

NO. 63352-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MUSE ALI MOHAMUD,

Appellant

APPELLANT'S BRIEF

Aric S. Bomszyk, WSBA #38020
BAROKAS MARTIN & TOMLINSON
1422 Bellevue Avenue
Seattle, WA 98122
Telephone: (206) 621-1871
Facsimile: (206) 621-9907

FILED
STATE OF WASHINGTON
2009 DEC 29 AM 11:36

ORIGINAL

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE CASE	2
ASSIGNMENT OF ERROR	17
ISSUES PERTAINING TO ASSIGNMENT OF ERROR	17
ARGUMENT	18
I. IT WAS AN ABUSE OF DISCRETION TO RULE IN FAVOR OF THE STATE, OVER MR. MOHAMUD'S OPPOSITION, SUCH THAT THE TRIAL WAS ALLOWED TO BE CONTINUED BEYOND THE AGREED TRIAL EXPIRATION DATE.	18
II. THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S PERFORMANCE AT MR. MOHAMUD TRIAL FELL BELOW A MINIMUM OBJECTIVE LEVEL OF REASONABLE ATTORNEY CONDUCT AND PREJUDICED MR. MOHAMED.	19
III IT WAS AN ABUSE OF DISCRETION TO RULE THAT THE ASSAULT AND KIDNAPPING WERE NOT PART OF THE SAME CRIMINAL CONDUCT	27
CONCLUSION	36

Cases

<u>State v. Gray</u> , 64 Wash.2d 979, 983 395 P.2d 490 (1964)	25
<u>State v. Babich</u> , 68 Wash.App. 438, 443-44, 842 P.2d 1053 (1993).....	23
<u>State v. Baldwin</u> , 63 Wash.App. 303, 306-07, 818 P.2d 1116 (1991).....	35
<u>State v. Barnes</u> , 58 Wash.App. 465, 471, 794 P.2d 52 (1990)	19
<u>State v. Bobenhouse</u> , 143 Wash.App. 315, 330, 177 P.3d 209 (2008).....	29, 30
<u>State v. Borg</u> , 145 Wash.2d 329, 337, 36 P.3d 546 (2001)	30
<u>State v. Calle</u> , 125 Wash.2d 769, 781-82, 888 P.2d 155 (1995).....	30
<u>State v. Denton</u> , 58 Wash.App. 251, 256, 792 P.2d 537 (1990).....	23
<u>State v. Dunaway</u> , 109 Wash.2d 207, 743 P.2d 1237 (1987)	36, 37, 38
<u>State v. Haddock</u> , 141 Wash.2d 103, 110, 3 P.3d 733 (2000).....	29
<u>State v. Hernandez</u> 95 Wash.App. 480, 485, 976 P.2d 165 (1999)	30
<u>State v. Horton</u> , 136 Wash.App. 29, 36, 146 P.3d 1227 (2006)	20, 21, 22
<u>State v. Longuskie</u> , 59 Wash.App. 838, 801 P.2d 1004 (1990).....	36
<u>State v. Lopez</u> , 107 Wash.App. 270, 275, 27 P.3d 237 (2001)	20
<u>State v. Mitchell</u> , 56 Wash.App. 610, 614. 784 P.2d 568 (1990).....	26
<u>State v. Nitsch</u> 100 Wash.App. 512, 523, 997 P.2d 1000 (2000)	31
<u>State v. Perez-Mejia</u> , 134 Wash.App. 907, 916, 143 P.3d 838 (2006).....	28
<u>State v. Releford</u> , 148 Wash.App. 478, 200 P.3d 729 (2009).....	20
<u>State v. Saunders</u> , 120 Wash.App. 800, 824, 86 P.3d 232 (2004).....	35
<u>State v. Taylor</u> , 90 Wash.App. 312, 950 P.2d 526 (1998).....	32, 33, 36
<u>State v. Thach</u> , 126 Wash.App. 297, 316, 106 P.3d 782 (2005)	27
<u>State v. Woolfolk</u> , 95 Wash.App. 541, 547, 977 P.2d 1 (1999)	27
<u>U.S.C.A. Const.Amend. 6</u>	19

Statutes

RCW 9.94A.589	14
RCW 9.94A.589(1)(a)	29, 30
RCW 9A.36.021(1)(g)	1
RCW 9A.40.020(1)(c)	1
RCW 9A.40.040	1

Rules

CrR 3.3.....	18
ER 613(b).....	22
Washington Rule of Professional Conduct 3.7(a)	22

Introduction

On December 5, 2009, over the defendant, Mr. Muse Ali Mohamud's objection, King County Superior Court Judge Cheryl Carey allowed Mr. Mohamud's trial to be continued.

Two months later, on the eve of trial, by way of amended information, Washington State charged Mr. Muse Mohamud, with the crimes of Felony Harassment in violation of RCW 9A.46.020(1)(2) ("Felony Harassment"), Assault in the Second Degree-Strangulation ("Assault") in violation of RCW 9A.36.021(1)(g), Kidnapping in the First Degree ("Kidnapping") in violation of RCW 9A.40.020(1)(c) and Unlawful Imprisonment ("Imprisonment") in violation of RCW 9A.40.040.

The State alleged that Mr. Mohamud perpetrated these crimes against Ms. Khadra Jama on the night and early morning of July 23, 2009 and July 24, 2009. At trial, a jury convicted Mr. Mohamud of Assault, Kidnapping and Imprisonment. The jury acquitted Mr. Mohamud of the Felony Harassment charge.

Mr. Mohamud received inadequate assistance of counsel at his trial in that his trial counsel, Mr. Peter Geisness ("Trial Counsel"). Trial Counsel failed to properly impeach Ms. Jama and, instead, put himself in the untenable position where he was not acting as a lawyer, but as a witness. Furthermore, Trial Counsel failed to object where competent

defense counsel would have made objections and failed to exclude evidence where competent would have moved to exclude evidence. Additionally, Trial Counsel wholly failed to address the most salient, and potent, impeachment evidence which would have significantly diminished Ms. Jama's credibility.¹

At sentencing, Mr. Mohamud argued that the Assault conviction and Kidnapping Conviction were part of same course of criminal conduct. The Court did not agree sentenced Mr. Mohamud with an offender score of "2," instead of "0," and to a term of 72 months of confinement.

