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Division III
State of Washington

No. 29774-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL R. SHAFER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ASOTIN COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Following a home invasion robbery, Nathaniel Shafer pled guilty to one count of first degree burglary, two counts of first degree robbery, and one count of first degree kidnapping. At sentencing, the trial court counted each offense separately in the offender score. But because the kidnapping was committed to further the robbery, the kidnapping and robbery of the same victim amounted to the "same criminal conduct" for sentencing purposes. Therefore, the court erred in counting the kidnapping conviction separately. To the extent Mr. Shafer waived his right to raise the issue by his attorney's failure to object, he received ineffective assistance of counsel.

In addition, Mr. Shafer is entitled to withdraw his guilty plea because it was not knowing, intelligent and voluntary. First, Mr. Shafer was misinformed of the offender score as a result of the parties' failure to appreciate that two of the offenses were the same criminal conduct. Second, the facts alleged in the police report show the kidnapping was only incidental to the robbery and a jury could not have found Mr. Shafer guilty of a separate count of kidnapping beyond a reasonable doubt. Therefore, there is an insufficient factual basis for the plea to the kidnapping charge.

B. ASSIGNMENTS OF ERROR

1. Mr. Shafer's convictions for first degree robbery and first degree kidnapping should have been treated as the same criminal conduct at sentencing and thus his offender score was erroneously calculated.

2. Mr. Shafer's Sixth Amendment right to the effective assistance of counsel was violated when his attorney failed to argue that his convictions for kidnapping and robbery of the same victim were the same criminal conduct.

3. Mr. Shafer's guilty plea was involuntary in violation of due process because he was misinformed of the offender score calculation.

4. Mr. Shafer's guilty plea was involuntary in violation of due process because there was an insufficient factual basis for the kidnapping charge.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Two current offenses amount to the "same criminal conduct," and shall be counted as only a single offense in the offender score, if they were committed at the same time and place, involved the same victim, and required the same objective criminal intent. Where a person commits a kidnapping to further a robbery,

robbery is the objective intent behind both crimes. Do Mr. Shafer's convictions for kidnapping and robbery of the same victim amount to the "same criminal conduct," where they occurred at the same time and place and the purpose of the kidnapping was to further the robbery?

2. Where a defendant's two convictions amount to the same criminal conduct, defense counsel provides deficient performance by failing to argue same criminal conduct at sentencing. Did Mr. Shafer receive constitutionally ineffective assistance of counsel, prejudicing him, where his two convictions for robbing and kidnapping the same victim amounted to the same criminal conduct but defense counsel did not raise the issue below?

3. A guilty plea is involuntary in violation of due process if based on misinformation about the sentencing consequences of the plea. Was Mr. Shafer's guilty plea involuntary where it was based on misinformation about the offender score calculation?

4. A guilty plea may not stand if there is an insufficient factual basis in the record to support the plea. Was there an insufficient factual basis for the plea to the kidnapping charge where the facts show the kidnapping was merely incidental to the robberies?

D. STATEMENT OF THE CASE

On August 3, 2009, Mr. Shafer was charged with one count of first degree burglary (RCW 9A.52.020); one count of first degree kidnapping of Trevor Morton (RCW 9A.40.020); one count of first degree kidnapping of Kayla Edmonson (RCW 9A.40.020); one count of first degree robbery of Trevor Morton (RCW 9A.20.021); and one count of first degree robbery of Kayla Edmonson (RCW 9A.20.021). CP 1-5. The information alleged Mr. Shafer "intentionally abducted" the victims "to facilitate commission of any felony or flight thereafter." Id. All of the charges carried firearm enhancement allegations. Id.

On February 10, 2010, the parties entered a negotiated plea agreement. CP 16-17. The State agreed to amend the information by consolidating the two counts of first degree kidnapping into a single count, and by withdrawing all of the firearm enhancement allegations. CP 16. The State also agreed to recommend a high-end sentence of 144 months for the kidnapping count, the most serious charge. CP 16. In exchange, Mr. Shafer agreed to plead guilty to the charges in the amended information. CP 16-17.

Mr. Shafer entered an Alford¹ plea. To determine whether there was a sufficient factual basis for the plea, the trial court considered the facts alleged in the police officer's report in support of the certification for determination of probable cause.² 2/10/10RP 6; CP 8-11.

According to the report, on the evening of August 1, 2009, Trevor Morton and his girlfriend Kayla Edmonson were at home watching television on the couch when they heard a knock at the door. CP 8. Mr. Morton went to the door to look through the eye hole and a man outside kicked the door open, striking him in the head. CP 8. Two men entered and one of them pointed a handgun in Mr. Morton's face and told him and Ms. Edmonson to get on the couch and put their heads down. CP 8. They complied. CP 8. The man with the gun stayed in the living room with them while the other man went from room to room collecting several of Mr. Morton's personal belongings. CP 8.

Meanwhile, the man with the gun tried to tie Mr. Morton's hands behind his back using zip ties, but Mr. Morton turned around and hit him. CP 8. Morton managed to wrestle the gun away from the suspect and tried to fire it at him, but could not because the

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 1632 (1970).

safety was on. CP 8-9. The suspect then grabbed him by the throat and choked him until he lost consciousness. CP 9.

The next thing Mr. Morton remembered was waking up on the floor with both his hands tied behind his back with zip ties. CP 9. Soon thereafter the suspects left the trailer. CP 9. Mr. Morton then got up, went into the kitchen, and cut the zip ties from his wrists with a knife. CP 9. He also cut the zip ties from Ms. Edmonson's wrists. CP 9. When she was free, he ran to a neighbor's trailer and had the neighbor call 911. CP 9.

The suspects took five medicinal marijuana plants, a flat-screen television, a "WII" video game system and several games, a cellular telephone, prescription bottles of methadone and something else, and \$200 in cash. CP 9.

At the guilty plea hearing, the trial court established Mr. Shafer had reviewed the guilty plea statement, guilty plea agreement, and amended information with his attorney. RP 2-3, 6. The court also established the parties understood the standard sentence range for the kidnapping charge was 108 to 144 months. 2/10/10RP 4. That range was arrived at by counting all four

² A copy of the police officer's report is attached as an appendix.

convictions separately in the offender score, for an offender score of 7.³ CP 30.

The trial court found the plea was knowing, intelligent and voluntary. RP 13. The court followed the prosecutor's recommendation and imposed a term of 144 months confinement for the kidnapping charge. RP 14; CP 35.

E. ARGUMENT

1. MR. SHAFER'S CONVICTIONS FOR KIDNAPPING AND ROBBERY OF THE SAME VICTIM AMOUNTED TO THE "SAME CRIMINAL CONDUCT" AND SHOULD HAVE COUNTED AS ONLY ONE OFFENSE IN THE OFFENDER SCORE

Mr. Shafer was charged with a single count of first degree kidnapping of "Trevor Morton and/or Kayla Edmonson." CP 19. He was also charged with two counts of first degree robbery, one for each victim. CP 20-21. The kidnapping and robbery charges for the same victim amounted to the "same criminal conduct" for sentencing purposes and should have counted as only one offense in the offender score.

³ Because all of the current offenses are "violent offenses" for purposes of the Sentencing Reform Act, each counted as two points in the offender score. See RCW 9.94A.030(54)(a)(i); RCW 9.94A.525(8); RCW 9A.40.020(2); RCW 9A.56.200(2); RCW 9A.52.020(2).

a. Two offenses that occur at the same time and place, involve the same victim, and result from the same objective criminal intent amount to the "same criminal conduct" for sentencing purposes. When a person is convicted of two or more offenses, they count as one crime in the offender score if they "encompass the same criminal conduct." RCW 9.94A.589(1)(a). "Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. All three prongs of the same criminal conduct test must be met to support a finding of "same criminal conduct." State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The State bears the burden of proving by a preponderance of the evidence that two or more offenses amount to separate criminal conduct. RCW 9.94A.500(1); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996).

b. The kidnapping and robbery of the same victim amounted to the "same criminal conduct" as a matter of law. There should be no question that the kidnappings and robberies occurred at the same time and place. Also, the kidnapping charge, which covered both victims, involved the same victim as one of the

robbery charges. Finally, the kidnappings and robberies resulted from the same objective criminal intent because the kidnappings were committed to further the robberies.

Whether two crimes involved the same criminal intent for purposes of RCW 9.94A.589(1)(a) is measured by determining whether the defendant's criminal intent, viewed objectively, changed from one crime to another. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987); State v. Israel, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002). Objective intent may be determined by examining whether one crime furthered the other or whether both crimes were part of a recognizable scheme or plan. Israel, 113 Wn. App. at 295. If two or more crimes are continuous, uninterrupted, and committed within a close time frame, it is unlikely the defendant formed an independent criminal intent between each separate act. State v. Tili, 139 Wn.2d 107, 124, 985 P.2d 365 (1999). If the defendant's intent does not change from one crime to the next, it is the same objective intent. Id.

In Dunaway, 109 Wn.2d at 217, the Washington Supreme Court held "the kidnapping and robbery of a single victim should be treated as one crime for sentencing purposes." The facts in Dunaway are similar to the facts in this case. Dunaway pled guilty

to two counts of first degree kidnapping and two counts of first degree robbery. Id. at 212. He admitted he got into a car with the two victims, showed them a gun, and told them to give him the cash they had on them; he took money from each. Id. at 211-12. He then had them drive to Seattle and when they got there, he told one of them to go inside a bank and withdraw more money. Id. When she did not return, he took control of the car, drove some distance away, and then got out of the car. Id.

The Supreme Court concluded that Dunaway's kidnapping and robbery of each victim "were intimately related." Id. at 217. His objective remained the same with respect to each crime: he committed the kidnapping to further the robbery. Indeed, Dunaway pled guilty to intentionally abducting his victim with the intent to commit robbery. Id. It was Dunaway's very intent to commit robbery that enabled the prosecutor to raise the charge from second degree to first degree kidnapping. Id. Because robbery was the objective intent behind both crimes and because the crimes were committed at the same time and place, they encompassed the same criminal conduct. Id.; see also State v. Longuskie, 59 Wn. App. 838, 847, 801 P.2d 1004 (1990) (applying Dunaway and holding first degree kidnapping and first degree child

molestation encompassed same criminal conduct where kidnapping furthered criminal objective of committing child molestation, and where underlying felony enabled State to elevate kidnapping charge to first degree); Annyas v. Cole, 2010 WL 4482103 (W.D. Wash. 2010) (applying Dunaway and holding kidnapping and attempted murder encompassed same criminal conduct where defendant abducted victim to further crime of attempted murder).

Dunaway is indistinguishable from this case. Like Dunaway, Mr. Shafer pled guilty to intentionally abducting his victim for the purpose of facilitating a robbery. CP 19. Also as in Dunaway, it was Mr. Shafer's very intent to commit robbery that enabled the prosecutor to raise the charge from second degree to first degree kidnapping. See RCW 9A.40.020(1)(b) ("A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent . . . [t]o facilitate commission of any felony or flight thereafter"); RCW 9A.40.030(1) ("A person is guilty of kidnapping in the second degree if he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree."). Finally, just like in Dunaway, the kidnapping furthered the robbery. One of the suspects restrained

the victims while the other suspect went from room to room collecting items to steal. CP 8.

In sum, the robbery and kidnapping of a single victim encompassed the same criminal conduct because they occurred at the same time and place and involved the same criminal intent. Dunaway, 109 Wn.2d at 217. Therefore, Mr. Shafer's sentence is erroneous because the crimes were counted separately in the offender score.

c. Mr. Shafer did not waive his right to challenge the legal error that occurred in the calculation of his offender score.

Generally, a defendant who does not argue same criminal conduct at the trial court level and stipulates to the State's calculation of the offender score waives the right to raise the issue on appeal. State v. Nitsch, 100 Wn. App. 512, 519, 997 P.2d 1000 (2000). But Nitsch does not apply in a case such as this, where (1) the crimes encompassed the same criminal conduct as a matter of law, leaving no room for judicial discretion, and (2) the defendant did not explicitly agree the crimes amounted to separate conduct.

