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STATE OF WASHINGTON
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Court of Appeals
Division I
State of Washington
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Supreme Court No. ____

COA No. 84717-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GHASSAN A. SHAKIR,

Appellant.

MOTION FOR DISCRETIONARY REVIEW

Treated as a petition for review; see the Clerk's letter dated 3-24-25
Supreme Court Clerk's Office

Judgment in King County Superior Court
No. 19-1-02848-0 SEA
Hon. Kristin V. Richardson, Presiding

Ghassan A. Shakir
Appellant, Pro Se
DOC# 435735
Stafford Creek Corr. Center
191 Constantine Way
Aberdeen, WA 98520

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A. IDENTITY OF PETITIONER

Ghassan A. Shakir asks this Court to accept review of the decision designated in Part B, infra.

B. DECISION BELOW

Mr. Shakir seeks review of the opinion of the Court of Appeals in State v. Shakir, No. 84717-1-I. Appendix A ("Slip Op.").

C. ISSUES PRESENTED FOR REVIEW

1. Is the evidence at trial insufficient, and therefore creates a reasonable doubt as to the essential element of "sexual contact" for the completed crime of indecent liberties in the first degree, and instead only supports guilt for the lesser crime of attempted indecent liberties?

2. Does the Court of Appeals opinion conflict with Washington case law precedent?

3. Was trial counsel ineffective for failing to move for a CrR 7.4 arrest of judgment?

4. Should the Court grant review under RAP 13.4(b)(1), (2), (3), or (4)?

D. STATEMENT OF THE CASE

1. General Background

Four women (K.D., A.A., K.P., and C.A.) accused Shakir of sexually assaulting them in 2019 while he was on duty as a rideshare driver. The State charged Shakir with the following six crimes:

1. Indecent liberties by forcible compulsion, committed against K.D.;

2. Kidnapping in the first degree with intent to commit the felony of indecent liberties and with the aggravating factor of sexual motivation, against K.D.;

3. Rape in the second degree, committed against A.A.;

4. Indecent liberties by forcible compulsion, committed against K.P.;

5. Kidnapping in the first degree with intent to commit the felony of indecent liberties and with the aggravating factor of sexual motivation, against K.P.; and

6. Rape in the third degree, committed against C.A.

A 14-day jury trial began in August 2022. The jury convicted Shakir only of both kidnapping counts and both indecent liberties counts. For both kidnapping counts, the jury found the aggravating factor of sexual motivation. The court imposed an indeterminate sentence of 226 months to life.

2. The Court of Appeals' Decision

On March 3, 2025, in an unpublished opinion, the Court of Appeals, Division One, denied in-part and granted in-part Mr. Shakir's appeal. The Court rejected most of the grounds raised by Mr. Shakir's counsel, only granting relief on the Legal Financial Obligations claim, and denied all of the independent grounds raised by Mr. Shakir in his July 2024 statement of additional grounds ("SAG II"). Mr. Shakir now seeks review of his SAG II claims. Appendix B ("SAG II").

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court Should Grant Review Because the Evidence Only Supports the Crime of Attempted Indecent Liberties, and the Opinion Below Conflicts With Published Court of Appeals and Supreme Court Decisions

"Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt." State v. Aver, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Under Washington law it is well established that,

> "[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence."

WPIC 4.01, at 79 (2d ed. Supp. 2005); State v. Bennett, 161 Wn.2d 303, 308, 309, 165 P.3d 1241 (2007).

At Shakir's trial, the allegations made by victim K.D. of Shakir touching her were ultimately inconclusive. At one point K.D. stated Mr. Shakir touched her breasts under her clothing. At another point K.D. admitted Shakir only made "attempts" to touch her breasts but never was successful. At yet another point K.D. claimed Shakir put his hand down her pants and underwear. But at another point K.D. stated that Mr. Shakir never put his hand down her pants. See Appendix B (SAG II), at pp. 8-12 (citing pertinent portions of Verbatim Report of Proceedings).

Even more significant, K.D. consistently testified that she had been so intoxicated from alcohol that the events in question were "hazy," she was "not 100 percent certain[]" about what happened with Mr. Shakir, and stated innumerable times that she simply could "not recall" exactly what happened. Id. These facts are undisputed.

On appeal below Mr. Shakir argued in his SAG II submission that his trial attorney was ineffective for not bringing a CrR 7.4 motion to arrest judgment, based on the issue that the State had not proven beyond a reasonable doubt all of the elements of first degree indecent liberties, which requires proof of "sexual contact" under RCW 9A.44.100(1)(a). Conversely, Mr. Shakir opined that based on the inconclusive and squarely contradictory statements of K.D., the most that the State had proven was the lesser crime of attempted indecent liberties which

only requires a "substantial step" with the "intent" to make sexual contact, per RCW 9A.29.020. Appendix B, at 7-8, 15.

However, the Court of Appeals rejected this claim, but curiously limited its analysis to only one case cited by Shakir, State v. Lopez, 107 Wn.App. 270 (2001). Slip Op., at 22. The Court of Appeals placed significant reliance on Lopez as being distinguishable from Shakir's case because, unlike Lopez, Shakir's jury "heard more than a mere 'fleeting' amount of evidence as to the 'sexual contact' element of indecent liberties." Slip Op. at 22.

However, the court's reliance on Lopez was misplaced, because Shakir's argument does not turn on the mere volume of trial testimony from alleged victim K.D. Rather, Shakir's argument is that because K.D. admitted that she was not "100 percent" certain what happened, could "not recall" and was "hazy" as to the events in question, and ultimately testified equally to both assertions that Shakir did, then did not, touch her breasts or genetalia, this was evidence insufficient to sustain a guilty verdict on the completed crime of indecent liberties.

To be sure, the Court of Appeals conclusion lacks any discussion of the Lorenzen, Powell, Khalif, Isiordia-Perez, or Anguiano cases in Washington's jurisprudence, which make clear that mere touching through clothing does not per se constitute the "sexual contact" element necessary to sustain an indecent

liberties conviction, and instead only supports the crime of attempted indecent liberties. Appendix B, at 16-17 (citing collective cases).

Moreover, while Shakir's SAG II arguments touched on the lack of DNA evidence as being further probative of the insufficiency of the State's evidence, see Appendix B, at 13-15, the Court of Appeals incorrectly concluded that any lack of DNA does not "negate any other evidence on this issue." Slip Op. at 22.

To be sure, the "other evidence" referenced by the court below has nothing to do with whether or not Shakir successfully touched K.D.'s breasts or genetalia. The "other evidence" -- which is comprised of K.D.'s testimony that she was handcuffed in Shakir's car, and the police photo of a tiny blemish allegedly from the handcuffs -- has nothing to do with whether Shakir touched K.D.'s intimate areas underneath her clothing. In fact, the Court of Appeals squarely contradicted itself by ruling that this "other" evidence of handcuffing "was not sufficient to establish indecent liberties, which again, requires the defendant make 'sexual contact' with another person." Slip Op. at 15.

While the handcuffing evidence does go to support the kidnapping elements, the lack of any of Shakir's DNA on K.D.'s clothing certainly would cast a reasonable doubt in the mind of at least one juror as to whether Shakir successfully

touched K.D.'s breasts or vaginal area underneath her clothes. See Buck v. Davis, 580 U.S. 100, 102, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017) (applying "one juror" test in assessing prejudice under Strickland analysis).

Contrary to the Court of Appeals' conclusion, a lack of DNA evidence does go to the insufficiency of evidence, as is shown by the acquittal of Shakir's other charge for second degree rape against A.A., where Shakir's jury heard A.A.'s direct testimony that Shakir beat her, and raped her with his penis, yet there was a complete lack of Shakir's DNA on A.A.'s clothing. See VRP (State's case in chief).

From K.D.'s testimony there is a reasonable doubt as a matter of law as to whether Shakir successfully touched K.D. under her clothing. This "sexual contact" is an essential element of the crime of indecent liberties in the first degree. Therefore, the Court of Appeals opinion conflicts with the due process requirements held in State v. Aver, 109 Wn.2d 303, 310 (1978), conflicts with the reasonable doubt standard described in State v. Bennett, 161 Wn.2d 303, 308-09 (2007), and conflicts with the "sexual contact" element for indecent liberties explained in State v. Powell, 62 Wn.App. 914, 917 (1991). Accordingly, this Supreme Court should grant review pursuant to RAP 13.4(b)(1), (2), or (3).

2. Trial Counsel Was Ineffective in Failing to Move for CrR 7.4 Arrest of Judgment

Mr. Shakir argued that his trial counsel was ineffective in failing to bring a motion to arrest judgment under CrR 7.4, based upon the above issue of the State's failure to prove beyond a reasonable doubt the essential element of "sexual contact" for indecent liberties.

State v. Lopez, 107 Wn.App. 270 (2001) is controlling to Shakir's claim on appeal. At issue in Lopez was whether trial counsel was ineffective in not bringing a CrR 7.4 motion to arrest judgment. The court held that counsel was ineffective because,

> "defense counsel should have moved for dismissal of the unlawful possession charge at the close of the State's case in chief. Because the State had neglected to prove an essential element of unlawful firearm possession, the trial court would have necessarily granted the motion."

Lopez, supra, at 277. While in Lopez the insufficiency of the evidence was found in that the only mention of fact to establish the essential element was a "fleeting admission" of Lopez's prior conviction in his direct testimony, id., at 276, the holding actually turns on the fact that the State's evidence was insufficient as to an essential element of the crime.

Because appellate analysis of a CrR 7.4(a) motion makes a determination of insufficiency, as a matter of law, it must follow that the evidence in the charge of indecent liberties against K.D. be found insufficient based on her equivocations, and admitted uncertainty as to what truly happened. As such, under

Lopez, Shakir's counsel would have likely had the CrR 7.4(a) motion granted, and thus counsel was ineffective under the meaning in Strickland v. Washington, 466 U.S. 668 (1984).

The Court of Appeals artificially narrowed the holding in Lopez, and therefore this Court should grant review pursuant to RAP 13.4(b)(1), (2), or (3).

3. This Court Should Grant Review Under RAP 13.4(b)(4)

This case presents a significant constitutional question: what is the brightline for sufficiency of evidence that determines whether an essential element of a crime has been proven beyond a reasonable doubt? Stated another way, is evidence insufficient as a matter of law when alleged victim testimony states two diametrically opposed facts that go directly to an essential element of the crime? Or, is evidence further insufficient as a matter of law when an alleged victim testifies to being too intoxicated to remember or be certain what happened in alleging a crime was perpetrated?

This Supreme Court has recently strengthened its awareness of injustices that arise when dealing with defendants of color, i.e., the Black and brown communities. Racial inequity in the justice system has become more acknowledged in recent years, but has by no means been completely eradicated. In State v. Gregory, 192 Wn.2d 1, 22-23, 427 P.3d 621 (2018), the Court

recognized the history of systemic race discrimination in Washington's criminal justice system. In State v. Blake this Court noted how this history caused disparate impacts regarding the application of the VUSCA statute on communities of color: "The drug statute that they interpreted has affected thousands upon thousands of lives, and its impact has hit young men of color especially hard." State v. Blake, 196 Wn.2d 170, 192, 481 P.3d 521 (2021). See also State v. Anderson, 200 Wn.2d 266, 295, 516 P.3d 1213 (2022)(Gonzalez, C.J., dissenting)("war on crime" "demonized" "young Black or brown children"). Protecting the ability of these victims of systemic discrimination to uphold the elements of Due Process and the reasonable doubt standard ameliorates the harm.

Mr. Shakir is a political refugee from Iraq. He is dark in complexion, and speaks imperfect English. At his trial he faced multiple White female accusers, all of whom seemed to be coloring their testimony from a position of racial prejudice. It must certainly look righteous to a jury for a prosecutor to be bringing alleged sex crimes perpetrated against young White women. In fact, as the Court of Appeals recognized, the prosecution made it a point to highlight for the jury that the victims were "four remarkably similar-looking [White] women around the same age with the same statute, with almost the same hairstyle." Slip Op. at 3.

Accordingly, this Court should exercise caution and grant review in this socially significant case. Immigrants lawfully coming to the United States should be afforded the same level of due process as they expected to find when they journeyed here. Washington jurisprudence should not defer to a path that allows the strict constitutional requirements of due process to wither at the edges, and bend to uphold guilty verdicts based on uncertain, or worse, unavailable memories and internally-conflicting testimony from a complaining witness.

The evidence in this case, viewed in the light most favorable to the State, simply does not prove beyond a reasonable doubt that Mr. Shakir made actual "sexual contact" with K.D.'s breasts or vagina. Under Washington's jurisprudence there must be actual touching of the breasts or vagina -- not mere attempts at such touching -- to sustain a conviction for indecent liberties.

Although Washington law does not require corroboration of alleged victim testimony in sex offense cases, see RCW 9A.44.010(1), this statutory provision necessarily places an even higher importance upon the State being held to its burden to prove each essential element of a crime beyond a reasonable doubt.

This case does not just represent a single person's conviction based upon an alleged victim's admittedly uncertain testimony. In a much bigger sense, this case stands to inform the public

that a degradation of fundamental constitutional protections has emerged.

This Court has granted review in similar classes of cases that bear significant consequence to the public interest. See In re Pers. Restraint of Williams, 2021 Wash. LEXIS 159, 2021 WL 1541532 (2021)(granting review for an inmate seeking immediate release due to COVID-19); In re Pers. Restraint of Flippo, 380 P.3d 413 (2016)(granting review on issue of imposition of LFO costs upon indigent criminal defendants); In re Pers. Restraint of Arnold, 190 Wn.2d 136 (2018)(granting review on issue of sex offender registration). And this Court has granted review on claims of insufficiency of the State's evidence. See State v. Bergstrom, 199 Wn.2d 23 (2022); State v. Lopez 147 Wn.2d 515 (2002)(review granted on issue of counsel's ineffectiveness in failing to bring motion to arrest judgment for insufficient evidence).

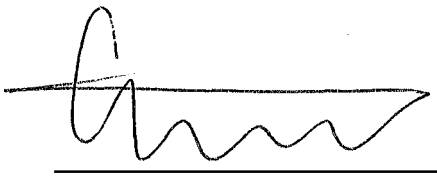
To ensure public trust in the law, the trial process, and the judiciary, this Court should grant review pursuant to RAP 13.4(b)(4).

F. CONCLUSION

The Court should accept review and vacate the conviction for first degree indecent liberties against K.D.

Dated this 20th day of March, 2025.

Respectfully submitted,



Ghassan A. Shakir
Appellant, Pro Se
DOC 435735
Stafford Creek Corr. Center
191 Constantine Way
Aberdeen, WA 98520

Certificate of Service

I, Ghassan A. Shakir, certify that on March 21, 2025, I served the attached pleading on counsel for Respondent by filing it through the electronic e-filing system in the Law Library at Stafford Creek Corrections Center.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 21 day of March, 2025, as Aberdeen, Washington.

Ghassan A. Shakir
Appellant, Pro Se
DOC 435735
Stafford Creek Corr. Center
191 Constantine Way
Aberdeen, WA 98520

APPENDIX A

FILED
3/3/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. GHASSAN A. SHAKIR, Appellant.	No. 84717-1-I DIVISION ONE UNPUBLISHED OPINION

DIAZ, J. — A jury convicted Ghassan Shakir, then a rideshare driver, of kidnapping and of committing indecent liberties against two female passengers. Shakir now claims that the State engaged in misconduct, that evidentiary errors occurred, and that his convictions violate his double jeopardy rights. Separately, Shakir asserts additional errors, including ineffective assistance of counsel. We remand this matter to the trial court with instructions to strike Shakir's victim penalty assessment (VPA) and DNA collection fee. Otherwise, we affirm.

I. BACKGROUND

Four women (K.D., A.A., K.P., and C.A.) accused Shakir of sexually assaulting them in 2019 while he was on duty as a rideshare driver. The State charged Shakir with the following six crimes:

1. Indecent liberties by forcible compulsion, committed against K.D.;
2. Kidnapping in the first degree with intent to commit the felony of indecent

liberties and with the aggravating factor of sexual motivation, against K.D.;

3. Rape in the second degree, committed against A.A.;
4. Indecent liberties by forcible compulsion, committed against K.P.;
5. Kidnapping in the first degree with intent to commit the felony of indecent liberties and with the aggravating factor of sexual motivation, against K.P.; and
6. Rape in the third degree, committed against C.A.

A 14 day jury trial began in August 2022. The jury convicted Shakir only of both kidnapping counts and both indecent liberties counts. For both kidnapping counts, the jury found the aggravating factor of sexual motivation. The court imposed an indeterminate sentence of 226 months to life.

Shakir now timely appeals. Shakir himself separately filed two statements of additional grounds (SAG).

II. ANALYSIS

A. Prosecutorial Misconduct

Shakir claims the State committed prosecutorial misconduct in its rebuttal closing argument when asserting he would be the "'unluckiest man in the world'" for four similar women to "'falsely accuse'" him. We disagree.

