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COA NO. 67524-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

RATTANA PHUONG,

Appellant.

REC'D  
MAR 07 2012  
King County Prosecutor  
Appellate Unit

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

The Honorable Regina Cahan, Judge

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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 at sentencing in relation to a "same criminal conduct" determination.

3. The information is defective because it omits essential elements of the crime of unlawful imprisonment. CP 2.

Issues Pertaining to Assignments of Error

1. Does insufficient evidence support appellant's conviction for unlawful imprisonment where the restraint was wholly incidental to the attempted rape?

2. Appellant was convicted of two crimes that involve the same victim, same time and place, and same objective intent. Was defense counsel ineffective in failing to make a "same criminal conduct" argument for offender score purposes that would have resulted in a reduced standard range sentence?

3. A charging document must properly notify a defendant of the charge by including all essential elements of the crime. Is reversal of the unlawful imprisonment conviction required because the information failed to allege appellant, in restricting another's movements, knowingly

did so (1) without that person's consent; (2) without legal authority; and (3) in a manner that substantially interfered with that person's liberty?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Rattana Phuong with attempted second degree rape and unlawful imprisonment against Samouen Liem, alleging an aggravating circumstance that a crime of domestic violence was committed in the presence of minor children. CP 1-2. A jury found Phuong guilty as charged. CP 77-79. The court imposed standard range sentences, consisting of an indeterminate term of 102 months to life for the attempted rape conviction and a determinate term of 12 months for the unlawful imprisonment conviction. CP 121-22. This appeal follows. 130-31.

2. Trial

Phuong and Samouen Liem were married in 2001 and separated in 2007. 2RP<sup>1</sup> 4, 11, 30-31. They have two children, A. and D. 2RP 17-19, 22. Following the separation, Phuong lived in his parent's house and Liem lived elsewhere. 2RP 32. A. lived with her father and D. lived with his

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 6/28/11 & 6/30/11; 2RP - 7/5/11; 3RP - 7/6/11; 4RP - 7/7/11; 5RP - 7/11/11; 6RP - 7/12/11; 7RP - 8/5/11.

mother. 2RP 35, 37. Liem brought D. over to Phuong's house for visits. 2RP 38.

Liem testified that on September 15, 2009, she arrived at Phuong's house to drop D. off for a visit. 2RP 45-46. She parked her car in the driveway and went inside. 2RP 46-47. Phuong's parents were not home. 2RP 48. While Liem was feeding the children some food, Phuong called Liem a hooker. 2RP 49-51. Liem said she was going to leave. 2RP 51. Phuong asked if she wanted to have sex. RP 51-52. Liem declined. 2RP 52.

She went to her car and started the engine. 2RP 52. Phuong grabbed her. 2RP 52-53. Liem asked what he wanted. 2RP 53. He said he wanted sex. 2RP 53. Liem said no. 2RP 54. Phuong pulled her out of the car. 2RP 53. Liem screamed and called out to her children for help. 2RP 53-54.

Phuong pulled Liem into the house by grabbing her waist and then pulled her up the stairs by grabbing onto her arms or hands. 2RP 55-56, 60. Liem fought back by kicking. 2RP 56. The children cried and yelled at Phuong to leave their mother alone. 2RP 54-55, 61-62. Phuong told the children to go downstairs. 2RP 62. The children did not go. 2RP 63.

Phuong pulled Liem into his upstairs bedroom and locked the door. 2RP 63. The children banged on the door yelling at their father to let their

mother out. 2RP 63. Liem tried to leave the bedroom but he blocked her way and said he still loved her and wanted to have sex with her. 2RP 67. Liem said she did not want to have sex with him. 2RP 67-68.

