IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27332-6-III**
	)	**(consolidated with**
Respondent,	)	**No. 28678-9-III)**
	)	
v.	)	
	)	
HERMAN LEWIS,	)	
	)	**Division Three**
Appellant.	)	
----------	)	
In the Matter of the Personal Restraint Petition of:	)	
	)	
HERMAN LEWIS,	)	
	)	**UNPUBLISHED OPINION**
Petitioner.	)	
	)	

Siddoway, J. — Herman Lewis appeals his convictions of attempted first degree rape and first and second degree assault arguing (1) insufficient evidence supports his convictions, (2) instructional error, and (3) ineffectiveness of trial counsel. In his pro se statement of additional grounds, Mr. Lewis contends the court erred in considering hearsay evidence at sentencing and violated the real facts doctrine. Finally, in his

consolidated personal restraint petition, Mr. Lewis contends he received ineffective assistance of counsel based on an insufficient challenge to the State's evidence of his sanity and his trial counsel's decision to pursue an insanity defense rather than a diminished capacity defense.

We conclude that Mr. Lewis was diligently and competently represented in this difficult case. The jury believed the evidence presented by the State. We find no error, affirm the convictions, and dismiss the personal restraint petition.

FACTS AND PROCEDURAL BACKGROUND

Early in the morning of April 30, 2007, Mr. Lewis went to a family dining restaurant, "Shari's," and struck up conversation with Amanda McKenna, a cook. Mr. Lewis had stopped for breakfast at the restaurant on prior occasions and Ms. McKenna recognized him as a regular customer. On this occasion, Mr. Lewis invited Ms. McKenna to go out to the parking lot to look at his new Corvette; she walked toward the foyer and looked at the car out the window but declined to go outside. He then told her he wanted to give her something and handed her $50. Ms. McKenna said she could not take it. Mr. Lewis then said, "Just come make love to me and you will have your million dollar house and you will never have to work at Shari's ever again." Report of Proceedings (RP) at 332. She continued to decline this, and repeated, requests. Mr. Lewis then grabbed at her breasts and ripped her shirt. Ms. McKenna pushed him away. Mr. Lewis grabbed

her hands. Ms. McKenna dropped to the floor to make it difficult for Mr. Lewis to pull her and she called to a co-worker, Bernice Caldwell, for help. Mr. Lewis began to drag Ms. McKenna on the floor toward the foyer.

Einar Pedersen, a regular customer at Shari's, came to Ms. McKenna's aid. Mr. Lewis hit him in the face with a closed fist, knocking him to the floor, unconscious.

Ms. Caldwell responded to Ms. McKenna's calls for help, jumping on Mr. Lewis and grabbing him. Ms. Caldwell and Ms. McKenna were able to break away and hide in a back office.

At trial, Ms. McKenna testified that it was odd for Mr. Lewis to approach her immediately on arriving, it was out of character for him to be insistent with her, and she was shocked by his actions. Ms. Caldwell testified that she thought Mr. Lewis was behaving oddly from the moment he came into the restaurant and that everything he did that day was abnormal; he had never been crude, inappropriate, or aggressive before.

After Ms. McKenna and Ms. Caldwell fled and hid, Mr. Lewis left the restaurant and drove across the street to a fast-food restaurant. Officer Terry Preuninger was the first police officer to respond to the report of a fight at Shari's involving a suspect who had moved on to the neighboring fast-food restaurant. The officer pulled into the parking lot of the fast-food restaurant and, recognizing the Corvette from the dispatch report, parked his car behind to block it. When Mr. Lewis emerged from the restaurant, the

officer told Mr. Lewis he needed to talk to him. Although Officer Preuninger was in uniform and his car blocking Mr. Lewis's Corvette was a fully loaded, marked patrol car, Mr. Lewis ignored the officer, told him "Move your car," and proceeded to get into the Corvette. RP at 464. Mr. Lewis then started the Corvette, placed it in reverse, knocked Officer Preuninger (who was attempting to pull him out of the car) to the ground, and repeatedly slammed the Corvette into the patrol car until he had moved it far enough that he could pull out. By this point, Officer Preuninger had drawn his firearm, commanded Mr. Lewis to stop, and threatened to shoot him. Undeterred, Mr. Lewis accelerated toward the officer, who jumped out of the way to avoid being hit. Mr. Lewis rammed a second responding patrol car as he left the parking lot. Following a chase by other officers called to assist, Mr. Lewis was held up in traffic, at which point the officers were able to reach him and pull him from his car—although not before he accelerated again, striking the car in front of him.

Because the officers used an electronic stunning device on Mr. Lewis in the process of capturing him, they took him to the hospital for a medical clearance before proceeding to the jail. At the hospital, Mr. Lewis was seen by Dr. A.B. Harris, an emergency room physician. Electronic medical records revealed that Mr. Lewis, a senior pastor at a Spokane church, had admitted himself to the emergency room the prior day, complaining of headaches, insomnia, and confusion. He had been seen by Dr. Jonathan

Lueders, who prescribed medication to help him sleep and referred him to a psychiatrist for outpatient treatment. Upon examining Mr. Lewis on the morning of the incident, Dr. Harris was convinced he was manic and treated him with Zyprexa, a fast-acting antipsychotic drug. Dr. Harris wanted to keep him at the hospital, so when officers pressed her to release him, telling her "Let him go. He's on cocaine or PCP [phencyclidine]," she administered a urine toxicology screen—not because she believed he was on drugs but because she hoped a negative test would persuade the officers to let her admit him to the hospital. RP at 588-89. The screen was negative for drugs, as had been a screen ordered by Dr. Lueders the prior day.

Mr. Lewis was nonetheless cleared for release by the hospital's psychiatric triage staff and was taken by officers to the major crimes division where he waived his *Miranda*[1] rights and was interviewed by Detectives Timothy Madsen and Marvin Hill. Initially, Mr. Lewis claimed confusion. But he then admitted that he had gone to Shari's that morning to see the cook; that he had given her $50 and told her he wanted to have sex with her; that she refused; and that he grabbed her and tried to forcibly take her out to his car, where he would have had sex with her. He also admitted that as he was trying to drag her out, a male customer tried to shove Mr. Lewis away in an effort to protect the cook and he hit the customer hard in the face. While recounting these events in an

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

orderly fashion, Mr. Lewis also stated that he was hearing voices, stated he was sleepy, and acted sleepy. Both detectives observed that while closing his eyes and seeming to nod off, he was intermittently looking for their reaction. They told him they did not believe he was crazy. In response, Mr. Lewis opened his eyes; began to converse normally; and told them he was only acting crazy because his drug dealer, Robert Harris, told him to act crazy if ever caught by the police.

Mr. Lewis then told the detectives he had been leading a double life, preaching on Sundays but using drugs and alcohol and chasing women during the week. He told detectives he had gotten up that morning around 6 a.m. and had been using crack cocaine and PCP but had no drugs left at home. He told them that when the cook at Shari's did not want to have sex, it angered him and he grabbed her to take her to have sex. He stated that he hit the intervening customer so hard he thought he had killed him. He stated he had then gone to the fast-food restaurant to look for another woman to have sex with but all he saw there were old women and children. He admitted that he had been approached by an officer outside the fast-food restaurant but at that point feared he had killed the customer at Shari's and was determined to do anything he needed to get away. He showed no remorse and told the detectives that he had a gun taped under the dashboard of the Corvette and would have used it to force a woman to have sex or to resist arrest if he had had the chance. Upon completion of the interview, the detectives

asked Mr. Lewis to provide a videotaped interview. He agreed and provided the incriminating information a second time.

Results of the detectives' follow-up on Mr. Lewis's statement were mixed. They were informed by a hotel owner that Mr. Lewis had booked rooms on six days over the prior year and had been placed on the hotel's do not rent list. A follow-up on the address given by Mr. Lewis for Robert Harris, his ostensible drug dealer, turned out to be a prior address for Mr. Lewis's church and no Robert Harris fitting Mr. Lewis's description of a drug dealer was ever identified. A search warrant for the Corvette was obtained and executed and no gun was found in the car.

The State charged Mr. Lewis with attempted first degree rape, indecent liberties, and multiple counts of assault. He eventually entered a plea of not guilty by reason of insanity. He was found competent to stand trial and his motion to suppress his statements made to Detectives Madsen and Hill on grounds that he did not knowingly waive his *Miranda* rights was denied.

At trial, the State's evidence of Mr. Lewis's conduct was overwhelming and undisputed; the only issue was his state of mind. In support of his insanity defense, Mr. Lewis presented evidence that he had begun to act strangely in the week prior to the assaults. His wife testified that, beginning on the prior Tuesday, he complained of feeling strangely and became upset, crying and telling her "I don't know what's wrong with me."

RP at 731. By Wednesday, he was not sleeping well and was acting differently. On Thursday, he told her that he had won the lottery and that they were rich. By that point, he was not going to bed at all. She pleaded with him to talk to her but for the most part he would not, and he did not want his grandchildren around, which was not like him. The Saturday prior to the assault he behaved erratically, inviting friends to a barbecue that he commenced to prepare and then abandoned. Later he traveled to a Chevrolet dealership, where he completed paperwork to test drive a $50,000 Corvette. He did not return home until around 8 p.m. with the new car, telling dinner guests that the Lord had blessed him by letting him win the lottery and acquire the new Corvette.

The next morning, Mrs. Lewis awoke to find the house in disarray, with Mr. Lewis frantically looking for his lottery ticket. He later calmed down and told her he knew where it was. He left for church and in the early afternoon called his wife to say that he had given $85,000 to the church from the lottery winnings and that he and a deacon were taking a $2,000 check from the church so that the entire congregation could celebrate with a meal at a local buffet restaurant. When he promised to come directly home but did not, she traveled to the restaurant to get him. As they drove home, he started crying, telling her "[S]omething's really wrong," and asked her to take him to the emergency room. RP at 747. At the emergency room, he told several of the medical staff that he had just won the lottery and asked Mrs. Lewis to give each of the staff $500 checks. As they

waited to be seen, Mrs. Lewis described Mr. Lewis as dancing and acting like a four-year-old. He argued with her at one point, insisting he could move a large piece of hospital equipment with his mind. Upon his discharge from the emergency room, Mrs. Lewis made an appointment for him with the mental health department.

Later that evening he again would not go to bed. He first began crying in distress over sexual molestation to which he had been subjected by his grandmother, something he had told his wife about decades earlier. Mrs. Lewis eventually calmed him down. Next, he told her that he did not want her to be scared, but that he was really God. He then corrected himself and said he was "one of God's great angels." RP at 754. After lying down, he got up again, insisting that there was a great storm and that he needed to call his sister in Texas. At 1 a.m. he began placing calls to his sisters and to several friends in Texas, waking them to tell them about an impending storm or family illness.