Mr. Mohamud has always maintained his innocence of the crimes charged.

Statement of the Case

On or about July 28, 2008, Mr. Mohamud was charged with Felony Harassment and Assault. CP 1 On October 17, 2008, the parties agreed that the trial expiration date was December 19, 2008 and set trial for December 10, 2008. CP 17 On December 5, 2008, Mr. Mohamud refused to agree to a continuance. CP 28 Mr. Mohamud had been in custody the entire time. CP 24 One of the reasons given for the extension

¹ Trial Counsel wholly failed to present certain impeachment evidence to Ms. Jama or Detective Jeffery Spong. Thus, certain impeachment evidence may not be party of the official record and not subject to appeal. Appellate counsel plans to file a separate personal restraint petition on behalf of Mr. Mohamud shortly. (It is estimated that this will be filed by January 6, 2009. The personal restraint petition could not be filed at the same immediate time as this appeal because of unforeseen difficulties and the desire to avoid multiple filings of personal restraint petitions for Mr. Mohamud.) Appellate counsel plans to consolidate this appeal with the personal restraint petition to globally address the cumulatively prejudicial affect of the ineffective assistance of counsel.

was that prosecutor was on vacation. CP 28 The prosecutor who represented that he was on vacation was Hugh Barber.² Id. Because Mr. Mohamud exercised his right to go to trial, the State amended the information to add the charges of Kidnapping and Imprisonment. CP 35, 43.

Trial was held two month later where the jury heard the following evidence.

Ms. Jama moved to Washington from Ohio in September 2007. RP 53 Ms. Jama lived with her aunt. RP 54 For unclear reasons, Ms. Jama left her aunt's house. RP 54 It is also unclear when she left her aunt's house. At trial, she stated she left in June 2009 and lived transiently, without a permanent residence. RP 54 -55 Trial Counsel attempted to impeach her with a conflicting statement. RP 98 Regardless, Ms. Jama had planned to return to Ohio on July 23, 2009. RP 55

In July 22, 2008, the day before the incident, Ms. Jama testified that she left the last house she was staying in because she was getting ready to return to Ohio. RP 56 A friend, YaYa called her, so she decided to stay with him that final night. Id. YaYa lived with Mr. Mohamud and Mr. Mohamud's uncle. RP 57 The first time she met Mr. Mohamud, was when she arrived at the house. RP 133 Apparently, this night was uneventful and Ms. Jama went to sleep at 3:00 a.m. Id.

² The personal restraint petition will confirm this conclusively as well as present other evidence to as to why the trial was continued over Mr. Mohamud's objection.

Ms. Jama woke up that next day to find out she wouldn't be leaving that day, but a few days later. RP 57 Almost immediately upon awakening, Ms. Jama began drinking. RP 137 She was drinking with Mr. Mohamud. RP 59, 65-66 Ms. Jama and Mr. Mohamud were drinking hard liquor, malt alcohol beverages and beer. RP 137-40 Though it is difficult to follow the exact sequence of events, it is clear that Ms. Jama drank a large quantity of alcohol. Id.

Mr. Mohamud, Ms. Jama, Yaya left the house where they were drinking. RP 59 They all got into a car driven by another individual. Id. Ms. Jama testified that they were selling drugs from the car and made multiple stops. RP 60, 145-146

At one point, Ms. Jama had to urinate and asked the driver to find a place where she could do so. RP 61 Ms. Jama testified that this upset Mr. Mohamud, because, she claimed, that he believed this was "wasting his beer." RP 150 Ms. Jama testified that Mr. Mohamud began to choke her because he was so upset. RP 61, 153

Ms. Jama testified that she tried to defend herself by hitting Mr. Mohamud with a bottle. RP 62 By doing so she broke his tooth. RP 63 This caused Mr. Mohamud to resume choking her. Id.

Ms. Jama testified that the other people in the car told Mr. Mohamud to stop choking her. RP 63 Ms. Jama testifies that one of the other persons in the car stated "We're going to go to a place that we can kick it at a house," RP 63, 156 Kicking it means drinking, talking,

relaxing. RP 167 Ms. Jama testified that even after this suggestion, Mr. Mohamud continued to choke her. RP 158

Ms. Jama then testified that they arrived at an apartment. RP 64 Ms. Jama testified that she was dragged into the house against her will. Id. Ms. Jama also testified that she was choked before she got into the apartment. RP 158 This conflicted with the testimony of another witness, Ali Noor, who briefly saw the parties exit the car and head to the apartment. RP 120, 127

Ms. Jama testified that in the Apartment

“[The Defendant] is taking me to the back room, started hitting me with the bottle, choking me, and I’m begging him “Please stop,” and he was like “I’m not going to stop,” you know. He just keeping hitting me. And I asked Yahya and the other boy, “Please help me.” And they was like, “It’s not us.” And he just keep hitting me and choking me, screaming. RP 67

Mr. Jama continued to describe a continuous beating. RP 73-75 She also describes her being choked quite extensively:

Q. Okay. Let me bring you back to the bathroom. So you’re in the bathroom and he’s choking you. You’re gasping for air. Does Mr. Mohamud sometimes use two hands on your neck?

A. One hand.

Q. Always one hand?

A. Uh-huh

Q. Never two hands?

A. It was just like two fingers, only one hand. It's not two hands.

Q. So he was using two fingers, you say?

A. Choking real hard.

RP 167-68

In addition, she said that Mr. Mohamud was speaking to her in both Somali and English and telling her that she was going to “die like that tonight.” RP 74 The police finally arrived. RP 75

After the police arrived, Ms. Jama was transported to the hospital. RP 79. She was still drunk or tipsy at the hospital. RP 79 Ms. Jama denied that she reported to various health care workers that she had been sexually assaulted. RP 178 She denied that she told anybody at the hospital that four people assaulted her. RP 178

However, Ms. Alexis Miller, a social worker at Harborview Hospital, testified that Ms. Jama told her that Ms. Jama was assaulted by four men with bottles and fists. RP 243 Ms. Miller also testified that Ms. Jama told her that four males attempted to sexually assault her. RP 244 Ms. Miller testified that Ms. Jama had alcohol on her breath. RP 245 Ms. Tammy Morrill, a licensed clinical social worker at Harborview Hospital Emergency Room, testified that Ms. Jama told her that she had been assaulted by four men. RP 260

Ms. Jama was released from the hospital that morning; She flew back to Ohio that week. RP 85-86.

