

67524-9

67524-9

NO. 67524-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RATTANA KEO PHUONG,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

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A. ISSUES

1. Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Unlawful imprisonment requires knowing restraint, while attempted second-degree rape requires forcible compulsion. The State presented evidence that Phuong dragged his wife out of her car and restrained her in multiple locations before attempting to rape her inside his bedroom. Given this record, has Phuong failed to show that no rational trier of fact would find that his unlawful imprisonment of his wife was "incidental" to his attempt to rape her?

2. Crimes are considered the "same criminal conduct" for scoring purposes when they are committed against the same victim, at the same time and place, and with the same criminal intent. A jury convicted Phuong of unlawful imprisonment for dragging his wife from her car into his house, and second-degree attempted rape for trying to rape her in his bedroom. The crimes occurred over a 10-minute period. At sentencing, Phuong agreed to his offender score and did not argue that the crimes constituted the same criminal conduct. Has Phuong waived his right to

challenge the calculation of his offender score, and if not, has he failed to show that his counsel was ineffective for failing to argue same criminal conduct?

3. A charging document challenged for the first time on appeal is liberally construed in favor of validity and will be upheld, unless the document omitted essential elements that cannot be fairly implied and the defendant demonstrates actual prejudice from the language used. The information alleged that Phuong committed unlawful imprisonment by knowingly restraining another, but did not include the statutory definition of "restrain." Has Phuong failed to show that the information was constitutionally deficient, and if so, has he demonstrated actual prejudice?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Rattana Keo Phuong with Attempted Rape in the Second Degree - Domestic Violence and Unlawful Imprisonment - Domestic Violence. CP 1-2. The State alleged that Phuong committed the attempted rape in the presence of minor children. Id. The jury convicted Phuong as charged, and the trial

court imposed a standard-range sentence. CP 77-79, 118-28; 7RP 9.¹

2. SUBSTANTIVE FACTS

In October 2001, Samoeun Liem married Phuong in her native country of Cambodia. 2RP 6, 10. Although Phuong lived in the United States, he wanted to marry a Cambodian woman and bring her back to the United States to start a family. 4RP 84-86. Phuong sponsored Liem and she arrived in early 2002. 2RP 12-13. Liem and Phuong had a daughter, A.,² in 2003, and a son, D., in 2006. 2RP 18-22.

Despite their happy beginning, Liem and Phuong's marriage began to fall apart in early 2007 when Phuong began accusing Liem of cheating on him. 2RP 26-30. Phuong admittedly quit his higher-paying job as a loan officer to work with Liem at a casino to keep "a better eye" on her. 4RP 112. After multiple arguments, Phuong moved back in with his parents and sought a divorce from Liem. 2RP 31-35. Unbeknownst to Liem, Phuong contacted

¹ The Verbatim Report of Proceedings consists of seven volumes designated as follows: 1RP (6/28/11 and 6/30/11), 2RP (7/5/11), 3RP (7/6/11), 4RP (7/7/11), 5RP (7/11/11), 6RP 7/12/11), and 7RP (8/5/11).

² The State refers to the children involved by their first initials to protect their privacy.

immigration officials and sought to have her deported back to Cambodia based on his belief that she had used him to obtain her citizenship. 4RP 126. During this time, Liem took care of D., while Phuong cared for A. at his parents' house. 2RP 34-35; 3RP 24-27.

On September 15, 2009, Liem called Phuong to arrange dropping off D. and seeing A. 2RP 45-46. When she arrived at Phuong's house, Liem noticed that Phuong's parents were not home like they usually were for their visits. 2RP 48. Liem spoke to Phuong for a few minutes and fed the children, but as she was preparing to leave, Phuong started calling her a "hooker" and asking her to go upstairs and "have sex." 2RP 49, 51-52. Liem refused and walked out of the house. 2RP 52.