On the morning of the assaults, Mrs. Lewis testified that Mr. Lewis left as usual at 6 a.m., insisting that he was all right. He promised to call her at 7 a.m. He called twice at 7 a.m to say that he was going to go to Texas to get their son. She insisted that he should not. A couple of hours later she learned about her husband's arrest.

Mrs. Lewis testified that Mr. Lewis had never had any prior history of mental illness and had never used any illegal drugs. There proved to be no truth to Mr. Lewis's repeated statements that he had won the lottery. Mrs. Lewis testified that upon release

from jail he had received treatment and was taking medication for acute manic disorder.

The defense called several treating and expert medical witnesses. It called Dr. Harris, the emergency room physician who had seen Mr. Lewis the morning of the assault. Dr. Harris testified that when she saw Mr. Lewis he was not psychotic but was manic with psychotic features, exhibiting symptoms of extreme hyperactivity and rapid and pressured speech. She testified that patients who are manic have grandiose plans or ideas that make no sense and that it is common for them to spend money they do not have and engage in sexual indiscretion. She testified that she would not expect persons in a manic phase to be responsible for their actions because they have no insight into what they are doing. When asked if he was insane, she testified that "insane" is not a word that doctors use but testified, "Was he mad, did he have extreme mental illness, which is what insane means, absolutely." RP at 601. On cross-examination, she acknowledged she was not a psychiatrist or psychologist.

The defense called Dr. Lueders, the emergency room physician who had seen Mr. Lewis the prior day. He testified that Mr. Lewis complained of problems with headaches the prior three weeks, of crying more, and of doing things that were not normal for him over the prior three days. Dr. Lueders learned that Mr. Lewis had not been sleeping. Mr. Lewis's behavior was somewhat manic, so Dr. Lueders had him seen by a psychiatric triage counselor. He testified that Mr. Lewis was released because he was not regarded

as a danger to himself or others; he was prescribed a medication that would relax him to improve his sleep and referred for outpatient follow-up.

The defense called Dr. Alan Muhlestein, a clinical psychologist at Eastern State Hospital. Dr. Muhlestein testified that on May 10, 2007, after Mr. Lewis had been in the Spokane County jail for a little over a week, a designated mental health professional for the county requested that Mr. Lewis be transferred from the jail to the adult psychiatric unit at Eastern. He testified that Mr. Lewis was seen at Eastern by an admitting psychiatrist, who diagnosed him as suffering from psychosis not otherwise specified. Dr. Muhlestein testified that he had not personally examined Mr. Lewis but relied on the medical records, concurred in the diagnosis, and provided an evaluation in support of further court ordered hospitalization for Mr. Lewis, which was later canceled when Mr. Lewis was referred for a competency evaluation. On cross-examination, he testified it would be unusual for a patient to vacillate between psychotic behavior and lucid, organized communication in short periods of time.

Finally, the defense called Dr. Clay Jorgensen, a forensic psychologist and Mr. Lewis's psychiatric expert, who testified that he evaluated Mr. Lewis on January 15, 2008 to determine Mr. Lewis's mental state on the day of the assaults, relying on police reports, emergency room notes, Eastern State Hospital records, and police investigation materials. Dr. Jorgensen expressed his opinion that Mr. Lewis had suffered from

posttraumatic stress disorder for most of his life as a result of the sexual molestation by his grandmother, that he was ruminating over the molestation in the week before the assaults leading to sleep deprivation, and that his mental state deteriorated as a result of the cumulative sleep deprivation to the point where he had a psychotic break. He testified that Mr. Lewis was "acutely psychotic" at the time of his criminal acts and in a dissociative fugue at the time he provided statements to Detectives Madsen and Hill. RP at 795. He testified that Mr. Lewis was unable to understand the nature and quality of what he was doing at that time. Dr. Jorgensen concluded that Mr. Lewis was legally insane at the time of the crimes.

In rebuttal, the State called Dr. Randall Strandquist, a clinical psychologist at Eastern State Hospital. Dr. Strandquist had first evaluated Mr. Lewis at Eastern on May 24, 2007, after the court ordered a competency evaluation. Dr. Strandquist concluded then that he was competent to stand trial. After Mr. Lewis entered a plea of not guilty by reason of insanity, Dr. Strandquist performed a second evaluation to determine whether Mr. Lewis had a basis for the defense. Dr. Strandquist's written report diagnosed Mr. Lewis with "polysubstance abuse and a major depressive episode" and concluded that Mr. Lewis had the capacity for legal sanity. RP at 847. His diagnosis of polysubstance abuse was based on Mr. Lewis's repeated reports to jail and medical staff of past substance abuse. He recognized that Mr. Lewis later denied using drugs and

that he did not have any concrete evidence of drug abuse but stood by his opinion that Mr. Lewis was not insane for additional reasons. He disputed Dr. Jorgensen's and Dr. Harris's diagnoses, testifying that the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) states that a psychotic break would last at least a day and that first onset mania at age 49 is rare. He also testified that Mr. Lewis's action in fleeing after he thought he had killed Mr. Pedersen demonstrated that he knew right from wrong and understood the nature and character of his actions.

The jury rejected Mr. Lewis's insanity defense. It found him guilty of attempted first degree rape, second degree assault, and one count of first degree assault. The court sentenced Mr. Lewis to 126 months.

Mr. Lewis timely appealed.

ANALYSIS

We first address the issues raised by Mr. Lewis's appeal.

