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FEB 04 2014

King County Prosecutor
Appellate Unit

NO. 69655-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTAPHER WHITE,

Appellant.

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

The Honorable Beth Andrus, Judge

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
CONFIRMED - 4 PM 4:23

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A. ASSIGNMENTS OF ERROR

1. The information was defective because it omitted essential elements of the crime of unlawful imprisonment.

2. The court erred when it admitted evidence that police found a ski mask in the home where the charged crimes occurred.

3. The instruction defining recklessness misstated the law and relieved the State of its burden to prove each element of second degree assault beyond a reasonable doubt.

4. In the alternative, by failing to object to the instruction, counsel provided ineffective assistance that denied the appellant a fair trial.

5. The court miscalculated the appellant's offender score for his assault conviction.

6. The term of community custody imposed for the assault conviction is not authorized by statute.

Issues Pertaining to Assignments of Error

1. To convict an accused of unlawful imprisonment, the State must prove an accused knowingly (1) restricted another's movements; (2) did so without that person's consent; by physical force, intimidation, or deception; or by acquiescence if the person was under 16 and her parent did not acquiesce; (3) did so without legal authority; and (4) did so in a manner that substantially interfered with that person's liberty. Where the

information failed to allege the essential elements of unlawful imprisonment, should the appellant's unlawful imprisonment conviction be reversed?

2. The court erred in admitting irrelevant, prejudicial evidence that police found ski masks in the home where the charged crimes were alleged to have occurred.

3. The trial court instructed the jury that to convict the appellant of second degree assault, the State need only prove that the appellant knew of and disregarded "a substantial risk that a wrongful act may occur," rather than "a substantial risk that substantial bodily harm may occur." Did this instruction impermissibly relieve the State of its burden to prove each element of the crime beyond a reasonable doubt?

4. Was defense counsel ineffective for failing to object to this instruction?

5. Did the court miscalculate the appellant's offender score as to his assault conviction?

6. Did the court err in imposing a 36-month community custody term as to assault, where the term authorized by statute is 18 months?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentence

The State charged Christopher White and Luis Perez with second degree assault, two counts of first degree rape, and unlawful imprisonment of complainant E.C., an acquaintance of both men. CP 1-14. The State also charged two counts of second degree rape as alternatives to the first degree charges. CP 11-14.

A jury found White and Perez guilty of both counts of second degree rape as well as the remaining counts. CP 63-66.

The court sentenced White to a high-end minimum standard range sentence² on the rape charges but ruled the offenses were the “same criminal conduct.” 22RP 64-65. The court sentenced White to high-end standard range sentences on the remaining counts. CP 114, 116-17. The court ordered the sentences on each count to run concurrently to the other counts. CP 117.

¹ The brief refers to the verbatim reports as follows: 1RP – 11/8/10, 12/23/10, 6/13/11, and 9/13/11; 2RP – 11/21/11; 3RP – 11/22/11; 4RP – 11/23/11; 5RP – 11/28/11; 6RP – 12/1/11; 7RP – 12/5/11; 8RP – 12/6/11; 9RP – 12/7/11; 10RP – 12/8/11; 11RP – 12/12/12; 12RP – 12/13/11; 13RP – 12/14/11; 14RP – 12/15/11; 15RP – 12/16/11; 16RP – 12/21/11; 17RP – 3/16/12; 18RP – 3/23/12; 19RP – 5/10/12; 20RP – 6/25/12; 21RP – 9/21/12; and 22RP – 11/9/12.

² RCW 9.94A.507(3).

White timely appeals.³ CP 127-40.

2. Trial testimony

Witnesses generally agreed that a disagreement between E.C. and a woman named Candice Sanders led to the events that ultimately led to the charges in this case. But the witnesses' versions varied in significant respects.

Troy O'Dell pleaded guilty to unlawful imprisonment and harassment for the incident involving E.C. 8RP 1276-77; 9RP 1322. O'Dell rented a home that he shared with Sanders, his girlfriend, their two small children. 8RP 1155, 1168-69, 1171, 1198. O'Dell, a rapper, also maintained a recording studio in the basement area of the home. 8RP 1162.

O'Dell had known Perez for many years and considered him a younger brother. 8RP 1157; 9RP 1346. Perez stayed in a basement

³ The court found White incompetent to be sentenced, and his sentencing hearing was stayed while the State attempted to restore him to competency. Supp. CP ___ (sub no. 164, Order Finding Defendant Incompetent). This appeal was stayed pending resolution of White's motion for a new trial on the grounds that he was, likewise, incompetent to stand trial. CP 79-111.

The court denied White's CrR 7.5 motion as untimely and on other grounds. Supp. CP ___ (sub no. 212, Order Denying Defendant's CrR 7.5 Motion). On November 12, 2013, the judge transferred his CrR 7.8 motion, which raised similar arguments, to this Court as a personal restraint petition. The PRP is being considered under case number 71175-0-I. Supp. CP ___ (sub no. 211, Order Transferring).

bedroom of O'Dell and Sanders's home. 8RP 1163. White is O'Dell's first cousin. 11RP 1164-65. At the time of the incident, White had been staying at the home for a few weeks. 8RP 1169. White and Perez, both younger than O'Dell, respected O'Dell based on his success as a musician and generally did what O'Dell said. 8RP 1160, 1163, 1167.

