

65172-2

65172-2

COA NO. 65172-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

TERRY GRANT,

Appellant.

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

The Honorable Ronald L. Castleberry, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports appellant's kidnapping conviction.
2. The court erroneously imposed an exceptional sentence.
3. Appellant received ineffective assistance of counsel.

Issues Pertaining To Assignments Of Error

1. Does insufficient evidence support appellant's conviction for kidnapping because the restraint was incidental to the robbery?
2. If this court vacates the kidnapping conviction due to insufficient evidence, must the case be remanded for resentencing within the standard range on the robbery conviction because the "free crimes" aggravating factor used to support an exceptional sentence no longer applies as a matter of law?
3. Even if the kidnapping conviction remains, must the exceptional sentence for kidnapping based on the "free crimes" aggravator be stricken because that crime was punished?
4. Is reversal of the robbery conviction required because defense counsel was ineffective in failing to maintain his request for instruction on third degree possession of stolen property as a lesser offense to robbery?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Terry Grant with first degree robbery and first degree kidnapping. CP 367. A jury convicted on both counts. CP 136-37. The court imposed an exceptional sentence of 252 months on both counts based on the "free crimes" aggravating factor. CP 122-23, 131; RCW 9.94A.535(2)(c). This appeal follows. CP 93-109, 110-11.

2. Trial

A little after 10 a.m. on December 4, 2008, two men armed with guns pushed their way into Joanne Bigelow's residence after she answered the door. 8RP¹ 22. Bigelow later identified Terry Grant as one of the men. 8RP 23. The men told her she would not get hurt if she did everything they said. 8RP 23. A man Bigelow later identified as "Paul" tied her wrists and ankles with plastic zip ties in the foyer. 8RP 22-24, 54. The men then took her into the downstairs bathroom and placed her in a sitting position. 8RP 24-25, 54.

Paul pointed a gun at her and asked where the safe was. 8RP 25. Bigelow said she did not have a safe. 8RP 25. The men started going

¹ The verbatim report of proceeding is referenced as follows: 1RP - 7/17/09; 2RP - 8/10/09; 3RP - 10/8/09; 4RP - 10/16/09; 5RP - 10/19/09; 6RP - 1/8/10; 7RP - 1/29/10; 8RP - four consecutively paginated volumes from 2/22/10, 2/23/10, 2/24/10, 2/25/10, 2/26/10; 9RP - 3/18/10.

through the house while Bigelow remained tied up in the bathroom. 8RP 29. Bigelow was in contact with the man she identified as Grant for two or three minutes between the time she was taken from the door to when the man left her in the bathroom, during which time she observed him at varying distances. 8RP 25, 29, 33.

The men were in Bigelow's house for three hours. 8RP 30, 63-64. Paul periodically poked his gun through the bathroom door and checked on Bigelow to make sure she was still tied up. 8RP 29. At one point, Paul pulled Bigelow's hair after she gave the wrong PIN number and lied about whether her husband would be coming home. 8RP 27-28. At another point, Bigelow overheard the men while they were in the next room talking about taking Bigelow to the bank and wrapping her in a plastic bag. 8RP 51. She overheard Paul say "just shoot her through the door" and the other man say "you shoot her." 8RP 51.

The men ransacked the house and took a number of items, including guns, computers, cameras, a television, purses, jewelry, boots and clothing. 8RP 30-31, 69, 166. When they were getting ready to leave, the man Bigelow identified as Grant took rings from Bigelow's fingers.² 8RP 31. The men left through the front door. 8RP 32. Bigelow said she ran over to

² Bigelow had earlier testified she did not see him after the first few minutes of entry. 8RP 29.

her neighbor's house at 1:30 p.m. and called 911. 8RP 30, 33, 64, 187.
Police were actually called at about 1 p.m. 8RP 164.

A patrol officer responding to the scene saw black zip ties on Bigelow's wrists. 8RP 178. Police found the same or similar type of zip tie on Bigelow's bathroom floor. 8RP 180, 184. Bigelow had red marks around her wrists and ankles from the ties. 8RP 164-65, 178.

A sketch artist drew a picture of the perpetrators. 8RP 38-39. Bigelow told the sketch artist that the man who she later identified as Grant had freckles. 8RP 40, 57, 264-66. Grant does not have freckles. 8RP 146. Grant does have a gap in his teeth. 8RP 398. The sketch artist routinely asks about teeth. 8RP 257. Bigelow could not recall mentioning anything about the perpetrator's teeth. 8RP 57.

Bigelow did not see any tattoos on the perpetrator. 8RP 57. Grant has tattoos all over his upper body, with those on his neck and right hand being particularly visible. 8RP 146, 351-52, 397-98.