I. Sufficiency of Evidence: Attempted First Degree Rape

Mr. Lewis contends the evidence is insufficient to sustain his conviction for attempted first degree rape. A person is guilty of first degree rape "when such person engages in sexual intercourse with another person by forcible compulsion" and one of four aggravating elements is present; in this case, the aggravating element charged by the

State was that "the perpetrator or an accessory . . . [k]idnaps the victim." RCW 9A.44.040. A person is guilty of criminal attempt if, with intent to commit a specific crime, the person does any act that is a substantial step toward committing the completed crime. RCW 9A.28.020(1); *State v. Aumick*, 73 Wn. App. 379, 383, 869 P.2d 421 (1994), *aff'd*, 126 Wn.2d 422, 894 P.2d 1325 (1995). Washington courts have defined a "substantial step" as "an act strongly corroborative of the actor's criminal purpose." *State v. Newbern*, 95 Wn. App. 277, 287, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018 (1999).

In considering a challenge to the sufficiency of the evidence, we construe the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim that the evidence was insufficient admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id*.

Intended Action

Mr. Lewis maintains there is no evidence that he intended to have "sexual intercourse" with Ms. McKenna as defined in RCW 9A.44.010(1) as opposed to "sexual contact" under RCW 9A.44.010(2).[2] In the absence of any specifics concerning the

[2] "'Sexual intercourse' (a) has its ordinary meaning and occurs upon any penetration, however slight." RCW 9A.44.010(1). "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

sexual act intended, he argues "the jury was left to speculate as to what the act might be." Br. of Appellant at 16.

Viewing the evidence and all inferences in the light most favorable to the State, the jury had sufficient evidence from which to conclude that Mr. Lewis intended to have intercourse with Ms. McKenna. Ms. McKenna testified that Mr. Lewis handed her $50 and then told her to "make love to me." RP at 332. Mr. Lewis admitted to police that he intended to take Ms. McKenna to his car and "have sex" with her. RP at 555, 646. While "sex" and "making love" could mean conduct other than sexual intercourse, we review all evidence and the inferences in the light most favorable to the State and a reasonable inference from Mr. Lewis's statements is that Mr. Lewis intended to have intercourse with Ms. McKenna.

State v. Jackson, 62 Wn. App. 53, 813 P.2d 156 (1991) supports our analysis. In *Jackson*, the defendant, like Mr. Lewis, challenged his conviction based upon his assertion that the fact finder could not reasonably have concluded that he intended to force intercourse. The defendant in that case backed a 14-year-old girl into her mother's bedroom and told her to lift up her skirt or he would kill her. 62 Wn. App. at 55. Despite no explicit statement as to the defendant's intention, Division One of this court concluded that this sequence of events supported an inference of intent to force intercourse. *Id*. at 57-58.

Forcible Compulsion and Kidnapping

Mr. Lewis argues that the State failed to establish the element of "forcible compulsion" or the aggravating factor of kidnapping, relying for support on *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In *Green*, the court held that the State had not presented substantial evidence of kidnapping as a factor in prosecuting the murder of a victim who was grabbed and restrained by the defendant in an open loading dock area behind an apartment building and was then carried by him to a public stairway within the building, where she was killed within a matter of two to three minutes. To establish kidnapping as an element of aggravated first degree murder, the State must establish that the defendant "abducted" the victim. "Abduct" is defined as "restraining" a person by "(a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2). "Restraint" means to restrict a person's movement without consent and without legal authority in a manner that interferes substantially with her liberty. RCW 9A.40.010(1). The *Green* court held that review of the record did not reveal evidence of any restraint by threat of deadly force, no deadly force was used in carrying the victim into the building, and the homicide could not establish kidnapping; kidnapping contemplates the use of deadly force that stops short of homicide. 94 Wn.2d at 228-29. The court held that substantial evidence did not support restraint by means of secreting the victim, because the defendant had moved her only a

slight distance, in a matter of moments, from one public place to another. The court held that the act of grabbing and moving the victim were an integral part and not independent of the underlying homicide. *Id.* at 226-27.

The court noted that both the loading dock and stairway areas were public areas, used in common by the occupants and visitors to the apartments. *Id.* It cautioned against reading its result too broadly:

> Although we characterize the movement and restraint in this case as *incidental*, we do not mean to suggest that under every conceivable set of facts a movement of 20 to 50 feet or being found in a stairwell would be *incidental*. That which constitutes *incidental* movement is not solely a matter of measuring feet and inches. It is a determination to be made under the facts of each case, in light of the totality of surrounding circumstances. This characterization is as much a consideration of the relation between the restraint and the homicide as it is a measure of the precise distance moved or place held. It involves an evaluation of the nature of the restraint in which distance is but one factor to be considered.

Id. at 227. In a case closer to the facts of this case, *State v. Whitney*, 44 Wn. App. 17, 21, 720 P.2d 853 (1986), *aff'd*, 108 Wn.2d 506, 739 P.2d 1150 (1987), the court found that a rational jury could reasonably have found that the State proved the kidnapping element of first degree rape beyond a reasonable doubt where the victim was forced by threatened violence to get into the defendant's car and was driven a short distance down the road before the defendant forced her to have sexual intercourse.

In this prosecution for *attempted* first degree rape, the State was not required to

show that Mr. Lewis successfully removed Ms. McKenna from Shari's; it had to show only that Mr. Lewis took a substantial step toward kidnapping her for the purpose of rape. Ms. McKenna testified to his statement as to what he wanted and several witnesses testified that when Ms. McKenna refused to leave with Mr. Lewis, he grabbed her by the hands and, when she fell to the ground, began dragging her across the floor toward the front door. Mr. Lewis told police he intended to take her to his car to have sex with her.