A prosecutor serves "as the representative of the people" and "[d]efendants are among the people the prosecutor represents." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Thus, the State "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Id.; CONST. art. I, §

22; U.S. CONST. AMEND. VI.

"In a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial." State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). We gauge whether a defendant has met this burden within "'the context of the entire record and the circumstances at trial.'" State v. Koeller, 15 Wn. App. 2d 245, 260, 477 P.3d 61 (2020) (quoting State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011)). "We review allegations of prosecutorial misconduct under an abuse of discretion standard." State v. Azevedo, 31 Wn. App. 2d 70, 78, 547 P.3d 287 (2024). "The trial judge is generally in the best position to determine whether the prosecutor's actions were improper and whether, under the circumstances, they were prejudicial." State v. Ish, 170 Wn.2d 189, 195-96, 241 P.3d 389 (2010).

In its rebuttal closing argument, the State stated:

> [PROSECUTOR:] [A]fter . . . the defense closing argument . . . the conclusion that [Shakir's counsel] would have you draw with the issues that he has raised is essentially that *Mr. Ghassan Shakir is the unluckiest man in the world*, right. He is just there in the Seattle area trying to help four women –
>
> [SHAKIR'S COUNSEL]: Your Honor, I object. This is impermissible. This is impermissible. It reverses the burden.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: He is just driving around the Seattle area and *four remarkably similar-looking women around the same age with the same stature, with almost the same hairstyle* or whether he tries to help, somehow he ends up in areas that are known to him, but he gets lost in those near his workplace or places that he has visited before in Renton, for example. And they all somehow *falsely accuse* him of sexual assault –
>
> [SHAKIR'S COUNSEL]: Wow.

> [PROSECUTOR]: -- without knowing each other. That is just simply not what the evidence in this case (unintelligible).

(Emphasis added).

At oral argument, Shakir's counsel clarified the scope of his prosecutorial misconduct claim. His counsel asserted that he was not objecting to the State noting the victims' physical similarities and that the "'unluckiest person in the world' [comment] standing alone is not prejudicial misconduct." Wash. Ct. of Appeals oral argument, State v. Shakir, No. 84717-1-I, (Jan. 9, 2025), at 6 min., 59 sec. through 7 min. 34 sec. & at 3 min., 49 sec. through 4 min., 11 sec. video recording by TVW, Washington State's Public Affairs Network, https://www.tvw.org/watch/?clientID=9375922947&eventID=2025011215. Instead, "it's the 'falsely accusing' [comment] combined . . . with 'unluckiest person,'" which constituted error because "basically what the prosecutor said is in order to acquit you have to find that the victims are lying." Id. at 3 min., 49 sec. through 4 min., 11 sec. In this way, Shakir argues that the State undermined the presumption of innocence and lowered or shifted the burden of proof.

It is true that the State may not shift the burden of proof to the defendant or otherwise undermine their presumption of innocence. State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). Even so, "[a]s an advocate, the prosecuting attorney is entitled to make a fair response to the arguments of defense counsel." State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997). We hold that it was not an abuse of discretion for the court to overrule Shakir's objection because each of the State's comments, individually or taken together, were a proper response to

his closing argument.

Shakir asserted in his closing argument that the victims or complaining witnesses' memories were unreliable, based in part on their apparent intoxication. Shakir's counsel also asked the jury to recall, when they are "getting into cabs or Ubers or Lyfts . . . what percentage [of drivers] are Middle Eastern? I think that's an issue insofar as the identification issues that confront these four young ladies and you, frankly, evaluating their identification." In turn, Shakir repeatedly argued this matter presented a case of mistaken identity.

In that context, the State's "unluckiest man" comment essentially is an appeal to the jury's common sense, or to the rough laws of probabilities, that it is unlikely that each woman would have the same type of memory lapse—based on intoxication and the inability to tell persons of different ethnicity apart—and accuse by mere coincidence the same person of sexual assault. State v. Welker, 37 Wn. App. 628, 638 n.2, 683 P.2d 1110 (1984) ("The jury is usually told it may rely upon common sense and the 'common experience of mankind.'"). In this way, we hold the State's "unluckiest man" comment was a fair response to Shakir's closing argument that the women simply had an unfortunate identical failure of memory. Brown, 132 Wn.2d at 566.

Turning to the State's "falsely accuse" comment,[1] Shakir strongly suggested

[1] At oral argument, counsel rhetorically asked, "What does ['falsely accused him'] mean? 'False.' They lied. It wasn't true. Ok, they didn't say they made a mistake or they could have made a mistake." Wash. Ct. of Appeals oral argument, supra at 6 min., 6 sec. through 6 min., 17 sec. For purposes this argument, we will assume "falsely accuse" means an intentional falsehood, though that is not its only meaning. BLACK'S LAW DICTIONARY, 742 (12th ed. 2024) ("[w]hat is false can be so by intent, by accident, or by mistake").

in his closing argument that the victims or complaining witnesses were lying, or otherwise questioned the truthfulness of the allegations. For example, Shakir asserted that "intentional falses, unintentional falses, and outright lies, they all look the same in court." And he argued "[e]ither [A.A.] intentionally didn't tell the truth or maybe she was so intoxicated that it didn't dawn on her that she just had a cigarette. Don't know which." Further, he described K.D.'s account of events as having "no basis[] [i]n fact, none. I didn't bring this up to her because I didn't want to embarrass her." Shakir characterized K.D.'s testimony multiple times as "false," and a "fantasy." In other words, Shakir's closing argument repeatedly urged the jury to conclude the victim's testimony was "false" and perhaps intentionally so.

We hold it was not an abuse of discretion for the court to overrule Shakir's objection because the State's "falsely accuse" comment was a fair response to Shakir's closing argument, which directly accused the victims or complaining witnesses of effectively intentionally fabricating the evidence. Brown, 132 Wn.2d at 566. Again, the State's argument essentially asked the jury to use their common sense to evaluate whether it is likely that all four complainants had the same "fantasy."

Moreover, we must still consider this assignment of error in the context of the entire record and the circumstances at trial. Koeller, 15 Wn. App. 2d at 260. "In the context of closing arguments, the prosecuting attorney has 'wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.'" State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006),

overruled on other grounds by State v. W.R., 181 Wn.2d 757, 760, 336 P.3d 1134 (2014)). "It is not misconduct for a prosecutor to argue that the evidence does not support the defense theory." State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

Here, the State went on to tie and contrast its comments on the implausibility of Shakir's theories to the entirety of the evidence presented at trial. Specifically, the State argued that "[e]ven if [the jury] want to disregard completely the in-court identification of each of these witnesses and their photomontages,[2] the other evidence supports that this person is Ghassan Shakir." The State then discussed "all of the video[3] . . . the geo location data"[4] and "[Shakir's] own admissions." The State also acknowledged the lack of conclusive DNA evidence, but argued that a forensic scientist and detective had testified such evidence is not the "end-all, be-all" before discussing other evidence such as the "handcuffs that [were] found in Mr. Shakir's car."[5] Thus, viewing the State's comments in context of the entire argument, as we must, it was not an abuse of discretion to conclude that the State's comments invited the jury to weigh the entirety of the evidence on one side to the likelihood of intentional falsehoods or mere coincidence on the other. Koeller, 15 Wn. App. 2d at 260.

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[2] The State was referring to the fact that all four complainants provided in-court identifications of Shakir at trial.

[3] The State was referring to various surveillance videos which, for example, show K.D. entering Shakir's car and the vehicle's subsequent inculpatory route.

[4] The State was referring to testimony and inculpatory evidence on geo-location, Google Maps, and rideshare app data detailing Shakir's whereabouts in relation to the victims.

[5] The State was referring to handcuffs found in a bag in Shakir's vehicle, which were engraved with the phrases "'50 shades of gray'" and "'you are mine.'"

Finally, Shakir also argues the State's comments violated a court order, namely jury instruction 3, which states jurors "'must decide each count separately'" and their "'verdict on one count should not control your verdict on any other count.'" In support, Shakir cites to Fisher. There, the "court expressly conditioned the admission of evidence of physical abuse on defense counsel's making an issue of [the victim's] delayed reporting." 165 Wn.2d at 747. The defense did not make an issue of delayed reporting, but the State nonetheless invoked the prohibited evidence in violation of this ruling. Id.