After police told Bigelow the names of suspects in the case and after Grant was arrested, Bigelow's daughter looked up Grant's MySpace page. 8RP 42-44, 76. Bigelow looked at the MySpace page and identified Terry Grant as the perpetrator.³ 8RP 43-44. She said this was the best picture she

³ Bigelow had testified she only looked at one suspect on MySpace, but her daughter testified she looked at several. 8RP 43, 74-76.

saw of him because "he had those yellow sunglasses on that he had at the house." 8RP 57. Her daughter showed her the MySpace photos of another person named Rob Green, who Bigelow described as a possible perpetrator. 8RP 81-82.

Before looking at the MySpace page, she had been shown a police montage, which she said did not contain a photo of Grant. 8RP 45-47. On direct examination, Bigelow testified she picked Grant out of another montage before viewing the MySpace page. 8RP 51-52. The defense impeached her with evidence that she viewed the MySpace page before viewing the montage in which she picked out Grant as the perpetrator. 8RP 57-60. A detective later confirmed Bigelow picked Grant out of a montage after she saw Grant's MySpace page, not before. 8RP 191-93.

At trial, Bigelow said she looked out the window while in the bathroom and saw a greenish-blue Ford Escort in her driveway. 8RP 36-37. She initially told police the car was blue. 8RP 63. Police then showed her pictures of cars, at which point she said one of them looked like the car that was in her driveway. 8RP 63. The car belonged to Grant. 8RP 214-15.

Bigelow told the sketch artist that the suspect was wearing a knit cap. 8RP 265-66. At trial, Bigelow identified Grant as one of the men drawn by the sketch artist. 8RP 39-40. She described what the man she identified as Grant was wearing, including yellow sunglasses and a Blink 182 hat "or

something like that." 8RP 26-27, 41. Bigelow's daughter found a Blink 182 hat in the house a few days after the incident. 8RP 78, 80. Bigelow did not say anything about the hat when her daughter showed it to her. 8RP 81. Bigelow did not recall describing a Blink 182 hat before trial. 8RP 62.

At trial, Bigelow testified Grant had a speech impediment. 8RP 32. She heard the same impediment when Grant testified at a pretrial hearing. 8RP 32-33. Grant's brother, Sean Grant, had known his brother his entire life and testified he did not have any kind of speech impediment. 8RP 198, 205.

Police searched Grant's car and found a black zip tie jerry rigged to the seatbelt mechanism. 8RP 215-26. Two bundles of black zip ties were found underneath the driver's seat. 8RP 218. A forensic expert said the ties recovered from the car floor were similar or the same in measured properties to those ties recovered from Bigelow's bathroom floor. 8RP 247-48, 250-51. The expert could not say the bathroom ties came from the bundle of ties found in the car. 8RP 248, 250.

A DNA expert testified Grant was a possible contributor to DNA found on Bigelow's pajama top, with a 1 in 4 chance that any random person pulled off the street was a possible contributor to the mixture of DNA found on the top. 8RP 284-86, 295, 298. Grant was also a possible contributor to the Blink 182 cap found in Bigelow's house, with a 1 in 69

chance that a random person would have DNA typing results showing possible contribution. 8RP 288.

As of December 4, 2008, Terry Grant was staying in Sean Grant's house.⁴ 8RP 198-99. Kristina Grant, Terry Grant's half-sister, was also in Sean's house at that time.⁵ 8RP 198-99.

Bigelow's residence was located between Monroe and Snohomish. 8RP 21. Sean lived two miles outside of Granite Falls. 8RP 198, 205. It took 30 to 45 minutes to drive from Sean's house to Monroe and 20 to 30 minutes to drive from Sean's house to Snohomish. 8RP 205.

Bigelow testified the men entered her home at a little after 10 a.m. on December 4. 8RP 22. Sean testified he saw Grant at his house at about 10:30 or 11:00 a.m. on December 4. 8RP 206. Kristina testified she saw Grant in Sean's house at around 10:30 a.m. 8RP 90, 141. Grant then left the house. 8RP 90. Kristina later saw Grant at Sean's house at about 12:30 p.m. 8RP 90, 141.

According to Kristina, Grant opened the garage door upon returning to Sean's house and Paul backed in a black truck. 8RP 91. Grant owned a green Ford Escort. 8RP 93. Kristina did not see anything in the Escort. 8RP

⁴ Sean is Kristina's half-brother. 8RP 88, 198.

⁵ They mostly did not grow up together and she did not know him well. 8RP 88, 146.

94. Grant and Paul unloaded a number of bags full of things from the truck and took them to Grant's bedroom. 8RP 92, 94-95. Kristina saw a television, firearms, camera equipment and jewelry. 8RP 92, 95. She also saw a driver's license with the name of "Joanne Bigelow" on it, and the name "Bigelow" on credit cards and paperwork. 8RP 97-99.

Sean came home at about 3:30 or 4 p.m. on December 4. 8RP 199. He told Grant, Paul and Kristina to get the property out of his house because he was concerned it was stolen. 8RP 200-02. Kristina helped remove the things from the house to Grant's Ford Escort and another vehicle. 8RP 101-02. Kristina knew the property was stolen. 8RP 101.

