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

STATE OF WASHINGTON,	)	No. 29774-8-III
Respondent,	)	
v.	)	UNPUBLISHED OPINION
NATHANIEL R. SHAFER,	)	
Appellant.	)	

Sweeney, J. — The trial court here denied a motion to modify a judgment and sentence after concluding that the crimes of robbery and kidnapping did not merge. On appeal, the assignment of error shifted to a claim that the crimes of robbery and kidnapping amounted to the same criminal conduct for sentencing purposes and that the defendant's lawyer was ineffective for not raising that issue during sentencing. We conclude, based on the uncontested facts here, that the robbery and kidnapping did not amount to the same criminal conduct and that counsel was not ineffective for not raising that question. We therefore affirm the court's denial of the motion to modify and we

affirm the sentence.

FACTS

The uncontested facts underlying Mr. Shafer's convictions are in a police officer's declaration in support of probable cause. On August 1, 2009, two men forced their way into the home of Trevor Morton and Kayla Edmonson. One man pointed a handgun at Mr. Morton and yelled for Mr. Morton and Ms. Edmonson to sit on the couch with their heads down. The man with the handgun began tying Mr. Morton's hands behind his back with zip ties. Meanwhile, the other man gathered items to steal. Mr. Morton fought back, grabbed the gun, and tried to fire it. The gunman choked Mr. Morton until he fell unconscious. After the burglars left, Mr. Morton freed himself and Ms. Edmonson. He then called police.

The police arrived and Mr. Morton reported that one of the robbers was an acquaintance, Joshua Hieronymus. Police learned that Mr. Hieronymus was on probation. A probation officer searched Mr. Hieronymus's home and found items taken in the robbery. Mr. Hieronymus's girl friend told police that Mr. Hieronymus and Nathaniel Shafer admitted that they had committed the robbery.

The State charged Mr. Shafer with two counts of first degree kidnapping, two counts of first degree robbery, and one count of first degree burglary. Each count

included a firearm enhancement. On February 10, 2010, Mr. Shafer entered a plea agreement. It provided, "The State will amend the Information by consolidating the two counts of Kidnapping in the First Degree into a single count and by withdrawing the Firearm Enhancement on all counts. The Defendant will plead guilty as charged." Clerk's Papers (CP) at 16. Mr. Shafer and the State also agreed: "The Defendant has one known prior felony conviction. The State agrees to recommend 144 months [of] incarceration followed by 36 months of supervision . . . . The State would further recommend that incarceration time run concurrently with time imposed in Idaho for probation violation." CP at 16.

On the same day, the State filed an amended information. It dropped the firearm enhancements and consolidated the kidnapping charge by alleging that Mr. Shafer intentionally abducted "Trevor Morton and/or Kayla Edmonson." CP at 18-21. Mr. Shafer pleaded guilty as promised.

The guilty plea statement said, "Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD RANGE as follows." It then listed standard ranges for each charge:

First Degree Burglary	67-89 months
First Degree Kidnapping	108-144 months

First Degree Robbery 87-116 months

CP at 23. Three offender scoring sheets were attached to the guilty plea statement. Each statement listed Mr. Shafer's offender score as 7 and recounted the same standard ranges set out in the guilty plea statement. Defense counsel argued for a 108-month prison sentence. The trial court accepted the guilty plea and sentenced Mr. Shafer to 144 months in prison.

On February 9, 2011, Mr. Shafer moved pro se to modify or correct his sentence. He argued that kidnapping and robbery should have merged because the kidnapping was incidental to the robberies. That same day, he also claimed that his lawyer was ineffective and moved to withdraw his guilty plea. He argued that his attorney advised him to plead guilty even though Mr. Shafer said he was innocent and that his attorney gave him incorrect advice about how much "good time" he would get. The trial court denied Mr. Shafer's motions.

Mr. Shafer filed this appeal challenging his sentence and the voluntariness of his plea. He subsequently withdrew assignments of error related to the voluntariness of his plea of guilty.

