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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 39246-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EUGENIO COLON, III

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
JAMES B. SMITH/WSBA#35537
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

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I. PROCEDURAL HISTORY

The appellant was charged by information with kidnapping in the first degree, robbery in the first degree, assault in the second degree-deadly weapon, assault in the second degree – torture, and felony harassment. The appellant was originally charged as a co-defendant with Joshua Clark and Brian Clark, but these cases were severed prior to trial.

The appellant proceeded to jury trial on April 13, 2009, before the Honorable Judge James Stonier. On April 15, 2009, the jury returned guilty verdicts for the charges of unlawful imprisonment, assault in the second degree – torture, and felony harassment. The appellant was acquitted of the other charges. The appellant was subsequently sentenced to an exceptional sentence above the standard range of thirty months in prison. The instant appeal timely followed.

II. STATEMENT OF THE CASE

In general, the State agrees with the statement of the case provided by the appellant. Where appropriate, the State cites to further pertinent facts in the record.

III. ISSUES PRESENTED

1. Was the Appellant's Conviction for Assault in the Second Degree Unsupported by Sufficient Evidence?

2. Were the Acts that Constituted the Unlawful Imprisonment Merely Incidental to Other Crimes?
3. Was the Appellant's Conviction for Felony Harassment Unsupported by Sufficient Evidence?
4. Was there Sufficient Evidence to Support the Jury's Finding of Two Aggravating Factors?
5. Did the Trial Court Err by Not Defining "Invasion of Privacy" for the Jury?
6. Was the Appellant's Exceptional Sentence Clearly Excessive?
7. Did the Trial Court Abuse Its Discretion By Finding the Offenses Were Not the Same Criminal Conduct?

IV. SHORT ANSWERS

1. No.
2. No.
3. No.
4. No.
5. No.
6. No.
7. No.

V. ARGUMENT

I. There Was Sufficient Evidence to Convict the Appellant of Assault in the Second Degree.

The appellant argues there was insufficient evidence to support the jury's finding that he was guilty as an accomplice to assault in the second degree. Specifically, the appellant argues there was no evidence that he commanded, aided, or encouraged the assault of Mr. Zelaya by the Clark brothers. However, when viewed in the light most favorable to the State, there was ample evidence to support the appellant's guilt for this charge.

When the sufficiency of the evidence is challenged, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant was guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Moreover, a claim of insufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, there was sufficient evidence from which a reasonable jury could conclude the appellant acted as an accomplice to the assault of Mr.

Zelaya. Mr. Zelya testified that he had moved in with the appellant and his girlfriend, and that the appellant had subsequently demanded an additional four hundred dollars for rent. 3RP at 70. On the 26th of November, the appellant and the Clark brothers violently woke up Mr. Zelaya in his apartment, beating and threatening to kill him. While still in Mr. Zelaya's apartment, the appellant took the victim's wallet, containing twelve dollars, and again demanded the four hundred dollars for rent. The Clarks also later told Mr. Zelaya he needed to pay the appellant the four hundred dollars. 3RP 72-75. Mr. Zelaya was then forced to walk to the Clarks' apartment, where the Clarks restrained him and burned him with a hot knife in several places on his body. 3RP 74-77. Mr. Zelaya's testimony was that the appellant left before he was actually burned. 3RP 77-78.

The jury also heard the testimony of Brenda Brown, the appellant's girlfriend, and Officer Chris Blanchard. Both these witnesses indicated the appellant had made statements that "his boys had taken care" of the victim, and that "his boys had burned Zelaya with a knife." 4RP at 20, 65-66. The appellant also admitted to Officer Blanchard that he was present when the Clarks heated a knife with a cigarette lighter and held it to Mr. Zelaya. 4RP 25. Ms. Brown also confirmed that Mr. Zelaya owed the appellant rent money, and that the rent was due to the landlord within a few days of the crime. 4RP 55-57.