The property was transported to a motel that same day (Thursday, December 4). 8RP 102. Kristina drove Grant's car to the motel. 8RP 103. She rented a room into which the property was placed. 8RP 104-05, 147. Kristina stayed at the motel until Sunday. 8RP 116, 150. Grant rented a separate room, which contained stolen firearms. 8RP 147, 153. Paul stayed until Friday, when he left after being upset that his share of the property was unfair. 8RP 116. He took the television, rifles, and some jewelry. 8RP 118. Video footage placed Kristina, Grant and Paul at the motel. 8RP 172-76. People came over to the motel room, apparently to look over the stolen property. 8RP 114.

Kristina read about the robbery of Bigelow in the newspaper on December 5. 8RP 138, 148. At trial, Kristina said she thought the police sketch that appeared in the newspaper the following day looked like Grant. 8RP 111-12. According to Kristina, Grant told her "loose lips sink ships." 8RP 118.

Kristina was given money and some of the stolen items. 8RP 104, 122, 143, 147. She rented a storage unit on Saturday for the purpose of storing the stolen property. 8RP 119, 127-28. She put camera equipment in there. 8RP 128, 152. Kristina did not want Grant to have the storage unit paperwork in his possession, at which point Grant pointed a gun at her and told her he could shoot her. 8RP 119-20. Kristina claimed Grant said at the motel that they forced their way into Bigelow's house with guns, zip-tied her, and took jewelry off her. 8RP 108-10.

Kristina came and went from the motel as she pleased. 8RP 150. Sean did not want Kristina to return to the house because she was high on drugs. 8RP 208. At one point Kristina went to Sean's house and told him she was afraid of Grant and Paul, but then decided to go back to the motel to be with Paul. 8RP 209.

Kristina drank to the point of intoxication on the first day of her motel stay. 8RP 123. She consumed a large amount of methamphetamine on the second day and continued to consume large amounts of

methamphetamine until she left the motel on Sunday. 8RP 124-25, 149. She had a history of heavy methamphetamine use. 8RP 149-50. Kristina called 911 on Tuesday out of guilt and fear. 8RP 126, 139-40. Kristina had been convicted for a crime of dishonesty (trafficking in stolen property). 8RP 135.

Grant testified in his own defense. According to Grant, he initially left Sean's house to get some cigarettes at 9:30 a.m. on December 4 and then came back. 8RP 394. He left Sean's house again at about 11:15 or 11:30 a.m. 8RP 394. He went to GI Joe's to turn in a job application and then went shopping at the Everett Mall. 8RP 395. He returned to Sean's house between 3 and 4 p.m. and saw "Rudy" pulling out of the driveway. 8RP 395. Kristina and Paul were smoking methamphetamine. 8RP 395. Sean came home and kicked everyone out because he did not like drugs in his house. 8RP 396. Sean was also angry because Paul and Kristina were going through things in the garage. 8RP 402.

Grant knew the property was stolen but took some items to his bedroom. 8RP 403. He then took the stolen property to the motel after being told to leave. 8RP 403-04. Kristina and Paul ended up taking some of the property for themselves. 8RP 405. Some property went into a storage unit. 8RP 405. People who came over to the motel room took some of the property as well. 8RP 405.

The defense argued Bigelow misidentified Grant as the perpetrator of the home invasion. 8RP 429-38. Psychologist Dr. Geoffrey Loftus, an expert in human perception and memory, testified a number of factors can lead to mistaken identification and that memory, which changes over time, can be inaccurately affected by environmental factors and post-event information. 8RP 324, 326, 333-36. Fear and stress diminish memory. 8RP 354-55. Post-event information capable of distorting memory included seeing pictures of a suspect. 8RP 378. Extremely stressful events are particular susceptible to subsequent distortion by post-event information. 8RP 358-59. Even strong and detailed memories can be false in important respects. 8RP 336. People can confidently remember things that never really happened. 8RP 337.

The defense contended Bigelow's viewing of Grant's MySpace page tainted Bigelow's identification. 8RP 438. Grant had tattoos, with those on his neck and right hand being particularly visible. 8RP 351-52, 397-98. Bigelow, however, did not say anything about seeing tattoos to the police. 8RP 436. Dr. Loftus testified people trying to memorize a person's features pay attention to unusual features of a person, such as tattoos. 8RP 349.

The defense also argued Grant could not have been at Bigelow's house at the time of the robbery because witnesses placed him at Sean's

house at the same time in which he was supposedly at Bigelow's house. 8RP 429-30, 432-33. Moreover, the driving distance did not allow for Grant to leave Sean's house when witnesses said he left and be at Bigelow's house by 10 a.m., when Bigelow claimed the men forced their way inside. 8RP 429-30. The defense further argued Kristina lacked credibility for a variety of reasons and that she went to police to minimize her involvement in criminal activity. 8RP 431-32, 438-41.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE KIDNAPPING AS A CRIME SEPARATE FROM ROBBERY UNDER THE INCIDENTAL RESTRAINT DOCTRINE.

