69005-1

69005-1

NO. 69005-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LUIS PEREZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH ANDRUS

STATE'S RESPONSE TO PRO SE STATEMENT OF ADDITIONAL GROUNDS

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A. ISSUES PRESENTED

1. Whether the trial court exercised sound discretion in deciding not to give instructions on the lesser crime of rape in the third degree because there was no evidence from which the jury could conclude that Perez and his co-defendant White committed that crime to the exclusion of rape in the first or second degrees.

2. Whether Perez has failed to demonstrate that prosecutorial misconduct occurred in closing argument or that he was prejudiced because the prosecutor's comments were reasonable inferences based on the evidence, and thus, they were neither flagrantly improper nor incurably prejudicial.

3. Whether the evidence was sufficient to support the jury's verdicts for rape in the second degree and unlawful imprisonment where the defendants told the victim they would not kill her if she submitted to having sex with them, the defendants took turns having anal sex with the victim for 15 to 20 minutes, and the defendants prevented the victim from leaving the house for a significant period of time.

B. STATEMENT OF THE CASE

The procedural and substantive facts of this case are set forth in the Brief of Respondent. *See* Brief of Respondent, at 2-14. Additional facts will be discussed below as necessary for argument.

C. ARGUMENT

1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN WITHDRAWING THE INSTRUCTIONS ON RAPE IN THE THIRD DEGREE BECAUSE THERE WAS AN INSUFFICIENT FACTUAL BASIS FOR THAT CRIME.

Perez first argues that the trial court erred in withdrawing[1] the instructions on rape in the third degree as an inferior degree offense to rape in the first degree and rape in the second degree as charged. SAG, at 15-24. This claim should be rejected because there was not a sufficient factual basis from which to conclude that Perez committed third-degree rape instead of first-degree rape or

[1] The trial court initially granted the defense's request to instruct the jury on rape in the third degree. RP (12/15/11) 2429-33. The court's basis was that the jury "could believe [E.C.] on some parts of her testimony and disbelieve her on others." RP (12/15/11) 2431. The next day, the court withdrew the instructions on rape in the third degree after reviewing relevant case law and concluding "that a rape three instruction should not be given in a case where there is no affirmative evidence that intercourse was unforced but non-consensual." RP (12/16/11) 2500.

second-degree rape. The trial court exercised sound discretion in withdrawing the instructions, and this Court should affirm.

A trial court's decision whether to give an inferior degree instruction based on a factual dispute is reviewed for abuse of discretion. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). A trial court abuses its discretion 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. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

A trial court may not instruct the jury on an inferior degree offense if there is insufficient evidence to support it. State v. Wright, 152 Wn. App. 64, 70, 214 P.3d 968 (2009), rev. denied, 168 Wn.2d 1017 (2010). In order for the trial court to instruct the jury on an inferior degree offense, "the evidence must support an inference that *only* the lesser crime was committed." Id. at 71 (emphasis in original). Put another way, "the evidence must permit a rational juror to find the defendant guilty of the lesser offense and acquit him or her of the greater." Id.

In making this determination, the evidence is viewed in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). However, "'[i]t is not enough that the jury might simply disbelieve the State's evidence.'" State v. Charles, 126 Wn.2d 353, 355, 894 P.2d 558 (1995) (quoting State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), and State v. Speece, 115 Wn.2d 360, 363, 798 P.2d 294 (1990)) (alteration in Charles). Rather, "'some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given.'" Charles, 126 Wn.2d at 355 (quoting Fowler, 114 Wn.2d at 57, and Speece, 115 Wn.2d at 363). The facts of Charles are instructive here.

In Charles, the victim testified that the defendant grabbed her, pushed her down behind a bush, and forcibly engaged in sexual intercourse with her. Charles, 126 Wn.2d at 354. On the other hand, the defendant testified that the victim agreed to have sex with him for $20. Id. at 345-55. The defendant proposed instructions on third-degree rape as an inferior degree of second-degree rape as charged, and the trial court refused the instructions on factual grounds. Id. at 355. Division Three of this

Court reversed, reasoning that "the evidence would support an inference that [the victim] did not consent to intercourse with Charles and clearly expressed her lack of consent, but that Charles did not use forcible compulsion to overcome her resistance." Id.

