁶ Defendant argues in his brief the jury rejected A.W.’s testimony about the rape and therefore determined A.W. was not credible. Brief of Appellant at 7, 10. This misconstrues what happened at the trial court. The jury did not find defendant not guilty of rape. Rather, the jury could not reach a unanimous decision. In not reaching a decision, the jury refused to say whether or not the State proved rape in the first degree beyond a reasonable doubt. This is not the same as a determination on the credibility of any witness. The jury clearly found A.W.’s testimony credible when they found defendant guilty of kidnapping and robbery. Furthermore, just because the jury could not reach a unanimous decision on whether a rape was *completed* does not mean the jury did not believe defendant had some sexual motivation when kidnapping defendant. A challenge to the sufficiency of the evidence accepts the State’s evidence as true and does not allow for reviewing courts to speculate as to what pieces of evidence the jury did or did not find credible.

relation to the crime.” *Saunders*, 120 Wn. App. at 818 (citing *State v. Harris*, 36 Wn. App. 746, 677 P.2d 202 (1984)). When the only evidence presented to the jury demonstrates that the restraint is merely incidental to completing another crime, the jury does not have sufficient evidence to convict a defendant of a separately charged kidnapping. *In re Bybee*, 142 Wn. App. 260, 175 P.3d 589 (2007).

In determining whether the facts and circumstances of a robbery and kidnapping sufficiently support the separately charged kidnapping, courts may consider 1) whether the restraint used was for the sole purpose of facilitating the robbery; 2) whether the duration of the restraint is substantially longer than the commission of the robbery; 3) whether the restrained victims are transported to another location; and 4) whether the restraint created a danger independent of the danger posed by the robbery. *Elmore*, 154 Wn. App. at 902; *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), *rev'd on other grounds by* 157 Wn.2d 614, 141 P.3d 13 (2006).

In defendant’s case, the State presented sufficient evidence proving the restraint used for the kidnapping was not incidental to the robbery. While the jury found the kidnapping facilitated the robbery, the restraint used in the kidnapping was above and beyond that used for the robbery,

and therefore sufficient to support an independent charge and conviction.

CP 117.

Defendant pulled up to A.W. in an alley, grabbed her, tied her arms behind her back, held a knife to her throat, and forced her into the backseat of his car. 3RP 182-184. He then drove from the alley to the Waller Road property in unincorporated Pierce County before untying the plastic bindings. 3RP 189, 196-197. Each of these acts occurred before defendant showed any intention of taking items from A.W. By tying up A.W. and then removing the bindings before robbing her, defendant used restraint beyond that used to ultimately rob her.

Other factors support the independent kidnapping conviction. Defendant restrained A.W. for an extended period of time, much longer than the time it took to take money and marijuana out of A.W.'s purse. Additionally, rather than robbing A.W. in the alley, he transported A.W. to the Waller Road property and then from the Waller Road property to Tacoma. The distance defendant transported A.W. went beyond the distance used in facilitating a typical robbery. Given the length of time defendant restrained A.W., the distance defendant transported A.W., and the use of bindings on A.W.'s arms before the robbery, the State presented sufficient evidence to prove the restraint used to kidnap A.W. was not incidental to the restraint used in the robbery.

Defendant compares his case to *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979), however *Johnson* is not applicable to the case at hand. Brief of Appellant at 9. *Johnson*, which has since been overruled in part by *State v. Sweet*, 138 Wn.2d 466, 908 P.2d 1223 (1999), looked at whether kidnapping and assault must merge with rape in the first degree, when restraint and use of force were elements that elevated the acts of sexual intercourse to rape in the first degree. *Johnson*, 92 Wn.2d at 681. The court held the restraint for the kidnapping and use of force in the assault were intertwined with the rape. *Id.* The court ruled further that:

[t]hey occurred almost contemporaneously in time and place. The sole purpose of the kidnapping and assault was to compel the victims' submission to acts of sexual intercourse. These crimes resulted in no injury independent of or greater than the injury of rape. Nevertheless, they were crimes for which, without the additional proof of rape, the defendant could have been convicted under RCW 9A.36.010 and 9A.40.020(1). But as we construe the legislative intent, when that proof was accepted by the jury, those crimes became merged in the completed crime of first-degree rape.

