

65978-2

65978-2

NO. 65978-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY MARBLE,

Appellant.

TB

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

The Honorable Gerald L. Knight, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports appellant's unlawful imprisonment conviction.

2. Appellant received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of first-degree assault with a deadly weapon and unlawful imprisonment with a deadly weapon for an incident occurring in the home of appellant and the complaining witness. The alleged assault and unlawful imprisonment occurred simultaneously and involved the same criminal purpose. There was no evidence appellant restrained the complaining witness in a place she could not be easily found or that she suffered injuries during the restraint distinct from those caused by the assault. Where the restraint on her movements was incidental to the assault, was there insufficient evidence to support appellant's unlawful imprisonment conviction?

2. The assault and unlawful imprisonment involved the same time and place, the same victim, and the same objective intent. However, appellant's attorney failed to request that the trial court treat the offenses as the same criminal conduct for sentencing purposes. Is remand for resentencing required because counsel was ineffective in preventing the

court from exercising its discretion to treat the offenses as the same criminal conduct?

B. STATEMENT OF THE CASE

1. Procedural History

On June 26, 2009, The Snohomish County prosecutor charged Jeffery Marble with one count of first-degree assault with a deadly weapon, and one count of unlawful imprisonment with a deadly weapon, occurring on or about June 1, 2009. CP 77-78.

Marble stipulated to the State's motion to admit his custodial statements. 2RP 2-4.¹ Two trial continuances were granted over Marble's objection. 1RP 1-3; 2RP 4. Trial commenced on August 23, 2010. 3RP 40.

A jury found Marble guilty of first-degree assault and unlawful imprisonment. CP 48, 51; 3RP 265-66. The jury also returned special verdict forms finding Marble armed with a deadly weapon during the first-degree assault and unlawful imprisonment. CP6-47. Marble timely appeals. CP 2-3.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – May 28, 2010; 2RP – July 2, 2010; 3RP – August 23, 2010, August 24, 2010, August 25, 2010, September 8, 2010.

2. Charged Offense

In May 2009, Marble lived at his house in Everett with his wife, Catherine Dunne, and their son Gavin. Marble and Dunne had a “pretty regular marriage,” of twenty years. 3RP 40-42, 101. Beginning in 2007, Dunne developed undiagnosed health problems and was often sick. During the time Dunne was sick, she stabbed herself with scissors because “Jeff [Marble] was not showing me enough attention.” 3RP 43, 97-98, 109-10, 166, 209-10.

On May 29, 2009, Dunne was ill and left work early. Dunne said while she was home resting, a man came to the house and told her the house was in foreclosure and would be sold at auction. Dunne said Marble was responsible for paying the bills, and they sometimes argued about money and finances. Marble told Dunne the house was not in foreclosure. 3RP 42-47, 49.

On June 1, 2009, Dunne was sick and did not go to work. Dunne decided to go to the bank to check on the status of the home mortgage. Dunne said Marble became “slightly agitated,” and said he would go with her. 3RP 48-50. Dunne testified she twice felt a hand push her from behind as she walked down the stairs to leave the house. 3RP 50-51, 124. Marble denied pushing her. 3RP 207.

Dunne went back up the stairs to call 911. Dunne testified that Marble knocked a cordless phone and cell phone out of her hand as she tried to call 911. The “next minute,” Dunne said she felt a blow to the top of her head. Dunne was not sure if she ever dialed 911. 3RP 52-53, 90-91, 124-25. Dunne realized she was being hit with a barbell that was kept in the house. 3RP 54-55.

Dunne said Marble blocked the front door when she tried to leave the house and “dragged me back to hit me.” 3RP 54-55, 67-68. Dunne testified Marble hit her on the head and body thirty to forty times with the barbell and pinned her to the ground and against the stair railing for two hours. Dunne acknowledged the incident was not continuous and Marble stopped at times from exhaustion. 3RP 55-57, 67-68, 77-79, 88-89, 99, 122, 124-25, 165. Dunne admitted she could not remember if Marble choked her, but told police he did. 3RP 79. Marble said nothing during the incident and hit himself in the head four to five times. 3RP 55, 79, 86, 91-92.

Dunne told Marble she needed to clean herself up before Gavin came home from school. 3RP 57-58, 92. Dunne told police she helped Marble get up and he followed her to the bathroom. 3RP 82, 99. In the bathroom, Dunne pushed out a window screen and tried to climb out the window. Marble pulled Dunne back in the bathroom and hit her with the

barbell while blocking the bathroom door with his body. 3RP 59, 83-84, 86, 93, 95. Dunne said she yelled for help and set off her car alarm, but no one responded. 3RP 69, 87, 91, 94. Dunne said she was not sure how long the bathroom incident lasted, but later testified it was “a couple of hours.” 3RP 83. Dunne admitted she “wanted the attack to last longer,” until Gavin came home. 3RP 97.

When Gavin got home from school he saw blood in the house and heard Dunne calling for help. 3RP 60, 103-05. Gavin saw Marble on top of Dunne against the bathroom wall. 3RP 105. Gavin said Dunne was holding Marble up. 3RP 110. Gavin moved the barbell from the bathroom counter. 3RP 106-07, 109, 112. Gavin never saw the barbell in Marble’s hands. 3RP 109. Dunne ran from the house and Gavin followed her outside and called 911. 3RP 61, 85-86, 107-08, 111-12. Gavin never spoke with Marble about the incident. 3RP 107-08.