Washington courts recognize that in some cases, two or more offenses amount to the "same criminal conduct" as a matter of law, leaving no room for judicial discretion. In State v. Porter, for

example, the Washington Supreme Court explained, "there is one clear category of cases where two crimes will encompass the same criminal conduct—the repeated commission of the *same crime* against the same victim over a short period of time." State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (quoting 13A Seth A. Fine, Washington Practice § 281 at 112 (Supp. 1996)). Thus, the Supreme Court has held that simultaneous delivery or possession with intent to deliver two different drugs constitutes the same criminal conduct as a matter of law. State v. Garza-Villarreal, 123 Wn.2d 42, 864 P.2d 1378 (1993); see also Porter, 133 Wn.2d 177 (back-to-back, uninterrupted sales of two different drugs amount to same criminal conduct as matter of law). Similarly, in State v. Worl, the court held malicious harassment and attempted murder of the same victim, occurring at the same time and place, comprised the same criminal conduct "as a matter of law." State v. Worl, 129 Wn.2d 416, 429, 918 P.2d 905 (1996).

Where two offenses comprise the same criminal conduct as a matter of law, leaving no room for judicial discretion, a defendant may raise the issue for the first time on appeal. In State v. Longuskie, as discussed, this Court held kidnapping and child molestation of the same victim amounted to the same criminal

conduct as a matter of law, where the purpose of the kidnapping was to further the child molestation. Longuskie, 59 Wn. App. at 847 (citing Dunaway, 109 Wn.2d at 217). Thus, although the issue was not raised at the trial court level, and no error was even assigned on appeal, the Court "address[ed] the issue sua sponte because of error." Id.

Allowing defendants to argue for the first time on appeal that two or more offenses comprise the same criminal conduct as a matter of law is consistent with the general rule that a party may challenge a sentence for the first time on appeal on the basis that it is contrary to law. It is well established that a defendant cannot waive the right to challenge "a *legal error* leading to an excessive sentence," although waiver may be found "where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." In re Pers.

Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

The purpose of allowing belated challenges to legal errors in the calculation of the offender score is "to preserve the sentencing laws and to bring sentences in conformity and compliance with existing sentencing statutes and avoid permitting widely varying sentences to stand for no reason other than the failure of counsel to register a

proper objection in the trial court." State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

The purpose of ensuring sentences are consistent and conform to the law is served by allowing defendants to argue for the first time on appeal that two or more current offenses comprised the same criminal conduct as a matter of law. Had Mr. Shafer raised the issue below, under Dunaway, the trial court would have been compelled to treat his kidnapping and robbery convictions of the same victim as the same criminal conduct. Mr. Shafer should not be denied the benefit of the law simply because his attorney failed to raise the issue below.

Similarly, Mr. Shafer did not waive his right to challenge his offender score by entering a plea agreement with the State. The general rule is that a defendant who pleads guilty pursuant to a plea agreement does not thereby waive his right to challenge his sentence if "the alleged sentencing error is a *legal error* leading to an excessive sentence." In re Pers. Restraint of West, 154 Wn.2d 204, 213, 110 P.3d 1122 (2005) (quoting Goodwin, 146 Wn.2d at 874). The Washington Supreme Court "has repeatedly held that 'an individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law.'" Id. (quoting In re

Pers. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004); citing Goodwin, 146 Wn.2d at 870 ("a plea bargaining agreement cannot exceed the statutory authority given to the court") (quoting In re Pers. Restraint of Gardner, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980)); In re Pers. Restraint of Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000) ("[T]he actual sentence imposed pursuant to a plea bargain must be statutorily authorized . . .") (quoting In re Pers. Restraint of Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991)). Therefore, a defendant does not waive the right to challenge an erroneous sentence by agreeing to it as part of a plea bargain. West, 154 Wn.2d at 214-15.

In Nitsch, the Court held the defendant waived his right to argue his crimes were the same criminal conduct because he stipulated, as part of his plea bargain, that his offender score was correct. Nitsch, 100 Wn. App. at 522. Although Nitsch did not explicitly agree that his crimes amounted to separate conduct, he did agree with the State's asserted standard sentence range. Id. And "his range can only be arrived at by calculating the score, and thus his explicit statement of the range is inescapably an implicit assertion of his score, and also an implicit assertion that his crimes did not constitute the same criminal conduct." Id. Thus, Nitsch

waived his right to challenge his offender score because he *implicitly* agreed with the State's factual assertions regarding same criminal conduct.

This aspect of the Nitsch holding can no longer be considered good law in light of the Supreme Court's opinion in Mendoza. In Mendoza, the court reaffirmed "the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing" in order to constitute a waiver of the right to challenge the offender score on appeal. Mendoza, 165 Wn.2d at 928 (citing State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999)). The mere failure to object to the prosecutor's factual assertions underlying the offender score calculation does not constitute an acknowledgement of those facts. Mendoza, 165 Wn.2d at 928. "Nor is a defendant deemed to have affirmatively acknowledged the prosecutor's asserted criminal history based on his agreement with the ultimate sentencing recommendation." Id. In other words, contrary to Nitsch, a defendant who agrees with the State's asserted sentence range does not thereby "affirmatively agree" with the implicit factual assertions underlying that range.

In State v. Lucero, the Supreme Court clarified that this is what Mendoza stands for: the defendant must explicitly agree to the prosecutor's asserted facts in order to waive his right to challenge them on appeal. State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010). In Lucero, at sentencing, the defendant recited a standard sentencing range that was apparently based on the inclusion of a California burglary conviction in the offender score. Id. at 787. But he did not "affirmatively acknowledge" that his California conviction was comparable to a Washington crime. Id. at 789. At most, he *implicitly* acknowledged that his offender score included the California burglary conviction. Id. But "[t]hat is not the 'affirmative acknowledgement' of comparability that Mendoza requires." Id. Instead, the defendant must *explicitly agree* the prior conviction is comparable in order to waive his right to challenge comparability on appeal. Id.