Liem tried to fight him and Phuong pulled her shirt down. 2RP 64. Phuong tried to push Liem onto a mattress on the floor and grabbed her pants in the process, tearing them. 2RP 64-65, 68-69. Liem tried to push him off. 2RP 64. Phuong twice pushed her down onto the mattress. 2RP 64-66. Phuong took off his shirt. 2RP 64-65. He got on top of her, grabbed her wrists and pushed her hands down. 2RP 66-67. Liem struggled. 2RP 66. She kicked him and stood up. 2RP 65.

At that point a neighbor knocked on the door. RP 65. Phuong opened the door and went downstairs. 2RP 68, 70. Liem left the bedroom and went to the bathroom to try to fix her pants. 2RP 70. She heard Phuong tell the neighbor that nothing happened. 2RP 71. Liem went down the stairs and told Phuong she had to leave. 2RP 73. Phuong told her to leave her pants so that he or his mother could fix them. 2RP 73. Liem left with both of her children. 2RP 73, 76-77. Phuong subsequently called her on the phone and said he was sorry. 2RP 80, 84.

Neighbor Audry Germanis testified at trial. According to Germanis, A. ran out of Phuong's house crying, saying her parents were fighting. 4RP 50-51. As Germanis attempted to comfort A., D. ran to

them upset. 4RP 53. Germanis went inside Phuong's house and called for him to come down. 4RP 54-56. Phuong did not respond. 4RP 56. Germanis heard a woman's voice, but it did not sound distressed. 4RP 67-68. Germanis also heard banging upstairs. 4RP 57-58, 67. Phuong soon came out without a shirt. 4RP 58. He was breathing heavily and told her "we are just up there making a little love." 4RP 60.

Phuong, testifying in his own defense, denied attempting to rape Liem or preventing her from leaving the house. 4RP 77, 100-02, 130-31.

C. ARGUMENT

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

The evidence was insufficient to convict Phuong of unlawful imprisonment because the restraint was in furtherance of and incidental to the attempted rape. The unlawful imprisonment conviction must therefore be vacated and the charge dismissed with prejudice.

a. The Unlawful Imprisonment Had No Purpose Or Effect Independent Of The Attempted Rape And Is Therefore Incidental.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502,

120 P.3d 559 (2005); U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3. Evidence is insufficient to support a conviction unless, viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

Cases involving a sufficiency of evidence analysis under the incidental restraint doctrine often address whether the crime of kidnapping is incidental to another offense. See 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, rev. in part on other grounds, 157 Wn.2d 614 (2006); State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760 ("Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction."), review denied, 169 Wn.2d 1018 (2010).

Such cases demonstrate incidental restraint exists when the accused's restraint or movement of the victim 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).

In order to establish the crime of unlawful imprisonment, the State must prove the defendant "knowingly restrain[ed] another person." RCW 9A.40.040(1). "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(6).

The crime of kidnapping also requires "restraint" of another person.<sup>2</sup> Unlawful imprisonment is a lesser included offense of kidnapping. State v. Hansen, 46 Wn. App. 292, 296, 730 P.2d 706 (1986). Because unlawful imprisonment and kidnapping both require restraint of a person as an essential element of the crime, the restraint issue at the core of incidental kidnapping is also present in incidental unlawful imprisonment cases. See State v. Washington, 135 Wn. App. 42, 50-51,

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<sup>2</sup> See RCW 9A.40.010(1) ("Abduct' means to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force."); RCW 9A.40.020(1) ("A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person . . . "); RCW 9A.40.030(1) ("A person is guilty of kidnapping in the second degree if he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.").

143 P.3d 606 (2006) (applying incidental restraint doctrine to crime of unlawful imprisonment) (citing Green, 94 Wn.2d at 226-27).

The mere incidental restraint of a victim during the course of another crime is insufficient to show a separate crime of unlawful imprisonment where the movement and restraint had no independent purpose or injury. See Brett, 126 Wn.2d at 166 (applying incidental restraint doctrine to kidnapping). In other words, to sustain a conviction for unlawful imprisonment, the restraint must have an independent purpose or effect, rather than merely being incidental to commission of another crime.

