

NO. 44694-4-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SAMUEL OSCAR GONZALEZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 10-1-03776-6

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether Defendant failed to show ineffective assistance of counsel where he failed to show that his trial counsel's performance was deficient.
2. Whether the sentencing court properly counted Defendant's three rape convictions as separate and distinct rather than as same criminal conduct under RCW 9.94A.589(1)(a), and therefore, properly calculated Defendant's offender score.
3. Whether Defendant's convictions should be affirmed where, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt.

B. STATEMENT OF THE CASE.

1. Procedure

On September 3, 2010, the State charged Samuel Oscar Gonzalez, hereinafter referred to as "Defendant," by information with three counts of first degree rape of Y.Z.-F. in counts I through III, first degree kidnapping of Y.Z.-F. in count IV, first degree kidnapping of Lisvi Munoz in count V, first degree robbery of Y.Z.-F. in count VI, first degree robbery of Lisvi Munoz in count VII, and first degree criminal impersonation in count VIII. CP 1-6, 7-8. Each count alleged a firearm sentence enhancement. CP 1-6.

On December 16, 2011, the State filed an amended information which changed count VII to first degree criminal impersonation, changed count VIII to first degree robbery of Viviana Garcia, and added count IX,

first degree robbery of Maria Espinoza, and count X, first degree kidnapping of Juan Espinoza, Jr. CP 56-61. All counts continued to allege firearm sentence enhancements. CP 56-61.

On September 14, 2012, the State filed a second amended information, which added the RCW 9A.44.040(1)(b) alternative means of committing first degree rape to counts I through III, deleted the RCW 9A.40.020(1)(d) alternative means of committing first degree kidnapping from counts IV and V, changed count IX to first degree kidnapping of Viviana Garcia, changed count X to first degree robbery of Maria Espinoza, and added count XI, first degree kidnapping of Juan Espinoza, and count XII, first degree robbery of Maria Espinoza. CP 75-81. *See* RP 4-6.

Finally, on November 18, 2012, the State filed a third amended information, which corrected the statutory citation in the criminal impersonation count from RCW 9A.60.040(1)(b) to 9A.60.040(1)(a). CP 84-90, RP 4. The State eliminated all of the firearm enhancements it had previously alleged. CP 84-90; RP 5.

The case was called for trial on October 18, 2012. RP 3-6. The defendant was arraigned on the third amended information and entered pleas of not guilty. RP 4-6.

The parties filed agreed motions in limine, CP 91-93; RP 17-18, and the defendant made additional oral motions. RP 26-31.

The parties selected a jury, RP 18-19, and gave their opening statements. RP 34.

The State called Viviana Garcia, RP 35-86, Lakewood Police Officer Jason Cannon, RP 88-118, Lakewood Police Detective Darin Sale, RP 118-32, Lakewood Police Detective Bryan Johnson, RP 132-40, Lakewood Police Investigator Shirley McLamore, RP 140-58, Lakewood Police Sergeant Andrew Gildehaus, RP 185-213, 355-57, 928-39, Maria Espinoza, RP 220-44, 252-267, Juan Espinoza, RP 267-324, Pierce County Sheriff's Deputy Jason Bray, RP 324-36, Pierce County Sheriff's Detective Brian Stepp, RP 357-81, Pierce County Sheriff's Detective Mike Hayes, RP 381-403, Pierce County Sheriff's Detective John Jiminez, RP 405-17, Yessica Zamora-Flores, RP 431-505, Lisvi Munoz, RP 509-61, Kelly Morris, RP 561-93, Tacoma Police Officer Matthew Graham, RP 611-23, Tacoma Police Detective Louise Nist, RP 623-54, Tacoma Police Detective Vicki Chittick, RP 655-64, Crime Scene Technician Aubrey Askins, RP 669-91, Tacoma Police Detective Frederick Pavey, RP 692-708, Lakewood Police Sergeant Andrew Suver, RP 726-36, Tacoma Police Detective Timothy Griffith, RP 737-56, Jeffrey Lundberg, RP 762-837, 844-81, 897-910, Tacoma Police Officer Michael Clark, RP 881-89, Tacoma Police Detective Bradley Graham, RP 913-28, and Matthew Quartaro, RP 985-1031.

The State then rested. RP 1031.

The defendant moved to dismiss “those counts in reference to Burger King and to McDonald’s,” i.e., counts VIII, IX, X, XI, and XII, because he argued they were “unsubstantiated except for the statements of Mr. Lundberg.” RP 1031-38. The court denied the motion. RP 1038-39.

The defendant had previously called Evelyn Rivera, RP 948-60, and Jeame Vanessa Gonzales, RP 960-66, out of order to accommodate scheduling concerns. RP 948. The defendant was advised of his right to testify and chose not to. RP 1040-43.

The defense rested. RP 1043.

The court considered the parties’ proposed jury instructions. RP 970-84, 1042. On December 12, 2012, the court took formal exceptions to its proposed instructions. RP 1051-55. The court then read the instructions to the jury. RP 1056-57.

The parties gave their closing arguments. RP 1057-88 (State’s closing argument); RP 1089-1105 (Defendant’s closing argument); 1106-17 (State’s rebuttal argument).

On December 13, 2012, the jury returned verdicts of guilty as charged in the third amended information. CP 175-89.

On March 29, 2013, the court sentenced Defendant to 720 months to life in total confinement, lifetime community custody, and no contact with the victims, among other conditions. CP 233-53. *See* CP 190-216.

The defendant filed a timely notice of appeal the same day. CP 254.

2. Facts

a. McDonald's Incidents.

On the evening of October 4 to 5, 2009, Viviana Garcia was working as a manager at the McDonald's restaurant on Steilacoom Boulevard in Lakewood, Washington. RP 36-38. She was the swing manager, responsible for closing the store, including cleanup, securing the cash, and locking the doors. RP 38-42. Garcia indicated that she emptied the cash from the tills into a deposit bag, entered her personal manager code for the company safe, and placed the bag into the safe for pick up by an armored car company the next day. RP 40-42.

After closing that night, Garcia gave a co-worker a ride to her residence, which was located five to six minutes by car from the restaurant. RP 42-43. When she thereafter left her co-worker's apartment complex, Garcia entered a dark alley, where she saw what she described as "police lights" in her mirror. RP 43. She testified that she thought she was being stopped by a police officer. RP 43.

Garcia pulled over and readied her driver's license and proof of insurance when a man appeared and shined a flash light at her, obstructing her ability to see. RP 44. The man asked if she had a cell phone and when, she indicated that she did, told her to put it on the dashboard. RP 44. He then told her to unlock the car. RP 44. When she did, he entered through the passenger side door, pulled out a gun, and placed it to the side of her

head. RP 44. Garcia testified that the muzzle of the gun felt "kind of cold."
RP 45.

The man told her to turn on her car, informed her that he knew where she worked, and instructed her to go back to work. RP 45. Garcia drove back to the restaurant, and opened the door for the man. RP 46. Once inside, he pushed her and told her to open the safe and take the money out. RP 46. Garcia opened the safe and pulled out all the money, but the man was angry because he only wanted bills, not coins. RP 47. The man began swearing at her because she did not give him the store's money fast enough. RP 47-48.

The man told her that he knew she had two children, and then handcuffed her to a table. RP 48-49. When he left, Garcia was eventually able to work her left hand out of the handcuffs, and thereby extricate herself from the table. RP 50-51, 58. She called her supervisor, Norma Diaz, who called 911, and then locked herself inside a large freezer so that the man could not get to her. RP 52-53, 63.

