No. **68679-8-I**

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ROBIN DAVIS,

Appellant.

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUN 26 PM 1:44

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

The Honorable Judge McKeeman

APPELLANT'S SUPPLEMENTAL BRIEF

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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

OTHER AUTHORITIES

I. THE "TO-CONVICT" INSTRUCTION

The Court has requested supplemental briefing on the applicability of State v. Lorenz, 152 Wn.2d 22 (2004) and State v. Stevens, 158 Wn.2d 304 (2006) to the issue of the adequacy of the to-convict instruction given in this case.

In State v. Lorenz, supra, the issue was whether the to-convict instruction needed to include the element of sexual gratification. While the Court in Lorenz held that sexual gratification is not an essential element of first degree child molestation, the holding would appear to be limited to the somewhat unique facts. The State charged Lorenz as an accomplice to an individual who the State alleged had touched the child for his sexual gratification. The Court noted that including sexual gratification as an essential element where the defendant's guilt is predicated on accomplice liability would have required the jury to find that the touching was done for her (the accomplice's) sexual gratification. The Court held such a result is not an accurate statement of the law. It is sufficient to

show that the touching was for the principal's sexual gratification.

Stevens appealed from the refusal by the trial court to give a voluntary intoxication instruction. The Supreme Court acknowledged that even if sexual gratification is not an essential element of child molestation in the second degree as held in Lorenz, supra., the State still had the burden of establishing the defendant acted for the purpose of sexual gratification. Since that raised the issue of his intent, he was entitled to an instruction on voluntary intoxication. However, without including sexual gratification in the to-convict instruction, one still is left with a voluntary intoxication instruction that is of dubious benefit to the defendant. The statutory defense reads in relevant part: whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state. RCW 9A.16.090. The only instruction that

typically uses the term "element" is the to-convict instruction. If the jury is not advised that intent in this case (touching for the purpose of sexual gratification) is an element of the offense, how can the jury know how to apply the voluntary intoxication instruction? This is an issue that the Court in Stevens failed to address.

Appellant continues to maintain that it was error for the Court not to include the definition of restrain in the to-convict instructions for kidnapping in the second degree. He asserts that neither Lorenz nor Stevens requires a different result. As set out in Mr. Saunders initial brief, adopted by Appellant Davis, the definition of restrain requires the jury to find that the defendant had a specific mens rea. The "to convict" instructions for the two counts of kidnapping omit the elements that the defendants (1) knowingly acted without that person's consent; (2) knowingly acted without legal authority; and (3) knowingly acted in a manner that substantially interfered with that person's liberty. Thus, the "to convict" instructions relieved the State of

its burden to prove all of the elements of the crime beyond a reasonable doubt.

While the definition of restrain was provided to the jury, our courts have held on numerous occasions that jurors are not required to supply an omitted element by referring to other jury instructions. See State v. Emmanuel, 42 Wash.2d 799, 819, 259 P.2d 845 (1953). The to-convict instruction on the kidnapping counts was defective.

If the to-convict instruction was in fact defective, the court still can uphold the conviction if it affirmatively appears that the instructional error was harmless. In order to hold the error harmless the court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. State v. Brown, 147, Wn.2d 330, 341, 58 P. 3d 889 (2002). When the harmless error test is applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted

evidence. Neder v. United States, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999).

There was conflicting evidence whether Saunders or Davis knew that what they were doing was unlawful and whether they knew the restraint was without consent and substantially interfered with the liberty of the Valdezes. The defense testimony was that the defendants believed that they had the right to restrain the Valdezes to perform a citizen's arrest and that they were following standard procedures in giving the Valdezes a ride home having repossessed the car. The error was not harmless.

DATED 24 day of June, 2013.

Respectfully submitted,

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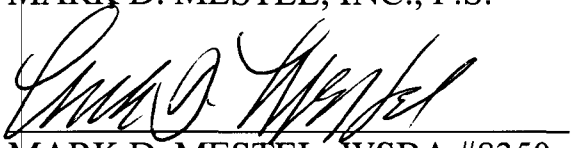

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Supplemental Brief was served upon the following by United States Postal Service, addressed to:

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DATED this 24 day of June, 2013.

Brandy L. Ellis, Secretary