On cross examination, Trial Counsel elicited the fact that he had spoke to Ms. Jama on the phone, the week prior (the “Telephonic Interview”) RP 96 Mr. Geisness elicited that it was him, Ms. Jama, and the trial prosecutor on the phone during the Telephonic Interview in a “three-way” call. RP 97 There is no indication that anyone else was on the line during this time.³ RP 97

As aforementioned, on direct examination, Ms. Jama testified that there was a period of time from when her aunt kicked her out of the house to July 22, 2008 that she was transient. RP . 54-55 However, Trial Counsel attempted to impeach Ms. Jama by alleging that, during the Telephonic Interview, Ms. Jama told him that her aunt had kicked her out of the house on July 22, 2008. RP 97 Ms. Jama denied that she ever told Trial Counsel this. RP 98 Mr. Geisness did not produce a separate witness under oath, or a tape recording, to impeach Mr. Jama. Id. Instead, Mr. Geisness relayed the facts of his own conversation with her. Id.

Ms. Jama testified that both Yaya and Haji Yusuf had picked her up on July 22, 2008. RP 109 Trial Counsel attempted to impeach Ms. Jama by stating that, during the Telephonic Interview, Ms. Jama told him that only Haji Yusuf picked her up, and not Yaya. Id. Ms. Jama denied that she ever told Trial Counsel this. RP 109 Trial Counsel did not

³ It is anticipated that the personal restraint petition will address this in a conclusive fashion.

produce a separate witness under oath, or a tape recording, to impeach Mr. Jama. Id. Instead, Trial Counsel relayed the facts of his own conversation with her. Id.

Ms. Jama's version of events, while she was drinking that afternoon, conflicted with what she said during the Telephonic Interview.⁴ RP 137-139. Trial Counsel did not produce a separate witness under oath, or a tape recording, to impeach Mr. Jama. Id. Instead, Trial Counsel relayed the facts of his own conversation with her. Id.

⁴ Q: Okay. When we spoke last week, you said at around one o'clock, you were drinking Hennessy and Heineken an Tilt and that you got—you had a couple of drinks, a couple of shots of Henny, a couple of mixed Henny and Coca Cola. And that you stopped drinking about 4:00 p.m.

Does that sound right?

A: No. We drink Hennessey, me and MJ. And then MJ uncle told him, "Go buy me some food." So we went to Somali restaurant and got food. And then he bought me a Tilt and a Joose and he buy himself a Tilt and a Joose.

Q: And then tell me if this is correct or not: You said you stopped drinking about 4:00 p.m. and that you and Mr. Mohamud then left and were gone for two hours. And during that time your were gone, you went to the bank where Mr. Mohamud cashed a check, you went to the corner store where he bought a T-shirt and cigarettes, you went to the Somali restaurant where he got food for his uncle and for everybody else.

A: I already told you. That's not correct. I already told you that answer.

Q: Okay. So let me just clarify. What you told me last week in terms of the sequence of events of what happened at the apartment by Sea-Tac at one o'clock and at two o'clock—I'm sorry, one o'clock and four o'clock is incorrect is what you're saying today?

A: It's incorrect yeah.

Q: Okay. And now you're saying that the—what you're telling us now as opposed to what you said last week when I spoke to you on the phone with Mr. Doyle on the phone is that at one o'clock you all left to go to the store and drop Yahya off at a friend's house; is that correct?

A: Yeah. We dropped Yahya off. Then [the defendant] went to the bank. He got some money. After that, he went to a corner store. And then he bought a drink. And we came back into the house and we started drinking the Hennessy. Then his uncle tell him to buy me some food. So we went to the Somali restaurant. And [the defendant] asked me do I want to drink more. So I said, "Okay." So he bought me Tilt and Jooses and he bought himself Tilt and Jooses.

RP 137-139

Trial Counsel then asked Ms. Jama about her level of sobriety and the time when she left the apartment:

Q. Okay. So can you—do you have any recollection about what time the four of you left the apartment where you were staying?

A. What's a recollection?

Q. Do you remember what time you left that apartment?

A. Probably—

Q. You don't remember; do you?

A. I don't remember.

Q. You were pretty drunk; right?

A. No. I wasn't pretty drunk.

Q. Okay. And you told me last week during the interview that you left maybe somewhere between ten and eleven o'clock in the evening and that you were still drunk. Do you remember saying that?

A. That night?

Q. Yes, that night. The evening between 10:00 p.m. and 11:00 p.m. on July 23rd, you left the apartment with Yahya and Mr. Mohamud and the driver and you were still drunk. Do you recall that?

A. I wasn't counting the time, so—

Q. You weren't what?

A. I don't know what time we left. We just left from the house. I think it was like 9:00 or 10:00 or 8:00. I don't know. I know it was dark outside.

Q So when you told me last week that it was between 10:00 and 11:00, you really don't recall. It could have been anywhere between 8:00p.m. and 11:00pm. When you left the apartment correct? Is that correct Ms. Jama?

A. To be honest with you. I don't know what time we left from the house. But we left from the house all together.

RP 141-42

Trial Counsel did not produce a separate witness under oath, or a tape recording, to impeach Mr. Jama. Id. Instead, Trial Counsel relayed the facts of his own conversation with her. Id.

Trial Counsel then went onto to discuss Ms. Jama's allegations that the parties in the car were selling drugs.

Q. So why did you believe that the driver was involved in selling drugs?

A. Because it was little bags, some white stuff and he was selling it. So I seen with my own eyes.

Q. Did you see the white stuff in the bags?

A. Yes.

Q. Okay. And that's what you told the detective; right?

A. Yes.

Q. Okay. Last week when I asked you, "Did you see any white powder in the bags," you said "No." Why did you say "No" last week when I asked you if you saw any white powder in the bags.

A. Mr. Doyle (Prosecutor): I'm going to object to the form of the question. Assuming facts not in evidence.

The Court: I'll sustain the objection. You have to first ask her if she in fact said that. So the objection is sustained. You may ask her another question.

Q. You told me last week that you did not see any white powder in the bags; correct?

A. No.

Q. You didn't say that when I spoke to you and Mr. Doyle was on the phone?

A. I told you he was selling drugs. That's what I told you, so—and I seen with my own eyes, so—

Q. I'm asking you—the question I'm asking you is did you tell me last week that you did not see the white powder in the bags.?