This is a fact-specific determination. Elmore, 154 Wn. App. at 901 (citing Green, 94 Wn.2d at 225-27). To affirm the unlawful imprisonment conviction, sufficient evidence must show Phuong's restraint of Liem had a purpose or effect independent from his attempt to rape her. No such evidence appears in this record.

The evidence, viewed in the light most favorable to the State, shows Phuong restrained Liem to further the attempted rape. The restraint was part and parcel of the attempted rape. The prosecutor argued in closing that restraint for the unlawful imprisonment charge was shown as follows: "she was trying to drive away when he went up to her, grabbed her out of the car, pulled her up the stairs, threw her in the room; and then

when she was trying to leave, he kept shoving her back down and getting on top of her. Yeah, he substantially interfered with her liberty. And such restraint was without Samouen's consent or accomplished by physical force, intimidation, or deception." 5RP 16. The prosecutor included these same acts as the substantial step towards the commission of attempted rape. 5RP 12-15. The prosecutor's summary of the evidence accords with Liem's testimony. 2RP 52-69.

The restraint used on Liem was for the sole purpose of facilitating the attempted rape inside his bedroom. The attempted rape was not a reaction to any resistance to the unlawful imprisonment. Cf. Washington, 135 Wn. App. at 50-51 (sufficient evidence supported restraint element of unlawful imprisonment where assault was a reaction to the victim's resistance to the restraint and thus the restraint was not merely incidental to the assault).

Moreover, Liem did not suffer any injury distinct from that inflicted by the attempted rape. Cf. State v. Saunders, 120 Wn. App. 800, 818-19, 86 P.3d 232 (2004) (where defendant handcuffed and shackled victim 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). Liem had some pain in her wrist, shoulder, arm, and elbow and one of her knees had been hurt when Phuong pulled her out

of the car. 1RP 91-92; 4RP 12, 13. She also had bruising on her arm. 4RP 13. Based on the evidence, these injuries could only have come from Phuong's restraint of Liem as he attempted to rape her.

The mere incidental restraint of a victim that might occur during the course of another crime is not, standing alone, indicia of a true unlawful imprisonment offense. See Green, 94 Wn.2d at 227 (applying incidental restraint doctrine to kidnapping). Here, the evidence plainly shows there was no restraint independent of the attempted rape.

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 a separately charged crime of unlawful imprisonment. Phuong's conviction for first degree kidnapping must be reversed and the charge dismissed with prejudice due to insufficient evidence. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). The prohibition against double jeopardy forbids retrial after a conviction is reversed for insufficient evidence. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

b. The Incidental Restraint Doctrine Applicable To A Sufficiency Of Evidence Analysis Remains Good Law Under Established Supreme Court Precedent.

Division Three recently issued a curious decision that appears to recognize the continued precedential value of the Supreme Court's

incidental restraint analysis in Green while repudiating it as controlling authority. State v. Butler, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2012 WL 28681 at \*5-6, (slip op. filed Jan. 5, 2012). Division Three's decision in Butler should be rejected to the extent it proclaims the death of the incidental restraint doctrine in a sufficiency of evidence analysis.

When faced with a sufficiency of evidence claim based on the incidental restraint doctrine, Butler maintained the controlling Supreme Court authority in that context is the double jeopardy merger analysis set forth in State v. Vladovic, 99 Wn.2d 413, 415, 662 P.2d 853 (1983). Butler, 2012 WL 28681 at \*5. Butler cited two other double jeopardy cases — State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005) and In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 776 P.2d 114 (1989) — as endorsing the Vladovic approach. Butler, 2012 WL 28681 at \*6.

Division Three misread Supreme Court precedent. Vladovic addressed Green and the manner in which it did so demonstrates the Supreme Court's continuing support of the sufficiency of evidence analysis in Green notwithstanding the lack of any double jeopardy problem.