Mr. Lewis argues on appeal, but without identifying supporting evidence, that his intent was only to have some sort of sex with Ms. McKenna in the parking lot of Shari's. Br. of Appellant at 17. But there is nothing about Mr. Lewis's behavior on the day in question that suggests he would have made himself an easy target for arrest by remaining in the parking lot of Shari's. He delivered what he thought was a fatal blow in his effort to abduct Ms. McKenna and he never voluntarily stayed put for Officer Preuninger or any of the other officers who were required to pursue and capture him. Viewing the evidence and the inferences in the light most favorable to the State, a rational jury could conclude from the evidence and the totality of the circumstances that Mr. Lewis was dragging Ms. McKenna from her place of employment, where she enjoyed some protection, in order to get her into his car, a private, moveable domain under his control, where she would not be protected. Viewed in the light most favorable to the State, the State established the necessary components of attempted first degree rape.

II. Jury Instruction

Mr. Lewis contends for the first time on appeal that the trial court's failure to define "kidnapping" deprived him of a constitutionally fair trial. He argues that kidnapping is a predicate element of first degree rape as charged in the information, so the trial court should have defined the term for the jury. He also contends counsel was ineffective for failing to propose an instruction that defined kidnapping.

Two jury instructions touched upon kidnapping as an aspect of forcible compulsion and a predicate element of rape in the first degree.[3] Mr. Lewis's trial counsel did not ask that kidnapping be defined by the instructions nor did the State propose an instruction defining the term. The possibility of defining kidnapping was raised by the trial court, however; after instructing the jury, she asked counsel to approach the bench. A several-minute sidebar occurred, with discussion including the following:

THE COURT: When I was reading these, we have no definition for

---

[3] Instruction 10, based on 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 40.01 (3d ed. 2008) (WPIC), states:

> A person commits the crime of rape in the first degree when he or she engages in sexual intercourse with another person by forcible compulsion when he or she uses or threatens to use a deadly weapon or what appears to be a deadly weapon or kidnaps the other person.

Clerk's Papers (CP) at 141. Instruction 12, based on WPIC 45.03, states:

> Forcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

CP at 143.

> the word "kidnap." I have seen it before. I mean, it's not -- but I think there is a definition from the WPICs [11 Washington Practice: Washington Pattern Jury Instructions: Criminal (3d ed. 2008)], don't you?
>
> [PROSECUTING ATTORNEY]: There is one. I just kind of assumed it was -- it speaks for itself in this situation.
>
> THE COURT: Here is my concern: The jury may think that it means the completed act unless we give them a definition. The kidnap -- I am not going [to] say anything more than that. I am concerned about that. Do you want to have Steve step in and get the WPICs?
>
> [PROSECUTING ATTORNEY]: We can.
>
> THE COURT: Would you rather not give it?
>
> [DEFENSE COUNSEL]: We didn't discuss it. It's a term there.
>
> THE COURT: It's a term that's not defined and we have defined other terms.
>
> [PROSECUTING ATTORNEY]: Right.
>
> THE COURT: Tell me what you would like to do. You can do what you prefer.
>
> [DEFENSE COUNSEL]: If we put it in there, there would be no question that it was excluded.
>
> [PROSECUTING ATTORNEY]: It's inadvertent.

RP at 915-16 . A volume of pattern instructions was consulted and discussion continued as the court and the attorneys looked for a relevant instruction. Apparently locating the pattern instructions for kidnapping and additional terms included in those instructions, discussion continued:

> [PROSECUTING ATTORNEY]: There is an abduct definition versus a restrain.
>
> [DEFENSE COUNSEL]: Maybe that's why you didn't put it in.
>
> THE COURT: Let's see what the charge is.
>
> [PROSECUTING ATTORNEY]: It goes with the attempted first-degree rape.
>
> THE COURT: Okay. So I just thought there would be a meaning on that word.
>
> [PROSECUTING ATTORNEY]: Look at the abduct definition,

> 39.30, and see if that might clear it up. It might or it might not.
> THE COURT: Means to restrain a person by either secreting or holding the person where that person's not going to be found or using or threatening deadly force. That might be more confusing.
> [PROSECUTING ATTORNEY]: If you had the kidnapping statute, abduct is in the kidnapping statute, so you would have to define abduct. That's probably why I didn't include it.
> THE COURT: Okay. So we'll leave it alone.
> [PROSECUTING ATTORNEY]: Yes.
> THE COURT: All right. Thanks.

RP at 917-18.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). CrR 6.15(c) requires that timely and well stated objections be made to jury instructions given or refused in order that the trial court may have the opportunity to correct any error. *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976). Where the defendant fails to offer an instruction or object, no error can be predicated on the failure of the trial court to give an instruction, unless the error is of constitutional magnitude. *State v. Parker*, 97 Wn.2d 737, 742, 649 P.2d 637 (1982); *Scott*, 110 Wn.2d at 686.

