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Court of Appeals
Division III
State of Washington

No. 29774-8-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL R. SHAFER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. COUNTERSTATEMENT OF FACTS

On February 10, 2010, Mr. Shafer entered a negotiated plea agreement with the State and pled guilty to: one count of first degree burglary; one count of kidnapping of Trevor Morton and Kayla Edmonson; one count of first degree robbery of Trevor Morton; and one count of first degree robbery of Kayla Edmonson. CP 16-17, 22-28. A judgment and sentence was entered the same date. CP 32-40. Mr. Shafer did not file a notice of appeal.

In the guilty plea statement, Mr. Shafer agreed with the State's assertions of his criminal history and standard sentence range. CP 23. But he did not explicitly agree his current offenses amounted to separate criminal conduct.

Less than one year later, on February 9, 2011, Mr. Shafer, *pro se*, filed "Motion to Modify or Correct Judgement [sic] and Sentence, CrR 7.8" in the trial court. CP 44-47. Mr. Shafer asserted the following claims:

1. The restraints in this case where [sic] for the sole purpose of facilitating the robberies to prevent the victims interference [sic] with searching their home for money and drugs to steal.
2. The restraint of the victims was inhernt [sic] in these robberies.
3. The victims were not transported away from there [sic] home during or after the invasions to some remote spot where they were not likely to be found.

4. Although the victims were left restrained in there [sic] home when the robbers left the duration of the restraints dose [sic] not appear to have been substantially longer than that required [sic] for the commison [sic] of the robberies.

5. The restraints did not creat [sic] singnifncant [sic] danger independ [sic] of that posed by the robberies themselves.

CP 45. Mr. Shafer argued the "kidnapping charges should have merged into the robberies" because the kidnappings were incidental to the robberies. CP 45.

On the same date, Mr. Shafer, *pro se*, filed another motion entitled, "Motion to Withdrawal [sic] of Guilty Plea, CrR 7.8; 4.2."

CP 48. He argued he was entitled to withdraw his guilty plea because he received ineffective assistance of counsel. CP 48-49. He argued his attorney provided deficient representation by advising him to plead guilty even after Mr. Shafer told him he was innocent, and by misadvising him about how much good time he would receive. CP 48.

The court denied both motions without holding a hearing. CP 90-93. In regard to the motion to modify or correct the judgment and sentence, the court ruled "the crimes of Robbery in the First Degree and kidnapping in the First Degree do not merge, and are not the same under the law. This is because each offense includes an element not included in the other." CP 92 (citing State

v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005)). As for the motion to withdraw the guilty plea, the court ruled it was supported only by "self-serving allegations" and must therefore be denied. CP 92.

Mr. Shafer filed a notice of appeal of the trial court's order denying his motion to withdraw the guilty plea and his motion to modify or correct the judgment and sentence. CP 94.

B. ARGUMENT IN REPLY

1. MR. SHAFER MAY CHALLENGE THE
MISCALCULATION OF HIS OFFENDER
SCORE FOR THE FIRST TIME ON APPEAL

The State contends Mr. Shafer may not argue his offender score was miscalculated because he did not raise the issue in the trial court. SRB at 9-14. The State primarily relies on State v. Nitsch, 100 Wn. App. 512, 997 P.2d 100 (2000).

To the contrary, as argued in the opening brief, the law is well-settled that an offender may challenge a legal error in the calculation of his offender score at any time, and that the court is obligated to correct the error whenever it is discovered. See, e.g., In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002) ("In keeping with long-established precedent, we adhere to the principles that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based

upon a miscalculated offender score (miscalculated upward), and that a defendant cannot agree to punishment in excess of that which the Legislature has established."); In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) ("When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered.") (emphasis and citation omitted).