Police Officer Lester Letoto arrived at the house and called an ambulance for Dunne. Letoto saw blood in the house and found Marble in the bathroom. 3RP 115-17. Letoto said Marble was not bruised or bleeding. Marble was unintelligible when Letoto tried to talk to him. 3RP 119.

Forensic Nurse Paula Skomski, examined Dunne at the hospital. 3RP 161, 165. Dunne was alert and able to speak. 3RP 138, 167. Dunne

was bloodied and her head and face were bruised, cut, and swollen. 3RP 121-22, 133, 146-47, 168-71. A piece of metal was removed from Dunne's eyelid. 3RP 136, 153. Skomski said Dunne's injuries were consistent with the incident she described. 3RP 175. A CT scan and chest x-ray showed Dunne had no fractures or internal bleeding in her brain or chest. 3RP 173, 175

Detective Timothy O'Hara searched the house on June 1, 2009. O'Hara saw blood on the floor and stair railings. 3RP 183-90, 194-98. Blood samples were never sent for DNA testing. 3RP 213-14. O'Hara said a barbell with blood and hair on it was found in the kitchen. 3RP 203-04. O'Hara admitted the barbell was not tested for fingerprints. 3RP 213. O'Hara said he found guns on the floor in Marble's office and a note signed by Marble that said he was responsible for all financial debt during the marriage. 3RP 64, 87, 211-14.

On June 2, 2009, Marble's friend Rod Brown visited Marble in the hospital. Dunne had already been discharged. 3RP 178-79. Marble had difficulty speaking and said he did not remember anything about the incident. 3RP 179-81. Marble asked Brown to rent a storage unit and clean out Marble's garage. 3RP 182. Dunne later found two or three garbage bags containing mail in the garage. Dunne found checks endorsed and cashed in her name. Dunne said the home mortgage had not been paid

for a year and other bills had not been paid for several months. 3RP 69-72, 155-56, 211.

O'Hara interviewed Marble in the hospital on June 3, 2009. Marble said he could not believe what he did to Dunne, but said he did not remember the incident because he blacked out. Marble admitted having financial difficulties and said he tried to shelter Dunne from them. 3RP 206-08, 214, 217.

3. Sentencing²

Marble was sentenced with an offender score of one. He had no prior felony convictions, but the current first-degree assault and unlawful imprisonment convictions were scored against each other. CP 10-20; 3RP 277-78. The prosecutor recommended the high end of the standard ranges, with 136 months for the first-degree assault, and 8 months for the unlawful imprisonment, with deadly weapon enhancements to be served consecutively to each other and to the standard ranges. 3RP 278-79.

Defense counsel acknowledged Marble had no prior felony convictions, but agreed with the prosecutor's calculation of Marble's offender score, stating, "I'm good with that." 3RP 282, 285. Defense counsel did not mention the same criminal conduct issue at sentencing,

² The Judgment and Sentence is attached as Appendix A.

and requested the court impose the low end of the standard range for both crimes. 3RP 284-86.

The court imposed a sentence of 124 months on the first-degree assault conviction, and 8 months on the unlawful imprisonment conviction, with 36 months of community custody. An additional 24-month deadly weapon enhancement was added to the first-degree assault conviction and 6 months was added to the unlawful imprisonment conviction to be served consecutively. CP 1, 10-20; 3RP 290-91. The court imposed the sentence without discussion of Marble's offender score or a same criminal conduct analysis.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE UNLAWFUL IMPRISONMENT WAS A SEPARATE CRIME FROM THE ASSAULT UNDER THE INCIDENTAL RESTRAINT DOCTRINE

Due process requires the state to prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). A conviction should be reversed for insufficient evidence where no rational trier of fact, viewing the evidence in a light most favorable to the State, could find each essential element of the crime

proved beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). A challenge to the sufficiency of evidence may be raised for the first time on appeal as manifest constitutional error. City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

The concept of one crime being “merely incidental” to another originates from merger doctrine case law. State v. Johnson, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979), cert. dismissed, 446 U.S. 948 (1980), overruled on other grounds, State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999). Nevertheless, merger analysis is not relevant to a sufficiency of the evidence challenge. State v. Whitney, 44 Wn. App. 17, 20, 720 P.2d 853 (1986), aff’d, 108 Wn.2d 506 (1987); State v. Harris, 36 Wn. App. 746, 754, 677 P.2d 202 (1984). But courts reviewing charges as predicate offenses to other charges frequently borrow merger analysis in discussing sufficiency of the evidence and vice versa. State v. Saunders, 120 Wn. App. 800, 817, 86 P.3d 232 (2004).

Cases involving an analysis of the incidental restraint doctrine generally concern the crime of kidnapping and an additional offense. See, e.g., State v. Green, 94 Wn.2d 216, 227, 616 P.2d 628 (1980) (insufficient evidence of kidnapping because the restraint and movement of the victim was merely “ incidental” to homicide rather than independent of it); State

v. Korum, 120 Wn. App. 686, 703, 86 P.3d 166 (2004) (restraint of victims during a robbery was solely to facilitate robberies and not kidnappings), aff'd in part, reversed in part on other grounds, 157 Wn.2d 614 (2006); Saunders, 120 Wn. App. at 819 (kidnapping was not merely incidental to rape); State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760 (2010) (“Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction.”), rev. denied, 169 Wn.2d 1018 (2010). These cases demonstrate incidental restraint exists when the accused’s restraint or movement of the complaining witness during the course of another crime has no independent purpose or injury. See State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995) (“mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish a kidnapping.”), cert. denied, 516 U.S. 1121 (1996).