Phuong followed Liem outside and tried to grab her as she started the engine to her car. 2RP 52-53. Phuong stated that he wanted "sex" and started pulling her out of the car, injuring Liem's knee in the process. 2RP 52-54. Liem screamed and yelled for her children to help. Id. Although Liem protested and the children repeatedly cried, "Daddy, don't hurt Mommy," Phuong persisted in dragging Liem out of the car, through the garage, and into the house. 2RP 54-56.

Once inside the house, Phuong began pulling Liem up the stairs to his bedroom. 2RP 55-56. Liem started kicking and screaming louder, while the children continued yelling at Phuong and tried to pull Liem away. 2RP 56, 62; 3RP 63. When they reached the top of the stairs, Phuong told the children to go downstairs and promised, "Daddy don't do nothing to Mommy." 2RP 62-63. Phuong then pulled Liem inside his room and locked the door. 2RP 63. Liem heard the children banging on the bedroom door and yelling, "Let Mommy out. Don't hurt Mommy." Id.

Liem struggled with Phuong in his bedroom to no avail. 2RP 64-67. Phuong pushed Liem, pulled down her shirt, and then pushed her onto his bed. 2RP 64. As Liem kicked and fought back, Phuong grabbed onto Liem's pants and ripped out the crotch seam. 1RP 93; 2RP 64-65; Ex. 2. Phuong took off his shirt and tried to get on top of Liem. 2RP 65-66. Phuong successfully blocked Liem's efforts to get away, pinning down her wrists and telling her that he still loved her and wanted to have sex with her. 2RP 66-67. Phuong did not stop wrestling with Liem until he heard his neighbor, Audrey Germanis, knock on the door downstairs. 2RP 68-70; 4RP 54-55.

Phuong left to answer the door while Liem quickly got up and went to the bathroom to fix her pants. 2RP 70-71. Liem heard Phuong tell Germanis that nothing had happened. 2RP 71. Liem did not call out to Germanis, or tell her what Phuong had done to her because she was scared. Id. Liem took D. and headed downstairs to leave when she ran into Phuong who told her to leave the ripped pants behind to be fixed. 2RP 71-73. Liem declined, pulled down her shirt to cover the pants, and left with both children. 2RP 71-77.

Once Liem was safely driving away, she called her boyfriend, Brian Armstrong, to tell him what had happened. 2RP 77; 4RP 8-9. Liem was crying and scared during the call. 2RP 77-78; 4RP 8-9. As Liem was driving home, Phuong called to apologize for what he had done. 2RP 80. Phone records admitted at trial showed that Phuong called Liem 16 times in the six hours following the incident. 2RP 81; 4RP 18-19. Armstrong convinced Liem to call the police, who responded and collected her torn pants.³ 2RP 79-80.

³ Liem feared calling the police because she mistakenly believed that she would get in trouble, like she would in Cambodia, for having a boyfriend while still being legally married to someone else. 3RP 65. Liem testified that it is not a crime in Cambodia in such a situation for a husband to force his wife to have sex with him. Id.

At trial, Germanis testified that she became involved in the incident when she saw A., a "very quiet and timid little girl," run crying and screaming from her house. 4RP 47-51. A. told Germanis that her parents were fighting and climbed into Germanis's lap. 4RP 52-53. A few minutes later, D. ran across the street crying after his sister. 4RP 53. Germanis offered to help and followed A. into the house. 4RP 54-55. Germanis loudly called Phuong's name until he emerged five to seven minutes later, shirtless and breathing "very heavily." 4RP 55-60. Phuong told Germanis that "we are just up there making a little love" and then grabbed onto her arm and physically escorted Germanis out of the house. 4RP 60-61.

Phuong testified at trial that he never attempted to rape or restrain Liem. 4RP 77. According to Phuong, he told Liem when she came over that he intended to have her deported and move to California with A. 4RP 133. Although Liem was upset, she sat down and watched television with him. 4RP 134. Phuong denied ever going upstairs with Liem or asking her to have sex. 4RP 130-31. Phuong denied telling Germanis that they were "making a little love," and denied being shirtless and breathing heavily when she arrived. 4RP 135.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS PHUONG'S UNLAWFUL IMPRISONMENT CONVICTION.