The Washington Supreme Court disagreed, and held that the evidence did not support the notion that the defendant committed third-degree rape instead of second-degree rape:

> According to the victim, Charles forced her to the ground, she struggled, and he forced her to have sex with him. If the jury believed this testimony, Charles was guilty of second degree rape. RCW 9A.44.050. According to Charles, the two engaged in a consensual act of intercourse, and he was not guilty of any degree of rape. In order to find Charles guilty of third degree rape, the jury would have to disbelieve both Charles' claim of consent and the victim's testimony that the act was forcible. But there is no affirmative evidence that the intercourse here was unforced but still nonconsensual. Thus, the trial court properly refused to instruct the jury on third degree rape.

Charles, 126 Wn.2d at 356. A very similar case presents itself here.

In this case, E.C. testified that she submitted to being anally raped by both Perez and his co-defendant White because they threatened to kill her if she did not comply. RP (12/12/11) 1789-91. E.C. believed this threat because she had seen both Perez and

White with firearms, and she knew that Perez kept a gun in his room. RP (12/12/11) 1788-89. On the other hand, Perez initially told the police that he did not have sexual intercourse with E.C. at all, and he later told them that he had had consensual intercourse with her. Pretrial Ex. 4; Pretrial Ex. 6. During his trial testimony, Perez again denied having intercourse with E.C., and he claimed that his statement to the police that he and E.C. had consensual sex was a "false confession." RP (12/14/11) 2295.

As in Charles, there is no affirmative evidence in this case that Perez committed third-degree rape instead of first-degree rape or second-degree rape. If the jury believed E.C.'s testimony (which they apparently did), she submitted to being anally penetrated by both defendants because they threatened to kill her; thus, according to E.C.'s testimony, the sexual intercourse was the result of forcible compulsion. On the other hand, if the jury believed any of Perez's custodial statements or his trial testimony, Perez either did not have sexual intercourse with E.C. at all, or else he had consensual intercourse with her. In any case, there is no factual support for the notion that Perez had sexual intercourse with E.C. that was non-consensual but not forcible. Charles is on point, and Perez's claim fails.

Nonetheless, Perez claims that this case is controlled by State v. Fernandez-Medina, 141 Wn.2d 452, 6 P.3d 1150 (2000), and that the trial court erred in refusing to instruct the jury on third-degree rape based on that case. SAG, at 16, 20. Perez is mistaken because Fernandez-Medina is readily distinguishable.

In Fernandez-Medina, the defendant was charged with attempted murder and assault in the first degree based on the victim's report that he had pointed a gun at her head and pulled the trigger, but the gun did not fire. Instead, the victim heard a "clicking sound." Fernandez-Medina, 141 Wn.2d at 451. The defendant requested instructions on the inferior degree offense of assault in the second degree, but the trial court refused those instructions on factual grounds. Specifically, the trial court rejected the instructions because the defendant raised an alibi defense, and the victim's testimony did not support an inference that the defendant committed only second-degree assault. Id. at 451-52. The defendant was convicted of first-degree assault. Id.

In reversing the defendant's conviction, the Washington Supreme Court observed that the trial court's ruling would have been correct if the victim's testimony and the defendant's alibi evidence were the only evidence presented at trial. Id. at 456.

However, the defendant had also presented expert testimony to the effect that there were explanations for the "clicking sound" that the victim heard other than pulling the trigger. Id. at 456-57. Accordingly, this was affirmative evidence supporting an inference that the defendant committed second-degree assault instead of first-degree assault because it suggested that the defendant could have pointed the gun at the victim without trying to fire it. Id. at 457.

In this case, unlike Fernandez-Medina, there is no evidence supporting an inference that Perez had non-consensual, yet unforced sexual intercourse with E.C. Indeed, the trial court's explanation of its preliminary ruling allowing the third-degree rape instructions demonstrates that this is the case:

> THE COURT: Well, [E.C.] testified that there was non-consensual anal sex, and the jury could believe that, and the jury could disbelieve the testimony about the physical threats, the forcible compulsion.

