

69655-6

69655-6

NO. 69655-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTAPHER WHITE,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH ANDRUS

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether definitions of elements are elements that must be alleged in the information when Washington Supreme Court precedent holds that they are not.

2. Whether the trial court exercised sound discretion in admitting physical evidence that was found at the crime scene that was relevant to proving the essential elements of both rape in the second degree and unlawful imprisonment.

3. Whether the standard definition of “reckless” is sufficient when coupled with a “to convict” instruction that correctly informs the jury of the elements of the crime in accordance with controlling Washington Supreme Court precedent.

4. Whether remand is necessary to correct the offender score and standard range for Count I.

5. Whether remand is necessary to correct the community custody term for Count I.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Christopher White, and his co-defendant, Luis Perez,<sup>1</sup> with assault in the second degree, two counts of rape in the first degree, two counts of rape in the second degree (in the alternative to rape in the first degree), and unlawful imprisonment based on a series of acts committed against E.C. between January 20 and January 22, 2010. CP 1-14. Perez was also charged with possession of a controlled substance (oxycodone).<sup>2</sup> CP 1-14.

A jury trial on the assault, rape, and unlawful imprisonment charges was held in November and December 2011 before the Honorable Beth Andrus. At the conclusion of the trial, the jury found both White and Perez guilty of assault in the second degree, two counts of rape in the second degree, and unlawful imprisonment. CP 141-44; RP (12/21/11) 6-9.

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<sup>1</sup> Perez has also appealed; oral argument took place on April 18, 2014. State v. Perez, No. 69005-1-I.

<sup>2</sup> Perez pled guilty to this charge and it was not an issue at trial.

Prior to sentencing, White was found to be incompetent and he was sent to Western State Hospital for competency restoration.<sup>3</sup> RP (5/10/12) 3-4; RP (6/25/12) 3-6; CP 210-12. White's competency was restored and he was returned for sentencing.<sup>4</sup> RP (11/9/12); CP 77-78.

At sentencing, the trial court found that the two counts of second-degree rape constituted the same criminal conduct for scoring purposes, and imposed a standard-range sentence totaling 147 months to life in prison. CP 200-12; RP (2/23/12) 2606-09. White now appeals. CP 255-57.

## 2. SUBSTANTIVE FACTS

In January 2010, Troy O'Dell, his girlfriend Candice Sanders, and co-defendant Perez were living together in a house in the Burien area. White had been staying there for a couple of weeks, and E.C. had been staying there for about a month. RP (12/6/11) 1168-69. White is O'Dell's "little cousin"; White's father is O'Dell's

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<sup>3</sup> In addition, the trial court allowed White's trial counsel to withdraw over the State's objection based on a potential conflict of interest, *i.e.*, that counsel could become a fact witness regarding White's competency to stand trial. RP (5/10/12) 3-7. The potential conflict never came to fruition.

<sup>4</sup> In addition, White's motion for a new trial based on CrR 7.5 was denied; the same motion based on CrR 7.8 was transferred to this Court for consideration as personal restraint petition. CP 213-24.

maternal uncle. RP (12/6/11) 1164. O'Dell and Perez had known each other since Perez was 13 years old. RP (12/6/11) 1156; RP (12/7/11) 1436. E.C. is O'Dell's older sister's best friend. RP (12/6/11) 1182. Although they are not related, E.C. considered O'Dell to be her little brother, and they referred to each other as "brother" and "sister." RP (12/12/11)1753-54. E.C. thought of White and Perez as family as well. RP (12/12/11) 1759, 1761.

E.C. was spending a lot of her time caring for O'Dell and Sanders's two young children because O'Dell was busy with his music career<sup>5</sup> and Sanders was abusing prescription drugs. RP (12/12/11) 1757. Tension arose between E.C. and Sanders because of Sanders's drug use. RP (12/12/11) 1757-58. E.C. told O'Dell's sister that Sanders was using drugs in front of the children, and Sanders found out about what E.C. had said; this caused further tension between them. RP (12/12/11) 1770-71. Two or three days before the events in question, E.C. left the house because she was "fed up" with babysitting the children and arguing with Sanders. During those two or three days, E.C. stayed in a

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<sup>5</sup> O'Dell was an aspiring hip-hop artist, and he had a music studio on the lower level of the house. RP (12/6/11) 1160, 1166, 1255.

series of motels and went on a crack cocaine binge. RP (12/12/11) 1766-67, 1771-72.