Phuong argues that his conviction for unlawful imprisonment must be reversed because there is insufficient evidence to establish the crime separate and independent from his attempted rape conviction. Phuong's claim fails. Viewing the evidence in the light most favorable to the State, there is substantial evidence for a rational trier of fact to find that that the unlawful imprisonment was not merely "incidental" to the attempted rape.

A person commits unlawful imprisonment if he "knowingly restrains another person." RCW 9A.40.040. "Restrain" means to restrict a person's movements "without consent and without legal authority" in a way that "substantially" interferes with the person's liberty. RCW 9A.40.010(6). Restraint is "without consent" if it is accomplished by physical force or intimidation. Id. A substantial interference must involve a "real" or "material" interference with a person's liberty, rather than "a petty annoyance, a slight inconvenience, or an imaginary conflict." State v. Washington, 135 Wn. App. 42, 50, 143 P.3d 606 (2006) (citation omitted).

At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Relying on State v. Green and later cases,⁴ Phuong argues that the evidence was insufficient to establish unlawful imprisonment because any restraint of Liem's liberty was merely "incidental" to his attempt to rape her. 94 Wn.2d 216, 616 P.2d 628 (1980). Phuong contends that Liem's unlawful imprisonment was "part and parcel of the attempted rape" based on the prosecutor's closing argument which focused on the same evidence to convict him of both crimes. App. Br. at 9. Additionally, Phuong argues that the restraint was "incidental" because the attempted rape was not a reaction to Liem's resistance, and she did not suffer any injury separate from that she suffered as a result of the attempted rape. Phuong's argument fails in light of the standard of review and the ample evidence produced at trial.

In State v. Green, the Washington Supreme Court reversed a defendant's conviction for aggravated first-degree murder based on kidnapping, because there was insufficient evidence to establish

⁴ Green and other incidental restraint cases generally involve kidnapping and another crime. See id., at 226 (kidnapping was merely incidental to homicide); State v. Saunders, 120 Wn. App. 800, 819, 86 P.3d 232 (2004) (kidnapping was not merely incidental to rape); State v. Harris, 36 Wn. App. 746, 754, 677 P.2d 202 (1984) (same). Because unlawful imprisonment is a lesser included offense of kidnapping and requires knowing restraint, the "incidental" restraint issue present in kidnapping cases applies with equal force to unlawful imprisonment cases. State v. Hansen, 46 Wn. App. 292, 296, 730 P.2d 706 (1986); RCW 9A.40.040(1); State v. Washington, 135 Wn. App. 42, 49-50, 143 P.3d 606 (2006) (applying the "incidental" restraint doctrine to unlawful imprisonment).

that the defendant abducted the victim by secreting her in a place where she was unlikely to be found. 94 Wn.2d at 226. At trial, the evidence showed that the defendant stabbed a young girl on a public sidewalk in broad daylight and then dragged her 20-50 feet behind an apartment building over the course of 2-3 minutes. Id. at 222-24.

The Green court held that the evidence was insufficient based on the "unusually short" time involved, the "minimal distance" the defendant moved the victim, the "clear visibility" of their location, and the "total lack of any evidence of actual isolation from open public areas." Id. The court added that "the mere incidental restraint" and movement of the victim was an integral part of the homicide, and not the "indicia of a true kidnapping." Id. at 226-27. The court limited its holding to the facts of the case presented, and indicated that the determination of what constitutes incidental restraint must be made on a case-by-case basis "in light of the totality of the surrounding circumstances." Id. at 227.

To the extent Green requires that the restraint sufficient to maintain a prosecution for unlawful imprisonment be distinct from the restraint inherent in attempted rape, that requirement is satisfied here. Phuong restrained Liem in multiple locations before

attempting to rape her in his bedroom over the course of at least 10 minutes.⁵ Phuong started restraining Liem by the side of her car when he prevented her from driving away, by pulling her out of her car and injuring her knee. 2RP 52-53; 4RP 12. Phuong continued to restrain Liem as he dragged her through the garage and into the house. 2RP 54-56. Although Liem protested, kicked and screamed, Phuong successfully overcame her efforts to fight back and pulled Liem up the stairs. 2RP 55-56. Phuong locked Liem in his bedroom and attempted to rape her by ripping out her pants, pushing her down on the bed, and pinning down her wrists. 2RP 64-67.

