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NO. 70665-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

TAMARA TRYON,

Appellant.

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

The Honorable Susan K. Cook, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The "to convict" instruction for kidnapping omitted elements of the crime, thereby relieving the State of its burden of proof. CP 71 (Instruction 21).

2. The instruction defining "knowledge" was wrong with respect to how that term applies to kidnapping, thereby relieving the State of its burden of proof. CP 74 (Instruction 23).

3. The court erred by refusing to instruct the jury on the defense of citizen's arrest, as requested by appellant. CP 43.

Issues Pertaining to Assignments of Error

1. Whether to convict for kidnapping the State must prove appellant (1) knowingly acted without consent; (2) knowingly acted without lawful authority; and (3) knowingly acted in a manner that substantially interfered with another's liberty and, if so, whether reversal is required because the "to convict" instruction for kidnapping omitted those elements of the crime?[1]

2. Where to convict for kidnapping the State must prove appellant knowingly acted without lawful authority in restraining a person,

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[1] Counsel is aware of this Court's recent decision in State v. Saunders, __ Wn. App. __, 311 P.3d 601, 606 (2013), which rejected this claim. It is nonetheless raised here in anticipation the Washington Supreme Court will grant review and reverse Saunders.

was it error to instruct the jury that appellant could act knowingly without being aware that her actions were unlawful?

3. Where the defense theorized appellant's restraint of the complaining witness was lawful because it was done to effectuate a citizen's arrest after the complaining witness and an accomplice stole her money, did the court commit reversible error by refusing to instruct the jury that finding appellant was acting under the reasonable belief that she had legal authority to restrain the person for purposes of effectuating a citizen's arrest is a complete defense to kidnapping, as it necessarily negates the "knowingly acted without lawful authority" element of the offense?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged appellant Tamara Tryon with first degree burglary, first degree kidnapping, felony harassment and misdemeanor possession of marijuana. CP 116-17. A jury acquitted Tryon of all charges except the kidnapping. CP 45-48. The trial court imposed a standard range 57-month sentence. CP 94-104; 5RP[2] 102-03. Tryon appeals. CP 109-110.

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[2] There are five volumes of verbatim report of proceedings referenced as follows: **1RP** - February 1, March 1, April 5, 10 & 16, May 17 and June

2. Substantive Facts

a. Relevant Trial Testimony

19-year-old Scott Osburn testified that on July 17, 2012, he and Jacob Mogan, who Osburn considered a brother,[3] were at a 7-Eleven in Burlington attempting to panhandle money for gas. 3RP 12-13. Osburn recalled seeing Mogan talk to some people in a car and then informing him that they had agreed to give him and Osburn a ride to Sedro Wooley, which was where they were trying to go. 3RP 14. Osburn and Mogan got in the back seat of the car. 3RP 14-15. In the front seat were a male driver and a female passenger, neither of which Osburn had met before, but whom he subsequently learned were Jordan Jefferson (the driver) and Tamara Tryon. 3RP 15, 19, 21.

According to Osburn, Mogan agreed to help Jefferson get some drugs on the way to Sedro Wooley. Osburn could not recall what type of drugs Jefferson sought. 3RP 16. Osburn did recall Mogan making some calls on the way, ostensibly to locate the requested drugs. 3RP 49.

17, 2013; **2RP** - March 7, 2013; **3RP** - June 18, 2013; **4RP** - June 19 & 20, 2013; and **5RP** - June 21 and July 19, 2013.

[3] Osburn explained he considered Mogan, who is about two years his senior, to be his brother because Osburn's mother and Mogan's father have two children in common. 3RP 11.

Osburn testified that Mogan directed Jefferson to Murdock Street in Sedro Wooley, the same street where Osburn's grandmother lives and where Osburn receives mail and occasionally sleeps. 3RP 10, 16-17. Jefferson parked the car and gave Mogan what Osburn believed to be at least $100. 3RP 19, 57. Mogan got out of the car and asked Osburn if he was coming. Jefferson responded by locking the car doors and explaining that Osburn would remain until Mogan returned, so Mogan left. 3RP 19-20.

Osburn recalled that after Mogan failed to return 20 to 30 minutes later, Jefferson and Tryon "started getting real antsy and concerned . . . that they were going to get ripped off and that [Mogan] was not coming back." 3RP 20. Osburn said they tried calling Mogan a couple of times but could not reach him. 3RP 21.

