

**FILED**

FEB 17, 2011

Court of Appeals  
Division III  
State of Washington

No. 29774-8-III

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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THE STATE OF WASHINGTON, Respondent

v.

NATHANIEL R. SHAFER, Appellant.

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**BRIEF OF RESPONDENT**

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CURT L. LIEDKIE  
Asotin County Deputy  
Prosecuting Attorney  
WSBA #30371

P. O. Box 220  
Asotin, Washington 99402  
(509) 243-2061

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I. ISSUES

1. CAN THE APPELLANT PROPERLY RAISE ADDITIONAL ISSUES NOT ADDRESSED IN EITHER OF HIS POST CONVICTION MOTIONS WHERE THE APPELLANT ONLY APPEALED THE DENIAL OF THESE MOTIONS?
2. WAS THE APPELLANT'S OFFENDER SCORE IMPROPERLY CALCULATED AT THE TIME OF SENTENCING WHERE HE FAILED TO REQUEST THAT ANY CONVICTIONS BE CONSIDERED "SAME CRIMINAL CONDUCT" AND OTHERWISE AGREED TO THE STATE'S CALCULATION?
3. WAS THE APPELLANT'S PLEA VOLUNTARY WHERE HE WAS PROPERLY APPRISED OF THE DIRECT CONSEQUENCE OF PLEADING GUILTY, INCLUDING HIS STANDARD RANGE?
4. WAS THE APPELLANT'S PLEA VOLUNTARY WHERE THERE WAS A SUFFICIENT FACTUAL BASIS TO SUPPORT HIS PLEA OF GUILTY TO KIDNAPPING IN THE FIRST DEGREE?

## II. ARGUMENT

1. BECAUSE THE APPELLANT HAS ONLY APPEALED THE TRIAL COURT'S DENIAL OF HIS POST CONVICTION MOTIONS, THIS COURT SHOULD REJECT HIS ARGUMENTS ON APPEAL WHICH RAISE NEW ISSUES NOT ADDRESSED TO THE TRIAL COURT BELOW.
2. THE APPELLANT'S OFFENDER SCORE CALCULATION WAS CORRECT AND IS NOT SUBJECT TO PROPER REVIEW HEREIN.
3. THE APPELLANT'S PLEA WAS VOLUNTARY AS HE WAS PROPERLY APPRISED OF HIS OPTIONS AND DIRECT CONSEQUENSES OF PLEADING GUILTY.
4. SUFFICIENT FACTUAL BASIS EXISTED IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDINGS THEREON AND ACCEPTANCE OF THE APPELLANT'S VOLUNTARY PLEA OF GUILTY.

### III. STATEMENT OF THE CASE

On August 1, 2009, at approximately 11:00pm, Joshua Heironymus and the Appellant, Nathaniel Shafer, forced entry into a residence in Asotin, Washington. Motion and Declaration for Order Determining Probable Cause, Clerks Papers (Hereinafter CP) 6 - 11. Heironymus was armed with a handgun and forced the occupants, Trevor Morton and Kayla Edmonson onto a sofa while Shafer went into a bedroom and began removing items of property. Id. Hieronymus decided to tie the victims' hands with zip ties and when he attempted to do so, Trevor fought with him, eventually, liberating the gun from Hieronymus. Id. Shafer grabbed Trevor from behind and strangled him to unconsciousness. Id. The assailants then tied Trevor's and Kayla's hands with nylon zip ties. Id. Shafer and Hieronymus then left the residence, having taken five medicinal marijuana plants, other prescription controlled substances, electronic equipment and approximately two hundred dollars in cash. Id.

After the assailants left, Trevor was able to go to the kitchen, retrieve a knife, and cut the ties from his and Kayla's wrists. Id. Kayla then ran to a neighbor's and called

911. Id. Police took statements from the victims and were led to the residence of Hieronymus in Lewiston, Idaho. Id. In the early morning hours of August 2, 2009, officers responded to that location and from outside the residence, heard Hieronymus and Shafer bragging about the crime and the use of the gun. Id. Officers contacted the two and placed each under arrest for violation of their respective Idaho parole. Id. A search warrant was obtained and many of the items taken were recovered as well as clothing matching the descriptions given by Kayla and Trevor. Id.

Shafer was charged by way of Information with Burglary in the First Degree, two counts of Kidnapping in the First Degree, and two counts of Robbery in the First Degree. Information, CP 1 - 5. The State also alleged that at the time of the commission of each of the above offenses, the Appellant or an accomplice was armed with a firearm, a fact which, if proven at trial or otherwise, would have added sixty months "hard time" to each count. Id. See also RCW 9.94A.533(3).

On February 10, 2010, the Appellant sought to avoid twenty-five years of "hard time" and entered into a negotiated plea agreement wherein the State agreed to

consolidate the two charges of Kidnapping in the First Degree into a single count and further, agreed to withdraw all firearm enhancements. Plea Agreement, CP 16 - 17. The Appellant pled guilty, pursuant to the plea agreement, to one count of Burglary in the First Degree, one Count of Kidnapping in the First Degree, and two counts of Robbery in the First Degree. Statement of Defendant on Plea of Guilty, CP 22 - 31. The Appellant agreed that his standard range for the most serious charge was one-hundred eight to one hundred forty-four months. Id. Report of Proceedings 02/10/10 (Hereinafter RP) p. 4. No request or argument was made asking the Court to treat the charges as same criminal conduct for scoring purposes and instead, the Appellant requested a sentence at the low end of the standard range. RP pp. 9 - 11. The Court sentenced the Appellant, pursuant to the plea agreement he had negotiated, to one hundred forty-four (144) months. Judgement and Sentence, CP 32 - 42. No direct appeal of the Judgement and Sentence or his conviction was filed by the Appellant.

On February 9, 2011, one day shy of one year after entry of the Judgement and Sentence, the Appellant filed two motions with the Trial Court seeking relief from his sentence. In the first, the Appellant sought to withdraw his

pleas of guilty. Motion to Withdrawal of Guilty Plea, CP 48.

Therein, the Appellant alleged ineffective assistance of counsel and set forth two grounds in support of his motion:

1) "Missadvice (*sic*) to plead guilty when told of actual innocence (*sic*)," and 2) "Missadvised (*sic*) of law of how much good time I would receive (*sic*)." *Id.* The Appellant also filed a document entitled "Motion to Modify or Correct Judgement and Sentence." CP 44 - 46. Therein, the Appellant asserted that the charge of Kidnapping in the First Degree should have merged with the robbery charges and that his convictions violated Double Jeopardy.<sup>1</sup> *Id.* The Trial Court denied the Appellant's motions. Memorandum Decision Re: Motions for Post Conviction Relief, CP 90 - 93.

In so ruling, the Trial Court found that his claims of ineffective assistance, as presented, were based solely on the Appellant's naked assertions and otherwise lacked factual support. See id. The Trial Court further found the Appellant's claims of merger and Double Jeopardy to be contrary to the legal authority of this State. See id. The Appellant then filed a Notice of Appeal. CP 94.

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<sup>1</sup> In his argument, the Appellant did not specify which convictions violated Double Jeopardy. Presumably, the Appellant meant to complain of all four convictions.

#### IV. DISCUSSION

1. BECAUSE THE APPELLANT HAS ONLY APPEALED THE TRIAL COURT'S DENIAL OF HIS POST CONVICTION MOTIONS, THIS COURT SHOULD REJECT HIS ARGUMENTS ON APPEAL WHICH RAISE NEW ISSUES NOT ADDRESSED TO THE TRIAL COURT BELOW.

Preliminary to any discussion of the issues raised by the Appellant in his brief on appeal, this Court should immediately recognize the procedural status of this case. The Appellant did not file a direct appeal of the Judgement and Sentence entered herein. Instead, the Appellant waited one day short of one year, and filed two motions for post conviction relief. Only after the Trial Court denied these motions did the Appellant file this appeal. As such, this appeal should be limited to review of the Trial Court's decision denying these motions. This Court should not entertain inquiry into the issues now raised by counsel for the Appellant as the issues now raised on appeal are not the issues that the Appellant presented in either of his motions; the denial of which he now appeals. In neither motion below did the Appellant raise the issue of "same criminal conduct" or ineffective assistance of counsel as it relates to that issue. The issues subject to review in the present appeal are limited to the issues raised by the Appellant and addressed by the Trial Court. See RAP 2.5(a), See also State v.

