NO. 44186-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID DARLING,

Appellant.

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

The Honorable Barbara Johnson, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The information was defective because it omitted essential elements of the crime of unlawful imprisonment. CP 7.

2. The trial court erred in calculating appellant's offender score because it wrongly concluded one of his offenses did not constitute the same criminal conduct as his two other offenses.

3. To the extent appellant is precluded from challenging his offender score because his trial counsel conceded not all three of his offense constituted same criminal conduct, then appellant was deprived of his right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. A charging document must properly notify a defendant of the charge by including the essential elements of the crime. Is reversal of appellant's unlawful imprisonment conviction required because the information failed to allege appellant knowingly (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interfered with that person's liberty?

2. Appellant was convicted of unlawful imprisonment, felony violation of a court order and harassment. The evidence at trial supports finding that all three offenses were committed at the same time, same place, against the same person and with the same objective intent. Where

the jury verdict does not conflict with a finding that all three offenses constituted same criminal conduct, did the trial court err calculating appellant's offender score as if one of the offenses did not constitute the same criminal conduct as the other two because there was a possibility the jury relied on evidence that the one offense was committed at a different time?

3. If appellant cannot challenge his offender score calculation on appeal because his trial counsel conceded that not all three offenses constituted same criminal conduct, then was appellant deprived of his right to effective assistance of counsel when there was no legitimate strategic basis for trial counsel's concession and when but for counsel erroneous concession, appellant would be entitled to be resentence based on a low offender score?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Clark County Prosecutor charged appellant David Darling with unlawful imprisonment, harassment, felony violation of a court order, and interfering with reporting domestic violence, all allegedly committed against Julie Barnes. CP 7-8. The prosecutor alleged all four offenses involved "domestic violence" and that in committing all but the

interference offense, Darling "displayed an egregious lack of remorse". Id.

A jury convicted Darling of the unlawful imprisonment, harassment, and felony violation of a court order, but acquitted him of the interfering charge. CP 42, 44, 46, 48. The jury found Darling's three crimes involved domestic violence, but rejected the claim that Darling displayed an egregious lack of remorse in committing them. CP 43, 45, 47, 49.

The court impose a 60-months sentence for the felony violation of a court order, and concurrent 38-month sentences for the unlawful imprisonment and harassment offenses. CP 52-66. Darling appeals. CP 68.

2. Substantive Facts

a. *Trial Evidence*

On August 26, 2012, at about 11:30 pm, private security guard Thomas Pelham saw Darling apparently pulling Barnes down a hill in Vancouver, Washington, while Barnes was screaming, "Stop, stop, you're killing me." RP 226. Darling stopped and let go of Barnes when Pelham shined a light on them, and complied when Pelham told him to move away from Barnes. RP 228. At Barnes' request, Pelham called police. RP 229.

Vancouver police officer Gerardo Gutierrez responded to the scene. RP 168, 171. After he arrived, he placed Darling in the back of his patrol car and then interviewed Barnes. RP 174, 176. According to Gutierrez, Barnes told him she was homeless, four months pregnant, and had a restraining order in place against Darling. Barnes also told Gutierrez that Darling had woken her up, started yelling at her, punched her in the face, chest and stomach, and had threatened to kill her before starting to drag her down the hill, which was when Pelham appeared. RP 177-78.

According to Pelham's partner, Jonathan Engel, after Darling was placed in Gutierrez's patrol car he yelled, "When I get out I'm going to kill you". RP 55. Both Barnes and Gutierrez corroborated Engel's claim. RP 118, 184.

Darling admitted knowing about and violating the restraining order, but denied ever hitting or threatening to kill Barnes. RP 250-51, 257, 267.

b. *Sentencing*

Neither the prosecution nor the defense submitted sentencing memoranda. At sentencing, both parties agreed Darling's criminal history gave him a starting offender score of "5". RP 349, 357. The parties

disputed, however, how his current offenses should count towards his offender score. RP 349.

According to the prosecutor, each offense should count separately against the others because there was a basis to conclude none of the offenses involved same criminal conduct. RP 351. With regard to the harassment conviction, the prosecutor argued, "there was evidence that there were death threats made both before the security guard intervened, and well after when Mr. Darling was sitting in the back of the police vehicle". RP 349. On this basis the prosecutor concluded, "there's plenty of evidence to show that that is separate intent and separate time as to all the incidents that occurred prior to his arrest" and therefore at least the harassment conviction should not be deemed the same criminal conduct as the unlawful imprisonment and felony violation of a court order. RP 349-51.

Initially, defense counsel asked only that the court "find some of this to be same criminal conduct, and then consider the low end of the standard range." When asked to clarify whether he meant that all three offenses should be considered same criminal conduct, defense counsel replied;

> No, not at all. I think [the harassment and felony violation of a court order convictions] though, would be the same. Although, you could also argue that it be [the

> unlawful imprisonment and harassment convictions that are the same criminal conduct]. But not all three, no, we're not arguing that, Your Honor.

RP 360.

The trial court ruled:

> Alright. I think what the State was arguing was that the harassment death threats was clearly separate conduct, and that the unlawful imprisonment and felony domestic violence Court order violation overlapped somewhat in that there was physical contact involved in both, and I'll find that [the unlawful imprisonment and court order violation] constitute same criminal conduct, but the death threats constitute a separate conduct in that they were made somewhat separately in time, as well, from that of the, the other two portions of it.

RP 360.

C. ARGUMENTS

1. THE INFORMATION IS DEFECTIVE IN FAILING TO INCLUDE ALL THE ESSENTIAL ELEMENTS OF THE UNLAWFUL IMPRISONMENT OFFENSE.

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); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. Darling's conviction for unlawful imprisonment must be reversed because the charging document does not set forth the essential elements that Darling knowingly (1) restricted another's movements; (2) without that

person's consent; (3) without legal authority; and (4) in a manner that substantially interfered with that person's liberty. CP 18.

In order to establish the crime of unlawful imprisonment, the State must prove the defendant "knowingly restrain[ed] another person." RCW 9A.40.040. "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." RCW 9A.40.010(1).

The definition of "restrain" has four primary components: "(1) restricting another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty." State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000). Warfield held the statutory definition of unlawful imprisonment, to "knowingly restrain," causes the adverb "knowingly" to modify all components of the statutory definition of "restrain." Warfield, 103 Wn. App. at 153-54, 157.

The modified components of the "restrain" definition are thus elements of the crime of unlawful imprisonment. Id. at 158, 159. The conviction in Warfield was reversed due to insufficient evidence where the State failed to prove the defendants knowingly restrained someone without lawful authority: "knowledge of the law is a statutory element of the crime of

unlawful imprisonment, without proof of which, defendants' convictions cannot stand." Id. at 159.

The elements of a crime are commonly defined as "'[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction.'" State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

To convict Darling of unlawful imprisonment, the State needed to prove he knowingly (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty. Warfield, 103 Wn. App. at 157-59. Those facts are necessary to establish the very illegality of the unlawful imprisonment offense and are therefore essential elements that needed to be set forth in the charting document. Feeser, 138 Wn. App. at 743. As Division One of this Court recently held, mere use of the term "restraint" in the charging document is inadequate to provide notice of each of the elements of the crime of unlawful imprisonment. See State v.

Johnson, 172 Wn. App. 112, 297 P.3d 662, 710, 722 (2012) (common understanding of "restraint" fails to convey statutory definition, and in particular, requirement of knowledge that such restraint occur "without legal authority").

In accord with Warfield and Johnson, the pattern "to convict" instruction for unlawful imprisonment recognizes the definition of "restrain" as modified by the adverb "knowingly" creates elements of the crime that need to be proved. WPIC 39.16; see State v. Davis, 116 Wn. App. 81, 96 n.47, 64 P.3d 661 (2003) ("While the WPICs are not binding on the court, they are persuasive authority."), aff'd, 154 Wn.2d 291, 111 P.3d 844 (2005), aff'd sub nom., Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

The "to convict" instruction for unlawful imprisonment here is modeled on WPIC 39.16. CP 19 (Instruction 7). Referring to the four components of the "restrain" definition, the jury was correctly instructed that "The offense is committed only if the person acts knowingly in all these regards." CP 18 (Instruction 6) (patterned on WPIC 39.15).

Proper jury instructions, however, do not cure a defective information. Vangerpen, 125 Wn.2d at 788. The State charged Darling by amended information with the offense of unlawful imprisonment as follows:

> That he, DAVID LAWRENCE DARLING, in the County of Clark, State of Washington, on or about and between August 26, 2012 and August 27, 2012, did knowingly restrain another person, to-wit: Julie Ann Barnes; contrary to Revised Code of Washington 9A.40.040 and 9A.40.10(6).

CP 7.

The information does not contain all essential elements of the crime. It does not allege Darling knowingly (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty.

Where, as here, the adequacy of an information is challenged for the first time on appeal, the appellate court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The information did not fairly imply each of the four elements that Darling knowingly (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that

substantially interferes with that person's liberty. At most, the language "knowingly restrain" as used in the information notifies the accused that an essential element of the crime is that a person knowingly restricted the movements of another.

The other three elements at issue here cannot be found by any fair construction. The information provides no notice that knowledge of lack of consent, knowledge of lack of legal authority to restrain, and knowledge of the *degree* of restriction (substantial interference) are all essential elements of the crime. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary elements of unlawful imprisonment are neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse Darling's unlawful imprisonment conviction. McCarty, 140 Wn.2d at 425.

2. DARLING'S OFFENSES INVOLVE THE SAME CRIMINAL CONDUCT.

There is evidence to support finding that Darling committed the unlawful imprisonment, harassment and felony violation of a court order at the same time and place, against the same victim, and without changing his objective intent. The jury verdicts do not conflict with this finding. Because

the record supports this finding, Darling's offenses should have all been found to constitute the same criminal conduct for purposes of calculating Darling's offender score. The trial court's failure to do so requires reversal and remand for resentencing based on a correct offender score.

Unless two or more current crimes involve the same criminal conduct, each is counted in determining the offender score for the other offenses. RCW 9.94A.589(1)(a). "'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." Id. A trial court's determination as to same criminal conduct is reviewed for an abuse of discretion or misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Our Supreme Court has recognized that "the same time and place analysis applies . . . when there is a continuing sequence of criminal conduct." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); see State v. Williams, 135 Wn.2d 365, 368-69, 957 P.2d 216 (1998) (sale of 10 rocks of cocaine to one police informant, followed immediately and without interruption by same transaction with second informant, were same criminal conduct); State v. Porter, 133 Wn.2d 177, 183, 186, 942 P.2d 974 (1997) (rejecting "simultaneity" requirement, Court finds immediate, uninterrupted,

sequential sales of methamphetamine and marijuana to same undercover officer occurred at same time).

Here, the unlawful imprisonment, harassment and felony violation of a court order involved the same place (a hill in Vancouver), the same time (the late evening/early morning hours of August 26-27, 2012) and the same victim (Barnes). The prosecutor, however, claimed the harassment offense did not occur at the same time as the other two offenses because there was evidence Darling made threats to kill Barnes both before the security guards arrived on the scene and after he had been arrested for the other offenses and placed in Officer Gutierrez's patrol car. The prosecutor claimed this showed different time and different intent. RP 349. It this potential difference in time that was the key to the trial court's decision to find the harassment conviction was not the same criminal conduct as the other two offenses. RP 360.