Eventually, E.C. decided to go back to O'Dell's house to get some rest, despite her problems with Sanders. RP (12/12/11) 1769-70. When E.C. arrived at the house, O'Dell told her that she and Sanders were going to fight each other because E.C. was "talking mess" about Sanders. RP (12/12/11) 1773. E.C. thought that if she fought with Sanders that the issue would be resolved, so she agreed. RP (12/12/11) 1773-74.

E.C. and Sanders started fighting immediately inside the front doorway. RP (12/7/11) 1446. When E.C. and Sanders stopped fighting, White stepped in and punched E.C. in the face so hard that she hit the floor and lost consciousness. RP (12/7/11) 1450-51. When E.C. regained consciousness and got up on her knees, Perez punched her in the face. RP (12/6/11) 1451. Sanders tried to light E.C.'s hair on fire with a cigarette lighter. RP (12/12/11) 1777. E.C. was moaning and crying. RP (12/7/11) 1452. O'Dell told her she was "going to die." RP (12/12/11) 1778. After White punched E.C. a second time, Sanders told White and Perez to stop hitting her and pointed out that "she's a female." RP (12/7/11) 1453.

E.C. was bleeding heavily from being punched in the face; there was blood on the wall by the door and a pool of blood on the carpet where she fell. RP (12/7/11) 1454. E.C. tried to stand up and she stumbled; White yelled at her while Perez and Sanders laughed at her. RP (12/7/11) 1457-58. O'Dell told White and Perez to take E.C. downstairs and "get her cleaned up." RP (12/12/11) 1781. White and Perez then helped E.C. down the stairs, and E.C. thought the incident was over at that point. RP (12/12/11) 1781.

White and Perez gave E.C. some clean clothes and told her to change out of her bloodstained clothes. When E.C. tried to shut the bathroom door for privacy, White and Perez prevented her from doing so and forced her to change in front of them. RP (12/12/11) 1785. Perez took E.C.'s bloody clothing and put it in the washing machine. RP (12/12/11) 1787. After E.C. changed clothes, White and Perez led her to Perez's room, which was also located downstairs. E.C. thought that they were finally going to let her go to sleep. RP (12/12/11) 1789.

At that point, White and Perez told E.C. that O'Dell had told them to kill her. RP (12/12/11) 1789. White said, "If you let us fuck you, then we will not kill you." When E.C. told them that she was menstruating, White said, "Well, we'll – we'll fuck you in the ass."

RP (12/12/11) 1790. E.C. told them she had HIV in an attempt to dissuade them from raping her. When that did not work, she begged them to at least wear condoms, and they agreed.

RP (12/12/11) 1791-93.

White and Perez took turns anally raping E.C. for about 15 to 20 minutes. RP (12/12/11) 1794. Both defendants also put their penises in E.C.'s face and told her to "suck it" while laughing at her.

RP (12/12/11) 1830. E.C. did not resist being anally raped by the defendants because she believed their threats to kill her if she did not comply with their demands. E.C. had seen both White and Perez in possession of firearms in the past, and she knew there were guns in Perez's room "all the time." RP (12/12/11) 1788-89, 1791, 1863, 1866.

When White and Perez stopped raping E.C., they would not let her leave the room; White slept on the couch with her in Perez's room, and the defendants followed her when she got up to go to the bathroom. RP (12/12/11) 1792. They warned her not to leave the house. RP (12/12/11) 1794. E.C. believed that they would kill her if she tried to leave. RP (12/12/11) 1796.

The next morning, O'Dell, Sanders, White, and Perez were upstairs in the living room watching television when White stated,

"We fucked her." At that point, Sanders realized that all of them "were in a lot of trouble" and "going to go to jail for a long time[.]" RP (12/7/11) 1467.

At some point that day, Sanders went downstairs and gave E.C. some food and a cigarette. Sanders told E.C. that she would let her leave to go to the hospital, except for the fact that E.C. would "probably bring the police to [her] house." RP (12/12/11) 1796.