Similar to the crime of kidnapping,³ unlawful imprisonment⁴ requires “restraint” of another person. RCW 9A.40.040(1); State v.

³ RCW 9A.040.020(1) provides in pertinent part: “A person is guilty of kidnapping in the first degree if he intentionally abducts another person....” ‘Abduct’ means “to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force.” RCW 9A.40.010(2).

Russell, 104 Wn. App. 422, 449, 16 P.3d 664 (2001); see also, State v. Gatalski, 40 Wn. App. 601, 613, 699 P.2d 804 (1985) (unlawful imprisonment is a lesser included offense of kidnapping in the first degree because unlawful restraint is an essential element of both crimes), rev. denied, 104 Wn.2d 1019 (1985), overruled on other grounds, State v. Baldwin, 63 Wn. App. 536, 821 P.2d 496 (1991). Therefore, the cases involving kidnapping are instructive in determining that Marble's unlawful imprisonment charge is incidental to the assault charge.

Whether actions are incidental to the commission of another crime is a fact-specific determination. Elmore, 154 Wn. App. at 901 (citing Green, 94 Wn.2d at 225-27; Korum, 120 Wn. App. at 707). The “to convict” instruction for unlawful imprisonment included the elements that “(1) the defendant restrained the movements of Catherine Dunne in a manner that substantially interfered with her liberty; and (2) that such restraint was accomplished by physical force, intimidation, or deception.” CP 39 (Instruction 16).

To affirm the unlawful imprisonment conviction, sufficient evidence must show Marble restrained and moved Dunne for a purpose

⁴ RCW 9A.40.040(1) provides: “A person is guilty of unlawful imprisonment if he knowingly restrains another person.” ‘Restrain’ means “to restrict a person's movements without consent” and “‘restraint’ is ‘without consent’ if it is accomplished by . . . physical force, intimidation, or deception.” RCW 9A.40.010(1).

independent from his intent to assault her. No such evidence appears in this record. Marble restrained and assaulted Dunne by hitting her with a dumbbell inside the house and continued the restraint and assault in the same manner as he and Dunne moved about the house. Marble restrained Dunne to further the assault. Indeed, as the prosecutor acknowledged during closing argument, “There’s no law that gives him [Marble] the authority to pull her back into the house so he can keep beating her.” RP 234. The evidence does not show any plan to move or restrain Dunne with any criminal purpose independent of the assault.

The seminal case addressing incidental restraint is Green, 94 Wn.2d at 216. In Green, Barry Miners heard screams outside his apartment building and saw Kelly Emminger huddled on the sidewalk with Green. Miners saw Green lift Emminger from behind and carry her around the back of the apartment building. Miners went to investigate and saw a knife lying in a pool of blood and Green holding Emminger. Emminger was quiet and pale and her clothing was ripped. Green was covered in blood. Miners went to get help. When Miners returned, Green had moved Emminger to the lawn in the back of the apartment building. Green, 94 Wn.2d at 222-23. Green was convicted of aggravated first-degree murder for allegedly causing Emminger’s death in the course of rape or kidnapping. Green, 94 Wn.2d at 219-20.

On appeal, Green argued there was insufficient evidence the murder was committed in the course or furtherance of kidnapping because the restraint and movement of Emminger was merely incidental to the murder. Green, 94 Wn.2d at 219-20, 229. The Supreme Court agreed. In reaching its decision, the Court considered the sufficiency of the evidence to prove restraint by the three means indicated by statute, and a fourth offered by the state:

(1) restraint by means of secreting the victim in a place where he or she is not likely to be found; (2) restraint by means of a threat to use deadly force; and (3) restraint by means of deadly force other than the killing itself. The State would add a fourth, i.e. restraint supplied by the killing itself.

Green, 94 Wn.2d at 225.

In examining the means of secreting, the Court noted the setting of events and physical surroundings must be examined carefully. Green, 94 Wn.2d at 225-26. Considering the short time involved, the minimal distance Emminger was moved, the location of Emminger and Green, and the visibility of that location to the public, the Court found insufficient evidence of secreting. Importantly, while Green lifted and moved Emminger, the court found these actions “an integral part of and not independent of the underlying homicide.” Green, 94 Wn.2d at 227. The Court explained:

While movement of the victim occurred, the mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping.

Green, 94 Wn.2d at 227.

In support of this reasoning, the Court found persuasive a Michigan Court of Appeals decision referring to a case of assault:

We have concluded that under the kidnapping statute a movement of the victim does not constitute an asportation unless it has significance independent of the assault. And, unless the victim is removed from the environment where he is found, the consequences of the movement itself to the victim are not independently significant from the assault -- the movement does not manifest the commission of a separate crime -- and punishment for injury to the victim must be founded upon crimes other than kidnapping.

Green, 94 Wn.2d at 227 (quoting People v. Adams, 389 Mich. 222, 236, 205 N.W.2d 415 (Mich. App. 1973)).

The Court further found no restraint by threat to use deadly force or use of deadly force, other than that used in the homicide itself. Finally, the Court rejected the State's argument that the force used in the ultimate killing could also constitute restraint for kidnapping purposes. The Court remanded Green's case for resentencing. Green, 94 Wn.2d at 228-29.

In a subsequent case, Guy Washington relied on Green to argue there was insufficient evidence to support his unlawful imprisonment conviction. Washington was convicted of several crimes including

unlawful imprisonment and third-degree assault as a result of an argument with his wife, Harmoni. Washington became upset with Harmoni and asked her to accompany him outside. Washington told Harmoni to get inside a car. Harmoni left the door open, further upsetting Washington, who ordered her to shut the door. Harmoni tried to leave and Washington grabbed her clothing, pulled her into the car, and hit her in the stomach. After pulling the door shut, Washington choked Harmoni. State v. Washington, 135 Wn. App. 42, 45-46, 143 P.3d 606 (2006), rev. denied, 160 Wn.2d 1017 (2007).

On appeal, Washington argued the unlawful imprisonment charge “was merely incidental to the ongoing assaults.” Washington, 135 Wn. App. at 50. The Court of Appeals rejected Washington’s comparison to Green. The Court concluded Washington’s assault of Harmoni was in response to her attempt to leave, not vice versa, and therefore the unlawful imprisonment was not incidental to the assault. The Court specifically noted:

[T]he evidence indicates that the assaults on Harmoni were acts of rage triggered by her brief act of independence in leaving the car door open. In other words, the assaults were a reaction to Harmoni’s resistance to the restraint. The evidence thus supports the conclusion that the restraint was not merely incidental to the assaults.

Washington, 135 Wn. App. at 50-51.

Marble's case is like Green, not Washington. Like Green, Marble's movement and restraint of Dunne was an integral part of, and not independent of, the underlying assault. Dunne was not moved away from the house she shared with Marble but rather moved from room to room within the house. Thus, Dunne was not secreted to a place where she was unlikely to be found. Indeed, Dunne's son found her in the house after school.

Furthermore, unlike Washington, the duration of Dunne's restraint was simultaneous with the commission of the assault. Unlike Washington's assault which was "a reaction to Harmoni's resistance to the restraint," the alleged assault and restraint of Dunne began simultaneously when Marble hit Dunne on the head with the barbell as she tried to call 911. Likewise, the assault and restraint ended simultaneously when Dunne left the house.

In response, the State may claim the restraint occurred before the assault when Marble attempted to push Dunne down the stairs as she walked toward the front door. But, the State charged Marble only for his conduct in restraining Dunne with the dumbbell. See also State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007) ("[w]hen the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either the State must

elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act.”) Count two of the information clearly provides:

That the defendant, on or about the 1st day of June, 2009, did knowingly restrain a person, to wit: Catherine J. Dunne-Marble; and that at the time of the commission of the crime, the defendant or an accomplice was armed with a deadly weapon other than a firearm, to wit: a barbell, as provided and defined in RCW 9.94A.510 and RCW 9.94A.602[.]

CP 77.

There is no evidence Marble had possession of the barbell when he allegedly pushed Dunne on the stairs. Dunne did not testify to seeing the barbell in Marble’s hand on the stairs. Furthermore, Dunne testified the first blow from the barbell she felt was on her head the “next minute,” after Marble knocked the cell phone from her hand. RP 53, 90-91.

Finally, the restraint of Dunne did not endanger her above and beyond the danger posed by the assault. Cf. Brett, 126 Wn.2d at 166 (“mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish a kidnapping.”); Saunders, 120 Wn. App. at 818-19 (where Saunders handcuffed and shackled complaining witness and taped her mouth shut, kidnapping not merely incidental to rape because restraint went above and beyond that required or even typical in the

commission of rape). Here, there is no evidence Dunne suffered any injuries during the restraint that were distinct from those caused by the assault.

When the only evidence presented to the jury demonstrates the restraint is merely incidental to completing another crime, the jury has not received sufficient evidence to convict the defendant of the separately charged crime. Korum, 120 Wn. App. at 707. Here, the evidence was insufficient to convict Marble of unlawful imprisonment because the restraint was in furtherance of and incidental to the assault. The unlawful imprisonment conviction must be vacated and dismissed with prejudice. See State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982) (double jeopardy forbids retrial after a conviction is reversed for insufficient evidence), cert. denied, 459 U.S. 842 (1982).

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THE ASSAULT AND UNLAWFUL IMPRISONMENT WERE THE SAME CRIMINAL CONDUCT⁵

Marble committed first-degree assault and unlawful imprisonment against the same complaining witness at the same place during the same time period. In addition, Marble's criminal intent, viewed objectively, did not change during commission of these crimes. Moreover, the unlawful

⁵ This argument need not be reached if the Court agrees the evidence was insufficient to support the conviction for unlawful imprisonment.

imprisonment furthered the purpose of the assault. Nonetheless, at sentencing defense counsel stipulated to the prosecutor's recommended offender score of "one" for both of Marble's current offenses. Because a same criminal conduct finding would have resulted in an offender score of "zero" and lower standard range, defense counsel was ineffective for failing to argue the charged offenses constituted the same criminal conduct.

a. The Assault and Unlawful Imprisonment Constitute 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); State v. Williams, 135 Wn.2d 365, 367, 957 P.2d 216 (1998). The test for determining same criminal conduct is objective and "takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Whether one crime furthered the other is relevant to determining objective intent. Burns, 114 Wn.2d at 318.

Both the assault and the unlawful imprisonment charged in this case involved the same time, the same place, and the same alleged victim.

Both alleged incidents occurred on June 1, 2009. Both incidents occurred inside Dunne's house. And Dunne was the alleged victim of both incidents.