Failure to Define "Kidnapping" as Constitutional Error

Mr. Lewis first contends that the failure to define "kidnapping" is constitutional error. He argues that kidnapping is a "predicate offense," and therefore an essential

element of the crime charged. A court's failure to instruct the jury on each element of an offense charged denies a defendant a jury verdict on the omitted element and can be raised as manifest error affecting a constitutional right. *State v. Daniels*, 87 Wn. App. 149, 155, 940 P.2d 690 (1997), *review denied*, 133 Wn.2d 1031 (1998); RAP 2.5(a)(3). There is a difference, however, between identifying the elements of an offense and further defining them. Kidnapping was identified as an element of first degree rape. It is not constitutional error for a court to fail to further define one of the elements, even if it is a technical term. *Scott*, 110 Wn.2d at 690; *see also Daniels*, 87 Wn. App. at 156 (failure to define "battery" as used in assault by battery instruction is not constitutional error); *State v. Ng*, 110 Wn.2d 32, 44, 750 P.2d 632 (1988) (failure to define "theft" as used in a robbery instruction was not a matter of constitutional consequence).

The failure to define kidnapping, if error, was not constitutional error.

Ineffective Assistance of Counsel

Mr. Lewis's second basis for arguing this issue for the first time on appeal is that trial counsel was ineffective for failing to request an instruction defining kidnapping. Although a trial court's failure to give a definitional instruction does not reach the constitutional realm, a claim of ineffective assistance of counsel does. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007) (claim of ineffective assistance of counsel is an issue of constitutional magnitude).

The "technical term rule" requires courts to define technical words and expressions but not words and expressions that are of ordinary understanding and self-explanatory. *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984).

Analysis of ineffective assistance of counsel begins with the strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To overcome this presumption, the defendant must show deficient performance and resulting prejudice. *State v. Townsend*, 142 Wn.2d 838, 843, 15 P.3d 145 (2001). Prejudice is established by showing that "there is a reasonable probability that, but for counsel's error, the result would have been different." *Id*. at 844. If a defendant fails to show either prong, the claim fails. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 421, 114 P.3d 607 (2005), *overruled in part on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

Had the trial court provided a definition of kidnapping, the characteristic common to first and second degree kidnapping is that a person "intentionally abducts another person." RCW 9A.40.020, .030. The dictionary similarly defines kidnapping as "the act or an instance of stealing, abducting, or carrying away a person by force." Webster's Third New International Dictionary 1241 (1993). Defense counsel might have concluded that kidnapping was a term of sufficient common understanding that no definition was needed. As discussed with the court during the sidebar, providing the jury with the

pattern instruction's definition of kidnapping would have placed additional potentially-definable terms before the jury. *See* WPIC 39.01 and 39.10, notes on use at 712, 716 (referencing WPIC 39.30 (Abduct—Definition) and others).

Both attorneys were squarely presented with the trial court's offer, regarding a definition of kidnapping, to "[t]ell me what you would like to do. You can do what you prefer." RP at 916. Clearly, defense counsel made a conscious decision not to request a definition. Not only was it arguably not needed, defense counsel might have concluded that he would make no use of the instruction if it were given, since it would only detract from his key insanity defense to be parsing rape instructions during closing argument. Because "[d]eficient performance is not shown by matters that go to trial strategy or tactics," Mr. Lewis fails to establish ineffective assistance of counsel. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), *overruled in part on other grounds by Carey*, 549 U.S. 70. Mr. Lewis does not meet his burden of demonstrating that defense counsel's conscious decision was not legitimate trial strategy.

III. Sufficiency of Evidence: Second Degree Assault

Mr. Lewis argues that his conviction of second degree assault is not supported legally or factually. Second degree assault is committed when a defendant "[w]ith intent to commit a felony, assaults another." RCW 9A.36.021(1)(e). Mr. Lewis's conviction for second degree assault was based on his assault of Mr. Pedersen; the applicable count

of the information (count III) reads:

> That the defendant, HERMAN LEWIS, in the State of Washington, on or about April 30, 2007, did, with intent to commit the felony of rape and/or indecent liberties, intentionally assault EINAR S. PEDERSEN.

Clerk's Papers (CP) at 2.

On review of a challenge to the sufficiency of the evidence, we determine whether the evidence is legally sufficient to support the jury's finding. *State v. Clark*, 143 Wn.2d 731, 769, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000 (2001). The standard is otherwise detailed above.

Mr. Lewis argues that for a defendant to be guilty of second degree assault, the felony being committed must be directed at the person being assaulted. Therefore, in the absence of any evidence that Mr. Lewis intended to rape Mr. Pedersen, he contends the evidence is insufficient to support the conviction for second degree assault. He cites no legal authority to support his position.

In determining statutory meaning, our goal is to carry out the intent of the legislature. *State v. Neher*, 112 Wn.2d 347, 350, 771 P.2d 330 (1989) (citing *State v. Wilbur*, 110 Wn.2d 16, 18, 749 P.2d 1295 (1988)). "If the language is plain and unambiguous, the meaning is derived from the wording of the statute itself." *Id*. "When interpreting a criminal statute, a literal and strict interpretation must be given." *State v. Wilson*, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994).

RCW 9A.36.021(1)(e) provides that the factor that elevates simple assault to second degree assault is when the assault is committed "[w]ith intent to commit a felony." The legislature could easily have provided that second degree assault is committed only when the victim of the assault is also the victim of the intended felony, but it did not. The statute is unambiguous and the evidence is sufficient to support Mr. Lewis's second degree assault conviction.

STATEMENT OF ADDITIONAL GROUNDS

In his pro se statement of additional grounds, Mr. Lewis raises concerns that the trial court violated the real facts doctrine under RCW 9.94A.530 and improperly relied on hearsay evidence at sentencing. RCW 9.94A.530(2) provides in part: "In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." Mr. Lewis's particular concern is with information learned by the police in following up on his reported "other life," including activities that may have occurred at the Econo Lodge Hotel and allegations that he engaged others in "sexual conversation." Statement of Additional Grounds for Review.