Officer Jason Cannon was among the Lakewood Police officers who responded to the 911 call. RP 90-91, 102. When Cannon arrived, he found an empty Chevrolet Tahoe parked in front of the store. RP 91.

Garcia came out shortly afterwards with one handcuff around her right wrist. RP 53-54, 63, 95-96, 106.

Officers then went in and searched the building for the man, but found no one. RP 93. While checking the store, Cannon noticed that the

safe was open, that there were some ripped-open money bags near the safe, and some empty cash register drawers. RP 94.

Cannon then came back outside, photographed and then removed the handcuff, and interviewed Garcia. RP 95-96. Garcia described the man who robbed her as a white man, in his mid-20s, who was taller than her, and skinny. RP 66, 114-16. However, Garcia testified that she was too scared and nervous to directly look at the man. RP 74-78. Garcia, whose primary language is Spanish, indicated that the man spoke to her in English with “an English/American accent.” RP 70-71. She testified that from what she was able to observe of the man, he was wearing a blue sweater and a hat that read “cops” or “police.” RP 66, 85.

She also testified that she had worked at the restaurant with a woman named Beatriz, who was the defendant’s girlfriend. RP 58-59. Garcia testified that she had seen the defendant at the restaurant before. RP 59-60.

Garcia was not able to identify any of the individuals pictured in a six-photograph montage as the man who robbed her. RP 143-48. Jeffrey Lundberg was among the people pictured in that montage. RP 148-49.

Lakewood Police Detective Darin Sale was called to the scene, met with Garcia, and walked through the restaurant with her, in part to know what areas on which to focus in processing the scene for fingerprints. RP 122-23. Sale then attempted to find latent fingerprints from the areas the man was likely to have touched, but could not find any. RP 124-25. Sale

also transferred the data from Garcia's phone, and attempted to find latent fingerprints on that phone and on her vehicle. RP 126-28. He did not locate any fingerprints. RP 128. He did, however, find a bag with a partial shoeprint and took that as evidence. RP 130.

Lakewood Police Detective Bryan Johnson examined the handcuffs used in the McDonald's robbery, which he described as a "novelty" made of "pot metal" rather than steel. RP 138. He could not find any fingerprints. RP 138.

b. Burger King Incidents.

Maria Espinoza worked as a manager at a Burger King restaurant on Mountain Highway in Spanaway, Washington. RP 221. She was in charge of closing the restaurant in the early morning of October 25, 2009. RP 222-27. She insured that the customers had left, counted the money from the day, placed that money in the restaurant's safe, locked the doors, and set the alarm. RP 222-26, 235. She then called her son, Juan, for a ride home. RP 227.

When Juan Espinoza arrived in a Ford Mustang to pick up his mother, he saw a black SUV in the parking lot. RP 276. Then, as they were driving home, he "saw a black SUV with really bright headlights" following him "really closely." RP 279.

Juan Espinoza testified that, before he made his final turn, the driver of the SUV activated flashing blue and red "police-like lights." RP

284-85. His mother also described what she believed were “police lights coming behind [them].” RP 228, 254. Juan Espinoza did not recall hearing any siren, RP 285, and Maria Espinoza testified that the vehicle behind them was like an SUV and dark in color, not like the police cars she had seen. RP 229.

However, they did believe that it was a police vehicle and Juan Espinoza stepped out of his own vehicle to explain his driving. RP 285-86, 320, 323-34. When he did so, the SUV occupants told him to turn around, put his hands up, and go back to the driver’s-side door of his own vehicle. RP 286. He noticed that there were two people in the SUV and that one of them had a gun. RP 287-88.

The two men then exited the vehicle behind them, and approached from opposite sides of Juan’s vehicle RP 229-30, 254-55. The one on the passenger side held a gun. RP 230.

Juan Espinoza testified that he heard the man on the passenger’s side tell his mother to turn off the car, which she did. RP 290. That man then took the keys, and gave them to the second man, who was with Juan Espinoza. RP 290. This second man then opened the trunk of Juan Espinoza’s car and told Juan to get inside. RP 290-92.

Juan Espinoza testified that this man was wearing a hooded sweatshirt with a bandana over the lower half of his face. RP 292. He was short, about five-feet-seven- to eight- inches tall, with a “kind of stocky” build. RP 293, 318-19.

Juan Espinoza was handcuffed, and then got into the trunk. RP 295. The man with the gun told Maria Espinoza not to look, and to get into the driver's seat. RP 230-31, 295. When she told him she didn't drive, he grew angry, and had her move to the backseat. RP 231, 257, 296.

The man then entered the driver's seat himself and drove the car back to the Burger King. RP 232, 259. He told Maria Espinoza not to activate the alarm when they returned and threatened her by telling her,

Don't do nothing stupid, don't do no secret code, don't do nothing, because we'll blow your head off. We'll be watching you. We have your son.

RP 401.

The man got her out of the car and told her to open the restaurant door. RP 232-33. After she did so, he followed her inside, with his firearm placed against her back, and demanded that she take him to the office. RP 233, 262-63. The man told her to open the safe and take out all the money, which she did. RP 235-36. As she did so, the man continued to tell her not to look. RP 237. Espinoza testified that the man was wearing a hooded sweatshirt, and was able to describe him as "not fat." RP 237, 255. He left the office once before returning, taking the money, and leaving for good. RP 238. The man also took the store's telephone with him, leaving Espinoza without a telephone. RP 239.

Juan Espinoza testified that, after a period of silence, he heard someone enter the driver's side of the Mustang and start the engine. RP

301-02. The vehicle then began to move, and continued to be driven for about two minutes before again stopping. RP 302. He again heard the door open and close, and heard another vehicle pull up. RP 303. Another vehicle door opened and closed, and the second vehicle pulled away. RP 303. He stayed quiet in the trunk for what he estimated was ten minutes before screaming for help. RP 303-04. No help arrived, though, and he was able to kick the trunk lid open and escape. RP 304. He ran across a street and recognized it as 22nd Avenue. RP 304-05. After trying unsuccessfully to get help at a mobile home park, he knocked on another house without response, and then ran back to the Burger King. RP 307.

Meanwhile, Maria Espinoza had tried to activate the store's alarm, hoping the police would respond, but it did not seem to work. RP 239-40. So, she left the restaurant on foot, and headed for her home. RP 240. As she was walking through the parking lot, she saw and flagged down a police patrol car. RP 241-42. As she was speaking to the officer, she saw her son, still in handcuffs, running towards them. RP 242-43. *See* RP 307-08.

Pierce County Sheriff's Deputy Jason Bray was on patrol on the night of October 24 to 25, 2009, when he was dispatched to investigate a vehicle collision RP 325-27. After he arrived in the area, he saw Maria Espinoza waiving her arms and screaming. RP 327-29. He stopped and contacted her, and she told him that she had been robbed and that her son had been kidnapped. RP 327. He put the information out over the radio

and began talking with her, when he heard Juan Espinoza screaming, “officer help” or “help me officer,” from down the road. RP 328-29.

The fire department removed the handcuffs that were on Juan’s hands, and Bray booked them into property. RP 330-32.

Pierce County Sheriff Detective Brian Stepp was called out to the Burger King to conduct follow-up investigation, and arrived at 4:47 a.m. RP 360-62. After meeting with Bray, he searched the area for cameras that may have captured video of the incident. RP 362-63. He learned from the Burger King’s general manager that there was video taken of the inside of the restaurant, and reviewed it. RP 364-66. It showed that Espinoza re-entered the restaurant with a man wearing a gray, hooded sweatshirt, the hood of which was pulled over his head, and a dark-colored baseball hat. RP 365. There was a logo on the front of the sweatshirt and hat. RP 365. The man was also wearing gloves. RP 365. The man held a handgun in his left hand. RP 365-66. Espinoza removed money from a cash drawer, and apparently placed it in a bag. RP 366. The man left and returned shortly thereafter to take the bag, and then again leave the restaurant for good. RP 366. The video showed the man leaving in a Ford Mustang. RP 366. However, apparently due to technical difficulties, Burger King was unable to give the detective a copy of the video. RP 367.