Here, although Mr. Shafer agreed with the State's asserted sentence range, he did not *explicitly agree* his convictions for kidnapping and robbery of the same victim comprised separate conduct. In the plea agreement, the State agreed to recommend a standard-range sentence of 144 months for the kidnapping charge, which was arrived at by counting the kidnapping and robbery

convictions separately in the offender score. CP 16, 30. In the plea statement, Mr. Shafer stated he understood the sentence range was 108-144 months. CP 23. But he never explicitly stated he agreed the kidnapping and robbery convictions comprised separate conduct. Therefore, under Mendoza and Lucero, he did not waive his right to argue same criminal conduct on appeal.

Mr. Shafer also did not waive his right to raise same criminal conduct on appeal by agreeing with the State's assertions about his criminal history. In the guilty plea statement, Mr. Shafer said he agreed the prosecutor's statement of his criminal history was "correct and complete." CP 23. But Mr. Shafer did not thereby agree the kidnapping and robbery of the same victim were separate conduct. "'Criminal history' means the list of a defendant's *prior* convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere." RCW 9.94A.030(11) (emphasis added); RCW 9.94A.525(1) ("A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed."). Thus, by agreeing with the prosecutor's asserted criminal history, Mr. Shafer explicitly agreed that he had a prior conviction from Idaho for "Hit and Run Injury." CP 28. But his agreement to criminal history was not an agreement

to facts regarding his *current* offenses, such as whether they comprised the same criminal conduct.

Finally, in In re Personal Restraint of Shale, 160 Wn.2d 489, 496, 158 P.3d 588 (2007), the Supreme Court held the defendant waived his right to argue same criminal conduct because he agreed with the State's offender score calculation as part of his plea bargain and did not challenge the offender score computation at the trial court level. The court acknowledged the general rule that a defendant pleading guilty does not waive his right to challenge legal errors occurring in the calculation of his offender score, but clarified that "those cases involved pleas, convictions, or sentences that were invalid on the face of the judgment and sentence." Id. at 496. In Shale, by contrast, no invalidity was apparent because the police reports and statement of probable cause showed "the separate nature of each charge."⁴ Id.

Shale is distinguishable because here, the police report unambiguously demonstrates the kidnapping and robbery of the same victim amounted to the same criminal conduct. As discussed, under Dunaway, "the kidnapping and robbery of a single

⁴ Documents signed as part of a plea agreement, including police reports and the statement of probable cause when used to establish the factual basis for the plea, may be considered in determining facial invalidity if those documents

victim should be treated as one crime for sentencing purposes" as a matter of law when the purpose of the kidnapping is to further the robbery. Dunaway, 109 Wn.2d at 217. Here, the facts in the statement of probable cause unambiguously show the kidnapping was committed to further the robbery. The judgment and sentence therefore shows, on its face, that the offender score was erroneously calculated when the trial court counted the crimes separately in the offender score. In sum, Mr. Shafer did not waive his right to raise the challenge on appeal.

d. To the extent Mr. Shafer waived his right to challenge the offender score due to his attorney's failure to object, Mr. Shafer received ineffective assistance of counsel. Although a defendant generally waives the right to argue on appeal that his multiple convictions constitute the same criminal conduct if he did not raise the issue below, the appellate court will reach the issue if the defendant can show his attorney's failure to argue same criminal conduct amounts to ineffective assistance of counsel. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004); State v. Allen, 150 Wn. App. 300, 316, 207 P.3d 483 (2009). Here, defense counsel's failure to challenge the offender score amounts

are relevant in assessing the validity of the judgment and sentence. In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002).

to ineffective assistance, where the facts unambiguously show the kidnapping and robbery of the same victim amounted to the same criminal conduct.

To establish ineffective assistance of counsel, the defendant must show his counsel's representation was deficient and he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. amend. VI. Counsel's performance is deficient if it falls below an objective standard of performance. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice results where there is a reasonable probability that but for counsel's deficient performance, the outcome would have differed. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

A defendant establishes ineffective assistance of counsel for his attorney's failure to argue same criminal conduct if the State's evidence shows the multiple offenses were committed at the same time and place against the same victim, and a fact finder could find the same criminal intent for each crime. Saunders, 120 Wn. App. at 825. In Saunders, Saunders was convicted of rape and kidnapping where he and a co-defendant allegedly placed the victim in handcuffs and raped her. Id. at 807. This Court

concluded a fact finder could find one offense furthered the other—that the perpetrators restrained the victim as retribution for her past noncompliance with Saunders's sexual demands or to allow Saunders to accomplish his sexual agenda or both. Id. at 824-25. The Court also concluded a fact finder could find the defendants had the same primary motivation for each offense—to dominate the victim and cause her pain and humiliation. Id. at 825. Therefore, because the evidence and case law supported a finding of same criminal conduct, counsel's failure to raise the issue amounted to deficient performance that prejudiced Saunders. Id. The Court reversed the sentence and remanded for a new sentencing hearing at which counsel could make the argument. Id.

Here, as discussed, the evidence shows unequivocally that the kidnapping and robbery of the same victim occurred at the same time and place and involved the same objective criminal intent. The purpose of the kidnapping was to further the robbery. Thus, had counsel made the argument below, the trial judge would have been compelled to find the offenses comprised the same criminal conduct. Counsel's failure to raise the issue was deficient performance, prejudicing Mr. Shafer.

e. The remedy is to reverse the erroneous portion of the sentence and remand for resentencing. The Supreme Court "has been clear that 'the imposition of an unauthorized sentence does not require vacation of the entire judgment or granting of a new trial. The error is grounds for reversing only the erroneous portion of the sentence imposed.'" West, 154 Wn.2d at 215 (quoting State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980); citing Goodwin, 146 Wn.2d at 877 ("Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed.")).

Here, the sentence was erroneous because it was based on an incorrect offender score. The trial court should have counted the kidnapping and robbery of the same victim as a single offense. This Court should therefore reverse the sentence and remand for resentencing based on a correct offender score.

2. THE GUILTY PLEA WAS INVOLUNTARY IN VIOLATION OF DUE PROCESS BECAUSE MR. SHAFER WAS MISADVISED OF THE SENTENCING CONSEQUENCES OF THE PLEA

When a defendant pleads guilty, constitutional due process requires that he do so knowingly, voluntarily, and intelligently.