The only remaining question is whether the crimes involved the same criminal intent. "Intent," as used under RCW 9.94A.589(1)(a), "is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990), rev. denied, 114 Wn.2d 1030 (1990). "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). "[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

The assault and unlawful imprisonment involved the same criminal intent because the unlawful imprisonment furthered the assault. In other words, by keeping Dunne in the house, the assault was possible, and conversely, the assault prevented Dunne from leaving the house, thus unlawfully imprisoning her.

A finding of same criminal conduct has been established under similar circumstances. Taylor was charged and convicted of second-degree assault and second degree kidnapping for pointing a gun in the face of the complaining witness and transporting him to another location against his will. State v. Taylor, 90 Wn. App. 312, 315, 950 P.2d 526 (1998).

The trial court refused to find the two offenses constituted the same criminal conduct. Taylor, 90 Wn. App. at 316. The Court of Appeals reversed, finding the offenses occurred at the same time and place, against the same victim, and that Taylor necessarily had the same objective intent during the commission of both offenses. Taylor, 90 Wn. App. at 321-22. In particular, the Court noted the assault was committed in order to accomplish the kidnapping. The Court concluded:

The evidence established that Taylor's objective intent in committing the kidnapping was to abduct Murphy by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade Murphy, by the use of fear, to not resist the abduction.

Taylor, 90 Wn. App. at 321.

The Court further noted "because the assault and kidnapping were committed simultaneously, it is not possible to find a new intent to commit

a second crime after the completion of the first crime.” Taylor, 90 Wn. App. at 322.

As in Taylor, Marble’s objective intent in unlawfully imprisoning Dunne was to assault her. Commission of the assault was the intimidation and means used by Marble to imprison Dunne against her will. Furthermore, as in Taylor, the alleged assault and restraint of Dunne began simultaneously when Marble hit Dunne on the head with the barbell as she tried to call 911, and likewise ended simultaneously, when Dunne left the house. Because the assault and unlawful imprisonment were committed simultaneously, Marble did not form a new intent to commit the unlawful imprisonment after he began assaulting Dunne.

Indeed, the State’s theory of the case was that Marble’s overall intent with both crimes was to kill Dunne. As the prosecutor noted in closing argument:

What was his [Marble’s] intent? This case really comes down to, what was he intending to do? You can tell what his intent was in a few ways....He couldn’t get her [Dunne] downstairs where the guns were, his weapon of choice that day was a barbell.

RP 227-29.

Because there was no substantial change in the nature of Marble’s criminal objective, and the time, place, and victim were the same, the assault and unlawful imprisonment constitute the same criminal conduct

for purposes of calculating Marble's offender score. This Court should reverse Marble's sentence and remand for resentencing to count the offenses as the same criminal conduct.

b. Defense Counsel was Ineffective for Failing To Argue Same Criminal Conduct.

Whether current offenses encompass the same criminal conduct is a question within the sentencing court's discretion. State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). But defense counsel must request the court exercise its discretion. See State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (failing to raise same criminal conduct before sentencing court waives argument that sentencing court erred when calculating offender score), rev. denied, 167 Wn.2d 1007 (2009). Here, defense counsel failed to argue same criminal conduct at sentencing and affirmatively adopted the State's calculated standard range. RP 284-85. As a result, counsel waived Marble's same criminal conduct argument. Because there was no strategic reason for waiving this argument, defense counsel's performance was defective.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Prejudice is demonstrated from a reasonable probability that, but for counsel's performance, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226. A tactical decision at trial will be found deficient if it is not reasonable. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). A claim of same criminal conduct may be raised for the first time on appeal in the context

of an ineffective assistance of counsel claim. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007); Saunders, 120 Wn. App. at 825.

Failure to argue same criminal conduct can constitute deficient performance. Saunders, 120 Wn. App. at 824. Saunders was convicted of the kidnap, rape, murder and robbery of a woman. All the incidents occurred in Saunders' home on the evening of February 25, 2000. Saunders, 120 Wn. App. at 806. On appeal, Saunders argued his attorney was ineffective for failing to argue the offenses constituted the same criminal conduct for offender score purposes. Saunders, 120 Wn. App. at 824.

The Court of Appeals concluded Saunders' intent to commit the robbery and murder was separate and distinct from the other crimes, but that his primary motivation for raping the complainant was "to dominate her and to cause her pain and humiliation." Finding Saunders' intent in committing the rape was arguably similar to the motivation for the kidnapping, the Court concluded defense counsel could have "argue[d] that the kidnapping was committed in furtherance of the rape and, thus, the kidnapping and rape were the same criminal conduct." Saunders, 120 Wn. App. at 824-25.

Though the Court of Appeals recognized the State could have disputed this interpretation of the evidence, the Court nonetheless found

trial counsel was ineffective for failing to argue the rape and kidnapping constituted the same criminal conduct. Finding this deficient performance prejudicial, the Court of Appeals remanded “for a new sentencing hearing where defense counsel can make this argument.” Saunders, 120 Wn. App. at 825.

As in Saunders, evidence from Marble’s trial supports an argument the unlawful imprisonment was committed in furtherance of the assault, and thus, constitutes the same criminal conduct. And, although the State may have been able to dispute this characterization of the offenses, it was deficient performance not to present this argument to the sentencing court.