Pierce County Sheriff’s Detectives Mike Hayes and John Jimenez interviewed Maria and Juan Espinoza at the South Hill Precinct. RP 386, 409-10. Maria informed him that she had placed \$4,4337.37 in the safe

before the robbery that morning in addition to about \$1,500 had been there already. RP 397. Hayes later contacted Burger King district manager Bob Passaretti and obtained a list of former or recently hired employees. RP 393. Neither the defendant's name nor that of Jeffrey Lundberg was on that list. RP 398-99, 402.

Mark Lacey of the Classic View Estates homeowner's association, also provided Jiminez with a video recording of the surveillance camera from the front gate of the Classic View Estates at the time the two men stopped the Espinoza vehicle. RP 410-11. However, detectives were not able to see the license plate number of the suspect vehicle or develop further leads at that time. RP 416-17.

c. Wendy's Incidents.

Y. Z.-F. worked at Wendy's restaurant in 2008 where she met and began dating her future husband, Lisvi Munoz. RP 433-37, 515. On the evening of October 31 through November 1, 2009, Y. Z.-F. was working at a Wendy's restaurant located on Bridgeport and 108th in Lakewood, Washington. RP 438-39, 516. She was working with Lisvi, a man named Daniel, and the manager, Linda. RP 439, 513-14.

After closing, at about 2:30 a.m., she and Munoz walked out together and got into his Mitsubishi Eclipse. RP 440, 516. He began driving her home, which entailed entering and driving on Interstate 5. RP

518-19. It was once he got onto I-5 that he noticed a car following them. RP 519.

Munoz pulled into Y.Z.-F.'s apartment complex parking lot. RP 442. Y. Z.-F. got out of the vehicle to go to her apartment and change so that they could then go to Denny's restaurant. RP 443, 519. When she did so, the car pulled up behind them with flashing red and blue lights like those of a police vehicle. RP 443-444, 519-20. Y. Z.-F. described the car behind them as a dark, four-door vehicle, and believed that they were being stopped by police. RP 444, 446, 480.

A man used a speaker in the car to tell her to step back into her vehicle, which she did. RP 444-45. He also told the driver, Munoz, to step out of the car, not look back, but walk towards his voice. RP 445, 485, 521. Munoz did so and the men told him he was under arrest and placed him in handcuffs. RP 445, 521-22.

Munoz testified that both men had their faces covered, but described both as a bit taller than him, one as skinny and the as "huskier" than he was. RP 529. In fact, Munoz would have called him fat, and estimated his weight to be between 200 and 250 pounds. RP 542-43. Munoz testified that he himself was 5'6" and 200 pounds. RP 538-39. The skinny man was taller than the husky man, who Munoz described as being about 5'6". RP 541, 543. Munoz also testified that both men were wearing latex gloves. RP 538.

One of the men walked up to the driver's side of the Mitsubishi and asked Y. Z.-F. where the trunk release button was located. RP 446, 485-86. Y. Z.-F. testified that she could only see him from the waist down and that he was wearing light, medium-size jeans. RP 446. He asked her for her cell phone and then took it from her. RP 488-89.

One of the men also asked Munoz how to open the trunk. RP 523. He told them, and the men opened it, removed a speaker box that was inside, and told Munoz to get in the trunk. RP 446, 523-25.

A second man then appeared on the passenger side of the vehicle with a black handgun, and asked Y. Z.-F. for the keys to the Wendy's restaurant. RP 447-48. Y. Z.-F. told them that she did not have the keys, and that she was not actually the manager. RP 448-49; 491-92. The men then took Y. Z.-F.'s phone and purse, removed the approximately \$60 in her purse, and placed the purse back in her car. RP 449.

This man with the gun then got into her vehicle and told her that they were leaving. RP 450. The man drove the Mitsubishi out of the parking lot and into a nearby wooded area. RP 452.

Y. Z.-F. testified that the man who got into the car with her had covered his face with something like a ski mask, and that she could only see his eyes, nose, and mouth. RP 450. She testified that she tried not to look at the man because he kept telling her not to look at him and she was scared. RP 450. The man was wearing jeans and a hooded sweatshirt. RP 450.

Nevertheless, Y.Z.-F. described the man as “bigger, he was like an average-sized person.” RP 449. In fact, Y. Z.-F. later told the police that the man was “chubby.” RP 498-99. Munoz also testified that this man was heavy set and “huskier” than he was. RP 529, 529, 531-32.

The man told Y. Z.-F. that if she didn’t have the keys to the restaurant, she had to give him something else. RP 454. Y. Z.-F. understood this to mean something sexual and told the man, no. RP 454. Munoz testified that he could hear Y. Z.-F. saying no from the trunk. RP 528. The man told her that she would have to do what he told her or he would kill her or her boyfriend, Munoz. RP 454.

Munoz, who was still in the trunk, told the man that he would give him money, but the man told him that he didn’t want anything from him. RP 454, 528.

The man then grabbed Y. Z.-F.’s hand, trying to get her to touch his penis. RP 456-58. He started to grab her legs and tried to take off her jacket and pants. RP 456. He was not able to do so, so he unclasped and unzipped her pants instead. RP 456-57, 459. He then touched her vaginal area with his hand and put his fingers inside her vagina. RP 457-58, 479, 503. He also apparently made her touch his penis with her hand. RP 459.

The man later had her get out of the car and took her into the woods. RP 460. The man took down his own pants. RP 467. Y. Z.-F. testified that he was wearing boxer-style underwear that was dark in color with an elastic band around the waist which bore writing of some sort. RP

467-68. Munoz testified that the boxer briefs bore the words "Perry Ellis."
RP 521-33, 537-38.

The man had Y. Z.-F. get on her knees and told her to "suck his dick," i.e., to perform oral sex on him. RP 461. He then held her head to his erect penis by placing his hand on the back of her head. RP 462. Meanwhile, he kept telling her not to look at his face. RP 462.

The man told her to stand up and made her get up. RP 462. He pulled down her pants, turned her away from him, and made her bend over. RP 462. The man then engaged in penile-vaginal intercourse with Y. Z.-F. for about one minute before he told her to move aside and ejaculated. RP 462-63.

He told her that if she told anyone about what he had just done to her, he would kill her or her family because he knew where she lived. RP 464. The man then ran off into the street and shortly thereafter, a black car drove off quickly. RP 465.

Y. Z.-F. opened the trunk and helped Munoz escape, but could not remove his handcuffs. RP 465, 533-34. Munoz testified that Y. Z.-F. was crying and appeared upset at the time. RP 534. They then ran to her parent's residence. RP 465-66. Her mother called the police, and officers responded to the apartment. RP 466.

Tacoma Police Officers Michael Clark and Rasmussen, who were among those officers, contacted Y.Z.-F. and Munoz, and conducted a brief, initial interview. RP 883-86.

Tacoma Police Officer Matthew Graham, who also contacted Munoz, testified that although Munoz was “holding it together,” he was “visibly upset” and in “emotional distress.” RP 614. Munoz had a pair of handcuffs on his right wrist. RP 615. He had removed himself from one side of them and handed the other to Graham. RP 615. Graham noted that the handcuffs, though not exactly a toy, were not law enforcement quality. RP 619. Detective Chittick was later able to remove the other side, collect it, and have forensics personnel take photographs of the marks it had left on his wrist. RP 658-60.