This evidence is more than sufficient for a reasonable jury to find that the appellant acted as an accomplice to the Clark's assault of Mr. Zelaya. There was no evidence whatsoever that would have given the Clarks a motive to assault Mr. Zelaya, while it was undisputed that the appellant had a motive to obtain four hundred dollars from the victim. Indeed, immediately prior to the assault, the appellant demanded this sum from the victim and this same demand was later repeated by the Clark brothers. Finally, the appellant made statements that "his boys" had taken care of Mr. Zelaya and had burned him with a knife. These statements, taken in the light most favorable to the State, provide ample evidence that the appellant encouraged, commanded, or otherwise aided in the commission of an assault against Mr. Zelaya. Under RCW 9A.08.020, the appellant is therefore liable for the acts of the Clark brothers. This Court should find there was sufficient evidence to support the jury's verdict of guilty for the crime of assault in the second degree.

II. The Appellant's Conviction for Unlawful Imprisonment Was Proper.

The appellant argues that his conviction for unlawful imprisonment is improper, claiming that the restraint was incidental to the assault under State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). However, the appellant did not present this argument to the trial court, and has failed to

preserve it for appeal. If this Court should consider the argument, the restraint used was not incident to the crime of assault but instead had a separate purpose.

As the appellant failed to present this argument to the trial court, he must show a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Elmore, No. 34861-6-II, 2010 WL 774968 (2010).¹ “Manifest error” requires the appellant show actual and identifiable prejudice to his constitutional rights. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). However, the appellant makes no attempt in his brief to meet this standard, and this Court should therefore refuse to consider this issue.

If the Court should consider this issue, the restraint used in the instant case was not incidental to the assault, but instead had a separate purpose and effect. The evidence showed that Mr. Zelaya was accosted in his apartment, then forced to walk down the hall to the Clark’s apartment where he was restrained. After Mr. Zelaya’s unlawful imprisonment and restraint had been completed, he was then assaulted. Given this, the restraint of Mr. Zelaya cannot be said to be “incidental” to his assault, but instead had a separate purpose and harm. See Elmore, 2010 WL 774968 at paragraphs 24-25; State v. Washington, 135 Wn.App. 42, 50, 143 P.3d

¹ No additional citation information is available at this time.

606 (2006). The Court should find the appellant's conviction for unlawful imprisonment was proper.

III. There Was Sufficient Evidence to Convict the Appellant of Felony Harassment.

The appellant claims the evidence "did not prove" Mr. Zelaya believed the appellant's threat to kill him. While framed as a challenge to the sufficiency of the evidence, this argument is in fact simply a challenge to the credibility of Mr. Zelaya. As such, this argument is without merit and should be rejected by the Court.

As noted previously, a claim of insufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. Furthermore, an appellate court must defer to the jury's determination of a witness's credibility. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Puzzlingly, the appellant's brief ignores the applicable legal standard and instead simply reargues the issues that were before the jury.

The appellant concedes the evidence showed a threat to kill, and that Mr. Zelaya testified he believed this threat would be carried out.² Under State v. C.G., 150 Wn.2d 604, 80 P.3d 595 (2003), this is sufficient evidence for the jury to convict the appellant of felony harassment. The

² Appellant's brief at 20.

appellant's arguments go to the credibility and weight of Mr. Zelaya's testimony, not the sufficiency of the evidence. Whatever the merits of these claims, the jury, not this Court, is the finder of fact. Camarillo, 115 Wn.2d at 71. Here, the jury found Mr. Zelaya credible and convicted the appellant. As the appellant has conceded there was sufficient evidence, the Court should summarily reject this invitation to usurp the jury's role as the finder of fact.

IV. There Was Sufficient Evidence to Establish the Aggravating Factors.

The appellant argues there was insufficient evidence to support the aggravating factors found by the jury. Specifically, the jury found the appellant acted with deliberate cruelty or intimidation and that the offenses involved an invasion of the victim's privacy. As these factors were supported by the evidence, the appellant's claims are unavailing.

a. The Jury Properly Found the Appellant Acted with Deliberate Cruelty or Intimidation.

The jury found that each three offenses the appellant was convicted of involved deliberate cruelty and intimidation of the victim. This finding was unsurprising, as the evidence had shown that the appellant had threatened to kill Mr. Zelaya, beat him, had him repeatedly burned with a hot knife on the face and body, and had repeatedly threatened him while demanding money. These acts went above and beyond the elements of

unlawful imprisonment and assault in the second degree, even an assault based on torture.

