68771-9

68771-9

COA NO. 68771-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SAUNDERS,

Appellant.

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

The Honorable Larry E. McKeeman, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE "TO CONVICT" INSTRUCTION FOR KIDNAPPING OMITTED ELEMENTS OF THE CRIME, THUS RELIEVING THE STATE OF ITS BURDEN OF PROOF.

a. The Instructions Relieved The State Of Its Burden Of Proving That Saunders Knew His Conduct Was Unlawful.

There is disagreement here, but let's start with what is not in dispute. The abduction element of kidnapping is defined in terms of "restrain." RCW 9A.40.030(1); RCW 9A.40.010(1); RCW 9A.40.010(6). The State does not dispute the restraint issue at the core of unlawful imprisonment is also present in kidnapping. State v. Worrell, 111 Wn.2d 537, 539, 761 P.2d 56 (1988).

Specifically, the State does not dispute that the offense of unlawful imprisonment and the offense of kidnapping both require a person to be restrained. State v. Russell, 104 Wn. App. 422, 449 n.61, 16 P.3d 664 (2001); State v. Hansen, 46 Wn. App. 292, 296, 730 P.2d 706 (1986), aff'd as modified by 737 P.2d 670 (1987); Seth A. Fine & Douglas J. Ende, 13A Wash. Prac., Criminal Law § 1607 (2011-12) ("Since an 'abduction' necessarily includes a restraint, unlawful imprisonment is a lesser included offense of either degree of kidnapping."). The State does not dispute that unlawful restraint is a necessary element of kidnapping. State v. Gatalski,

40 Wn. App. 601, 613, 699 P.2d 804 (1985), overruled on other grounds, State v. Harris, 121 Wn.2d 317, 849 P.2d 1216 (1993).

In light of the undisputed propositions referenced above, the answer to what constitutes the essential elements of unlawful imprisonment in relation to restraint tells us what constitutes the essential elements of kidnapping in relation to abduction, which is defined in terms of restraint. There is, however, disagreement over what constitutes the essential elements of unlawful imprisonment.

Warfield held the statutory definition of unlawful imprisonment — to "knowingly restrain" — causes the adverb "knowingly" to modify all four components of "restrain." State v. Warfield, 103 Wn. App. 152, 153-54, 157, 5 P.3d 1280 (2000). Warfield accordingly held "knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand." Warfield, 103 Wn. App. at 159.

The WPIC committee changed the pattern instruction because of Warfield. WPIC 39.16 comment. The pattern "to convict" instruction for unlawful imprisonment recognizes the definition of "restrain" as modified by the adverb "knowingly" creates mental elements of the crime that need to be proved. WPIC 39.16.

Relying on Warfield, this Court recently held an essential element of unlawful imprisonment that must be included in the charging document is that the person has knowledge that the restraint is "without legal authority." State v. Johnson, __Wn. App.__, 289 P.3d 662 (2012); App. A (Order On Motion For Reconsideration and Order Modifying Opinion at 5 (filed Feb. 13, 2013)).[1]

The State claims the pattern "to convict" instruction for unlawful imprisonment did not "create additional elements to the crime where those elements did not previously exist." Brief of Respondent (BOR) at 14. In light of the foregoing authority, the State is plainly wrong to the extent it suggests knowledge that the restraint was "without legal authority" is not an essential element of the crime.

The "to convict" instruction must contain every element of the crime charged. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). The salient issue is what constitutes an essential element and whether the instructions relieved the State of its burden of proving every element of an offense.

The State asserts the instructions in Saunders's case did not relieve the State of proving every element of the crime of kidnapping because the

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[1] The Court's order modifying the opinion is not reflected in Westlaw as of the filing of this reply brief and is therefore attached as Appendix A.

"to convict" instruction followed the language of the statute, as did instructions defining intent, abduct, restrain and knowledge. BOR at 11.

The State is wrong. The instructions did not track the elements associated with restraint. Those elements, including the element of knowing a restraint is without lawful authority, are not only elements of unlawful imprisonment but also elements of kidnapping because the "abduct" element of kidnapping is defined in terms of "restrain." RCW 9A.40.010(6); RCW 9A.40.030(1); RCW 9A.40.010(1).

The intent element of kidnapping encompasses the knowledge element of unlawful imprisonment. See RCW 9A.08.010(2) (a person acts knowingly when he acts intentionally); CP 116 (Instruction 23: "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.").