A. He had in his pocket, so I seen it.

Q. He had the bags in his pocket.

A. Uh-hu.

Q. Okay.

The Court: Again, yes or no?

A. Yes.

Q. The question I'm asking you, I asked you directly last week "Did you see the white powder in the bags." And you said no, "No:" correct?

A. It's not correct

Q. You told me that you did see the white powder in the bags?

Mr. Doyle: Objection. Asked and answered

The Court: Overruled. But this will be the last time we revisit this question.

Mr. Geisness: Yes, your honor.

The Court: Rephrase please.

Q. Did you tell me that you did see the powder in the bags last week when we spoke on the phone?

A. Yes.

RP 147-48

Mr. Geisness did not produce a separate witness under oath, or a tape recording, to impeach Mr. Jama. *Id.* Instead, Mr. Geisness relayed the facts of his own conversation with her. *Id.*

After Ms. Jama's testimony, Officer Darryl D'Ambrosio testified that he responded to the scene of the incident—2468 South College Street, Seattle. RP 204. He testified his partner at the time, Officer Aaron Johnson was currently serving with the United States Army in Iraq. RP 202. Officer Johnson would be in Iraq until October or November of 2009. *Id.* Officer D'Ambrosio described the bottle he stated he saw in Mr. Mohamud's hand:

Q. When you saw the defendant, did he have anything in his hands when you first saw him?

A. It appeared he had a bottle in his hand.

Q. Could you tell what type of bottle it was at the time?

A. It was green in color. It could have been a pop or beer bottle from just me seeing it.

Next, Detective Lisa Haakenstad testified that she found a Heineken brand beer bottle in the car. RP 201 The beer bottle was about three-quarters of the way full. RP 202 The actual beer bottle was displayed to the jury and admitted into evidence. RP 203 There was no blood on the beer bottle. *Id.* No fingerprint evidence regarding the finger prints were admitted. RP 204 Trial Counsel never objected to the admission of this bottle. RP 201-205. However, at closing Trial Counsel made an issue about the Heineken bottle and its irrelevance. RP 334.

At closing, the State opened with this statement:

Terror. Terror is a word that we have heard a lot in our society. Many would say it is a word that is overused and abused. When you think of the core meaning of the word terror, it means an intense overpowering fear.

You can step back and think of Khadra Jama in that apartment. Think of the terror that she felt at the hands of this man, the defendant, Muse Mohamud. The terror she must have felt and she did feel, begging for him to stop, pleading, begging him over and over again, “Don’t kill me.” RP 309-310

Trial Counsel did not object. *Id.*

The jury was provided with the following jury instruction regarding Assault:

The State alleges that the defendant committed acts of Assault in the Second Degree on multiple occasions. To convict the defendant of Assault in the Second Degree, on particular act of Assault in the Second Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Assault in the Second Degree. CP 51, pg. 16

The jury convicted Mr. Mohamud of the Assault, Kidnapping and Imprisonment charges. CP 55, 56, 57.

At sentencing, Trial Counsel argued that the Assault and Kidnapping constituted the same course of criminal conduct. CP 68, pg. 3 Counsel's brief argued:

"Pursuant to RCW 9.94A.589, counts 2 and 3 encompass the same criminal conduct: "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Counts [Assault] and [Kidnapping] are both intentional crimes that when objectively look at one crime furthered the other." Id.

The State, in oral argument, stated:

"The closer call is whether these crimes should constitute the same criminal conduct. In order to find the same criminal conduct the offenses need to occur at the same time, with the same victim, but also share the

same intent. Two crimes do not contain the same criminal intent when the defendant's intent objectively changes from one crime to the other.

In addition, if the second crime occurs after the first is completed or furthers some other purpose, then the same crimes do not share the same intent. When looking to whether the crimes share the same intent the Court doesn't merely rely on the elements.

Here, for kidnapping and the assaults they involve different intents. For the offense of kidnapping the state needed to prove that the defendant intentionally abducted the victim, abducted her with the intent to inflict bodily injury. Abduction is to restrain a person by either secreting or holding a person in place where the person is not likely to be found or using or threatening to use deadly force.

By contrast, Assault II, strangulation, simply has elements of assault by strangulation. For the crime of kidnapping a defendant does not have to complete whatever they're intending to do. In other words, they don't have to actually cause bodily harm. IN our case the kidnapping was complete when the defendant dragged the victim out of her car with the intent to cause bodily harm. Therefore, these crimes occurred at different times and had different intents.

In addition, Assault II has a specific intent under this prong for the intent of strangulation. As the Court is well-aware, the finding of different intents and finding that this does not involve the same course of conduct is within the broad discretion of the trial court and reversed only with an

abuse of discretion. I ask the Court to exercise its discretion in finding that the Kidnapping and Assault in the Second Degree involve different intents.” RP 20

After Defense presented his argument, Mr. Mohamud again protested his innocence.

The Court: Mr. Mohamud, you have the right to bring anything up what you’d like to say, anything you’d like before sentence is imposed.

....

The Court: Is there anything that you would like to say.

Mr. Mohamud: Yes.

The Court: Go ahead.

Mr. Mohamud: To begin with I didn’t do anything to the girl Khadra because she’s women. I have a mother and she’s a woman. I have a daughter who’s two years old. I have my grandmother who raised me. I also have aunts and many sisters and I love them all. Never in my life I did anything to a woman. I did not do that to that girl. She lied about me. I want to let the Court know that I didn’t do anything to that girl and I like women because those, nay women are related to my life. That much I am saying. RP 21

The Court then issued its sentence

The Court: First of all, with regard to the merger issue I find that these crimes do have different intents. They do not merge. I will con Count II impose 14 months of confinement. On Count III, the Kidnapping

in the First Degree, I'm going to impose a mid-range sentence of 72 months of confinement, these terms to be served concurrently. RP 21

The Court then issued the rest of the sentence, advised Mr. Mohamud on his right to appeal, rights because he was presumed indigent, and previewed the Personal Restraint Petition process. RP 21-24

Subsequent to this the following colloquy occurred:

Prosecutor: Just to be clear, the Court of Appeals sometimes interchanges the word merger with same course of criminal conduct. I would ask that the Court make a specific finding that the two counts do not merge, but also that the two counts are not the same course of criminal conduct because they don't have the same intent.

