SUPREME COURT NO. 89545-7
COA NO. 69077-9-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANE SKJOLD,

Petitioner.

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

The Honorable Harry McCarthy, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Shane Skjold asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Skjold requests review of the decision in State v.Shane Skjold, Court of Appeals No. 69077-9-I (slip op. filed October 14, 2013), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the information charging unlawful imprisonment was defective in failing to omit the element of knowledge that the restraint was unlawful?

2. Whether the trial court wrongly denied Skjold's mistrial motion, thereby violating his due process right to a fair trial?

3. Whether defense counsel provided ineffective assistance in failing to object to hearsay statements?

4. Whether the trial court erred in failing to treat the current offenses as "same criminal conduct" for the purpose of computing the offender score?

D. STATEMENT OF THE CASE

On December 2, 2011, at around 5:30 p.m., Richard Romero reported he had been assaulted in the early hours of the morning. 1RP[1] 68-79. Romero identified the assailant as Shane Skjold, a tenant of the apartment building in which Romero worked as a maintenance man. 2RP 16, 22. Romero testified that around 1 or 2 a.m., he heard a loud knock on his door. 2RP 28-29. Romero opened the door and saw Skjold and Jeff Shultz standing outside. 2RP 29, 102. Skjold seemed upset. 2RP 33. According to Romero, Skold entered the apartment, pushed Romero to the ground, and demanded to know where his "stuff" was. 2RP 33. Skjold pulled a "little knife" from under his shirt and waved it in front of Romero. 2RP 34-35. Skjold accused Romero of taking his "stuff." 2RP 37. Skjold asked Romero to return the key he kept for Skjold's apartment. 2RP 38. Romero got the key and gave it to Skjold. 2RP 39.

Skjold then told Romero to come with him to his apartment because his property was missing. 2RP 37. Romero said he did not want to leave his apartment because his young son would be left alone. 2RP 37. Romero agreed to go with Skjold to distance his son from the conflict.

[1] The verbatim report of proceedings is referenced as follows: 1RP - 6/21/12 & 6/25/12; 2RP 6/26/12; 3RP - 6/27/12; 4RP 6/28/12; 5RP - 6/29/12; 6RP 7/23/12.

2RP 38. Romero felt he did not have a choice but to go. 2RP 44-45. Romero did not see the knife after leaving his apartment. 2RP 43-44, 47.

Once in Skjold's apartment, Skjold showed Romero his bedroom closet and said the stolen money was kept there, and accused Romero of taking it. 2RP 41. Romero denied stealing the money. 2RP 41. Skjold punched Romero on the side of the head. 2RP 42-43. Romero was bleeding and asked Skjold if he could go. 2RP 82-83. Skjold did not stop Romero from leaving. 2RP 83. Romero never saw Skjold with a knife while in Skjold's apartment. 2RP 99.

Back at his own apartment, Romero waited until morning and then called his father, asking to be taken to the hospital. 2RP 84. Romero had suffered several small fractures to his orbital socket and nose. 2RP 85-86. Romero called the police that evening. 2RP 87.

Police arrested Skjold the following day. 1RP 89-90. Skjold denied being in the apartment building when Romero said he was assaulted. 2RP 145. Skjold said he went to a bar with his girlfriend, Abigail Pitblado. 2RP 145. He got into an argument with Pitblado and then called a friend to pick him up from the bar. 2RP 145. Skjold stayed with his friend and did not return to his residence until the early afternoon of December 2. 2RP 145, 3RP 17.

Skjold also reported that Pitblado was missing $5000 in cash from their apartment. 2RP 146. Skjold suspected someone had entered while they were away. 2RP 146. There was no sign of forced entry, but he did find a key on the floor. 2RP 146-47, 161. The key he found was in his pocket when he was arrested. 1RP 91-92. Skjold denied being in Romero's apartment or punching him. 2RP 170-71. Skjold had no injury to his hands. 2RP 163. No blood was found in Skjold's apartment. 1RP 64, 2RP 77.