RP (12/15/11) 2430. This is precisely what Washington law prohibits, *i.e.,* giving an instruction based solely on the notion that the jurors could disbelieve both the victim's testimony and the defendant's testimony, and that they could convict on a lesser charge based on some sort of hybrid of the two. *See* Charles, at 356; *see also* State v. Wright, 152 Wn. App. 64, 214 P.3d 968

(2009), rev. denied, 168 Wn.2d 1017 (2010) (explaining the distinction between Charles and Fernandez-Medina). Accordingly, the trial court exercised sound discretion when it reversed its erroneous preliminary ruling and withdrew third-degree rape from the jury's consideration. RP (12/16/11) 2506-07.

As the court correctly stated in reversing its previous ruling, "a rape three instruction should not be given in a case where there is no affirmative evidence that intercourse was unforced but non-consensual." RP (12/16/11) 2500. This Court should affirm.

2. PEREZ HAS NOT SHOWN EITHER THAT PROSECUTORIAL MISCONDUCT OCCURRED OR THAT PREJUDICE RESULTED.

Perez next claims that the trial prosecutor committed misconduct in closing argument that deprived him of his right to a fair trial. SAG, at 24-37. This claim should be rejected. Perez has not shown that any of the prosecutor's remarks were improper or that prejudice resulted; therefore, this Court should affirm.

In order to prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's conduct was both improper and prejudicial in light of the entire record and all of the circumstances present at trial. State v.

Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), rev. denied, 151 Wn.2d 1039 (2004) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who claims prosecutorial misconduct during closing argument "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Moreover, a defendant who did not object at trial has waived any claim on appeal unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. Stenson, 132 Wn.2d at 727. Also, arguments in rebuttal that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). The prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence

addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561.

In this case, there were no objections to the remarks that Perez now challenges on appeal. *See* RP (12/16/11) 2507-40, 2568-78. Accordingly, Perez must show that these remarks were so flagrantly improper that they resulted in incurable prejudice. Perez cannot meet this burden because the remarks were reasonable inferences drawn from evidence that was admitted at trial, and none of them were so irreparably prejudicial that an instruction from the court could not have ameliorated any possible effect on the jury.

Perez first argues that the prosecutor improperly characterized him as a liar and improperly vouched for E.C.'s credibility by characterizing her as a "poor mom who could be believed despite shortcomings, who was telling the truth, and who was wronged[.]" SAG, at 25-28. But there is nothing improper about such remarks because they are grounded in the evidence presented at trial.

Perez gave contradictory statements to the police: first, that he did not have sexual intercourse with E.C., and then, that he did have sexual intercourse with her, but it was consensual. Pretrial

Ex. 4, Pretrial Ex. 6. In his trial testimony, Perez went back to his original story that he had not had sex with E.C. RP (12/14/11) 2297-98; RP (12/15/11) 2375. Perez testified 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. Therefore, the evidence established that Perez was, in fact, untruthful. Accordingly, the prosecutor's argument that Perez was lying is not improper. *See* State v. McKenzie, 157 Wn.2d 44, 59, 134 P.3d 221 (2006) (holding that "[w]here a prosecutor shows that other evidence contradicts a defendant's testimony, the prosecutor may argue that the defendant is lying").

Moreover, the evidence established that E.C. was a mother, that she admitted that she had been bingeing on crack cocaine in the days leading up to the incident, and that she had been beaten and raped by people she had thought of as family. RP (12/12/11) 1751, 1753, 1759, 1761, 1766-67, 1892. The prosecutor's arguments based on this evidence does not constitute vouching. *See* State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (a prosecutor cannot state a personal opinion regarding a witness's credibility, but it is proper for a prosecutor to argue credibility based on evidence produced at trial).

