

No. 44952-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

ARNOLD BRIONES FLORES,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 12-1-03352-0  
The Honorable John McCarthy, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The State failed to meet its constitutional burden of proving all of the elements of first degree kidnapping.
2. The State failed to meet its constitutional burden of proving all of the elements of unlawful imprisonment.
3. The State failed to meet its constitutional burden of proving that Arnold Flores was armed with a deadly weapon during the commission of the kidnapping offense.
4. The trial court properly granted motions to dismiss various unlawful imprisonment counts but failed to set forth its ruling in a written order or in the Judgment and Sentence.
5. The trial court erred when it included a finding in the Judgment & Sentence that the offenses were committed against a minor.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the State fail to prove the elements of kidnapping beyond a reasonable doubt when there is no evidence that Arnold Flores used or threatened the use of deadly force when he “abducted” Yonhee Flores? (Assignment of Error 1)
2. Did the State fail to prove the elements of unlawful imprisonment beyond a reasonable doubt when Arnold Flores did not specifically direct employees and customers of the bank to remain inside the bank when he argued with his wife while holding a BB gun, and where there is no evidence that he knew his actions would cause employees or customers to remain in the bank? (Assignment of Error 2)
3. Did the State fail to prove the elements of unlawful imprisonment beyond a reasonable doubt in count 9 when the evidence showed that a means of escape existed for the individual charged in that count? (Assignment of Error 2)
4. Where the unlawful imprisonment statute requires proof that a defendant “knowingly restrain” an individual, can the State

convict a defendant without any proof that the defendant knew the particular individual was present during the offense? (Assignment of Error 2)

5. Did the State fail to prove a nexus between the box cutter and the kidnapping offense, for the purpose of a special deadly weapon finding, where the evidence showed that Arnold Flores did not carry the box cutter or threaten to use the box cutter during the kidnapping offense, and where the evidence shows that his intent changed from using the box cutter to assault his wife to using a BB gun to entice responding police officers into shooting and killing him? (Assignment of Error 3).
6. Should a written order be entered or the Judgment and Sentence be corrected to reflect the trial court's dismissal of four counts of unlawful imprisonment? (Assignment of Error 4).
7. Should the Judgment and Sentence be corrected to remove a finding that the victim was a minor, where no such finding was made and the evidence does not support the finding? (Assignment of Error 5)

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Arnold Briones Flores by Amended Information with: second degree assault (count 1, RCW 9A.36.021(1)(c)) and first degree kidnapping (count 2, RCW 9A.40.021(1)(a)(d)), both committed against his wife, Yonhee Flores.<sup>1</sup> (CP 18-20) The State alleged several aggravating sentencing factors: including that Arnold was armed with a deadly

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<sup>1</sup> Because they share a last name, Arnold Flores and Yonhee Flores will be referred to by their first names throughout the brief.

weapon (a box cutter) during the commission of the offenses and that the offenses involved domestic violence. (CP 18-20)

The State also charged Arnold with 10 counts of unlawful imprisonment against 10 different individuals who were present inside the bank where the charged incident took place (counts 3 thru 12, RCW 9A.40.040). (CP20-26) The State alleged that Arnold was also armed with a deadly weapon (the box cutter) when he committed these offenses. (CP 20-26)

After the State rested its case-in-chief, the trial court granted the defense motion to dismiss the unlawful imprisonment charges alleged in counts 5 (David Ohls), 8 (Alison Odziemek), 10 (Albert Vital) and 11 (Jyll Berg). (TRP 576-77, 580-83, 596-607, 614; CP 44-48)<sup>2</sup> The court denied the defense motion to dismiss the kidnapping charge alleged in count 2 and the unlawful imprisonment charges alleged in counts 3 (Stephanie Crockett), 4 (Brielle Eldridge), 6 (Deanna Erwin), 7 (Shawna Loomis), 9 (Kelly Flynn), and 12 (Alyssa Dominguez Luther). (TRP 580-83, 596, 614; CP 44-48) The court also dismissed the deadly weapon allegations for all of the unlawful imprisonment counts. (TRP 615)

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<sup>2</sup> The transcripts containing the pretrial and trial proceedings, labeled Volumes 1 thru 7, will be referred to as "TRP". The transcript containing the sentencing proceeding will be referred to as "SRP".