Warren, 55 Wn.App. 645, 649-50, 779 P.2d 1159 (Div. I, 1989).

The Appellant filed two motions at the trial level. In his Motion to Withdrawal of Guilty Plea, the Appellant alleged ineffective assistance of counsel and set forth two grounds in support of his motion: 1) "Missadvice (*sic*) to plead guilty when told of actual innocence (*sic*)," and 2) "Missadvised (*sic*) of law of how much good time I would receive (*sic*)." *Id.* These two statements are the only accusations regarding ineffective assistance of counsel in either of his motions. Neither assertion of ineffective assistance touched upon his offender score calculation. Rather, the Appellant accused trial counsel of failing to recognize his claim of innocence and failing to recognize the proper rate of good time he would receive. The Trial Court rejected these accusations as lacking any factual support in the record. Therein, the Trial Court ruled that in order to support an involuntariness claim, the Appellant must present some evidence beyond his self-serving allegations pursuant to State v. Holley, 75 Wn.App. 191, 197, 876 P.2d 973 (Div. II, 1994).

The Appellant also filed a document entitled Motion to Modify or Correct Judgement and Sentence and therein

asserted that the charge of Kidnapping in the First Degree should have merged with the robbery charges and that his convictions violated Double Jeopardy. Again, the Appellant made no claim regarding "same criminal conduct" or ineffective assistance of counsel relating thereto. The Appellant never raised any issues as to the sufficiency of the factual basis to support his pleas.

The issues raised by the Appellant in his motions were the only issues decided by the Trial Court. These were the only issues the Trial Court was asked to address. Now, the Appellant raises all new issues relating to offender score calculation and "same criminal conduct," ineffective assistance of counsel based upon the "same criminal conduct," and whether there was a factual basis to support his plea. The Appellant now seeks what amounts to *de novo* review of the entirety of the proceedings. In this is what he sought, the Appellant should have filed a direct appeal within thirty days of entry of the Judgment and Sentence. See RAP 5.2. Instead, the Appellant waited nearly a year and then sought to file post conviction motions which were denied. The Appellant now appeals the denial of these motions by raising new issues not previously

presented to the Trial Court.<sup>2</sup> This Court must limit its review to the issues raised in the Appellant's motions and the Trial Court's denial thereof. The Appellant should not be allowed to use this appeal as a basis to now reopen the entire Judgement and Sentence. The Appellant argues that because he raised ineffective assistance in his Motion to Withdraw Guilty Plea, he has therefore preserved all issues of ineffective assistance of counsel as to all other claimed deficiencies. To allow such a broad review of very limited motions is to read RAPs 2.5 and 5.2 out of the rule book.

The Appellant did not file a direct appeal of his conviction. Instead, he waited nearly a year to file motions pursuant to CrRs 7.8 and 4.2. Review by this Court is limited to the denial of these motions. To the extent this appeal raises new issues, the State objects pursuant RAP 2.5 to issues not properly preserved, as well as pursuant to RAP 5.2 as an untimely general appeal of the Judgement and Sentence. The State would ask this Court to deny this appeal as not properly preserved or untimely pursuant to the Rules of Appellate Procedure.

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<sup>2</sup>Conspicuously absent from the Appellant's Opening Brief is any statement or assertion that the "Trial Court erred in denying the Appellant's motions for post conviction relief." This makes clear that the new issues now presented were never proffered to the Trial Court.

2. THE APPELLANT'S OFFENDER SCORE CALCULATION WAS CORRECT AND IS NOT SUBJECT TO PROPER REVIEW HEREIN.

A. The Appellant failed to raise the issue of "Same Criminal Conduct" at the time of sentencing, and cannot raise this issue for the first time on appeal.

The first issue raised by the Appellant relates to offender score calculation. Specifically, the Appellant asserts that the crimes of Kidnapping and Robbery should have been treated as "same criminal conduct" for the purposes of scoring. However, this argument is fatally flawed procedurally. Since the Appellant failed to raise any challenge to his offender score calculation at sentencing, the Trial Court was never given an opportunity to pass on the issue. Therefore, the Appellant cannot now raise the issue for the first time on appeal. This Court should reject the Appellant's attempt to substitute this appeal for a belated direct appeal of the entire case.