The Court: Well, I would so find. RP 24

Assignments of Error

- I. Judge Carey erred in overruling Mr. Mohamud's objection to the continuance of trial.
- II. The cumulative errors of Mr. Mohamud's trial counsel constituted ineffective assistance of counsel.
- III. Judge Fox erred when he ruled that the convictions for Assault and Kidnapping were not part of the "same criminal conduct."

Issues Pertaining to Assignments of Error

- I. Does a Court err in overruling an objection to a continuance of trial pursuant to, CrR 3.3, on untenable grounds or for untenable reasons,

when among other items, prosecutor states he has a “prescheduled vacation,” but, at time for trial, a different prosecutor represents the State?

II. Do the cumulative errors of a lawyer’s (1) lack of investigative planning which placed him in a role of an unsworn impeachment witness at trial (2) failure to force the Sate to provide proper foundation for pejorative exhibits and (3) failure to object to religiously biased closing, fall beyond a standard of reasonableness such that representation was ineffective and prejudicial?

III. Does an Assault occurring at the same exact time as a Kidnapping and furthering a Kidnapping constitute “same criminal conduct?”

Argument

I. IT WAS AN ABUSE OF DISCRETION TO RULE IN FAVOR OF THE STATE, OVER MR. MOHAMUD’S OPPOSITION, SUCH THAT THE TRIAL WAS ALLOWED TO BE CONTINUED BEYOND THE AGREED TRIAL EXPIRATION DATE.

A Grant or denial of a motion for continuance is within trial court's discretion and will not be disturbed absent showing that the court abused its discretion, defendant was prejudiced, or outcome of trial likely would have been different had the continuance been granted. State v. Barnes, 58 Wash.App. 465, 471, 794 P.2d 52 (1990) Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Id.*

The record on appeal shows that the State’s motion for continuance for trial was granted, over Mr. Mohamud’s opposition, in part, because the prosecutor at the time, Hugh Barber, had a pre-scheduled

vacation. However, Mr. Barber was not the prosecuting attorney at trial. Mr. William Doyle was.⁵

Thus, the continuance requested was not based on a tenable ground and, therefore, was continued without a tenable reason.

II. THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S PERFORMANCE AT MR. MOHAMUD TRIAL FELL BELOW A MINIMUM OBJECTIVE LEVEL OF REASONABLE ATTORNEY CONDUCT AND PREJUDICED MR. MOHAMED.

A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct. U.S.C.A. Const.Amend. 6, State v. Releford, 148 Wash.App. 478, 200 P.3d 729 (2009). For purposes of ineffective assistance of counsel, Counsel's performance is evaluated against the "entire record." State v. Lopez, 107 Wash.App. 270, 275, 27 P.3d 237 (2001). The Court of Appeals reviews a claim of ineffective assistance de novo; the appellant must show both that counsel's performance was defective and that the error changed the outcome of the trial. State v. Horton, 136 Wash.App. 29, 36, 146 P.3d 1227 (2006).

In this case, the cumulative deficiencies of Mr. Mohamud's trial attorney fell below an objective standard of reasonable attorney conduct

⁵ The Personal Restraint Petition will bring evidence onto the appellate record which will show that Mr. Barber represented that one police officer (Officer Johnson) was stationed in Iraq as a grounds for continuance. The Court considered this in its overruling of Mr. Mohamud's objection to the continuance of the trial date. The record shows that Officer Johnson was, in fact, not returning from Iraq until October or November of 2009.

and these cumulative deficiencies created a tangible probability that outcome would have been different but for the attorney's conduct. This is especially so since, the jury split the verdict and did not convict Mr. Mohamud on all counts. There obviously was enough evidence presented to create some doubt in the jury's mind regarding what they had heard.

The errors fall into two different categories. First, the record reveals that Trial Counsel failed to have an investigator at his interview of Ms. Jama, and, thus acted as an unsworn witness at trial. Second, Trial Counsel Mr. Geisness failed to object when competent counsel would have objected, allowing unnecessarily prejudicial evidence before the jury.⁶

The failure to properly impeach a witness can constitute ineffective assistance of counsel. State v. Horton, 116 Wash.App. 909, 68 P.3d 1145 (2003). In *Horton*, the Court held that defense trial counsel was constitutionally deficient because she failed to properly impeach the State's complaining witness S.S, who claimed that Mr. Horton sexually abused her. Id. at 917.

Specifically, during defense counsel's investigation, defense counsel interviewed a friend of S.S.. Id. at 913. This friend told defense counsel that S.S. had bragged about sexual relations with boy. Id. S.S. had

⁶ These acts should also be considered in conjunction with the personal restraint petition which appellate counsel will consolidate and add another prejudicial error in that Mr. Geisness wholly failed to impeach Ms. Jama on the most prejudicial statement she gave.

also acknowledged to a CPS investigator that S.S. had sexual relations with others. Id. at 916

At trial, the prosecutor, in the case in chief, asked S.S., “Prior to your physical examination...had you engaged in any sexual intercourse with a person other than the defendant?” Id. at 913 S.S. answered only using word “No.” Id. On cross examination, defense counsel asked “You told the prosecutor this morning that you had not engaged in sexual intercourse with anyone other than Mr. Horton; correct?” S.S. answered, again, “No.” Id. Defense counsel did not ask her to explain or deny her pretrial statements to Ms. Hughes, nor did she ask the court to have S.S. remain in attendance after testifying. Id.

Later, in the defense case in chief, defense counsel wanted to call the CPS Worker and the friend to relate S.S.'s pretrial statements about sexual activity. Out of the presence of the jury, the State moved to exclude such testimony. The trial court sustained because defense counsel had not complied with ER 613(b). Id. at 914.

Horton found that non-compliance with ER 613(b) was entirely to Horton's detriment; that compliance with ER 613(b) would have been *only* to his benefit; and thus that counsel's non-compliance could not have been a strategy or tactic designed to further his interests. Id. at 916-17. Accordingly, they held that defense counsel's performance fell below an objective standard of reasonableness. Id. at 917.

In the case at hand, the record reflects that trial counsel attempted to impeach the star witness based, solely, on the lawyer's own recollection of his interview Ms. Jama. The very attempt to do this clearly violated Washington Rule of Professional Conduct 3.7(a)—Rule Lawyer as Witness (“A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness...”).