E.C. finally made her escape a day or so later when everyone had left the house except for a music business associate of O'Dell's.<sup>6</sup> RP (12/12/11) 1799. E.C. ran to Milton Chatman's house, which was about a block away from O'Dell's. RP (12/12/11) 1799. Chatman's wife, Karen Santos, saw that E.C. was obviously injured and invited her inside. RP (12/7/11) 1417. When Chatman came home, he saw that E.C. was crying and "all beat up." E.C. told him that she had been raped and held against her will at her "brother's" house. RP (12/7/11) 1403. Chatman drove E.C. to Highline Hospital because she was in pain and "very injured." RP (12/7/11) 1402, 1406.

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<sup>6</sup> E.C. knew this person only by his nickname, "Blessed Hands." RP (12/12/11) 1798-99.

Nurse Christine Hoolboom treated E.C. at Highline. E.C. told Hoolboom that she was beaten and raped by two men, but she refused to say where it happened. RP (12/1/11) 978. E.C. was "afraid she would get hurt if she gave a lot of information," and she did not want to call the police. RP (12/1/11) 977-78. E.C. told Dr. Lance Young, who also treated E.C. at Highline, that she was assaulted by two men and a woman, and that she was anally raped by two men. RP (12/13/11) 2004. E.C. also told Dr. Young that she did not want to be transferred to Harborview Medical Center "because she was concerned that the people who did this to her might . . . find her there," and that they would "show up at the hospital and execute her with handguns." RP (12/13/11) 1999.

E.C.'s CT scan revealed a blowout fracture of the orbital bone on the left side of her face. RP (12/13/11) 2001-02. Despite E.C.'s reluctance, she was transferred to Harborview for treatment of her injuries and for a sexual assault examination. RP (12/13/11) 2110-11. E.C. told Harborview social worker Joanne Veneziano that she was afraid that her assailants would kill her because she was reporting the crime. RP (12/13/11) 2052. In spite of these fears, E.C. finally named her assailants; she told Veneziano that she was physically assaulted by Sanders, White, and Perez, and

that White and Perez had anally raped her. RP (12/13/11) 2058-59. Although E.C. was afraid to make a police report, it was a relief when she finally did so. RP (12/12/11) 1803.

Deputy Gerald Meyer of the King County Sheriff's Office was the first police officer to contact E.C. at Harborview. Deputy Meyer was "stunned" and "taken aback" by the amount of swelling on her face. RP (11/30/11) 653. Deputy Meyer took a brief statement from E.C. and drew a diagram of O'Dell's house with E.C.'s help in order to assist detectives in obtaining a search warrant. RP (11/30/11) 654; RP (12/1/11) 688-92. E.C. told Meyer that she was afraid to talk about "snitching" because she believed that "she would be killed." RP (12/1/11) 692. After lead Detective Marylisa Priebe-Olson spoke with Deputy Meyer and took a recorded statement from E.C., she directed other officers to arrest O'Dell, Sanders, White, and Perez. RP (12/14/11) 2225-28.

After all four suspects had been arrested, they were transported to the Burien precinct to be interviewed and processed. RP (12/14/11) 229-31. During their initial interviews, O'Dell and Sanders both claimed that E.C. was already injured when she arrived at their house, and that they would not allow her to come in

because she was drunk.<sup>7</sup> RP (12/14/11) 2231, 2234-35, 2237-38. White and Perez denied assaulting and raping E.C., and they also claimed that E.C. had not been inside the house.<sup>8</sup> Pretrial Ex. 1; Pretrial Ex. 4. However, the detectives noticed that the knuckles of Perez's right hand were obviously swollen. RP (12/8/11) 1594-95.

O'Dell's house was searched pursuant to a search warrant. Among other items of evidence, the police found a gun case,<sup>9</sup> ammunition, ammunition magazines, and ski masks. These items were found in Perez's room and in the music studio, both of which were downstairs where E.C. had been raped and held against her will by White and Perez. RP (12/1/11) 750-51, 756, 859-60, 862, 869; RP (12/8/11) 1604-05, 1608, 1610, 1612-13. A condom wrapper was found in Perez's room, and two condom wrappers were found in a bag of wet clothing nearby. RP (12/1/11) 760, 849, 858.