Indeed, the State may not present evidence in violation of a court order, instructions, or ruling in limine. Gregory, 158 Wn.2d at 864-67 ("the State made the motion in limine and then blatantly violated the resulting order"). But here, the court issued only general instructions to consider each count separately, that the State has the burden of providing each element beyond a reasonable doubt, and that the "lawyers' statements are not evidence." Nothing in the State's closing argument undermined those instructions. The State's comments did not expressly or implicitly instruct the jury to conflate the complaining witness' accusations, in contravention of the instructions or court's findings. And the State ended its argument with a reminder that "[t]here is no question at all that [Shakir] do[es] not have a burden of proof" and the "State has the burden of proof beyond a reasonable doubt for each element." Thus, we hold the State's challenged comments did not violate a court order as Shakir argues.

In sum, we hold that Shakir has not carried his burden to show the State's comments were improper. Emery, 174 Wn.2d at 756. We need not reach the

prejudice prong.[6]

B. Recorded Recollection

Shakir next argues the court abused its discretion by admitting under ER 803(a)(5) a recording of K.D.'s 2019 statements to a detective. We disagree.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." ER 802. Relevant here is the "Recorded Recollection" hearsay exception. ER 803(a)(5). Under this exception:

> Admission is proper when the following factors are met: (1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness' memory; and (4) the record reflects the witness' prior knowledge accurately.

State v. Alvarado, 89 Wn. App. 543, 548, 949 P.2d 831 (1998). Shakir only disputes the first and third prong, largely conflating the two in arguing that K.D. "never" had either knowledge or a fresh memory of the events.

"The admission of statements under ER 803(a)(5) is reviewed for an abuse of discretion." Id. While this standard "provides great deference to the trial court's evidentiary rulings, it does not immunize them." State v. Broussard, 25 Wn. App. 2d 781, 789, 525 P.3d 615 (2023). "A court abuses its discretion when its decision

[6] Shakir makes a single passing reference that the State's comments also violated his "due process" rights. We will not reach this issue as "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996).

adopts a view that no reasonable person would take or that is based on untenable grounds or reasons." State v. Boyle, 183 Wn. App. 1, 12-13, 335 P.3d 954 (2014).

The State moved the court to admit K.D.'s recorded statements to a detective in January 2019 under ER 803(a)(5). Shakir's counsel expressed concerns about K.D.'s memory, citing the four-prong test above. On the court's instruction to the State to lay further foundation, K.D. then testified she remembered giving the statements at issue to the detective, that she was telling the truth in that statement, and that her memory was clearer back then. K.D. further testified on the evolution of her memory since giving this statement to detectives. In short, she explained that the trauma of this incident and the passing of three family members negatively affected her memory. With this, the court held it was "satisfied with the foundation" and allowed the admission of the recording.

Based on the totality of K.D.'s testimony, we hold the court did not abuse its discretion in finding the State established the recording conveys information K.D. "once had knowledge" about and "was made" and later adopted by K.D. when the subject matter was "fresh in [her] memory." Alvarado, 89 Wn. App. at 548. The testimony above provided tenable grounds on which the court based its decision. State v. Hag, 166 Wn. App. 221, 261-62, 268 P.3d 997 (2012).

In response, Shakir argues that there are numerous inconsistencies between the recorded recollection and other evidence.[7] Even assuming Shakir

[7] For example, as Shakir argues in his brief, K.D. "stated that she walked to the Uber or Lyft alone, but in fact her friend Fernando Garcia walked her to the car and helped her get in"; K.D. "told the detective that she only got into one car, but surveillance video shows she got out of the first car while the driver was dropping off another passenger at the W Hotel, leaned against a wall for several minutes,

accurately identifies inconsistencies between the statements in the recorded recollection and other evidence, his argument conflates the credibility of a given statement with its admissibility. We have held that there is a "distinction between the accuracy of the recorded recollection itself and the credibility of the witness's statement." In re Det. of Peterson, 197 Wn. App. 722, 728, 389 P.3d 780 (2017). "[A] record can be considered accurate for the purposes under ER 803(a)(5) even when a witness's credibility is clearly questionable." Id. at 729. Credibility issues from "inconsistencies in evidence are matters which affect weight and credibility and are within the exclusive province of the jury." Herriman v. May, 142 Wn. App. 226, 232, 174 P.3d 156 (2007); In re Det. of R.W., 98 Wn. App. 140, 144, 988 P.2d 1034 (1999) ("the jury is the sole judge of the weight of the testimony"). In contrast, the preliminary question of "admissibility of evidence shall be determined by the court." ER 104(a). Shakir's remedy was to highlight these purported inconsistencies within cross-examination or at closing argument. See Peterson, 197 Wn. App. at 728-29.

This court's decision in State v. White, 152 Wn. App. 173, 215 P.3d 251 (2009), is instructive. There, the witness "could not remember if the statement accurately reflected what she told the police, because she was 'too intoxicated.'" Id. at 185. However, the witness, "even after reading the statement on the stand, did not disavow the accuracy of the statement." Id. Further, we held that the witness "[o]n the 911 tape, identifies [the defendant] as the attacker" and "testified

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then got in another car."; and K.D. "also told the detective that she sat in the front because the driver told her to, but surveillance video shows she got in the back of both cars.

that it is her voice on the tape." Id. at 186. As such, this court held "the totality of the circumstances support the trial court's ruling" and "the trial court did not abuse its discretion in admitting [the witness'] statement" as an ER 803(a)(5) recorded recollection. Id. This court so held, despite the fact the witness "did not testify that the statement accurately reflected her prior knowledge." Id. at 184.

Here, while she acknowledged her memory was "hazy" due to her consumption of alcohol, K.D., not only did not disavow the accuracy of the statement, but affirmatively testified that she recalled giving the statement in the recording. And, unlike the witness in White, K.D. expressly testified the recording accurately reflected her knowledge at the time.

From the above, we hold the court did not abuse its discretion in allowing K.D.'s statements to be admitted as a recorded recollection under ER 803(a)(5). Shakir did not show that the court's decision "adopts a view that no reasonable person would take." Boyle, 183 Wn. App. at 12-13.[8]

C. Double Jeopardy

Shakir next argues his convictions for kidnapping in the first degree and indecent liberties violate double jeopardy. We disagree.

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[8] Shakir further argues the court erroneously "conflated knowledge with truth-telling, and repeatedly indicated it thought that the statement could only be excluded if K.D. lied." This argument is contrary to the record as the court demonstrated it was cognizant of the difference between admissibility and credibility. For example, the court explained Shakir's concerns on credibility were "a matter for argument in cross-examination. That's not a matter for – for foundation." The court also accurately cited to authority which "says even if the declarant later claimed a statement was not true that that would be – it would be susceptible to admissibility." (Citing State v. Nava, 177 Wn. App. 272, 294-95, 311 P.3d 83 (2013)).

"The constitutional guaranty against double jeopardy protects a defendant . . . against multiple punishments for the same offense." State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991); see also U.S. CONST. amend. V; CONST. art. I, § 9. "'If the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended.'" State v. Arndt, 194 Wn.2d 784, 815-16, 453 P.3d 696 (2019) (quoting State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

To "determine legislative intent regarding whether cumulative punishment is authorized,"

> [w]e follow four analytical steps . . . : (1) consideration of any express or implicit legislative intent, (2) application of the Blockburger, or 'same evidence,' test, (3) application of the 'merger doctrine,' and (4) consideration of any independent purpose or effect that would allow punishment as a separate offense.

Id. at 816 (citing Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Double jeopardy "does not prohibit the imposition of multiple punishments if legislative intent can be found in one of the four double jeopardy analytical steps" articulated above. Id. at 818. Claims of double jeopardy are reviewed de novo. Id. at 815. The party asserting a double jeopardy claim bears the burden of showing a double jeopardy violation, here Shakir. State v. Moses, 104 Wn. App. 153, 158 n.16, 15 P.3d 1058 (2001).

Shakir only addresses the second analytic step. Under Blockburger's same evidence test, we gauge whether "the same act or transaction constitutes a violation of two distinct statutory provisions" by asking "whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. Stated otherwise, "[i]f each offense requires proof of an element not required in the other,

where proof of one does not necessarily prove the other, the offenses are not the same and multiple convictions are permitted." State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). Thus, we now consider whether indecent liberties and kidnapping in the first degree are the same in law and in fact. State v. Tili, 139 Wn.2d 107, 125, 985 P.2d 365 (1999).

For double jeopardy claims, "[w]e consider the elements of the crimes as charged and proved, not merely as the level of an abstract articulation of the elements." Freeman, 153 Wn.2d at 777.