Osburn claimed Jefferson and Tryon's concerns made him concerned for his own safety. 3RP 21. When Osburn discovered he was not actually locked in the car, he opened the door and ran into a nearby housing development. 3RP 22. Jefferson gave chase, and eventually caught Osburn as he tried to enter a home. 3RP 22-26. Osburn recalled Jefferson dragging him away from the house, Tryon driving up in the car, and Tryon and Jefferson forcing him into the backseat, where Tryon sat on him while Jefferson drove away from the area. 3RP 26-27, 61.

According to Osburn, they told Osburn as they drove off, "You fucked up. You fucked with the wrong people. We are Lumi [sic] Indians. We don't fuck around. We straight do away with you." 3RP 27. When Osburn responded by claiming he had no involvement in Mogan's apparent theft of their money, they replied that if that was true then he should help them find Mogan, to which Osburn agreed. 3RP 27-28, 62.

Osburn said they drove around the area until Jefferson announced, "Cop, cop, cop." 3RP 29. They were then promptly pulled over by Office Heather Sorsdal. 3RP 29, 162. Osburn claimed Jefferson offered him $100 to "act normal", but Osburn declined and informed Officer Sorsdal that he did not want to be in the car with Jefferson and Tryon and then got out. 3RP 30.

Police photographed Osburn's injuries, which included a bloody lip and some marks on his body. 3RP 31. Osburn admitted lying to police about who had been in the car by failing to acknowledge Mogan was involved. Osburn said he did not tell them Mogan was involved because he wanted to protect Mogan from trouble. 3RP 37, 69. Osburn acknowledged he wrote in his statement that he told Jefferson and Tryon he could help them find marijuana, even though at trial he testified he was not involved with Mogan's drug purchase scheme, and had told Jefferson and Tryon as much after they caught him. 3RP 26-27, 52.

Osburn denied seeing Mogan for at least a month after the incident. He also denied that he and Mogan had an agreement to steal the drug money from Jefferson and Tryon, or that Mogan ever gave him any of the money after the fact. 3RP 37-38.

Although Mogan was under subpoena for trial, he failed to appear, and a material witness warrant failed to secure his presence. 4RP 56-66; 5RP 2-6. In light of his absence, however, the defense was permitted to introduce the testimony of Joshua Crabtree. 4RP 118.

According to Crabtree, Mogan came to his house the evening of July 17, 2012 and said he and Osburn had just "jacked . . . two natives" for their money. 4RP 122-23. Crabtree recalled Mogan had about $200 and some heroin when he showed up. 4RP 123. Crabtree also recalled Mogan explaining how he had planned to "jack them" after meeting them at the gas station, and that Osburn was aware of the plan. 4RP 126, 133. Crabtree's understanding was that Osburn was supposed to flee the car after Mogan got away with the money. 4RP 142. Crabtree also testified Osburn came by his place the same evening and the two of them went out together to buy drugs. 4RP 123, 128.

b. Defense Theory and Proposed Instructions

After the State rested, the defense requested a continuance to locate Mogan and present his testimony to the jury. 4RP 38-40. Defense

counsel explained Mogan's testimony should be helpful to Tryon's defense theories, which included self-defense, defense of property and "citizen's arrest." 4RP 43. Counsel explained that if Mogan testified consistent with what he said in prior interviews, it would provide a basis to infer Osburn was aware of the plan to rob Jefferson and Tryon. 4RP 49-50. The court stated it did not understand how that would support any of the proffered defense theories, but agreed to grant a brief continuance and directed that reasonable effort be made to secure Mogan's attendance at trial. 4RP 51-55. When Mogan failed to appear, the defense called Crabtree as a witness, and rested thereafter. 4RP 87-148.

Defense counsel proposed several instructions. CP 34-44. One of them provides:

> A citizen's arrest requires reasonable and probable cause to believe the arrested party guilty of a felony before the arrest will support a search and seizure of evidence of a crime.

CP 43 (citing State v. Jack, 63 Wn.2d 632, 637, 388 P.2d 566 (1964)).

The trial court's instructions to the jury do not contain the "citizen's arrest" instruction proposed by defense counsel, or any other version. See CP 49-86. Defense counsel noted his exception to this omission, as well as the court's failure to provide the defense proposed instructions on self defense and defense of others. 5RP 9.