O'Dell met E.C. through his older sister years earlier. 8RP 1170, 1182-83. A month before the incident, O'Dell allowed E.C. to stay at the home on the condition that she provide childcare. 8RP 1284-85. About two or three days before the incident, however, E.C. left the house. 8RP 1286-87. When E.C. returned, she was intoxicated. 8RP 1288-91.

According to O'Dell, Sanders had learned E.C. had badmouthed Sanders. Upon E.C.'s return, the women decided to fight. 8RP 1254, 1292. O'Dell denied intervening in the fight or ordering anyone else to do so. 8RP 1298. E.C. was, nonetheless, injured in the fight and began to bleed. 8RP 1246. After the fight, O'Dell told Perez and White to take E.C. downstairs to "get her cleaned up." 8RP 1243, 1246, 1254, 1256.

According to O'Dell, White later admitted he had sex with E.C. 8RP 1253; 9RP 1374. O'Dell acknowledged he lied to police when he said E.C. did not come into the house and that she received her injuries elsewhere. 8RP 1220.

Sanders pled guilty to second degree assault for her role in the incident. 9RP 1427. Her testimony was more detailed than that of her boyfriend.

According to Sanders, E.C. agreed to stay with Sanders's family while Sanders was in jail, but she remained after Sanders returned. 9RP 1480.

E.C. left at some point, but returned in the wee hours of the morning a few days later. 9RP 1495. E.C. appeared to be under the influence of crack cocaine. 9RP 1497. For their part, O'Dell, White and Perez were drinking Hennessy, and Sanders had snorted a crushed 80-milligram Oxycontin pill. 9RP 1443, 1509-10.

Sanders did not want to let E.C. in. She was angry E.C. had said bad things about her. Moreover, Sanders was nervous about E.C.'s apparent intoxication given that there was an ongoing child Protective Services investigation of Sanders and O'Dell. 9RP 1499-501. E.C. nonetheless forced her way into the house and swung a fist at Sanders. Sanders swung back and a scuffle ensued. 9RP 1446, 1498, 1503.

At some point, White and Perez entered the fray on Sanders's behalf. Sanders recalled White punched E.C.'s face twice and Perez punched her once. 9RP 1450-51. O'Dell did not participate but looked on. 9RP 1511. E.C. eventually stopped fighting back and began to cry.

9RP 1454. White berated E.C. for saying bad things about Sanders and everyone laughed. 9RP 1452, 1458-59. Someone called E.C. a “snitch,” but Sanders was not sure why. 9RP 1532.

Both women were injured in the fight. E.C. left a puddle of blood on the floor. 9RP 1458-59. Sanders sustained a black eye and learned the next day that her own arm was broken in the fight. 9RP 1474, 1505; 13RP 2237.

After the fight, E.C. wanted to use the upstairs bathroom to clean up, but O’Dell told her to use the basement bathroom and directed either Perez or White to accompany her. 9RP 1462, 1514. Both followed. 9RP 1462.

Sanders saw E.C. the next day in Perez’s room. Her face was bruised, and Sanders brought her a bag of frozen peas for the swelling. 9RP 1464-65. E.C. did not mention she was raped, and Sanders believed E.C. was free to leave. 9RP 1518. E.C. stayed the whole next day, although she left at some point the following day. 9RP 1470.

According to Sanders, the morning after the fight, Sanders, O’Dell, Perez, and White were watching television in the living room when White commented, “I f---ed her.” 9RP 1467. He added, “We f---ed her.” 9RP 1467. After O’Dell received an angry call from E.C., moreover, Sanders began to worry she would be arrested. 9RP 1473. Shortly before police

arrived to serve a warrant on the house, Sanders fled, leaving her six-month-old baby on the couch. 6RP 798-99; 9RP 1473-74, 1507-08. She was soon arrested and taken to the station along with the three men, who were stopped near the home in O'Dell's car. 6RP 810-11, 814-15; 13RP 2229.

At first, Sanders told the police that E.C. was already injured when she arrived at the home. 9RP 1474-75, 1523. Sanders claimed she received her own injuries from her children, the oldest of whom was a toddler. 9RP 1506-07; 13RP 2237-38. At trial, Sanders acknowledged these statements were inaccurate and that she and the other participants agreed to lie to the police about the incident. 9RP 1506-07, 1517, 1521, 1527. Sanders denied receiving a plea deal in exchange for testimony but acknowledged she expected the prosecutor's help in rescinding a no-contact order between her and O'Dell after trial was complete. 9RP 1491, 1535-36.

Complainant E.C. provided an account different in many respects from that of O'Dell and Sanders. She was best friends with O'Dell's older sister. 11RP 1752. As a young adult, E.C. took O'Dell and his sisters into her home and considered them her siblings. 11RP 1754, 1833. E.C. had also known Perez and White for many years. 11RP 1758-61.