Kidnapping in the first degree requires the defendant "intentionally *abducts* another person with intent . . . [t]o facilitate commission of any felony," here indecent liberties. RCW 9A.40.020(1)(b) (emphasis added). "'Abduct' means to *restrain* a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1) (emphasis added). "'Restrain' means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty." Id. at (6). In contrast, indecent liberties requires the defendant "knowingly causes another person to have *sexual contact* with him or her or another . . . [b]y forcible compulsion." RCW 9A.44.100(1)(a) (emphasis added). "'Sexual contact,'" by definition, requires physical "touching." RCW 9A.44.010(13).

Here, the charging documents and jury instructions align with the statutory definitions below. As the State charged then, indecent liberties required it to show that Shakir made physical "sexual contact" with the victim(s) while its kidnapping

charges do not. The kidnapping in the first degree charge could have been accomplished by only "intimidation" and thus without any physical contact. Further, as both charged and under the statute, kidnapping in the first degree requires only "intent" to facilitate another felony and does not require the defendant actually succeed in committing said felony. RCW 9A.40.020(1)(b). Thus, the kidnapping in the first degree charge did not incorporate the "sexual contact" element of indecent liberties. In other words, as charged, kidnapping in the first degree and indecent liberties each "includes an element not included in the other" and are, thus, legally distinct. Louis, 155 Wn.2d at 569.

The factual distinction between Shakir's charges for kidnapping in the first degree and indecent liberties is also reflected in the facts "proven" at trial. Freeman, 153 Wn.2d at 777. For example, K.P. testified she tried to leave Shakir's vehicle, but the doors were locked. She also testified that Shakir told her "'[y]ou want this'" and took her to a "dark abandoned parking lot." As further example, K.D. testified Shakir "handcuffed" her to a "bar in the front seat," and had taken her to a dark, wooded area that she did not recognize.

Based on this testimony, the jury could have found that the State established kidnapping in the first degree as Shakir restrained K.P. and K.D. by secreting or holding them in a place where they were not likely to be found. RCW 9A.40.010(1)(a). However, this testimony alone was not sufficient to establish indecent liberties, which again, requires the defendant make "sexual contact" with another person. RCW 9A.44.100(1). Thus, as charged and on the facts proven, the charges of kidnapping in the first degree and indecent liberties require different

evidence be proven. See, also, State v. Nysta 168 Wn. App. 30, 49, 275 P.3d 1162 (2012) (distinguishing between the evidence *required* to convict versus the evidence *available* to convict).

In sum, we hold Shakir's convictions for kidnapping in the first degree and indecent liberties are legally and factually distinct under Blockburger. 284 U.S. at 304. Thus, we reject Shakir's double jeopardy claim under Arndt, 194 Wn.2d at 818, based only on this factor.

D. Legal Financial Obligations

Shakir's judgment and sentence imposed both a VPA and DNA collection fee. Shakir now requests a remand to strike both legal financial obligations. The State states it "does not oppose a remand for the limited purpose of striking the VPA and DNA fee without a hearing." We accept this concession and remand this case to the trial court to strike the DNA collection fee[9] and VPA[10] in accordance with RCW 43.43.7541(2) and RCW 7.68.035(4).[11]

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[9] The legislature amended statutes governing DNA collection fees, eliminating the fee for all defendants. LAWS OF 2023, ch. 449, § 4. Further, courts are required to waive any DNA collection fee imposed prior to the 2023 amendments, on the offender's motion. Id.; RCW 43.43.7541(2).

[10] Formerly, RCW 7.68.035(1)(a) mandated a $500 victim penalty assessment for all adults found guilty in superior court of a crime. State v. Mathers, 193 Wn. App. 913, 918, 376 P.3d 1163 (2016). In 2023, our legislature amended RCW 7.68.035 to state that "[t]he court shall not impose the penalty assessment under this section if the court finds that the defendant, at the time of sentencing, is indigent as defined in RCW 10.01.160(3)." LAWS OF 2023, ch. 449, § 1; RCW 7.68.035(4). Further, courts are required to waive VPAs imposed prior to the 2023 amendments, on the offender's motion. Id.; RCW 7.68.035(5)(b).

[11] Shakir also claims the "offender score and sentence length are improper because counts one and two constituted the same criminal conduct and counts four and five constituted the same criminal conduct" and asserts his counsel was ineffective for not raising this claim at sentencing. As the claims have no accompanying substantive argument, we will not consider these two assignments

E. Statements of Additional Grounds

Statements of additional grounds ensure an appellant can raise issues in their criminal appeal that may have been overlooked by their attorney. RAP 10.10(a). Recognizing the practical limitations many incarcerated individuals, RAP 10.10(c) does not require that the statement contain citation to the record or authorities. But the appellant must still "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Further, courts are not obliged to search the record for support of the appellant's claims. Id.

In June 2023, Shakir filed a four page handwritten document titled "RAP 10.10 (SAG) Reserve to Supplement" (SAG I).[12] In July 2024, Shakir also filed a typed 20 page statement of additional grounds (SAG II).

1. Prosecutorial Misconduct

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of error. State v. Sims, 171 Wn.2d 436, 441, 256 P.3d 285 (2011)

[12] Within SAG I, Shakir presents two overarching arguments. We reject both.

First, Shakir argues the superior court acted outside its jurisdiction by failing to order post-conviction discovery or an evidentiary hearing. Further, he alleges his appellate counsel failed to find additional evidence. In so arguing, Shakir fails to provide any specific citation to the record or specifically describe what this additional evidence is. Regardless, we do not reach claims that rely on evidence outside the record. See State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995) (if an appellant "wishes a reviewing court to consider matters outside the record, a personal restraint petition is the appropriate vehicle").

Second, Shakir argues RCW 9A.44.020(1), which states an alleged victim's testimony need not be corroborated, violates the equal protection and due process protections of the United States Constitution as well as his "'[r]ight to remain silent.'" We need not consider these high level assertions as Shakir fails to cite any binding authority. Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 14, 721 P.2d 1 (1986) ("'[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" (alterations in original) (quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970))).

Shakir in SAG II claims the State committed prosecutorial misconduct three times in its closing argument.

Again, prosecutorial misconduct requires the appellant establish both impropriety and prejudice. Emery, 174 Wn.2d at 756. As Shakir acknowledges, his counsel did not object to the alleged misconduct and thus he must show that the actions, even if improper, were "flagrant and ill-intentioned." Emery, 174 Wn.2d at 760-61. We need not reach that heightened standard of prejudice because Shakir does not establish any of these statements below were improper.

a. Vouching

Shakir alleges the State "repeatedly vouched for the 'credibility' of its witnesses and that they were telling the 'truth.'" It "is improper for a prosecutor to vouch for the credibility of a witness." State v. Warren, 134 Wn. App. 44, 68, 138 P.3d 1081 (2006). "However, an argument does not constitute vouching unless it is clear that the prosecutor is not arguing an inference from the evidence, but instead is expressing a *personal opinion* as to the witness's credibility." Id. (emphasis added). The State "may freely comment on the credibility of the witnesses *based on the evidence*." Id. (emphasis added).

Similar to the facts of Warren, the State's comments here specifically discussed the trial testimony or evidence. Cf. Warren, 134 Wn. App. at 68 ("the prosecutor argued that [the witness]'s testimony was credible *based on specific details she testified to at trial*" and thus "[b]ecause the prosecutor's argument was based on the evidence presented at trial, it was not misconduct.") (emphasis added). Thus, we hold the State's challenged comments were not improper

vouching.[13]

b. Evidence Outside the Record

Shakir next argues the State improperly created a "false narrative about what Mr. Shakir was supposedly thinking during the attack on [K.P.]." Among other comments, Shakir cites to the State's claim in closing argument that Shakir "[knew] what to expect when he [took] K.P." to an isolated "closed business" and that he "knew that she did not need to be in this Kirkland location. He knew that she needs to be going to Everett, and he took her here instead."

In support, Shakir relies on State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). There, this court held that "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record" and there the State "attribut[ed] repugnant and amoral thoughts to him—thoughts that were based on the *prosecutor's speculation and not evidence*." Id. at 553-54 (emphasis added).

In contrast to Pierce, the State here based its discussion on evidence from the record. For example, Shakir's quote omits the beginning of the State's argument referring to how "he works at that AT&T right on the other side of the road. So he knows this area." Shakir does not dispute he worked at that AT&T or the fact he admitted as much to detectives. Further, K.P. testified that she had indicated she wished to be dropped off at a different location, specifically an address in Everett. The State reasonably drew the inference that Shakir both knew

[13] Shakir also asserts his counsel's performance was deficient by not objecting to the State's conduct discussed above. Because we hold the State's conduct was not improper, this claim also fails.

the area where the incident occurred and that K.P. did not intend to be transported there. Thus, we hold the State's comments not speculative or based on evidence outside the record.

c. Remaining Comments

Shakir alleges the State committed misconduct when it argued that he had "'got[ten] away' with his crimes 'for awhile [*sic*] until today.'" Shakir implies this statement improperly carries a personal opinion of guilt. Indeed, "many cases warn of the need for a prosecutor to avoid expressing a personal opinion of guilt." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 706-07, 286 P.3d 673 (2012).

However, the authorities summarily cited by Shakir are factually distinguishable. State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) (where the State argued it was the jury's duty to "'speak the truth'" rather than to assess if the State had proven the defendant guilty beyond a reasonable doubt); Monday, 171 Wn.2d at 677 (where the State argued "good prosecutors believe 'the word of a criminal defendant is inherently unreliable'"); State v. Hecht, 179 Wn. App. 497, 506, 319 P.3d 836 (2014) (where the State superimposed the word "'GUILTY'" in red capital letters over defendant's photo); Glasmann, 175 Wn.2d at 708 (same).

Finally, Shakir avers that the State improperly "asked the jury to hold Mr. Shakir 'accountable for the things that he did'" to the four victims. In so arguing, Shakir cites to no on-point published Washington authority. Instead, Shakir cites a case from New Jersey, State v. Neal, 361 N.J. Super. 522, 826 A.2d 723, 734 (App. Div. 2003), and a case from Maine, State v. Begin, 2015 ME 86, 120 A.3d

97, 103. Id. at 6.

This court recently rejected a similar invocation of Neal in State v. Bianchi, simply holding Neal was "not controlling in Washington." No. 83338-3-I, slip op. at 23 fn.8 (Wash. Ct. App. Apr. 4, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/833383.pdf.[14] Likewise, we are unpersuaded by Shakir's reliance on out-of-state authorities.

We hold Shakir failed to establish the impropriety of the State's above conduct and thus we need not consider prejudice. Emery, 174 Wn.2d at 760.

2. Ineffective Assistance of Counsel

Shakir next alleges he received ineffective assistance of counsel because his attorney failed to present a CrR 7.4 motion, which permits a judgment to be arrested for inter alia "insufficiency of the proof of a material element of the crime." Shakir lists numerous purported inconsistencies within trial evidence and the lack of DNA evidence. From this, he argues there was a "reasonable doubt of the successful 'sexual contact' element of indecent liberties."

We examine this claim under the test from Strickland v. Washington, 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Sardinia, 42 Wn. App. 533, 540, 713 P.2d 122 (1986).

"In order to prove ineffective assistance of counsel, a defendant must show that the attorney's performance was deficient and that prejudice resulted." State v. Levy, 156 Wn.2d 709, 729, 132 P.3d 1076 (2006). To establish deficient

[14] We cite these unpublished authorities as it is "necessary for a reasoned decision" as it directly addresses an out-of-state case invoked by the appellant. GR 14.1(c).

performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Our analysis "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

In arguing deficient performance, Shakir cites to State v. Lopez, 107 Wn. App. 270, 276-77, 27 P.3d 237 (2001), where the defendant was charged with unlawful firearm possession. There, "the State presented *no* evidence showing Mr. Lopez had been convicted of a serious offense prior to the alleged assault" and the "sole evidence of a previous conviction was Mr. Lopez's *fleeting* admission during his direct testimony in the defense phase of the trial." Lopez, 107 Wn. App. at 276 (emphasis added). Thus, this court held that, "[b]ecause the State had neglected to prove an essential element of unlawful firearm possession, the trial court would have necessarily granted the [CrR 7.4] motion" and, thus, there was "no sound strategic or tactical reason" for "counsel's failure to move for dismissal." Id. at 277.

Shakir's matter is distinguishable from Lopez. As evidenced by Shakir's own lengthy discussion of trial testimony, the jury heard more than a mere "fleeting" amount of evidence as to "sexual contact" element of indecent liberties. Lopez 107 Wn. App. at 276; RCW 9A.44.100(1). Further, Shakir's own discussion of DNA evidence fails to cite any Washington authority indicating a lack of DNA evidence creates reasonable doubt for indecent liberties, let alone negate any other evidence on the issue.

As Shakir failed to establish deficient performance for the above two claims,

his claim fails and we need not consider prejudice. Levy, 156 Wn.2d at 729.[15]

III. CONCLUSION

We remand with instructions to strike Shakir's VPA and DNA collection fee. Otherwise, we affirm.

Díaz, J.

WE CONCUR:

Bjelkeman, J.

Bowman, J.

[15] SAG II also seeks reversal under the cumulative error doctrine. As we hold there is no error, this claim fails as well.

APPENDIX B

COA No. 84717-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GHASSAN SHAKIR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY - STATE OF WASHINGTON

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS
RAP 10.10

GHASSAN SHAKIR
Appellant
DOC No. 435735
Stafford Creek Corr. Center
191 Constantine Way
Aberdeen, WA 98520

Having received and reviewed the opening brief prepared by my attorney, below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for review when my appeal is considered on the merits.

I. ARGUMENT FOR RELIEF

A. Prosecutorial Misconduct Denied Mr. Shakir a Fair Jury Trial

The State's narrative included argument about what Mr. Shakir supposedly was thinking, believed, or knew during the incident, while not supported by any evidence. The State improperly vouched for the truth and credibility of its witnesses. The State improperly asked the jury to hold Mr. Shakir "accountable."

"The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution, and article I, section 22 of the Washington State Constitution." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial misconduct may deprive defendants of their constitutional right to a fair jury trial. U.S. Const. amends. VI & XIV; Const. art. I, secs. 3, 21 & 22. See Glasmann, 175 Wn.2d at 703-04

A new trial should be granted where a prosecutor's conduct was both improper and prejudicial even if there was no objection

at the time. Glassman, 175 Wn.2d at 704. When evaluating whether misconduct is flagrant and ill-intentioned, we "focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Multiple instances of misconduct may result in an unfair trial, in violation of state and federal due process, requiring reversal even if each improper comment in isolation would not. "There comes a time...when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error." State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).

The cumulative nature of the misconduct is readily apparent in this case. The prosecutors here did not make just one questionable statement in a lengthy closing argument. See State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978)(reversal based on brief comment on failure to call spouse). Rather, the State's closing argument was filled with one improper statement after another.

At the outset, the State repeatedly vouched for the "credibility" of its witnesses and that they were telling the "truth."

"the credible evidence presented to you during the course of this trial supports guilty verdicts for each of these counts." RP (Smith), 1351;

"So you know that this is a true statement that Kelly Diggins made." RP (Smith), 1363;

"this is a detail that shows an indicia of truth and a ring of truth about what Kelly Diggins is saying." RP(Smith), 1364;

"an indication that Kelly Diggins is telling the truth. ...another ring of truth that Kelly Diggins did experience this. She is not fabricating." RP (Smith), 1365;

the fact that three other women made allegations means "she has a marker of credibility and that she is telling the truth about how these events went down." RP (Smith), 1397-98;

victim's own testimony and memory "is a marker of reality and truth." RP (Smith), 1400;

the "other sort of indicia of reliability markers of credibility with Kirsten Page is that...." RP (Smith), 1404;

"what we find with Coco Agnell is that she actually has many markers of credibility." RP (Smith), 1407.

Such repeated improper vouching for the credibility or truth of state witness testimony violates due process. "The prosecutor's vouching for the credibility of witnesses...carries with it the imprimatur of the Governmant and may induce the jury to trust the Government's judgment rather than its own view of the evidence." United States v. Young, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). See, e.g., U.S. v. Cormier, 468 F.3d 63, 73 (1st Cir. 2006)(prosecutor's statement that witnesses "telling the truth" improper); U.S. v. Henry, 545 F.3d 367, 379-80 (6th Cir. 2008)(prosecutor's statement that witness

testimony "highly credible" improper); Hein v. Sullivan, 601 F.3d 897, 913 (9th Cir. 2010)(prosecutor's description of witness as "very powerful and credible" improper).

The State did not stop with the credibility/truth vouching. It continued it with a false narrative about what Mr. Shakir was supposedly thinking during the attack on Kirsten Page - that Shakir "knows what to expect when he takes K.P. there. He known its going to be isolated. He knows that it is a closed business;" and that Shakir "knew that she did not need to be in the Kirkland location. He knew that she needs to be going to Everett, and he took her here instead." RP (Smith), 1405, 1406. The State further opined that Shakir "believed he could get away with these crimes because he did for awhile until today," and he counted on the fact that his Lyft account had not yet been suspended." RP (Smith), 1339, 1350.