A neighbor testified that she heard a dispute between a man and a woman coming from Skjold's apartment at around 2:30 or 3 in the morning. 3RP 40-42. She thought the man's voice belonged to Skjold. 3RP 42. Another neighbor heard Pitblado screaming "Please don't hurt me, he's trying to hurt me, he's trying to kill me" and saying "I don't have your money." 3RP 56. She later heard a voice she identified as Skjold's saying "Shut up, the cops are here." 3RP 58.

Police arrived 15 minutes after a 911 call was made. 3RP 43. Pitblado was the only one on Skjold's apartment. 1RP 59. Pitblado testified she arrived home at 5 a.m. from a bar. 1RP 61. She said "Shane" and "Jeffy" were there with her, but then left. 1RP 61. Pitblado was intoxicated and upset because someone stole money from her dresser. 1RP 60.

Two witnesses, Travis Guthrie and Josh Melde, confirmed that Skjold, Pitblado, and Shultz were still at the bar when Guthrie and Melde left around 11:30 p.m. 3RP 20-22, 29-31. Benjamin Southard and his wife testified that Ms. Southard picked up Skjold at a bar around 2:30 a.m. 3RP 88. Skjold told them he had argued with Pitblado. 3RP 92. Mrs. Southard brought Skjold to the Southard's home 30 minutes away and he stayed there until Ms. Southard drove him home around noon. 3RP 89.

The State charged Skjold with first degree burglary with a deadly weapon allegation, second degree assault with a deadly weapon allegation and unlawful imprisonment. CP 10-11. The jury returned guilty verdicts for all three charges and deadly weapon findings on the burglary and assault. CP 77-81.

On appeal, appellate counsel argued the information charging unlawful imprisonment was defective and the evidence was insufficient to convict for burglary. See Brief of Appellant at 6-14. Skjold raised several additional issues in his Statement of Additional Grounds. The Court of Appeals found no error and affirmed. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. DIVISION ONE'S DECISION THAT THE CHARGING DOCUMENT CONTAINED THE ESSENTIAL ELEMENTS OF THE CRIME OF UNLAWFUL IMPRISONMENT CONFLICTS WITH ANOTHER DECISION FROM THE SAME COURT.

A charging document is constitutionally defective if it fails to include all essential elements of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (quoting State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). Stated another way, essential elements are those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime. Zillyette, 178 Wn.2d at 158.

The Court of Appeals in State v. Johnson held knowledge that the restraint is without legal authority is an essential element of the crime of unlawful imprisonment and its omission from the charging document requires reversal. State v. Johnson, 172 Wn. App. 112, 136, 139, 297 P.3d 710 (2012), review granted, 178 Wn.2d 1001, 308 P.3d 642 (2013).

Review is warranted under RAP 13.4(b)(2) because the opposite holding in Skjold's case directly conflicts with Johnson. Slip op. at 3-4.

The State charged Skjold with the offense of "unlawful imprisonment" as follows: "That the defendant Shane Allen Skjold, in King County, Washington, on or about December 2, 2011 did knowingly restrain Richard Romero, a human being; Contrary to RCW 9A.40.040, and against the peace and dignity of the State of Washington." CP 11.

The constitutionally deficient information in Johnson contained the same relevant language. Johnson, 172 Wn. App. at 137. Under Johnson, Skjold's unlawful imprisonment conviction should be reversed.

There is a split on this issue in Division One of the Court of Appeals. See State v. Phuong, 174 Wn. App. 494, 542-45, 299 P.3d 37 (2013) (holding knowledge that restraint is without legal authority is not an essential element that needs to be set forth in the information), review pending (No. 88889-2).[2] This Court has already granted review of the issue in Johnson. The decision in Skjold's case conflicts with Division One's decision in Johnson. The conflict in the Court of Appeals calls for review of the deficient information issue under RAP 13.4(b)(2).

[2] Consideration of the petition for review in Phuong has been stayed pending this Court's final decision in Johnson.

2. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL.

In a Statement of Additional Grounds (SAG), Skjold argued the trial court erred in denying his motion for mistrial. Slip op. at 8-10; SAG at 17-20. During pre-trial motions, the prosecutor announced he intended to elicit evidence that a knife was found in Skjold's apartment and that Skjold admitted to having one, but did not intend to get into the underlying facts surrounding the admission, i.e., that it would be a violation of his DOC conditions to have a knife. 1RP 20-22. During the prosecutor's examination of Detective Cyrus O'Bryant, however, the following exchange occurred:

> Q. And what did he say about the knife?
> A. He said the knife wasn't his, and he was very specific. He said because he's under DOC super—
> Q. Wait.
> [PROSECUTOR]: Move to strike.
> THE COURT: Motion granted.

2RP 147-48.

At the end of the day's testimony, out of the presence of the jury, defense counsel moved for a mistrial, arguing the detective's statements ran afoul of ER 404(b). 2RP 176-77. Defense counsel put on the record that three or four jurors, upon hearing the "DOC super—" testimony, immediately looked at him "with big eyes." 2RP 177. The trial court denied the motion for a mistrial. 2RP 178.

"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) (citing Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)). A denial of a mistrial motion will be overturned where is a substantial likelihood that the irregularity affected the verdict and thus deprived the defendant of a fair trial. State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). In deciding whether an irregularity deprived the accused of a fair trial, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

The error here was serious. The detective did not complete the word "supervision" but in context, "DOC super—" clearly referred to supervision by the Department of Corrections. The jury would have easily picked up on the significance of that reference. Jurors are assumed to be intelligent and are expected to exercise common sense, insight and the normal avenues of deductive reasoning. People v. Barnum, 104 Cal. Rptr.2d 19, 24 (Cal. Ct. App. 2001), superseded on other grounds, 29 Cal.4th 1210, 131 Cal.Rptr.2d 499, 64 P.3d 788 (Cal. 2003); State v.

Balisok, 123 Wn.2d 114, 119, 866 P.2d 631 (1994); State v. Carlson, 61 Wn. App. 865, 878, 812 P.2d 536 (1991). "A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box." State v. Jaime, 168 Wn.2d 857, 877, 233 P.3d 554 (2010) (J.M. Johnson, J., concurring in dissent) (quoting Barnum, 104 Cal.Rptr.2d at 24). It is a ready inference that Skjold was on DOC supervision because he committed a past crime. There is no other reason why the DOC would supervise someone.

Evidence of other bad acts "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). "The presumption of innocence is the bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). To jurors, propensity evidence is logically relevant to whether the accused committed the charged crime. State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986). A juror's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990).

This prejudicial evidence was not cumulative. The jury heard no other evidence that Skjold was on DOC supervision or had committed any other bad act in the past.

No instruction was given to cure the prejudice. While the court granted the prosecutor's motion to strike the testimony, the jury was never told what that meant. 2RP 147-48. The jury was not given an instruction to disregard the testimony.

There is a substantial likelihood that the irregularity affected the verdict because Skjold presented an alibi defense that was backed up by witness testimony. 3RP 20-22, 29-31, 88-89, 92. The likelihood that a juror would find the State failed to prove its case beyond reasonable doubt in light of that defense was lessened by the improper reference to DOC supervision. Skjold seeks review of the issue under RAP 13.4(b)(3) and (4).

3. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO HEARSAY.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const. art. I, § 22. In a Statement of Additional Grounds, Skjold argued

his trial counsel was ineffective because he failed to object to the court's allowance of hearsay statements. Slip op. at 7; SAG at 2-11.

A police officer relayed Pitblado's out-of-court statement, made in response to the police officer's direct question, that "Shane" had been with her in the apartment. 1RP 60-61. Defense counsel did not object to it. This was a testimonial hearsay statement forbidden by the confrontation clause of the Sixth Amendment to the United States Constitution. Crawford v. Washington, 541 U.S. 36, 52, 124 S. Ct. 1354, 158 L. Ed. 2d 177(2004) (statements taken by police officers during interrogations are testimonial); State v. Koslowski, 166 Wn.2d 409, 430, 209 P.3d 479 (2009) (statements made by robbery victim to police officers when they responded to her 911 call were "testimonial" where circumstances objectively indicated that there was no ongoing emergency and the primary purpose of the interrogation was to establish past events potentially relevant to later criminal prosecution).

The second statement at issue involves a neighbor's testimony that she heard Pitblado screaming, "Please don't hurt me, he's trying to hurt me, he's trying to kill me" and saying, "I don't have your money." 3RP 56. Defense counsel did not object to this testimony. The neighbor later heard a voice she identified as Skjold's saying, "Shut up, the cops are here." 3RP 58.

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. The failure to object to hearsay may constitute ineffective assistance. State v. Hendrickson, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007), aff'd, 165 Wn.2d 474, 198 P.3d 1029 (2008). The Court of Appeals opined counsel was not deficient in failing to object to the hearsay because these statements were not central to the State's case and it is likely that counsel did not object to avoid drawing unnecessary attention to the statements. Slip op. at 7. But these statements were central because they undermined Skjold's alibi defense. For the same reason, the failure to object undermines confidence in the outcome. Both prongs of the ineffective assistance standard are met. Skjold requests review under RAP 13.4(b)(3).

4. THE TRIAL COURT ERRED IN FAILING TO TREAT CURRENT OFFENSES AS SAME CRIMINAL CONDUCT.

In his Statement of Additional Grounds, Skjold argued the trial court improperly calculated his offender score because the three offenses constituted the same criminal conduct. SAG at 20-25. The Court of Appeals disagreed. Slip op. at 10-11.

For purposes of computing the offender score, RCW 9.94A.589(1)(a) provides current offenses "shall be counted as one crime:

if the court finds "some or all of the current offenses encompass the same criminal conduct." "Same criminal conduct" is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a).

A trial court's decision on whether to count two or more offenses as same criminal conduct is reviewed for abuse of discretion based on the theory that the trial court is in a better position than the appellate court to assess the facts and resolve any uncertainty in them. State v. Graciano, 176 Wn.2d 531, 536-38, 295 P.3d 219 (2013). Skjold raised the same criminal conduct issue at sentencing. 6RP 23. The trial court did not count any offenses same criminal conduct in the judgment and sentence, but did not address the reason why at sentencing. 6RP 23-25; CP 93-94.

A trial court abuses its discretion when it gives no reason for its discretionary decision. State v. Hampton, 107 Wn.2d 403, 409, 728 P.2d 1049 (1986). That is what happened here. Because the trial court was silent as to the reasons for not counting the offenses as same criminal conduct, this Court cannot say whether the trial court rested its decision on facts supported by the record. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). Nor can the reviewing court be sure what legal standard the trial court applied. Rafay, 167 Wn.2d at 655. Depending on what the trial court thought about the issue or to what extent the court did or did not incorporate the proper

legal standard into its reasoning, it may be that it abused its discretion per se based on an erroneous interpretation of law. Id. In some instances, appellate courts may overlook a court's abuse of discretion if its decision can be affirmed on any ground within the pleadings and the proof. Id. "But such a rule presupposes that we have some knowledge of the reasons upon which the lower court based its decision, and the rule should not apply where, as here, we have no insight into the lower court's reasoning." Id.

The trial court abused its discretion as a matter of law by declining Skjold's request to treat the offenses as same criminal conduct without giving a reason for its decision. The State points to RCW 9A.52.050, the burglary anti-merger statute, as a reason not to count the burglary and the other offenses as the same criminal conduct. See State's Response to Appellant's Statement of Additional Grounds at 13-14. But a trial court has discretion *not* to apply the burglary anti-merger statute in finding same criminal conduct. State v. Davis, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998). The bottom line is that there is no way of knowing how the trial court exercised its discretion on the same criminal conduct issue because it gave no reason for computing the offender score as it did.

Turning to the same criminal conduct test itself, crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136

Wn.2d 856, 858, 966 P.2d 1269 (1998). The objective intent is the same if one crime furthered the other or were part of a recognizable scheme. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994); State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). Objectively viewed, Skjold entered Romero's apartment or remained unlawfully in order to assault Romero. The burglary and assault offenses involved the same criminal intent because the burglary facilitated the assault. State v. Collins, 110 Wn.2d 253, 262-63, 751 P.2d 837 (1988) (burglary and assault should be considered one crime where burglary was committed in furtherance of the assault and occurred at the same time and in the same place). The recognizable scheme is that Skjold burgled, assaulted and imprisoned Romero for the purpose of extracting the missing money. The Court of Appeals overlooked this aspect of the same criminal conduct analysis, instead focusing solely on whether the burglary and assault furthered the unlawful imprisonment. Slip op. at 10-11.

The Court of Appeals acknowledged all three crimes involved the same victim but determined the unlawful imprisonment did not occur in the same place as the burglary and assault. Slip op. at 10-11. But offenses need only be sequential and continuous, not simultaneous, to satisfy the "same time" element. State v. Porter, 133 Wn.2d 177, 180, 183, 942 P.2d 974 (1997). All three offenses occurred in a continuous sequence.

Consistent with the evidence and the State's theory, the unlawful imprisonment began in Romero's apartment and continued in Skjold's apartment. 2RP 41, 44, 81-84; 4RP 79. The assaultive acts occurred in Romero's room and Skjold's apartment. The State, in closing argument, told the jury that Skjold was guilty of assault in two ways, one of which occurred "at the same time as the burglary" and the other that occurred when Skjold punched Romero in Skjold's apartment. 4RP 75. The evidence supported this theory. 2RP 35, 41-44. Thus, the burglary occurred in the same place as the assault (Romero's apartment) and the unlawful imprisonment occurred in the same room as the assault (Skjold's apartment). In the absence of a special verdict, there is no way of knowing from this record which act of assault the jury relied upon to convict. And in the absence of the trial court's reasoning on the same criminal conduct issue on the record, there is no way of knowing how the court, in exercising its discretion, resolved the issue. Skjold requests review under RAP 13.4(b)(4).

F. CONCLUSION

For the reasons stated above, Skjold respectfully requests that this Court grant review.

DATED this 13th day of November 2013.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SHANE ALLEN SKJOLD, Appellant.	)	No. 69077-9-I DIVISION ONE UNPUBLISHED OPINION FILED: October 14, 2013

GROSSE, J. — The statutory definition of "restrain" is not an essential element of the crime of unlawful imprisonment and failure to include the statutory definition in an information does not render the information deficient. Accordingly, the information in this case was not deficient. Further, the evidence was sufficient to convict the appellant of first degree burglary, and the issues he raises in his statement of additional grounds are without merit. For these reasons, we affirm.

FACTS

On December 2, 2011, at around 2:00 a.m., Richard Romero, Jr. was awakened from his sleep by a pounding on his apartment door. Romero was the maintenance person at the apartment complex and thought the knock was by a tenant who was having an emergency, so he walked into the living room, unlocked the door, and opened it. When Romero opened the door, appellant Shane Skjold walked into the living room, grabbed Romero by the throat, pushed him to the ground, pulled out a knife from underneath his sweatshirt, and repeatedly asked Romero "where his stuff was." Skjold kneeled over Romero

and waved the knife in front of him. While this was happening, Romero's 9-year-old son was sitting in a chair in the living room and started crying. Romero was very scared and did not know what Skjold was talking about.

Romero managed to get up, and Skjold told him they needed to go to Skjold's apartment because there was "stuff" missing from his apartment. Before they left, Skjold asked Romero to give him the key to his (Skjold's) apartment. Romero gave Skjold the key and the two men went to Skjold's apartment.