In Vladovic, the Supreme Court held the conviction for robbery and kidnapping did not merge and were not barred by double jeopardy. Vladovic, 99 Wn.2d at 417, 420-24. It then addressed the separate claim that insufficient evidence supported the kidnapping conviction. Vladovic, 99

Wn.2d at 424. The petitioner, in making the insufficient evidence claim, relied on Green in arguing his kidnapping convictions could not stand because the acts did not bear the indicia of a true kidnapping. Id. Vladovic applied the sufficiency of evidence test enunciated in Green: "whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of [the crime] beyond a reasonable doubt." Id. (quoting Green, 94 Wn.2d at 221–22). Vladovic recognized an ultimate killing of a victim does not itself constitute the restraint necessary to prove kidnapping under Green, but found Green did not compel reversal under the facts of the case because the restraint of certain victims was a separate act from the robbery of a different victim. Vladovic, 99 Wn.2d at 424.

The Supreme Court in Vladovic had the opportunity to overrule Green but declined to do so. In fact, Vladovic accepted the Green analysis. Vladovic recognizes the sufficiency of evidence analysis and double jeopardy/merger analyses are co-existent.

The sufficiency of evidence analysis is distinct from whether crimes merge for double jeopardy purposes. In re Pers. Restraint of Bybee, 142 Wn. App. 260, 266-67, 175 P.3d 589 (2007). "Although Green borrowed the 'incidental restraint' concept from an earlier merger case, it

incorporated this concept into a new standard for determining sufficiency of evidence on appeal." Bybee, 142 Wn. App. at 266-67.

Phuong has the constitutional due process right not to be convicted if the State fails to prove all necessary facts of the crime. Winship, 397 U.S. at 364; Smith, 155 Wn.2d at 502. That due process right remains, regardless of whether the distinct right to be free from double jeopardy is protected. Division Three in Butler improperly conflated the merger doctrine under double jeopardy jurisprudence and the incidental restraint doctrine under sufficiency of evidence jurisprudence.

In Green, the Supreme Court held the evidence was insufficient to convict the defendant of kidnapping because the restraint and movement of the victim was merely "incidental" to the homicide rather than independent of it. Green, 94 Wn.2d 216, 219, 227-28. Green began and ended its "incidental restraint" discussion by making clear it was applying the sufficiency of evidence test under the due process clause of the Fourteenth Amendment. Id. at 225-26, 228.

In Louis, the Supreme Court held the crimes of robbery and kidnapping do not merge and a defendant may be punished separately for robbery and kidnapping without violating the prohibition against double jeopardy under the Fifth Amendment of the United States Constitution. Louis, 155 Wn.2d at 568-71.

Louis cannot be construed as overruling Green *sub silentio*. Louis did not mention Green let alone declare that the sufficiency of evidence analysis advanced in Green was overruled. No one asked the court in Louis to overrule Green in name or theory. In reaching its holding, Louis stated it was adhering to Vladovic and Fletcher. Louis, 155 Wn.2d at 571. As shown above, Vladovic adhered to Green when given the opportunity to overrule it. Fletcher, meanwhile, did not mention Green.

The Supreme Court does not overrule binding precedent *sub silentio*. Broom v. Morgan Stanley DW Inc., 169 Wn.2d 231, 238, 236 P.3d 182 (2010) (citing State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999)). This Court recognizes that fact. In re Estate of Borghi, 141 Wn. App. 294, 301, 169 P.3d 847 (2007). Louis cannot therefore be construed as overruling Green and its sufficiency of evidence analysis in relation to the incidental restraint doctrine.

The Supreme Court has emphatically stated "Where we have expressed a clear rule of law . . . we will not-and should not-overrule it *sub silentio*." Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 280, 208 P.3d 1092 (2009). "To do so does an injustice to parties who rely on this court to provide clear rules of law and risks increasing litigation costs and delays to parties who cannot determine from this court's precedent

whether a rule of decisional law continues to be valid." Lunsford, 166 Wn.2d at 280.