The Appellant asserts that he can raise the issue of "same criminal conduct" for the first time on appeal. See Appellant's Opening Brief, p. 13. Pertermittting the fact that this is not a direct appeal of the Judgement and Sentence entered herein, but rather, an appeal of the Trial Court's denial of his post conviction motions, the case law in this

State is clear; an appellant cannot raise the issue of "same criminal conduct" for the first time on appeal. See State v. Nitsch, 100 Wn.App. 512, 997 P.2d 1000 (Div. I, 2000), *review denied*, 141 Wn.2d 1030 (2000). In Nitsch, the Court therein noted that analysis of "same criminal conduct" is a mixed question of factual determinations and exercise of discretion by the trial court. *Id.* at 523. As such, the determinations upon which the question of "same criminal conduct" rest, are best left to the purview of the trial court. See id. at 524. The Appellant relies on State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987), asserting that Dunaway stands for the proposition that crimes can be characterized as "same criminal conduct" as a matter of law. See Appellant's Opening Brief, p. 21. Dunaway says no such thing. In Dunaway, the defendant therein raised the issue of "same criminal conduct" and the trial court found in favor of the defendant on that issue. *Id.* at 212. The State appealed. See id. The Dunaway court merely affirmed the trial court's decision therein. *Id.* at 217. The Dunaway case is clearly distinguishable from the case at bar as well as Nitsch, where the respective defendants failed to raise the issue of "same criminal conduct." Further, in Nitsch, which

was decided thirteen years after Dunaway, the Court therein stated;

... [T]he effect of permitting review for the first time on appeal is to require sentencing courts to search the record to ensure the absence of an issue not raised. In the same criminal conduct context, such a search requires not just a review of the evidence to support the State's calculation, or a review to ensure application of the correct legal rules, but an examination of the underlying factual context in every sentencing involving multiple crimes committed at the same time. Because this is not the legislature's directive, the trial court's failure to conduct such a review sua sponte cannot result in a sentence that is illegal. The trial court thus should not be required, without invitation, to identify the presence or absence of the issue and rule thereon.

Nitsch at 524 -525. The Appellant attempts to discredit Nitsch, claiming that it has been effectively overruled. The Appellant claims that Nitsch was overruled in State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009). Mendoza addressed the issue of whether a defendant had acknowledged his prior criminal history. See id. However, in Mendoza, the Supreme Court specifically differentiated the facts therein with the facts in Nitsch, noting the difference between the State's obligation to prove prior criminal history in the absence of the defendant' acknowledgment, and the factual determination that must be made by a sentencing

court prior to treating two current offenses as same criminal conduct. See id. at 928, FN 7. Based upon the authority above, the Appellant cannot now raise, for the first time on appeal, the issue of "same criminal conduct."

B. The crimes to which the Appellant pled guilty and was sentenced did not constitute "Same Criminal Conduct".

Assuming that it were proper to reach the merits of the issue, the Appellant failed to ask the Sentencing Court to treat any of these convictions as "same criminal conduct."

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

Except as provided in (b) or (c) of this subsection, whenever 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.

Looking at the facts of the case and the crimes to which the Appellant pled guilty, they are not factually the same criminal conduct. In order for two crimes to encompass the "same criminal conduct," they must require the same criminal intent, be committed at the same time and place, and involve the same victim. See RCW

9.94A.589(1)(a). Applying these requirements to the case at bar, the Burglary charge was completed upon entry.

Therefore that offense fails the "same time" test. The Robbery charges have two separate victims and therefore fail the "same victim" test.

With regard to the Kidnapping charge, while one of the purposes of restraining the victims was to facilitate the robbery, the Appellant and his co-assailant went far and above what was necessary to accomplish this result. Restraint here went beyond merely displaying a firearm and threatening harm to the victims to obtain their cooperation. Trevor was physically attacked, choked out, and tied up. Kayla was terrorized and forced to watch as her boyfriend was brutalized by the assailants. The restraint continued after the Robbery and Burglary charges were completed. Once Trevor came to, he had to cut himself and Kayla free before he could call the police.