E.C. began staying at the O'Dell/Sanders residence in December of 2009.⁴ 11RP 1764. She agreed to care for the couple's children but clashed frequently with Sanders. 11RP 1751. Sanders was addicted to Oxycontin, which hindered the woman's parenting abilities. 11RP 1758. E.C. became frustrated with the situation and left the home on January 17 or 18. She complained about Sanders to O'Dell's sister. 11RP 1835. She then relapsed on crack cocaine and spent time begging for drugs and getting high in various motels in Tukwila. 11RP 1767-69; 1772, 1832. E.C. believed Sanders's mother overheard E.C.'s complaints and reported the conversation to Sanders. 11RP 1769-70.

E.C., who was intoxicated and had not slept in several days, returned to O'Dell's residence and demanded to be let in. 11RP 1772-73. E.C. understood she would have to fight Sanders if she came in, but was resigned to doing so. 11RP 1773.

Once E.C. was let in, Sanders and O'Dell berated E.C. for saying bad things about Sanders. 11RP 1775, 1846-47. After a brief tussle with Sanders, E.C. tried to leave the home, but O'Dell and the others pulled her back in. 11RP 1776, 1860. E.C. and Sanders then began to fight in earnest; White and Perez also joined in. 11RP 1777.

⁴ While E.C. kept her belongings in a downstairs bedroom, she always slept upstairs because the downstairs bedroom had a mold problem. 11RP 1764.

Each of the men punched E.C. in the face as O'Dell and his children looked on. 11RP 1777-78. E.C. felt her face swell instantly. 11RP 1778. Dizzy, she sat down on the floor. 11RP 1778. O'Dell, children on his lap, said, "[E.C.], you're going to die." 11RP 1178-79. Meanwhile, Sanders burned E.C.'s hair with her cigarette lighter. 11RP 1779.

After the altercation, O'Dell told White and Perez to take E.C. downstairs. 11RP 1781. E.C. was relieved the fight was over and hoped to get some sleep and leave the next day. 11RP 1781.

Once downstairs, White and Perez got E.C. a change of clothes and put her bloodstained clothes in the washing machine. 11RP 1787. White and Perez watched E.C. undress and use the bathroom, which alarmed E.C.. They informed E.C. that O'Dell had ordered them to kill her. If she agreed to have sex with them, however, they would spare her life. 11RP 1790. E.C. protested that she was menstruating, but Perez and White were undeterred. 11RP 1790-91.

E.C. attempted to persuade the men that it would be unwise to have sex with her because she might have a disease. When they continued to insist, she asked them to wear condoms, and they agreed. 11RP 1791. E.C. believed she would be killed if she did not have sex with the men.

11RP 1791. E.C. believed there was a gun in the house and had seen an ammunition magazine on the floor in Perez's room. 11RP 1881-82.

White engaged in penile-anal intercourse with E.C. He then urged Perez to take a turn. 11RP 1791. White resumed after Perez was done and seemed more enthusiastic than Perez. 11RP 1793. Finally, E.C. told White, "no more." 11RP 1791. White threatened to punch E.C. if she stopped, but she told him she did not care. White stopped anyway. 11RP 1792.

After that, the men told E.C. she could not leave. After E.C. lay on the couch in Perez's room, White positioned himself in a manner that prevented her from leaving. One of the men followed E.C. when she used the bathroom. 11RP 1794, 1902.

The next day, Sanders brought E.C. food and examined her injured face. Sanders commented she ought to let E.C. go to the hospital for her facial injuries, but if she did, the police would come to the house. 11RP 1796, 1822.

E.C. spoke with three visitors to the house the next day but told no one what had happened. 11RP 1796-98. E.C. feared that if she tried to leave, the others would believe she was headed to the police, and she would be killed. 11RP 1796. E.C. finally left when a musician who worked with O'Dell was busy in the studio and everyone else seemed to

be gone. 11RP 1799. She fled to a neighbor's house, and the neighbor took her to the hospital. 11RP 1799-800.

E.C. was diagnosed with a fractured eye socket. 11RP 1805; 12RP 1998, 2001. E.C. also sustained a cut over her eye. 12RP 1999, 2028. Hospital staff reported E.C. was agitated and made a number of phone calls, but she was not forthcoming with details of her assault and told staff she did not want to press charges. 7RP 978-79; 10RP 1022; 12RP 2002, 2006. Meanwhile, E.C. called O'Dell seeking an explanation or an apology, but he hung up on her. 11RP 1801.

E.C. later agreed to be transferred to Harborview for a forensic sexual assault examination. 7RP 936, 942; 11RP 1806-07; 12RP 1998. The nurse examiner noted E.C. had suffered facial injuries but found no evidence of trauma to her genital area or anus. 12RP 2123-25, 2129. E.C. also spoke with police at Harborview. 13RP 2227.

After her initial report to police, E.C. minimized O'Dell's involvement in the incident. 11RP 1812, 1850-56, 1860-61, 1874-75. E.C. testified she feared she would be branded a "snitch" and, consistent with her belief about the fate of snitches, she would be harmed for testifying. 11RP 1795-96. E.C. later testified that when she made that

comment regarding snitches, White nodded. E.C. believed the jurors did not notice because they were taking notes. 11RP 1820.⁵

Police searched the home after E.C. made her report at Harborview. They found a ski mask and Springfield Armory gun case in the closet of the recording studio.⁶ 10RP 1605, 1610. Police also found an ammunition magazine, ammunition, and a ski mask in Perez's room, although no gun was ever found. 10RP 1605, 1611-13; 13RP 2247.

The state lab tested a number of items for DNA evidence, but few could be connected to any individual. Blood stains on a shirt found in a plastic bag matched Perez's DNA profile. 10RP 1699; 11RP 1829-30. Shoes collected from White tested positive in a "presumptive" test for the presence of blood, but scientists were unable to find DNA on the shoes. 10RP 1711; 11RP 1918-19.

Police also located E.C.'s wet clothes, as well as two condom wrappers, in the same plastic bag as the shirt with the bloodstains. 6RP 849-50; 11RP 1829; 13RP 2243, 2259-60. Police found another condom

⁵ The prosecutor argued in closing that the fact that White nodded provided corroboration that E.C.'s fear was reasonable. 15RP 2529-30.

⁶ The court excluded evidence suggesting Perez was dealing drugs, as well as gun-related evidence found upstairs, including a holster and body armor. 4RP 474-91, 494-502. The court admitted the downstairs items, including ski masks, as relevant to E.C. knowledge there were weapons in the house. 4RP 502-03.

wrapper in Perez's room. 6RP 858; 13RP 2259-60. E.C. testified all her other clothing was missing from the downstairs bedroom where it had been stored. 11RP 1829.

White did not testify. But in his recorded interview with police shortly after his arrest, he denied raping or hitting E.C. Ex. 202 at 21 (transcription of exhibit played for jury). At the time of the arrests of the four suspects, Perez's and Sanders's hands appeared swollen, but White's hands did not appear to be injured. 7RP 1057-58; 10RP 1594-95; 13RP 2201, 2237.

Perez testified at trial. 13RP 2280. The State also admitted Perez's recorded interviews with police following the arrests. Perez at first denied sexual contact with E.C. but later told police they had consensual sex. Exs. 209, 211 (transcriptions of exhibits played for jury); 13RP 2216-17.

At trial, Perez testified that neither he nor White had sex with E.C. 13RP 2298; 14RP 2375. He explained that he felt compelled to take responsibility because he feared O'Dell. 13RP 2281, 2296, 2298; 14RP 2314-15, 2318. In addition, he was exhausted from hours of interrogation. 13RP 2298; 14RP 2341.⁷ Perez testified, moreover, that O'Dell was the

⁷ Perez denied owning a gun, 13RP 2282, but on rebuttal the State presented an officer's testimony that he possessed a gun during a 2009

one who hit E.C. 14RP 2375. The four suspects had agreed to lie that there was no fight at the house, but that story broke down quickly. 14RP 2367.

C. ARGUMENT

1. THE INFORMATION IS DEFECTIVE FOR FAILING TO INCLUDE ALL THE ESSENTIAL ELEMENTS OF UNLAWFUL IMPRISONMENT.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. White's conviction for unlawful imprisonment must be reversed because the charging document does not set forth the essential elements of that crime. CP 1-2, 5-6, 11-12.

To establish unlawful imprisonment, the State must prove the defendant "knowingly restrain[ed] another person." RCW 9A.40.040. "Restrain" means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(6) (formerly codified as subsection (1)). To restrain a person "without consent" is accomplished by "physical force,

traffic stop. 14RP 2393-400. Perez testified O'Dell forced Perez to take the gun after the police stopped the car. 13RP 2287-89.

intimidation, or deception” or “by any means including acquiescence” if the restrained person’s parent has not consented. RCW 9A.40.010(6).

Thus, for purposes of unlawful imprisonment, "restraint" has four primary components: "(1) restricting another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty." State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000). The adverb “knowingly” modifies all components of restraint. Id. at 153-54, 157. The modified components of “restraint” are thus elements of the crime of unlawful imprisonment. Id. at 158-59.

In Warfield, three defendants’ convictions were reversed for insufficient evidence where the State failed to prove Warfield and two other men knowingly restrained someone without lawful authority. This Court held "knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand." Id. at 159.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime – [usually] consisting of the actus reus, mens rea, and causation – that the prosecution must prove to sustain a conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). "An

'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

To convict White of unlawful imprisonment, the State needed to prove he knowingly accomplished each of the four elements. Warfield, 103 Wn. App. at 157-59; Feeser, 138 Wn. App. at 743. As this Court has held, moreover, mere use of the term "restraint" in the charging document is inadequate to provide notice of each of the elements of the crime of unlawful imprisonment. See State v. Johnson, 172 Wn. App. 112, 139, 297 P.3d 710 (2012) (common understanding of "restraint" fails to convey statutory definition, and in particular, requirement of knowledge that such restraint occur "without legal authority"), review granted, 178 Wn.2d 1001 (2013).

In accord with Warfield and Johnson, the pattern "to convict" instruction for unlawful imprisonment recognizes the elements of the crime that need to be proven. WPIC 39.16; see State v. Davis, 116 Wn. App. 81, 96 n.47, 64 P.3d 661 (2003) ("While the WPICs are not binding on the court, they are persuasive authority."), aff'd, 154 Wn.2d 291, 111 P.3d 844 (2005), aff'd sub nom., Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

The "to convict" instructions in White's case were modeled on WPIC 39.16. CP 197, 199 (Instructions 52, 54). The jury was correctly instructed that "with regard to [the elements] the defendant acted knowingly." CP 199 (Instruction 54).

Proper jury instructions, however, cannot cure a defective charging document. Vangerpen, 125 Wn.2d at 788. The State charged White and Perez with unlawful imprisonment as follows:

That [White and Perez], in King County, Washington . . . did knowingly restrain E.C., a human being; [c]ontrary to RCW 9A.40.040. . . .

CP 13 (amended information); see also CP 2 (original charging document also charging O'Dell and Sanders).

The information does not contain all essential elements of the crime. It does not allege White knowingly: (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty.

Where, as here, the adequacy of an information is challenged for the first time on appeal, the appellate court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik,

117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The information did not fairly imply each of the four elements. At most, the language "knowingly restrain" as used in the information notifies the accused that an essential element of the crime is that a person knowingly restricted the movements of another.

The other three elements at issue here cannot be found by any fair construction. The information provides no notice that knowledge of lack of consent, knowledge of lack of legal authority to restrain, and knowledge of the degree of restriction (substantial interference) are all essential elements of the crime. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary elements of unlawful imprisonment are neither found nor fairly implied by the charging document, this Court must presume prejudice and reverse White's conviction. McCarty, 140 Wn.2d at 425.

2. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF SKI MASKS FOUND IN THE HOME BECAUSE SUCH EVIDENCE WAS RELEVANT ONLY FOR THE IMPROPER PURPOSE IF SUGGESTING WHITE WAS A “CRIMINAL TYPE.”

In a criminal trial, evidence that is not relevant is not admissible”.

ER 402. Evidence is “relevant” if it tends to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. But even if evidence is relevant, it is not admissible if its probative value is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” ER 403.

ER 404(b) also provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rule is a categorical bar to the admission of evidence to prove a person's character and to show the person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). There are no “exceptions” to this rule. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 404.9, at 497 (5th ed. 2007).

Instead, there is one improper purpose and an undefined number of proper purposes. Gresham, 173 Wn.2d at 420.

The purpose of ER 404(b) is “to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (internal quotation marks and citation omitted). Evidence of a defendant’s other bad acts is admissible only if it “is logically relevant to prove an essential element of the crime charged, rather than to show the defendant had a propensity to act in a certain manner.” State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008). A court’s ER 404(b) ruling is reviewed for abuse of discretion. In close cases, the balance must weigh in favor of the accused. Id.

Here, the trial court admitted evidence that two ski masks were found at the scene, one in Perez’s bedroom and one in the downstairs studio closet. 4RP 483, 501-02 (parties’ argument and court’s ruling to admit); 6RP 75010RP 1605, 1610 (police officers’ testimony regarding discovery of masks). The ski mask evidence was not relevant to prove an essential element of the crime. There is no evidence that the masks played any role at all in the crime. But not only did the jury hear about the discovery of the ski masks, the prosecutor took care to establish that no

one associated with the home was a snow sports aficionado. E.g., 8RP 1266-67.

The only possible relevance of the evidence was to suggest that White was a “criminal type” who might have worn a ski mask to commit other, unrelated crimes. It is commonly understood that criminals often wear ski masks, which cover the head and have openings for the eyes and mouth, while committing crimes for which they do not want to be identified. In State v. Sweet, 44 Wn. App. 226, 235, 721 P.2d 560 (1986), for example, police stopped Sweet while investigating a burglary. He was wearing gloves and carrying a ski mask. The Court concluded, “[a] ski mask and gloves are items reasonably associated, in the circumstances of this case, with burglary and crimes of violence.” Id. The ski mask and other items provided officers with a reasonable suspicion that Sweet was armed. Id.

Ski masks are associated with criminality in other Washington cases. See, e.g., State v. Frost, 160 Wn.2d 765, 769, 161 P.3d 361 (2007) (ski masks found inside suspect’s home were associated with series of robberies); State v. Vickers, 148 Wn.2d 91, 97, 59 P.3d 58 (2002) (robbery committed by two men wearing ski masks and brandishing guns); State v. Sanchez, 171 Wn. App. 518, 536, 288 P.3d 351 (2012) (ski masks and guns found in suspect’s truck during investigation of home invasion

robbery and aggravated murder); State v. Ferguson, 164 Wn. App. 370, 373, 264 P.3d 575 (2011) (ski mask found on suspect of robbery and kidnapping); State v. Johnson, 147 Wn. App. 276, 281, 194 P.3d 1009 (2008) (assault victim described assailants as three black men wearing ski masks and camouflage clothing); State v. Eggleston, 129 Wn. App. 418, 429, 118 P.3d 959 (2005) (defendant convicted of robbing bank while wearing ski mask).

