SUPREME COURT NO. 89955-6
COA NO. 68771-9-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SAUNDERS,

Petitioner.

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

The Honorable Larry E. McKeeman, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jeffrey Saunders, the appellant below, asks this Court to accept review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Saunders requests review of the published decision in State v. Jeffrey Saunders, Court of Appeals No. 68771-9-I (slip op. filed Oct. 21, 2013), attached as appendix A. The Order Denying Motion To Reconsider entered on January 9, 2014 is attached as appendix B.

C. ISSUE PRESENTED FOR REVIEW

Whether the jury instructions relieved the State of its burden of proving all the facts necessary to support the kidnapping convictions?

D. STATEMENT OF THE CASE

Saunders owned a vehicle repossession and fugitive recovery business. 1RP 386, 524-25. Robin Davis and his son, Chet Davis, worked with Saunders. 1RP 518, 524. Saunders was hired to repossess two vehicles, an Explorer and an Expedition, belonging to Salvador Valdez and his wife. 1RP 93, 137, 375-77, 390-93.

Saunders located the Explorer in the drive-through at a Mount Vernon Kentucky Fried Chicken (KFC). 1RP 395-96. Valdez and his teenage son J.V. were in the vehicle. 1RP 92, 94, 109-10. Saunders verified the vehicle was the one to be repossessed and announced to those

inside that it was wanted. 1RP 398-400. When Saunders approached, Valdez drove off quickly, jumping the curb and speeding off into the street. 1RP 111, 118-20, 139, 157, 167, 230-31, 252-53. According to Saunders, Valdez accelerated and almost ran him over. 1RP 400-02. Chet had to leap out of the way. 1RP 539, 541. At trial, Valdez and his son denied driving toward the men or trying to hit them with the vehicle. 1RP 120, 231.

Saunders decided to continue the repossession effort by going after the other vehicle, the Expedition. 1RP 403-05. As they were heading toward the location of the Expedition, Saunders saw the Explorer on the freeway in front of them. 1RP 405, 433-34. Saunders, assuming the Explorer was headed to where the Expedition was located, followed when Valdez took an exit and stopped at a Burger King. 1RP 406, 434-35, 545. Saunders decided to again attempt repossession of the Explorer. 1RP 494.

Saunders got out of the passenger side of his truck in the Burger King parking lot and started walking to the Explorer, with Davis and Chet nearby. 1RP 408-09, 546. Valdez gassed the vehicle and drove at them. 1RP 409-10, 436-38, 470, 494, 546.

Valdez had a different version of events, claiming the truck he had seen at the Burger King zoomed up when he tried to leave in the Explorer. 1RP 97, 144, 146-50. Valdez and J.V. maintained Saunders and Davis,

each holding a firearm, ran toward the Explorer and ordered them out of the car at gunpoint. 1RP 97-99, 147, 151-52, 215. Two women walking by saw a man point a gun at the Explorer. 1RP 62-65, 67, 194-96, 203-04, 206. They called 911. 1RP 70.

Saunders testified he did not have a gun. 1RP 412. Davis, however, grabbed his unloaded shotgun, walked in front of the Explorer and yelled at Valdez to stop in an effort to prevent Valdez from running over Chet and himself. 1RP 496, 546-48, 563-65, 592, 594. Valdez stopped the Explorer. 1RP 547, 549. Saunders did not know Davis was going to take out the gun and was surprised he did so. 1RP 425, 491. Saunders told Davis to secure his weapon as soon as he noticed it was out. 1RP 490-91, 496. 479, 488. Davis put the shotgun back in the truck after the vehicle stopped. 1RP 445, 473, 497, 549, 565, 595-96.

Valdez testified he thought it was a carjacking up to that point. 1RP 103. He claimed not to know anything about a repossession or that he was behind on car payments. 1RP 103-04, 175, 182, 221, 223.

Saunders decided to make a citizen's arrest for what he described as attempted vehicular assault. 1RP 410, 494. Valdez and J.V. complied when Saunders told them to get out of the car. 1RP 410-11, 550-51. Saunders frisked Valdez for weapons. 1RP 411, 413. Saunders located Valdez's wallet and handed it to Davis, saying, "Hold this in case he runs."

1RP 416, 551. Saunders told Valdez he was going to jail. 1RP 413, 551. His intent was to make a citizen's arrest of Valdez because he tried to run Saunders and Chet down. 1RP 413-14, 416 439, 472.

Valdez said he was going into a diabetic shock. 1RP 414. Saunders offered to call 911. 1RP 415. Valdez declined, saying he needed a soda. 1RP 415-16. Saunders still intended to repossess both the Explorer and the Expedition. 1RP 439-40, 495. He told J.V. to ride with Davis. 1RP 417, 551. Saunders and Davis explained at trial that this was a safety precaution. 1RP 417-18, 452, 559.

According to J.V., when Valdez asked if J.V. could ride or stay with him, Valdez was told no and a pistol was put into J.V.'s back. 1RP 187-88, 218-19. J.V. was afraid he was going to be shot. 1RP 233-34.

The pedestrian bystanders testified that a person with a gun told the passenger to get out of the Explorer and pointed the gun when the passenger got out and went into the truck with the man. 1RP 68-69, 83-86. The men told the bystanders "Don't worry. We're bounty hunters." 1RP 70, 198.

Saunders testified that J.V. was not threatened in any way. 1RP 418-19. Davis never heard Valdez ask to ride with J.V. 1RP 569. No one touched J.V. 1RP 551-52. According to Saunders and Davis, J.V. walked

to the truck and got in the passenger seat without being held at gunpoint. 1RP 419, 551, 607.

Saunders, meanwhile, got into the driver's seat of the Explorer and told Valdez to get in. 1RP 103, 105, 419. Saunders ordered Valdez to take him to the Expedition and said he was going to take both vehicles. 1RP 104-05, 129. He did not threaten Valdez to get back into the Explorer. 1RP 419. Saunders told Davis to follow him. 1RP 551. Their intent was to go where the Expedition was located and repossess it, taking Valdez and J.V. back home in the process. 1RP 418, 553, 560-61. Valdez offered to take Saunders there. 1RP 419.

Davis drove J.V. in the truck, following the Explorer driven by Saunders. 1RP 220. According to Davis, J.V. was calm, did not express fear, and did not indicate he wanted to be in the same vehicle as his father. 1RP 560-61. According to J.V., Chet told him to be calm and "just go along with it." 1RP 234. J.V. testified that he no longer felt afraid of being harmed at this point. 2RP 234.

Saunders stopped at a Shell station so Valdez could get a soda to avoid going into diabetic shock. 1RP 420, 443. Davis testified that J.V. had a choice to get out of the truck at the Shell station if he wanted to: "I never imprisoned him." 1RP 603, 607-08. The Shell station was a little under a mile from the Burger King. 1RP 420. It took about two minutes

to get there. 1RP 480. The police showed up while Valdez was inside the convenience store buying a soda. 1RP 422.

Saunders told a responding officer that he was trying to repossess the vehicle when Valdez tried to run them over, that Davis armed himself for protection, and that they were escorting Valdez to the location of the second vehicle in need of repossession. 1RP 277-78, 285-86. Valdez and J.V. admitted to an officer that the three men said they were repossessing the Explorer. 1RP 328-29. Valdez also told the officer that he was behind on his payments for the Explorer. 1RP 329.

The State charged Saunders with two counts of second degree kidnapping and two counts of second degree assault, with a special allegation for each count that he was armed with a firearm. CP 70-71. Saunders was also charged with unlawful possession of a firearm. CP 71.

The "to convict" instruction for kidnapping (count I) provided:

> To convict the defendant, Jeffrey Saunders, of the crime of kidnapping in the second degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 10th day of September, 2010, the defendant intentionally abducted Salvador Valdez; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 103 (Instruction 10).

The "to convict" instruction for kidnapping under Count II was identical, except that the instruction referred to J.V. instead of Salvador Valdez. CP 105 (Instruction 12).

The jury was further instructed "Abduct means to restrain a person by using or threatening to use deadly force. Restraint or restrain means to restrict another's movements without consent and without legal authority in a manner that interferes substantially with that person's liberty." CP 107 (Instruction 14).

The jury was also instructed "a person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 106 (Instruction 13). The jury was also given a definition of knowledge:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 116 (Instruction 23).

The jury convicted Saunders of two counts of second degree kidnapping while armed with a firearm, but acquitted him of the assault and unlawful possession of a firearm charges. CP 58-68.

On appeal, Saunders argued the "to convict" instruction for kidnapping omitted the essential element that Saunders knew the restraint was unlawful. Brief of Appellant at 1, 18-24; Reply Brief at 1-7. After the Court of Appeals ordered supplemental briefing on the distinction between an element and a definition of an element, Saunders pressed the argument but alternatively argued that, even if the "to convict" instruction was proper, the instructions still relieved the State of its burden of proof because the knowledge instruction affirmatively misadvised the jury that Saunders need not know the restraint was unlawful. Supp. Brief of Appellant at 1-5.

