NO. 44186-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

DAVID LAWRENCE DARLING, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01562-7

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

Darling was charged by information with unlawful imprisonment, felony harassment, felony violation of a court order and interfering with reporting, all domestic violence offenses, all committed against victim Julia Barnes. CP 7-8.

The charges stemmed from an incident that occurred on August 26, 2012. On that date, in the late evening hours, Julia Barnes was asleep outside (as she was homeless) when her intimate partner, the defendant, David Darling (hereafter 'Darling') approached her, and was angry and yelling at her. RP at 102-10; 177. At trial Barnes did not testify entirely consistently with her reports to police, or with the statement she filled out immediately following the incident. RP at 110, 114. But the evidence supports that the events that transpired occurred as follows: Darling

prevented Barnes from leaving the area by blocking her repeatedly with his body as she attempted to flee from him. RP at 117, 123 177-78. Darling physically assaulted Barnes by grabbing her and dragging her down a hill. RP at 116-17; 177-78. Darling made threats to Barnes that included threatening to harm her, and threatening to kill her. RP at 118, 177-78. Barnes was in fear and took the threats seriously. RP at 118. A security guard, Mr. Pelham, saw Darling pull Barnes down the hill while Barnes screamed, "Stop, stop you're killing me." RP at 226. Mr. Pelham shined a light on them and told Darling to move away from Barnes. RP at 228. Mr. Pelham called police. RP at 229.

Police interviewed Barnes and Pelham; Barnes also filled out a written statement describing what had occurred. In Barnes' statements to police she described that Darling had woken her up, started yelling at her, punched her in the fact, chest and stomach and threatened to kill her before he then drug her down the hill. RP at 102-23;177-78. Police also heard Darling threaten to kill Barnes once he got out of jail. RP at 184, 187. Specifically, in Officer Gutierrez's presence, Darling said that they "can't keep me in jail forever. When I get out, I'm going to beat her fucking ass. I'm going to kill her. They can't keep me in jail." RP at 187.

At the time of this incident there was a valid and served restraining order preventing Darling from having any contact with Barnes. RP at 79, 183.

Darling was convicted by a jury of unlawful imprisonment, felony harassment and felony violation of a court order. CP 42, 44, 46, 48. At sentencing, the trial court imposed 60 months on the felony violation of a court order and 38 months for the unlawful imprisonment and harassment convictions, all concurrent to each other. CP 52-66. At sentencing, Darling argued that two of his three crimes should constitute same criminal conduct. RP at 360. The trial court found that the unlawful imprisonment and felony court order violation constituted same criminal conduct. RP at 360. However, the trial court specifically found that the harassment conviction was separate in time from the other two crimes and therefore did not constitute "same criminal conduct."

C. ARGUMENT

I. THE INFORMATION INCLUDES ALL THE ESSENTIAL ELEMENTS OF UNLAWFUL IMPRISONMENT

Darling alleges the information charging Unlawful Imprisonment was defective for failing to include all the essential elements of the crime. An Information must include all essential elements of a crime in order to

afford notice to an accused of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). As Darling is challenging the sufficiency of the information for the first time on appeal, the information shall be construed "quite liberally." *State v. Moavenzadeh*, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998) (quoting *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992)). Darling contends that the information is deficient for failing to define the word "restraint." In *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013), the Washington Supreme Court rejected the defendant's contention that the definition of an element of an offense is an essential element that must be alleged in the charging document. *Allen*, 176 Wn.2d at 628-30.

Unlawful Imprisonment is set by statute as "[a] person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040. The term "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). The State charged Darling with one count of unlawful imprisonment, using the statutory language under RCW 9A.40.040. For an information to be constitutionally sufficient, the essential elements must "appear[] in any form, or by fair construction can be found" in the information. *Kjorsvik*, 117 Wn.2d at 108. If all the

essential elements are in the information, the court inquires as to whether the defendant "has shown that he was nonetheless prejudiced by any vague or inartful language in the charge." *Kjorsvik*, 117 Wn.2d at 111.