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, there is ample evidence for a rational trier of fact to find that Phuong knowingly restrained Liem without her consent, separate and independent from his attempt to rape her. Phuong dragged Liem from the

⁵ Germanis testified that she spent 3-5 minutes comforting A. in her front yard before offering to accompany A. home, and another 5-7 minutes waiting for Phuong to emerge from his bedroom. 4RP 54, 58-59. It can be reasonably inferred that the entire incident lasted at least 10 minutes given that Germanis's time estimate did not include the time that it took Phuong to confront Liem at her car, pull her out, drag her through the garage, into the house, up the stairs, and into his bedroom.

environment she was in, her car, injuring Liem's knee in the process, and then isolated her in his locked bedroom, substantially interfering with her liberty. The entire incident lasted at least 10 minutes, rather than 2-3 minutes as in Green. 94 Wn.2d at 224. Unlike the defendant in Green, Phuong restrained Liem in multiple locations, including areas that were invisible to the public, such as the inside of his garage, house, and bedroom. Once inside his room, Phuong attempted to rape Liem, forcing her onto his bed and ripping out the crotch seam in her pants. The two crimes had separate purposes and separate injuries, and the evidence was sufficient to support both convictions.

Phuong's argument that his unlawful imprisonment conviction should be reversed based on the prosecutor's closing argument is meritless. Phuong fails to cite any authority for the position that the evidence relied on by a prosecutor in closing argument informs the sufficiency of the evidence analysis on review. Phuong's argument that he was convicted of two crimes based on the same evidence, sounds more akin to a double

jeopardy argument, which he has not raised, than a sufficiency of the evidence challenge.⁶

Although Phuong argues that the restraint used on Liem was for the "sole purpose of facilitating the attempted rape in his bedroom," that is not the test. App. Br. at 9. By focusing entirely on his alleged singular purpose for committing the crimes, Phuong overlooks the significant facts that led to the court's holding in Green, specifically that the defendant moved the victim a minimal distance around the corner. 94 Wn.2d at 223, 226-27. Here, Phuong dragged Phuong from her car in the driveway, through the garage, into the house, up the stairs, and into his room. 2RP 52-56. If Phuong had attempted to rape Liem in her car, or even the garage, without moving Liem any further, then there likely would have been insufficient evidence to convict him of unlawful imprisonment because the restraint would have been incidental to his attempt to rape her.

⁶ Washington courts have repeatedly rejected the notion that kidnapping is incidental to another crime for purposes of double jeopardy and merger. See State v. Vladovic, 99 Wn.2d 413, 422-24, 662 P.2d 853 (1983) (holding double jeopardy does not prevent convictions for kidnapping and robbery); State v. Louis, 155 Wn.2d 563, 571, 120 P.3d 936 (2005) (refusing to adopt the proposed "kidnapping merger" rule and holding that a defendant may be punished separately for kidnapping and robbery).

Moreover, there was substantial evidence from which a rational trier of fact could have reasonably inferred that Phuong restrained Liem out of anger that she had "disrespected" him by allegedly cheating on him and using him to obtain her citizenship. App. Br. at 9; 4RP 94 (Phuong testifying that Liem cheated on him), 98 (Phuong testifying that Liem "destroyed" his life by using him to "get [a] green card," abusing his trust, and not taking care of the kids), 127-29 (Phuong testifying that Liem "disrespected" him by becoming involved with Armstrong and deserved to be sent back to the "bad life" in Cambodia).