Knowledge that the restraint is unlawful is an essential statutory element of the crime of unlawful imprisonment. Warfield, 103 Wn. App. at 159; Johnson, app. A at 5. Knowledge that the restraint is unlawful is also an essential statutory element of the crime of kidnapping because unlawful restraint of another is a necessary element of kidnapping. Gatalski, 40 Wn. App. at 601.

The State nonetheless relies on State v. Jain, where this Court concluded a "to convict" instruction for money laundering written in the language of the statute and accompanied by separate definitional instructions did not relieve the State of its burden of proof.[2] State v. Jain, 151 Wn. App. 117, 128, 210 P.3d 1061 (2009). The challenged instructions in that case were constitutionally sufficient because the "to convict" instruction stated the essential statutory element of "specified unlawful activity," the "to convict" instruction did not need to include a definition of that element, and the supporting definitions for this element were elsewhere in the instructions. Jain, 151 Wn. App at 128.

Jain is different in dispositive ways. Case law does not require that definitions of elements be included in "to convict" instructions. Id. (citing State v. Fisher, 165 Wn.2d 727, 754-55, 202 P.3d 937 (2009)). But for restraint-based crimes, knowledge that the restraint is without lawful authority is not a mere definition but an essential mental element that the State needs to prove beyond a reasonable doubt in order to convict.

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[2] This portion of the opinion was actually dicta because the Court reversed on a separate issue, addressing whether the "to convict" instruction omitted an essential element of the crime only because it was likely to arise on remand. Jain, 151 Wn. App at 124; see State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (where court of appeals reversed on separate issue, its discussion of another issue likely to arise on remand was dicta).

Warfield, 103 Wn. App. at 159; Johnson, App. A at 5. That element is a statutory element. Id.

RCW 9A.40.040(1) — the statute defining the crime of unlawful imprisonment — does not contain all the essential elements of that crime. We must read 9A.40.040(1) in conjunction with the restraint definition found at RCW 9A.40.010(6) to arrive at all of the essential elements. Warfield, 103 Wn. App. at 159; Johnson, App. A at 5.

Likewise, RCW 9A.40.030(1) — the statute defining the crime of kidnapping — does not contain all the essential elements of that crime. To arrive at all of the essential elements of kidnapping, we must read RCW 9A.40.030(1) in conjunction with the abduct definition found at RCW 9A.40.010(1) and the restraint definition found at RCW 9A.40.010(6).

Citing Jain, the State contends the instructions here, when read as a whole, did not relieve the State of its burden of proof because the definitions of intent, abduct, restrain and knowledge were given. BOR at 11. The problem is that the jury was nowhere told that, to convict Saunders of kidnapping, it needed to find beyond a reasonable doubt that Saunders knew the restraint was unlawful.

In fact, the instruction defining knowledge stated just the opposite: "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.*" CP 116 (Instruction 23) (emphasis added).

Thus, even if it were proper to look beyond the "to convict" instruction to see if the jury was adequately instructed on all the elements, the knowledge instruction that was given did not cure the defect in the "to convict" instruction. On the contrary, it told the jury the exact opposite of what it needed to find. The State needed to prove Saunders knew the restraint (the abduction) was unlawful, but neither the "to convict" instruction nor any other instruction told the jury of this requirement.

b. The State Cannot Prove Beyond a Reasonable Doubt That The Error Is Harmless.

The State claims the instructional error was harmless, but its argument looks like a sufficiency of evidence argument, where all the evidence and reasonable inferences are considered in the light most favorable to the State while conflicting evidence and inferences favorable to the defense are disregarded.

An instructional error infringing upon a defendant's constitutional rights is presumed to be prejudicial, and the State has the burden of affirmatively proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Smith,

131 Wn.2d 258, 263, 930 P.2d 917 (1997). The error 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. State v. Shouse, 119 Wn. App. 793, 797, 83 P.3d 453 (2004) (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

The error was not harmless because whether Saunders and Davis knew their conduct in restraining Valdez and J.V. was unlawful was not uncontroverted. The record contains evidence that could rationally lead a juror to conclude they did not know the restraint was unlawful, such that the State had not proven the contrary beyond a reasonable doubt.

The State seems to acknowledge there was evidence showing Saunders was acting as a repossession agent and was unaware of any law governing that field. BOR at 15; see 1RP 376-77, 390-93, 439-40, 494-95. The State, however, contends his intent changed from repossessing the car to making an arrest when the kidnapping occurred, and that there is "no evidence" that Saunders "believed he had any lawful authority to effect an arrest in the manner that he did." BOR at 16.