The jury found Arnold guilty of all the remaining charges, and found that he was armed with a deadly weapon when he committed the assault and kidnapping offenses. (TRP 710-12; CP 98-110) The trial court denied Arnold's assertion that the assault and kidnapping offenses were the same criminal conduct. (CP 111-15; SRP 12) The court then imposed a standard range sentence totaling 211 months (concurrent sentences totaling 175 months, plus consecutive 24 and 12 month deadly weapon enhancements). (CP 139; SRP 26-27) This appeal timely follows. (CP 150)

#### B. SUBSTANTIVE FACTS

Arnold and Yonhee Flores were married in 1985 and had two children together. (TRP 105-06) In the summer of 2012, Arnold and Yonhee were experiencing marital difficulties, and were discussing getting a divorce. (TRP 107-08, 109) Arnold had lost his job, and he also believed that Yonhee was having an affair. (TRP 108, 109) When Yonhee stayed with her cousin for a short time, Arnold called her on the telephone almost daily. (TRP 108) According to Yonhee, he seemed angry about the state of their relationship, and about bills that he believed she should help pay. (TRP 109, 112-13)

On August 25, 2012, Arnold contacted Yonhee and asked her to meet him at their bank, the Washington State Employee's Credit

Union (WSECU) in Lakewood, so that they could discuss an issue relating to their car loan and registration. (TRP 114, 115) Yonhee arrived around 11:30 that morning, approached WSECU employee Kelly Flynn and explained the issue to her. (TRP 115, 419, 420) As Flynn went to investigate the matter, Arnold arrived and approached Yonhee. (RP 115, 119-20) Flynn returned and explained the status of the loan to Arnold and Yonhee, then turned and began to walk away. (TRP 120, 422-23)

Arnold then charged towards Yonhee and pushed her against the wall, pinning her with his forearm. (TRP 120-21, 375) Arnold then placed a box cutter against Yonhee's neck and cut her. (TRP 121-23) Yonhee could not remember what he said, but testified that he looked angry and she felt frightened. (TRP 122, 124) She and Arnold struggled, but Arnold was able to kept ahold of her. (TRP 125)

Then Yonhee saw that Arnold was now holding what appeared to be a gun.<sup>3</sup> (TRP 126) For approximately 30 minutes, Arnold moved around the lobby of the bank while he continued to hold onto Yonhee's arm, and demanded that Yonhee "tell [him] the

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<sup>3</sup> The item in Arnold's hand was actually a BB gun. (TRP 183)

truth.” (TRP 127, 128-29) Based on Arnold’s other statements and behavior, Yonhee realized that Arnold did not want to kill her, but instead wanted to be shot by responding police officers. (TRP 127, 129, 144-45) Yonhee also testified that she did not see anyone in the bank during this time. (TRP 129)

As Flynn walked away after her conversation with Arnold and Yonhee, she heard another employee say that Arnold had a gun. (TRP 423-24) She walked into the manager’s office and called 911. (TRP 424) She stayed hidden in the back area of the bank during the incident because she did not want to draw attention to herself. (TRP 426, 427)

WSECU customer Anne Jones was standing nearby in the lobby, and saw Arnold lunge towards Yonhee and knock her down. (TRP 192-93) She saw Arnold put his hand into his pocket and pull out a gun. (TRP 193) Arnold was angry and yelling for someone to call the police. (TRP 194) Arnold held the gun at his side, and did not point it at anyone. (TRP 194, 195, 199) Jones and several other employees or customers exited the bank. (TRP 196) Jones did not hear Arnold try to stop anyone from leaving. (TRP 199)

WSECU employee Alyssa Dominguez Luther was assisting a customer near the teller stations, and saw Arnold push Yonhee

against the window. (TRP 373, 374-75) She testified that she saw Arnold holding a gun, and that he gestured towards her and said to “call the cops.” (TRP 375, 377) Luther ran behind the teller stations, hid under a desk, and called 911. (TRP 375, 377-78)

Luther testified that this was clearly a domestic violence incident between Arnold and Yonhee, and Arnold never showed any interest in the bank’s money or anyone other than Yonhee. (TRP 389) But Luther was afraid to leave the bank because she did not feel she could do so without drawing Arnold’s attention and wondered whether he would shoot her. (TRP 380-81, 391)