Considering the totality of the circumstances and the evidence in the light most favorable to the State, there is ample evidence that Phuong's restraint of Liem was not merely "incidental" to the attempted rape. Sufficient evidence existed for a rational trier of fact to find the essential elements of unlawful imprisonment beyond a reasonable doubt.

2. PHUONG'S OFFENDER SCORE WAS PROPERLY CALCULATED.

For the first time on appeal, Phuong claims that his convictions for unlawful imprisonment and second-degree

attempted rape constitute the "same criminal conduct" for scoring purposes. Phuong argues that his counsel's failure to raise such an argument at sentencing amounted to ineffective assistance of counsel. Phuong's claim fails. By affirmatively agreeing to his offender score, Phuong waived his right to raise a same criminal conduct claim for the first time on appeal. Even if he has not waived the claim, Phuong cannot show that his counsel's performance was deficient, or that there is a reasonable probability that the court would have found that the convictions constituted the same criminal conduct.

a. Phuong Waived His Right To Raise A Same Criminal Conduct Claim.

For purposes of calculating a defendant's offender score, current offenses are counted as prior convictions unless two or more of the offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Crimes are considered the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Id. The Legislature intended, and courts construe, the same criminal conduct provision narrowly. State v. Flake, 76 Wn. App. 174, 180,

883 P.2d 341 (1994); State v. Palmer, 95 Wn. App. 187, 190-91, 975 P.2d 1038 (1999).

The standard for determining whether two offenses require the same objective criminal intent is "the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). Intent, in this context, does not mean the *mens rea* element of the crime, but rather the defendant's "objective criminal purpose" in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

A defendant waives a same criminal conduct claim by failing to raise the issue at the trial level and affirmatively assenting to his offender score. See In re Shale, 160 Wn.2d 489, 495-96, 158 P.3d 588 (2007) (defendant waived challenge by agreeing to the offender score as part of his plea bargain); State v. Nitsch, 100 Wn. App. 512, 520-22, 997 P.2d 1000 (2000) (defendant waived challenge by failing to identify a factual dispute for the court's resolution and failing to request that the court exercise its discretion); State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (defendant waived challenge by failing to raise a same criminal conduct claim at sentencing).

Phuong is barred from raising a same criminal conduct claim for the first time on appeal because he affirmatively agreed to the calculation of his offender score, and failed to raise the issue at sentencing. Prior to being sentenced, Phuong submitted a presentence report acknowledging that his standard sentencing range was 76.5-102 months on the attempted rape conviction, and 4-12 months on the unlawful imprisonment conviction. CP 112. Phuong arrived at these ranges by counting the convictions separately. See RCW 9.94A.510 (sentencing grid establishing standard ranges); RCW 9.94A.515 (listing seriousness level of current offenses).

At sentencing, Phuong maintained his view of the appropriate sentencing ranges, and never asked the court to exercise its discretion to consider the offenses the same criminal conduct. 7RP 6. Having failed to alert the court to the factual, discretionary issue at the time it occurred, Phuong has waived his right to challenge same criminal conduct on appeal.

Seeking to avoid waiver, Phuong claims that his counsel was constitutionally ineffective for failing to raise a single, discretionary sentencing issue. Phuong should not be allowed to raise a waived claim under the guise of ineffective assistance of counsel. Phuong

argues generally that ineffective assistance of counsel claims may be raised for the first time on appeal, but fails to cite any cases specifically addressing whether a defendant can raise a same criminal conduct claim, after having waived it below, under the pretext of ineffective assistance of counsel.⁷

b. **Phuong Received Effective Assistance Of Counsel.**

Even if Phuong can raise a same criminal conduct claim by arguing ineffective assistance of counsel, his claim fails. Phuong cannot show that his counsel's failure to argue a single, factual and discretionary sentencing issue deprived him of his Sixth Amendment right to counsel, or that there was a reasonable probability that the court would have ruled in his favor.