The Court of Appeals affirmed, holding the requirement that knowledge of the law was a definition of an element and need not be included in the "to convict" instruction, and that the instructions as a whole allowed the Saunders to argue his theory that he believed he was

acting lawfully in restraining Valdez and his son. Slip op. at 1-2, 10-12. Saunders seeks review following the denial of his motion to reconsider.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE JURY INSTRUCTIONS RELIEVED THE STATE OF PROVING ALL THE NECESSARY FACTS TO SUPPORT THE KIDNAPPING CONVICTIONS IS A QUESTION OF SIGNIFICANT CONSTITUTIONAL LAW.

Neither the "to convict" instruction nor the instructions as a whole informed the jury that a defendant must know the restraint is unlawful in order to be convicted of kidnapping. The instruction defining knowledge affirmatively misadvised the jury in relation to the kidnapping charges that "[i]t is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime." CP 116 (Instruction 23). Whether the instructions relieved the State of its burden of proof on kidnapping is a significant question of constitutional law warranting review under RAP 13.4(b)(3).

a. Knowledge That The Restraint Is Without Legal Authority Is An Element Of Kidnapping That Must Be Included In The "To Convict" Instruction.

Due process requires the prosecution to prove all necessary facts of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3. Where the jury was instructed in a manner that would

relieve the State of this burden, the conviction must be reversed unless the State proves the error was harmless beyond a reasonable doubt. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000); State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

A person can only be convicted of second degree kidnapping if he or she intentionally "abducts" another person. RCW 9A.40.030(1). "Abduct" is defined in terms of "restrain." State v. Worrell, 111 Wn.2d 537, 539, 761 P.2d 56 (1988); RCW 9A.40.010(1); RCW 9A.40.010(6).

The restraint issue at the core of kidnapping is also present in unlawful imprisonment. See State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000) ("For kidnapping and unlawful imprisonment crimes, the Legislature crafted its own definition of 'restrain' in RCW 9A.40.010(1)."). In order to establish the crime of unlawful imprisonment, the State must prove the defendant "knowingly restrain[ed] another person." RCW 9A.40.040(1). One of the requirements of knowing restraint is knowledge that the restraint is unlawful. Warfield, 103 Wn. App. at 159.

This is significant because "[u]nlawful imprisonment is also a lesser included offense of kidnapping." State v. Davis, __Wn. App.__, 311 P.3d 1278, 1282 (2013). A crime can be a lesser offense only if the elements of the lesser offense are "necessarily" and "invariably" included

among the elements of the greater offense. State v. Porter, 150 Wn.2d 732, 736, 82 P.3d 234 (2004). Because unlawful imprisonment is a lesser offense of kidnapping, it follows that the elements of unlawful imprisonment are "necessarily" and "invariably" included among the elements of the greater offense of kidnapping. The general requirement of "knowingly restrains" for unlawful imprisonment is included within kidnapping. It is not possible to commit kidnapping, which requires an intentional abduction, without "knowingly" restraining another person. See RCW 9A.08.010(2) (a person acts knowingly when he acts intentionally).

The "to convict" instruction for kidnapping in Saunders's case does contain the requirement that the State prove he knew the restraint was unlawful. CP 103, 105. Where the court issues a summary instruction setting forth each element of the crime necessary to convict, the instruction "must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). The "to convict" instruction, by omitting the requirement that Saunders knew the restraint was unlawful, relieved the State of its burden of proof.

The Court of Appeals, however, affirmed the kidnapping convictions on the theory that a statutory definition of an element of a crime does not need to be included in the "to convict" instruction. Slip op. at 10-12 (citing State v. Lorenz, 152 Wn.2d 22, 93 P.3d 133 (2004)). It therefore held the mens rea requirement that Saunders knew the restraint was without legal authority did not need to be included in the "to convict" instruction for kidnapping. Slip op. at 10-12.

Saunders's case is distinguishable from Lorenz, which held "sexual gratification" did not need to be included in the "to convict" instruction for first degree child molestation because it is not an "essential element to the crime" but rather "a definitional term that clarifies the meaning of the essential element, 'sexual contact.'" Lorenz, 152 Wn.2d at 24, 36.

Unlike Lorenz, the mens rea requirement that a defendant know the restraint is unlawful is an element, not a definition of an element. Knowledge of the law is a "statutory element" of the crime of unlawful imprisonment. Warfield, 103 Wn. App. at 159. Because unlawful imprisonment is a lesser included offense of kidnapping, that knowledge element must apply to kidnapping.