Darling relies in part on a recent Division One holding in *State v. Johnson*, 172 Wn. App. 112, 297 P.3d 710 (2012). However, Division One reversed its holding in *Johnson, supra* after the Supreme Court issued its opinion in *State v. Allen, supra.* In its holding in *State v. Phuong*, 174 Wn. App. 494, 299 P.3d 37 (2013), Division One found that the defendant's contention that the statutory definition of 'restrain' is an essential element of the crime of Unlawful Imprisonment fails. *Phuong*, 299 P.3d at 86. The defendant in *Phuong*, claimed that a statutory definition, not a constitutional imperative, was required to be in the charging document. *Id.* Division One relied upon the Supreme Court's holding in *Allen, supra* to deny the defendant in *Phuong*'s claim and upheld the information as constitutionally sufficient. *Id.*

In *State v. Allen, supra*, the Supreme Court addressed whether, in a case involving the crime of Felony Harassment, the true threat requirement is an essential element of the statute. *Allen*, 294 P.3d at 687. The Court rejected the defendant's contention that the true threat requirement is an essential element of felony harassment, and relied upon Court of Appeals' cases that found the true threat requirement is not an

essential element of harassment. *Id.* at 688-89 (citing *State v. Tellez*, 141 Wn. App. 479, 170 P.3d 75 (2007); *State v. Atkins*, 156 Wn. App. 799, 236 P.3d 897 (2010)).

As in the cases above in which the Court found it sufficient to instruct the jury on the definition of "true threat" (referring to *Allen, supra, Tellez, supra,* and *Atkins, supra*), it was sufficient for the trial court in Darling's case to instruct the jury on the definition of "restrain." Darling was sufficiently notified of the crime for which he was charged, including all essential elements, by the information, which reflects the statutory language of the Unlawful Imprisonment statute. As in *Phuong, supra*, the information was sufficient, and the necessary elements of unlawful imprisonment are found and fairly implied by the charging document. Darling's convictions for Unlawful Imprisonment should be affirmed.

II. DARLING'S HARASSMENT AND UNLAWFUL IMPRISONMENT CONVICTIONS WERE PROPERLY COUNTED IN HIS OFFENDER SCORE AS THEY ARE NOT "SAME CRIMINAL CONDUCT"

Darling claims the trial court erred in failing to find that his unlawful imprisonment conviction and harassment conviction should constitute "same criminal conduct" for sentencing purposes. The trial court did not abuse its discretion or misapply the law in making its sentencing determination and Darling's claim fails.

An appellate court reviews a trial court's determination of whether two crimes constitute "same criminal conduct" for abuse of discretion or misapplication of the law. *State v. Aldana Graciano*, 176 Wn.2d 531, 537, 295 P.3d 219 (2013). If the record below adequately supports either conclusion on the same criminal conduct analysis, then the matter lies appropriately within the trial court's discretion and will not be disturbed. *Id.* at 538. However, if the record only possibly supports one conclusion, then a sentencing court abuses its discretion by arriving at the contrary conclusion. *Id.* Here, the facts in Darling's case support the trial court's conclusion that harassment and unlawful imprisonment were not "same criminal conduct" for sentencing purposes, so much so that Darling didn't request the court make this determination. If nothing else, the record supports a reasonable finding of either same criminal conduct or not, and the trial court did not abuse its discretion.

Darling bears the burden of proving that his two current offenses constitute "same criminal conduct." *Aldana Graciano*, 176 Wn.2d at 539. RCW 9.94A.589(1)(a) provides that "'Same criminal conduct' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). This statute is construed narrowly and disallows most assertions of "same criminal conduct." *State v. Flake*, 76

Wn. App. 174, 180, 883 P.2d 341 (1994). There are three factors which must be present for two crimes to be considered "same criminal conduct:" 1) committed at the same time and place; 2) involve the same victim; and 3) require the same criminal intent. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). If a defendant fails to prove any one of the three factors, then the crimes are not "same criminal conduct." *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

To determine whether the two crimes committed involve the same criminal intent purposes for determining "same criminal conduct," the court must examine each statute and compare them to determine whether the required intents are the same or different for each crime. *State v. Hernandez*, 95 Wn. App. 480, 484, 976 P.2d 165 (1999). When a defendant's intent objectively changes from one crime to the other, the two crimes do not contain the same criminal intent. *State v. King*, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1015 (2003). To determine where two crimes constitute "same criminal conduct," a reviewing court should look to whether one crime furthered the other, or whether both crimes were part of a scheme or plan. *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). If one crime can be said to have been completed before commencement of the second, then the two crimes involved different intents and do not constitute the same

criminal conduct. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

In Darling's case it is clear that the crimes he committed of harassment and unlawful imprisonment do not constitute "same criminal conduct." Though these two crimes involved the same victim and occurred on the same evening, they did not occur at the same time and did not involve the same objective intent. Though Darling claims that the record below is unclear on the time and place of the harassment, this does not lead to a finding of same time and place as the unlawful imprisonment. A "same criminal conduct" analysis does not rely on the absence of facts clarifying the time and place of the crime. *See Aldana Graciano*, 176 Wn.2d at 541. Darling has the burden of proving all factors of a "same criminal conduct" analysis and as he failed to do so with time and place, it was not an abuse of discretion for the trial court to find that the crimes did not constitute same criminal conduct. *See id.*