Here, the miscalculation of Mr. Shafer's offender score is the result of a legal error.¹ As argued in the opening brief, State v. Dunaway establishes, as a matter of law, that Mr. Shafer's conviction for kidnapping involves the same criminal conduct as his conviction for robbery of the same victim. 109 Wn.2d 207, 217, 743 P.2d 1237 (1987) ("the kidnapping and robbery of a single victim should be treated as one crime for sentencing purposes"). There was simply no room for the judge to decide, as a matter of discretion, that the offenses involved separate conduct. Therefore, the judge's decision to count the offenses separately in the offender score was a legal error that Mr. Shafer may challenge for the first

¹ The related issue of whether an appellate court reviews a trial court's determination of same criminal conduct *de novo* or for an abuse of discretion is currently pending in the Washington Supreme Court in State v. Graciano, 2011 WL 3684814 (No. 40289-1-II, Aug. 23, 2011), review granted, 2012 WL 37089 (No. 86530-2, Jan. 5, 2012). Oral argument is scheduled for May 24, 2012.

time in this appeal. Goodwin, 146 Wn.2d at 873-74; Carle, 93 Wn.2d at 33.

The State complains that the trial court should not be required to make a same criminal conduct determination *sua sponte*. But trial courts are required to find the existence of the defendant's criminal history and calculate the offender score correctly, even if no objection is raised; if the findings are not supported by the evidence or the offender score is miscalculated, the sentence will be reversed on appeal. State v. Mendoza, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009); State v. Ford, 137 Wn.2d 472, 484-85, 973 P.3d 452 (1999).

The purpose of allowing belated challenges to legal errors in the calculation of the offender score is "to preserve the sentencing laws and to bring sentences in conformity and compliance with existing sentencing statutes and avoid permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court." Mendoza, 165 Wn.2d at 920. That purpose is served by allowing defendants to argue for the first time on appeal that two or more current offenses comprised the same criminal conduct as a matter of law. Had Mr. Shafer raised the issue below, the trial court would have been compelled

to treat his convictions for kidnapping and robbery of the same victim as the same criminal conduct. Mr. Shafer should not be denied the benefit of the law simply because his attorney failed to raise the issue.

This Court has held that, if the defendant did not argue same criminal conduct at sentencing and the trial court did not make a finding but instead counted the convictions separately, the reviewing court will treat the court's calculation of the offender score as an implicit finding that the offenses were not the same criminal conduct. State v. Anderson, 92 Wn. App. 54, 61-62, 960 P.2d 975 (1998), review denied, 137 Wn.2d 1016, 978 P.2d 1099 (1999). The Court will affirm the sentence if the facts in the record are sufficient to support a finding either way on the determination of same criminal conduct. Id. at 62. But if the facts show the two offenses amounted to the same criminal conduct as a matter of law, the Court will reverse the sentence. Id.; see also State v. Longuskie, 59 Wn. App. 838, 847, 801 P.2d 1004 (1990) (holding convictions for kidnapping and child molestation of the same victim amounted to same criminal conduct as a matter of law, and "address[ing] the issue *sua sponte* because of error").

In State v. Nitsch, the Court held a defendant may waive the right to argue same criminal conduct on appeal *if the record supports a finding of separate conduct* and the defendant stipulated to the State's calculation of the offender score. 100 Wn. App. at 522, 525. In Nitsch, the record supported a determination of separate conduct. Id. at 525. Therefore, the same criminal conduct decision "involve[d] both factual determinations and the exercise of discretion." Mendoza, 165 Wn.2d at 928 n.7 (citing Nitsch, 100 Wn. App. at 523). Under those circumstances, Nitsch waived his right to argue same criminal conduct on appeal by failing to object below. Nitsch, 100 Wn. App. at 520-21, 525.

But where, as here, two offenses were counted separately in the offender score but the record supports only a determination of same criminal conduct, the offender score is erroneous as a matter of law and may be challenged for the first time on appeal.

Goodwin, 146 Wn.2d at 873-74; Carle, 93 Wn.2d at 33; Anderson, 92 Wn. App. at 61-62; Longuskie, 59 Wn. App. at 847.