The "essential elements" of a crime that must be included in the "to convict" instruction are "[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. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (quoting Black's Law Dictionary 559 (8th ed. 2004)). The prosecution must prove Saunders knew the restraint was unlawful to convict him of kidnapping. That mens rea component is a constituent part of the crime under the "essential element" standard. The "to convict" instruction does not set forth the requirement and is therefore constitutionally defective.

An error in the "to convict" instruction is not harmless if "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Stated another way, the error is harmless only if the missing element is supported by uncontroverted evidence. Brown, 147 Wn.2d at 341.

The error was not harmless because whether Saunders and Davis knew their conduct in restraining Valdez and J.V. was unlawful was not uncontroverted. Both Saunders and Davis testified Valdez tried to run them and Davis's son over with his vehicle during the course of the attempted repossession. 1RP 400-02, 409-10, 436-38, 470, 494, 546. Defense witnesses testified the firearm was only used to stop Valdez from advancing with his vehicle and then immediately put away. 1RP 445, 473,

496-97, 546-49, 563-65, 592-96. Davis testified he only took out the gun to defend himself and his son from being hit by the vehicle. 1RP 564-65.

After Valdez's second attempt at running them over, Saunders decided to make a citizen's arrest of Valdez for what he described as attempted vehicular assault. 1RP 410, 494. Saunders told Valdez he was going to jail. 1RP 413, 551. Saunders testified it was his intent to make a citizen's arrest of Valdez because he tried to run Saunders and Davis's son down. 1RP 413-14, 416 439, 472. Under these circumstances, a rational trier of fact could find Saunders believed he was acting lawfully in restraining Valdez and J.V. (who was in the vehicle with Valdez) as he did. The restraint was a response to almost being run over by Valdez. Right or wrong, Saunders believed he had the legal authority to make a citizen's arrest in the manner that he did.

Saunders only changed his mind about arresting Valdez primarily because he became concerned about Valdez going into a diabetic shock. 1RP 415, 417, 495. At this point, their intent was to go where the Expedition was located and repossess it, taking Valdez and J.V. back home in the process. 1RP 553, 560-61. Saunders testified he did not threaten J.V. or Valdez to get into the vehicles. 1RP 418-19. In fact, Valdez offered to take Saunders to the Expedition to be repossessed. 1RP 419. They took J.V. along because they did not want to leave him

stranded. 1RP 559. While riding with Davis, J.V. was calm and did not express fear. 1RP 560.

Saunders and Davis started driving Valdez and J.V. home during the course of the continued repossession effort but stopped about two minutes later at the Shell station. 1RP 480, 553, 560-61. Saunders stopped at the Shell station so that Valdez could get a soda and avoid going into diabetic shock. 1RP 420, 443.

Under these circumstances, a rational juror could find the State had failed to prove beyond a reasonable doubt that Saunders knew he was unlawfully restraining Valdez and J.V. There was conflicting evidence on the issue. The error is not harmless beyond a reasonable doubt because the missing element is not supported by uncontroverted evidence. Brown, 147 Wn.2d at 341; Neder, 527 U.S. at 19.

b. In The Alternative, The Jury Instructions Affirmatively Relieved The State Of Its Burden Of Proof In Telling The Jury That The State Need Not Need Prove Saunders Knew The Restraint Was Unlawful.

Even if the requirement that Saunders knew the illegality of the restraint did not need to be included in the "to convict" instruction, the State was still relieved of its burden of proof on this issue because remaining instruction misinformed the jury that the State did not need to prove Saunders knew the restraint was unlawful.

The State's burden of proof extends farther than the "to convict" instruction. For example, the conclusion that the purpose of sexual gratification is not an essential element of first degree child molestation that must be included in the "to convict" instruction "does not . . . relieve the State of its burden to show sexual gratification as part of its burden to prove sexual contact." State v. Stevens, 158 Wn.2d 304, 309, 143 P.3d 817 (2006)). "[W]hile sexual gratification is not an explicit element of second degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification." Stevens, 158 Wn.2d at 309-10.

Following that reasoning, even if the "to convict" instruction for kidnapping did not need to include the requirement that the State prove knowledge that the restraint was unlawful, the State still needed to prove Saunders knew the restraint was unlawful in order to convict him.

Lorenz held "'sexual gratification' is properly included in the separate instruction defining 'sexual contact' and is not an essential element of first degree child molestation." Lorenz, 152 Wn.2d at 24. The trial court in fact gave an accurate instruction to the jury that defined "sexual contact." Id. at 29.