Inside Skjold's bedroom, Skjold was upset and said that somebody had taken something from his closet. He started throwing drawers. He told Romero, "It's gone. It's gone." Skjold accused Romero of taking whatever he was talking about. Romero tried to calm Skjold down and convince him that he had not taken anything from his apartment. Skjold, who had been pacing in the bedroom, got quiet, bent over as if he was going to pick something up, stood up, and hit Romero on the side of his face. The punch completely collapsed most of the bones on the left side of Romero's face and caused eight separate fractures.

After the punch, Romero, who was bleeding profusely from the face, felt "trapped" and told Skjold he would not say anything about the incident. Skjold told Romero he could leave, and Romero returned to his apartment.

The next morning, Romero called his father, who drove him to the hospital. Romero told his father what had happened to him the previous night. At first, Romero told the hospital personnel that he had slipped, but when they expressed disbelief that a slip could result in such serious injuries, he said he had been assaulted. From the hospital, Romero and his father went to the

father's house; from there, Romero's mother drove him to the police station, where he gave a statement.

The State charged Skjold with first degree burglary with a deadly weapon enhancement, second degree assault with a deadly weapon enhancement, and unlawful imprisonment. A jury found Skjold guilty as charged. The court sentenced Skjold to an exceptional sentence of 229 months because, due to Skjold's high offender score, a standard range sentence would have allowed some crimes to go unpunished. Skjold appeals.

ANALYSIS

Sufficiency of the Charging Document – Unlawful Imprisonment

Skjold argues his conviction of unlawful imprisonment must be reversed on the ground that the count of the information charging him with that crime is deficient because it does not contain the four components of "restrain."

"A person is guilty of unlawful imprisonment if he or she knowingly restrains another person."[1] "Restrain" for purposes of the crime of unlawful imprisonment is defined as

> to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he or she is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him or her has not acquiesced.[2]

[1] RCW 9A.40.040(1)
[2] RCW 9A.40.010(6).

Skjold argues the information is deficient because it omits essential elements of the offense, namely that he knowingly restricted another's movements, without that person's consent, without legal authority, and in a manner that substantially interfered with that person's liberty. We rejected this argument in State v. Phuong, holding that the statutory definition of "restrain" is not an essential element of the crime of unlawful imprisonment and that failure to include the statutory definition in an information does not render the information deficient.[3] The charging document here is sufficient.

Sufficiency of the Evidence – First Degree Burglary

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.[4]

A person "enters or remains unlawfully" in or upon premises, for purposes of the first degree burglary statute, "when he or she is not then licensed, invited, or otherwise privileged to so enter or remain."[5]

Skjold argues that the evidence is insufficient to convict him of first degree burglary because there is no evidence that he entered or remained unlawfully in Romero's apartment. We disagree.

> Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. We defer to

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[3] 174 Wn. App. 494, 502, 299 P.3d 37 (2013).
[4] RCW 9A.52.020(1).
[5] RCW 9A.52.010(5).

> the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.[6]

Contrary to Skjold's argument, there is no evidence that Romero invited Skjold into his apartment. Rather, the evidence shows that when Romero heard the pounding on the door to his apartment, he opened it to see if it was a tenant having an emergency. When Romero opened the door, Skjold walked into the apartment, grabbed Romero by the throat, pushed him to the ground, and pulled a knife. According to Romero, very little time passed as these events unfolded and Romero "pretty much went right down on the ground." We find no evidence to support Skjold's contention that he was invited into Romero's apartment. The evidence, viewed in a light most favorable to the State, was sufficient to support Skjold's conviction of first degree burglary.