This was error because although there was evidence Darling made threats both before[1] and after his arrest,[2] the record is ambiguous as to which instance the jury relied on to convict him of the harassment. In fact, the court instructed the jury:

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[1] See RP 177 (Officer Gutierrez testified Barnes told him that Darling threatened to kill her before the security guard's arrived).

[2] See RP 118 (Barnes testified Darling threatened to kill her after he had been arrested and placed in a patrol car.)

> The State alleges that the defendant committed acts of Harassment on multiple occasions. To convict the defendant of Harassment as charged in Count 2, one separate and distinct act of Harassment must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Harassment.

CP 27 (Instruction 15).

The jury verdict shows the jury was unanimous that at least one of instances was proved beyond a reasonable doubt, but not which one. CP 44. As such, the verdict is ambiguous as to whether the alleged threat relied on to convict Darling of harassment was one that occurred at the same time as the unlawful imprisonment and violation of court order offenses, or only after those had been completed and Darling was in the patrol car.

Ambiguous verdicts must be resolved in the defendant's favor. State v. Kier, 164 Wn.2d 798, 811-12, 194 P.3d 212 (2008). Here, that means the sentencing court should have assumed the jury relied on the alleged pre-arrest threats to kill because that leads to the conclusion that all three offense occurred not only at the same place, against the same victim, and with the same objective intent, but also at the same time. Had the trial court done so, none of Darling three current offenses would have counted against the other, his offender score would have been lower for each, as would the corresponding standard range sentences. This Court should reverse.

3. DARLING WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

To the extent trial counsel's concession that not all three of Darling's current offense constitute the same criminal conduct preclude Darling from challenging his offender score on appeal, then Darling was deprive of his right to effective assistance of counsel. There was no legitimate strategic basis for counsel to make the concession, and Darling unnecessarily suffers a longer sentence as a result. This Court should reverse and remand for resentencing at which Darling receives effective assistance of counsel.

The state and federal constitutions guarantee criminal defendants reasonably effective representation by counsel at all critical stages of a case. U.S. Const. amend. 6; Wash. Const. art. 1 § 22; Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Sentencing is a critical stage of a criminal case. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, review denied, 132 Wn.2d 1004 (1997).

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must show that: 1) counsel's performance was deficient "and not a matter of trial strategy or tactics;" and 2) the deficient performance prejudiced the defendant's case. State v.

Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003) (citing State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) and Strickland, 466 U.S. at 687-89). A tactical decision will be found deficient if it is not reasonable. Hendrickson, 129 Wn.2d at 77-78; Roe v. Flores-Ortega, 528 U.S. 470, 481, 145 L. Ed. 2d 985, 120 S. Ct. 1029 (2000). Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). The defendant need not show counsel's deficient performance more likely than not altered the outcome. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). He need only show lack of confidence in the outcome. Thomas, 109 Wn.2d at 226.

There was not reasonable tactical basis for Darling's trial counsel to concede that not all of Darling's current convictions constituted same criminal conduct. In light of the discussion in section C.2, supra, that this constituted deficient performance cannot reasonable be disputed.

Nor can it be reasonably disputed that counsel deficient performance prejudiced Darling. Had counsel made the argument set for in section C.2 supra, there is a reasonable probability Darling would have been sentenced to serve less time on all three convictions. This Court should therefore reverse and remand for resentencing.

D. CONCLUSION

For the reasons stated, this Court should reverse Darling's conviction for unlawful imprisonment and remand for resentencing based on a correct offender score.

DATED this 31st day of May 2013.

Respectfully submitted,

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

STATE OF WASHINGTON Respondent, vs. DAVID DARLING, Appellant.	)))))))))	COA NO. 44186-1-II

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 30TH DAY OF MAY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID DARLING
DOC NO. 353110
OLYMPIC CORRECTIONS CENTER
11235 HOH MAINLINE RD
FORKS, WA 98331

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MAY 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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