In State v. Pierce, 169 Wn.App. 533, 553, 280 P.3d 1158 (2012), the Court of Appeals reversed a conviction for murder, holding: "If it is improper for the prosecutor to step into the victim's shoes and become his representative, it is far more improper for the prosecutor to step into the defendant's shoes during rebuttal and, in effect, become the defendant's representative." Id. at 554 (emphasis in original). The argument in this case did just what the Court of Appeals has condemned - creating a false narrative of what supposedly Mr. Shakir was thinking.

All the more, it was improper for the prosecutor to say Shakir "got away" with his crimes "for awhile until today" as that was an impermissible commentary on Mr. Shakir's guilt. Prosecutors may not comment on credibility of witnesses, or guilt of the defendant. State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014); State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011). See Glasmann, 175 Wn.2d at 708 (highly prejudicial for a prosecutor to say defendant is "guilty"); State v. Hecht, 179 Wn.App. 497, 506, 319 P.3d 836 (2014)(statement to jury that "you shouldn't" believe the defendant improperly stated personal opinion as to credibility).

Finally, the State asked the jury to hold Mr. Shakir "accountable for the things that he did." RP (Smith), 1350. Yet the jury's function in our society is not to find defendants "accountable." Rather, the function of the constitutional right to a jury trial under the Sixth and Fourteenth Amendments and Article I, sections 21 and 22 is to protect defendants from the power of the state, actually serving the role of holding the government "accountable." See Alleyne v. United States, 570 U.S. 99, 100, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)(noting "the historic role of the jury as an intermediary between the State and criminal defendants"); Duncan v. Louisiana, 391 U.S. 145, 155, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government").

Telling jurors to depart from their historic function and to hold an accused person "accountable" is essentially an appeal to emotion, rather than reason. See State v. Neal, 361 N.J.Super. 522, 826 A.2d 723, 734 (N.J.Sup.Ct. App.Div. 2003); State v. Begin, 2015 ME 86, 120 A.3d 97, 103 (2015).

All of these arguments were flagrant and ill-intentioned and the aggregate effect should result in the vacation of the judgment. The prejudice is apparent and no instructions could have cured the misconduct even if Mr. Hershman had objected. As noted, the evidence against Mr. Shakir was highly contradictory and there was zero DNA evidence to indicate guilt. The State's misconduct was intended to fill in the gaps in its case, and caused significant prejudice that - especially due to its widespread occurance through closing arguments - could not have been cured had there been a contemporaneous objection.

B. Counsel was Ineffective by not Objecting

Additionally, the failure to object to the prosecutor's statements, without a valid tactical reason where a timely objection would have resulted in striking the argument and a cautionary instruction, is ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendment and article I, section 22. See State v. Stotts, 26 Wn.App. 2d 154, 173, 527 P.3d 842 (2023)(we "conclude that Stott's trial attorney

was constitutionally deficient for failing to object to the prosecutor's improper arguments."); In re Pers. Restraint of Whitaker, 24 Wn.App.2d 1007 (2022)(unpub.)(prejudice from failure to object in closing argument to misconduct was that trial court did not provide a curative instruction).

C. Counsel Was Ineffective in Failing to Move for Arrest of Judgment on Count One (Indecent Liberties)

Mr. Shakir was charged with one count of indecent liberties (Count I) and one count of first degree kidnapping (Count II) as to victim Kelly Diggins.

As defined by statute, in pertinent part, "a person is guilty of indecent liberties when he or she knowingly causes another person to have sexual contact with him or her or another...by forcible compulsion." RCW 9A.44.100(1)(a). "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(13).

Conversely, the crime of attempted indecent liberties requires that a person take a substantial step toward the crime of indencent liberties, with the intent to commit that crime. RCW 9A.28.020. See State v. Khalif, 2024 Wash.App. LEXIS 197, at *6. "Any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime." State v. Price, 103 Wn.App. 845, 852, 14 P.3d 841

(2000). Attempt therefore consists of two elements: "(1) intent, and (2) a substantial step." State v. Aumick, 73 Wn.App. 379, 429, 869 P.2d 421 (1994).

During Mr. Shakir's trial the jury heard both the testimony of victim Kelly Diggins under oath, and an audio recording of statements she made to Bellevue Police Detective Schendel two days after the incident in question. Ms. Diggins was also confronted with statements she had given to defense counsel shortly before trial.

Without question, there was a large number of material contradictions internal to Ms. Diggins' body of statements. As summarized by counsel, numerous elements of Diggins' statements were also refuted by indisputable fact of physical evidence presented by the State. RP (English), 1497-1500, 1512-1514.

Significantly, Ms. Diggins in her earlier statement had told police that her intoxication level at the time of the event regarding Mr. Shakir caused her to not remember the majority of what transpired. RP (Smith), 217. This is further established in her other previous statements to Det. Schendel:

> Diggins: "night did get a little hazy. I will be honest with you. I hadn't been drinking much before I came on this trip. And so I don't have, like, 100 percent recollection."

RP (English), 1549.

....

Diggins: "But then also I had been drinking. So there's not 100 percent certainty for me."

RP (English), 1553.

....

Diggins: "I was pretty drunk."

....

Diggins: "from not knowing what was happening, to then all of a sudden being handcuffed."

RP (English), 1560.

While it was established that Ms. Diggins admitted her level of intoxication severely affected her perceptions of what was occurring, this skewed perception of events caused her alleged facts to be polar opposites.

On the one hand, Ms. Diggins told police she was touched under her shirt on the breasts:

Det. Schendel: "And how many times do you think that he kept trying to grope you?"

Diggins: "I would say successfully got down my shirt probably three or four. He probably tried seven or eight times though, in total."

RP (English), 1558-59.

....

Diggins: "And he was, like, trying to, like, massage my — my breasts....And I told him to please stop."

RP (English), 1556-57.

....

Diggins: "Every time I was pushing him off."

RP (English), 1577.

Yet conversely, when under oath at trial Ms. Diggins' version of events changed:

> Q: "And when you say that he was touching sort of your breasts, do you mean over or under clothes?"
>
> A: "I believe attempts were made at both."
>
> Q: "When you say 'attempts,' what do you mean by that?"
>
> A: "Trying to touch me, but I kept pushing."
>
> Q: "Okay. Can you describe how you were pushing?"
>
> A: "If I recall, it was first with my hands and elbows."
>
> Q: "You were saying 'attempts.' I guess, do you distinguish that from successful groping?"
>
> A: "Yes."
>
> Q: "Were there times that he was successful?"
>
> A: "I don't recall."

RP (English), 1490.

Notably, there is significant further trial testimony where Ms. Diggins cannot establish if Mr. Shakir actually accomplished any touching of her breasts:

> Q: "in terms of the groping, tell us what you remember of that."
>
> A: "I remember him trying to stick his hands down my clothes, shirt, pants."
>
> A: "I remember him trying to get under my clothes, shirt mostly."

RP (English), 1536.

....

Q: "Do you know how many attempts he would have made?"

A: "I do not recall."

Q: "Do you know how many times he was successful?"

A: "I do not."

Q: "Do you remember if he actually made contact with your breasts?"

A: "I do not recall."

RP (English), 1536-37.

....

Q: "Okay. As you sit here today, can you tell the jury that you believe you recall the suspect putting hands down your shirt or not?"

A: "I don't recall."

RP (Smith), 97.

Of further significance, at trial Ms. Diggins stated under oath that Shakir attempted to touch her under her pants:

Q: "Do you recall him attempting to put his hands in your pants?"

A: "I do."

RP (English), 1540-41.

Yet in her earlier statement to police Ms. Diggins had stated the opposite.

Det. Schendel: "And did he touch any other parts of your body?"

Diggins: "Not really...he wasn't, like, going for my pants or anything....no, he didn't touch me anywhere else really.

RP (English), 1558-59.

Further still, at trial Diggins could not affirm that Mr. Shakir touched any part of her:

> Q: "And as you sit here today, can you tell this jury that my client groped you from -- on any part of your body?"
>
> A: "I don't recall."

RP (Smith), 97.

In summary, taking all inferences in a light most favorable to the State, Ms. Diggins' assertions do not establish beyond a reasonable doubt what did or did not occur. Ms. Diggins' trial testimony is opposite to her earlier out of court statements. And her out of court statements are opposite to her trial testimony. Mr. Shakir allegedly touched Diggins' breasts under her shirt, but then by another account there were only unsuccessful "attempts" which were fended off by Ms. Diggins "every time" and Shakir never actually touched her breasts.