WSECU employee Ramona Hope Figueroa was standing next to Luther, and also saw Arnold holding onto Yonhee. (TRP 395, 399) Figueroa told Arnold to leave Yonhee alone, then Arnold pulled out a gun. (TRP 400) Figueroa then told Arnold to leave, but Arnold told her to call the police. (TRP 401)

Figueroa walked away from Arnold, and began telling nearby customers and employees to get out of the bank. (TRP 401) Figueroa then walked into the break room, and notified her fellow employees Alison Odziemek and Albert Vital, who were unaware of what was going on in the lobby. (TRP 402, 412, 528, 529) Odziemek and Vital remained in the break room, and never saw Arnold. (TRP

412, 531-32, 537)

Figueroa also stayed in the break room for the duration of the incident, because she did not know what Arnold was planning to do and thought it best to wait quietly out of sight. (TRP 405-06) As she waited, Figueroa could hear Arnold yelling “Why are you doing this to me? You are going to watch me die today.” (TRP 404) It seemed to Figueroa that Arnold’s only concern was Yonhee. (TRP 408)

WSECU employee Deanna Erwin was assisting a customer at her teller station when she heard the commotion. (TRP 481, 482) She saw Arnold push Yonhee against the wall, and saw something with a black handle in Arnold’s hand. (TRP 482, 483) She told her customer to get out of the bank, then hid under a desk. (TRP 484, 485) The customer left the bank without incident, and Arnold did not try to contact or stop her. (TRP 491-92)

Erwin did not believe that Arnold knew she was there. (TRP 488-89) Erwin could hear Arnold telling Yonhee, “You don’t love me anymore. Why did you do this?” (TRP 487) She realized the incident had nothing to do with the bank, but she was still fearful. (TRP 487) Erwin testified that Arnold did not seem to notice anyone else in the bank, and that he seemed oblivious to everyone except Yonhee. (TRP 490) Erwin also heard Arnold tell Yonhee several

times that she should leave. (TRP 493)

WSECU branch manager, Jyll Berg, was in her office, when she heard a commotion. (TRP 332, 333) She began to walk to the lobby, when another employee walked towards her and told her a man in the lobby had a gun. (TRP333-34) Berg then hid in the back area of the bank, where she remained during the incident because she did not feel safe exposing herself. (TRP 334, 341, 342, 343, 346)

Berg heard Arnold say that he was going to kill himself, and it seemed to her that Arnold and Yonhee were focused only on each other. (TRP 342, 348) She only caught a brief glimpse of Arnold and Yonhee, and does not know whether they saw her. (TRP 334, 348)

WSECU employee Shawna Loomis was at her desk in her cubicle near the front door, when she heard yelling. (TRP 3356, 357) She stood up and started to walk towards the lobby so that she could see what was going on, when Figueroa walked towards her and told her to call 911. (TRP 357) She returned to her cubicle and called 911, then hid under a desk with two customers. (TRP 358, 361, 362) Loomis was afraid to leave the bank because she did not know what Arnold might do if he saw her, so she stayed hidden. (TRP 363)

During the incident, Loomis could hear Arnold yelling, “Why are you doing this? Don’t you love me anymore?” (TRP 358) She later heard Arnold tell Yonhee that she should go out the doors, then it will “all be over” and she “won’t see him again.” (TRP 364) Loomis never interacted with Arnold, and Arnold never directed her to do anything. (TRP 365, 367) Arnold never turned his focus from Yonhee to anyone else in the bank. (TRP 369)

WSECU employee David Ohls was assisting customers at his cubicle desk when the incident began. (TRP 468, 496) Since he could not see Arnold, Ohls assumed that Arnold could not see him either. So he decided to exit through the back door of the bank. He walked outside, and let several waiting police officers in through the back door. (TRP 475) He never heard Arnold tell anyone to stay inside, and it seemed that Arnold was completely focused on Yonhee. (TRP 477)

Ohls was assisting customer Stephanie Crockett and her daughter, Brielle Eldridge, when the incident began. (TRP 495, 496, 550) After Ohls left, Crockett and Eldridge considered leaving too, but Loomis told them to get down. (TRP 498, 553, 554) Crockett and Eldridge hid under the desk. (TRP 499, 554, 555) They could not see what was going on, but could hear Arnold tell Yonhee that

he was going to die and it was her fault. (TRP 501-03, 561) They heard Arnold tell Yonhee to run out the door, but Yonhee said no. (TRP 502-03, 542-43, 561)