No legitimate tactical decision justified counsel’s stipulation to an offender score that increased Marble’s term of confinement when there was a possibility the court would have determined a lesser offender score had such a request been made. Counsel’s deficient performance was prejudicial because had the court exercised its discretion in Marble’s favor, his offender score on the assault count would have been zero instead of one. With an offender score of zero, Marble’s standard range for the assault would have been 93 to 123 months rather than 102 to 136 months. Likewise, Marble’s offender score for the unlawful imprisonment count would have zero instead of one. With an offender score of zero, the

standard range for the unlawful imprisonment would have been 1 to 3 months rather than 3 to 8 months. See RCW 9.94A.510.

Marble need not show counsel's deficient performance more likely than not altered the outcome. Strickland, 466 U.S. at 693. He need only show lack of confidence in the outcome. Thomas, 109 Wn.2d at 226. Here, the trial court did not address the same criminal conduct issue at sentencing because Marble's attorney failed to ask the trial court to exercise its discretion in finding same criminal conduct. This Court cannot be confident the trial court would not have concluded the assault and unlawful imprisonment constituted the same criminal conduct had it been asked to do so. Remand for resentencing is required.

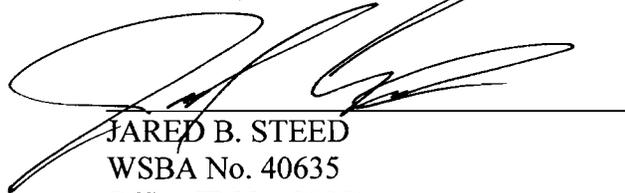
D. CONCLUSION

For the reasons stated, this Court should reverse the unlawful imprisonment conviction and order dismissal of that charge with prejudice. The deadly weapon enhancement for that count should also be vacated and dismissed with prejudice. In the event this Court declines to reverse the unlawful imprisonment conviction, it should reverse Marble's sentence and remand for a new sentencing hearing at which Marble's counsel can argue the assault and unlawful imprisonment constitute the same criminal conduct.

DATED this 31st day of March, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

Appendix A



CL14376907

FILED

2010 SEP -8 PM 3:30

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

INELIGIBLE TO CARRY FIREARMS

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

No. 09-1-01178-2

Plaintiff,

JUDGMENT AND SENTENCE

v.

Prison

Jail One Year or Less

MARBLE, JEFFERY CURTIS

First Time Offender

Special Drug Offender Sentencing Alternative

Defendant.

Clerk's action required, firearm rights
revoked, ¶ 5.5

SID: WA

Clerk's action required, ¶¶ 2.1, 4.1, 4.3, 4.5, 5.2, 5.3

If no SID, use DOB:

Clerk's action required, ¶ 5.6 (use of motor vehicle)

Restitution Hearing set, ¶ 4.3

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

2.1 CURRENT OFFENSE(S). The defendant was found guilty on August 25, 2010 by jury-verdict of:

COUNT	CRIME	RCW	CLASS	INCIDENT #	DATE OF CRIME
1	First Degree Assault with a Deadly Weapon (DV)	9A.36.011(1)(a), 9.94A.510 & 9.94A.602, 10.99.020	A	EVE 0911275	6/1/09
2	Unlawful Imprisonment with a Deadly Weapon (DV)	9A.40.040(1), 9.94A.510 & 9.94A.602, 10.99.020	C		6/1/09

as charged in the Information.

The jury returned a special verdict or the court made a special finding with regard to the following:

See ¶ 4.1 regarding findings in relation to Drug Offender Sentencing Alternative.

The defendant used a firearm in the commission of the offense(s) in Count(s) _____ RCW 9.94A.602, 9.41.010, 9.94A.533.

The defendant used a deadly weapon other than a firearm in the commission of the offense(s) in Count(s) 1 and 2. RCW 9.94A.602, 9.94A.533.

ORIGINAL

67

9-8-10 Date
CC PA I Clerk RT
CC SCSO 6 DPA Stim Q/N
CC-SCSO

Verified in JIS

- The defendant committed the offense in Count(s) _____ with sexual motivation. RCW 9.94A.835.
- Count(s) _____ Violation of the Uniform Controlled Substances Act (VUCSA), RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, in a public transit vehicle, or in a public transit stop shelter; or in or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, when a juvenile was present in or upon the premises of manufacture in Count(s) _____. RCW 9.94A.605, 69.50.401, 69.50.440.
- Count(s) _____ is (are) a criminal street gang-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that minor in the commission of the offense. RCW 9.94A.833.
- Count(s) _____ is (are) the crime of unlawful possession of a firearm and the defendant was a criminal street gang member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.____.
- The defendant committed vehicular assault proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count(s) _____ involve(s) attempting to elude a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- Count(s) _____ is (are) a felony in the commission of which the defendant used a motor vehicle. RCW 46.20.285.
- The defendant has a chemical dependency that has contributed to the offense(s) in Count(s) _____. RCW 9.94A.607.
- The crime charged in Count(s) 1 and 2 involve(s) domestic violence. RCW 10.99.020.
- The offense in Count(s) _____ was (were) committed in a county jail or state correctional facility. RCW 9.94A.533(5).
- Count(s) _____ involve(s) kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in Chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- Count(s) _____ and _____ merge. (See ¶ 3.2 for dismissal of specific count.)
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY. Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

<u>CRIME</u>	<u>DATE OF SENTENCE</u>	<u>SENTENCING COURT (County & State)</u>	<u>A or J (Adult or Juvenile)</u>	<u>TYPE OF CRIME</u>
1 None				

- The defendant committed Count(s) _____ while on community custody (adds one point to score). RCW 9.94A.525.
- The court finds the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA.