But in Saunders's case, *no* instruction informed the jury of the requirement that the State needed to prove Saunders's knowledge that the restraint was unlawful. On the contrary, the instruction defining

knowledge expressly told the jury "[i]t is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime." CP 116 (Instruction 23). That was an incorrect statement of the law in relation to the kidnapping counts. It affirmatively relieved the State of its burden of proving that Saunders knew the restraint was unlawful.

According to the Court of Appeals, the instructions, read as a whole, still allowed Saunders to argue his theory that he believed he had authority to restrain Valdez and his son. Slip op. at 11-12. But the knowledge instruction prevented the defense from effectively arguing its theory that Saunders believed the restraint was lawful because the instruction rendered that theory legally irrelevant in deciding whether the State proved its case. See State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984) (failure to give instruction supporting defense theory rendered defense unable to effectively argue their theory of the case).

Where an instruction that is given incorrectly defines an element of a crime, the State is unconstitutionally relieved of its burden to prove all essential elements. State v. Williams, 136 Wn. App. 486, 492-93, 150 P.3d 111 (2007); see State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011) (instruction defining recklessness relieved state of burden of proof; error could be raised for first time on appeal under RAP 2.5(a)(3); State v.

Goble, 131 Wn. App. 194, 202-03, 126 P.3d 821 (2005) (instruction defining knowledge relieved state of burden of proof; error could be raised for first time on appeal under RAP 2.5(a)(3)).

Kidnapping charges are frequently brought and the standard knowledge instruction is commonly given. Review will clarify what is needed to prove kidnapping and what the instructions must be in order to avoid relieving the State of its burden of proof. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated above, Saunders respectfully requests that this Court grant review.

DATED this 10th day of February 2014.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEFFREY SAUNDERS, Appellant.	)	No. 68771-9-I DIVISION ONE PUBLISHED OPINION FILED: October 21, 2013

SPEARMAN, A.C.J. — The purpose of the "essential elements" rule in the context of a to-convict instruction is to ensure that the jury is not left guessing at the meaning of an element of the crime and that the State is not relieved of its burden of proving each element of the crime. By contrast, the goal of the "essential elements" rule in the context of a charging document is to give a defendant notice of the nature of the crime charged so the defendant can prepare a defense. In applying the rule we are guided by the purpose to be served. As such, we reject Jeffrey Saunders' argument that his conviction for second degree kidnapping must be reversed under State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2013), where we held that the definition of "restrain" was an "essential element" of unlawful imprisonment that must be included in the charging document. Holding that Johnson does not control in this challenge to the to-convict

instruction, that the jury was not left guessing at the meaning of an element of the crime, and that the State was not relieved of its burden of proof, we affirm.

FACTS

On September 10, 2010, in Mount Vernon, Washington, Salvador Valdez, his son J.V., his niece, and his sister were waiting in a Kentucky Fried Chicken drive-through in Valdez's red, Ford Explorer. They were approached by Jeffrey Saunders, who unbeknownst to Valdez, was a "bounty hunter," who along with Robin Davis and his son, Chet Davis,[1] had been hired to repossess the Explorer. Saunders yelled at Valdez and directed him to pull forward. As Valdez proceeded through the drive-through lane, he saw Saunders and the Davises standing near a large truck. They told him to get out of the Explorer. But instead, Valdez drove off quickly, going over the curb as he left.

Valdez drove to his sister's home in Mount Vernon where he dropped off his sister and niece. On his way to Stanwood, he stopped at a Burger King. As he was entering the parking lot he saw the same large truck driving behind him. Saunders and Davis got out of the truck and ran toward the Explorer. Davis and Saunders ordered Valdez and J.V. out of the car at gunpoint. Saunders denied brandishing a pistol that was later found in the truck, but all parties agreed Davis was brandishing a rifle. Valdez and J.V. complied. Saunders and Davis explained to two women who witnessed the incident that they were bounty hunters. The women called 911.

[1] For ease of reference, Chet Davis will be referred to by his first name. No disrespect is intended.

Saunders ordered Valdez to put his hands on the car and patted Valdez down. He then took Valdez's wallet and gave it to Davis, telling him to "hold this in case he runs." Saunders told Valdez that he was going to jail. Saunders got into the driver's seat of the Explorer and ordered Valdez, who thought he was being carjacked, into the passenger seat. J.V. was ordered at gunpoint to get into Saunders' truck. Saunders and Davis refused Valdez's request that he and J.V. ride together. Davis then drove J.V. in the truck, following the Explorer driven by Saunders.

While riding in the Explorer, Valdez told Saunders he was diabetic and that he feared he was going into diabetic shock. Saunders drove to a gas station and allowed Valdez to get a drink. In response to the 911 call, the police arrived at the gas station and investigated the incident, which resulted in Saunders and Davis each being charged with two counts of kidnapping and two counts of second degree assault, each count with a special allegation that the defendants were armed with a firearm at the time the crimes were committed. [2]

Saunders and Davis were tried together. At trial, Saunders testified that he owned Allstate Recovery, a vehicle repossession business. He testified that he and Davis were hired to repossess two of the Valdezes' cars, and that when he approached the Explorer at the Kentucky Fried Chicken, he saw the driver make a hand movement that was consistent with putting the car in gear. According to Saunders, he had to jump

[2] Saunders was also charged with and acquitted of one count of unlawful possession of a firearm.

back as the Explorer accelerated out of the drive-through. He testified he did not call the police because he believed the police were biased against repossession agents.

Davis testified that when they approached the Explorer at the Burger King parking lot, it accelerated, nearly running over his son Chet. According to Davis, it was at this point that he decided to arrest Valdez for attempted vehicular assault.

The jury convicted Saunders of two counts of second degree kidnapping while armed with a firearm, but acquitted him of the assault charges.[3] He appeals.

DISCUSSION

Saunders argues the to-convict instruction relieved the State of its burden of proving all of the elements of kidnapping. We reject his argument and affirm.

A to-convict instruction "must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Here, the to-convict instruction read:

> To convict the defendant, Jeffrey Saunders, of the crime of kidnapping in the second degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 10th day of September, 2010, the defendant intentionally abducted Salvador Valdez; and

[3] Davis was convicted on all counts, with firearm enhancements on each count. He appeals separately, cause No. 68679-8-I.

> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers at 103. (The to-convict instruction for Count II, second degree kidnapping of J.V. was identical in all material respects; see also CP at 105).

Although this instruction mirrors the language in the statute defining kidnapping in the second degree, RCW 9A.40.030, Saunders nevertheless argues it omits an essential element of the crime. Saunders' argument can be summarized as follows: (1) the word "abduct" is defined in RCW 9A.40.010(1)[4] as "to restrain" a person by threatening to use deadly force; (2) "restrain" is further defined in RCW 9A.40.010(6)[5] as (a) restricting a person's movements; (b) without consent; (c) without legal authority; and (d) in a manner which interferes substantially with his or her liberty; (3) each portion of the definition of "restrain" requires the *mens rea* of knowledge;[6] and (4) because the definitions of "abduct" and "restrain" were not included in the to-convict instruction, but were instead set out in a separate instruction, the State was relieved of its burden of

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[4] "'Abduct' means to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1).

[5] "'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.040.010(6).

[6] Although RCW 9A.40.030 establishes intent as the *mens rea* for kidnapping, Saunders argues that because RCW 9A.08.010(2) provides that if a person acts intentionally, the person also acts knowlingly, knowledge is also an element of kidnapping upon which the jury must be instructed. See Brief of Appellant at 21-22. He cites no authority for this proposition.

proving Saunders knew he did not have legal authority to restrict the victims' movements.

In his opening brief, Saunders relies primarily on State v. Warfield, 103 Wn. App. 152, 5 P.3d 1280 (2000). In that case, three bounty hunters restrained a person for the purpose of arresting him on a 1987 misdemeanor warrant out of Maricopa County, Arizona. Id. at 154. It was undisputed that the three did not know that the Arizona warrant "had no lawful effect in Washington." Id. at 155. Division Two of this court held that the word "knowingly" in the statute defining the crime of unlawful imprisonment[7] modified all portions of the definition of "restrain." Id. at 159. Because it was undisputed that the three bounty hunters did not have knowledge they were without legal authority to restrict the person's movement, the court held the evidence was insufficient and reversed the bounty hunters' convictions for unlawful imprisonment. Id.

Warfield is of no help to Saunders because the question of what must be included in a to-convict instruction for unlawful imprisonment was not at issue in that case. The court did not discuss the to-convict instructions or any instructions at all. Warfield simply held that a person charged with unlawful imprisonment must have knowledge the restraint was without authority of law, and if the evidence does not show the requisite knowledge, it is insufficient to sustain a conviction.