C. ARGUMENTS

1. THE STATE WAS UNFAIRLY RELIEVED OF ITS BURDEN TO PROVE EVERY ELEMENT OF THE OFFENSE OF KIDNAPPING.

The "to convict" instruction for the kidnapping charge unfairly relieved the State of proving every essential element of the kidnapping charge beyond a reasonable doubt by failing to include as essential elements that Tryon (1) *knowingly* acted without consent; (2) *knowingly* acted without lawful authority; and (3) *knowingly* acted in a manner that substantially interfered with Osburn's liberty. In addition, regardless of whether the "to convict" instruction needed to include these elements, the instruction defining "knowledge" affirmatively misinformed the jury that Tryon did not need to know her restraint of Osburn was unlawful. For either or both these reasons, Tryon's kidnapping conviction must reversed.

a. The Error May Be Raised For The First Time On Appeal.

As an initial matter, trial counsel's lack of objection to the kidnap "to convict" instruction did not waive the issue for review. A "to convict" instruction that omits an element presents an issue of constitutional magnitude that may be raised for the first time on appeal. State v. Fisher, 165 Wn.2d 727, 753, 202 P.3d 937 (2009) (citing State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005)).

b. The Instruction Relieved The State Of Its Burden Of Proving Knowledge Elements Of The Crime.

Due process requires the prosecution to prove every element 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. A conviction "cannot stand if the jury was instructed in a manner that would relieve the State of this burden." State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

A person can be convicted of first degree kidnapping only if he or she intentionally "abducts" another person with intent to (a) hold that person for ransom or reward, (b) to facilitate commission of a felony or flight thereafter, (c) inflict bodily injury, (d) inflict extreme mental distress or (e) interfere with the performance of a government function. RCW 9A.40.020(1). "Abduct" is defined in terms of "restrain." State v. Worrell, 111 Wn.2d 537, 539, 761 P.2d 56 (1988) (holding statutory definition of "restrain" in kidnapping statute gave adequate notice of proscribed conduct).

"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). Unlawful restraint of another is therefore 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). "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.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)."). Therefore, 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); see State v. Johnson, 172 Wn. App. 112, 139-40, 297 P.3d 710 (2013) ("an essential element of unlawful imprisonment is that a person have knowledge that the restraint was 'without legal authority.'"), review granted, 178 Wn.2d 1001, 308 P.3d 642 (2013).

Similarly, knowledge that the restraint is unlawful is 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 definition of "restrain" has four primary components: "(1) restricting another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty." Warfield, 103 Wn. App. at 157.

Warfield held the statutory definition of unlawful imprisonment — to "knowingly restrain" — causes the adverb "knowingly" to modify all four components of the statutory definition of "restrain." Id. at 153-54, 157. The modified components of the "restrain" definition are thus elements of the crime of unlawful imprisonment. Id. at 158, 159.

Warfield acknowledged ignorance of the law is usually no excuse. Id. at 159. The conviction was nonetheless reversed due to insufficient evidence because the State failed to prove the defendants knowingly restrained someone without lawful authority: "knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand." Id.

In accord with Warfield, the pattern "to convict" instruction for unlawful imprisonment recognizes the definition of "restrain" as modified by the adverb "knowingly" creates elements of the crime that need to be proved. WPIC 39.16. The pattern instruction was revised to comport with the holding in Warfield. WPIC 39.16, comment.

The question here, as it was in Saunders, is whether the holdings in Warfield and Johnson compel the conclusion that, for the greater crime of kidnapping, the State must prove the defendant (1) *knowingly* acted in a manner that substantially interfered with another's liberty; (2) *knowingly* acted without that person's consent; and (3) *knowingly* acted without legal authority. Despite this Court's contrary decision in Saunders, the answer should be "yes."

Unlawful imprisonment is a lesser included offense of kidnapping because both require a person to be restrained. State v. Davis, __Wn. App.__, 311 P.3d 1278, 1282 (2013); 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.")

A crime can be a lesser offense only if the elements of that crime are "necessarily" and "invariably" included among the elements of the greater charged offense. State v. Porter, 150 Wn.2d 732, 736, 82 P.3d 234 (2004). Stated another way, if it is possible to commit the greater offense without committing the lesser offense, the lesser offense is not an included offense. Porter, 150 Wn.2d at 736.

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).

Following Warfield and Johnson and the law regarding when a lesser offense is included within a greater offense, the State needed to prove not only that Tryon intentionally abducted another and thereby restrained another's movements, but also that she (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.