Crockett and Eldridge never saw Arnold, and did not believe that he saw them. (TRP 506, 564) Arnold never directed them to do anything and they never heard him tell anyone to stay in the bank. (TRP 564) But they were afraid and did not know what he would do if he saw them, so they decided to stay hidden for the duration of the incident. (TRP 505-06, 557-58)

Eventually, Arnold moved towards the exit, then told Yonhee that he would open the door and she should run outside. (TRP 129, 131-32) According to Yonhee, Arnold opened the door, she ran outside, and as she ran she heard gunshots.<sup>4</sup> (TRP 132)

Lakewood Police Officer Vince Sivankeo encountered Ohls as he exited the bank through the back door. (TRP 161, 162) Officer Sivankeo entered the bank but stayed out of sight, and tried to gather information about the incident to relay to the other responding officers. (TRP 164, 167-68) He could hear Arnold and Yonhee arguing, and heard Arnold say, "They are going to have to kill me."

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<sup>4</sup> A video recording of the incident shows that Yonhee was still inside the bank's vestibule when the shots were fired. (TRP 312; Exh. P-96A)



(TRP 166) He could see Arnold and Yonhee moving around near the front doors of the bank, and did not see them go into any other areas. (TRP 179) It also seemed to Officer Sivankeo that Arnold did not talk to or focus on any of the customers or employees in the bank. (TRP 179)

Lakewood Police Officer Richard Barnard happened to be driving through the parking lot of WSECU at the moment the incident began. (TRP 205) He saw several people exiting the bank through the main entrance, and they flagged him down and told him that a man with a gun was inside the bank. (TRP205, 206, 207)

SWAT team members who eventually assembled outside saw Arnold and Yonhee standing together in the bank's vestibule. (TRP 246, 437-38, 456) They appeared to be having a discussion, and from Arnold's body language he seemed to be distressed by what Yonhee was saying. (TRP 457) Arnold had ahold of Yonhee's arm or hand most of the time, but a few times he let go and Yonhee reached out and took his hand. (TRP 316, 439, 457, 458)

When it appeared that Arnold began to lift the gun towards Yonhee, several officers fired and shot Arnold.<sup>5</sup> (TRP 169, 219, 249,

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<sup>5</sup> However, another officer testified that Arnold never pointed the BB gun at Yonhee. (TRP 439)

458) Officers then took Arnold into custody. (TRP 169)

Arnold was later interviewed at the hospital. (TRP 218) He had been frustrated that Yonhee was not talking to him, and believed that meeting at the bank was the only way to get her to talk. (TRP 223, 224) He told investigators that he did not want to hurt anyone, but rather he wanted to die and wanted the police to kill him. (TRP 223, 225, 231) He said he brought the BB gun so that the police would shoot him. (TRP 223, 226) He said he knew other people were in the bank and that they would be scared, and was sorry for that. (TRP 227, 228, 230)

#### **IV. ARGUMENT & AUTHORITIES**

- A. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE THE ELEMENTS OF THE CRIMES OF KIDNAPPING AND UNLAWFUL IMPRISONMENT, OR THE DEADLY WEAPON FINDING FOR COUNT 2 (KIDNAPPING).

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvone, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential

elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1988); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

1. The State failed to prove the elements of kidnapping because there is no evidence that Arnold “abducted” Yonhee by use or threatened use of deadly force.

The State charged Arnold in count two with first degree kidnapping pursuant to RCW 9A.40.020(1)(a) and (d). Under those sections, a person is guilty of kidnapping in the first degree if he or she “intentionally abducts another person with intent . . . [t]o hold him or her for ransom or reward, or as a shield or hostage; or . . . [t]o inflict extreme mental distress[.]” RCW 9A.40.020(1)(a)(d). The court instructed the jury on the definition of “abduct” found in RCW 9A.40.010(1)(b): “to restrain a person by . . . using or threatening to use deadly force.” (CP 70)