Munoz described the two men who had kidnapped him to Graham. RP 621-22. He stated that one was about 20 years old, about six feet tall, and 165 pounds, wearing a black zip-up hooded sweatshirt, jeans, and white gloves. RP 621.

The second man he described as about 20 years of age, between five foot six and five foot nine, with “a huskier, fat build.” RP 622.

The defendant’s driver’s license, issued on April 20, 2009, indicated that he was five foot eight inches tall, and weighed 205 pounds. RP 744-45. At trial, the defendant’s mother, Evelyn Rivera, described the defendant as five foot six inches tall and 239 pounds. RP 952-53. The defendant’s wife testified that he weighed 235 pounds. RP 964-65.

Officers Clark and Rasmussen transported Y.Z.-F. to Tacoma General Hospital for a sexual assault examination. RP 887. *See* RP 469, 657. Tacoma General Hospital Sexual Assault Nurse Examiner Kelly

Morris examined Y. Z.-F. at 5:55 a.m. on November 1, 2009. RP 562-65, 570, 576. Morris testified that, by that time, Y. Z.-F. appeared calm and quiet, but had tears in her eyes at times. RP 577. However, Morris also testified that she could not complete the genital exam because Y. Z.-F. “was having a very hard time,” “was in tears a lot, and upset.” RP 581. Morris could not visualize any physical injuries. RP 577-81. She took vaginal swabs. RP 582.

Morris testified that Y. Z.-F.’s statements and demeanor were consistent with what she stated occurred and prescribed her antibiotics and “plan B.”¹ RP 589.

Officer Clark took custody of the victim’s clothing and the rape kit after Morris completed her examination, and booked them into the Tacoma Police Department’s property room. RP 887-89.

Y. Z.-F. was then interviewed by Tacoma Police Detectives Chittick and Yglesias. RP 661. Y. Z.-F. accompanied detectives to the crime scene and walked them through it. RP 661. Detective Chittick compared the sole of the shoes that Y. Z.-F. and Munoz were wearing to the shoe impressions at the scene and found that they were “clearly” different patterns. RP 662.

Tacoma Police Detective Louise Nist also responded to the scene, and supervised forensics technicians, who took photos of the scene. RP

¹ “Plan B” is a brand name of an emergency contraceptive pill designed to prevent pregnancy after intercourse.

627-629 . Nist testified that when she observed the area around where the Mitsubishi Eclipse had been left, she saw a tire impression and a number of shoe impressions. RP 636, 643. They were photographed and marked with evidence markers. RP 637, 644. Nist looked for the victim's cell phone, but could not find it. RP 649.

She had the Eclipse itself towed to headquarters where it was searched. RP 645. Tacoma Police Crime Scene Technician Aubrey Askins took photos of the vehicle both at the scene and at headquarters, after a search warrant was obtained. RP 681-83. Inside the vehicle was a blue Wendy's shirt with Munoz's name on it. RP 683. They searched for bodily fluids using an alternate light source and vacuumed for trace evidence, but were unable to find either. RP 683-84.

Tacoma Police Detectives Vicki Chittick and Yglesias drove around the area of the Wendy's restaurant to attempt to locate a surveillance camera which may have taken footage of the suspect vehicle or suspects. RP 663. They reviewed footage from a camera at a nearby gas station but were unable to see anything of value. RP 663.

Aubrey Askins arrived at the scene, and after completing a walk through, took photographs of the scene, collected a cigarette holder, and casted and collected one of the shoe impressions. RP 672-74, 677-78. She was unable to find any fingerprints on the cigarette holder. RP 686.

Tacoma Police Detectives Frederick Pavey and Filbert contacted Shane Lynn, the manager of the Swan Creek Apartments where the

incident occurred on November 3, 2009, and viewed surveillance video of part of the incident. RP 694-70.

Detective Timothy Griffith prepared a photo montage and showed it to Y. Z.-F. and Munoz, but neither were able to identify their attackers. RP 740-41. However, that same day, he learned that “there had been a DNA identification of a possible suspect,” and a search warrant was obtained for the defendant’s residence and a vehicle that he was known to have been driving at the time, a Volkswagen Touareg. RP 742-43.

On September 2, 2010, Lakewood Police Sergeants Suver and Gildehaus, assisted by Lakewood and Tacoma officers, served a search warrant at the defendant’s residence. RP 728-29, 929. As they were entering the defendant’s bedroom, they saw a coat rack and hanging on that rack, a ball cap with the word “police” written across the front. RP 730. Detective Suver also found three pairs of boxer briefs with the brand name “Perry Ellis” stitched into the waistband in the defendant’s bedroom, inside the defendant’s dresser. RP 732. Officers also found some cash in the top dresser drawer, along with the defendant’s wallet, his car keys, and some papers with his name as well as the address of the residence searched listed on them. RP 735, 930-34. The defendant’s mother testified that the defendant bought the cap in May 2010. RP 955.

On September 2, 2010, Griffith and Gildehaus found the defendant’s vehicle at the Larson Volkswagen dealership on South

Tacoma Way in Tacoma. RP 746, 935, 938. *See* RP 958, 965-66. The dealership staff indicated that the vehicle had been traded in. RP 755.

Detectives had the vehicle photographed and then searched it. RP 747-52. They found an envelope with the defendant's name on it located under the front passenger seat, but nothing else of significance inside the vehicle. RP 749-50, 935-38.

However, Griffith did notice that the vehicle itself had silver trim that ran horizontally along the bottom of its doors. RP 748-49; Exhibit 418 (photo of vehicle). When Griffith reviewed the video from Classic View Estates, where Juan and Maria Espinoza had been kidnapped, he saw similar silver trim on the door of the vehicle from which one of the kidnappers emerged. RP 753-54. In fact, Detective Griffith testified that the silver trim in the video "appeared to match in every respect that [which] was visible [on] the Touareg that [he] found on the lot." RP 756. He also testified that, despite the quality of the video, the shape and size of the suspect vehicle "appear[ed] to be remarkably similar" to the defendant's Volkswagen Touareg. RP 754, 742-43, 958.

Jeffrey Lundberg testified that he worked as a salesman for Larson Volkswagen from November 2007 through October 2009. RP 764-65. He met the defendant when the defendant came to the dealership to buy a car, and ultimately sold the defendant the Volkswagen Touareg that Detective Griffith searched. RP 766-67, 861.

Lundberg testified that the defendant called him and asked him if he was interested in making some money by robbing a McDonald's restaurant. RP 779-80. The defendant told him that his girlfriend and the mother of his child was a manager of the place to be robbed and had given him information, RP 779, such that, it was an "inside job." RP 865, 867.

Lundberg agreed and went to the defendant's residence. RP 781. The defendant showed him a set of "blue and red LED lights" about the size of "a large book" that plugged into a car's cigarette lighter and flashed at different intervals. RP 782-83. They planned to go to the McDonald's at closing, wait for the employees to leave, stop the manager, and take her back to the restaurant. RP 782.

They put the lights in Lundberg's vehicle, a Volkswagen GLI, and drove to and parked on the street across from the McDonald's. RP 784, 863-64. They were both wearing hooded sweatshirts and gloves. RP 784. After an approximately 15 to 20 minute wait, people began leaving the restaurant, including one that the defendant was able to identify as the manager. RP 785-86. She got into a vehicle with another person and, as they were leaving, the defendant instructed Lundberg to drive. RP 786-87. They followed the manager's vehicle into an apartment complex. RP 787. When it again left the apartment parking lot, they pulled in behind it and turned on what Lundberg described as "[t]he police lights, the red and blues." RP 788.