This maxim is set forth in *Denton*, where the court stated, “Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence.” State v. Denton, 58 Wash.App. 251, 256, 792 P.2d 537 (1990)

Here, defense counsel's very act of conducting this interview, of the State's main witness, on the telephone, without a thought or plan for how impeachment would play out in trial, *prima facie*, constitutes ineffective assistance of counsel. Aside from him taking the stand himself, there was no way for Trial Counsel to offer objective, sworn testimony, to impeach Ms. Jama. *See State v. Babich*, 68 Wash.App. 438, 443-44, 842 P.2d 1053 (1993). (“[I]f foundation questions are asked and the witness denies making the inconsistent statement, there may be error under particular circumstances if the cross-examiner does not later introduce extrinsic evidence of the statement. If the rule were otherwise, cross-examination could be abused by making insinuations about statements that the witness did not in fact make, and the jury could be

misled into thinking that the statements allegedly attributable to the witness were evidence.”)

As far as the prejudicial effect, this Court should consider the impeachment value of the contradictions in the Telephonic Interview which are far greater than the impeachment value of the statements she gave to health care workers the night of the incident. The record implies that Ms. Jama was intoxicated when she gave her original statements to the medical workers and, in the immediate excitable aftermath, of whatever incident did occur at the apartment.

In contrast, the contradictions between the Telephonic Interview and trial are far more glaring and prejudicial. First, Ms. Jama, presumably, was not intoxicated when she gave her interview to Mr. Geisness and, furthermore, certainly not in the excitable aftermath of the incident. Second, we had a situation where Ms. Jama was changing her story within the scope of a few days.

When Ms. Jama was denying that she made certain assertions, just five days later, Trial Counsel was simply left to argue with her. He had no evidence, other than himself, an unsworn advocate, to proffer to the jury to demonstrate that she was willing, or at least able, to misrepresent facts under oath. Her credibility is called far more into question when she is denying statements that she made five days before, versus intoxicated statements made seven months prior.

Compounding this ineffective assistance of counsel, Trial Counsel also failed to object to prejudicial evidence during both during the state's case in chief and during closing.

In the state's case in chief, the Detective Haakenstad was allowed to submit a Heineken bottle from the car. It was conclusively established that this was absolutely not the alleged bottle used to assault Ms. Jama. Nevertheless, this Trial Counsel did not object to its admission as evidence. He also did not object it being shown to the jury and discussed at length. However, showing this bottle was gratuitous, irrelevant, and inflammatory. From a legal standpoint, the proper foundation was not established to admit the bottle.

“Courts should approach the admission of models, samples and things offered exclusively for illustrative purposes with wariness and circumspection....Thus, models, samples and objects offered in evidence for purely illustrative purposes must not only be relevant and material in character to the ultimate fact sought to be demonstrated by their use, but, *additionally, must be supported by proof showing such evidence to be substantially like the real thing and substantially similar in operation and function to the object or contrivance in issue. If the proffered evidence does not meet this test it should be rejected.*” State v. Gray, 64 Wash.2d 979, 983 395 P.2d 490 (1964) (emphasis added)

Real or illustrative evidence needs a proper foundation. State v. Mitchell, 56 Wash.App. 610, 614. 784 P.2d 568 (1990).Detective

Haakenstad did not offer any foundational evidence that would connect this bottle to the one that Ms. Jama alleged she was struck with. Indeed she could not. She was not at the incident at the time of the incident.

Furthermore, Detective D'Ambrosio was never asked if this Heineken bottle that was displayed to the jury was similar to the one he saw in Ms. Jama's hand. More importantly, Ms. Jama was never asked if this bottle was similar in shape, size, or thickness to the bottle she was struck with.

Therefore the State did not lay a proper foundation for admitting this bottle. Without laying this foundation, the jury was allowed to improperly conjecture that this bottle was similar, if not identical to, the bottle Ms. Jama alleged she was struck with.

A constitutionally sufficient defense attorney would have forced the state to lay the proper foundation for allowing this bottle to be shown and, indeed given, to the jury. Instead, the State was essentially allowed a "free pass" to inflame the jury and to imagine what it would have been like to be struck with the bottle pulled from the car. The State was allowed to do this without having to comply with basic rules of evidentiary admission—which is to lay a competent foundation. The bottle should have never been admitted with such a lack of foundation and competent counsel would have objected to the same.

Compounding the errors cited above, the State appealed to juror bias with the opening of the closing which repeated the word "terror" no

less than four times, referring to terror that that “society” hears “a lot about” and implicitly tied it to Mr. Muse Ali Mohamud—a name of obvious Islamic heritage. There was also a religious undertone to some of the allegations set forth by witnesses in which various religiously blasphemous lines were screamed. Terrorism that “society” hears “a lot about” is linked to both religion, and, unfortunately, in particular the Islamic religion.

“Closing argument is perhaps the most important aspect of advocacy in the adversarial criminal justice system.” State v. Woolfolk, 95 Wash.App. 541, 547, 977 P.2d 1 (1999) Courts afford a prosecutor wide latitude in closing argument to draw and express reasonable inferences from the evidence; a prosecutor, however, may not appeal to the jury's passions or prejudice. State v. Thach, 126 Wash.App. 297, 316, 106 P.3d 782 (2005). “Accordingly, a prosecutor engages in misconduct when making an argument that appeals to jurors' fears and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict.” State v. Perez-Mejia, 134 Wash.App. 907, 916, 143 P.3d 838 (2006). “It is unquestionably improper for a prosecutor to reference racial or ethnic prejudice or to appeal to jurors' fear and repudiation of criminal groups as a reason to convict” Id. at 918

Although failure to “failure to object to an improper argument constitutes a waiver of the claimed error unless the improper argument was so flagrant and ill-intentioned that it caused an enduring and resulting

prejudice that could not have been neutralized by an admonition to the jury.” Id. at 917 FN 9,

However, this rule must be scrutinized in that Mr. Mohamud is alleging that Trial Counsel, as a whole was constitutionally deficient. It is an unworkable contradiction to allow defendants to allege ineffective assistance of counsel and, yet, hold defendant’s accountable for their attorney’s failure to object.