Statement of Additional Grounds

1. Deadly Weapon Enhancement

In his statement of additional grounds (SAG), Skjold argues that the deadly weapon enhancements were not proper because the blade of the knife he wielded during the events was two and a half inches long. He argues that an enhancement is proper only if the blade is three inches long or longer. Skjold is incorrect. The statutes on which Skjold relies pertain to indeterminate sentences and crimes committed before July 1, 1984. These statutes are not relevant here. For purposes of a deadly weapon special verdict, a "deadly weapon" "is an implement or instrument which has the capacity to inflict death and from the

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[6] State v. Cordero, 170 Wn. App. 351, 361, 284 P.3d 773 (2012) (internal quotation marks and citations omitted).

manner in which it is used, is likely to produce or may easily and readily produce death."[7] The knife Skjold pulled on Romero falls within this definition. The fact that the blade of the knife Skjold pulled on Romero was less than three inches in length does not change our conclusion. Knives with blades longer than three inches are included in the statutory list of instruments included in the term "deadly weapon," but that list is not exclusive.[8]

2. Ineffective Assistance of Counsel

To succeed on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's conduct was deficient; and (2) the defendant was prejudiced as a result.[9] Deficient performance is that which falls below an objective standard of reasonableness.[10] To demonstrate prejudice, a defendant must show that, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have been different.[11] If the ineffective assistance claim fails on one prong, we need not address the other prong.[12]

We presume that counsel's representation of his or her client was reasonable and are highly deferential to counsel's decisions.[13] Strategic and tactical decisions are not grounds for error.[14]

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[7] RCW 9.94A.825.
[8] See State v. Samaniego, 76 Wn. App. 76, 81, 882 P.2d 195 (1994).
[9] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
[10] In re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009).
[11] In re Matter of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).
[12] State v. Staten, 60 Wn. App. 163, 171, 802 P.2d 1384 (1991).
[13] Strickland, 466 U.S. at 689-91.
[14] Strickland, 466 U.S. at 689-91.

A. Trial Counsel

Skjold argues his trial counsel was ineffective because he failed to object to the trial court's allowance of testimonial hearsay statements. The testimony to which Skjold refers is a police officer's testimony about statements Skjold's girlfriend made to the police when the police arrived at her and Skjold's apartment in response to a 911 call from neighbors reporting a domestic dispute and testimony from the neighbor about what he heard the girlfriend saying. The testimony was that the girlfriend was screaming loudly, "Please don't hurt me, he's trying to hurt me, he's trying to kill me" and that she was fighting with another person (who turned out to be Skjold) about money.

"The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal."[15] Here, the statements of which Skjold complains were not central to the State's case. Further, it is likely that defense counsel did not object to avoid drawing unnecessary attention to the statement. This decision was a valid trial tactic. Even if, however, counsel's performance was deficient for failing to object, Skjold has not demonstrated that, but for the deficient performance, the outcome of the trial would have been different.

B. Appellate Counsel

In order to establish ineffective assistance of appellate counsel, the defendant must show that the legal issue appellate counsel failed to raise had

[15] State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

merit and that the defendant was actually prejudiced by the failure to raise or adequately raise the issue.[16] Skjold has failed to do so.

Skjold argues his appellate counsel was ineffective for not arranging for the transcription of the opening statements, voir dire, and the court's reading of the instructions to the jury. "A verbatim report of proceedings provided at public expense will not include the voir dire examination or opening statement unless so ordered by the trial court."[17] Further, Skjold has not shown, nor can we ascertain, any possibility of prejudice to Skjold by not having a transcript of the trial court's reading of the instructions to the jury.

Skjold has filed a motion entitled "Motion to Supplement Statement of Additional Grounds for Review," which is, in effect, a third SAG. This SAG, like the other two he filed, was filed well past the 30-day due date in RAP 10.10(d). We deny Skjold's motion. Further, the issues he raised in it are without merit. Skjold fails to show how he was prejudiced by appellate counsel's failure to raise an issue about the trial court's rulings on the motions in limine. And, Skjold cites no authority requiring appellate counsel to respond to the State's response to an appellant's pro se SAG.

3. Denial of Motion for Mistrial

During Detective Cyrus O'Bryant's testimony, the following colloquy occurred:

Q. And what did he say about the knife?

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[16] In re Matter of Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997).
[17] RAP 9.2(b).