The "to convict" instruction for the kidnap charge against Tryon provides:

> To convict the defendant of the crime of kidnapping in the first degree as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 17, 2012 the defendant intentionally abducted Scott Osburn,

(2) That the defendant abducted that person with the intent

(a) to hold the person for ransom or reward, or

(b) to facilitate the commission of Delivery or Possession of a Controlled Substance or flight thereafter, or

(c) to inflict bodily injury on the person, or

(d) to inflict extreme mental distress on that person or a third person; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1) and (3), and any of the alternative elements (2)(a), (2)(b), 2(c), or (2)(d), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), (2)(b), 2(c), or (2)(d), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

CP 71-72 (Instruction 21).

The jury was further instructed;

Abduct means to restrain a person by either secreting or holding the person in a place where that person is not likely to be found or 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 69 (Instruction 19).

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 adequacy of a "to convict" is reviewed de novo. DeRyke, 149 Wn.2d at 910.

The "to convict" instruction for the kidnapping charge here omits the elements that Tryon (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 Osburn's liberty. Thus, the "to convict" instruction relieved the State of its burden to prove all of the elements of the crime beyond a reasonable doubt.

c. This Court's Decision in Saunders is Wrong.

In Saunders, this Court held

> 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.[4] It did not do so. We conclude that, similar to [State v. Lorenz, 152 Wn.2d 22, 93 P.3d 133 (2004)], 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

[4] RCW 9A.40.030 defines the crime of "Kidnapping in the second degree."

> that clarifies the meaning of "abduct," the essential element of the crime of kidnapping.

__ Wn. App. __, 311 P.3d at 616. This Court's reliance on Lorenz is misplaced.

Lorenz 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. The decision in State v. Stevens, 158 Wn.2d 304, 309, 143 P.3d 817 (2006), recognized the holding in Lorenz.

Tryon's case is distinguishable. As argued above, the mens rea requirement for a kidnapping— that a defendant knows the restraint is unlawful — is an element, not a definition of an element. This Court's decision in Warfield carefully analyzed legislative intent and properly concluded knowledge of the law is a "statutory element" of the crime of unlawful imprisonment. 103 Wn. App. at 159. As explained above, that same knowledge requirement applies to kidnapping.

The Supreme Court in Lorenz analyzed legislative intent and concluded the statutory definition of "sexual gratification" merely clarified the meaning of the essential element of "sexual contact." Lorenz, 152 Wn.2d at 34-35. In contrast, this Court in Warfield analyzed the plain

language of the unlawful imprisonment statute and its legislative history to conclude knowledge of the unlawfulness of the restraint is a statutory element. Warfield, 103 Wn. App. at 156-59. As such, Lorenz is not on point, and the Saunders decision constitutes an aberration in the otherwise established proposition that knowledge of the unlawfulness of the restraint is an essential element of the crime of 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." Fisher, 165 Wn.2d at 754 (quoting Black's Law Dictionary 559 (8th ed. 2004)). The prosecution should have been required to prove Tryon knew the restraint was unlawful to convict her 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.

d. The State Was Relieved Of Its Burden Of Proof Even If The Knowledge Requirement Did Not Need To Be Included In The "To Convict" Instruction.

Even if the requirement that Tryon knew the illegality of the restraint did not need to be included in the "to convict" instruction, the State was still unfairly relieved of its burden of proof on this issue because

another instruction misinformed the jury that the State did not need to prove Tryon knew the restraint was unlawful, to wit; Instruction 23, the instruction defining "knowing" and "knowledge." CP 74.

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." Stevens, 158 Wn.2d at 309. "[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." Id. 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 Tryon knew the restraint was unlawful in order to convict.

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 here, there was no separate instruction that informed the jury of the requirement that the State needed to prove Tryon knew the restraint of Osburn was unlawful. On the contrary, the instruction defining "knowledge" expressly told the jury "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 74 (Instruction 23). That was an incorrect statement of the law in relation to the kidnapping count. It affirmatively relieved the State of its burden of proving that Tryon knew the restraint was unlawful.

Lack of instruction on the definition of an element of a crime is not a constitutional error that may be raised for the first time on appeal. State v. Scott, 110 Wn.2d 682, 690-91, 757 P.2d 492 (1988). But 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). If the requirement that the State prove the defendant's knowledge of the illegality of the restraint is a definitional matter, then the affirmative misstatement of the law in the knowledge instruction presents a constitutional error because it relieved the State of its burden of proof.

Definitional instructions that relieve the State of its burden of proof may also be challenged for the first time on appeal under RAP 2.5(a)(3).