The defendant then got out and approached the manager in her vehicle. RP 788. Lundberg saw the defendant say something to her and then enter her vehicle via the passenger door. RP 788. They then pulled off and Lundberg followed them back to the McDonald's, parking across the street. RP 789. About five to ten minutes later, the defendant came out of the store, jogged to Lundberg's vehicle, and got in with a large McDonald's bag. RP 789. The two returned to the defendant's house, where they discovered that they had taken a little over \$11,000, and split the money between them. RP 791-92, 864-65.

On October 25, 2009, the defendant called Lundberg and asked him if he wanted to do another robbery. RP 793-94. They took the defendant's Volkswagen Touareg to the Burger King on Mountain Highway, and waited for the employees to leave. RP 793-997. As they were waiting, a Ford Mustang pulled into the parking lot. RP 796. The manager came out, locked the restaurant door, and got into the Mustang. RP 796. Lundberg and the defendant then followed the Mustang out of the parking lot to a gated community. RP 796-98. When they pulled up to the gate, they put the lights on the dashboard and turned them on. RP 799-800.

They then both got out of the vehicle. RP 800. The defendant approached the male driver, and Lundberg the female passenger. RP 800. Lundberg told her to drive back to the Burger King, but she told him she didn't know how to drive. RP 801. The defendant handcuffed the man and put him in the trunk and Lundberg got into the driver's seat of the

Mustang. RP 801-02. They went back to the Burger King, where he had the manager open the restaurant, disarm the alarm, and open the safe. RP 804. He gave her a bag and told her to put the money inside, which she did. RP 804. Lundberg sat the bag down on the counter, told her to wait, and when he got outside, realized he had forgotten the bag. RP 805. He came back, got the bag and left for good. RP 805.

When he got outside, the defendant wasn't there, so he called him. RP 806. The defendant said he was a short way down the road and Lundberg took the Mustang to meet him. RP 806. He left the Mustang and got into the defendant's Touareg. RP 807.

Lundberg had the defendant stop at a 7-11 so he could call 911 to report that there was a vehicle in distress parked on the side of the road. RP 808. Lundberg testified that he called because he wanted to the police to "get that kid out of the trunk." RP 808.

Lundberg and the defendant then went to Lundberg's residence, where they divided what he estimated was approximately four to five thousand dollars of stolen money. RP 809-10.

Lundberg testified that he was wearing a hooded sweatshirt with a big "D.C." logo on it, and a hat with an emblem on it, probably an "H" or "DC." RP 811-12. Lundberg does not own any hats with the words "police" or "cops" on them. RP 812.

On Novemeber 1, 2009, Lundberg and the defendant took Lundberg's black Volkswagen GLI to the Wendy's restaurant in

Lakewood, Washington. RP 816-17, 863-64. They parked across the street in a residential area and waited until the restaurant closed. RP 817.

Because they could not see the front door of the Wendy's, the defendant was standing away from the vehicle where he could observe what was happening. RP 817-18. He returned to Lundberg's vehicle and told Lundberg to follow a Mitsubishi Eclipse. RP 818.

After the Eclipse pulled into an apartment parking lot, Lundberg pulled in behind it and activated the blue and red lights. RP 819. Lundberg told the driver to step out of the vehicle and walk backwards towards him. RP 819-20. He testified that he had heard this language on the television show "Cops." RP 820. The driver did as instructed. RP 821.

Lundberg and the defendant then exited their vehicle. RP 822. Lundberg testified that he was armed with a pellet gun and that the defendant had a firearm in his waistband. RP 822. Lundberg placed the driver in handcuffs and, after locating the trunk release, placed him in the trunk of the Eclipse. RP 822-23.

Meanwhile, the defendant was on the passenger side of the Eclipse, speaking to the female passenger. RP 823. The defendant told Lundberg that the woman was not the manager and did not have the keys. RP 823. Lundberg then grabbed her purse to try to confirm that she did not have the keys, and not finding them, took the girl's cell phone. RP 823-24.

Lundberg testified that he told the defendant they should leave, but the defendant told him he wanted to drive the Eclipse to an adjacent

construction site so that the victims would not be as close to a telephone when they left. RP 824-25. The defendant drove the Eclipse into the construction site until it was out of sight and Lundberg pulled his vehicle out of the parking lot and about 15 to 20 feet ahead of the road down which the defendant had driven. RP 825. The defendant was gone for about five to ten minutes, and Lundberg tried to contact him unsuccessfully by cell phone. RP 825-26. The defendant was out of breath by the time he returned to Lundberg's vehicle. RP 826.

Lundberg testified that the defendant was shorter by several inches than he was and that the defendant was "chubby" at the time. RP 826-27, 862-63. He said they were both wearing hooded sweatshirts. RP 827.

The defendant threw Y. Z.-F.'s cell phone out the window while he and Lundberg were driving on Interstate 5. RP 828. After they arrived at Lundberg's residence, Lundberg put the red and blue lights in a shopping bag and placed the bag in a utility closet. RP 835.

In February, 2010, after Lundberg was arrested for an unrelated robbery, he called his wife and told her to remove drug paraphernalia, anything related to a gun, and the lights from the house and throw them all away. RP 835-36, 898-99. He believed that she did so. RP 836.

Lundberg pleaded guilty to first degree robbery and unlawful possession of a firearm for an unrelated bank robbery, first degree robbery for his part in the October 5, 2009 McDonald's robbery, first degree

robbery for his part in the October 25, 2009 Burger King robbery, and attempted robbery for his part in the attempted Wendy's robbery. RP 774.

Tacoma Police Detective Bradley Graham took possession of the rape kit collected from Y.Z.-F., and sent it, along with DNA² samples from Munoz, to Orchid Cellmark, a laboratory in Texas, for DNA analysis. RP 917-18. In October, 2009, Graham obtained a DNA sample from the defendant and sent this to Orchid Cellmark, as well. RP 919-21.

Matthew Quartaro is supervisor of forensics at Orchid Cellmark, a Dallas, Texas laboratory which provides DNA testing in criminal cases from across the country. RP 986. Quartaro testified that Orchid Cellmark received the rape kit from Graham on November 5, 2009. RP 995-96. Quartaro testified that the Orchid Cellmark analyzed the samples for the presence of semen and found semen on the vaginal, vulvar, and perianal swabs. RP 997.

Orchid Cellmark developed DNA profiles of the semen found in the vaginal and vulvar samples, but could not do so for the perianal sample. RP 997-1000, 1011-12. The "sperm cell fraction" of the vaginal sample contained a mixture of at least two men's DNA. RP 1000. The sperm cell fraction of the vulvar sample originated from a single unknown man. RP 1000.

² Deoxyribonucleic Acid. RP 988.

When Quartaro later received DNA samples from Munoz, he compared those to the DNA profile developed from the vaginal and vulvar swabs. RP 1001-03. He could not exclude Munoz as a potential contributor of DNA to the sperm cell fraction the vaginal swab, which contained DNA from more than one man. RP 1007. However, he did exclude him as a contributor of DNA to the sperm cell fraction of the vulvar swab, which contained the DNA of only one unknown male, RP 1008, meaning that there was still “another unknown male present.” RP 1003.

When Quartaro received the defendant’s DNA sample, he compared it to the DNA profiles developed from the sperm cell fraction of vaginal and vulvar swabs. RP 1005-06. The defendant could not be excluded as a contributor to the DNA of the sperm from either the vaginal or the vulvar samples. RP 1006. With respect to the vaginal sample, which contained DNA from more than one source, the probability of an unrelated person in the North American population having the same profile is one in 3,771. RP 1007.