A. He said the knife wasn't his, and he was very specific. He said because he's under DOC super –

Q. Wait.

[PROSECUTOR]: Move to strike.

THE COURT: Motion granted.

At the end of the day's testimony, out of the presence of the jury, defense counsel moved for a mistrial, arguing that the detective's statements ran afoul of ER 404(b). The trial court denied the motion for a mistrial. In his SAG, Skjold argues that the denial of his motion for a mistrial was error.

The trial court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried."[18] Factors to consider in determining whether a trial irregularity prejudiced a defendant's right to a fair trial are (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard the irregularity.[19] We review the trial court's denial of a motion for mistrial for an abuse of discretion, finding such an abuse only if "'no reasonable judge would have reached the same conclusion.'"[20]

The trial court's denial of Skjold's motion for a mistrial was not an abuse of discretion and was not a conclusion that no reasonable judge would have reached. The detective did not complete the word "supervision" and the trial

[18] State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).
[19] Emery, 174 Wn.2d at 765 (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).
[20] Hopson, 113 Wn.2d at 284 (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).

court immediately struck the comment from the record. We cannot say that the detective's truncated statement so prejudiced Skjold that nothing short of a new trial can ensure that he will be fairly tried.

4. Offender Score Calculation

Skjold argues that the trial court improperly calculated his offender score because the three counts with which he was charged constituted the same criminal conduct.

"Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim."[21] All three factors must be present; "[i]f any element is missing, multiple offenses cannot be said to encompass the same criminal conduct."[22] We construe the definition of "same criminal conduct" narrowly so as to disallow most assertions of same criminal conduct. And, "we will reverse a sentencing court's determination of same criminal conduct only when there is a 'clear abuse of discretion or misapplication of the law.'"[23]

Here, all three crimes with which Skjold was charged involved the same victim. But, the unlawful imprisonment did not occur in the same place as the burglary and the assault. Further, the offenses do not share the same criminal intent. One factor in determining whether offenses share the same criminal

[21] RCW 9.94A.589(1)(a).
[22] State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007) (quoting State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992)).
[23] Wilson, 136 Wn. App. at 613 (quoting State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990)).

intent is whether one crime furthered the other.[24] The burglary and assault did not further the unlawful imprisonment. The trial court did not abuse its discretion in not counting the three offenses as constituting the same criminal conduct.

5. Cruel and Unusual Punishment

Skjold argues that his 229-month sentence constitutes cruel and unusual punishment. We review the length of a sentence for abuse of discretion.[25] We will find an abuse of discretion only if (1) the trial court relied on an impermissible reason, or (2) the sentence is so long that, in light of the record, it shocks the conscience of the reviewing court.[26] We do not review the length of a sentence in comparison with or in proportion to sentences in other cases.[27] A sentence shocks the conscience when it is one that no reasonable person would adopt.[28]

The trial court properly relied on the "free crimes" aggravator in imposing an exceptional sentence. Under the aggravator, the trial court may impose an exceptional sentence where the defendant "has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."[29] And, while lengthy, Skjold's sentence does not shock the conscience of this court. The trial court did not abuse its discretion in imposing the exceptional sentence.

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[24] See State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).
[25] State v. Ritchie, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995).
[26] Ritchie, 126 Wn.2d at 396 (quoting State v. Ross, 71 Wn. App. 556, 573, 861 P.2d 473 (1993)).
[27] Ritchie, 126 Wn.2d at 396.
[28] State v. Halsey, 140 Wn. App. 313, 324-25, 165 P.3d 409 (2007).
[29] RCW 9.94A.535(2)(c).

Affirmed.

WE CONCUR:

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DSHS, Respondent, v. SHANE SKJOLD, Appellant.	)	SUPREME COURT NO. _____ COA NO. 69077-9-I

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 NOVEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SHANE SKJOLD
DOC NO. 748218
COYOTE RIDGE CORRECTION CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF NOVEMBER, 2013.

X Patrick Mayovsky