In his reply brief, Saunders cites a case recently decided by this court, State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012) as modified on denial of

[7] "A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040(1).

reconsideration (Feb. 13, 2013)). In that case, Johnson was convicted of three counts of second degree assault and one count of unlawful imprisonment for what his wife testified amounted to years of domestic violence. Among other things, Johnson challenged the sufficiency of the information charging him with unlawful imprisonment. The information stated that the defendant "did knowingly restrain [J.J.], a human being[.]" Id. at 137. The court held that the use of the word "restrain" was, by itself, insufficient to provide Johnson with notice of the charge:

> Because the information refers only to "restrain," we look to its plain meaning in a dictionary. The American Heritage Dictionary states the following definitions: (1) "To hold back or keep in check; control"; (2) "To prevent (a person or group) from doing something or acting in a certain way"; and (3) "To hold, fasten, or secure so as to prevent or limit movement." Noticeably absent from these definitions is any mention of restricting "a person's movements without consent," "without legal authority," or by "interfer [ing] substantially with his or her liberty." While one could reasonably infer the first and last phrases, there is no way to reasonably conclude that the restraint must be "without legal authority." In short, the information is deficient because this essential element cannot be reasonably inferred from the information.

Id. at 138-39. The court also held that, based on Warfield, the statutory definition of "restrain" was an "essential element" of the crime of unlawful imprisonment:

> In State v. Warfield, Division Two of this court held that "the statutory definition of unlawful imprisonment, to 'knowingly restrain,' causes the adverb 'knowingly' to modify all components of the statutory definition of 'restrain,' Including the 'without lawful authority' component." There, three bounty hunters knowingly restrained Mark DeBolt for the purpose of arresting him on a 1987 misdemeanor warrant out of Maricopa County, Arizona. The three did not know that the Arizona warrant "had no lawful effect in Washington."
>
> The court explained that "knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand." Then, the court reversed the defendants' unlawful imprisonment convictions

> because "[i]t is uncontroverted that defendants believed they were acting lawfully because they had a warrant for DeBolt's arrest" and a Washington police officer "appeared to ratify the lawfulness of their actions."
>
> Warfield supports the conclusion that an essential element of unlawful imprisonment is that a person have knowledge that the restraint was "without legal authority."

Id. at 722-23 (footnote and citations omitted).[8]

Johnson does not control our decision in this case because, like Warfield, it does not address the question presented here: Whether the statutory definition of an element of a crime must necessarily be included in the to-convict instruction? Washington courts have long held that they do not. For example, in State v. Lorenz, 152 Wn.2d 22, 93 P.3d 133 (2004), the court addressed whether a definition of an element of first degree child molestation must be included in the to-convict instruction. A person is guilty of first degree child molestation "when the person has [ ] sexual contact with another who is less that twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." Id. at 31 (citing RCW 9A.44.083(1)). The court noted that in a separate "definitions" section, the legislature had defined "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party or a third party." Id. (quoting RCW 9A.44.010(2)).

The court rejected the defendant's argument that sexual gratification was an essential element that must be included in the to-convict instruction:

[8] We note there is a split of authority in this court regarding whether the portions of the definition of restrain are "essential elements" for the purpose of being included in an information charging unlawful imprisonment. A recently decided case held the opposite of Johnson on this issue: State v. Phuong, 174 Wn. App. 494, 299 P.3d 37 (2013).

> RCW 9A.44.083 unambiguously states that a person is guilty of the crime of first degree of child molestation if: (1) the perpetrator has *sexual contact*, (2) with victim who is less than twelve years old, and (3) perpetrator is at least thirty six months older than the victim. The plain meaning rule applies. The legislature codified "sexual contact" as an essential element of first degree child molestation. The definition of "sexual contact" is in RCW 9A.44.010(2), a wholly separate section of chapter 9A.44 RCW, entitled "Definitions." Had the legislature intended a term to serve as an element of the crime, it would have placed "for the purposes of sexual gratification" in RCW 9A.44.083. Rather the definition of "sexual contact" clarifies the meaning such that it excludes inadvertent touching or contact from being a crime. State v. Gurrola, 69 Wn. App. 152, 157, 848 P.2d 199 (1993); Brown, 78 Wn. App. at 895. A plain reading of the statute favors a holding that "sexual gratification" is not an essential element to the crime of first degree child molestation but a definition clarifying the meaning of the essential element "sexual contact." On this basis, we hold that "sexual gratification" is not an essential element of first degree child molestation.
>
> The State offers three additional reasons in support of the court holding that "sexual gratification" is not an essential element of first degree child molestation: First, the State asserts that courts have never required the words defining an element be included in the "to convict" instruction in place of the actual element itself. See State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (definition of "great bodily harm" does not add an element to the assault statute, rather it is intended to provide understanding); State v. Marko, 107 Wn. App. 215, 219-20, 27 P.3d 228 (2001) (definition of threat does not create additional elements rather it merely defines an element); State v. Strohm, 75 Wn. App. 301, 308-09, 879 P.2d 962 (1994) (definitional term does not add elements to the criminal statute).
>
> Second, according to the State, such a holding would create poor policy because the inclusion of definitions would result in lengthy "to convict" instructions and potentially confuse the jury.
>
> . . .
>
> The State's argument is supported by authority. We hold that "sexual gratification" is not an essential element to the crime of first degree child molestation but a definitional term that clarifies the meaning of the essential element, "sexual contact."