The evidence shows that Arnold assaulted Yonhee with the box cutter, then dropped the box cutter and pulled out a BB gun.<sup>6</sup> (TRP 121-22, 124-26) He then held on to Yonhee's arm as they argued and moved around the lobby of the bank. (TRP 127-29) Yonhee testified she did not believe that Arnold wanted to kill her, but she realized instead that he wanted the police officers to kill him. (TRP 144-45) Other witnesses testified that Arnold never pointed the BB gun at anyone, including Yonhee, and none of the witnesses testified that they heard Arnold make any verbal threats to hurt Yonhee. (TRP 195, 199, 407, 439) And eventually, Arnold was heard repeatedly telling Yonhee to go outside, but she refused to leave him. (TRP 131-32, 364, 367, 493, 502-04, 507, 542-43, 561, 567)

There is simply no evidence that, during the time that Arnold restrained Yonhee, he ever used or threatened to use deadly force against her, and indeed she did not believe he intended to do so. The State failed to prove that Arnold "abducted" Yonhee, and therefore failed to prove an essential element of first degree kidnapping. This conviction must be reversed and dismissed.

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<sup>6</sup> According to the prosecutor, the assault was completed "in moments" when Arnold cut Yonhee with the box cutter, then the kidnapping began and lasted the remaining 30 or so minutes. (TRP 702)

2. The State failed to prove the elements of unlawful imprisonment because there is no evidence that Arnold “knowingly” restrained employees and customers of the bank.

A person is guilty of unlawful imprisonment if he or she knowingly restrains another person. RCW 9A.40.040. To “restrain” means:

to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is “without consent” if it is accomplished by (a) physical force, intimidation, or deception....

RCW 9A.40.010(1).

Unlawful imprisonment requires proof that the accused acted knowingly. State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000). Thus, [the defendant] must have been aware that he was restraining his victim, [and] that the restraint was unlawful[.]” Warfield, 103 Wn. App. at 159, 5 P.3d 1280 (2000) (quoting 2 AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, § 212.2, at 242 (1980), which contains statutory language similar to that contained in Washington’s unlawful imprisonment statute).

At the close of the State’s case-in-chief, the defense moved to dismiss all of the unlawful imprisonment counts, arguing that Arnold did not knowingly restrain the bank employees or customers.

(TRP 583, CP 44-48) The trial court agreed that the charges relating to any individuals that Arnold did not specifically interact with should be dismissed; thus the court initially ruled that only the charges relating to Kelly Flynn and Alyssa Dominguez Luther would go to the jury. (TRP 606-07) But the State convinced the trial court to add back the charges against employees and customers who remained in the lobby and customer service area of the bank, because those individuals “would have been visible to the defendant, if he would have cared to look[.]” (TRP 607-08, 610-11)

As a result, the court dismissed the charges relating to Ohls (who left his customers at his cubicle desk and walked out the back door), Odziemek and Vital (who were in the break room when the incident began and remained there), and Berg (who was in her office when the incident began and stayed out of sight). (TRP 333, 412, 476, 528, 532, 576-77, 614)

The counts relating to Flynn, Luther, Erwin, Eldridge, Crockett, and Loomis remained. (TRP 614) Flynn and Luther directly interacted with Arnold. (TRP 375, 422-23) Erwin was assisting a customer at her teller station and saw the incident as it began. (TRP 481-82) Eldridge, Crockett and Loomis were in the cubicle area when the incident began and never saw Arnold or

Yonhee. (TRP 356, 361, 362, 496, 499, 506, 550, 554, 564) The jury convicted Arnold of unlawfully imprisoning all six of these individuals. (TRP 710-12; CP 102-07) However, the State's evidence did not establish that Arnold "knowingly" restrained any of these people.

First, a number of people left the bank through the front and back doors when the incident began. (TRP 196, 205, 206, 475) And Arnold made no effort to stop anyone from leaving. (TRP 199, 407, 477, 491-92) Other than telling Luther to call the police, Arnold never interacted with anyone other than Yonhee after the incident began. He never directed anyone to do anything, and never told anyone they could not leave. (TRP 365, 375, 369, 394, 407, 447, 477, 490, 506, 564) And the witnesses testified that Arnold was completely focused on Yonhee during the entire incident. (TRP 145, 179, 348, 369, 389, 408, 479, 490, 506) So there is no evidence that Arnold intended to keep anyone other than Yonhee from leaving the bank.