No evidence? Really? 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 shock. 1RP 420, 443.

Under these circumstances, a rational trier of fact could find Saunders believed he was acting lawfully. Conversely, 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., quite apart from the question of whether he in fact broke the law.

The prosecutor in closing argument told the jury that "intentionally abduct" meant only the intent to do the act, not the intent to commit the crime. 1RP 685. Defense counsel argued the restraint had to be

"knowing." 1RP 733-34. But no instruction told the jury that the restraint needed to be knowing in the sense that Saunders needed to know he was acting without legal authority in order for him to be guilty of the crime.

The issue of whether Saunders knew the restraint (the abduction) was unlawful was controverted. There was conflicting evidence on the issue. There was evidence from which a rational trier of act could find Saunders did not know he was acting without legal authority in restraining Davis and J.V. The error is not harmless beyond a reasonable doubt because the missing element is not supported by uncontroverted evidence. Shouse, 119 Wn. App. at 797; Brown, 147 Wn.2d at 341.

B. CONCLUSION

Saunders requests reversal of the convictions.

DATED this 8th day of March 2013.

Respectfully Submitted,

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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 68771-9-I
	)	
JEFFREY SAUNDERS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 8TH DAY OF MARCH, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** 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 8TH DAY OF MARCH, 2013.

X Patrick Mayovsky

APPENDIX A

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

STATE OF WASHINGTON,	)	No. 66624-0-I
Respondent,	)	ORDER ON MOTION FOR RECONSIDERATION AND
v.	)	ORDER MODIFYING OPINION
J.C. JOHNSON,	)	
Appellant.	)	

Respondent, State of Washington, moved for reconsideration of this court's decision filed December 3, 2012. Now, therefore, it is hereby

ORDERED that

1. the motion for reconsideration is denied, and

2. the slip opinion shall be modified as follows:

At page 20, second full paragraph of the slip opinion which reads:

Though we hold that the "to convict" instruction here was error, for Johnson's ineffective assistance of counsel claim, the question is whether trial counsel's performance was defective for failing to predict the outcome in Peters and Harris. Given the strong presumption of effective representation, we cannot say that the performance in this case was deficient.

shall be changed to read:

Though we hold that the instruction defining recklessness here was error, for Johnson's ineffective assistance of counsel claim, the question is whether trial counsel's performance was defective for failing to predict the outcome in Peters and Harris. Given the strong presumption of effective representation, we cannot say that the performance in this case was deficient.

At pages 22 to 27, the **SUFFICIENCY OF INFORMATION** section of the slip opinion shall be deleted in its entirety and replaced with the following revised section:

SUFFICIENCY OF INFORMATION

Johnson argues that the information for the unlawful imprisonment and felony harassment charges were insufficient because they were missing elements of the crime. Because the trial court vacated the felony harassment conviction and we do not reverse the assault convictions, we need not address his argument regarding felony harassment.[74] Johnson also challenges the deadly weapon enhancement for the felony harassment conviction. But for the reasons stated above, we also need not address this argument.

Unlawful Imprisonment

Johnson challenges the sufficiency of the second amended information charging him with the crime of unlawful imprisonment. We hold that the information is deficient and dismiss this conviction without prejudice.

The adequacy of a charging document is reviewed de novo.[75] A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington state constitution if it fails to include "all essential elements of a crime."[76] The rationale underlying this rule is that a defendant must be apprised of the charges against him or her and allowed to prepare a defense.[77] "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged."[78]

---

[74] Johnson acknowledges that his felony harassment conviction was vacated on double jeopardy grounds. Johnson explains that he is challenging this conviction because the State could attempt to reinstate it in the event that the greater conviction of second degree assault with a deadly weapon was reversed on appeal.

[75] State v. Allen, 161 Wn. App. 727, 751, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011).

[76] State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

[77] Id.