Next, Perez argues that the prosecutor committed misconduct when he drew the jury's attention to co-defendant White's conduct during E.C.'s testimony. More specifically, he argues that it was improper for the prosecutor to note that White apparently nodded when E.C. testified that "snitches end up in ditches." SAG, at 29-30. However, during this portion of the prosecutor's closing argument, he made it clear that this action was made only by White, not to Perez. RP (12/16/11) 2529-30, 2571-72. The fact that Perez and White were properly tried together as co-defendants does not render the prosecutor's remarks about White prejudicial misconduct as to Perez. Perez has cited no authority supporting this argument, and the State has found none. This argument is wholly without merit.[2]

Perez also claims that the prosecutor made arguments that were not supported by the record. SAG, at 30-34. But the record demonstrates otherwise. First, Perez argues that it was improper for the prosecutor to characterize his and White's actions as "tag teaming." But the evidence established that White punched E.C.,

[2] In a related claim, Perez also argues that the prosecutor "testified" during closing argument regarding White's actions during E.C.'s testimony. SAG, at 33-34. But E.C. described White's actions to the jury during her testimony. RP (12/12/11) 1820-21. Perez's argument is contrary to the record.

and then Perez punched E.C., and, after taking her downstairs, that White raped E.C., and then Perez raped E.C. The evidence also established that White threatened to punch her again during the rape. RP (12/12/11) 1777, 1791. E.C. testified that Perez and White took turns raping her for 15-20 minutes. RP (12/12/11) 1794. Based on this evidence, "tag teaming" is a fair characterization of the defendants' actions.[3]

Perez argues that the prosecutor misstated the evidence when he argued that both White and Perez told E.C. that they would not kill her if she let them "fuck [her] in the ass." SAG, at 32-33. Although Perez is correct that White actually uttered those words, Perez was present when they were uttered, and he anally raped E.C. along with White. RP (12/12/11) 1789-91. Accordingly, the evidence shows that White's statement was adopted by Perez, and thus, the prosecutor's argument was proper. *See* State v. Neslund, 50 Wn. App. 531, 551, 749 P.2d 725, rev. denied, 110 Wn.2d 1025 (1988) (discussing adoptive admissions).

[3] In a related argument, Perez claims that the prosecutor misstated the evidence because he claims that he anally penetrated E.C. "once only, briefly," and then "disengaged himself from the situation[.]" SAG, at 32. Perez's attempts to minimize his abhorrent behavior on grounds that White's behavior was even more abhorrent should be soundly rejected.

In sum, Perez has not shown that any of the prosecutor's remarks were improper, let alone flagrant and ill-intentioned. Moreover, Perez also has not shown that any of the prosecutor's remarks, even if improper, were so irreparably prejudicial that a curative instruction from the trial court would not have been sufficient to ameliorate any possible prejudice. Brown, 132 Wn.2d at 561. Perez's prosecutorial misconduct arguments are wholly without merit.

Nonetheless, Perez attempts to bolster his prosecutorial misconduct claim by recasting it as a claim of ineffective assistance of counsel. SAG, at 36-37. These arguments should be rejected as well.

To prove ineffective assistance of counsel, the defendant must meet both prongs of a stringent two-part test by showing: 1) that counsel's performance was actually deficient (the performance prong); and 2) that the deficient performance resulted in actual prejudice (the prejudice prong). Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's performance is deficient only when it falls below an objective standard of reasonableness. State v. Stenson, 132

Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs only when, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have been different. McFarland, 127 Wn.2d at 335.

Trial counsel's decisions about whether to object are tactical decisions, and only in egregious circumstances relating to evidence central to the State's case will the failure to object constitute incompetent representation that justifies reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, rev. denied, 113 Wn.2d 1002 (1989). To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show the absence of legitimate tactical reasons, that the trial court would have sustained an objection, and that the result of the trial would have been different if an objection had been made and sustained. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

As explained at length above, the prosecutor's closing arguments were neither improper nor prejudicial. Therefore, Perez cannot meet his burden under either prong of the Strickland test, and thus, his claim fails on this basis as well.

3. THE EVIDENCE PRODUCED AT TRIAL WAS MORE THAN SUFFICIENT TO SUPPORT THE JURY'S CONCLUSION THAT PEREZ WAS GUILTY OF RAPE IN THE SECOND DEGREE AND UNLAWFUL IMPRISONMENT.