The evidence was insufficient to convict Grant of kidnapping because the restraint was in furtherance of and incidental to the robbery. The kidnapping conviction must therefore be vacated and dismissed with prejudice.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is insufficient to support a conviction unless, viewed in the light most favorable to the State, a rational trier of fact could

find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). A challenge to the sufficiency of evidence may be raised for the first time on appeal. City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

"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); see, e.g., State v. Green, 94 Wn.2d 216, 227-28, 616 P.2d 628 (1980) (insufficient evidence of kidnapping because the restraint and movement of the victim was merely "incidental" to homicide rather than independent of it).

To establish a defendant committed the offense of first degree kidnapping, the State must prove that the defendant intentionally abducted another person. RCW 9A.40.020. But "the mere incidental restraint and movement of [a] victim during the course of another crime" is insufficient to show a separate kidnapping crime where the movement and restraint had "no independent purpose or injury." State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995).

Whether the kidnapping is incidental to the commission of another crime is a fact-specific determination. Elmore, 154 Wn. App. at 901 (citing Green, 94 Wn.2d at 225-27; State v. Korum, 120 Wn. App. 686, 707, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614, 141 P.3d

13 (2007). To affirm the kidnapping conviction, sufficient evidence must show Grant restrained and moved Bigelow for a purpose independent from his intent to commit robbery. No such evidence appears in this record.

Korum is dispositive. The Korum court held as a matter of law that the kidnapping convictions were incidental to the robberies and therefore not supported by sufficient evidence because (1) the restraint used was for the sole purpose of facilitating the robberies; (2) forcible restraint is inherent in armed robberies; (3) the restrained victims were not moved away from their homes; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint was not substantially longer than the commission of the robberies; and (5) the restraint did not create danger independent of the danger posed by the armed robberies themselves. Korum, 120 Wn. App. at 707.

Those same features are present in Grant's case. The restraint used on Bigelow (zip ties on wrists and ankles) was for the sole purpose of facilitating the robbery inside her home. She was restrained so that the men could complete the robbery and flee. Bigelow was not moved away from her home but rather put in the bathroom. She was therefore not secreted to a place where she was unlikely to be found. The duration of the restraint was not substantially longer than the commission of the

robbery, as Bigelow was able to go to her neighbor's house soon after the men left. 8RP 30, 63-64, 164. Finally, Bigelow's restraint, consisting of being placed in a bathroom in a sitting position while her arms and feet were bound by zip ties, did not endanger her above and beyond the danger posed by the armed robbery itself, which consisted of taking Bigelow's personal property against her will by the use or threatened use of immediate force, violence, or fear of injury while armed with what appeared to be a firearm or other deadly weapon.

When the only evidence presented to the jury demonstrates that the restraint is merely incidental to completing another crime, the jury has not received sufficient evidence to convict the defendant of a separately charged kidnapping. Korum, 120 Wn. App. at 707. Grant's kidnapping conviction must therefore be reversed and the charge dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853-54, 72 P.3d 748 (2003) (remedy for conviction based on insufficient evidence is dismissal with prejudice). The prohibition against double jeopardy forbids retrial after conviction is reversed for insufficient evidence. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. GRANT IS ENTITLED TO BE RESENTENCED WITHIN THE STANDARD RANGE BECAUSE THE FREE CRIMES AGGRAVATING FACTOR NO LONGER APPLIES FOLLOWING VACATURE OF THE KIDNAPPING CONVICTION.

Assuming this Court agrees Grant's kidnapping conviction must be vacated, the exceptional sentence must be reversed because the aggravating factor no longer applies to Grant as a matter of law. The statute requires "multiple current offenses" before the "free crimes" aggravator is applicable. RCW 9.94A.535(2)(c). Following vacature of the kidnapping conviction, Grant does not stand convicted of having "committed multiple current offenses" as required by statute.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Whether a trial court has exceeded its statutory authority under the Sentencing Reform Act of 1981(SRA) is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Questions of statutory interpretation are also reviewed de novo. State v. Alvarado, 164 Wn.2d 556, 561, 192 P.3d 345 (2008).

RCW 9.94A.535(2)(c) provides a sentencing court may impose an exceptional sentence based upon a judicial finding that "[t]he defendant has committed multiple current offenses and the defendant's high offender

score results in some of the current offenses going unpunished." A defendant's standard range sentence reaches its maximum limit at an offender score of nine. RCW 9.94A.510. "Under RCW 9.94A.535(2)(c) the legislature provided that where current offenses go unpunished based on criminal history and current offenses, this is an aggravating circumstance per se." Alvarado, 164 Wn.2d at 567.

Grant committed one current offense: robbery. As set forth in section C. 1., supra, the kidnapping is not a separate offense as a matter of law and must be vacated. As a result, Grant did not commit "multiple current offenses" as required by the plain language of RCW 9.94A.535(2)(c). The statutory aggravating factor relied on by the trial court to impose an exceptional sentence is therefore inapplicable.