COUNT NO.	OFFENDER SCORE	SRA LEVEL	STANDARD RANGE (not including enhancements)	*PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
1	1	XII	102 – 136 Months	24 Months	126 – 160 Months	LIFE/ \$50,000
2	1	III	3 – 8 Months	6 Months	9 – 14 Months	5 Years/ \$10,000

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile Present, (CSG) Criminal Street Gang Involving Minor, (AE) Endangerment While Attempting to Elude.

- 2.4** **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence above below the standard range for Count(s) _____ or within the standard range for Count(s) _____ but served consecutively to Count(s) _____.
- The defendant and State stipulate that justice is best served by imposition of an exceptional sentence above the standard range and the court finds that exceptional sentence furthers and is consistent with the interests of justice and the purpose of the Sentencing Reform Act.
- Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory. Findings of fact and conclusions of law are attached in Appendix 2.4. The jury's interrogatory is attached. The prosecuting attorney did did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753(5)):
- _____

- The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

2.6 PROSECUTOR'S RECOMMENDATION. The prosecutor's recommendation was as follows:

36 + 24 months on Count I _____ months on Count IV

8 + 6 months on Count II _____ months on Count V

_____ months on Count III _____ months on Count VI

Terms on each count to run:

- concurrently with or consecutively to each other
- concurrently with or consecutively to the terms imposed in Cause No(s). _____

III. JUDGMENT

- 3.1 The defendant is GUILTY of the counts and charges listed in Paragraph 2.1.
- 3.2 [] The court DISMISSES Count(s) _____
- 3.3 [] The defendant was found NOT GUILTY of Count(s) _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 CONFINEMENT OVER ONE YEAR. The court sentences the defendant to total confinement as follows:

CONFINEMENT. RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

124 + 24 months on Count I _____ months on Count IV
8 + 6 months on Count II _____ months on Count V
 _____ months on Count III _____ months on Count VI

The confinement time on Count(s) 1 & 2 includes 24 & 6 (30 total) months as enhancement for [] Firearm Deadly Weapon [] VUCSA in a Protected Zone [] Manufacture of Methamphetamine with Juvenile Present [] other _____

Actual term of total confinement ordered is 154 months.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at ¶ 2.3, and the following counts which shall be served consecutively:

_____ The sentence herein shall run consecutively with the sentence in cause number(s) _____

_____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589

_____ Confinement shall commence immediately unless otherwise set forth here: _____

CREDIT FOR TIME SERVED. The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505(6). The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

[] WORK ETHIC PROGRAM. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in ¶ 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement.

4.2

COMMUNITY CUSTODY. RCW 9.94A.701. The defendant shall serve the following term of community custody (12 months for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate; 18 months for violent offenses; and 36 months for serious violent offenses):

Count I for a period of <u>36</u> months	Count IV for a period of _____ months
Count II for a period of _____ months	Count V for a period of _____ months
Count III for a period of _____ months	Count VI for a period of _____ months

and the conditions ordered are set forth below. The combined term of community custody and confinement shall not exceed the statutory maximum.

The defendant shall report to DOC, 8625 Evergreen Way, Suite 100, Everett, Washington 98208 not later than 72 hours after release from custody.

While on community custody, the defendant shall (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution; (3) notify DOC of any change in the defendant's address or employment; (4) not consume or possess controlled substances except pursuant to lawfully issued prescriptions; (5) not own, use, or possess firearms or ammunition; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with orders of the court as required by DOC; and (8) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The defendant shall not consume any alcohol.

The defendant shall have no contact with Catherine Dunne. See ¶ 4.5.

The defendant shall remain within outside of a specific geographical boundary, to wit:

The defendant shall participate in the following crime-related treatment or counseling services:

The defendant shall participate in the following: State certified domestic violence treatment program chemical dependency evaluation mental health evaluation anger management program, and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: no law violations

- 4.4 **DNA TESTING.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.
- HIV TESTING.** The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. The defendant, if out of custody, shall report to the HIV/AIDS Program Office at 3020 Rucker, Suite 206, Everett, Washington 98201 within one (1) business day of entry of this order to arrange for the test. RCW 70.24.340.

4.5 **NO CONTACT.**

The defendant shall not have contact with Catherine Dunne
DOB 6-18-1965 (name, DOB)
 including, but not limited to, personal, verbal, telephonic, written or contact through a third party until 8-25-2009 (date) (not to exceed the maximum statutory sentence). EVEN IF THE PERSON WHO THIS ORDER PROTECTS INVITES OR ALLOWS CONTACT, YOU CAN BE ARRESTED AND PROSECUTED. ONLY THE COURT CAN CHANGE THIS ORDER. YOU HAVE THE SOLE RESPONSIBILITY TO AVOID OR REFRAIN FROM VIOLATING THIS ORDER.

A separate post conviction Domestic Violence No Contact Order, Anti-Harassment Order, or Sexual Assault Protection Order was filed at the time of entry of the plea of guilty/guilty verdict is filed contemporaneously with this Judgment and Sentence. (Entry of a separate order makes a violation of this no contact sentencing provision also punishable as a criminal offense, and the order will be entered into the law enforcement database.)

The pre-trial Domestic Violence No Contact Order, Anti-Harassment Order, or Sexual Assault Protection Order entered on 6-29-2009 is hereby terminated.

4.6 **OTHER.** _____

4.7 **OFF-LIMITS ORDER.** (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 Unless otherwise ordered, all conditions of this sentence shall remain in effect notwithstanding any appeal.