DISCUSSON

Same Criminal Conduct

This is an appeal from the court's order denying Mr. Shafer's motion to modify his judgment and sentence. The only basis for Mr. Shafer's motion was that the crimes of kidnapping and robbery should have merged. And, yet, his only remaining assignments of error on appeal relate to whether these crimes amounted to the same criminal conduct for sentencing purposes. That question was not raised, briefed, or in any way argued in the superior court. Indeed, the sentencing proceeding, including the criminal history, was stipulated to, so, of course, it is not properly before us. *State v. Nitsch*, 100 Wn. App. 512, 522, 977 P.2d 1000 (2000). The failure to find that two crimes encompass the same criminal conduct is not a miscalculation when nobody asked the trial court to rule on the issue and the defendant stipulates to his offender score. *See In re Pers. Restraint of Shale*, 160 Wn.2d 489, 495-96, 158 P.3d 588 (2007); *Nitsch*, 100 Wn. App. at 522.

Our standard of review for the judge's denial of his motion is abuse of discretion. *State v. Grantham*, 84 Wn. App. 854, 857, 932 P.2d 657 (1997). The judge abuses his discretion when he applies the wrong legal standard or bases his ruling on an erroneous view of the law. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). And that is the claim here. But the judge did not apply any legal standard or base a ruling on an erroneous view of the law because he was not asked to make a ruling on same criminal conduct.

Ineffective Assistance of Counsel

Mr. Shafer also couches his assignment of error as one of ineffective assistance of counsel and argues that his lawyer should have challenged the sentence, again, because the crimes here amount to the same criminal conduct.

Ineffective assistance of counsel is a manifest error affecting a constitutional right and so we must review the claim even if it is raised for the first time on appeal. *See State v. Brown*, 159 Wn. App. 1, 17, 248 P.3d 518 (2010) (citing RAP 2.5), *review denied*, 171 Wn.2d 1015 (2011). Mr. Shafer is required to show that his lawyer's representation was deficient and that the deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Performance is deficient when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). We start with a "'strong presumption'" that his lawyer effectively represented Mr. Shafer and that the lawyer's decisions were legitimately strategic or tactical. *State v. McFarland*, 127 Wn.2d 322, 336-37, 899 P.2d 1251 (1995) (quoting *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). Mr. Shafer must show that the outcome here would have been different to satisfy the prejudice prong. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998); *McFarland*, 127 Wn.2d at 337 n.4.

We can easily pass on whether Mr. Shafer's conduct here amounted to the same criminal conduct since the facts are undisputed and the criteria for "same criminal conduct" is well settled and easily applied. Two crimes encompass the same criminal conduct if the crimes "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

And the criminal conduct is not the same on the same victim criteria alone. *State v. Davis*, 90 Wn. App. 776, 782, 954 P.2d 325 (1998). In *Davis*, Division One of this court concluded that three crimes did not encompass the same criminal conduct when a defendant was charged with burglary and two counts of assault. *Id.* There, the defendant forced his way into Kenny Milton's home and pointed a gun at Mr. Milton and his guest, Ann Anthony. *Id.* at 779. The sentencing court found that the three crimes encompassed the same criminal conduct and the State appealed. *Id.* at 781. The appellate court reversed. It explained that "two crimes cannot be the same criminal conduct if one involves two victims and the other involves only one." *Id.* at 782 (citing *State v. Davison*, 56 Wn. App. 554, 784 P.2d 1268 (1990)). The court concluded that "[t]he trial court erred in not imposing a sentence for the assault on Anthony." *Id.*

The amended information charged Mr. Shafer with burglary, first degree kidnapping, and two counts of first degree robbery. It listed "Trevor Morton and/or

Kayla Edmonson" as the victim of the kidnapping; Trevor Morton is the victim of one robbery count, and Ms. Edmonson is the victim of the other robbery count. CP at 19-21. "Trevor Morton and/or Kayla Edmonson" is not, for us, the same as Mr. Morton or Ms. Edmonson. Here the gunman pointed a gun while ordering Mr. Morton and Ms. Edmonson to stay on the couch with their heads down. Mr. Morton and Ms. Edmonson both wound up with zip ties binding their wrists. The court then would easily have concluded that they were both victims of the kidnapping.

We affirm the judge's denial of Mr. Shafer's motion to modify the judgment and sentence and we affirm the sentence.

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.

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Sweeney, J.

WE CONCUR:

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Korsmo, C.J.

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Brown, J.