The goal of statutory construction is to carry out legislative intent. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Courts "must give effect to that plain meaning as an expression of legislative intent." Alvarado, 164 Wn.2d at 562.

Grant's argument is that RCW 9.94A.535(2)(c) means exactly what it says. It requires the defendant to have "*committed multiple current*

offenses and the defendant's high offender score results in *some of the current offenses going unpunished.*" RCW 9.94A.535(2)(c) (emphasis added). "Multiple" means "consisting of, including, or involving more than one." Webster's Third New International Dictionary 1485 (1993). When there is only one current offense, that current offense is punished. There are no "free crimes" in such a circumstance. RCW 9.94A.535(2)(c) is clear and compels the conclusion that this aggravating factor does not apply to Grant as a matter of law because he did not commit multiple current offenses.

The reviewing court does not resort to canons of statutory interpretation if a statute is unambiguous. Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). Nevertheless, it is worth noting RCW 9.94A.535(2)(c) was designed to codify the "free crimes" factor as an automatic aggravator without the need for additional fact finding as to whether the existence of "free crimes" results in a "clearly too lenient" sentence. Alvarado, 164 Wn.2d at 567; see also Laws of 2005 ch. 68 § 1 ("The legislature intends . . . to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances.").

The "free crimes" factor is predicated on crimes going unpunished only where a defendant is convicted of multiple current offenses. State v.

Smith, 123 Wn.2d 51, 56, 864 P.2d 1371 (1993) (free crimes factor "automatically satisfied whenever 'the defendant's high offender score is combined with multiple current offenses so that a standard sentence would result in 'free' crimes - crimes for which there is no additional penalty.'") (quoting State v. Stephens, 116 Wn.2d 238, 243, 803 P.2d 319 (1991)). In other words, "one who is already at the upper limit of the sentencing grid should receive a greater punishment *if he commits more than one current crime.*" Stephens, 116 Wn.2d at 243. This was the trial prosecutor's understanding. He told the court "the sole basis for the exceptional sentence is because it is a high offender score, that the robbery doesn't count the two points against the kidnapping." 9RP 5-6.

A defendant who commits one current offense does not result in some crimes going unpunished under RCW 9.94A.535(2)(c). The single current offense is punished, regardless of offender score. There is no free crime in such a circumstance. This Court should vacate the exceptional sentence and remand for sentencing within the standard range.

3. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE FOR THE KIDNAPPING CONVICTION.

The trial court, in the written judgment and sentence, imposed an exceptional sentence on counts I (robbery) and II (kidnapping). CP 122. The written findings of fact justifying an exceptional sentence under RCW

9.94A.535(2)(c) state "The defendant has committed multiple current offenses and defendant's high offender score (18) results in the current offense of 1st degree robbery goes [sic] unpunished." CP 131.

The court did not find and could not find the kidnapping went unpunished. When the offender score is over nine and there are two current offenses, only one of those two offenses goes unpunished. See section C. 2., supra. Here, the trial court deemed the robbery unpunished. CP 131. It follows that the kidnapping offense was punished. An exceptional sentence for kidnapping cannot stand in the absence of a valid aggravating factor supporting it. See State v. Worl, 91 Wn. App. 88, 95-96, 955 P.2d 814 (1998) ("two exceptional sentences are improper when based on one aggravating factor that only applies to one of the offenses") (citing State v. McClure, 64 Wn. App. 528, 534, 827 P.2d 290 (1992)). The exceptional sentence for kidnapping must therefore be stricken.

4. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST LESSER OFFENSE INSTRUCTION ON POSSESSION OF STOLEN PROPERTY.

Defense counsel was ineffective in failing to maintain his request for instruction on third degree possession of stolen property as a lesser offense of first degree robbery. No legitimate strategy justified the failure, which undermines confidence in the outcome.

a. Defense Counsel Withdrew A Request For Lesser Offense Instructions To Robbery After The Court Preliminarily Ruled He Would Not Give Them.

Defense counsel initially proposed instructions on first and second degree possession of stolen property as lesser offenses to robbery. CP 246-52, 261-62. He later submitted proposed instructions on third degree possession of stolen property as a lesser offense to robbery. CP 160-64. In opening statement, made after the State rested its case, counsel told the jury it would have an opportunity to decide whether Grant was guilty of a lesser crime. 8RP 323.

The trial court later addressed the proposed instructions, noting defense counsel had proposed "lesser included instructions of possession of stolen property in one degree or another." 8RP 318. In an ensuing colloquy, the court informed the parties that it had at least preliminarily decided not to give lesser offense instructions on first or second degree possession of stolen property because they were not "legally" lesser crimes of robbery. 8RP 410. The court was willing to hear argument on the issue after lunch. 8RP 410. During the post-lunch colloquy, defense counsel withdrew his request for any lesser included instructions. 8RP 412. The court said "based upon the prosecutor's citing of the case of *State v. Herrera*, found at 95 Wn. App. 328, which the court has read, I would also concur that the proposed instructions of possessing stolen property in the

first and second degree are not as a matter of law lesser included instructions to that of the robbery charge. Therefore, even though the instructions have been withdrawn, if they were not, the court would not give them." 8RP 412.

b. Grant Was Entitled To A Third Degree Possession Of Stolen Property Instruction As Lesser Included Offense Robbery.