Second, Arnold cannot "knowingly restrain" a person when he does not know that they are present or that they even exist. A person knows or acts knowingly or with knowledge when he or she is aware of a fact or circumstance, or has information that would lead a reasonable person to believe a fact exist. WPIC 10.02; RCW

9A.08.010(1)(b). Thus, if Arnold is not aware of the fact that a person is present, he cannot know that he is restraining that person.

The definition of knowing requires actual awareness of a relevant fact or circumstance. The definition does not allow a conviction when a person merely “could have” or “should have” known of the existence of a fact. But this is what the State argued here; that it proved knowledge because Arnold could have known that people were there if he had “cared to look,” and that he should have known that anyone remaining in the bank would feel they could not leave. (RP 607-08, 610-11)

Furthermore, the distinctions that the State and the trial court made in this case between the various “victims” are false and nonsensical. The court first made a distinction between individuals that Arnold interacted with and those he did not. But there is no evidence that Arnold knew or should have known that those specific individuals remained in the bank after the incident began, as a number of customers and employees left without incident, and those that remained were not visible.<sup>7</sup> The State and the trial court next

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<sup>7</sup> Interestingly, the State did not bring an unlawful imprisonment charge relating to Ramona Figueroa, the third WSECU employee who directly interacted with Arnold, even though she remained hidden in the bank for the entire incident. (CP 18-26; TRP 401, 405-06)



made a distinction between the individuals who were in the customer service area during the incident versus those who were in the employee-only area during the incident. However, though Arnold could have seen Eldridge, Crockett, Erwin, and Loomis if he had “cared to look” in the cubicle area or behind the teller desk, Arnold also could have seen Odziemek, Vital and Berg if he “cared to look” in the employee-only area or break room.

The State and the trial court have created an arbitrary and unpredictable standard for determining when a defendant does or does not (or should or should not) have “knowledge.” For example, if there were 100 people in the cubicle area of the bank, could Arnold be charged and convicted of 100 counts of unlawful imprisonment because he would have seen those people if he “cared to look?” If the bank was on the first floor of a high rise office building, could Arnold be charged with thousands of counts of unlawful imprisonment because he should have predicted that people on the upper floors might be unable or unwilling to leave? And if police had placed nearby businesses or residences in the area on lock-down, would Arnold then be guilty of unlawfully imprisoning the entire neighborhood?

The unlawful imprisonment statute specifically requires proof

that the defendant knowingly restrained another person. This Court should not allow the statute to be applied to any and all persons, known and unknown, who may feel it is in their best interest to hide out until a dangerous situation is resolved. The State must be required to meet its burden of proving that a defendant is aware that his actions are restraining a specific individual in order to convict the defendant of unlawful imprisonment. This Court should reverse and dismiss all six of Arnold's unlawful imprisonment convictions.

3. The State failed to prove that Arnold substantially interfered with Flynn's liberty because a reasonable means of escape existed for her.

To support a conviction for unlawful imprisonment, the State must show that a real or material interference occurred, as opposed to "a petty annoyance, a slight inconvenience, or an imaginary conflict." See State v. Robinson, 20 Wn. App. 882, 884, 582 P.2d 580 (1978). "The presence of a means of escape may help defeat a prosecution for unlawful imprisonment unless 'the known means of escape . . . present[s] a danger or more than a mere inconvenience.'" State v. Washington, 135 Wn. App. 42, 50, 143 P.3d 606 (2006) (quoting State v. Kinchen, 92 Wn. App. 442, 452 n.16, 963 P.2d 928 (1998)).

For example, in Kinchen, the court reversed the defendant's

conviction, finding the evidence insufficient to establish that the child victims were substantially restrained when they were locked and left alone in an apartment, because they were able to climb in and out of a window and sliding glass door. 92 Wn. App. at 452. The court noted that “[t]he window and the sliding glass door presented a reasonable and readily accessible means of escape.” 92 Wn. App. at 452 n.16.

In this case, Flynn retreated to the manager’s office then a rear vault area, where she encountered Dave Ohls. (TRP 425-26) Ohls decided to walk out the back door of the bank, and did so successfully. (TRP 426-27, 475) Flynn watched as Ohls exited the bank, but chose not to follow him. (TRP 427) Clearly, there was a reasonable and readily accessible means of escape available to Flynn. Accordingly, Arnold’s actions did not substantially interfere with her freedom, and his conviction relating to Flynn should be dismissed for this alternative reason as well.