The general rule is that current convictions are scored separately. See id. "Same criminal conduct" is an exception to the general rule and requires that the Court enter a finding that two or more offenses constitute the same criminal conduct. See id. The Appellant therefore, again,

waived this issue by failing to ask the Sentencing Court to find that any or all of his current offenses are same criminal conduct. See In re Pers. Restraint of Shale, 160 Wn.2d 489, 494-96, 158 P.3d 588 (2007) (*holding that issue waived when defendant failed to ask the sentencing court to make a discretionary call of any factual dispute regarding the issue of same criminal conduct and did not contest the issue at sentencing*). Contrary to the Appellant's intimations, the Trial Court is not required to *sua sponte* raise the issue of "same criminal conduct." See State v. Nitsch, *supra*.

The only case cited by the Appellant for in support of this proposition is State v. Longuskie, 59 Wn.App. 838, 801 P.2d 1004 (Div. III, 1990). Longuskie's value as precedent is dubius at best. It has never been cited by the Supreme Court as authority and further, the Supreme Court has subsequently rejected the premise that the Appellant can raise the issue of "same criminal conduct" for the first time on appeal. See In Re Shale, *supra*.<sup>3</sup> The law in Washington State is clear: a defendant must raise the issue of whether two offenses constitute the "same criminal

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<sup>3</sup>In Re Shale was decided by the Washington Supreme Court in 2007, seventeen years after the decision in Longuskie. Further, while citing approvingly to Nitsch in its opinion in Shale, the Supreme Court has never cited to Longuskie for any legal proposition.

conduct" at the time of sentencing in order to preserve the issue for review by the appellate courts. In Shale, Nitsch, and here, the Appellant waived this issue when he failed to raise it below, either at the time of sentencing, or in either of his two motions for post conviction relief. Just as in Nitsch, the Appellant herein acknowledged his standard range based upon his offender score at the time of sentencing. RP p. 4. He did not argue for a finding of "same criminal conduct" at that time. He did not raise this issue in either of his post conviction relief motions. Based upon clear precedent, he cannot do so now.

C. Trial Counsel was not ineffective for failing to raise the issue of "Same Criminal Conduct" at the time of sentencing.

In an attempt to avoid this obvious result, the Appellant asserts ineffective assistance of counsel based upon trial counsel's failure to raise the issue of "same criminal conduct" at the time of sentencing. Once again, this was not an issue raised in the Appellant's motions below. While the Appellant did allege ineffective assistance regarding his decision to plead guilty, the Appellant made no assertion of ineffective assistance as to offender score below. As stated above, this Court's review should be limited to the Trial Court's denial of his post conviction relief

motions. The Appellant again attempts to convert this very limited review into a full blown direct appeal.

Again assuming this Court looks beyond this obviously fatal flaw, counsel was not ineffective. There is a strong presumption that counsel provided adequate assistance. See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To establish ineffective assistance of counsel, a defendant must prove that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, the result would have been different. See State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001) (*citing In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992)). This places a heavy burden on the defendant. See State v. Jury, 19 Wn.App. 256, 263, 576 P.2d 1302, (Div. II, 1978), *review denied*, 90 Wn.2d 1006 (1978). If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, it is not ineffective assistance of counsel. See State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991) (*citing State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986)).

In State v. Nitsch, the Court acknowledged that the failure to raise "same criminal conduct" is an issue of strategy in certain cases. Therein the Court stated,

It is entirely conceivable that in some cases-especially in the context of plea agreements-it may not be to the defendant's advantage to raise the same criminal conduct issue.

Nitsch, at 523. Here, Counsel not only negotiated away the firearm enhancements on each count, but negotiated away the second count of Kidnapping in the First Degree, a serious violent offense. The second charge thereof would not have been subject to "same criminal conduct" as it involved a different victim. Further, because Kidnapping in the First Degree is a "serious violent offense" under the SRA, sentences for multiple counts thereof would be served consecutively pursuant to RCW 9.94A.589(1)(b). Also, regardless of any "same criminal conduct" finding by the Trial Court after a trial, all firearm enhancements must be served consecutively as well pursuant to RCW 9.94A.533(3)(e). Had the matter proceeded to trial and the Appellant was convicted as charged, including all enhancements, he would have been facing consecutive sentences on the Kidnapping charges and an additional

twenty-five mandatory years (300 months) of "hard time," even if the Trial Court accepted any "same criminal conduct" arguments. As such, counsel observed that winning the battle would mean losing the war. Giving up the an argument for "same criminal conduct" and agreeing to the State's offender score calculation was a more sound legal strategy than running a huge risk with five firearm enhancements. This decision cannot be assailed two years later on the basis of "ineffective assistance of counsel." The State would again remind this Court that the Appellant did not raise this issue at the time of sentencing.