Quartaro testified that, with respect to the sperm cell fraction of the vulvar sample, which contained DNA from only one man, the probability of selecting an unrelated person in the North American population with the same profile is one in 732,600,000. RP 1008.

Although this number was drawn from a Caucasian database, Quartaro used it because it was the most conservative number. RP 1028-

30. The probability of selecting an unrelated person in the southwest hispanic population with the same profile was one in 859,200,000. RP 1029. The probability of selecting an unrelated person in the North American population of African descent with the same profile was one in 1,233,000,000. RP 1029. The population of the United States at the time of trial was approximately 315,000,000. RP 1008-09.

These results were peer-reviewed and no sign of contamination was found. RP 1026-28.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE FAILED TO SHOW THAT HIS TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT.

“Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X).” *State v. Yarbrough*, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009); *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. *Yarbrough*, 151 Wn. App. at 89.

“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.” *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001) (citing *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); *State v. Thomas*,

109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See also *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27.

A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); *In re Personal Restraint of Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Specifically, “[t]o establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness.” *Johnston*, 143 Wn. App. at 16. “The reasonableness of trial counsel’s performance is reviewed in light of all the circumstances of the case at the time of counsel’s conduct.” *Id.*; *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). “Competency of counsel is determined based upon the entire record below.” *State v. Townsend*, 142 Wn.2d 838,

15 P.3d 145 (2001) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)).

With respect to the second prong, “[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Yarbrough*, 151 Wn. App. at 90. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Cienfuegos*, 144 Wn.2d at 229.

In the present case, the defendant argues that his trial counsel was ineffective for failing to request WPIC 6.05 as a jury instruction. Brief of Appellant (BOA), p. 25-35. The record shows otherwise.

To find that a defendant received ineffective assistance of counsel based on the failure of trial counsel to request a jury instruction, it must be shown that the defendant was “entitled” to the instruction, that counsel’s performance was deficient in failing to request the instruction, and that the failure to request the instruction prejudiced the defendant. *See State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

The model accomplice testimony instruction provides that

[t]estimony of an accomplice, given on behalf of the [State], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

WPIC 6.05.

“In *State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984)[, *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 554, 782 P.2d 1013 (1989) and *State v. McKinsey*, 116 Wn.2d 911, 914, 810 P.2d 907 (1991)], the Supreme Court harmonized two previous cases on the necessity of giving a cautionary accomplice testimony instruction, *State v. Gross*, 31 Wn.2d 202, 216, 196 P.2d 297 (1948), and *State v. Carothers*, 84 Wn.2d 256, 269, 525 P.2d 731 (1974)[, *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588, 787 P.2d 906 (1988)]. *State v. Sherwood*, 71 Wn. App. 481, 484-85, 860 P.2d 407 (1993), *review denied by, State v. Sherwood*, 123 Wn.2d 1022, 875 P.2d 635 (1994). The Court held that

(1) [I]t is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies *solely* on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends on the extent of corroboration. If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.

Sherwood, 71 Wn. App. at 485 (quoting *Harris*, 102 Wn.2d at 155) (emphasis added).

In other words, an accomplice testimony instruction is only mandatory, and hence a defendant is only entitled to such an instruction, where the prosecution relies “solely upon the uncorroborated testimony of

an accomplice.” *Carothers*, 84 Wn.2d at 269; *State v. Sherwood*, 71 Wn. App. 481, 860 P.2d 407 (1993). See *State v. Allen*, 161 Wn. App. 7827, 744, 255 P.3d 784 (2011); *State v. Willoughby*, 29 Wn. App. 828, 630 P.2d 1387 (1981); *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984).

In this case, Jeffrey Lundberg’s accomplice testimony, RP 762-837, 844-81, 897-910, was substantially corroborated by other evidence in the record, and therefore, the defendant would not have been entitled to an accomplice testimony cautionary instruction. See *State v. Harris*, 102 Wn.2d at 155.

Indeed, Lundberg’s testimony was almost entirely corroborated by other evidence in the record.

With respect to the *McDonald’s robbery*, which gave rise to counts VIII and IX, Lundberg testified that the defendant told him that his girlfriend was a manager of the McDonald’s to be robbed and that she had given him information to assist in that robbery. RP 779. This testimony was corroborated by Viviana Garcia, the manager of the McDonald’s in question, who testified that the defendant’s girlfriend, Beatriz did indeed work at that restaurant with her, and that Garcia had actually seen the defendant at the restaurant before. RP 59-60.

Lundberg further testified that the defendant owned a set of “blue and red LED lights” that plugged into a car’s cigarette lighter and flashed at different intervals, and that they used these “police lights” to stop

Garcia's vehicle after she left the McDonald's at closing. RP 782-83, 788. This was also corroborated by Garcia, who testified that, after closing, as she was returning to her residence, she saw what she described as "police lights" in her mirror. RP 43. She testified that she thought she was being stopped by a police officer, and pulled over. RP 43-44.

Lundberg testified that the defendant then got out of his vehicle and approached Garcia in her vehicle, said something to her, and entered her car via the passenger door before that car pulled off and Lundberg followed it back to the McDonald's. RP 788-89. Garcia corroborated this, testifying that a man approached her, told her to put her cell phone on the dashboard and to unlock the car, before entering it via the passenger door and forcing her to drive back to the McDonald's, and allow him inside. RP 44- 46.

Finally, Lundberg testified that about five to ten minutes after entering the restaurant, the defendant came out, jogged to Lundberg's vehicle, and got in with a large McDonald's bag full of over \$11,000. RP 789, 791-92, 864-65. This was corroborated by Garcia, who testified that once inside the restaurant, the man made her open the safe and take out all the money. RP 46-48.

Although the defendant argues that because Garcia was unable to accurately describe him as her assailant, "Lundberg's testimony is the only 'evidence' corroborating [his] presence at the McDonald's robbery," BOA, p. 32-34, the record shows otherwise.

While it is true that Garcia described the man who robbed her as a white man, in his mid-20s, who was skinny, RP 66, she also testified that she was too scared and nervous to look at the man. RP 74-78, In fact, she testified that she never looked directly at his face. RP 85. Though she testified that the man spoke to her with “an English/American accent,” which presumably meant that he did not have a perceptible accent to a native English speaker, she also testified that her “primary language” was Spanish, not English. RP 70-71. Moreover, she testified that the man was wearing a sweater, RP 66, which may have disguised his true girth. Most important, however, Garcia testified that the man who robbed her was wearing a cap with the word “cops” or “police” written on it, RP 66, 85, and police found a cap with the word “police” written on it in the defendant’s bedroom. RP 730.

Hence, Lundberg’s testimony that the defendant was the person who robbed Garcia was substantially corroborated by other evidence in the record.

With respect to the Burger King robbery, which gave rise to counts X, XI, and XII, Lundberg testified that they took the defendant’s black Volkswagen Touareg to the Burger King, waited for the manager to come out and enter a Ford Mustang driven by a third person, and then followed that Mustang until it reached a gated community, where they turned on the defendant’s red and blue lights to stop the Mustang. RP 793-800, 816.

This testimony was corroborated by the testimony of several witnesses and by physical evidence. Both Maria and Juan Espinoza testified that Juan picked her up after the Burger King closed in a Ford Mustang, and that they drove from the restaurant to the gate of their gated community in that Mustang. RP 227, 276. Juan Espinoza testified that, as they were driving home, he “saw a black SUV with really bright headlights” following him “really closely.” RP 279. He testified that, before he made his final turn, the driver of the SUV activated flashing blue and red “police-like lights.” RP 284-85. His mother also described what she believed were “police lights coming behind us.” RP 228, 254.