Additionally, Nitsch's holding that a defendant's agreement with the State's asserted standard sentence range is also an implicit agreement that his crimes did not constitute the same criminal conduct can no longer be considered good law in light of

the Supreme Court's more recent opinion in Mendoza, 165 Wn.2d 913. In Mendoza, the court reaffirmed “the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing” in order to constitute a waiver of the right to challenge the offender score on appeal. Mendoza, 165 Wn.2d at 928 (citing Ford, 137 Wn.2d at 482-83). The mere failure to object to the prosecutor's factual assertions underlying the offender score calculation does not constitute an acknowledgement of those facts. Mendoza, 165 Wn.2d at 928. “Nor is a defendant deemed to have affirmatively acknowledged the prosecutor's asserted criminal history based on his agreement with the ultimate sentencing recommendation.” Id. In other words, a defendant who agrees with the State's asserted sentence range does not thereby “affirmatively agree” with the implicit factual assertions underlying that range.

Here, Mr. Shafer agreed with the State's assertions about the standard sentence range and that he had one prior conviction, but he did not *explicitly agree* his current convictions for robbery and kidnapping of the same victim comprised separate conduct. CP 23, 28. Therefore, under Mendoza, he did not waive his right to argue same criminal conduct on appeal.

This analysis is consistent with another case on which the State relies, In re Personal Restraint of Shale, 160 Wn.2d 489, 158 P.3d 588 (2007). In Shale, the defendant agreed with the State's offender score calculation as part of his plea bargain and did not challenge the offender score computation at the trial court level. Id. at 496. The supreme court held the defendant waived his right to argue same criminal conduct on appeal because the police reports and statement of probable cause showed "the separate nature of each charge." Id. (plurality opinion). In other words, as in Nitsch, the record supported a determination of separate conduct. See Nitsch, 100 Wn. App. at 525.

But here, as stated, the record supports only one determination: that the robbery and kidnapping of the same victim amounted to the same criminal conduct. Therefore, Mr. Shafer did not waive his right to challenge his offender score by not objecting below.

2. MR. SHAFER'S OFFENDER SCORE WAS
MISCALCULATED

The State contends the robbery and kidnapping of the same victim did not amount to the same criminal conduct because the restraint of the victim went beyond what was necessary to

accomplish the robbery.² SRB at 15. But that is not the test. The test is whether the robbery and kidnapping of the same victim occurred at the same time and place and involved the same objective criminal intent. RCW 9.94A.589(1)(a); Dunaway, 109 Wn.2d at 215.

Multiple offenses need not occur simultaneously in order to meet the "same time" requirement of the same criminal conduct analysis. State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998). If the crimes occurred sequentially, the question is whether they "occurred in a continuing, uninterrupted sequence of conduct as part of a recognizable scheme." Id. (quoting State v. Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997)).

Here, the crimes occurred at the same time and place. According to the police statement, one of the robbers restrained the victims by pointing a gun at them and tying their hands with zip ties while the other robber went from room to room collecting Trevor Morton's belongings. CP 60-61. As soon as the robbers left, Mr. Morton got up and cut the zip ties from his and Ms. Edmonson's wrists. CP 61. Therefore, the crimes were simultaneous or near

² The State also argues the burglary was not the same criminal conduct as the other offenses, and the two robberies were not the same criminal conduct as each other. SRB at 15. But Mr. Shafer is arguing only that the robbery and kidnapping of the same victim amounted to the same criminal conduct.

simultaneous and occurred in a “continuing, uninterrupted sequence of conduct.” Williams, 135 Wn.2d at 368.

In addition, as discussed in the opening brief, the crimes involved the same objective criminal intent—to accomplish the robbery. The question is not whether the restraint went beyond what was necessary to accomplish that result. Instead, the question is whether the defendant’s objective intent changed from one crime to the other. Dunaway, 109 Wn.2d at 215; State v. Israel, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002). Intent, as used in this analysis, “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).

If two crimes occurred simultaneously and “were continuous, uninterrupted, and committed within” a close time frame, and the defendant engaged in an “unchanging pattern of conduct,” the evidence “supports the conclusion that his criminal intent, objectively viewed, did not change” from one crime to the next. State v. Tili, 139 Wn.2d 107, 123-25, 985 P.2d 365 (1999). On the other hand, if the crimes occurred sequentially, and the defendant “had the time and opportunity to pause, reflect, and either cease

his criminal activity or proceed to commit a further criminal act,” then the record supports a finding of separate conduct. Id. at 123 (quoting State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997)).