State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); U.S. Const. amend. XIV; Const. art. I, § 3. Whether a plea satisfies this standard depends primarily on whether the defendant correctly understood its consequences. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988), overruled on other grounds by State v. Barber, 170 Wn.2d 854, 248 P.3d 494 (2011).

A defendant must be properly informed of all direct sentencing consequences of his guilty plea. Ross, 129 Wn.2d at 285; State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980) ("Defendant must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea."). A direct consequence is one that has a definite, immediate and largely automatic effect on the range of the defendant's punishment. In re Pers. Restraint of Bradley, 165 Wn.2d 934, 939, 205 P.3d 123 (2009). "A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) (citing Miller, 110 Wn.2d at 531).

When a defendant is misinformed about a direct sentencing consequence of a guilty plea, he need not demonstrate that the

misinformation materially affected his decision to plead guilty. State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006); Isadore, 151 Wn.2d 294. A guilty plea based on misinformation about a direct consequence of the plea is involuntary "regardless of whether the actual sentencing range is lower or higher than anticipated." Mendoza, 157 Wn.2d at 591. Thus, "[a]bsent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea." Id.; Isadore, 151 Wn.2d at 298; Ross, 129 Wn.2d at 284; CrR 4.2(f).

In Bradley, 165 Wn.2d at 937, the defendant pled guilty to two counts of possession of cocaine with intent to deliver and did not challenge the offender score calculation at the plea hearing or at sentencing. Later, Bradley learned his offender score was miscalculated due to the erroneous inclusion of "washed out" juvenile offenses. Id. at 938. The Supreme Court concluded Bradley was misinformed as to his offender score and the length of his sentence range and therefore, under Ross and Mendoza, he was not apprised of a direct consequence of the plea. Id. at 938-41. The plea was involuntary and Bradley was entitled to withdraw the plea. Id. at 944.

Here, as in Bradley, Mr. Shafer pled guilty based on misinformation about his offender score. As discussed above, the offender score was miscalculated because the kidnapping and robbery convictions of the same victim comprised the same criminal conduct as a matter of law, but they were counted separately in the offender score. Therefore, under Ross and Mendoza, Mr. Shafer was not apprised of a direct consequence of the plea. See Bradley, 165 Wn.2d at 938-41. He is entitled to withdraw the plea. Id. at 944.

3. THE PLEA WAS INVOLUNTARY BECAUSE
THERE WAS AN INSUFFICIENT FACTUAL
BASIS FOR THE PLEA

The facts in the record show unambiguously the "restraint" of the victims was for the sole purpose of facilitating the robbery, the victims were not transported away from their home, the restraint ended soon after the robbery ended, and forcible restraint of the victims was inherent in the charged crime of armed robbery. These facts would preclude a jury from finding beyond a reasonable doubt that Mr. Shafer kidnapped the victims, because they show only that the kidnapping was incidental to the robbery. Therefore, there is not a sufficient factual basis for Mr. Shafer's guilty plea. He is entitled to withdraw the plea.

a. For a guilty plea to be knowing, intelligent and voluntary, the facts in the record must be sufficient for a jury to find beyond a reasonable doubt the defendant is guilty of the crime. As discussed, it is a violation of due process to accept a guilty plea without an affirmative showing that the plea was made intelligently and voluntarily. State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); U.S. Const. amend. XIV.

"A guilty plea cannot be voluntary in the sense that it constitutes an intelligent admission unless the defendant is apprised of the nature of the charge." In re Pers. Restraint of Keene, 95 Wn.2d 203, 207, 622 P.2d 350 (1981); see also CrR 4.2(d) ("The court shall not accept a plea of guilty without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea."). This is "the first and most universally recognized requirement of due process." Id. (quoting Henderson v. Morgan, 426 U.S. 637, 645, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976)). Apprising a defendant of the nature of the charge requires, at a minimum, that the defendant be made "aware of the acts and the requisite state of mind in which they must be performed to

constitute a crime." Keene, 95 Wn.2d at 208 (citing State v. Holsworth, 93 Wn.2d 148, 153 n.3, 607 P.2d 845 (1980)). This requirement can be satisfied by ensuring that the defendant has received a copy of the information and has read and understood it. Keene, 95 Wn.2d at 208-09.

But due process requires not only that the defendant be made aware of the nature of the charge; he must also understand "that the conduct which [he] admits constitutes the offense charged." Id. at 209 (quoting McCarthy v. United States, 394 U.S. 459, 467, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969) (quoting Fed.R.Crim.P. 11, Notes of Advisory Committee on Criminal Rules)). "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy, 394 U.S. at 466. Requiring the judge to inquire whether the defendant understands how his conduct constitutes the charged crime "protects a defendant 'who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" Keene, 95 Wn.2d at 209 (quoting

McCarthy, 394 U.S. at 467) (quoting Fed.R.Crim.P. 11, Notes of Advisory Committee on Criminal Rules)).

To satisfy the due process requirement that the defendant understand the relationship of the law to the facts, the judge must satisfy himself there is a sufficient factual basis for the plea.

McCarthy, 394 U.S. at 467; Keene, 95 Wn.2d at 209; see also CrR 4.2(d) ("The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."). The judge must determine that the "conduct which the defendant admits constitutes the offense charged." McCarthy, 394 U.S. at 467.

The factual basis for the plea must be on the record and developed at the time the plea is taken. Keene, 95 Wn.2d at 209 (citing Santobello v. New York, 404 U.S. 257, 261, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). The factual basis for the plea need not come from the defendant's admissions but may also come "from any source the trial court finds reliable," including "signed statements from government witnesses implicating defendant in the crime charged." State v. Newton, 87 Wn.2d 363, 370-71, 552 P.2d 682 (1976).

The facts on the record need not be sufficient to convince the court beyond a reasonable doubt that the defendant is guilty,

but they must be sufficient for a jury to find guilt beyond a reasonable doubt. Id. at 370.