State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011) (instruction defining recklessness); State v. Goble, 131 Wn. App. 194, 202-03, 126 P.3d 821 (2005) (instruction defining knowledge); cf. State v. Sibert, 168 Wn.2d 306, 315-17, 230 P.3d 142 (2010) (alleged error in instruction defining knowledge was not error of constitutional magnitude where the instructions, taken as a whole, accurately defined knowledge and did not create a mandatory presumption).

e. The Remedy Is Reversal Of The Conviction.

The State has the burden to prove every element of the crime beyond a reasonable doubt. Winship, 397 U.S. at 364. "It is reversible error to instruct the jury in a manner that would relieve the State of this burden." State v. Byrd, 125 Wn.2d 707, 714, 887 P.2d 396 (1995); see, e.g., State v. Seek, 109 Wn. App. 876, 880-84, 37 P.3d 339 (2002) (bigamy conviction reversed where WPIC "to convict" instruction failed to instruct jury on the wrongful intent element).

The failure to instruct the jury on all the elements of an offense results in automatic reversible error. DeRyke, 149 Wn.2d at 912. Examination of the other instructions here reveals the jury was nowhere informed that the State was required to prove Tryon knowingly acted without consent, knowingly acted without legal authority, and knowingly acted in a manner that substantially interfered with liberty. To the

contrary, the jury was affirmatively misinformed that Tryon did not need to know her restraint of Osburn was unlawful. CP 74. The kidnapping conviction is therefore subject to automatic reversal.

Even if the instructional errors here do not mandate automatic reversal, this Court must still reverse unless the State proves the errors were harmless beyond a reasonable doubt. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 15, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). "An instructional error is presumed to [be] prejudicial unless it affirmatively appears that it was harmless." Smith, 131 Wn.2d at 263. "From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Brown, 147 Wn.2d at 344.

The State cannot meet that burden here. The evidence at trial supports the defense theory that Tryon and Jefferson enlisted Mogan and Osburn to obtain drugs for them in return for a ride to Sedro Wooley, that Mogan was given at least $100 and never returned, and that Osburn tried to flee but was caught and detained by Jefferson and Tryon. There is no real dispute about the fact that Jefferson and Tryon thought they had been "ripped off" by Mogan, or that they suspected Osburn was a knowing accomplice, at least when they forcibly put him back into their car, which

was the act relied by the prosecution in closing for the kidnapping charge. 5RP 32-35.

Although the court refused to instruct the jury on "citizen's arrest" as a lawful basis for Tryon to have detained Osburn (see §C.2 infra), this is not an unfamiliar concept for most people.[5] Had the jury been properly instructed that to convict Tryon of kidnapping it had to find she *knowingly* acted without legal authority in restraining Osburn, there is a reasonable possibility that one or more jurors would have concluded the State failed to prove this element. This is because it would be reasonable for someone who had been ripped off as Tryon had to believe she had a legal right to detain the thief and/or his accomplice (i.e., make a "citizen's arrest") in an effort to recover the money.

And not only would it be reasonable for someone in Tryon's circumstances to believe she had such lawful authority, she in fact did. See State v. Malone, 106 Wn.2d 607, 609 n.1, 724 P.2d 364 (1986) (A private citizen can make a citizen's arrest "when a felony or a misdemeanor that constitutes a breach of the peace is committed in that

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[5] See State v. Eriksen, 172 Wn.2d 506, 516, 259 P.3d 1079 (2011) (Alexander, J., dissenting) ("It is well settled that under the common law an individual citizen can affect an arrest of a person who is committing a felony or a misdemeanor in the citizen's presence if the offense is a breach of the peace.").

individual's presence."). A breach of the peace is "a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order." Restatement (Second) of Torts § 116 (1965); see also Stone Mach. Co. v. Kessler, 1 Wn. App. 750, 754, 463 P.2d 651 (1970) (quoting Restatement § 116).

> "To constitute a 'breach of the peace' it is not necessary that the peace be actually broken, and if what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required, nor is actual personal violence an essential element of the offense."

Kessler, 1 Wn. App. at 754 (quoting McKee v. State, 75 Okla.Crim. 390, 132 P.2d 173 (1942)).

Here, evidence supported finding Tryon detained Osburn because she believed Mogan and Osburn were committing a theft[6] of at least $100.[7] It also supports finding that this theft was likely to cause an immediate disturbance because it was "unjustifiable and unlawful, tending with sufficient directness to break the peace[.]" Id.