[78] State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

Where, as here, the adequacy of a charging document is challenged for the first time on review, "it will be construed liberally and will be found sufficient if the necessary elements appear in any form, or by fair construction may be found, on the face of the document."[79] But "[i]f the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it."[80] The court employs a two-part test:

> (1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so, (2) can the defendant show he or she was actually prejudiced by the inartful language.[81]

"If the necessary elements are not found or fairly implied, however, we presume prejudice and reverse without reaching the question of prejudice."[82]

Here, the information for unlawful imprisonment provided:

> And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse J.C. JOHNSON of the crime of **Unlawful Imprisonment – Domestic Violence**, based on a series of acts connected together with another crime charged herein, committed as follows:
>
> That the defendant J.C. JOHNSON in King County, Washington, during a period of time intervening between May 4, 2009 through May 6, 2009, did ***knowingly restrain*** [J.J.], a human being;
>
> Contrary to RCW 9A.40.040, and against the peace and dignity of the State of Washington.[83]

Johnson argues that this information failed to include all of the "essential elements" of the crime because they are neither expressly stated nor fairly implied. We agree.

---

[79] State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

[80] State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (quoting State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995)).

[81] McCarty, 140 Wn.2d at 425.

[82] Id.

[83] Clerk's Papers at 18 (emphasis added).

Since Johnson challenges the information for the first time on appeal, it must be liberally construed.[84] Even with a liberal reading, however, all of the essential elements of unlawful imprisonment do not appear in the document. Since the information fails to set forth all of the essential elements of the crime, prejudice is presumed under the two-part test.[85]

In State v. Borrero, the supreme court considered whether an information charging a defendant with attempted first degree murder was sufficient.[86] There, the information failed to include the statutory definition of "attempt," which included the essential element of "substantial step."[87] The court determined the common meaning of "attempt" by looking at a dictionary definition and synonyms.[88] The court concluded that "the element of 'substantial step' is conveyed by the word 'attempt' itself" because the words had the "same meaning and import."[89]

Here, the statute for unlawful imprisonment provides that "[a] person is guilty of unlawful imprisonment if he or she knowingly ***restrains*** another person."[90] Under RCW 9A.40.010, to "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***."[91] To restrain a person "without consent" is accomplished by "physical force, intimidation, or deception."[92] The statute does not otherwise define the remainder of the last clause of the definition of restrain.[93]

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[84] See McCarty, 140 Wn.2d at 425.

[85] See State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991).

[86] 147 Wn.2d 353, 359, 58 P.3d 245 (2002).

[87] Id.

[88] Id. at 363; see also State v. Morgan, 163 Wn. App. 341, 346-47, 261 P.3d 167 (2011), review denied, 175 Wn.2d 1013 (2012) (taking the same "common meaning" approach to the word "attempt").

[89] Borrero, 147 Wn.2d 363.

[90] RCW 9A.40.040 (emphasis added).

[91] (Emphasis added.)

[92] RCW 9A.40.010(6).

[93] See id.

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."[94] 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.

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."[95] There, three bounty hunters knowingly restrained Mark DeBolt for the purpose of arresting him on a 1987 misdemeanor warrant out of Maricopa County, Arizona.[96] The three did not know that the Arizona warrant "had no lawful effect in Washington."[97]

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."[98] 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."[99]

Warfield supports the conclusion that an essential element of unlawful imprisonment is that a person have knowledge that the restraint was "without legal authority."

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[94] THE AMERICAN HERITAGE DICTIONARY 1538 (5th ed 2011), http://www.ahdictionary.com/word/search.html?q=restrain.

[95] 103 Wn. App. 152, 5 P.3d 1280 (2000).

[96] Id. at 154.

[97] Id. at 155.

[98] Id. at 159.

[99] Id.

The State argues that definitional elements cannot be essential elements of a crime. The State is mistaken.

The State cites State v. Rhode to support this proposition.[100] Rhode addressed a similar issue as Borrero: whether the "'substantial step' element of attempt" could be found in the defendant's information.[101] There, the court explained that the issue was whether the statutory definition was "encompassed" by the term used in the information.[102] As discussed above, "restrain" does not "encompass" the essential element that a person had knowledge that the restraint was "without legal authority." In this case, part of the definition of "restrain" contains an essential element of unlawful imprisonment.

Johnson's unlawful imprisonment conviction must be vacated without prejudice.[103]

It is further ORDERED that the remaining footnote shall be renumbered accordingly.

DATED this 13th day of February 2013.

Cox, J.

Becker, J.

[100] 63 Wn. App. 630, 821 P.2d 492 (1991).

[101] Compare Rhode, 63 Wn. App. at 633 with Borrero, 147 Wn.2d at 359.

[102] Rhode, 63 Wn. App. at 636 (quoting State v. Smith, 49 Wn. App. 596, 600, 744 P.2d 1096 (1987)).

[103] See McCarty, 140 Wn.2d at 428.

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SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF MARCH, 2013.

X Patrick Mayovsky