3. THE APPELLANT'S PLEA WAS VOLUNTARY AS HE WAS PROPERLY APPRISED OF HIS OPTIONS AND DIRECT CONSEQUENCES OF PLEADING GUILTY.

Next, the Appellant assails the pleas of guilty themselves. This argument hinges on this Court's acceptance of the argument above. Because the Appellant's arguments regarding "same criminal conduct" must fail as clearly beyond the scope of proper review, this argument must also necessarily fail.

Again, it should be noted that this issue, like the others, was never raised below. While the Appellant claimed ineffective assistance of counsel in his motion to

withdraw his guilty plea, that assertion was premised on "Missadvice (*sic*) to plead guilty when told of actual innocence(*sic*)" and "Missadvised(*sic*) of law of how much good time" he would receive. CP 48. As the Trial Court determined, the Appellant failed to provide any factual support for these assertions. Further, and more importantly, the Appellant never raised his offender score calculation at all, let alone in connection with his claims of ineffective assistance of counsel. The Appellant is attempting to use this appeal as a substitute for a direct appeal or personal restraint petition. This appeal is and should be limited to a direct review of the Trial Court's denial of his two post conviction relief motions. The Appellant should not now be allowed to raise issues never addressed to the Trial Court. See RAP 2.5(a). Because the underlying issues raised in this appeal lack merit, the Appellant's attempt to assail his pleas of guilty on this basis must necessarily fail as well.

4. SUFFICIENT FACTUAL BASIS EXISTED IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDINGS THEREON AND ACCEPTANCE OF THE APPELLANT'S VOLUNTARY PLEA OF GUILTY.

Next, the Appellant claims that there was insufficient factual basis to support his plea of guilty to Kidnapping. This is an issue not previously raised at the Trial Court level and

should be rejected as not properly preserved for this appeal. See RAP 2.5(a). The Appellant again seeks more expansive review of the case when all that is and should be before this Court is the denial of the motions filed.

Factually, the Kidnapping charges can hardly be considered "incidental" to the Robbery. Here, the victim was threatened with a gun, physically assaulted, strangled to unconsciousness and tied up. This type of restraint is legally sufficient. See State v. Vladovic, 99 Wn.2d 413, 417, 662 P.2d 853 (1983). The Appellant seems to argue that movement of the victims is required. However, this contention has likewise been rejected. The statute does not require movement of the victims. See id. at 418 n. 1.

The Appellant's argument relies on the precept that if a crime is "merely incidental" to another crime, there is insufficient factual basis to support the additional conviction, and relies heavily on State v. Korum, 120 Wn.App 686, 86 P.3d 166 (Div II, 2004) *aff'd in part, rev'd in part on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006). In a recent decision from this Division of the Washington Court of Appeals, this Court rejected the proffered contention. See State v. Butler, \_\_\_ Wn.App \_\_\_, \_\_\_ P.3d \_\_\_, 2012 WL

28681 (Div. III, Jan. 5, 2012). Therein, this Court stated,

And that brings us to our next point which is that the controlling Supreme Court authority here is set out in Vladovic. That case resolves these questions on the basis of merger principles. Vladovic, 99 Wn.2d at 418–22, 662 P.2d 853.

In Vladovic, the court holds that the controlling principles here are those of the merger doctrine, with its attendant inquiry into legislative intent, not whether one crime was “incidental” to another:

Our only apparent divergence from the above analysis [merger analysis] occurred in State v. Allen, 94 Wn.2d 860, 621 P.2d 143 (1980), which petitioner relies upon. In Allen we determined that, under the facts of that case, the kidnapping was separate and distinct from the robbery and thus the case fell within an exception to the merger doctrine set forth in Johnson I [State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979)]. There is dictum in Allen to the effect that had the kidnapping merely been incidental to the robbery, the former offense would have “merge[d] into the robbery as a matter of law.” Allen, at 864, 621 P.2d 143. That statement is not in accord with either Johnson I or II [State v. Johnson, 96 Wn.2d 926, 639 P.2d 1332 (1982)] and we do not now adhere to it. We reaffirm our holdings that the merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime ( e.g., first degree rape) the State must prove not only that a defendant committed that crime ( e.g., rape) but that the crime

was accompanied by an act which is defined as a crime elsewhere in the criminal statutes ( e.g., assault or kidnapping). Pursuant to this rule, kidnapping does not merge into first degree robbery.