A defendant in a criminal case has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on an ineffective assistance of counsel claim, the defendant must

⁷ Phuong cites Division Two's decision in State v. Saunders for the proposition that failing to argue same criminal conduct when such an argument is warranted constitutes ineffective assistance. 120 Wn. App. 800, 825, 86 P.3d 232 (2004). The Saunders court, however, does not appear to have explicitly considered whether a defendant may raise a same criminal conduct claim, after having waived it below, by arguing ineffective assistance of counsel.

show that (1) his attorney's conduct fell below an objective standard of reasonableness and (2) this deficiency resulted in prejudice. Id. at 687-88; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If the defendant fails to demonstrate either prong, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. ___, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010).

Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689. "Effective assistance of counsel" does not mean "successful assistance," nor is counsel's competency measured by the result. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Reviewing courts make "every effort to eliminate the distorting effects of hindsight." In re Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). The relevant inquiry on review is "whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 688. There is a "wide range" of reasonable performance and a "strong presumption" of competence. Id. at 689.

Further, the defendant must show prejudice, specifically "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78; Strickland, 466 U.S. at 694. "The likelihood of a different result must be *substantial*, not just conceivable." Harrington v. Richter, 562 U.S. ___, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011) (emphasis added).

Phuong's counsel was not constitutionally ineffective for failing to raise a single, factual and discretionary issue at sentencing. Phuong cannot show that his counsel's failure to argue same criminal conduct at sentencing was so objectively unreasonable as to have deprived him of his Sixth Amendment right to counsel. Phuong has not cited any controlling authority holding that unlawful imprisonment and second-degree attempted rape constitute the same criminal conduct. Although the Constitution guarantees criminal defendants a competent attorney, it "does not insure that defense counsel will recognize and raise every conceivable constitutional claim." Engle v. Isaac, 456 U.S. 107, 134, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982).

Moreover, Phuong's counsel may have recognized that raising a same criminal conduct claim was difficult at best given the evidence at trial and the law regarding same criminal conduct. Two crimes constitute the same criminal conduct only if they share the same (1) criminal intent, (2) time and place, and (3) victim. RCW 9.94A.589(1)(a). If any one of these elements is missing, the crimes cannot be considered same criminal conduct and must be counted separately in calculating the offender score. Vike, 124 Wn.2d at 410.

Courts construe the same criminal conduct provision "narrowly to disallow most claims that multiple offenses constitute the same criminal act." State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). A reviewing court will reverse a sentencing court's determination of "same criminal conduct" only upon a showing of a "clear abuse of discretion or misapplication of the law." State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Although both of Phuong's crimes involved the same victim, they did not occur at the same time or place, nor did they involve the same criminal intent. Despite the Legislature's intent and courts' practice of construing same criminal conduct narrowly, Phuong urges this Court to adopt a broad view of same time and

place, and find that both elements are satisfied because they occurred at his "residence" on the same date. App. Br. at 17.

Courts have found the same time and place elements satisfied when two or more crimes have occurred in the same room or vehicle, over a continuous, uninterrupted time frame. See State v. Tili, 139 Wn.2d 107, 123-24, 985 P.2d 365 (1999) (three rapes occurred continuously and uninterrupted over the course of two minutes in victim's kitchen); State v. Grantham, 84 Wn. App. 854, 858-59, 932 P.2d 657 (1997) (two rapes occurred in the same room sequentially, but not continuously because the defendant had time to pause and reflect before committing second rape); State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 526 (1998) (assault and kidnapping occurred simultaneously in the victim's car).

Offenses that occur in different rooms of the same house, however, do not constitute the same place for purposes of same criminal conduct. See State v. Stockmyer, 136 Wn. App. 212, 220, 148 P.3d 1077 (2006) ("guns found in different rooms in the same house are found in different 'places' for purposes of the same criminal conduct test").

Here, the evidence showed that Phuong unlawfully imprisoned Liem in multiple places - the driveway, garage, internal

doorway linking the house and garage, and stairway leading up to the defendant's bedroom - before attempting to rape her inside his locked bedroom. 2RP 46-47, 52-64. Given that the offenses occurred in different places, and that the absence of even one element of same criminal conduct is sufficient to defeat such a claim, Phuong cannot show that his counsel was deficient for failing to argue same criminal conduct at sentencing.