The Court of Appeals is not free to ignore controlling Supreme Court authority. Matia Contractors, Inc. v. City of Bellingham, 144 Wn. App. 445, 452, 183 P.3d 1082 (2008) (citing 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006) ("When the Court of Appeals fails to follow directly controlling authority by this court, it errs."); State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (once the Supreme Court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by the Supreme Court). Green remains controlling authority and the lower courts are duty bound to follow it.

The Supreme Court also recently addressed the showing that is required before it will change a rule of law. State v. Barber, 170 Wn.2d 854, 863-64, 248 P.3d 494 (2011). There must be "a clear showing that an established rule is incorrect and harmful before it is abandoned." Barber, 170 Wn.2d at 863 (quoting In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Here, where the Supreme Court has not undertaken such an analysis or overturned the incidental restraint doctrine in relation to sufficiency of evidence analysis, it remains in force. This Court's duty is to follow the Supreme Court's precedent on the

sufficiency of evidence issue and its relation to the incidental restraint doctrine.

Finally, it may also be noted that in the over 30 years since Green was decided, the legislature had never substantively amended the kidnapping or unlawful imprisonment statutes or issued clarifying legislation. RCW 9A.40.020, RCW 9A.40.030; RCW 9A.40.040. "This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." City of Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). The legislature had had over 30 years to amend the kidnapping and unlawful imprisonment statutes or issue clarifying legislation in the event it disagreed with the sufficiency of evidence analysis in Green. It has not done so. The legislature has acquiesced to the incidental restraint doctrine advanced in Green.

2. PHUONG WAS DENIED EFFECTIVE REPRESENTATION WHEN HIS ATTORNEY FAILED TO ARGUE THE ATTEMPTED RAPE AND UNLAWFUL IMPRISONMENT OFFENSES CONSTITUTED THE "SAME CRIMINAL CONDUCT" IN CALCULATING THE OFFENDER SCORE.

The attempted rape and unlawful imprisonment offenses should be counted as the same criminal conduct in determining Phuong's offender

score. Phuong's attorney rendered ineffective assistance in failing to make this argument. Remand for resentencing is required.

a. The Attempted Rape And Unlawful Imprisonment Constituted The Same Criminal Conduct.

RCW 9.94A.589(1)(a) provides:

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

"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). The test is an objective one that "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).

The crimes charged in this case — attempted rape and unlawful imprisonment — involved the same place (Phuong's residence), the same time (September 15, 2009) and the same victim (Liem). 2RP 45-69.

The question is whether the crimes involved the same criminal intent. Multiple factors inform the objective intent determination,

including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. Burns, 114 Wn.2d at 318-19; State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996). 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).

Here, the attempted rape and unlawful imprisonment of Liem were part of a continuous sequence of conduct over a short period of time. Phuong tried to rape Liem by grabbing and dragging her to the bedroom, where he closed the door and prevented her from leaving by blocking the door and grabbing onto her. 2RP 52-69. Phuong restrained Liem to carry out a rape. The prosecutor, in accord with the evidence, treated the conduct for unlawful imprisonment as part of the substantial step towards attempted rape. 5RP 12-16.

Viewed objectively, the unlawful imprisonment furthered the attempted rape by preventing escape while Phuong tried to rape her. The attempted rape and unlawful imprisonment therefore involved the same criminal intent under a "same criminal conduct" analysis. "[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 State may claim the court is precluded from finding that the two crimes shared the same criminal objective because the statutory mens rea element for each charge is different. That claim fails. Case law interpreting the "same criminal intent" language in RCW 9.94A.589(1)(a) distinguishes it from the mens rea element of the particular crime involved. The inquiry in this context is not whether the crimes share a particular mens rea element but whether the offender's objective criminal purpose in committing both crimes is the same. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030, 793 P.2d 976 (1990); State v. S.S.Y., 170 Wn.2d 322, 332-33, 333 n.5, 241 P.3d 781 (2010) (criticizing Division Two's contrary approach).

b. Defense Counsel Was Ineffective In Failing To Raise A Same Criminal Conduct Argument.