The State may argue the ski masks, in conjunction with the gun case, ammunition, and magazines, were admissible to corroborate E.C.'s testimony that she feared the defendants would kill her and to prove that her fear was reasonable. This argument should be rejected. Unlike the gun-related evidence, 11RP 1789, 1866, there is no reason to believe, and no evidence to support the conclusion, that E.C. was afraid of the defendants because of ski masks in the house. 11RP 1750-1904 (E.C.'s testimony). Instead, the ski masks merely invited the jurors to draw the improper conclusion that the defendants probably participated in other, unrelated, crimes.

The ski mask evidence was thus relevant only for the improper purpose of suggesting that White was a "criminal type." It was therefore categorically prohibited by ER 404(b). Foxhoven, 161 Wn.2d at 175; Wilson, 144 Wn. App. at 177.

Such evidence was, moreover, prejudicial to White. White's theory was that E.C., the oldest member of the makeshift family, fabricated the rape allegations against White and Perez because she was enraged by her treatment by O'Dell and his girlfriend, the most powerful members of the group. White and Perez were the available targets because they had the least power, lowest social status, and she feared them less than O'Dell. 15RP 2541-43. Although physical evidence found at the scene corroborated portions of E.C.'s story, the foundation for the State's case, particularly as to the rape, was E.C.'s credibility.

As to the rape charges, however, White repeatedly denied sexual contact with E.C. And despite a rape exam days after the claimed sexual assault, there was no physical evidence E.C. suffered harm to her genital area. As for the assault conviction, unlike Perez and Sanders, White's hands were not injured despite E.C.'s claim he punched her. Perez testified O'Dell, not White, punched E.C. As for the unlawful imprisonment conviction, even Sanders, who provided detailed testimony that incriminated herself and others, testified she believed E.C. was free to go the day after the fight.

Given the conflicting evidence, the ski mask evidence could have prejudiced the defense, persuading the jury that White was of a criminal type and therefore likely to engage in the charged conduct. It was, in

summary, reasonably likely that the jury's verdict as to each charged crime was negatively affected by the presence of such inflammatory evidence. Where it is reasonably probable such evidentiary error affected the verdict, a new trial is required. Gresham, 173 Wn.2d at 433-34.

3. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON RECKLESSNESS AND DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

The trial court's instructions misstated the law by giving the jury an incorrect definition of "recklessness," thereby relieving the State of its burden of proving an essential element of second degree assault. Reversal of the assault conviction is also required because counsel was ineffective for failing to object to the flawed instruction.

a. The jury instruction defining recklessness misstated the law and relieved the State of its burden of proof.

"Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt." State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011) (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). It is reversible error to instruct the jury in a way that relieves the State of the burden of proof. Id. (quoting State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)). Accordingly, a challenge the jury instruction defining recklessness may be raised for the first time on appeal.

Peters, 163 Wn. App. at 847 (citing RAP 2.5(a)(3)). This Court reviews errors of law in jury instructions de novo. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Under RCW 9A.36.021(1)(a), a person commits second degree assault if he "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." The "to convict" instruction for count 1 provided:

To convict [White] of the crime of assault in the second degree, as charged in count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That between January 20 . . . and January 22, 2010, [White] or an accomplice intentionally assaulted [E.C.];
2. That [White] or an accomplice thereby recklessly inflicted substantial bodily harm on [E.C.]; and
3. That this act occurred in the State of Washington.

CP 184 (Instruction 17).

RCW 9A.08.010(1)(c), addressing general levels of culpability, states, "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation."

Here, Instruction 20 defined "recklessness" as follows:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a *wrongful act* may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that result.

CP 185 (emphasis added).

The italicized portion of Instruction 20 misstates the law because it does not convey the mental state required to convict White of second degree assault under RCW 9A.36.021(1)(a). To hold the State to its burden of proof, the instruction should have used the term "substantial bodily harm" rather than the term "a wrongful act."⁸

In State v. Harris, Harris was charged with first degree assault of a child, which requires the State to prove "the person . . . [i]ntentionally assaults the child and . . . [r]ecklessly inflicts great bodily harm." 164 Wn. App. 377, 383, 263 P.3d 1276 (2011) (quoting RCW 9A.36.120(1)(b)(i)). The State alleged that the injury resulted from shaking. Harris, 164 Wn. App. at 380. To convict for first degree assault of a child, the jury had to find Harris recklessly disregarded a substantial risk that "great bodily harm" would occur as a result of shaking the child. Id. at 384. The

⁸ Although the jury did not reach the charge, the instructions on the lesser degree offense of third degree assault were similarly defective as to criminal negligence. CP 186-87 (Instructions 24 and 27).

instruction defining recklessness thus relieved the State of its burden. Id. at 388. In reversing the conviction, this Court held that a jury instruction defining recklessness must account for the specific risk contemplated under that statute, i.e., "great bodily harm" rather than some undefined "wrongful act." Id. at 387-88 (quoting State v. Gamble, 154 Wn.2d 457, 468, 114 P.3d 646 (2005) ("the risk contemplated per the assault statute is of 'substantial bodily harm'")).