In this case, this expression “terror,” that society “hears about” can not be distinguished from terrorism and the fact that the terrorism that everybody hears about—at least the vast extent of terror—is Islamic Terror. There were many words that could have been used, fear, fright, horror, and the like. However the prosecutor chose to use “terror” and linked to terrorism and then linked to a defendant of demonstrably Islamic heritage.

These three errors, taken individually, or in their totality, (as well as the errors in the soon to be filed personal restraint petition), fell below a standard of reasonableness and prejudiced Mr. Mohamud.

III IT WAS AN ABUSE OF DISCRETION TO RULE THAT THE ASSUALT AND KIDNAPPING WER NOT PART OF THE SAME CRIMINAL CONDUCT.

Under the Sentencing Reform Act, prior, as well as current, convictions count towards the offender score. RCW 9.94A.589(1)(a) However, in certain circumstances, a “current” conviction will not count towards the offender score. Current convictions will not count towards an offender

score if they constitute the “same criminal conduct.” Id. For two crimes to constitute the “same criminal conduct,” the crime must involve the same victim, occur at the same time and place, and involve the same criminal intent. Id. A lack of any one of these factors precludes a finding that the two separate crimes constitute the “same criminal conduct.” State v. Bobenhouse, 143 Wash.App. 315, 330, 177 P.3d 209 (2008)

The conclusion that crimes constitute the same criminal conduct is “somewhat discretionary” with the trial court. Bobenhouse at 330 *citing* State v. Haddock, 141 Wash.2d 103, 110, 3 P.3d 733 (2000) It is to be construed narrowly. State v. Hernandez 95 Wash.App. 480, 485, 976 P.2d 165 (1999) An appellate court will reverse the sentencing court's conclusion of same criminal conduct only for abuse of discretion or misapplication of the law. Bobenhouse at 330

At first glance, the standard set forth above may seem to provide the Court of Appeals with little authority to overturn a trial courts judge's determination. However, in Mr. Mohamud's case, the facts, lack of record, prosecutor's erroneous legal assertions as well as the particularities of the crime of kidnapping require a closer analysis.

First, the standard set forth above, must be taken in light of that fact the Washington State Supreme Court has repeatedly stated that the purpose of RCW 9.94A.589(1)(a) is, to is “to limit the consequences of multiple convictions stemming from a single act.” State v. Borg, 145 Wash.2d 329, 337, 36 P.3d 546 (2001) *citing* State v. Calle, 125 Wash.2d

769, 781-82, 888 P.2d 155 (1995). Furthermore, the application of the “same criminal conduct statute” regarding current offenses, for purposes of determining sentencing range, “involves both *factual determinations* and the exercise of discretion.” State v. Nitsch 100 Wash.App. 512, 523, 997 P.2d 1000 (2000) *review denied* 141 Wash.2d 1030, 11 P.3d 827 (emphasis added)

In this case there was only one eyewitness that testified to the strangulation—Ms. Jama. Ms. Jama testified that she was strangled three distinct times: in the car, as she left the car, and in the apartment. In this case, the State conceded that Ms. Jama had many inconsistencies and emphasized that the jury should convict on bases other than her testimony. However, all these other corroborative bases occurred at the apartment—and not in the car. The strangulation in the car was solely based off Ms. Jama’s testimony, during a period when she was undeniably at the peak of intoxication.

The trial court provided the jury with instructions informing them that they did not need to agree on which episode of strangulation occurred; they only needed to find that one did. The prosecutor argued the same point in closing.

The jury came back with a verdict of guilty on Assault without any indication of which, or how many, of the three alleged choking incidents they found were committed beyond a reasonable doubt. Furthermore, at sentencing, the trial court does not state which act of strangulation it found

supported the conclusion that the strangulation and the kidnapping were separate incidents and not the “same criminal conduct.”

In fact, initially, the trial court failed to make a ruling in response to Mr. Mohamud’s argument that the strangulation and the kidnapping were part of the “same course of criminal conduct.”⁷ Only upon the prosecutor’s specific request, after a longer unrelated soliloquy, did the trial court cursorily answer the prosecutor’s question. The circumstances lead an objective observer to believe, had the prosecutor not asked, the question would have not been answered.

Nevertheless, nothing on the record establishes which episode of strangulation the jury found occurred. Therefore, *Taylor*, another assault/kidnapping case, controls the result. State v. Taylor , 90 Wash.App. 312, 950 P.2d 526 (1998)

In that case, Jonathan Taylor, the defendant, approached a stopped car at a gas station and punched the driver as he exited the car. Taylor at 315. Mr. Taylor then aimed a gun at the driver. Id. Mr. Taylor’s accomplice got into the back seat, took the gun from the Mr. Taylor, and loaded it. The accomplice ordered the driver to take him, Mr. Taylor, and the passenger to a park. Id. At the park, Mr. Taylor restrained the driver by “[by] pushing his face forward” while his accomplice robbed the

⁷ The Court only ruled that the two crimes did not merge. These are separate, and distinct, legal inquires.

passenger. Id. The victims left, and as they were leaving, several gun shots hit their car. Id.

The Taylor Court gave the following instruction:

There are allegations that the defendant committed acts of assault with a deadly weapon against [the victim] on multiple occasions. These occasions include pointing a weapon at [the victim] [as an accomplice to [the accomplice] during the kidnapping] and firing a weapon at [victim] [as either an accomplice or a principal as either [victim #1] or [victim #2] left the scene]. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

Taylor at 316

The jury unanimously concluded that the defendant was guilty of assaulting the victim, but the verdict did not indicate which assaultive incident the jury was relying upon to find guilt—whether it was incident (a), the defendant’s accomplice liability for defendant’s accomplice conduct in pointing the gun during the kidnapping, or incident (b), the shooting of the gun at the car. Taylor at 317.

On appeal of his sentence, the Mr. Taylor based his argument on an understanding that the incident “(a)”, the assault during the kidnapping was the offense under consideration, not assault “(b)” the shooting at the car. Id.

Due to the ambiguity, *Taylor* agreed that Mr. Taylor could elect that only one incident occurred, and, further, could elect which incident was the one that occurred. Id. *Taylor* stated “Under these circumstances, principles of lenity require this court to interpret the ambiguity in favor of the criminal defendant.” Id. And, to that effect, the Court stated, “for the purposes of analysis” they would consider that the assault conviction was based solely on incident “(a)”. Id.