Mr. Lewis does not explain how the real facts doctrine is violated and we find no violation here. During trial, Detective Madsen testified that in the course of investigating Mr. Lewis's statements about having led a double life, he learned that Mr. Lewis had

booked rooms at the Econo Lodge Hotel and been placed on its do not rent list. RP at 645. Other trial evidence dealing with Mr. Lewis's asserted "double life" was largely defense evidence, showing that Mr. Lewis's statements to the detectives were unreliable or false.

The presentence report touched on the so-called "double life" matters further, but defense counsel filed a six-page objection identifying statements, findings, and conclusions that should be disregarded by the court. CP at 191-96. At sentencing, the court stated that it would rely only on "the facts that were proved at trial and the testimony that occurred at trial." RP at 979. It further stated, "[T]o the extent that the Presentence Investigation Report is editorial in nature or gives us a subjective opinion of the person writing the report or is not supported by the facts as they came in the trial, I disregard it." RP at 980.

The trial court imposed a standard range sentence, which a defendant generally may not appeal. RCW 9.94A.585(1); *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993) (a trial court's decision regarding the length of a sentence within the standard range is not appealable because as a matter of law there can be no abuse of discretion).

Mr. Lewis fails to establish a real facts violation.

PERSONAL RESTRAINT PETITION

Mr. Lewis's consolidated personal restraint petition (PRP) raises two issues of

ineffective assistance of counsel arising out of his insanity defense. These issues were raised by his original appellate briefing but were stricken as relying on portions of the DSM-IV that were not in evidence. Commissioner's Ruling, *State v. Lewis*, No. 27332-6-III (Wash. Ct. App. May 8, 2009). Although the State continues to object to our reviewing the issues, we are able to review much of what Mr. Lewis argues without relying on his argument from portions of the DSM-IV that were not in evidence.[4]

Mr. Lewis argues first that his defense counsel failed to object to Dr. Strandquist's diagnosis that Mr. Lewis suffered a "major depressive disorder with polysubstance abuse," a diagnosis that was vulnerable to attack. PRP at Appendix A. His second argument is that defense counsel was ineffective for raising the defense of insanity instead of what he contends now is the more viable defense of diminished capacity. He argues that none of the psychiatric experts or treating physicians "provided any specific basis for their opinions that Mr. Lewis was or was not insane." *Id*.

Relief through a PRP is available where a petitioner is under "restraint" that is

[4] As pointed out by the commissioner of the Supreme Court in affirming our commissioner's ruling striking portions of the appellant's brief, a court can take notice of scholarly works such as the DSM-IV as "legislative facts"; what Mr. Lewis was not entitled to do was to seek to impeach, contradict, or discredit expert testimony given at trial with evidence not offered at trial. Commissioner's Ruling, *State v. Lewis*, No. 83359-1 (Wash. Aug. 26, 2009). And both experts testified to, or were examined about, portions of the DSM-IV. RP at 806-07, 809-10, 822, 824-25 (cross-examination of Dr. Jorgensen), 851, 856, 875 (direct and redirect examination of Dr. Strandquist).

"unlawful." RAP 16.4(a)-(c). A petitioner has the burden of establishing by a preponderance of the evidence that constitutional error resulted in actual and substantial prejudice. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). As earlier discussed, a claim of ineffective assistance of counsel in criminal proceedings raises a constitutional issue and the standard by which we review counsel's performance is discussed in section II above. If a petitioner fails to demonstrate actual prejudice, his petition will be dismissed. *In re Pers. Restraint of Grisby*, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

Failure to Object to State Expert's Diagnosis

Mr. Lewis first contends that defense counsel should have objected to Dr. Strandquist's diagnosis of polysubstance abuse. Specifically, Mr. Lewis argues that in light of two key negative drug screens—the first obtained on April 29, 2007 at Dr. Lueders's request and the second obtained on the morning of April 30, 2007 at the request of Dr. Harris—defense counsel should have objected to Dr. Strandquist's opinion. At the time of his trial testimony, however, Dr. Strandquist had become aware of the conflict between the drug screens taken at the hospital and his diagnosis and he qualified his opinion. He admitted that in making the diagnosis he did not have concrete evidence of any drug abuse nor did he have the hospital report but testified that he had been told about Mr. Lewis's report to the detectives and others about prior substance abuse. RP at

848. He defended his opinion that Mr. Lewis was sane on other grounds.

Mr. Lewis's defense counsel did not allow the discrepancy to pass with Dr. Strandquist's explanation in his direct testimony; defense counsel cross-examined Dr. Strandquist further about discrepancies and problems with his diagnosis. RP at 870-73. And he addressed the discrepancy in closing argument, telling the jury that the State's expert, among other matters:

> [S]aid Mr. Lewis was full of drugs, which he wasn't, and therefore, he is not insane, which he was.
>
> Because no drugs in his system on Sunday. No drugs in his system on Monday. Despite the fact of what he says in his taped statement, he smoked a bunch of PCP and crack, all that stuff is not true. Because of this, the diagnosis of polysubstance abuse that the doctor says he exhibited that day can't be . . . true, as well.

RP at 947-48.