Id. In reaching this rule, the *Johnson* court relied on their interpretations of the rape statutes and merger statutes, making their decision one of statutory interpretation. They concluded that under the facts of that case, the legislature intended only one punishment for that type of scenario. *Id.*

In defendant's case, the State did not rely on the kidnapping to elevate the robbery charge from the second degree to the first degree. CP 1-3.⁷

Additionally, the analysis used in *Johnson* differs substantially from that which is undertaken by courts today in determining whether a kidnapping is merely incidental to another crime. For example, in *State v. Saunders*, this court held that when viewing the totality of the circumstances, evidence that Saunders handcuffed, shackled, and taped the victim's mouth shut before raping the victim indicated "restraint above and beyond that required or even typical in the commission of rape. Thus, there was sufficient evidence of kidnapping that was not merely incidental to the rape." *Saunders*, 120 Wn. App. at 818. Rather than looking at statutory interpretation, the *Saunders* court relied on the sufficiency of the evidence to support the independent charge. *Id.* *Saunders* is similar to the case at hand because defendant used restraint for an extended period of time that went above and beyond the restraint necessary or typical when merely stealing items out of a teenage girl's purse.

⁷ The court instructed the jury that to find defendant guilty of robbery in the first degree the State had to prove beyond a reasonable doubt that: 1) on or about December 19, 2008, the defendant unlawfully took personal property from the person or in the presence of another; 2) the defendant intended to commit theft of the property; 3) the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person; 4) the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and 5) in the commission of these acts or in immediate flight therefrom the defendant (a) was armed with a deadly weapon, or (b) displayed what appeared to be a firearm or other deadly weapon. CP 49-97 (Jury Instruction No. 24).

Defendant's case is also similar to *State v. Allen*, 94 Wn.2d 860, 621 P.2d 143 (1980), *abrogated on other grounds by State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983). In *Allen*, the co-defendants pointed a rifle at the employee of a convenience store and told him it was a "hold up." *Allen*, 94 Wn.2d at 861. The co-defendants then demanded that the victim get into their car. *Id.* Once inside the car, the co-defendants ordered the victim to tell them how to open the store's cash register. *Id.* After taking items from the cash register, the co-defendants drove away, keeping the victim in the back seat of the vehicle with the rifle pointed at him. *Id.* After driving three blocks, the co-defendants told the victim to get out of the car. *Id.* The Washington Supreme Court found the kidnapping was not incidental to the robbery because the robbery had come to an end before the kidnapping began. *Id.* at 864.

In defendant's case at hand, the order of the robbery and kidnapping were reversed compared to *Allen*, but the fact remains that like *Allen*, defendant completed two independent crimes. Defendant tied up A.W., drove her around town, and then untied her before making any attempt to rob her. 3RP 183, 189-190. Had the restraint used in the kidnapping been merely incidental to the robbery, it is reasonable to expect defendant would have robbed A.W. before removing the plastic ties from her arms. Rather, the evidence shows the initial restraint used

against A.W. was for the sole purpose of getting A.W. into defendant's vehicle and transporting her to a different location.

Viewing the totality of the circumstances, the restraint used to kidnap A.W. was not incidental to the restraint used in the robbery. Accepting the State's evidence as true, and viewing the evidence in the light most favorable to the State, the jury had sufficient evidence and was within their rights to find defendant kidnapped A.W..

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the judgment and sentence below.

DATED: March 21, 2011

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Amanda Kunzi
Rule 9 Legal Intern

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.

3-21-11 Theresa Ka
Date Signature

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