Further, in light of State v. Grantham, Phuong cannot show that his counsel unreasonably concluded that the crimes occurred at separate times, or that Phuong possessed a different objective intent when he committed the crimes. In Grantham, the defendant raped the same victim twice within a short period. 84 Wn. App. at 859. The court held that the sequential rapes did not constitute the same criminal conduct because the defendant completed the first rape before commencing the second, had the presence of mind to threaten the victim between the rapes, and used new physical force to accomplish the second rape. Id. The court concluded that during the brief gap in time between the rapes, the defendant had the "opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." Id.

This case is no different. Although the crimes occurred sequentially, they did not occur over a continuous, uninterrupted timeframe. Phuong formed new criminal intent when he paused long enough on the stairs to reassure his crying children, saying "Daddy don't do nothing to Mommy," and to order them "downstair[s]." Grantham, 84 Wn. App. at 858-59; 2RP 62-63. Once Phuong locked Liem in his bedroom, he applied newer and more aggressive force to obtain her submission. He pushed her onto his bed, he ripped out the crotch seam of her pants, he pinned down her wrists, and he professed to still love her while demanding that they have sex. 2RP 63-67.

Unlawful imprisonment contains no statutory intent requirement, but occurs when a person knowingly restrains another person. RCW 9A.40.040(1). Viewed objectively, Phuong's intent in unlawfully imprisoning Liem was to prevent her from leaving the house. Second-degree attempted rape, on the other hand, occurs when a person takes a substantial step toward engaging in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050(1)(a). Phuong knowingly imprisoned Liem and then, with the intent to forcibly compel her into engaging in sexual intercourse, attempted to rape her. Phuong's intent, objectively

viewed, changed from controlling Liem's movements to compelling her to have sexual intercourse. Given the evidence and the court's decision in Grantham, Phuong's counsel reasonably concluded that the crimes did not occur at the same time or involve the same criminal intent.

Even if his counsel was deficient for failing to argue same criminal conduct at sentencing, Phuong cannot show prejudice. Phuong must show that there is "a reasonable probability" that the court would have found that his crimes constituted the same criminal conduct. Given the evidence at trial that Phuong's crimes occurred in different places, at different times, and involved different criminal intent, Phuong cannot show that there is a reasonable probability that the court would have found in his favor. Phuong cannot show that he was prejudiced by counsel's failure to make a same criminal conduct argument.

3. THE INFORMATION CONTAINED THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED.

For the first time on appeal, Phuong argues that his conviction for unlawful imprisonment must be reversed because the information was constitutionally deficient for failing to define the

term "restrain." Phuong contends that the definition of "restrain," contained in RCW 9A.40.010(6), is an "essential element" of the crime of unlawful imprisonment that must be included in the information. Phuong's argument fails. The definition of "restrain" is not an essential element of unlawful imprisonment. Phuong cannot show that he was actually prejudiced by the wording of the information.

An information is constitutionally sufficient if it includes all of the essential elements of the crime, both statutory and non-statutory. State v. Moavenzadeh, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998). The purpose of the essential elements rule is to afford the defendant notice of the nature and cause of the allegations against him so that he may properly prepare a defense. State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). An information challenged for the first time on appeal is more liberally construed in favor of validity than an information challenged before or during trial. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

Courts apply a two-prong test to determine an information's sufficiency post-verdict: (1) Do the necessary elements appear in any form, or can the elements be found by fair construction, in the

information, and if so, (2) can the defendant show that he was actually prejudiced by the inartful language that caused the lack of notice? Id. at 105-06. Courts considering the first prong look at the face of the information only, but courts considering the second prong may look beyond the face of the information to determine if the defendant actually received notice of the charges that he had to defend against. Id. at 106.