Defendants are entitled to have juries instructed not only on the charged offense, but also on all lesser included offenses. RCW 10.61.006. A defendant is entitled to a lesser offense instruction if (1) each of the elements of the lesser offense is a necessary element of the charged offense and (2) the evidence supports an inference that the defendant committed the lesser offense. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The test is satisfied here in relation to third degree possession of stolen property.

A person commits robbery when "he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial." RCW 9A.56.190. A person commits

first degree robbery if, in the commission of a robbery or of immediate flight therefrom, displays what appears to be a firearm or other deadly weapon. RCW 9A.56.200(1)(a)(ii). The intent to commit theft of property is an element of first degree robbery. WPIC 37.02; CP 150 (Instruction 10).

"Possessing stolen property" means "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). To "receive" means, among other things, acquiring possession or control in the property. RCW 9A.56.010(11).

A person commits third degree possession of stolen property under former RCW 9A.56.170 (Laws of 1998 ch. 236 § 2) if he "possesses . . . stolen property which does not exceed two hundred fifty dollars in value."

A person commits second degree possession of stolen property under former RCW 9A.56.160(1)(a) (Laws of 2007 ch. 199 § 7) if he "possesses stolen property, other than a firearm as defined in RCW 9A.41.010 or a motor vehicle, which exceeds two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value."

A person commits first degree possession of stolen property under former RCW 9A.56.150 (Laws of 2007 ch. 199 § 6) if he "possesses

stolen property, other than a firearm as defined in RCW 9A.01.010 or a motor vehicle, which exceeds one thousand five hundred dollars in value."

A defendant is entitled to a lesser-included offense instruction under the legal prong of the Workman test if the lesser offense is necessarily committed whenever the greater offense is committed. State v. Porter, 150 Wn.2d 732, 736-37, 82 P.3d 234 (2004). The legal prong of the Workman test is satisfied for third degree possession of stolen property because a person invariably commits third degree possession of stolen property when one commits robbery.

A person cannot take personal property from another against his or her will with the intent to commit theft of the property (robbery) without knowingly receiving or possessing stolen property knowing that it has been stolen (possession of stolen property). "Stolen" means "obtained by theft, robbery, or extortion." RCW 9A.56.010(14). When a person commits robbery, one necessarily steals the person's property. When a person *intentionally* commits theft (robbery), one necessarily *knows* the taken property is stolen (possession of stolen property). Knowledge is a lesser included mental state than intent, so that proof of intent necessarily includes proof of knowledge. State v. Soto, 45 Wn. App. 839, 841, 727 P.2d 999 (1986); RCW 9A.08.010(2) ("When acting knowingly suffices to

establish an element, such element also is established if a person acts intentionally.").

Possession of stolen property includes the element that the person "withhold or appropriate the [stolen property] to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). One cannot unlawfully take personal property from the person of another or in his presence against his will and use force or fear to obtain or retain possession of the property (robbery) without withholding or appropriating the stolen property "to the use of any person other than the true owner or person entitled thereto" (possession of stolen property).

The offense of possessing stolen property obviously includes the element of "possession." Possession may be actual or constructive. State v. Summers, 107 Wn. App. 373, 389, 28 P.3d 780, 43 P.3d 526 (2001). Actual possession occurs when the person has physical custody of the item, and constructive possession occurs if the person has dominion and control over the item. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Dominion and control means that the defendant can immediately convert the item to their actual possession. Jones, 146 Wn.2d at 333. Constructive possession need not be exclusive. Summers, 107 Wn. App. at 389. One cannot unlawfully take personal property from the person of another and use force or fear to obtain or retain possession of the property

(robbery) without also possessing the property (possession of stolen property).

The trial court remarked it would have denied counsel's request for lesser offense instruction on first and second degree possession of stolen property even if it had not been withdrawn, citing State v. Herrera, 95 Wn. App. 328, 977 P.2d 12 (1999). 8RP 412. Herrera held third degree assault is not a lesser included offense of robbery because the legal prong of the Workman test cannot be satisfied. Herrera, 95 Wn. App. at 332. Herrera is not on point and it is unclear what the court seized upon in that case other than the general notion of what the legal prong of the Workman test requires.

In any event, the court's ruling that it would have rejected instructions on first and second degree possession of stolen property is correct on the basis that it is possible to commit robbery without also taking property valued in excess of \$250 (second degree possession of stolen property) or \$1500 dollars (first degree possession of stolen property). The value of the taken property is not an element of robbery. State v. Brown, 75 Wn.2d 611, 612, 452 P.2d 958 (1969).