Contrary to the defendant’s contention that “Lundberg’s testimony is the only ‘evidence’ corroborating [his] presence at the Burger King robbery,” BOA, p. 34, Lundberg’s testimony regarding the defendant’s presence was corroborated by both testimonial and physical evidence. Specifically, police recovered video footage of the defendant’s vehicle stopping the Mustang at the gate. RP 410-11. Detective Griffith, who later searched the defendant’s Touareg, noticed that that it had silver trim that ran horizontally along the bottom of its doors. RP 748-49; Exhibit 418 (photo of vehicle). When Griffith reviewed the video from Classic View Estates, where Juan and Maria Espinoza had been kidnapped, he saw similar silver trim on the door of the vehicle from which one of the kidnappers emerged. RP 753-54. In fact, Detective Griffith testified that the silver trim in the video “appeared to match in every respect that

[which] was visible [on] the Touareg that [he] found on the lot.” RP 756. He testified that the shape and size of the suspect vehicle “appear[ed] to be remarkably similar” to the defendant’s Volkswagen Touareg. RP 754, 742-43, 958.

Lundberg further testified that the defendant approached the male driver, while he approached the female passenger. RP 800. This was corroborated by Juan and Maria Espinoza, who testified that two men exited the vehicle behind them, and approached from opposite sides of Juan’s vehicle. RP 229-30, 254-55.

Lundberg testified that the defendant handcuffed the man and put him in the trunk while he got into the driver’s seat of the Mustang. RP 801-02. Juan Espinoza corroborated this, testifying that one of the men handcuffed him, opened the Mustang’s trunk, and made him get inside. RP 290-92, 295. Juan Espinoza’s description of the man at trial matched that of the defendant. RP 293, 318-19.

Lundberg testified that he told Maria Espinoza to drive back to the Burger King, but she told him she didn’t know how to drive. RP 801. Both Juan and Maria Espinoza corroborated this. RP 231, 257, 296. Lundberg testified that he then drove the Mustang back to the Burger King, RP 801-03, which Maria Espinoza confirmed in her testimony. RP 232, 259.

Lundberg testified that, when they arrived at the Burger King, he had the manager open the restaurant, disarm the alarm, and open the safe. RP 804. Maria Espinoza confirmed this. RP 232-33, 235-36, 262-63.

Lundberg testified that he gave Espinoza a bag and told her to put the money inside, which she did, but that he left without the bag, and had to come back in to get it before leaving for good. RP 804-05. Maria Espinoza corroborated this, testifying that the robber left the office once before returning, and taking the money, and leaving for good. RP 238.

Lundberg testified that after he left with the defendant, he had the defendant stop at a 7-11 so he could call 911 to report that there was a vehicle in distress parked on the side of the road. RP 808. Lundberg testified that he called because he wanted to the police to “get that kid out of the trunk.” RP 808. Pierce County Sheriff’s Deputy Jason Bray partially corroborated this by testifying that, on the night of October 24 to 25, 2009, he was dispatched to investigate a vehicle collision in the area. RP 325-27.

Thus, Lundberg’s testimony regarding the defendant’s participation in the Burger King robbery, which gave rise to counts X, XI, and XII, was substantially corroborated by other evidence in the record.

The defendant does not argue that Lundberg’s testimony regarding the defendant’s participation in the attempted robbery of Wendy’s, the kidnapping of Y. Z.-F., and Munoz, and the rape of Y. Z.-F., giving rise to counts I through VII, was not substantially corroborated. *See* BOA, p. 25-35. Indeed, the record shows this testimony was almost entirely corroborated by other evidence in the record.

Lundberg testified that after Munoz pulled his Mitsubishi Eclipse into the apartment parking lot, Lundberg pulled in behind it and activated the blue and red lights, told the driver to step out of the vehicle and walk backwards towards him, and that the driver did so. RP 819-21. Both Y. Z.-F., and Munoz corroborated this through their own testimony. RP 443-45, 485, 519-22.

Lundberg testified that the defendant then exited their vehicle armed with a firearm. RP 822. Y.Z.-F. confirmed this, testifying that a second man appeared on the passenger side of the vehicle with a black handgun, and asked her for the keys to the Wendy's restaurant. RP 447-48.

Lundberg testified that he placed the driver in handcuffs and, after locating the trunk release, placed him in the trunk of the Eclipse. RP 822-23. Munoz corroborated this by testifying that after he told the men how to open the trunk, one of them opened it, removed a speaker box that was inside, and told Munoz to get in the trunk. RP 446, 523-25.

Lundberg testified that the defendant was speaking to the female passenger when he told Lundberg that the woman was not the manager and did not have the keys. RP 823. Lundberg then grabbed her purse to try to confirm that she did not have the keys, and not finding them, took the girl's cell phone. RP 823-24. Y. Z.-F. corroborated this testimony entirely. RP 448-49; 491-92.

Lundberg testified that the defendant then got in and drove the Eclipse into the construction site until it was out of sight and Lundberg pulled his vehicle out of the parking lot and about 15 to 20 feet ahead of the road down which the defendant had driven. RP 825. The testimony of Y.Z.-F. and Munoz again largely corroborated this account. RP 450, 452.

Both Y.Z.-F. and Munoz gave descriptions of the man who entered their car that were consistent with a description of the defendant. Y. Z.-F. told police that the man was “chubby.” RP 498-99, 529, 529, 531-32. Munoz described him described as about 20 years of age, between five foot six and five foot nine, with “a huskier, fat build.” RP 622. The defendant’s driver’s license, issued on April 20, 2009, indicated that he was five foot eight inches tall, and weighed 205 pounds. RP 744-45.

Y. Z.-F. testified that he was wearing boxer-style underwear that was dark in color with an elastic band around the waist which bore writing of some sort, RP 467-68, and Munoz testified that the boxer briefs bore the words “Perry Ellis.” RP 521-33, 537-38. Police found three pairs of Perry Ellis boxer briefs matching this description in the dresser of the defendant’s bedroom. RP 732.

Thus, Jeffrey Lundberg’s accomplice testimony was substantially corroborated by other evidence in the record.

Because an accomplice testimony instruction is only mandatory where the prosecution relies “solely upon the uncorroborated testimony of

an accomplice,” *Carothers*, 84 Wn.2d at 269, the defendant would not have been entitled to such an instruction here.

Given that the defendant would not have been entitled to this instruction, his trial counsel’s performance cannot be considered deficient for failing to request that instruction. See *State v. Cienfuegos*, 144 Wn.2d at 227.

Therefore, the defendant has failed to show ineffective assistance of counsel and his convictions and sentence should be affirmed.

2. THE SENTENCING COURT PROPERLY COUNTED DEFENDANT’S THREE RAPE CONVICTIONS AS SEPARATE AND DISTINCT RATHER THAN AS SAME CRIMINAL CONDUCT UNDER RCW 9.94A.589(1)(a), AND THEREFORE, PROPERLY CALCULATED DEFENDANT’S OFFENDER SCORE.

At sentencing, a defendant’s current offenses must be counted separately in calculating his or her offender score unless the trial court enters a finding that they “encompass the same criminal conduct.” RCW 9.94A.589(1)(a).

“[S]ame criminal conduct” means “two or more crimes that require [1] the same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim.” RCW 9.94A.589(1)(a); *State v. Walker*, 143 Wn. App. 880, 890, 181 P.3d 31 (2008); *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999).