When the police later drove E.C. to the house to retrieve her belongings, everything was gone. The only things that had not

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<sup>7</sup> Eventually, O'Dell and Sanders entered plea agreements with the State and they both testified against White and Perez at trial. RP (12/6/11) 1276-80; RP (12/7/11) 1427-29.

<sup>8</sup> After failing a polygraph examination in which he denied having anal intercourse with E.C., Perez then claimed that his encounter with E.C. was consensual. RP (11/21/11) 84, 88-92.

<sup>9</sup> No gun was found.

been thrown away before the four suspects were arrested were the bloody shirt, jeans, and underwear that E.C. had been wearing when she was beaten. These items were still wet from the washing machine, as if the defendants had simply forgotten to throw them out. RP (12/12/11) 1829.

Perez testified at trial, and claimed that he had lied during all of his interviews with the police because he was afraid of Troy O'Dell. RP (12/14/11) 2281. Perez denied raping E.C., and he claimed that O'Dell was the one who had assaulted E.C. RP (12/14/11) 2297-98; RP (12/15/11) 2375. Perez also testified that when he told the police that he had consensual anal sex with E.C. during his second recorded statement, it was a "false confession." RP (12/14/11) 2295.

White did not testify at trial. During E.C.'s testimony, however, White nodded in agreement when E.C. said that "snitches end up in ditches." RP (12/12/11) 1796, 1820-21.

Additional facts will be discussed below as necessary for argument.

C. **ARGUMENT**

1. **THE DEFINITION OF “RESTRAINT” IS NOT AN ELEMENT OF UNLAWFUL IMPRISONMENT AND NEED NOT BE ALLEGED IN THE INFORMATION.**

White first claims that the charging document in this case was deficient because it did not contain all of the essential elements of unlawful imprisonment as charged in count VI. More specifically, White claims that the information should have alleged that the restraint of the victim was “without legal authority,” citing State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012), rev. granted in part, 178 Wn.2d 1001 (2013). Brief of Appellant, at 15-19. This claim should be rejected because the Washington Supreme Court has now held to the contrary. State v. Johnson, \_\_\_ Wn.2d \_\_\_ (No. 88683-1, filed 5/1/14) (hereinafter “Slip Op.”). Definitions of elements are not elements themselves, and thus, they need not be included in a charging document. This Court should affirm.

A criminal defendant is entitled to notice of the nature and cause of the accusation against him or her, and thus, all “essential elements” of the crime must be pleaded in the information and proved beyond a reasonable doubt. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The “to convict” instruction

to the jury must also contain all essential elements of the crime.

State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

However, *definitions* of elements are not themselves essential elements that must be included in either a charging document or a “to convict” instruction. See, e.g., State v. Allen, 176 Wn.2d 611, 627, 294 P.3d 679 (2013) (holding that the definition of a “true threat” need not be alleged in the information or included in the “to convict” instruction, even though the State is required to prove that the threat in question was a true threat); see also State v. Smith, 159 Wn.2d 778, 785, 154 P.3d 873 (2007) (three common-law definitions of assault are not alternative means of committing the crime of assault).

In accordance with the authority cited above, the Washington Supreme Court has held that the definition of restraint (*i.e.*, restraint “without legal authority”) need not be alleged in an information charging a defendant with unlawful imprisonment. Johnson, Slip Op. at 4-9. Johnson is directly on point, and requires that White’s claim be rejected.

In this case, White was charged with unlawful imprisonment in count VI as follows:

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse LUIS ANDRE PEREZ and CHRISTAPHER TARENCE WHITE, and each of them, of the crime of **Unlawful Imprisonment**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendants LUIS ANDRE PEREZ and CHRISTAPHER TARENCE WHITE, and each of them, together with others, in King County, Washington, during a period of time intervening between January 20, 2010 through January 22, 2010, did knowingly restrain E.C., a human being . . . .

CP 13 (bold in original).