But even if Tryon was wrong to believe she had legal authority to detain Osburn for theft, that fact does not render harmless the trial court's

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[6] A person commits a "theft" when "[b]y color or aid of deception" they "obtain control over the property . . . of another . . . with intent to deprive him or her of such property . . .." RCW 9A.56.020.

[7] A theft of $750 or less constitutes a third degree theft, which is a gross misdemeanor. RCW 9A.56.050.

failure to properly instruction jury that she *knowingly* acted without legal authority in detaining Osburn. This is because, to convict Tryon of kidnapping, a properly instructed jury needed to find Tryon knew she lacked legal authority, and even a mistaken contrary belief could negate this element.

In order to hold the error harmless, the reviewing court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Brown, 147 Wn.2d at 341 (quoting Neder, 527 U.S. at 19). That conclusion cannot be reached here. The kidnapping conviction must be reversed.

2. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE DEFENSE OF CITIZEN'S ARREST.

A defendant is entitled to have the jury fully instructed on the defense theory of the case whenever there is evidence to support it. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). This is a due process requirement. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011); U.S. Const. amend. XIV; Wash. Const. art I, § 3.

A trial court's refusal to give a jury instruction based on the evidence is generally reviewed for abuse of discretion, whereas the refusal to give a jury instruction based on the law is reviewed de novo. State v.

Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). However, when an otherwise discretionary decision is based solely on application of a court rule or statute to particular facts, the issue is one of law reviewed de novo. State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994). A trial court's interpretation of case law is also reviewed de novo. State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004). Furthermore, whether a constitutional right has been violated is a question of law reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). "[A] court 'necessarily abuses its discretion by denying a criminal defendant's constitutional rights.'" Id. (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

De novo review is appropriate here because it appears the trial court[8] applied the legal standard to the facts of Tryon's case in refusing to give the "citizen's arrest" instruction. Tatum, 74 Wn. App. at 86. Moreover, it is a question of law whether the failure to instruct the jury on citizen's arrest violated Tryon's constitutional right to due process. Iniguez, 167 Wn.2d at 280.

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[8] The record is scant with regard to why the trial court refused to instruct the jury on "citizen's arrest." The only specific comment was made in the context of discussing a defense requested continuance so Mogan could be found and brought to testify. Following an offer of proof as to what the defense expected Mogan to testify about, the court stated it did not understand how his testimony would support any of the defense theories, including the citizen's arrest theory. 4RP 51-55.

The evidence must be viewed in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 456. Although there must be affirmative evidence supporting the instruction, this evidence need not come from the party requesting it. Id.

Even without Crabtree's testimony, which supported finding Osburn was in on the plan to steal the money from the beginning, the evidence supported instructing the jury on the "citizen's arrest" theory. It was undisputed that Jefferson and Tryon contacted Mogan and Osburn in an effort to obtain drugs, that they gave Mogan at least $100 to purchase drugs for them, that Mogan left and did not return, and that Jefferson and Tryon eventually chased Osburn down and restrained him in the back of their car after he tried to flee. The only disputed issue as to the kidnapping was whether they were justified in restraining Osburn in light of the apparent theft of their money. If the jury concluded Tryon was entitled to make a citizen's arrest under these circumstances, then it necessarily would have acquitted her of kidnapping because a valid citizen's arrest negates the "without legal authority" aspect of the "abduct" element of the charge. See CP 69 (Instruction 19, defining "abduct" and "restrain").

Moreover, as previously noted, even if the jury found Tryon lacked actual legal authority to conduct a citizen's arrest of Osburn, it could still have acquitted Tryon for kidnapping because a properly instructed jury

needed to find Tryon knew she lacked legal authority in order to convict, and even a mistaken contrary belief could negate this element.

A criminal defendant is entitled to have the jury fully instructed on his theory of the case where the instructions are supported by the evidence. Fernandez-Medina, 141 Wn.2d at 453. Because Tryon's jury was not so instructed, this Court should reverse her conviction. Id. at 462.

D. CONCLUSION

For the reasons stated, this Court should reverse Tryon's judgment and sentence.

DATED this 19th day of February 2014.

Respectfully Submitted,

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70665-9-I
	)	
TAMARA TRYON,	)	
	)	
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 19TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] SKAGIT COUNTY PROSECUTOR'S OFFICE
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[X] TAMARA TRYON
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SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF FEBRUARY 2014.

X Patrick Mayovsky