The determination of whether two crimes constitute the same criminal conduct involves both determinations of fact and the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000, review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000). Defense

counsel waived a direct challenge to the same criminal conduct determination by not raising the argument below. Nitsch, 100 Wn. App. at 519-20.

A claim of ineffective assistance of counsel, however, is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). 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. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. A failure to argue same criminal conduct when such an argument is warranted constitutes ineffective assistance. Saunders, 120 Wn. App. at 824-25.

Only legitimate trial strategy or tactics constitute reasonable performance. Kylo, 166 Wn.2d at 869. Defense counsel's performance

fell below an objective standard of reasonableness because, under the circumstances, there was no legitimate reason not to have requested the trial court to find the attempted rape and unlawful imprisonment offenses were the same criminal conduct. Phuong would only have benefited from such a request, and could not have suffered adverse consequences.

Phuong's offender score would have been one point lower for each offense, which would have lowered his standard sentencing range for the attempted rape conviction. See RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (seriousness level of current offenses); RCW 9.94A.589(1)(a) (sentence range for each current offense determined by using other current convictions as if they were prior convictions for offender score). No legitimate strategy or tactical decision justified counsel's acquiescence to an implicit separate criminal conduct determination that increased his client's minimum term of confinement.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. Applying the facts to the law, Phuong's ineffective assistance claim prevails because he shows a reasonable probability that the sentencing court would have exercised its discretion to find that the two offenses constituted the same criminal conduct. Phuong 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 Phuong'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 attempted rape and unlawful imprisonment constituted the same criminal conduct had it been asked to do so.<sup>3</sup> Remand for resentencing is required. Saunders, 120 Wn. App. at 824-25 (setting forth remedy).

3. 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. Phuong's conviction for unlawful imprisonment must be reversed because the charging document does not set forth the essential elements that he knowingly restricted another's movements (1) without that person's consent; (2) without legal authority; and (3) in a manner that substantially interfered with that person's liberty. CP 2.

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<sup>3</sup> The court sentenced Phuong to the top of the standard range in setting the minimum term of confinement for the attempted rape offense. CP 119, 122.

In order to establish the crime of unlawful imprisonment, the State must prove the defendant "knowingly restrain[ed] another person." RCW 9A.40.040(1). "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(6).

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)), review denied, 163 Wn.2d 1007, 180 P.3d 784 (2008).

To convict Phuong 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 charging document. Feeser, 138 Wn. App. at 743.

In accord with Warfield, 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. The "to convict" instruction in Phuong's case is modeled on WPIC 39.16. CP 98-99 (Instruction 15). 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 97 (Instruction 14) (patterned on WPIC 39.15).

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

That the defendant Rattana Keo Phuong in King County, Washington, on or about September 15, 2009, did knowingly restrain Samoeun Liem a human being; Contrary to RCW 9A.40.040, and against the peace and dignity of the State of Washington.

CP 2.

The information does not contain all essential elements of the crime. It does not allege Phuong (1) knowingly restrained *without that person's consent*; (2) knowingly restrained without legal authority; and (3) knowingly restrained in a manner that substantially interfered 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 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 Phuong's conviction. McCarty, 140 Wn.2d at 425; State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010).

D. CONCLUSION

For the reasons stated, Phuong requests reversal of the unlawful imprisonment conviction. In the event this Court declines to reverse the conviction, the case should be remanded for resentencing on the same criminal conduct issue.

DATED this 7<sup>th</sup> day of March, 2012

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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

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STATE OF WASHINGTON/DSHS,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67524-9-1
	)	
RATTANA PHUONG,	)	
	)	
Appellant.	)	

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**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 7<sup>TH</sup> DAY OF MARCH 2012, 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] RATTANA PHUONG  
DOC NO. 317384  
WASHINGTON STATE CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF MARCH 2012.

x Patrick Mayovsky

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STATE OF WASHINGTON  
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