V. NOTICES AND SIGNATURES

- 5.1 COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.753(4); RCW 9.94.A.760 and RCW 9.94A.505(5).
- 5.3 NOTICE OF INCOME-WITHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7606.
- 5.4 VIOLATION OF JUDGMENT AND SENTENCE/COMMUNITY CUSTODY VIOLATION.**
(a) Any violation of a condition or requirement of sentence is punishable by up to 60 days confinement for each violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

- 5.5 FIREARMS.** You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. *(The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.)* RCW 9.41.040, 9.41.047.

(Pursuant to RCW 9.41.047(1), the Judge shall read this section to the defendant in open court.)

The defendant is ordered to forfeit any firearm he/she owns or possesses no later than 9-8-10 to Everett Police Dept. (name of law enforcement agency). RCW 9.41.098

- 5.6 MOTOR VEHICLE.** If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.
- 5.7 CERTIFICATE OF DISCHARGE.**
(a) If you are under the custody and supervision of the Department of Corrections, the court will not issue a Certificate of Discharge until it has received notice from Department of Corrections and clerk's office that you have completed all requirements of the sentence and satisfied all legal financial obligations. RCW 9.94A.637.
- (b) If you are not under the custody and supervision of the Department of Corrections, the court will not issue a Certificate of Discharge until it has received verification from you that you have completed all sentence conditions other than payment of legal financial obligations and the clerk's office that you have satisfied all legal financial obligations.

5.8 RIGHT TO APPEAL. If you plead not guilty, you have a right to appeal this conviction. If the sentence imposed was outside of the standard sentencing range, you also have a right to appeal the sentence. You may also have the right to appeal in other circumstances.

This right must be exercised by filing a notice of appeal with the clerk of this court within 30 days from today. If a notice of appeal is not filed within this time, the right to appeal is IRREVOCABLY WAIVED.

If you are without counsel, the clerk will supply you with an appeal form on your request, and will file the form when you complete it.

If you are unable to pay the costs of the appeal, the court will appoint counsel to represent you, and the portions of the record necessary for the appeal will be prepared at public expense.

5.9 VOTING RIGHTS STATEMENT. I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

5.10 OTHER. _____

DONE in Open Court and in the presence of the defendant this date: 9.8.10

Gerald L. Knight

JUDGE
Print name: **GERALD L. KNIGHT**

Valerie S. Shapiro

VALERIE S. SHAPIRO
WSBA 36618
Deputy Prosecuting Attorney

Philip G. Sayles

PHILIP G SAYLES
WSBA 37503
Attorney for Defendant

Jeffery Curtis Marble

JEFFERY CURTIS MARBLE
Defendant

Interpreter signature/Print name: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language. Cause No. of this case: 09-1-01178-2.

I, Sonya Kraski, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID Number: WA
(if no SID, take fingerprint card for State Patrol)

Date of Birth: 04/08/1961

FBI Number: _____

Local ID Number: _____

PCN Number: _____

DOC Number: _____

Alias name, SSN, DOB:

Race: White

Ethnicity:
 Hispanic
 Non-Hispanic

Sex: M

Height: 507

Weight: 160

Hair: Brown

Eyes: Blue

FINGERPRINTS: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court: [Signature] Deputy Clerk.

Dated: 9-8-10

DEFENDANT'S SIGNATURE: [Signature]

ADDRESS: _____



ORDER OF COMMITMENT

FILED
2010 SEP - 8 PM 3: 31
SONYA KRASKI
SNOHOMISH COUNTY CLERK
SNOHOMISH CO. WASH

THE STATE OF WASHINGTON to the Sheriff of the County of Snohomish; State of Washington, and to the Secretary of the Department of Corrections, and the Superintendent of the Washington Corrections Center of the State of Washington:

WHEREAS, JEFFERY CURTIS MARBLE has been duly convicted of the crime(s) of Count 1: First Degree Assault with a Deadly Weapon (DV), Count 2: Unlawful Imprisonment with a Deadly Weapon (DV) as charged in the Information filed in the Superior Court of the State of Washington, in and for the County of Snohomish, and judgment has been pronounced against him/her that he/she be punished therefore by imprisonment in such correctional institution under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections pursuant to RCW 72.02.210, for the term(s) as provided in the judgment which is incorporated by reference, all of which appears of record in this court; a certified copy of said judgment being endorsed hereon and made a part thereof; Now, Therefore,

THIS IS TO COMMAND YOU, the said Sheriff, to detain the said defendant until called for by the officer authorized to transfer to the custody of the Superintendent for the Washington State Department of Corrections or his designee for transport to either the Washington Corrections Center at Shelton, Washington or Washington Corrections Center for Women at Purdy, Washington and this is to command you, the said Superintendent and Officers in charge of said Washington Corrections Center to receive from the said officers the said defendant for confinement, classification, and placement in such corrections facilities under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections.

And these presence shall be authority for the same. HEREIN FAIL NOT.

WITNESS the Honorable GERALD L. KNIGHT, Judge of the said Superior Court and the seal thereof, this 8 day of September, 2010.

Sonya Kraski
CLERK OF THE SUPERIOR COURT

By: [Signature]
Deputy Clerk

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65978-2-1
)	
JEFFREY MARBLE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 31ST DAY OF MARCH 2011, 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] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] JEFFREY MARBLE
DOC NO. 343850
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326



SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH 2011.

x *Patrick Mayovsky*