This charging language is entirely consistent with RCW 9A.40.040(1), which provides that a “person is guilty of unlawful imprisonment if he or she knowingly restrains another person.” This charging language is also identical to the charging language at issue in Johnson. Slip Op. at 5. “Restrain” is defined in a separate statute as “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). In accordance with Johnson, although the information must allege that the defendant knowingly restrained the victim, it need not allege the full definition

of the term “restrain,” because definitions of elements are not essential elements of the crime.

In sum, the information is sufficient in this case because it contains the essential elements of unlawful imprisonment. This Court should reject White’s arguments to the contrary, and affirm.

**2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING SKI MASKS AND OTHER PHYSICAL EVIDENCE THAT WAS RELEVANT TO PROVING THE ELEMENTS OF RAPE AND UNLAWFUL IMPRISONMENT.**

White also argues that his right to a fair trial was violated by the admission of ski masks that were found in the basement where E.C. was raped and held against her will. White claims that the admission of the ski masks served no legitimate evidentiary purpose and invited the jury to conclude that he was a “criminal type.” Brief of Appellant, at 20-25. This claim should be rejected. The ski masks, in conjunction with the gun case, ammunition, and ammunition magazines, were admitted to corroborate E.C.’s testimony that she feared that the defendants would kill her and to prove that her fear of the defendants was reasonable. In turn, E.C.’s fear was relevant to proving the forcible compulsion element of rape and the restraint element of unlawful imprisonment. This

was a proper basis upon which to admit the evidence, and the trial court's ruling should be affirmed.

Evidentiary rulings are matters addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion in deciding whether evidence is admissible only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914.

Forcible compulsion is an element of second-degree rape as found by the jury in this case. RCW 9A.44.050(1)(a). Forcible compulsion does not require the use of physical force; rather, forcible compulsion may be established by evidence of an express or implied threat to use a weapon or to otherwise inflict injury upon the victim. State v. Bright, 129 Wn.2d 257, 266-70, 916 P.2d 922 (1996); CP 149.

As discussed above, restraint is an element of unlawful imprisonment. RCW 9A.40.040. Restraint means "to restrict a person's movements without consent and without legal authority" in

a manner that substantially interferes with that person's liberty.  
RCW 9A.40.010(6). "And restraint is 'without consent' if it is  
accomplished by physical force *or intimidation*." State v. Atkins,  
130 Wn. App. 395, 401, 123 P.3d 126 (2005) (emphasis supplied);  
RCW 9A.40.010(6)(a).

In short, evidence of an express or implied threat of harm to  
the victim is relevant to proving second-degree rape, and evidence  
of intimidation of the victim is relevant to proving unlawful  
imprisonment. Therefore, evidence of a victim's fear that the  
defendant has both the intent and the capability to harm her is  
relevant to proving the elements of both crimes.

In this case, the trial court ruled that certain evidence  
discovered by the police during service of a search warrant was  
admissible during the State's case-in-chief. More specifically, the  
trial court allowed the State to introduce the gun case, ammunition,  
ammunition magazines, and ski masks that were found in Perez's  
room and in the studio in the lower level of the house, where E.C.  
had been raped and restrained against her will by both White and  
Perez. The basis of the trial court's ruling was that these items  
were relevant to prove why E.C. was afraid of the defendants, and  
to prove that her fear was reasonable. RP (11/23/11) 473-502.

During the trial, E.C. testified that she submitted to having anal intercourse with White and Perez because they threatened to kill her if she refused. RP (12/12/11) 1789-91. In addition, E.C. explained that she stayed in the house after the rape when White and Perez told her that she was not allowed to leave; again, she believed that they would kill her if she tried to leave "because they would think [she] was going to tell the police" about what they had done. RP (12/12/11) 1794, 1796. E.C. also testified that she had seen both White and Perez possess firearms in the past, and that she knew that Perez kept a firearm in his room. RP (12/12/11) 1788-89. This was the same room where White slept with E.C. on the couch in order to make sure that E.C. did not leave the house. RP (12/12/11) 1792.