Finally,[4] Perez argues that the evidence produced at trial was insufficient to sustain his convictions for two counts of rape in the second degree[5] and one count of unlawful imprisonment. SAG, at 38-48. This claim should be rejected. Ample evidence produced at trial supports the jury's conclusion that Perez and his accomplice White had sexual intercourse with E.C. by forcible compulsion, and that they unlawfully restrained her without her consent by force or intimidation. This Court should affirm.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any rational juror could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A defendant who challenges the sufficiency of the

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[4] Perez also makes a cumulative error claim; however, appellate counsel also made a claim of cumulative error to which the State has already responded. *See* Appellant's Opening Brief (Amended), at 47-48, and Brief of Respondent, at 43-44.

[5] The two convictions were based on multiple penetrations by both defendants. RP (3/23/12) 2595. The trial court found that the two counts of second-degree rape constituted the same criminal conduct for sentencing purposes. CP 200-12.

evidence admits the truth of the evidence and all reasonable inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 929 P.2d 1068 (1992).

Furthermore, an appellate court considering a sufficiency challenge must defer to the jury's determination as to the weight and credibility of the evidence, and to the jury's resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. In addition, circumstantial evidence is not to be considered any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence supporting a jury verdict. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In sum, under these deferential standards, any question as to the meaning of the evidence should be resolved in favor of the jury's verdict whenever such an interpretation is reasonable. Under these well-settled standards for evidentiary sufficiency, the evidence produced at trial amply supports the rape and unlawful imprisonment charges beyond a reasonable doubt.

a. Ample Evidence Proves Rape By Forcible Compulsion.

As found by the jury in this case, a person commits rape in the second degree by engaging in sexual intercourse by forcible compulsion. RCW 9A.44.050(1)(a). "Forcible compulsion" means force that overcomes the victim's resistance or a threat, express or implied, that places the victim in fear of death or physical injury. RCW 9A.44.010(6). The victim's knowledge that a defendant possesses weapons is relevant evidence of an implied threat. State v. Bright, 129 Wn.2d 257, 270-71, 916 P.2d 922 (1996).

Moreover, accomplices are legally accountable for one another's actions. RCW 9A.08.020. Therefore, White's actions are relevant to proving Perez's guilt, and vice versa, when the evidence shows that they were acting in concert. Further, as stated above, under the applicable standard for reviewing a sufficiency challenge, all reasonable inferences from the direct and circumstantial evidence admitted at trial must be drawn in favor of the conviction. Salinas, 119 Wn.2d at 201; Delmarter, 94 Wn.2d at 638.

In this case, after Perez and White had both punched E.C. in the face so hard that her eye socket was fractured, they took her downstairs to "get her cleaned up" in accordance with Troy O'Dell's

directive. RP (12/7/11) 1450-51; RP (12/12/11) 1781. After forcing E.C. to change her clothes in front of them, Perez and White took E.C. into Perez's room. RP (12/12/11) 1785, 1789. At that point, Perez and White 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. Perez was present when White made these statements, and White's statements obviously included Perez. White and Perez then took turns having anal intercourse with E.C. for about 15 to 20 minutes. RP (12/12/11) 1794. Both Perez and White 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. submitted to being anally penetrated multiple times by both Perez and White because she believed that they were going to kill her if she did not comply. E.C. had seen both Perez and White in possession of firearms, and she knew that there were guns in Perez's room "all the time." RP (12/12/11) 1788-89, 1791. E.C.'s fears in this regard were corroborated by physical evidence;

pursuant to a search warrant, the police found a gun case, magazines, and ammunition in the basement where E.C. had been raped. RP (12/1/11) 750-51, 756, 859-60, 862, 869; RP (12/8/11) 1604-05, 1608, 1610, 1612-13.

This evidence proves that E.C. was raped by forcible compulsion by both Perez and White. They told her that they were going to kill her, but White said she would live if she allowed both of them to have sexual intercourse with her. E.C. knew that they had the means to kill her, and she believed that they would do so if she did not comply with their demands. Moreover, Perez and White raped E.C. after both of them had punched her so hard that her facial bones were fractured; this also proved that E.C.'s fear of the defendants was well-founded. Accordingly, the jury's conclusion that both Perez and White had sexual intercourse with E.C. by means of forcible compulsion (*i.e.,* because of a threat that placed her in fear of death or physical injury) is amply supported by the evidence.