Thus, the court must determine, on the record at the time the plea is taken, whether there is a factual basis for the plea, whether the defendant understands the nature of the charge, and whether the defendant understands how the factual allegations satisfy the elements of the crime. McCarthy, 394 U.S. at 470; Keene, 95 Wn.2d at 209; Newton, 87 Wn.2d at 370; CrR 4.2(d). The court "must make direct inquiries of the defendant as to whether he understands the nature of the charge and the full consequences of a guilty plea." Wood v. Morris, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976); CrR 4.2(d). "[F]ailure to comply fully with CrR 4.2 requires that the defendant's guilty plea be set aside and his case remanded so that he may plead anew," because "prejudice inheres in a failure to comply with [the rule]." Wood, 87 Wn.2d 511 (quoting McCarthy, 394 U.S. at 471).

Thus, where the facts in the record at the time of the plea are not sufficient to support a conviction for the charged crime, the guilty plea is involuntary and must be set aside. Keene, 95 Wn.2d at 210-11, 213; In re Pers. Restraint of Bratz, 101 Wn. App. 662, 5 P.3d 759 (2000).

In Keene, the defendant pled guilty to three counts of forgery. Keene, 95 Wn.2d at 204. But neither Keene's admissions, nor the facts contained in the presentence report, were sufficient to show he falsely made or falsely completed the instrument. Id. at 211. Instead, the facts showed Keene was authorized to complete the check by his employer, and authorized to cash it. Id. What he was not authorized to do was to use the money for non-business purposes. Id. Thus, Keene's personal use of the money constituted third degree theft and not forgery. Id. Because the facts in the record were not sufficient for a jury to find Keene guilty of forgery beyond a reasonable doubt, the Supreme Court vacated the conviction. Id. at 213.

Similarly, in Bratz, the defendant was found not guilty by reason of insanity to first degree robbery.⁵ Bratz, 101 Wn. App. at 665. But although the information alleged Bratz was armed with nitroglycerin, a deadly weapon, nothing in the record other than his statements to the bank teller supported the allegation. Id. at 674-76. The record showed no more than a verbal threat of harm with a deadly weapon. Id. Therefore, the evidence was insufficient for a

⁵ "For purposes of due process, the constitutional constraints imposed on the acceptance of an RCW 10.77.080 motion for acquittal by reason of insanity are similar to those on the acceptance of a guilty plea." Bratz, 101 Wn. App. at 671-72.

jury to find beyond a reasonable doubt that Bratz was actually armed with a deadly weapon. Id. The Court vacated the conviction. Id.

b. The facts in the record were insufficient for a jury to find Mr. Shafer guilty of kidnapping beyond a reasonable doubt, because they showed only that the kidnappings were incidental to the robberies. As in Keene and Bratz, the facts in the record at the time of the plea were insufficient for a jury to find Mr. Shafer guilty of kidnapping beyond a reasonable doubt. That is because the facts showed only that the kidnappings were incidental to the robberies.

Mr. Shafer was charged with first degree kidnapping under RCW 9A.40.020(1)(b). CP 19. A person is guilty of first degree kidnapping under that provision "if he or she intentionally abducts another person with intent . . . [t]o facilitate commission of any felony or flight thereafter." RCW 9A.40.020(1)(b). "'Abduct' means to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2).

Mr. Shafer was also charged with two counts of first degree robbery, one for each victim, under RCW 9A.56.200(a). CP 20-21.

A person is guilty of first degree robbery under that provision if "[i]n the commission of a robbery or of immediate flight therefrom, he or she: (i) [i]s armed with a deadly weapon; or (ii) [d]isplays what appears to be a firearm or other deadly weapon; or (iii) [i]nflicts bodily injury." RCW 9A.56.200(a). A person commits "robbery," in turn, "when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone." RCW 9A.56.190.

When the facts show the restraint and movement of a victim are merely incidental and integral to commission of another crime, such as robbery or rape, the facts are not sufficient to sustain a separate conviction for kidnapping. State v. Korum, 120 Wn. App. 686, 703-04, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2006); State v. Green, 94 Wn.2d 216, 226-29, 616 P.2d 628 (1980). For the crime of robbery, for instance, the statutory definition includes the threat or use of force to obtain property from another or to prevent resistance to taking property. RCW 9A.56.190. The Legislature established more severe punishment for first degree robbery where the robber

displays a firearm as compared to second degree robbery. RCW 9A.56.200. But "[t]hat all robberies necessarily involve some degree of forcible restraint, however, does not mean that the Legislature intended prosecutors to charge every robber with kidnapping." Korum, 120 Wn. App. at 705. To find that the use of force inherent in a robbery is the "restraint" required for kidnapping, would mean that every robbery would also be kidnapping. See Green, 94 Wn.2d at 229. "Historically, such 'pyramiding' of a kidnapping charge upon that for the underlying offense [to obtain more punishment] was a common abuse and has been roundly condemned by commentators." Korum, 120 Wn. App. at 704 (and authorities cited).

In Korum, the defendant was charged with several counts of first degree kidnapping and first degree robbery following a series of home invasion robberies. Korum, 120 Wn. App. at 695. During the robberies, the robbers restrained the victims at gunpoint with duct tape and stole personal property. Id. at 690-92. But the victims were not moved from their homes or transported under cover to another location. Id. at 707. Also, the restraints were contemporaneous with the robberies. Id. Thus, this Court held as a matter of law that the kidnappings were "incidental" to the

robberies. Id. The Court relied on the following reasons: (1) the restraints were for the sole purpose of facilitating the robberies—to prevent the victims' interference with searching their homes for money or drugs to steal; (2) forcible restraint of the victims was inherent in the armed robberies; (3) the victims were not transported away from their homes during or after the invasions to some remote spot where they were unlikely to be found; (4) the duration of the restraints were not substantially longer than required for commission of the robberies; and (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves. Id. at 707.

Thus, where the victim is not secreted or held in a place where she is unlikely to be found, and the restraint of the victim is achieved by means of the force relied upon to prove another crime, then the evidence is insufficient to sustain a separate finding of guilt of kidnapping beyond a reasonable doubt. Green, 94 Wn.2d at 220-23; Korum, 120 Wn. App. at 703-04.