4. The evidence is insufficient to support the jury’s special verdict on count 2 (kidnapping) that Arnold was armed with a deadly weapon.<sup>8</sup>

A defendant “armed” with a deadly weapon or firearm at the

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<sup>8</sup> This argument is presented in the event that this Court finds sufficient evidence to uphold Arnold’s kidnapping conviction.

time of the commission of a crime receives an enhancement to their standard range sentence. RCW 9.94A.825; RCW 9.94A.533(3), (4). “A person is ‘armed’ if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.” State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). “But a person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime.” State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007).

Merely showing that a weapon was accessible during a crime, or that a defendant constructively possessed a weapon on the premises sometime during the entire period of illegal activity, is not enough to establish a nexus between the crime and the weapon. State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632 (2001) (quoting State v. Johnson, 94 Wn. App. 882, 895, 974 P.2d 855 (1999)).

During the course of the kidnapping in this case, Arnold held onto Yonhee with one hand and onto the BB gun with the other hand. (TRP 309) The box cutter was later found in the lobby. (TRP 294) There is no evidence that Arnold ever touched, looked at, referred to, or even thought about the box cutter during the course of the kidnapping.

Furthermore, the evidence shows that Flores intended to use the box cutter for the assault because he wanted Yonhee to “bleed and feel the way he did.” (TRP 225) But after that, his intention was to wait for the police and use the BB gun to entice them into shooting him. (TRP 222-23, 225) The evidence shows that, while the kidnapping was ongoing, Flores had no use for the box cutter and no intention of using it again.

There is absolutely no connection between the box cutter and the kidnapping offense in this case. The State therefore failed to prove a nexus between the alleged deadly weapon and the crime of kidnapping. The jury’s special finding that Arnold was armed during the kidnapping, and the deadly weapon sentence enhancement imposed as a result of that finding, should be stricken.

B. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO ACCURATELY REFLECT THE TRIAL COURT’S RULINGS AND THE JURY’S FACTUAL FINDINGS.

The court dismissed counts 5, 8, 10 and 11 based on insufficient evidence to establish knowing restraint. (TRP 606-07, 614) However, the court did not enter a written order dismissing these counts. And the Judgment and Sentence, which contains a blank space for the court to list dismissed charges, also does not mention the charges. (CP 137)

Additionally, on page two of the Judgment and Sentence, a checkmark is placed next to the following finding: “This case involves kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment . . . where the victim is a minor and the offender is not the minor’s parent.” (CP 135) However, the victim of the kidnapping offense was Arnold’s then 49 year old wife, Yonhee. (TRP 104; CP 19, 20, 71) The ages of the victims of the unlawful imprisonment counts ranged from 24 years to 51 years old. (TRP 353, 371, 417, 480, 494, 548; CP 20-26) None of the victims in this case were minors, so this finding is incorrect.

This Court should remand for amendment of the Judgment and Sentence to: (1) reflect the trial court’s dismissal of four out of the ten charged unlawful imprisonment counts or, in the alternative, enter an order dismissing the counts; and (2) remove the checkmark indicating that the victim was a minor, and strike any sentencing conditions imposed as a result of that incorrect finding. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener’s error referring to wrong statute on judgment and sentence form); see also State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

## V. CONCLUSION

There is no evidence that Arnold used or threatened to use deadly force when he restrained Yonhee, so Yonhee was not “abducted” and Arnold’s kidnapping conviction should be reversed and dismissed. Because there is no evidence that Arnold knowingly restrained employees or customers inside the bank (and indeed, did not know that certain individuals even existed), and because the trial court’s standard for who can and cannot be knowingly restrained is arbitrary and unpredictable, Arnold’s unlawful imprisonment convictions must also be reversed and dismissed. Furthermore, because the State failed to prove a nexus between the box cutter and the kidnapping offense, the deadly weapon sentence enhancement for this offense should be stricken.

Finally, the trial court should enter a written order or correct the Judgment and Sentence to reflect the trial court’s dismissal of four counts of unlawful imprisonment and to remove an erroneous finding that the victim was a minor.

DATED: November 25, 2013



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Attorney for Arnold Briones Flores

**CERTIFICATE OF MAILING**

I certify that on 11/25/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Arnold B. Flores # 366674, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM, WSBA #26436



# CUNNINGHAM LAW OFFICE

**November 25, 2013 - 4:07 PM**

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