“Deliberate cruelty” has been defined as gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. State v. Atkinson, 113 Wn.App. 661, 54 P.3d 702. The acts in this case clearly meet these criteria, and shock the conscience of any reasonable person. The appellant argues this cruelty and intimidation is subsumed into the assault in the second degree, but the appellant’s acts went beyond mere physical torture and became the sort of psychological and emotional cruelty envisioned by the Atkinson court. Also, torture or cruelty are indisputably not elements of unlawful imprisonment, and the acts in question were therefore undeniably gratuitously cruel for that count. As such, the Court should find there was sufficient evidence to support this aggravating factor.

b. The Jury Properly Found the Offenses Involved an Invasion of the Victim’s Privacy.

Invasion of the victim’s privacy has been long recognized as an aggravating factor in Washington. It has been observed that “citizens ... have a right to let down their guard and enjoy the relaxed atmosphere of home and hearth.” State v. Hernandez, 54 Wn.App. 323, 327, 773 P.2d 857 (1989). While the appellant cites a number of cases holding that this

aggravating factor does not apply to the crime of burglary, the appellant provides no authority that holds this is true for unlawful imprisonment or harassment.

Here, the victim, Mr. Zelaya, was asleep in his apartment when he was awakened violently by the appellant and two other men. He was then assaulted and threatened within his own home. This conduct flagrantly violated the very ideals supporting this aggravated factor that were noted by the Hernandez court. As such, there was sufficient evidence to support the jury's finding on this issue.

V. The Failure to Define "Invasion of Privacy" Was Not Error, or Was Waived by the Appellant.

The appellant argues the trial court was required to define the meaning of "invasion of privacy" for the jury. However, the appellant provides no authority to support this claim. An appellate court will not review issues lacking in any legal support. RAP 10.3(a)(5). Thus, this Court should refuse to consider an issue unsupported by rule, statute, or caselaw.

Moreover, the appellant offers no argument or authority to show the term "invasion of privacy" is a term of art requiring additional definition for the jury. Indeed, the appellant's trial counsel did not object to the lack of definition or request additional instructions on this issue.

5RP at 54-55. Due to this failure to object, the appellant must show the lack of further definition was a manifest error under RAP 2.5(a)(3). Unfortunately for the appellant, failure to define a term has been repeatedly found to *not* be manifest error. See State v. Scott, 110 Wn.2d 682, 690-691, 757 P.2d 492 (1988). Given this, the Court should find the appellant has waived this issue by failing to object before the trial court.

VI. The Trial Court's Exceptional Sentence Was Not Clearly Excessive.

The appellant argues the trial court's sentence was clearly excessive because there was insufficient evidence to support the aggravating factors found by the jury. The State has previously addressed this issue, and will not repeat the same arguments here. However, even if this Court should find that one of the two aggravating factors was invalid, remand is unnecessary as the trial court would still have imposed the same sentence.

In State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003), the Supreme Court held that:

[w]here the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing.

See also State v. Saltz, 137 Wn.App. 576, 154 P.3d 282 (2007). Here, the trial court specifically found that it would impose the same sentence even if only one of the aggravating factors was valid. CP 121. Based on this finding, remand is unnecessary so long as one of the aggravating factors is upheld by this Court.

VII. The Appellant's Convictions Did Not Amount to Same Criminal Conduct Under RCW 9.94A.589(1).

The appellant argues that the trial court erred by counting his three convictions separately, rather than finding they comprised the same criminal conduct. However, as the offenses did not occur at the same time and place and involved different intents, the trial court properly declined to treat the offenses as the same when calculating the appellant's offender score. This Court should affirm the trial court ruling on this issue.