Nonetheless, Perez claims that the evidence was insufficient to prove forcible compulsion because E.C. asked Perez and White to wear condoms that she provided, because E.C. had been

smoking crack for several days and was "paranoid," and because Perez did not anticipate that E.C. would take their threats seriously. SAG, at 40-42. But these arguments concern the weight, credibility, and meaning of the evidence, not its sufficiency. Such matters are the sole province of the jury to resolve, and cannot be reviewed. Thomas, 150 Wn.2d at 874-75. Perez's arguments are wholly without merit, and this Court should affirm his convictions for rape in the second degree.

b. Ample Evidence Proves Unlawful Imprisonment.

As was also found by the jury in this case, a person commits unlawful imprisonment by knowingly and unlawfully restraining another person. RCW 9A.40.040(1). Restraint means "to restrict a person's movements without consent and without legal authority" in a manner that substantially interferes with the person's liberty. RCW 9A.40.010(1). Restraint is "without consent" if it is accomplished by force, intimidation, or deception. RCW 9A.40.010(1)(a).

In this case, in addition to the evidence outlined above, the evidence also proved that Perez and White would not allow E.C. to leave the house after they were finished raping her. To the contrary, they told her that they could not allow her to leave, and White slept on the couch with E.C. in Perez's room that night in order to ensure that she did not try to escape. RP (12/12/11) 1792-94. Perez and White even followed E.C. when she got up to go to the bathroom during the night. RP (12/12/1) 1792. E.C. believed that Perez and White would kill her if she tried to leave. RP (12/12/11) 1796. E.C.'s face was very swollen and painful from the defendants' initial physical assault, and she was very much in need of medical attention. RP (12/7/11) 1402, 1406. Yet E.C. did not leave the house until a day or so later, when no one was present except for a business associate of Troy O'Dell's, because of her fear of the defendants. RP (12/12/11) 1799. This evidence, along with the evidence discussed above, is more than sufficient to show that Perez and White knowingly and unlawfully restrained E.C. by means of force and intimidation.

Nonetheless, Perez argues that E.C.'s belief that she would be killed if she tried to leave the house was the product "of her own paranoia," and that E.C. did not avail herself of her first opportunity

to escape; therefore, he posits that it was not reasonable for the jury to believe her. SAG, at 45-47. Like his arguments regarding the rape charges, however, these arguments concern the weight, meaning, and credibility of the evidence; thus, they must be rejected. Thomas, 150 Wn.2d at 874-75.

In addition, Perez argues that any restraint of E.C. in this case was "incidental" to raping her. SAG, at 47-48. Even if such an argument were legally tenable,[6] it is factually untenable in this case because the rape had already occurred when Perez and White restrained E.C. from leaving the house. Thus, any argument that the restraint was merely "incidental" to the rape must necessarily fail on factual grounds as well as legal grounds.

In sum, the jury's verdicts in this case are supported by sufficient evidence, and Perez's arguments to the contrary are without merit.

D. CONCLUSION

For the reasons stated above, and for the reasons stated in the Brief of Respondent, this Court should affirm Perez's

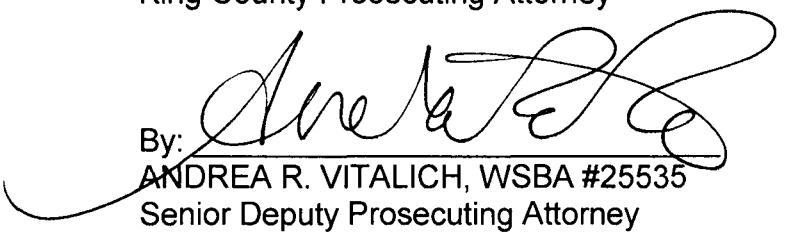
[6] Perez acknowledges that this argument is contrary to this Court's decision in State v. Phuong, 174 Wn. App. 494, 299 P.3d 37 (2013). *See* SAG, at 48.

convictions for assault in the second degree, two counts of rape in the second degree, and unlawful imprisonment.

DATED this 17th day of December, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



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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 Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the State's Response to Statement of Additional Grounds, in STATE V. LUIS PEREZ, Cause No. 69005-1-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.

U Brame
Name

12/17/13
Date

Done in Seattle, Washington