Here, because the crimes occurred simultaneously in an unchanging pattern of conduct, they involved the same objective criminal intent.

Objective intent may also be determined by examining whether one crime furthered the other or whether both crimes were part of a recognizable scheme or plan. Israel, 113 Wn. App. at 295. One crime furthers another if the first crime facilitates commission of the second. State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004), review denied, 156 Wn.2d 1034, 137 P.3d 864 (2006); State v. Collins, 110 Wn.2d 253, 263, 751 P.2d 837 (1988). In Saunders, a rape and kidnap were part of the same scheme or plan where the defendant's primary motivation for both crimes was to dominate the victim and cause her pain and humiliation. Saunders, 120 Wn. App. at 825. In Collins, a burglary furthered a rape and assault, where the defendant committed the burglary in order to accomplish the attacks. Collins, 110 Wn.2d at 263.

Here, the kidnapping and robbery were part of the same scheme or plan with the primary motivation being to accomplish the robbery. The kidnapping was committed to further the robbery. Therefore, Mr. Shafer had the same objective criminal intent for both crimes and they should have counted as only one offense in the offender score. Dunaway, 109 Wn.2d at 217.

3. MR. SHAFER MAY ARGUE FOR THE FIRST TIME ON APPEAL THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The State contends Mr. Shafer may not argue he received ineffective assistance of counsel because he did not raise the issue in his post-conviction motions in the trial court. SRB at 9-10, 17-18. The State relies primarily on RAP 2.5(a).

The general rule is that issues not raised below may not be raised on appeal, but an exception exists for manifest constitutional errors. RAP 2.5(a)(3) provides: "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right." The State ignores this exception.

In State v. Greiff, the Washington Supreme Court held ineffective assistance of counsel is a claim of constitutional

magnitude that may be raised for the first time on appeal. 141
Wn.2d 910, 924, 10 P.3d 390 (2000) (citing RAP 2.5(a)(3)).

The State appears to contend Mr. Shafer may not even raise a manifest error affecting a constitutional right in this appeal if he did not raise the issue in his post-conviction motions. But that is incorrect. In State v. Aguirre, for instance, the Court permitted the State to raise a manifest constitutional error for the first time on appeal of a post-conviction motion even though the issue was not raised below. 73 Wn. App. 682, 871 P.2d 616 (1994). There, Aguirre was convicted of drug offenses and did not appeal. Id. at 685. Almost three years later, he filed a CrR 7.8 motion in the trial court to vacate his convictions and the court granted the motion. Id. at 686. The State opposed the motion but did not apprise the court of the constitutional grounds it asserted for the first time on appeal. Id. at 687. The Court acknowledged the general rule that an appellate court will not review issues that were not argued and decided at the trial court level. Id. But the Court still addressed the issue because "appellate courts have an obligation to correct manifest constitutional error." Id.

Here, Mr. Shafer argued in his *pro se* CrR 7.8 motion that he received ineffective assistance of counsel, although he asserted

different grounds from those he asserts on appeal. CP 48-49. As in Aguirre, Mr. Shafer's ineffective assistance of counsel claim is a manifest error of constitutional magnitude that he may raise for the first time on appeal of the trial court's denial of his CrR 7.8 motion.

4. MR. SHAFER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The State relies on Nitsch to argue defense counsel had strategic reasons for not arguing same criminal conduct. SRB at 19-20. The State contends counsel was not deficient for not arguing same criminal conduct because he was able to negotiate a favorable plea deal for Mr. Shafer. In other words, the State implies that foregoing the same criminal conduct argument was a necessary condition of the plea agreement.