In Peters, Peters was convicted of first degree manslaughter, which requires proof that the defendant "recklessly causes the death of another person." 163 Wn. App. at 847 (quoting RCW 9A.32.060(1)(a)). This Court concluded the jury instructions provided an improper explanation of recklessness. Peters, 163 Wn. App. 849-50. As in Harris, the instruction informed the jury the State had to prove only that Peters "knew of and disregarded 'a substantial risk that a wrongful act may occur', rather than that a substantial risk that death may occur." Id. The Court held the instruction relieved the State of its burden of proving Peters knew of and disregarded a substantial risk that death may occur, and allowed the jury to convict Peters based on a lesser showing. Id. at 850.⁹

⁹ This Court later found a similar "wrongful act" instruction was erroneous, but declined to reverse where defense counsel proposed the instruction. The appellant's claim was thus one of ineffective assistance of counsel, but the Court denied the claim because trial occurred before

Instruction 20 here is flawed for the same reason as the instructions in Harris and Peters. The instruction needed to account for the specific risk contemplated by the second degree assault statute, i.e., "substantial bodily harm" as opposed to a generic "wrongful act." The instruction therefore relieved the State of its burden of proving White or an accomplice acted with a disregard that a substantial risk of substantial bodily harm would result.

The instruction is, however, subject to a harmless error analysis. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). A misstatement of the law with respect to an element is harmless if the element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). To determine whether the error is harmless, this Court must find beyond a reasonable doubt the verdict would have been the same without the error. Brown, 147 Wn.2d at 341. The State bears the burden of showing that the error is harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S.

Harris and Peters were decided. Johnson, 172 Wn. App. 112 (declining to find deficient performance because at the time of Johnson's trial "though incorrect, [proposing the flawed instruction] was not objectively unreasonable.").

673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Guloy, 104 Wh.2d 412, 425, 705 P.2d 1182 (1985).

Here, the jury should have been required to find White or an accomplice knew of and disregarded a risk that the assault would result in E.C. suffering “substantial bodily harm.” That term is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

White does not dispute that the jury was entitled to find substantial bodily harm based on E.C.’s injuries. For example, a fragile bone in her eye socket was fractured. But these injuries are far from “substantial bodily harm” at its most extreme. See, e.g., State v. Duncalf, 177 Wn.2d 289, 297-98, 300 P.3d 352 (2013) (upholding exceptional sentence for second degree assault based on a severe beating). White denied hitting E.C. The lack of injury to White’s hands at his arrest was consistent with this denial. It was, perhaps, also consistent with a less significant blow.

But White was also charged as an accomplice. A proper instruction could have resulted in acquittal because it could have allowed the defense to argue that the assailant who caused the fracture – whoever it was – failed to appreciate the intensity of the injuries that could result, and

thus did not disregard a risk that substantial bodily harm could occur. One of E.C.'s admitted assailants was Sanders, who had snorted 80 milligrams of Oxycontin shortly before the fight and was apparently too intoxicated to notice she had broken her arm until the following day. 9RP 1474, 1506, 1509-10. In that state, Sanders could have therefore failed to appreciate the harm she was likely to cause. The same is true of the men, who were all drinking that night.

The State cannot, therefore, prove the instructional error was harmless beyond a reasonable doubt, and reversal is required. Peters, 161 Wn. App. at 851-52.

- b. In the alternative, defense counsel was ineffective for failing to object to the flawed recklessness instruction.

The Sixth Amendment and Article I, Section 22 guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the accused Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

The State, not the defense, proposed Instruction 20. CP 23-42. But defense counsel did not object to it. 14RP 2415. Deficient

performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Both Harris and Peters had been decided at the time of White's November-December 2011 trial. A competent attorney would have been aware Instruction 20 was flawed and would have objected to it, and, likewise been able to argue White's case from a more advantageous position.

The State may argue that counsel's performance cannot be deficient because Instruction 20 is based on the pattern instruction. That argument fails. Even though Instruction 20 is based on WPIC 10.03, it is not properly tailored to the charge and facts.

WPIC 10.03 provides:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a [wrongful act] [_____] may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

[When recklessness [as to a particular [result] [fact]]] is required to establish an element of a crime, the element is also established if a person acts [intentionally] [or] [knowingly] [as to that [result] [fact]].]

11 Washington Practice: Washington Pattern Jury Instructions: Criminal (WPIC) 10.03 (3d Ed. 2008).

Pattern instructions are not to be applied in a mechanical manner. The WPIC committee specifically cautions lawyers that pattern instructions "provide a neutral starting point for the preparation of

instructions that are *individually tailored for a particular case*. We emphasize that they are a starting point, not an ending point. Trial judges and *attorneys must always consider appropriate modifications to fit the individual case.*" 11 Wash. Prac.: WPIC 0.10 (Introduction to Washington's Pattern Jury Instructions for Criminal Cases) (emphasis added).