The information need not contain the exact words used in a statute or case law to be sufficient. Id. at 108-09. Failing to "define every element that the State must prove at trial does not render the information constitutionally defective." State v. Rhode, 63 Wn. App. 630, 635, 821 P.2d 492 (1991). Courts read the information as a whole and are guided by common sense and practicality in construing the language. State v. Hopper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992).

By statute, "[a] person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040. The definition of "restrain" is contained in another section of the same chapter, entitled "Definitions," which defines "restrain" as restricting a person's movements (1) without consent, (2) without legal authority, and (3) in a manner that interferes substantially with the

person's liberty. RCW 9A.40.010(6). The adverb "knowingly" modifies all three components of the statutory definition of "restrain." State v. Warfield, 103 Wn. App. 153, 153-54, 5 P.3d 1280 (2000).

Here, the State charged Phuong with unlawful imprisonment, alleging in relevant part that Phuong "did knowingly restrain Samoeun Liem a human being . . . Contrary to RCW 9A.40.040." CP 2. The information cited the correct statute, provided a sufficient factual basis, and mirrored the statutory language. Reading the information as a whole in a common-sense, practical manner, and applying a liberal construction in favor of its validity, this Court should find that it adequately informed Phuong of the essential elements of the crime. Kjorsvik, 117 Wn.2d at 110-11. The information satisfied the purpose of the rule by informing Phuong of the nature and cause of the allegations against him, and allowing him to prepare a defense. Campbell, 125 Wn.2d at 801.

Phuong's argument that his conviction should be reversed because the information did not contain the statutory definition of "restrain," which is contained in another statute, separate and apart from the unlawful imprisonment statute, is meritless. The "essential elements" rule only requires that the charging document contain the

essential elements of the crime. Moavenzadeh, 135 Wn.2d at 362. The charging document is not required to define every element that the State must prove. Rhode, 63 Wn. App. at 635; see also State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (holding that the definition of "great bodily harm" does not add elements to the crime of first-degree assault). Phuong fails to cite even a single case that has held that the statutory definition of restrain is an essential element of unlawful imprisonment that must be included in the information.

Instead, Phuong relies on Washington's pattern jury instructions to advance his claim because they include the statutory definition of restraint in the instructions defining unlawful imprisonment, and the "To convict" instruction for unlawful imprisonment. See WPIC 39.15 (defining unlawful imprisonment), WPIC 39.16 ("to convict" instruction for unlawful imprisonment).

Jury instructions, however, serve different purposes than charging documents. State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995). In this case, the jury instructions merely incorporated the definitional language of "restrain," and explained how "knowingly restrain" is proven. They did not create additional essential elements of unlawful imprisonment. The information

adequately informed Phuong of the essential elements of the charge against him, echoing the language of the unlawful imprisonment statute which requires only that a person "knowingly restrain[] another person." RCW 9A.40.040(1). The information was not required to mirror the language of a jury instruction, or include a definition for the word "restrain."

Phuong cannot show, nor does he attempt to show, that he was actually prejudiced by the information's alleged inadequacy. Phuong argues simply that the information was constitutionally inadequate and therefore that "this Court must presume prejudice." App. Br. at 26. Phuong's argument does not address the alternative situation presented here, where the information contained the essential elements of the crime, and the defendant must show that he was actually prejudiced by the language in the information. See Kjorsvik, 117 Wn.2d at 111.

Here, the jury was instructed in accordance with the pattern jury instructions on unlawful imprisonment. See CP 97 (Instr. No. 14 applying WPIC 39.15), 98 (Instr. No. 15 applying WPIC 39.16). Thus, to convict Phuong, the jury had to find beyond a reasonable doubt the three definitional components of "restrain," which Phuong contends are "essential elements" of unlawful imprisonment.

Because the jury considered the definitional components of "restrain" when convicting him, Phuong cannot show that he was prejudiced by the information's failure to include them.

D. CONCLUSION

For the reasons stated above, the Court should affirm Phuong's conviction and sentence.

DATED this 29th day of May, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Respondent's Brief, in STATE V. RATTANA PHUONG, Cause No. 67524-9-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

05/25/12
Date

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