The SRA defines "same criminal conduct" as two or more crimes that require the (1) same intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1). For crimes to constitute the same criminal conduct, each of the three prongs must be met. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). A trial court's ruling on this issue is reviewed under an abuse of discretion standard. State v. Fisher, 139 Wn.App. 578, 161 P.3d 1054 (2007); State v. Blanks, 139 Wn.App. 543, 161 P.3d 455 (2007); State v. Taylor, 90

Wn.App. 132, 950 P.2d 526 (1998). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

In Taylor, 90 Wn.App. 312, the court found that kidnapping and assault were the same criminal conduct where the assault was the defendant pointing a gun at the victim while kidnapping him. The court noted that there was no evidence of "any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction." Id. at 321-322. Taylor is thus immediately distinguishable from the instant case, as the burning of Mr. Zelaya did not serve to facilitate his restraint but was instead above and beyond the force inherent in the restraint.

Indeed, the trial court recognized this in its detailed ruling on this issue:

I think in this case, the intent, initially – the motive was the same throughout, I agree with that. The motive was – was to try to get money, and it stayed the same throughout the entire process. But the intent of the Unlawful Imprisonment was to take him to an area and keep him in an area where he couldn't be found, or at least to intimidate him, by that act.

The intent of the assault was to inflict pain, and the public policy I'm referring to, which I think goes to the heart of the

analysis here, is that if I accept your argument, which I understand you do have case law supporting it, then once you have an Unlawful Imprisonment, then whatever you do to the individual doesn't increase the punishment. He can assault, and burn him, and inflict pain upon him, and it all continues and there's no additional punishment for what you do after the person is taken from the area and secreted in the area.

I think that's bad public policy. I think that sends the wrong message. I don't think that's what the Legislature intended, and I think that the analysis of some of the case, they – they get confused between their intent and the motive, and I think I'm going to follow Judge Seinfeld's rationale, in the – I believe it was the Taylor case. However, it would be dicta, she clearly said there's no evidence that Taylor or Nicholson engaged in any assaultive behavior during that kidnapping that did anything beyond facilitating and furthering the – the abduction.

In this case, there was evidence, and that is at the point that the burns are inflicted, there is no longer – the Unlawful Imprisonment acts are complete. He's in their total control. And, I specifically note, in that regard, that the jury found in the Special Verdict that this conduct manifested deliberate cruelty, and I think that that's a clear indication of twelve jurors saying that the burning was the basis for the assault, it was the rationale, and I'm satisfied that – that it – it's a separate, different intent.

Looking at it objectively, not strictly subjective, but objectively, it's a different intent. I'm going to hold that they are separately punishable.

6RP at 10-11.

When the record of the trial court's ruling is reviewed, it cannot be said that the trial judge's decision was manifestly unreasonable as required for an abuse of discretion. Stenson, 132 Wn.2d at 701. Instead, it is apparent the trial judge carefully weighed the facts and the law before

finding the acts in question were not the same criminal conduct. The appellant does not even attempt to show the trial court abused its discretion, and without such a showing his argument on this issue cannot prevail.

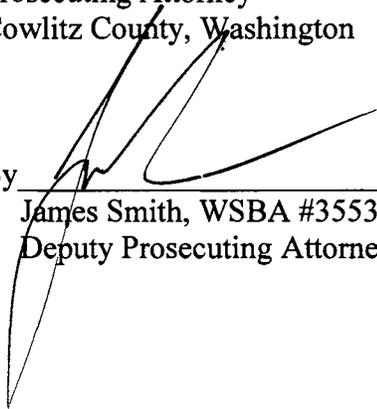
This Court should find that the trial court did not abuse its discretion by finding the three offenses were not the same criminal conduct.

VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court deny the instant appeal. There was sufficient evidence to support the appellant's convictions and the aggravating factors, while the other issues asserted are without merit. The appellant's convictions and exceptional sentence should stand.

Respectfully submitted this 17th day of March, 2010.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By 
James Smith, WSBA #35537
Deputy Prosecuting Attorney

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	NO. 39246-1-II
)	Cowlitz County No.
Respondent,)	08-1-01338-1
)	
vs.)	CERTIFICATE OF
)	MAILING
EUGENIO COLON, III,)	
)	
Appellant.)	
)	

I, Michelle Sasser, certify and declare:

That on the 16th day of March, 2010, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Peter B. Tiller
Attorney at Law
P.O. Box 58
Centralia, WA 98531-0058

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

Dated this 16th day of March, 2010.

Michelle Sasser
Michelle Sasser

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