To the contrary, the case law is well-established that a defendant cannot negotiate away his right to a legally correct sentence. In Goodwin, the supreme court explained, "this court has consistently rejected arguments that a defendant must be held to the consequences of a plea agreement to an excessive sentence." 146 Wn.2d at 869-71 (and cases cited). In other words, "the actual sentence imposed pursuant to a plea bargain must be statutorily authorized; a defendant cannot agree to be punished more than the Legislature has allowed for." Id. at 871 (quoting In re Pers.

Restraint of Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991)).

Thus, Mr. Shafer cannot be held to his agreement to an excessive sentence that was contrary to law.

5. MR. SHAFER MAY ARGUE FOR THE FIRST TIME ON APPEAL THAT HIS GUILTY PLEA WAS INVOLUNTARY

The State contends Mr. Shafer may not argue his guilty plea was involuntary based on the miscalculation of his offender score or the insufficient factual basis for the plea because he did not raise those issues in the trial court.³ SRB at 9-10, 20-22.

Mr. Shafer argued in his *pro se* CrR 7.8 motion that he was entitled to withdraw his guilty plea for reasons different from those he asserts on appeal. CP 48-49. Contrary to the State's argument, the case law establishes he may challenge the voluntariness of his guilty plea on the newly-asserted grounds in this appeal. In State v. Knotek, for instance, Knotek pled guilty to second degree murder and first degree manslaughter pursuant to a guilty plea agreement. 136 Wn. App. 412, 419, 149 P.3d 676 (2006), review denied, 161 Wn.2d 1013, 166 P.3d 1218 (2007). Knotek pled guilty in part to avoid an exceptional sentence, before the United States Supreme Court issued its decision in Blakely v. Washington, 542 U.S. 296,

³ Mr. Shafer *did* argue the kidnapping was incidental to the robberies, although he did not claim his plea was involuntary for that reason. CP 45.

124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which held that a court may not impose an exceptional sentence unless the State proves the aggravating factors to a jury. Knotek did not file a direct appeal or move in the trial court to vacate or withdraw the plea on the basis of Blakely. 136 Wn. App. at 421. Instead, she filed a *pro se* motion to withdraw the plea for other reasons. Id. at 422. The trial court denied the motion. Id.

On appeal, Knotek argued for the first time that her guilty plea was involuntary because, pursuant to Blakely, she was misinformed about the maximum sentence that could be imposed. Id. The Court of Appeals acknowledged the general rule that a defendant may not raise issues on appeal that were not raised in the trial court. Id. (citing RAP 2.5). Nonetheless, the Court reached the merits of the argument because "a defendant can raise for the first time on appeal alleged manifest errors significantly affecting constitutional rights." Id. (citing RAP 2.5(a)(3)). The Court said, "[a]lleged involuntariness of a guilty plea is the type of constitutional error that a defendant can raise for the first time on appeal." Id. at 422-23 (citing State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001)). "[W]hen an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials

by engaging in review of manifest constitutional errors raised for the first time on appeal." Id. (citing State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998)).

Here, as in Knotek, Mr. Shafer may argue for the first time in this appeal that his guilty plea was involuntary for reasons different from those he set forth below. The record is adequate and the asserted error is a manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a)(3). This Court has an obligation to reach the issue. Knotek, 136 Wn. App. at 422-23.

6. MR. SHAFER'S GUILTY PLEA WAS
INVOLUNTARY BECAUSE THERE WAS AN
INSUFFICIENT FACTUAL BASIS FOR THE
PLEA

The State relies on State v. Vladovic, 99 Wn.2d 413, 417, 662 P.2d 853 (1983) to argue the restraint was legally sufficient to sustain the kidnapping conviction. SRB at 22. The State also relies on State v. Butler, ___ Wn. App. ___, 269 P.3d 315 (2012) to argue this Court has rejected the contention that if a crime is "merely incidental" to another crime, there is an insufficient factual basis to support the additional conviction. SRB at 22-23.