The court did not expressly address defense counsel's proposed instruction on third degree possession of stolen property. Dollar value for that offense does not preclude satisfaction of the legal prong under the

Workman test. "Value" means "the market value of the property or services at the time and in the approximate area of the criminal act." RCW 9A.56.010(18)(a). The dollar value of stolen property is not an essential element of third degree possession of stolen property because all items have some value under the statutory definition of value. State v. Tinker, 155 Wn.2d 219, 222, 118 P.3d 885 (2005). For this reason, "[t]he act of taking *any* item constitutes at least third degree theft." Tinker, 155 Wn.2d at 222; see RCW 9A.56.010(18)(e) ("Property or services having value that cannot be ascertained pursuant to the standards set forth above shall be deemed to be of a value not exceeding two hundred and fifty dollars[.]").

For the reasons set forth above, all the elements of third degree possession of stolen property are included in first degree robbery as a matter of law. The legal prong of the Workman test is satisfied.

The factual prong of the Workman test is satisfied when evidence raises an inference that the lesser included offense was committed to the exclusion of the charged offense. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In other words, if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser offense instruction should be given. State v. Berlin, 133 Wn.2d 541, 551, 947 P.2d 700 (1997). In making this

determination, the appellate court must view the supporting evidence in the light most favorable to the party seeking the instruction and must consider all evidence presented at trial, regardless of its source. Fernandez-Medina, 141 Wn.2d at 455-56.

The factual prong is satisfied in this case because the evidence, viewed in the light most favorable to Grant, allowed for the inference that Grant only committed third degree possession of stolen property. Grant admitted he possessed stolen property. He knew the property was stolen. 8RP 403. He possessed some of it in his bedroom on December 4 and helped transport all of the stolen property to the motel, where he unloaded it. 8RP 403-04. In so doing, he withheld or appropriated the stolen property to the use of the true owner or person entitled thereto. RCW 9A.56.140. The value of the stolen property was not ascertained at trial, and was therefore deemed to have a value not exceeding \$250. RCW 9A.56.010(18)(e).

As argued by the defense, affirmative evidence supported its theory that Bigelow's identification of Grant as the man who entered her house and robbed her was mistaken, providing a basis for the jury to infer he did not commit robbery. 8RP 429-39. This evidence included (1) Bigelow's view of Grant's MySpace page before she identified him as the perpetrator to police; (2) her description of the perpetrator as having

freckles to the sketch artist when Grant did not have freckles; (3) her lack of description of tattoos when Grant had visible tattoos; (4) her lack of description of a gap in the perpetrator's teeth when Grant had a gap in his teeth, (5) and Dr. Loftus's expert testimony about how a person can be confident in making an identification when in reality the identification is mistaken. 8RP 40, 43-44, 51-52, 57-60, 146, 191-93, 257, 264-66, 351-52, 397-98. Furthermore, eyewitness evidence showed Grant could not have been at Bigelow's residence at the time she said the forced entry occurred. 8RP 21-22, 90, 141, 205-06.

The affirmative evidence, viewed in the light most favorable to Grant, allowed for the inference that he only committed third degree possession of stolen property. The trial court was required to give this lesser instruction had defense counsel not withdrawn his request for it.

c. Defense Counsel's Unreasonable Decision Not To Request The Lesser Offense Instruction Undermines Confidence In The Outcome.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) counsel's

performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Id. at 226. Counsel submitted proposed instructions on third degree possession of stolen property. CP 160-64. Counsel then committed himself (and his client) to giving the jury the opportunity to convict on a lesser offense in his opening statement. 8RP 323. Counsel later withdrew his request for all of the lesser offense instructions, including third degree possession of stolen property, only after being confronted with the court's belief that the legal prong for first and second degree possession of stolen property did not satisfy the legal prong of the Workman test.

It appears defense counsel withdrew his request for lesser offense instructions because he believed the trial court was correct in preliminarily determining the legal prong of the Workman test could not be satisfied either based on the value issue or some other reason. This was deficient performance. Counsel has a duty to know the relevant law. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). And only legitimate trial strategy or tactics constitute reasonable performance. Kylo, 166 Wn.2d at 869. Competent counsel would know the legal prong is satisfied as set forth in section C. 4. b., supra.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

The State may argue the failure to request a lesser offense instruction was harmless because jurors are presumed to follow instructions and will never convict on the charged crime unless the State proved its case beyond a reasonable doubt.

The United States Supreme Court has already rejected the basis for that argument: "True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction — in this context or any other — precisely because he should not be exposed to *the substantial risk* that the jury's practice will diverge from theory." Keeble v. United States, 412 U.S. 205, 212, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973) (emphasis added).

The lesser offense rule "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). "Where one of the elements of the offense charged remains in

doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Keeble, 412 U.S. at 212-13. This result is avoided when the jury is given the option of finding a defendant guilty of a lesser included offense, thereby giving "the defendant the full benefit of the reasonable-doubt standard." Beck, 447 U.S. at 634.