Further, Darling did not have the same objective intent in committing the crimes of unlawful imprisonment and harassment. Harassment requires a knowing threat and unlawful imprisonment requires knowing restraint. RCW 9A.46.020; 9A.40.040. Darling's intent in committing the harassment was to make a realistic threat thereby frightening the victim. The objective intent in Darling committing the

unlawful imprisonment was to restrict the victim's movements. The harassment did not further the unlawful imprisonment and the unlawful imprisonment did not further the harassment.

Darling did not meet his burden at sentencing, and continues to fail to meet his burden in proving that the two crimes of harassment and unlawful imprisonment constitute "same criminal conduct." A record that is unclear or does not establish that certain crimes are separate does not mean the defendant has met his burden in establishing "same criminal conduct." *See Aldana Graciano*, 176 Wn.2d at 540 (holding that at best the record was unclear as to whether the crimes were committed at the same time and place and therefore the defendant did not meet his burden in proving "same criminal conduct."). As Darling has failed to prove these crimes constitute "same criminal conduct" this Court should deny his assignment of error and affirm the trial court's finding below as there was no abuse of discretion or misapplication of the law.

III. DARLING HAD THE BENEFIT OF EFFECTIVE ASSISTANCE OF COUNSEL

a. DEFENSE COUNSEL WAS NOT INEFFECTIVE

Darling argues his attorney was ineffective for failing to argue that his unlawful imprisonment and harassment convictions constituted "same criminal conduct" for sentencing purposes. To establish ineffective

assistance of counsel, a defendant must show that the attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice exists where there is a reasonable probability that, but for counsel's performance, the result would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To satisfy the prejudice prong, Darling must show that the outcome probably would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption of effective assistance of counsel which a defendant must overcome to prevail on a claim. *McFarland*, 127 Wn.2d at 335.

Counsel need not make frivolous arguments that are not supported by law in order to be effective. It is reasonable that defense counsel for Darling understood the law and would know that the law provides that the "same criminal conduct" provision is applied narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). Also, there is no line of case law that provides any support for the argument that unlawful imprisonment and harassment necessarily constitute the same criminal conduct. It is therefore not ineffective for defense counsel to agree that unlawful imprisonment and harassment were not "same criminal conduct."

b. DARLING CANNOT SHOW PREJUDICE

Even if this court finds Darling's attorney's performance fell below an objective standard of reasonableness, Darling is unable to show the prejudice which is required to prevail on a claim of ineffective assistance of counsel. *See Strickland v. Washington, supra.* When a defendant alleges a same criminal conduct error within the context of an ineffective assistance of counsel claim, the court on appeal reviews for prejudice by determining whether the sentencing court would have concluded the current offenses were the same criminal conduct if counsel had argued the issue. *See State v. Beasley*, 126 Wn. App. 670, 686, 109 P.3d 849 (2005); *see also McFarland, supra* at 335. Darling is unable to meet this burden and cannot show any prejudice.

As discussed above, Darling's convictions for harassment and unlawful imprisonment did not occur at the same time and place and did not have the same objective intent for committing them. As Darling could not have met his burden in showing that these two crimes constituted "same criminal conduct," Darling cannot establish prejudice for his attorney's actions. *See* Argument in section III-B above.

At a minimum, the trial court could have reasonably determined that Darling could not meet his burden in showing "same criminal conduct" and the trial court would not have abused its discretion by failing

to find "same criminal conduct." As such, Darling has not established prejudice for his attorney's actions. Absent prejudice, Darling's claim of ineffective assistance of counsel fails.

D. CONCLUSION

The information charging Darling with Unlawful Imprisonment properly apprised him of the essential elements of the crime against him. His convictions for harassment and unlawful imprisonment do not constitute same criminal conduct and his attorney was not ineffective for failing to so argue. The trial court should be affirmed in all respects.

DATED this 30th day of August, 2013.

Respectfully submitted:

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