Butler (slip opinion) at 5 (*quoting Vladovic*). This is an unequivocal statement of law by this Court and the Washington Supreme Court that rejects the legal analysis proffered by the Appellant.

Turning to the proper analysis, sufficiency of the evidence to support a conviction turns on whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of the crime. See State v. Vladovic, 99 Wn.2d 413, 424, 662 P.2d 853 (1983). See also State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Here, the Appellant and his co-defendant, Mr. Heironymus, forced their way into the victims' home at gun point for the purpose of stealing property from the victims. The Appellant and/or his co-assailant used physical force to restrain both Mr. Morton and Ms. Edmonson. The two victims were tied up with nylon ties and Mr. Morton was strangled to unconsciousness after he resisted. The victims were not merely held at gunpoint, or otherwise merely restrained during the course of this home-

invasion robbery. They were physically assaulted, terrorized, and left tied up in the home after the robbery was completed. There can be no dispute that the State has made a sufficient showing that the Defendant was guilty of Kidnapping in the First Degree, either as an accomplice or as principal. The Appellant's unpreserved claims as to this issue must necessarily fail on the merits as well.

## **V. CONCLUSION**

The Appellant was sentenced in this matter on February 10, 2010. The Appellant did not file a direct appeal of his conviction and sentence within 30 days as required by RAP 5.2(a). The only issues which are appealable pursuant to RAP 2.5(a) are as enumerated in the Appellant's motions filed with the Trial Court February 9, 2011. The Appellant's motions were denied due to their utter lack of factual support. The Appellant does not assail the Trial Court's sound reasoning for denying these motions. Instead, the Appellant raises new issues which were not before the Court below. This is a clear abuse of the appellate process and should not be tolerated by this Court. If allowed to stand, this appeal is tantamount to the camel's nose under the edge of tent. No conviction, regardless of how final it

appeared, would be final. An offender could file at any time, any random challenge to his conviction via CrR 7.8, and when the Trial Court denies the motion, simply appeal the Trial Court's decision. At that point, any and all issues sought to be raised, whether addressed in the motions or not, would be subject to review. The Appellant did not file direct appeal within thirty days of entry of the Judgement and Sentence in this matter. Instead, he waited a year to filed two clearly frivolous motions which raised issues that cannot possibly be morphed into the issues now raised on this appeal. This Court should not allow that camel anywhere near this tent. In the best interests of justice this appeal should be denied.

Dated this 16<sup>th</sup> day of February, 2012.

Respectfully submitted,



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CURT L. LIEDKIE, WSBA #30371  
Attorney for Respondent  
Deputy Prosecuting Attorney for Asotin County  
P.O. Box 220  
Asotin, Washington 99402  
(509) 243-2061

COURT OF APPEALS OF THE STATE OF  
WASHINGTON - DIVISION III

THE STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL B. SHAFER,

Appellant.

Court of Appeals No: 29774-8-III

DECLARATION OF MAILING

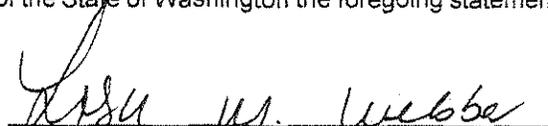
DECLARATION

On February 17, 2012 I deposited in the mail of the United States a properly stamped, and addressed envelope directed to all counsel and parties as listed below a copy of the BRIEF OF RESPONDENT in this matter to:

NATHANIEL R. SHAFER, #338175  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on February 17, 2012.

  
LISA M. WEBBER  
Office Manager

DECLARATION  
OF MAILING

Benjamin C. Nichols, Prosecuting Attorney  
P. O. Box 220, Asotin, WA 99402  
(509) 243-2061