Id. at 34-36; see also State v. Allen, 176 Wn.2d 611, 630, 294 P.3d 679 (2013) (separate definitional instruction defining "true threat" in felony harassment case was not error; definition of "true threat" need not be included in to-convict instruction).

The reasoning in Lorenz and Allen applies to this case. If the legislature had intended for the statutory definition of restraint to be an element of the crime to be included in a to-convict instruction, it could have included the definition, or any part thereof, in RCW 9A.40.030. It did not do so. We conclude that, similar to Lorenz, the definition of "restrain" is not an essential element for purposes of being included in a to-convict instruction, but is instead simply a definitional term that clarifies the meaning of "abduct," the essential element of the crime of kidnapping.

Saunders' reliance on Johnson also fails to recognize the different underlying purposes for including an essential element in a charging document and including such an element in a to-convict instruction. The rule that a charging document must include all essential elements of a crime is grounded in the constitutional requirement that defendants be informed of the nature and cause of the accusation against them. State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). Thus, "[t]he 'primary goal' of the 'essential elements rule' is to give a defendant notice of the nature of the crime charged so the defendant would be able to prepare to defend against the charge." Id. (quoting State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991)).

By contrast, notice to a defendant so he can prepare a defense is not a purpose of including essential elements in a to-convict instruction. Rather, "'a 'to convict' instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence.'" DeRyke, 149 Wn.2d at 910, (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917

(1997)). "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." Smith, 131 Wn.2d at 263 (citing State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983) overruled on other grounds, State v. Bergeron, 105 Wn.2d 1,4, 711 P.2d 1000 (1985)).

Thus, the fact that a portion of a definition must be included in an information does not mean it is essential to a to-convict instruction. For example, although "sexual gratification" is an element of the proof necessary for the State to obtain a child molestation conviction, it is not an essential element for purposes of a to-convict instruction:

> Lorenz held only that the purpose of sexual gratification was not an essential element of first degree child molestation that must be included in the to-convict instruction. This conclusion does not, however, relieve the State of its burden to show sexual gratification as part of its burden to prove sexual contact.

State v. Stevens, 158 Wn.2d 304, 309, 143 P.3d 817 (2006).

The proper question here is whether Saunders' right to due process was violated by a to-convict instruction that left the jury guessing at the meaning of an element of the crime or relieved the State of the burden of proving an element. It did not. "Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law[.]" State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). We review jury instructions "in the context of the instructions as a whole[.]" State v. Pirtle,

127 Wn.2d 628, 656, 904 P.2d 245 (1995). Here, the to-convict instruction mirrored the statute defining kidnapping in the second degree, and both "abduct" and "restrain" were defined in a separate instruction. Saunders has not shown a danger that the jury was guessing at the meaning of an element of the crime, or that the State was relieved of proving an element of the crime. Additionally, the trial court permitted Saunders to argue, and Saunders did so argue, to the jury that he believed he had the authority to restrain the Valdezes. In sum, Saunders' right to due process was not violated by the to-convict instruction.

Affirmed.

Spearman, A.C.J.

WE CONCUR:

Cox, J.

APPENDIX B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEFFREY SAUNDERS, Appellant.	)	No. 68771-9-I ORDER DENYING MOTION TO RECONSIDER

Appellant Jeffrey Saunders filed a motion to reconsider the opinion filed in the above matter on October 21, 2013. A majority of the panel has determined this motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion to reconsider is denied.

DATED this 9th day of January 2014.

FOR THE COURT

Presiding Judge

IN THE COURT SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, vs. JEFFREY SAUNDERS, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 68771-9-I

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 10TH DAY OF FEBRUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF FEBRUARY, 2014.

X Patrick Mayovsky