Here, the jury could have just as easily found that the strangulation actually occurred right outside, or in, the apartment—not in the car. Ambiguity exists and, per *Taylor*, it must be construed in favor of Mr. Mohamud. Therefore, Mr. Mohamud can elect that if any strangulation is found to have happened, it can be found to have happened either right outside, or within, the apartment.

After the mandatory finding that the strangulation occurred right outside, or within, the apartment, the only question truly in dispute is whether the offenses share the same “criminal intent” under the Sentencing Reform Act.

Contrary to what the State argued at Mr. Mohamud’s sentencing, “criminal intent” within the Sentencing Reform Act dealing with use of

current offenses for enhancement purposes *does not* define “intent” as “specific intent” required as element of crime charged. State v. Baldwin, 63 Wash.App. 303, 306-07, 818 P.2d 1116 (1991). When “determining” if two crimes share the same “criminal intent” under the Sentencing Reform Act, the court “must look objectively at whether one crime furthered the other, *or* whether there was a substantial change in the nature of the criminal objective.” State v. Saunders, 120 Wash.App. 800, 824, 86 P.3d 232 (2004). (emphasis added)

Finally, as aforementioned, this Court should interpret of “same criminal intent” in light of how courts have analyzed crimes committed contemporaneously alongside the particular crime of kidnapping.⁸ The crime of assault is typically used to *further* the crime of kidnapping, and, conversely, the crime of kidnapping is typically used to *further* a sex crime.

Taylor, *Longuskie*, and *Dunaway* are all cases that illustrate the singular issues that occur with the crime of kidnapping—either kidnapping furthering a crime or a crime furthering a kidnapping. State v. Taylor, 90 Wash.App. 312, 950 P.2d 526 (1998), State v. Longuskie, 59 Wash.App. 838, 801 P.2d 1004 (1990), State v. Dunaway, 109 Wash.2d 207, 743 P.2d 1237 (1987).

⁸ A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent to inflict bodily injury on him. RCW 9A.40.020 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. WPIC 39.30.

In *Taylor*, discussed previously, the Court ruled that the assault charge and the kidnapping charge were part of the same criminal conduct. *Taylor* held that the assault began at the same time as the abduction, when Mr. Taylor and his accomplice entered the car and ended when the kidnapers exited the car and the abduction was over. Taylor at 322 The assault simply facilitated and furthered the abduction. Id. at 322-23.

In *Longuskie*, Mr. Longuskie became very close with his young student J.D. Longuskie at 841. J.D.'s father desired to put an end to this relationship, but Mr. Longuskie abducted J.D. from his grandmother's house. Id. During the next week traveled to different hotels with J.D. Id. There was evidence that Mr. Longuskie had sexual contact with J.D. during this week. Id.

The trial court treated the molestations and kidnapping as separate criminal conduct and added points accordingly. Id. at 847 However, *sua sponte*, the *Longuskie* Court reversed this verdict. Id. They stated "Here, the child molestation was the objective intent. The kidnapping furthered that criminal objective and the crimes were committed at the same time and place." Id.

In *Dunaway*, Mr. Dunaway plead guilty on two counts of first degree kidnapping and two counts of first degree robbery based on the following facts he admitted on the guilty plea:

On March 3, 1986, I went to the Alderwood Mall. I got into a car where Ora Buck and Grace Johnson were present. I showed them the gun

and, under threat, asked them to drive toward Seattle. I told them to give me the cash that they had on them. I took some money from each. When we got to Seattle, I told one of the women to go inside the Rainier bank in the University District and to get some more money for me. When she did not return for some time, I told the other Lady to move over and let me drive. We drove to somewhere in Seattle and I got out of the car.

Dunaway at 211-212

The trial court found that all four counts constituted the same criminal conduct. Id. at 212. The Washington State Supreme Court overruled that all four counts constituted the same criminal conduct, as a matter of law, because there were two different victims. However, they did rule that each kidnapping and robbery was the same criminal conduct vis-à-vis the same victim. The two crimes were “intimately related” and “it is evident that the kidnapping furthered the robbery.” Id. 217.

Here, since it is ambiguous, Mr. Mohamud could argue that the jury found that the strangulation occurred right outside the car, or within the apartment. In either case, it is clear that the assault furthered the kidnapping in that it allowed the kidnapping to continue and prevented it from terminating. There is simply no way to distinguish the two crimes and the intent—kidnapping and assault to continue the kidnapping do not change and they cannot be seriously argued to be easily unwoven.

Regarding the Appellate standard, abuse of discretion, one should first consider if there was a misapplication of the law. The record leaves

us greatly wanting. The State certainly argued the law incorrectly. Secondly, the judge seemed to rush to find merger without mentioning course of conduct. Only after the State pointed this out, did the judge make a cursory finding. The Appellate Record clearly leaves Mr. Mohamud wondering if the correct standard was applied in his matter- which resulted in an increased sentence.

Second, one truly has to wonder how the Judge separated the strangulation alleged to have occurred outside the car from the abduction and secretion into the apartment, or, in the alternative how the Judge separated the strangulation from the kidnapping the testimony indicates continued unabated until the police arrived.

Conclusion

Mr. Mohamud seeks the following forms of relief, depending on which error this Appellate Court finds existed.

If the first error is found, then Mr. Mohamud should have never been tried and be released-forthwith. And if it is not then, if the second error is found, then Mr. Mohamud should be brought to King County, Washington, and granted a new trial with new competent counsel. And if neither the first or second errors are found, but the third error is found, then Mr. Mohamud should be brought back to King County to be resentenced with an offender score of "0" or be able to present argument as to why the offender score should be a "0" and not a "2."

DATED this 28th day of December, 2009 at Seattle, King County
Washington.

BAROKAS MARTIN & TOMLINSON

By



Aric S. Bomszyk, WSBA #38020
Attorney for Appellant

PROOF OF SERVICE

On December 28, 2009, I caused the foregoing Appellant's Brief to be served on the parties to this action, by legal messenger to:

Prosecuting Attorney
Office of the King County Prosecutor
Appellate Unit
516 Third Avenue, Room W554
Seattle, Washington 98104

I declare that the statements above are true to the best of my information, knowledge and belief.

DATED this 28th day of December, 2009.



Alison Forrest

FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2009 DEC 29 AM 11:36