Also, Mr. Shakir allegedly touched Ms. Diggins under her pants, but by another account he never even attempted to put his hands down her pants. Compounded to this extreme confusion are Diggins' multiple earlier admissions to police that she was too intoxicated to truly know what happened, (RP Smith, 217), she did "not know what was happening" in the car at times, (RP English, 1560), and the night was "hazy" as to what happened. RP (English), 1549.

But additional evidence - or actually the lack thereof - goes to further undermine Diggins' claims of Mr. Shakir successfully touching her under her shirt or pants. Despite some accounts of the purported length of time that Shakir allegedly kept touching Diggins underneath her shirt or pants, the police's extensive and thorough DNA testing of Ms. Diggins' clothes from the incident could not match any DNA profile to Mr. Shakir to show he actually touched her breasts or genital area (over or under clothing).

While the jury heard some evidence establishing the ability to identify "touch DNA" from just a few skin cells, case law explains the impact of touch DNA in a criminal case.

"As technology has progressed, scientists have been able to create these DNA fingerprints with much smaller DNA samples." M. May, "Next Generation Forensics: Changing the role DNA plays in the justice system," Science in the News; Harvard University (11/9/18).[1]

"Touch DNA" is a field of forensics that focuses on the cells from the outermost layer of a person's skin. See United States v. Thomas, 597 F.App'x 882, 884 (7th Cir. 2015)(unpub.). Current technology is so sensitive that it allows for testing of DNA

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[1] Https://sitn.hms.harvard.edu/flash/2018/next-generation-forensics-changing-role-dna-plays-justice-system/ (viewed 4/25/23)

samples left on zip ties, United States v. Brooks, 727 F.3d 1291, 1298 (10th Cir. 2013), or on metal gun magazines. United States v. Anderson, 169 F.Supp.3d 60, 62 (D.D.C. 2016). In United States v. Barton, 909 F.3d 1323 (11th Cir. 2018), a scientist obtained a sample of 210 picograms[2] of material from a firearm, and using amplification techniques, copied the DNA to obtain a sample, a technique that the Eleventh Circuit found to be reliable enough for admission at a criminal trial.

To be sure, the lack of positive DNA match to a defendant can carry just as much weight as a positive one. See, e.g., WPIC 4.01, at 79 (2d ed. Supp. 2005)("...carefully considering all of the evidence or lack of evidence."). "The aura of reliability surrounding DNA evidence does present the prospect of a decision based on the perceived infallibility of such evidence...." United States v. Bonds, 12 F.3d 540, 56768 (6th Cir. 1993). The weight of DNA evidence is so great that as one commentator noted, "when DNA evidence is introduced against an accused at trial, the prosecutor's case can take on an auru of invincibility." People v. Wright, 25 N.Y.3d 769, 16 N.Y.S.3d 485, 37 N.E. 3d 1127, 1137 (N.Y. 2015).

As another court has held, without the positive DNA evidence matching a defendant, "a reasonable doubt would exist in the

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[2] A picogram is a unit of mass equal to 0.000 000 000 001 grams.

mind of any rational trier of fact preventing them from finding each and every element of the crimes which Petitioner stands convicted." Brown v. Farwell, 2006 U.S. Dist. LEXIS 98154, at *19. Accordingly, the lack of any DNA matching Mr. Shakir to Diggins' clothing/person goes to further bolster a reasonable doubt that Shakir successfully had "sexual contact" with Ms. Diggins by touching her breasts or genitals.

Because Diggins' two versions of events directly contradict one another as to whether Shakir successfully touched her breast/genitals, the lack of DNA matching Shakir should serve to "tip the scale" - even if only so slightly - toward a preponderance of evidence in Shakir's favor, creating reasonable doubt

"Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt." State v. Aver, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." WPIC 4.01, at 79 (2d ed. Supp. 2005); State v. Bennett, 161 Wn.2d 303, 308, 09, 165 P.3d 1241 (2007).

This reasonable doubt of the successful "sexual contact" element of indecent liberties should have been raised by attorney Hershman by way of a CrR 7.4 motion for arrest of judgment. The Rule provides for relief based upon "insufficiency of the proof of a material element of the crime." CrR 7.4(a).

Under CrR 7.4 analysis, the evidence presented in a criminal trial is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in a light most favorable to the State, could find the essential elements of the chraged crime beyond a reasonable doubt. State v. Longshore, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000)(citing State v. Bourne, 90 Wn.App. 963, 967-68, 954 P.2d 366 (1998)).

As recently addressed by Division Three of this Court, for indecent liberties, "if the contact is directly to the genital organs or breasts, the 'sexual or other intimate parts' element is susceptible to being resolved as a matter of law." In re Sexual Assault Prot. Ord. for Lorenzen, 2024 Wash.App. LEXIS 1316, *8 (citing In re Welfare of Adams, 24 Wn.App. 517, 519, 601 P.2d 995 (1979)).

Conversely, mere fleeting touching through clothing does not per se constitute "sexual contact" absent additional evidence of "sexual gratification." State v. Powell, 62 Wn.App. 914, 917, 816 P.2d 86 (1991).

Ms. Diggins could not affirm that Mr. Shakir actually touched her breast or genitals. Because of the described actions of Mr. Shakir merely making "attempts," which Diggins fended off "every time" with her arms and elbows, plus there being no DNA of Shakir's found on Diggins' clothing, no rational trier of fact viewing this evidence in the light most favorable to the State could find the essential "touching" element beyond a reasonable doubt.

At most, the evidence only supports a guilty finding for the crime of attempted indecent liberties. See State v. Khalif, 2024 Wash.App. LEXIS 197, at *9 (unpub.)(evidence of pulling at victim's pants supported beyond a reasonable doubt the "sexual contact" element of attempted indecent liberties); State v. Isiordia-Perez, 2010 Wash.App. LEXIS 1497 (unpub.)(court finding sufficient evidence to support attempted indecent liberties conviction where defendant twice grabbed victim in a bear hug, pinned her on the bed, and touched her "all over," and victim repeatedly pushed him away to prevent further contact); State v. Anguiano, 2015 Wash.App. LEXIS 2461 (unpub.)(evidence of victim being held in choke hold on the ground, struggling to get free and waiving one arm in defensive move, while defendant exposed his own penis, sufficient evidence of "sexual contact" element for attempted indecent liberties).

Trial counsel was ineffective in not bringing a motion under CrR 7.4. Counsel's performance was deficient, and caused prejudice under the meaning of Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In State v. Lopez, 107 Wn.App. 270, 276-77, 27 P.3d 237 (2001), aff'd, 147 Wn.2d 515, 55 P.3d 609 (2002), defense counsel's performance was deficient in failing to move to arrest judgment after the State failed to present sufficient evidence to establish beyond a reasonable doubt an essential element of the charged crime.

In the case at bar, "no possible advantage could flow" to Mr. Shakir from counsel's failure to move for dismissal. Lopez, 107 Wn.App. at 277. Nor was there a "sound strategic or tactical reason evident from counsel's failure to move for dismissal." Id.

Mr. Shakir can establish the prejudice prong of Strickland because the State only presented highly conflicting statements and testimony from Ms. Diggins, which was not only colored by her inability to perceive the events in question due to intoxication, but also was accompanied by the overly prejudicial effect of having the jury hear three other similar allegations at the same time as those from Diggins. As argued in Counsel's briefing, hearing all four victims' allegations at the same trial had un unfair emotional impact on the jurors' view of the evidence, especially that from Ms. Diggins.

"Because the State had neglected to prove an essential element...the trial court would have necessarily granted the motion." Lopez, 107 Wn.App. at 277; see State v. Jackson, 2015 Wash.App. LEXIS 1539 (unpub.)(convictions reversed where defense counsel's failure to move to dismiss was deficient and caused prejudice under Strickland).

Due to the large problem with Diggins' contradicting assertions, Diggins' intoxication at the time, and no supporting DNA, there is a "reasonable probability" that had counsel brought the CrR 7.4 motion "the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

D. Cumulative Error

The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007)(citing Chambers v. Mississippi, 410 U.S. 284, 298, 302-03, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)).

The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. Chambers, 410 U.S. at 290 n.3. See also Donnelly v.

DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

Taking the cumulative effect of the errors asserted in the brief filed by Shakir's counsel, as well as the errors submitted in his SAG brief, the combined effect of these errors rendered Shakir's criminal defense "far less persuasive than it might otherwise have been," resulting in convictions that violated due process. Chambers, 410 U.S. at 294, 302-03.

II. CONCLUSION

For the foregoing reasons Appellant respectfully requests that the convictions in this case be vacated.

Respectfully submitted this 17 day of July, 2024.

Ghassan

Ghassan Shakir, Appellant
DOC 435735
191 Constantine Way
Aberdeen, WA 98520

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