Given E.C.'s testimony, and given the elements of rape and unlawful imprisonment as discussed above, the physical evidence admitted by the trial court corroborating E.C.'s fear of the defendants was relevant to an issue of consequence at trial. See ER 401, 402. Accordingly, the trial court's ruling is reasonable and rests on tenable grounds. In addition, the trial court excluded other evidence; specifically, the court excluded body armor and a holster that were found upstairs rather than downstairs, and all

evidence of drugs and drug dealing. RP (11/23/11) 492, 496-502. The fact that the trial court admitted only the evidence found in the downstairs rooms and excluded other evidence further demonstrates that the trial court exercised its discretion carefully and appropriately. In sum, White cannot demonstrate that the trial court manifestly abused its discretion in allowing the ski masks to be admitted along with the gun case, ammunition, and ammunition magazines that were found in the basement rooms where E.C. was raped and held captive.

But even if this Court were to conclude that the ski masks should not have been admitted, White is still not entitled to a new trial. Evidentiary error will not result in reversal on appeal unless there is a reasonable probability that “the outcome of the trial would have been different if the error had not occurred.” State v. Jackson, 102 Wn.2d 689, 696, 689 P.2d 76 (1984). In this case, the jury did not convict White of assault, rape, and unlawful imprisonment because the police found two ski masks in the basement. Rather, the jury convicted White of assault, rape, and unlawful imprisonment because the direct evidence of White’s guilt for those crimes (including White’s own statement to his housemates that he “fucked” E.C.) was strong and compelling. In short, White has not

shown that the ski masks had any effect on the outcome of the trial in light of the record as a whole. White's claim may be rejected for this reason as well.

**3. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ELEMENT OF RECKLESSNESS, AND WHITE CANNOT DEMONSTRATE EITHER DEFICIENT PERFORMANCE OR PREJUDICE.**

White claims that the jury instruction defining "reckless" was inadequate and relieved the State of its burden of proving the elements of assault in the second degree as charged in count I. In the alternative, White claims that trial counsel was ineffective for not objecting to the "reckless" definitional instruction that was given to the jury. Brief of Appellant, at 25-36. These claims should also be rejected in accordance with the Washington Supreme Court's decision in Johnson, *supra*. As the court held in Johnson, the jury instruction defining recklessness in this case is sufficient when coupled with the "to convict" instruction, which accurately sets forth the essential elements of the crime. Moreover, White cannot demonstrate either deficient performance or prejudice arising from trial counsel's failure to object to the standard definitional instruction. This Court should affirm.

Jury instructions are sufficient if they properly inform the jury of the applicable law, are not misleading, and allow the parties to argue their theories of the case. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Moreover, a claim of instructional error cannot be raised for the first time on appeal unless the claimed error is a “manifest” error of truly constitutional magnitude under RAP 2.5(a)(3). State v. Scott, 110 Wn.2d 682, 684-90, 757 P.2d 492 (1988). Further, “[t]he requirements of due process usually are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted.” Id. at 690.

White was charged in count I with assault in the second degree under RCW 9A.36.021(1)(a) for “intentionally assault[ing] another and thereby recklessly inflicting substantial bodily harm upon E.C.” CP 1, 11. The crime of second-degree assault was defined for the jury as “when [the defendant] or an accomplice intentionally assaults another and thereby recklessly inflicts *substantial bodily harm*.” CP 183 (emphasis supplied). The “to convict” jury instruction further required the State to prove beyond a reasonable doubt that White or an accomplice “recklessly inflicted *substantial bodily harm* on [E.C.]” CP 184 (emphasis

added). “Reckless” was then separately defined, without objection,<sup>10</sup> in an instruction providing that a “person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a *wrongful act* may occur...” (emphasis added). CP 185. The language of this instruction tracks the statutory language defining recklessness. RCW 9A.08.010(1)(c).

In Johnson, which also involved a charge of second-degree assault under the “substantial bodily harm” means and a claim of ineffective assistance of counsel, the Washington Supreme Court held that the same instructions that were given in this case were sufficient to convey the applicable law to the jury and did not relieve the State of its burden of proof. Slip Op. at 9-13. As the court stated,

[I]t is not error to use the generic definition of “reckless” when the “to convict” instruction contains all of the essential elements, including the charge-specific language for recklessness. Having found that no error occurred, we hold that counsel provided effective assistance.