This case is indistinguishable from Korum. As in Korum, (1) the restraints of the victims were for the sole purpose of facilitating the robberies—to prevent the victims from interfering with the search of the home for items to steal; (2) forcible restraint of the

victims was inherent in the charged crime of armed robbery; (3) the victims were not transported away from the home during or after the robbery to a remote spot where they were unlikely to be found; (4) the duration of the restraints was no longer than required to commit the robbery; and (5) the restraints did not cause a significant danger independent of that posed by the armed robbery itself. Korum, 120 Wn. App. at 707; CP 8-9.

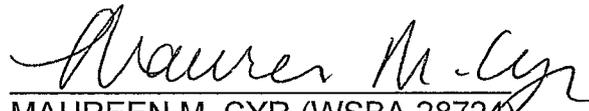
Because the facts show merely that the kidnappings were incidental to the robberies, they are insufficient as a matter of law to sustain a finding of guilt of kidnapping beyond a reasonable doubt. Green, 94 Wn.2d at 220-23; Korum, 120 Wn. App. at 703-04.

c. The plea must be set aside. As discussed, where the facts in the record at the time of the plea are not sufficient to support a conviction for the charged crime, the guilty plea is involuntary and must be set aside. McCarthy, 394 U.S. at 466-67; Keene, 95 Wn.2d at 210-11, 213; Bratz, 101 Wn. App. 662. Here, the facts in the police report show only that the kidnappings were incidental to the robberies. The facts are therefore insufficient to sustain a jury finding of guilt of kidnapping beyond a reasonable doubt. Green, 94 Wn.2d at 220-23; Korum, 120 Wn. App. at 703-04. The plea must be set aside.

F. CONCLUSION

Mr. Shafer's sentence is erroneous because his convictions for kidnapping and robbing the same victim were counted as separate offenses in his offender score. Therefore, Mr. Shafer is entitled to be resentenced. Also, Mr. Shafer's guilty plea is involuntary in violation of due process because he was misadvised of the offender score calculation. The plea is involuntary for the additional reason that the facts in the record are not sufficient to show the State could have proved the kidnapping charge beyond a reasonable doubt. Because the plea was involuntary, Mr. Shafer is entitled to withdraw the plea.

Respectfully submitted this 7th day of October 2011.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

Narrative:

Investigative Narrative

Robbery

09AS-0548
8/3/2009
W. Derbonne

On 8/1/2009 at about 2302 hours, I was backing up WSP Trooper Scott and Asotin County Sergeant Kingsbury at SR 129 near mile post marker 29, when Whitcom advised me of a robbery that had just occurred at 1412 Fourth Street space 19. I immediately cleared and responded with lights and siren. Asotin County Deputy Polillo advised he would be responding from the Asotin County Jail. While en-route Whitcom advised two victims had been assaulted and tied up inside the residence and they were dispatching medical.

Once Deputy Polillo and I arrived on scene we parked at the trailer court entrance and walked to space number 19. We then contacted victims, Trevor Morton his pregnant girlfriend Kayla Edmondson and the 911 caller Molly Armstrong. While clearing the trailer home I noticed the front door had been forced open and the door jamb was broken and there were pieces of the broken door jamb on the porch and inner doorway of the trailer home. Once inside, I noticed several plastic zip ties on the floor in the living room and numerous items scattered about. I next made my way down the hallway and to the first room on the right finding several recently emptied planted pots, fertilizer spilled and knocked over all over the room. I could smell the odor of fresh Marijuana and noticed heat lamps as well in this room, with my training and experience it was obvious that this room was being used to grow Marijuana. I continued down the hallway to the next room again on my right, which was the bathroom and it was clear. I next entered the master bedroom at the end of the hallway and noticed closet doors open and items scattered about the room. I noticed a computer and other related items had been thrown off the desk and onto the floor wires still attached. Now the residence being clear I contacted the victims.

I asked both Trevor and Kayla if they wanted medical to continue and they requested I discontinue them. I advised Whitcom to cancel medical.

I requested Deputy Polillo interview Kayla and to get a written statement from her while I requested Trevor come outside to talk with me.

Once outside I asked Trevor to start from the beginning and tell me what happened. Trevor then told me the following: Tonight he was watching TV with Kayla on the couch when he heard a knock at the door. He looked through the eye hole to see who was there but couldn't see anything so he turned on the front porch light. He then realized somebody had their finger over the hole when the finger came off and a male leaned back and kicked the door open striking him in the head. Two males entered and one of the men entered pointing a handgun at his face yelling, "Get on the fucking couch and get your head down". He and Kayla complied. The man with the gun stayed in the living room with them while the other man went room to room stealing his belongings and his five medicinal Marijuana plants. The man with the gun started to tie his hands behind his back using zip ties after the first zip tie was on his wrist he decided to fight back, turned and hit the man with the gun. He was able to wrestle the gun away ✓

from the suspect and he attempted to fire it at the suspect but the safety was on. The man then grabbed him by the throat and choked him until he lost consciousness. The next thing he remembered was waking up on the floor with both his hands tied behind his back with the zip ties and overheard the suspects saying that they couldn't leave without the gun. He then realized he was face down and the gun was under his chest on the floor. He rolled over so the suspects would take the gun and leave. The suspects took the gun and left the trailer. He then got up and went into the kitchen where he was able to use a knife and cut the zip ties from his wrists. He then cut Kayla's zip ties off her wrists and once she was free he ran to their neighbor, Molly's trailer and asked her to call 911.

While talking to Trevor I noticed he had several scrapes and bumps on his face. I also noticed both his wrist had redness and indentations from the zip ties. I further noticed redness directly around the front of his neck. I asked Trevor if he could give me a description of the suspects and he told me both were about 5-11, medium build.

I asked Trevor if he knew what type of handgun the suspect had. Trevor told me he thinks it was a 32 automatic. Trevor described the handgun as a small pocket size handgun.

I asked Trevor what the suspects were wearing and he told me he did not know. Trevor said he was too busy being beat up. Trevor was able to tell me the suspect with the gun was wearing a pullover and he had a black mask covering his face down from his nose.