In challenging the effectiveness of defense counsel on this ground, it appears that Mr. Lewis either does not recall Dr. Strandquist's testimony and cross-examination or that he misperceives the role of an objection. Cross-examination and closing argument were appropriate vehicles used by defense counsel to challenge Dr. Strandquist's diagnosis. Mr. Lewis has not demonstrated that defense counsel's failure to "object" to the testimony constituted deficient performance.

Failure to Assert Diminished Capacity Defense

Mr. Lewis also argues that his defense attorney's choice to use the defense of not

guilty by reason of insanity "deprived him of the viable defense of diminished capacity." PRP at Appendix A. Both the insanity and diminished capacity defenses can be available in a single case, however, if there is evidence supporting each. *State v. Gough*, 53 Wn. App. 619, 620, 768 P.2d 1028 (citing *State v. Martin*, 14 Wn. App. 74, 75, 538 P.2d 873 (1975), *review denied*, 86 Wn.2d 1009 (1976)), *review denied*, 112 Wn.2d 1026 (1989). A defendant is entitled to a diminished capacity instruction if (1) the crime charged includes a particular mental state as an element, (2) the defendant presents evidence of a mental disorder, and (3) expert testimony logically and reasonably connects the defendant's alleged mental condition with the asserted inability to form the mental state required for the crime charged. *State v. Atsbeha*, 142 Wn.2d 904, 914, 921, 16 P.3d 626 (2001). It is reversible error for a judge to refuse an offered diminished capacity instruction supported by the evidence. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). The pattern instruction, had it been given, states:

> Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form (fill in requisite mental state).

WPIC 18.20.

First and foremost, Mr. Lewis's expert, Dr. Jorgensen, concluded that Mr. Lewis fit the legal criteria for an insanity defense. He testified that during commission of the offenses, Mr. Lewis was "psychotic on the face of it" and unable to appreciate the nature

of his actions. RP at 796, 800. His opinion was supported by Dr. Harris, who was not a psychiatrist or psychologist and albeit for different reasons, but she was the only qualified medical professional to testify who saw Mr. Lewis immediately after his criminal acts. "[A]n attorney is entitled to rely on the opinions of mental health experts in deciding whether to pursue an insanity or diminished capacity defense." *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995), *cert. denied*, 517 U.S. 1111 (1996). In view of the ample evidence supporting an insanity defense, defense counsel's choice to place principal reliance on Dr. Jorgensen's expert opinion was clearly within the "wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

And while defense counsel relied principally on the insanity defense, he still presented some evidence of diminished capacity. In cross-examining Dr. Jorgensen, he elicited the following testimony:

> [DEFENSE COUNSEL]: Now, each of these crimes with which he is charged has some sort of mental intent to it, does it not?
> [DR. JORGENSEN]: I believe so, yes.
> [DEFENSE COUNSEL]: And with how you evaluate and diagnosed him, what is your professional opinion regarding his ability to form that intent?
> [DR. JORGENSEN]: At the time, I believe that he was delusional as part of his psychosis and was unable to form the intent to understand, unable to know what the nature and quality of what he was doing at that time.

RP at 795. Defense counsel might have made a tactical choice to place less emphasis on the defense of diminished capacity because it could be attacked not only with the seemingly intentional nature of Mr. Lewis's conduct but also his statements to detectives within a matter of hours following the events, portions of which were videotaped and aired to the jury during the trial; in closing argument, the prosecutor argued that on the videotape made shortly after the events, Mr. Lewis "puts down the order of events exactly how they happened." RP at 934.

Whether the failure to request a diminished capacity instruction constitutes ineffective assistance of counsel can turn on whether the instruction is needed, which it might not be if the jury can infer the defense from the remaining instructions. In *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), for instance, the defendant was prosecuted for eluding a pursuing police vehicle, a felony charge requiring that the driver both subjectively and objectively act with willful or wanton disregard for the lives or property of others. The jury was instructed that the manner of driving could be circumstantial evidence creating an inference of the required "willful and wanton" mental state. Although the defense theory was that the defendant was too intoxicated to form the required subjective intent, counsel failed to request an instruction that evidence of the defendant's drunkenness could negate the willful and wanton state that the jury might otherwise infer from her driving. In *Thomas*, it could not; in fact, the prosecution was

able to argue from the instructions given that the defendant's intoxication actually *established* the required mental state. The court held that the failure to request instruction on diminished capacity was both deficient and prejudicial.

A different result was reached in *Cienfuegos*, 144 Wn.2d 222, on facts similar to those involved in this case. In a prosecution of the defendant for escape, the evidence and argument focused almost exclusively on whether his drug-intoxicated state at the time he bolted from custody during transport (the defendant was suffering symptoms of withdrawal; probably from heroin and cocaine) prevented him from knowing that he was escaping from custody. The court concluded that he was entitled to a diminished capacity instruction and counsel should have requested one. Nonetheless, because the jury was given a correct instruction on knowledge and intent modified from WPIC 10.02 from which defense counsel could, and did, argue the diminished capacity defense, the court held that Cienfuegos had not met the second prong of *Strickland* requiring that his counsel's error actually deprived him of a fair trial. *Cienfuegos*, 144 Wn.2d at 229-30. The instruction on knowledge deemed sufficient in *Cienfuegos* is identical to the instruction given in this case. CP at 148.

Here again, Mr. Lewis has not demonstrated that defense counsel's tactical decisions about how to best present the issues of insanity and diminished capacity constituted deficient performance.

Mr. Lewis's convictions are affirmed and his PRP is dismissed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

_____
Siddoway, J.

WE CONCUR:

_____
Kulik, C.J.

_____
Sweeney, J.