The Legislature intended the phrase “same criminal conduct” to be construed narrowly, *State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994), and the absence of any one of these criteria prevents a finding of same criminal conduct. *Walker*, 143 Wn. App. at 890; *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

“Intent in this context means the defendant’s objective criminal purpose in committing the crime.” *Walker*, 143 Wn. App. at 891. To determine whether two or more criminal offenses involve the same criminal intent, the Washington Supreme Court established the objective criminal intent test, which requires a court to focus on “the extent to which a defendant’s criminal intent, as objectively viewed, changed from one crime to the next.” *State v. Dunaway*, 109 Wn.2d 207, 214-15, 743 P.2d 1237 (1987); *State v. Lessley*, 118 Wn.2d 773, 777-778, 827 P.2d 996 (1992). The Court also “consider[s] whether one crime furthered the other.” *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). Thus, this Court has held that “evidence of a gap in time between” two or more crimes together with “the activities and communications that took place during that gap in time, and the different methods of committing the [crimes]” can be “sufficient to support a finding that the crimes did not occur at the same time and that [the defendant] formed a new criminal

intent when he committed the second [or subsequent crime].” *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

At sentencing, “it is the defendant who must establish the crimes constitute the same criminal conduct.” *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013).

On review, “determinations of same criminal conduct are reviewed for abuse of discretion or misapplication of law.” *State v. Graciano*, 176 Wn.2d 531, 535-38, 295 P.3d 219 (2013); *State v. Maxfield*, 125 Wn.2d 378, 402, 866 P.2d 123 (1994) (“[t]he trial court’s determination whether two offenses require the same criminal intent is reviewed by this court for abuse of discretion or misapplication of the law”).

In the present case, the defendant contends that “the trial court erred by counting the three rapes as separate charges for purposes of calculation of offender score and sentencing.” BOA, p. 37, 36-39. The record shows otherwise.

The defendant’s three acts of first degree rape, while committed against the same victim, were not committed at the same time and place, and were not committed with the same criminal intent.

After the defendant, armed with a firearm, drove Y.Z.-F. out of the parking lot and into a nearby wooded area, RP 452, he made her touch his penis. RP 455-56, 458. He then unclasped and unzipped her pants, touched her vaginal area with his hand, RP 456-58, and ultimately put his fingers

inside her vagina, thereby engaging her the digital-vaginal rape charged in count I. RP 479, 503. *See* CP 84-90, 175.

After the defendant completed this rape, he removed a CD from the stereo and threw it on the floor. RP 460. He then got out of the car, walked to the passenger door, opened it, grabbed Y.Z.-F., and told her to get out of the car. RP 460. The defendant grabbed her by the jacket and made her walk with him into a wooded area. RP 460. He then pulled down his pants, and told her to get on her knees. Only then did he engage the oral-penile rape charged in count III. RP 461. *See* CP 84-90, 180. He did so by placing his hand on the back of her head and holding her head to his erect penis. RP 462.

After the defendant completed the oral-penile rape, he withdrew his penis from the victim's mouth. *See* RP 462. He then made the victim stand up again. RP 462. He pulled down her pants. RP 462. He turned her away from him. RP 462. He told her to bend over. RP 462. He then forced her to bend over. RP 462. Only then did the defendant commit the penile-vaginal rape charged in count II. RP 462-63. *See* CP 84-90, 177.

Thus, the rape charged in count I occurred at a different place from those charged in counts II and III. The first rape, charged as count I, occurred in the car and the second and third rapes, charged as counts II and III, occurred in a wooded area outside of the car. This alone renders the rape charged in count I separate criminal conduct from those charged

in counts II and III. See *Walker*, 143 Wn. App. at 890; RCW 9.94A.589(1)(a).

Moreover, none of the rapes occurred at the same time. The first rape in the car was complete before the second rape in the woods began, and the oral-penile rape in the woods was complete before the defendant repositioned the victim and began the penile-vaginal rape. Therefore, none of the rapes occurred at the “same time,” and, under RCW 9.94A.589(1)(a), none can be the “same criminal conduct.”

Finally, even were these times and locations considered to be legally the same, the defendant formed a new criminal intent between each of the rapes.

Here, as in *Grantham*, the defendant “completed the first rape before commencing the second,” *Grantham*, 84 Wn. App. at 859, and between those rapes he turned his attention first to the car’s stereo and the CD it was playing and then to forcibly removing the victim from the car and taking her elsewhere. RP 460. Hence, the defendant’s intent to engage in digital-vaginal intercourse was complete before he even left the car, and certainly before he committed the second act of oral-penile rape. Here, as in *Grantham*, the defendant, after completing the first rape, “had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.” *Grantham*, 84 Wn. App. at 859. When, as this Court held in *Grantham*, the defendant chose the latter he “form[ed] a new criminal intent to commit the second act.” *Id.*

The defendant also completed the second rape before commencing the third, and between those rapes, had the presence of mind to pull down the victim's pants and reposition both himself and the victim. In other words, the defendant's intent to engage in oral-penile intercourse was complete before he commenced the final rape. Again, the defendant "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." *Grantham*, 84 Wn. App. at 859. When he chose the latter he formed a new criminal intent to commit the third and final rape. *See Id.*

Thus, counts I, II, and III involved different criminal intents. Moreover, count I was committed at a different place than counts II and III, and no count was committed at the "same time."

Therefore, the sentencing court did not err by concluding that counts I, II, and III were not the "same criminal conduct" under RCW 9.94A.589(1)(a), and the defendant's sentence should be affirmed.

3. DEFENDANT'S CONVICTIONS SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of

all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). “In a claim of insufficient evidence, a reviewing court examines whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,’ ‘viewing the evidence in the light most favorable to the State.’” *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, “[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt.” *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, “[d]eterminations of credibility are for the fact finder and are not reviewable on appeal.” *Brockob*, 159 Wn.2d at 336; *State v. Locke*, 175 Wn. App. 779, 788-89, 307 P.3d 771, 776 (2013).

In the present case, although the defendant seems to argue that there is insufficient evidence to support any of his convictions³, he bases this argument on a contention inconsistent with the applicable standard of review. BOA, p. 39-46. Specifically, he argues that only “absent Lundberg’s testimony,” would there be “no evidence whatsoever connecting [him] to any of the crimes, except arguably to [counts I through VII],” and then argues that Lundberg’s testimony should be disregarded because it was uncorroborated and/or not credible. BOA, p. 40-46.

However, “[a] claim of insufficiency admits the truth of the State’s evidence,” *Salinas*, 119 Wn.2d at 201, and the State’s evidence in this case included the testimony of Jeffrey Lundberg. RP 762-837, 844-81, 897-910. Therefore, Lundberg’s testimony cannot be disregarded. Rather, it must be considered true for purposes of analyzing the sufficiency of the evidence. When it is, as the defendant admits here, BOA, p. 40, 43, 44, there is sufficient evidence to support all of defendant’s convictions.

Therefore, those convictions should be affirmed.

D. CONCLUSION.

Defendant failed to show ineffective assistance of counsel because he failed to show that his trial counsel’s performance was deficient.

³ The defendant later concedes that, given the DNA evidence and standard of review, his convictions in counts I through III, and perhaps I through VII, may be “supported by sufficient evidence.” BOA, p. 46.

The sentencing court properly counted Defendant's three rape convictions as separate and distinct rather than as same criminal conduct under RCW 9.94A.589, and therefore, properly calculated Defendant's offender score.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt.

Therefore, Defendant's convictions and sentence should be affirmed.

DATED: March 14, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney


BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date: 3/14/14 Signature: C. Johnson

PIERCE COUNTY PROSECUTOR

March 14, 2014 - 10:43 AM

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