I asked Trevor who he thought did this and he told me he is pretty sure the guy with the gun was Joshua Ruckdashel. I asked him why he thought this and he told me he went to school with Joshua and his voice was identical to that Joshua. Trevor also mentioned Joshua had big holed ear piercings through his ears as had the suspect.

About this time Clarkston Officer Babino arrived on scene to assist. I asked Trevor what did the suspects take from his residence and he told me Five Marijuana plants approximately 3 and a half feet tall, 26 inch Vizo flat screen television, WII video game system with several games, \$200 cash, his cell phone, his prescription bottle of Methadone (approximately 15 pills), and another prescription of what he thought was Dalveid, (approximately 10 pills). I re-contacted Deputy Polillo and requested he take photographs of the scene and victims. I also requested he collect the zip ties as evidence.

I requested Whitcom call Inland Cellular to see if they could GPS Trevor's cell phone. Whitcom later advised Inland Cellular did not have the ability to do that.

Deputy Polillo checked his in-car computer and he was able to locate a possible address for Joshua in the 700 block of Second Street Asotin. Sergeant Kingsbury did a drive by of the residence and did not see anything unusual.

Officer Babino, Deputy Polillo, Sergeant Kingsbury and I all responded to the Second Street address to see if we could locate the person in question. We ran all vehicle license plates in the area and none were registered to Joshua. We then learned that Joshua's last contact at that address was in 2001. Officer Babino responded to meet a Lewiston Officer whom gave him a photograph of Joshua.

When Officer Babino returned he informed me Joshua's real name was Joshua Hieronymus and he resided at 1128 14th Ave. in Lewiston. Officer Babino advised me Joshua was on Probation with Idaho Probation and Parole. Probation Officer Nolan was currently working and wanted me to call him.

I telephoned Probation Officer Nolan and advised him of the situation. Probation Officer Nolan told me he was going to do a probation check at Joshua's residence.

Later I received a phone call from a Nez Perce County Deputy informing me they were at Joshua's residence and they located a bunch of Marijuana a T.V. and game system in an outbuilding at Joshua's residence. He also informed me Joshua's girlfriend, Amber, had told officers that Joshua and Nathaniel Schafer admitted to her that they committed a robbery that night.

I responded to the Lewiston address and once on scene officers showed me the outbuilding where I saw fresh Marijuana laid out on some type of shelf, a 26 inch Vizio T.V. in the center of the door way and a Wii game console with random games. I also noticed the Wii game console had numerous stickers shaped as heads.

Officers also pointed out a vehicle in the driveway that had a big Marijuana bud on the dashboard and a grey hoodie and dark-colored hoodie on the seats along with two dark colored ball caps. I also noticed the grey hoodie had the word panthers on it. The vehicle is a light blue Honda hatch back bearing Idaho License Number N123712.

Lewiston Officer Hibbard contacted me and also told me Amber told him Joshua and Nathan had told her they had committed a robbery that night. Officer Hibbard told me he had Mirandized both Joshua and Nathan and they both waived their rights.

I entered the Lewiston residence and located both Joshua and Nathan handcuffed in the front room. I asked a Deputy on scene if he could take Nathan outside so I could interview Joshua and he escorted Nathan outside. I asked Joshua if he still knew his Miranda rights and if he was still willing to talk and he said he would. I asked Joshua what he did today and he told me he worked and got off from work at 2100 hours. I asked Joshua where he worked and he said Tomato Brothers. I asked Joshua if he went to Asotin today and he said, "No". I asked Joshua not to lie to me and he then told me he needed an attorney. I ended the interview with Joshua.

I walked outside and contacted Nathan. I asked Nathan if he was still aware of his Miranda rights and he said yes. I asked Nathan if he was still willing to talk to me and he said, "I guess". Nathan asked what this was about and I told him a robbery. Nathan told me he no longer wanted to talk. I ended the interview with Nathan.

One of the Lewiston Police Supervisors on scene told me he was calling out the detectives to write a search warrant for the suspect vehicle and residence. Deputy Polillo responded back to the victim's residence to pick up the statement forms per my request.

Once Deputy Polillo was on scene he collected the statement forms and provided me with a brief description of the stolen property. Deputy Polillo told me the

Wii consol had stickers with faces on them. I told Deputy polillo that the one I saw here matched that description.

I cleared and met with Deputy Polillo in Asotin and picked up the statement forms.

I next drove to the Lewiston Police Department to contact LPD Detective Arnzen. Once on scene I briefed Detective Arnzen and provided him with the statement forms.

I then went to the Asotin Police Department to pick up my evidence kit. I responded back to the victim's residence and saw a note on the front door addressed to me stating that Trevor and Kayla went to the hospital. I used my finger print kit and was able to lift a partial print off of the glass on the door peep hole.

Later that morning Trevor called me and told me he was now home. I told Trevor not to move anything because I would be over later today to finger print. Later that afternoon I fingerprinted some of the moved items and was not able to lift any full fingerprints from any moved items. While at the residence I asked both to write out a more detailed statement of the incident.

See attached statements. More to follow.

Date, Time, Reporting Officer:

8/3/2009 W.Derbonne

Approved by:

Date, Time

I declare under penalty of perjury under the laws of the State of Washington that the foregoing information is true and correct to the best of my knowledge and belief.

Signed at (Asotin/Clarkston), Washington on

8/3/2009

Date

W-DR

310

Deputy/Officer Badge #

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

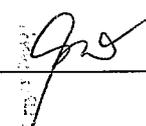
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 29774-8-III
v.)	
)	
NATHANIEL SHAFFER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] CURTIS LIEDKIE, DPA	(X)	U.S. MAIL
ASOTIN COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
PO BOX 220	()	_____
ASOTIN, WA 99402-0220		
[X] NATHANIEL SHAFFER	(X)	U.S. MAIL
338175	()	HAND DELIVERY
WSP	()	_____
1313 N 13 TH AVE		
WALLA WALLA, WA 99362		

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF OCTOBER, 2011.

X _____ 

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Seattle, Washington 98101
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