The jury's deliberative process is different when it is given an opportunity to acquit on a greater offense while still convicting on a lesser offense. "The element the Court in Beck found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." Spaziano v. Florida, 468 U.S. 447, 455, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). The goal of the lesser offense rule "is to eliminate the distortion of the factfinding process." Spaziano, 468 U.S. at 455.

Whether error is harmless is not determined by the existence of sufficient evidence to affirm a conviction. Rather, the crucial consideration is what impact the error may reasonably have had on the jury's decision-making process. Cf. State v. Bashaw, 169 Wn.2d 133, 147-48, 234 P.3d 195 (2010) (instructional error requiring unanimity for special verdict not harmless because it resulted in flawed deliberative

process that "tells us little about what result the jury would have reached had it been given a correct instruction;" State's argument that error was harmless because all twelve jurors agreed to verdict missed the point).

The lack of a lesser offense instruction where one should be given distorts the jury's deliberative process, leading to a conviction that otherwise may not have been happened. The rationale for how the absence of lesser offense instruction influence jury deliberation due to the court's failure to give one is equally applicable to the situation where the defendant is denied the jury's consideration of the lesser offense due to trial counsel's failure to offer such an instruction.

Reversal is required when a defendant is entitled to instruction on a lesser charge but does not receive it. State v. Parker, 102 Wn.2d 161, 163-64, 166, 683 P.2d 189 (1984). In Parker, the trial court committed prejudicial error in failing to instruct on reckless driving as a lesser offense to felony flight from a police officer, even though there was no dispute that the evidence was sufficient to convict for the greater offense. Parker, 102 Wn.2d at 162, 166. The Court of Appeals, in affirming conviction, wrongly presumed from the jury's verdict of guilt on felony flight that the intoxication defense presented for the greater offense was rejected and a retrial would produce no different result. Id. at 166. This type of reasoning was improper because it ignored "the fact that the jury had no

way of using the intoxication evidence short of outright acquitting Parker, because they were never told that the option of the lesser-included offense existed." Id. Parker refutes any argument that there is no prejudicial error when the jury is not instructed on a lesser offense.

The lack of a lesser offense instruction distorts the deliberative process by restricting the jury's consideration of the evidence in relation to the full range of crimes available on which to convict. State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987). In Grant's case, the lack of instruction on possession of stolen property precluded the jury from taking into account the less culpable mental state associated with that lesser crime in determining guilt.

A trial court's wrongful failure to instruct on a lesser offense when one is requested is prejudicial when, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Southerland, 109 Wn.2d at 391. This is at least the same standard of prejudice used for ineffective assistance of counsel claims. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 229. "The prejudice prong of a claim of ineffective assistance of counsel compares well to a harmless error analysis — essentially 'no harm, no foul.'" State v. Rodriguez, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004).

There is no justifiable reason that a different type of prejudice analysis should prevail when the failure to give a lesser offense instruction stems from counsel not asking for one as opposed to the trial court not giving one. In the latter case, the jury was deprived of considering the lesser offense issue due to an error made by the trial court. In the former case, the jury was deprived of considering the lesser offense issue due to an error made by trial counsel. To the jury, it makes no difference whether the trial court or defense counsel deprived it of an opportunity to consider a lesser offense. The jury never knows why it was not given the option of convicting on a lesser offense. Who is responsible has no bearing on whether there is a reasonable probability that the lack of such instruction influenced the jury's deliberations and, ultimately, the outcome.

When assessing the impact of instructional error due to defense counsel's deficient performance, reversal is automatic unless the error is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001) (quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)). Reversible error occurs "[w]hen the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the

error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial." State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968).

Again, the prejudice prong of a claim of ineffective assistance of counsel compares well to a harmless error analysis. Rodriguez, 121 Wn. at 187. Prejudice in an ineffective assistance case is established when confidence is undermined in the outcome. Thomas, 109 Wn.2d at 226. This standard of prejudice is in accord with the definition of reversible error advanced by the Court in Martin. It is also in accord with Keeble, where the United States Supreme Court found prejudicial error from the lack of a lesser offense instruction because the jury could rationally have convicted the defendant of a lesser offense if that option had been presented. Keeble, 412 U.S. at 213. The Court reversed because it could not say that the availability of a third option — convicting the defendant of lesser offense — could not have resulted in a different verdict. Id. The same holds true here.

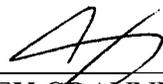
D. CONCLUSION

For the reasons stated, this Court should (1) reverse the kidnapping conviction and order dismissal of that charge with prejudice and (2) reverse the robbery conviction. In the event this Court declines to reverse the robbery conviction, the case should be remanded for resentencing within the standard range. In the event this Court declines to reverse any conviction, the exceptional sentence for kidnapping must be stricken.

DATED this 13th day of December, 2010.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65172-2-1
)	
TERRY GRANT,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 13TH DAY OF DECEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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[X] TERRY GRANT
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SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF DECEMBER 2010.

x *Patrick Mayovsky*