This case-by-case approach includes "substituting more specific language for the necessarily general language of a pattern instruction." *Id.* Bracketed language in a pattern instruction, such as the "wrongful act" language in WPIC 10.03, signifies "the enclosed language may or may not be appropriate for a particular case." *Id.* Brackets "are inserted to alert the judge and attorneys that a choice in language needs to be made." *Id.* WPIC 10.03, the recklessness instruction, puts "wrongful act" in brackets immediately followed by a direction to "fill in more particular description of act, if applicable." *Harris*, 164 Wn. App. at 384-85 (citing 11 Wash. Prac.: WPIC 10.03, at 209).

Reasonably competent counsel would have known at the time of White's trial that it was necessary to fill in the bracketed language with a more particular description of the act at issue for second degree assault. Indeed, the statutory definition of second degree assault under RCW

9A.36.021(1)(a) requires that a person "recklessly inflict[] substantial bodily harm," not recklessly inflict a "wrongful act."

Only legitimate trial strategy or tactics constitute reasonable performance. See State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Counsel has a duty to know the relevant law. Kylo, 166 Wn.2d at 862. Case law should have alerted counsel that the "wrongful act" required for a finding of recklessness in a second degree assault case is recklessness that substantial bodily harm would occur, not simply whether an undefined "wrongful act" would occur. The failure to object was objectively unreasonable.

A defendant demonstrates prejudice from such ineffective assistance by showing a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (quoting Strickland, 466 U.S. at 694). White "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

By relieving the State of its burden of proof on the recklessness element, the flawed instruction undermines confidence in the jury's verdict. There is no question that a "wrongful act" occurred here. Indeed, any offensive touching – whether or not it results in injury – may be considered wrongful. State v. Stevens, 158 Wn.2d 304, 314, 143 P.3d 817 (2006).

But Instruction 20 improperly allowed the jury to find White guilty if he or an accomplice knew of and disregarded a substantial risk that any "wrongful act" could occur, rather than holding the State to its more difficult burden of proving White or an accomplice knew of and disregarded the risk that "substantial bodily harm" – such as a fracture – could occur.

As discussed above, the evidence conflicted as to who caused the fracture, the injury that clearly qualified as substantial bodily harm. The evidence could have likewise permitted the defense to call into question whether E.C.'s assailant was, in fact, capable of appreciating the degree of harm that could result. Reversal of the assault conviction is required because there is a reasonable probability the flawed instruction affected the verdict. See Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (test for "reasonable probability" of prejudice is

whether it is reasonably probable that, without the error, at least one juror would have reached a different result).

4. THE COURT ERRED WHEN IT CALCULATED AN OFFENDER SCORE OF FIVE ON THE ASSAULT CONVICTION.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Statutory construction is a question of law and is reviewed de novo. In re Pers. Restraint of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

The court erred in calculating White's offender score on his assault conviction because it appears to have counted the assault conviction against itself. The court ruled the rape convictions were the "same criminal conduct" and scored as a single offense. Thus, in calculating the offender score on the assault conviction, the convictions counted as two points under the doubling provision of RCW 9.94A.525(8); RCW 9.94A.030(54). White's unlawful imprisonment conviction, not considered a violent offense, added a single point. RCW 9.94A.525(8); RCW 9.94A.030(54). White's two juvenile offenses, neither a violent offense, counted as one point combined. RCW 9.94A.525(8). The total is therefore four points. But at the sentencing hearing, the court appears to

have mistakenly counted the assault conviction against itself, arriving at a total of five points. 22RP 67.

The case should be remanded for resentencing on the assault charge based on an offender score of four. See RCW 9.94A.510; RCW 9.94A.515 (setting standard range for second degree assault with offender score of four as 15-20 months).

5. THE COURT IMPOSED AN EXCESSIVE COMMUNITY CUSTODY TERM ON THE ASSAULT CONVICTION.

Under RCW 9.94A.701(2), a court is directed to sentence an offender to 18 months of community custody if he is convicted of a “violent offense that is not considered a serious violent offense.” Second degree assault is considered a “violent” offense, not a “serious violent” offense, under RCW 9.94A.030(54)(a)(viii). The court therefore erred in sentencing White to 36 months rather than 18 months of community custody for the assault. CP 116

D. CONCLUSION

Because the State failed to list all essential elements of the crime of unlawful imprisonment, this Court should reverse and dismiss that count without prejudice. Admission of the ski mask evidence improperly exposed the jury to prejudicial evidence, suggesting White had a general propensity to commit criminal acts. In addition, the court relieved the state of its burden on an element of second degree assault by instructing the jury that recklessness as to any wrongful act could support a conviction. In any event, two separate sentencing errors related to the assault conviction require resentencing on that count.

DATED this 4TH day of February, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 69655-6-I
)	
CHRISTAPHER WHITE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF FEBRUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRISTAPHER WHITE
DOC NO. 354893
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE WA, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF FEBRUARY, 2014.

X Patrick Mayovsky

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STATE OF WASHINGTON
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