Slip Op. at 13.

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<sup>10</sup> RP (12/15/11) 2415.

Johnson is dispositive of both of White's arguments regarding the definition of recklessness that was given to the jury in this case; the jury instructions were correct, and thus, counsel was not ineffective for not objecting to them. Accordingly, this Court should affirm.

**4. THE STATE AGREES THAT WHITE'S OFFENDER SCORE ON COUNT I SHOULD BE FOUR RATHER THAN FIVE.**

White also argues that the trial court calculated his offender score incorrectly for his conviction for second-degree assault. Brief of Appellant, at 36-37. The State agrees that White's offender score for this conviction should be four rather than five, and accordingly, the offender score and standard range for Count I need to be corrected on remand.

The trial court found that Count III and Count V, the two convictions for second-degree rape, constituted the same criminal conduct. RP (11/9/12) 62-63. Accordingly, one of the rape counts should not be included in White's offender score on any of the other counts because the two rape convictions are scored as one crime

for sentencing purposes.<sup>11</sup> Former RCW 9.94A.589(1)(a).

Therefore, on the second-degree assault count, the rape charges score as a total of two, the unlawful imprisonment scores as a one, and White's two prior juvenile offenses score as one-half point each for a total of four points in accordance with RCW 9.94A.525(8).

The trial court found a score of five on Count I. CP 114, 116.

Accordingly, the case should be remanded for correction of the offender score and standard range for Count I.<sup>12</sup>

**5. THE STATE ALSO AGREES THAT THE  
COMMUNITY CUSTODY TERM FOR COUNT I  
SHOULD BE AMENDED.**

Lastly, White argues that the trial court imposed an incorrect term of community custody for his conviction for assault in the second degree. Brief of Appellant, at 37. The State concedes that the applicable statute dictates that the term of community custody should be 18 months. RCW 9.94A.701(2). The judgment and

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<sup>11</sup> Notably, the trial court also erred in calculating the standard range for Count V as "0" and in imposing no sentence whatsoever on Count V. CP 114, 117. The same criminal conduct rule is a scoring rule; it does not nullify the conviction and sentence entirely. Thus, a defendant still receives a sentence for each conviction, even if two or more of them count as one crime for scoring purposes. Because remand is necessary, the trial court should correct this error in the judgment as well.

<sup>12</sup> White's total sentence will not be affected, however, because his sentence on Count III (and, presumably, on Count V upon remand) remains 147 months to life. CP 114, 117.

sentence reflects that the term of community custody for Count I is 36 months. CP 116. Accordingly, this Court should remand for the trial court to amend the judgment and sentence to reflect that the term of community custody on Count I should be 18 months.<sup>13</sup>

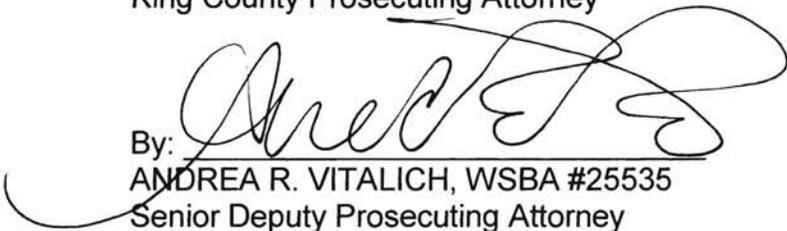
**D. CONCLUSION**

The judgment and sentence should be amended to reflect the correct offender score, term of community custody, and sentence for Count I, and a sentence should be imposed on Count V. In all other respects, this Court should affirm.

DATED this 5<sup>th</sup> day of May, 2014.

Respectfully submitted,

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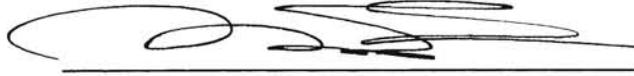
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<sup>13</sup> As with the offender score issue discussed above, although this error in the judgment should be corrected, it is not prejudicial because White will be on community custody for life upon release from prison due to his convictions for rape in the second degree. CP 117.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CHRISTAPHER WHITE, Cause No. 69655-6-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name  
Done in Seattle, Washington

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*04* 05-05-14  
Date

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