To the contrary, the record and the case law show the evidence was insufficient to sustain the kidnapping conviction. As argued in the opening brief, when the facts show the restraint and

movement of a victim are merely incidental and integral to commission of another crime, such as robbery, the facts are not sufficient to sustain a separate conviction for kidnapping., State v. Korum, 120 Wn. App. 686, 703-04, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2006); State v. Green, 94 Wn.2d 216, 226-29, 616 P.2d 628 (1980). Notwithstanding Butler, the Washington Supreme Court has not departed from this principle. See, e.g., State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 20 (1995) (“This court has held and the State concedes that the 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.”) (citing Green, 94 Wn.2d at 227; State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979); State v. Allen, 94 Wn.2d 860, 862-64, 621 P.2d 143 (1980)).

This case is indistinguishable from Korum because (1) the restraint of the victims was for the sole purpose of facilitating the robbery—to prevent the victims from interfering with the search of the home for items to steal; (2) forcible restraint of the victims was inherent in the charged crime of armed robbery; (3) the victims were not transported away from the home during or after the

robbery to a remote spot where they were unlikely to be found; (4) the duration of the restraints was no longer than required to commit the robbery; and (5) the restraints did not cause a significant danger independent of that posed by the armed robbery itself.

Korum, 120 Wn. App. at 707; CP 8-9.

Because the facts show merely that the kidnapping was incidental to the robbery, they are insufficient as a matter of law to sustain a finding of guilt of kidnapping beyond a reasonable doubt.

Green, 94 Wn.2d at 220-23; Korum, 120 Wn. App. at 703-04.

Vladovic is distinguishable because that case involved a double jeopardy challenge whereas this case involves a challenge to the sufficiency of the evidence to sustain the kidnapping conviction. See Green, 94 Wn.2d at 220-23 (citing Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)); Korum, 120 Wn. App. at 703-04. In Vladovic, the court applied the test from Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), a double jeopardy case, and concluded the kidnapping did not "merge" into the robberies because "[p]roof of kidnapping [wa]s not necessary to prove the robbery or attempted robbery." Id. at 420. The court did not hold the evidence was

sufficient under the Due Process Clause to sustain the kidnapping conviction.⁴

Contrary to the State's argument, in Green, the court held "it is clear 'abduction' is a critical element in the proof of kidnapping." Green, 94 Wn.2d at 225. In Green, because there was not substantial evidence to show the victim was restrained by means of secreting her in a place she was not likely to be found, the evidence was insufficient to sustain the kidnapping conviction. Id. at 226-27.

Here, similarly, there is not substantial evidence to show the victims were restrained or secreted to a degree that was not incidental to the robbery. Therefore, as argued in the opening brief, there was not a sufficient factual basis for the kidnapping charge and Mr. Shafer is entitled to withdraw the plea.

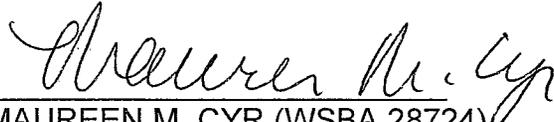
C. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Shafer's offender score was miscalculated and he is entitled to be

⁴ In addition, as the Korum Court noted, in Vladovic, the State "did not charge Vladovic with both robbing and kidnapping the same victims. Rather, the State elected to charge only one or the other crime. For example, Vladovic was charged with robbing a Mr. Jensen. He was charged with kidnapping four other people, not Jensen, whom he forced to lie on the floor, binding their hands and taping their eyes, while he robbed Jensen. The Court ruled, 'Because the injuries of the robbery and kidnappings involved different people, they clearly created separate and distinct injuries.'" Korum, 120 Wn. App. at 704 n.14 (citing Vladovic, 99 Wn.2d at 421-22).

resentenced. In addition, his guilty plea was involuntary in violation of constitutional due process and he is entitled to withdraw the plea.

Respectfully submitted this 22nd day of March 2012.

A handwritten signature in cursive script, reading "Maureen M. Cyr".

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project 91052
Attorneys for Appellant

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

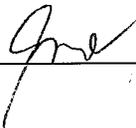
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 29774-8-III
)	
NATHANIEL SHAFER,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] CURTIS LIEDKIE, DPA ASOTIN COUNTY PROSECUTOR'S OFFICE PO BOX 220 ASOTIN, WA 99402-0220	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF MARCH, 2012.

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