

NO. 68771-9-I

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

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STATE OF WASHINGTON

Respondent

v.

JEFFREY S. SAUNDERS,

Appellant

2013 JUL -2 PM 1:52  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## **I. SUPPLEMENTAL ISSUE**

Whether State v. Lorenz, 152 Wn.2d 22 (2004) and State v. Stevens, 158 Wn.2d 304 (2006) provide guidance in determining whether the to convict instructions for second degree kidnapping were adequate to inform the jury of the essential elements of that crime?

## **II. SUPPLEMENTAL ARGUMENT**

The Court in Lorenz considered the adequacy of jury instructions in a child molestation case. A person commits child molestation when the person has, or knowingly causes another person to have sexual contact with another when the other person is not married to the perpetrator. RCW 9A.44.083, RCW 9A.44.086, RCW 9A.44.089.<sup>1</sup> “Sexual contact” is specifically defined by statute as “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). The Court considered whether a “to convict” instruction omitted an essential element when it did not include the phrase “for the purpose of sexual gratification.” Lorenz, 152 Wn.2d at 30. The Court found no

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<sup>1</sup> The differences between first, second, and third degree child molestation relate to the ages of the parties. It is not relevant to the discussion here.

error reasoning that had the Legislature intended the phrase “for the purpose of sexual gratification” to be an element of child molestation it would have been included in the child molestation statute, rather than a separate statute defining terms. Id. at 35. Because a plain reading of the statute showed “sexual gratification was a definition clarifying the essential element “sexual contact” it was not itself an essential element of the crime. Id.

The Court’s reasoning in Lorenz applies equally to the question presented here. The elements of second degree kidnapping are set out in RCW 9A.40.030(1) which includes the elements of intentionally abducts another person. “Abduct” is separately defined to include the term “restrain”. RCW 9A.40.010(1). “Restrain” in turn is also defined by a separate statute. RCW 9A.40.010(6). Like “sexual gratification” as it relates to child molestation, had the Legislature intended the definition of restrain to be an essential element of kidnapping it could have included that in the statute setting out the elements of kidnapping. Since it did not, the definition of “restrain” simply clarifies the essential element of abduct, and was not required to be included in the “to convict” instruction.

The defendant's argument is based on the premise that the State must prove the defendant knew the restraint was unlawful, citing State v. Warfield, 103 Wn App. 152, 5 P.3d (2000). Warfield considered the sufficiency of the evidence for unlawful imprisonment, not kidnapping. The Supreme Court in Stevens explained that sufficiency of a jury instruction and sufficiency of the evidence are separate inquiries; while certain facts need not be included in the "to convict" jury instruction, the State must prove those facts because they are included in the definition of an element of an offense. Stevens 158 Wn.2d at 309. Stevens provides further support for the State's position that the WPIC committee's modification of the standard "to convict" instruction for unlawful imprisonment says nothing about whether the "to convict" instruction for kidnapping is sufficient.

The defendant's premise also ignores the plain language of the statute. The mens rea for kidnapping is intent, not knowledge. RCW 9A.40.030(1). Intent modifies "abduct." Thus, the conduct constituting abduction must have been done intentionally, not knowingly.

When considering the sufficiency of jury instructions the court will read the challenged instruction as an ordinary reasonable

juror would. State v. Killingsworth, 166 Wn. App. 283, 288, 269 P.3d 1064, review denied, 174 Wn.2d 1007 (2012). The jury was instructed in the language of the second degree kidnapping statute. 1 CP 103, 105. The mens rea for kidnapping was intent, not knowledge. Intent was defined for the jury. 1 CP 106. The instructions held the State to its burden of proof for second degree kidnapping.

The defendant argues that the additional instruction defining knowledge relieved the State of its burden to prove that he knew that his conduct was unlawful. Supplemental BOA at 4. The only offense the defendant was charged with that required proof of knowledge was the unlawful possession of firearm charge. 1 CP 115, 116. Reading the instructions as a whole as an ordinary reasonable juror would, the knowledge instruction would not have been applied to the kidnapping charge.

Even if a juror considered the instruction defining knowledge in conjunction with the kidnapping case the State would not have been relieved of the burden of proof. The definition of knowledge did not conflict with the kidnapping “to convict” instructions. Intent served as a substitute mental state for knowledge. Thus, since the jurors necessarily found the defendant acted intentionally as it was


instructed for the kidnapping charges, then it necessarily found the defendant acted with knowledge he abducted the two victims. In turn he would have had knowledge of each of the constituent parts making up the definition of abduct, including the unlawfulness of his conduct.

### **III. CONCLUSION**

For the foregoing reasons, and the reasons previously outlined in the State's arguments, the State asks the Court to affirm the convictions.

Respectfully submitted on June 28, 2013.

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THE STATE OF WASHINGTON,  Respondent.  v.  JEFFREY S. SAUNDERS,  Petitioner.
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No. 68771-9-I  
  
AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 1<sup>st</sup> day of July, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

MARK D. MESTEL  
ATTORNEY AT LAW  
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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Petitioner of the following documents in the above-referenced cause:

SUPPLEMENTAL BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 15<sup>th</sup> day of June, 2013.

A handwritten signature in black ink, appearing to read 'Diane K. Kremenich', written over a horizontal line. The signature is stylized and extends to the right of the line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit