NO. 43855-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN DUNN,

Appellant.

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

The Honorable Barbara Johnson, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ISSUES IN REPLY

1. Did the charging document fail to notify the appellant of the essential elements of unlawful imprisonment?

2. Does the instruction informing jurors they could find each element of unlawful imprisonment if the Dunn acted "intentionally" constitute a confusing misstatement of the law?

3. Where the complainants' fear, or lack thereof, was relevant to the jury's consideration of whether the State proved an element of the crime of unlawful imprisonment, did the trial court err in excluding the cell phone video?

4. Did the trial court violate the appellant's right to a public trial by taking peremptory challenges in a proceeding closed from public view?

B. ARGUMENTS IN REPLY

1. THE STATE IGNORES CONTROLLING AUTHORITY FROM THIS COURT IN ARGUING THE CHARGING DOCUMENT WAS ADEQUATE.

The State argues that the information contained all elements of the crime. Brief of Respondent (BOR) at 6-8. Dunn was charged with unlawful imprisonment as follows:

> That . . . in the County of Clark, State of Washington, on or about May 13, 2012 . . . [Dunn] did knowingly restrain [one of the three complainants], a human being; contrary to

> [RCW] 9A.40.040 (1),[1] and/or was an accomplice to the crime. . .

CP 12.

In arguing the information is adequate, the State ignores, and fails to address, the primary authority supporting Dunn's argument, State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000). There, this Court held that for purposes of unlawful imprisonment, "restraint" 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." Id. at 157. "Knowingly" modifies all four components of restraint. Id. at 153-54, 157. The modified components of "restraint" are thus elements of the crime of unlawful imprisonment. Id. at 158-59. This proposition was later cited with approval in State v. J.M., 144 Wn.2d 472, 480-81, 28 P.3d 720 (2001).

The State correctly notes, however, that Division One's recent decision in State v. Johnson, ___ Wn. App. ___, 289 P.3d 662, 674 (2012), which holds that the common understanding of "restraint" fails to convey statutory definition, and in particular, requirement of knowledge that such restraint occur "without legal authority," is at odds with the two-

[1] The citation is to the 1975 version of the statute.

judge majority in another recent decision of that Court, State v Phuong, ___ Wn. App. ___, 299 P.3d 37 (2013). The Phuong dissent is consistent with this Court's decision in Warfield. Phuong, 299 P.3d at 66-67 (Becker, J., dissenting). The appellant in that case has filed a petition for review, which is set for consideration on October 1, 2013 under Supreme Court case no. 88889-2.

In any event, Warfield was correctly and logically decided and supports Dunn's claim. This Court carefully analyzed legislative intent and concluded the statutory definition of unlawful imprisonment, to "knowingly restrain," causes the adverb "knowingly" to modify all components of the statutory definition of "restrain." Warfield, 103 Wn. App. at 153-54. This 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." Id. at 159.

Relying on Warfield, the Johnson opinion correctly recognized that, even if an accused could fairly infer some of the knowledge requirements attached to "restrain" from the charging document, one could not infer from the charging language that the restraint must be accomplished with knowledge it was "without legal authority." Johnson, 297 P.3d at 722-23. A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen,

125 Wn.2d 782, 787, 888 P.2d 1177 (1995); see also U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. "An element is 'essential' if its 'specification is necessary to establish the very illegality of the behavior.'" State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)), cert. denied, 554 U.S. 922 (2008). Knowledge that the restraint was without lawful authority is an essential element because it is one of the facts the State must prove beyond a reasonable doubt. Johnson, 297 P.3d at 722-23.

The State claims the statutory language is sufficient and it should not be required to provide more. BOR at 8. The State is mistaken. "[T]his court has specifically referred prosecutors to the criminal pattern instructions for the purpose of identifying, in many cases, the essential elements that must be included in a charging document." State v. Studd, 137 Wn.2d 533, 554, 973 P.2d 1049 (1999) (Madsen, J., concurring). As the Supreme Court has noted, the responsibility to include all essential elements of a crime is not unduly burdensome, considering the WPICs list the elements of the most common crimes. State v. Kjorsvik, 117 Wn.2d 93, 102 n.13, 812 P.2d 86 (1991). Following this Court's 13-year-old decision in Warfield, the standard "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 proven,

including the element that the person know the restraint was without legal authority. WPIC 39.16. The State nonetheless failed to allege all of the essential elements here. CP 12.

As the State notes, in holding to the contrary the Phuong majority relied on State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013). But in doing so, the Phuong majority simplifies the issue to the point of error, reformulating the question as whether the definition of an element of the offense must be alleged in the charging document.

The essential elements rule, however, requires a charging document to "allege facts supporting every element of the offense." State v. Simms, 171 Wn.2d 244, 250, 250 P.3d 107 (2011) (citing State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). The first step is to determine what constitutes an essential element. The second step is to determine whether all of the essential elements are contained in the information. Kjorsvik, 117 Wn.2d at 105-06. Again, an element is essential if it is necessary to establish the illegality of the behavior. Yates, 161 Wn.2d at 757.

The charging document in this case is deficient under this standard. The State was required to prove knowledge that the restraint was unlawful in order to convict Dunn of unlawful imprisonment. Warfield, 103 Wn. App. at 159; Johnson, 297 P.3d at 721-23. The Phuong majority's attempt

to draw an absolute line between a "definition" and an essential element makes little sense in the present context. The rationale behind requiring all "essential elements" be included is to give the accused proper notice of the nature of the crime so that the accused can prepare an adequate defense. State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010).

With that goal in mind, it becomes clear that an essential element of unlawful imprisonment is that the accused not only knowingly restrained someone, but also that he knowingly violated the law. Warfield, which involved bounty hunters that restrained a man on an outstanding arrest warrant and checked with local police before returning him to jail, illustrates the kind of case where knowledge of the law obviously makes a difference in terms of defending against the charge. Warfield, 103 Wn. App. at 153-54. Unlawful imprisonment is one of the few crimes that require the State to prove the offender knew his conduct was without authority of law. Id. at 159.

The charging language here failed to apprise Dunn of that element of the State's case. The deficiencies of the information in this respect carried through, for example, to the following argument by the State in closing:

> . . . . Because the old adage about ignorance of the law not being an issue here, well, when you look at intent intend and I submit to your read it [closely], *you won't find*

> *anything in there that says you have to know that it's a crime*. In fact, let's look at that. This causes people confusion sometime[s] and I just don't' want anybody to be confused by this part.

4RP 38-39 (emphasis added) (quoted in Amended Brief of Appellant (ABOA) at 23).

The State also argues that the Phuong majority is amply supported by the reasoning of Allen. BOR at 7-8. Again, the State is mistaken. In Allen, the Court held a "true threat" was not an essential element of the crime of harassment. Allen, 176 Wn.2d at 628-30. The constitutional concept of true threat "merely defines and limits the scope of the essential threat element" in the harassment statute and is not itself an essential element. Id. at 630.

The "true threat" cases are distinguishable, however, because they arise out of the First Amendment overbreadth concern that such statutes could be interpreted to encompass a substantial amount of protected speech. Id. at 626. In light of that constitutional concern, threat-based statutes are construed to be limited to "true threats." Id. The "true threat" requirement is a limitation on the essential "threat" element. Id.

Dunn's case does not implicate First Amendment concerns. Unlike First Amendment cases where the "true threat" definition limits the scope of the threat element, the knowledge requirement attached to

restraint, including the requirement that the accused knew the restraint was unlawful, does not *limit* the scope of the restraint element. As construed in Warfield, the provision defining restraint, when coupled with the definition of the crime, expands the mens rea requirement, that is, what the accused must know in order to be convicted. Knowledge of the unlawfulness of the act is an element of the crime.[2]

Significantly, Allen also recognized the charging language including to "knowingly threaten" left to its ordinary meaning satisfied the mens rea element as to the result encompassed within the meaning of "true threat." Allen, 176 Wn.2d at 629 n.11 (citing State v. Schaler, 169 Wn.2d 274, 287-88, 236 P.3d 858 (2010)). The "knowingly restrains" language of the unlawful imprisonment charge, left to its ordinary meaning, does not set forth all of the specific mens rea for each element of the crime.

If the charging document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most

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[2] The rationale espoused by the State is consistent with the holdings of cases like State v. Smith, which held a charging document need not contain knowledge as an element of possession of stolen property because the knowledge requirement was contained in a definitional statute. State v Smith, 49 Wn. App. 596, 599, 744 P.2d 1096 (1987), review denied, 110 Wn.2d 1007 (1988), overruled by State v. Moavenzadeh, 135 Wn.2d 359, 956 P.2d 1097 (1998). But the Supreme Court later held knowledge is an essential element that must be set forth in the information. Moavenzadeh, 135 Wn.2d at 361-64.

liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary elements of unlawful imprisonment are neither found nor fairly implied by the charging document, this Court must presume prejudice and reverse Dunn's convictions. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

2. THE INSTRUCTION INFORMING JURORS THEY COULD FIND EACH ELEMENT OF UNLAWFUL IMPRISONMENT IF DUNN ACTED "INTENTIONALLY" IS A CONFUSING MISSTATEMENT OF THE LAW.

As the State acknowledges, jury instructions must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. Moreover, this Court reviews challenged instructions de novo, evaluating them in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995) (cited in BOR at 10). But the instructions in this case, read as a whole, are misleading for the reasons set forth in the appellant's opening brief. ABOA at 18-25. Worse, the instructions enabled the prosecutor to argue that Dunn committed the crimes because he was acting intentionally, that is, not sleepwalking, throughout the day in question. ABOA at 21-22, 25-27.

In State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005), this Court held that a knowledge instruction providing that acting knowingly is

also established if a person acts intentionally was confusing because it potentially allowed the jury to find Goble guilty of third degree assault against a law enforcement officer without having to find that the defendant had the knowledge required to convict him on the crime. There, the knowledge required was that the complainant was a law enforcement officer performing his official duties. Id. at 202-03; see also State v. Atkins, 156 Wn. App. 799, 811-17, 236 P.3d 897 (2010) (holding similar error occurred but error was harmless).

The State subsequent cases limit Goble to its facts and this case is more like those cases than Goble. BOR at 13. A review of those cases, however, reveals they are distinguishable on their facts.

In State v. Gerdts, 136 Wn. App. 720, 150 P.3d 627 (2007), a man was charged with second degree malicious mischief. The jury instruction defining second degree malicious mischief stated "[a] person commits the crime of malicious mischief in the second degree when he or she knowingly and maliciously causes physical damage to the property of another in an amount exceeding $250." The to-convict instruction similarly required the jury to find the accused "caused physical damage to the property of another in an amount exceeding $250" and that he "acted knowingly and maliciously." The court defined knowledge to include that "acting knowingly or with knowledge also is established if a person acts

intentionally." Id. at 726. This Court held that, as a whole, these instructions clearly required the jury to find that Gerdts knowingly and maliciously caused physical damage to the property of another. Id. Logically, the jury could have found that the defendant knowingly scraped the side of the van if it also found that he did so intentionally.

The same is true of State v. Boyd, also cited by the State. There, Boyd was charged with voyeurism and attempted voyeurism for attempting to take up-skirt photos while following girls up stairs. State v. Boyd, 137 Wn. App. 910, 155 P.3d 188 (2007). The pertinent statute provided:

> A person commits the crime of voyeurism if, for the purpose of rousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films . . . [t]he intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

RCW 9A.44.115(2)(b). "Intimate areas" are further defined as "any portion of a person's body or undergarments that is covered by clothing and intended to be protected from public view." RCW 9A.44.115(1)(a). Boyd argued the trial court erred in instructing the jury that "[a]cting knowingly or with knowledge also is established if a person acts intentionally" because it created a mandatory presumption requiring the jury to find that he knowingly photographed the victim's intimate area

based on any intentional act. Boyd, 137 Wn. App. at 924. Consistent with Gerdts, this Court rejected Boyd's arguments. Again, logically, the jury was entitled to convict Boyd if it found he intentionally took up-skirt photos.

As the above facts illustrate, these cases are distinguishable. BOR at 12-14. Neither involve a situation in which knowledge of the unlawfulness of an act was required to prove guilt. This aspect of the unlawful imprisonment statute renders this case more like Goble, and less like Gerdts and Boyd; the potential for jury confusion is just as great as it was in Goble.

In context, and consistent with the State's presentation of its case, the instruction defining knowledge as encompassing intentional conduct as to any fact that must be to be committed "with knowledge" allowed the jury to convict Dunn without finding he *knew* the conduct was unlawful. Because, under the circumstances, this "knowledge" instruction lessened the State's burden in proving unlawful imprisonment, and residential burglary as well,[3] each of Dunn's convictions should be reversed.

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[3] See ABOA at 23-25 (residential burglary conviction is also undermined because jury could have concluded Dunn's intent in entering or remaining in the apartment was "criminal" from the fact that he *intentionally* drove the girls away from the apartment without their mother's permission).

3. THE STATE MISSTATES THE LAW IN ARGUING THAT EXCLUSION OF THE CELL PHONE VIDEO WAS PROPER.

The State argues that even if erroneous, the exclusion of the cell phone video was not prejudicial because "neither fear nor physical restraint are elements" of unlawful imprisonment and therefore the girls demeanor was irrelevant. BOR at 20-21. The State is, again, mistaken.

While arguably neither is required to prove the third alternative means of accomplishing unlawful imprisonment – acquiescence of a child under 16 without parental consent – fear and physical restraint are arguably relevant to the first form of restraint, "without consent," and overwhelmingly relevant to restraint "accomplished by physical force [or] intimidation." See ABOA at Appendix A (unlawful imprisonment to-convict instructions). The girls' demeanor during the events in question was also relevant to proving whether Dunn knew that his conduct was against the law, an essential element of the crime no matter which alternative means of committing the second element the State relied on. Id. (to-convict instructions); Warfield, 103 Wn. App. at 158-59.

In any event, the general verdicts do not reveal under which alternative Dunn was convicted. CP 31, 40-44. An ambiguity in the jury's verdict under the rule of lenity must be resolved in the defendant's favor. State v. Lindsay, 171 Wn. App. 808, 288 P.3d 641, 660 (2012). For these

reasons, and those explained in the amended brief of appellant,[4] the trial court erred in excluding the cell phone video.

4. THE PEREMPTORY CHALLENGES OCCURED IN PRIVATE IN VIOLATION OF THE RIGHT TO A PUBLIC TRIAL.

The State argues that the silent exercise of peremptory challenges at a private meeting at the clerk's station does not implicate, or violate, the right to a public trial. BOR at 22. The State is incorrect.

The State first relies on State v. Lormor, 172 Wn.2d 85, 257 P.3d 624 (2011). BOR at 22-23. But that case involved the exclusion of a three-year-old on a ventilator, the noises from which the court found would be a distraction. Id. at 88-89. The circumstances here are obviously distinguishable. Lormor, moreover, clearly states that proceedings conducted in an inaccessible or private location may violate the right to a public trial. The case also holds that the public trial right extends to trial and "those proceedings that cannot be easily distinguished from the trial itself," including jury voir dire. Id. at 93. A close reading of Lormor demonstrates that it supports Dunn's claim.

The public trial right applies to voir dire, which is important to the adversaries in a proceeding, as well as to the criminal justice system as a whole. In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d

[4] ABOA at 30-32.

291 (2004) (citing Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The exercise of peremptory challenges, governed by CrR 6.4, constitutes a part of "voir dire." State v. Wilson, ___ Wn. App. ___, 298 P.3d 148, 155-56 (2013); People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (state and federal authority support conclusion that "peremptory challenge process is a part of the "trial" to which a criminal defendant's constitutional right to a public trial extends"); accord, Hollis v. State, 221 Miss. 677, 74 So.2d 747 (1954) (to comply with state constitutional mandate of a public trial, peremptory challenges must be exercised at the bar, in open court, not at a private conference); cf. State v. Sublett, 176 Wn.2d 58, 70-71, 77, 292 P.3d 715 (2012) (consistent with CrR 6.15, in-chambers discussion of jury question posed during deliberations did not implicate public trial right).

While the State relies primarily upon Wilson in arguing that the exercise of peremptory challenges does not implicate the public trial, that case too supports Dunn's claim. In Wilson, this Court observed that peremptory challenges are part of the "voir dire" process. Wilson, 298 P.3d at 155. This makes sense, given the important legal limits on the exercise of peremptory challenges. In contrast, the excusal of ailing veniremembers by the bailiff, while part of the broader concept of "jury

selection" was, unsurprisingly, not a part of the protected voir dire process. Id. at 157.

While the State and the accused need give no rationale for peremptory challenges, their open exercise is essential given the important limits on such challenges,[5] which may be triggered solely by a juror's appearance, see, e.g., State v. Cook, __ Wn. App. ___, ___P.3d ___, 2013 WL 2325117 at *4 (May 28, 2013). Thus, a record of names created after the fact cannot guarantee the fairness of the process in the way that open exercise does. Contrary to the State's claim, an after-the-fact written record of such challenges is inadequate given the need for public scrutiny in the first instance. BOR at 25. And, generally speaking, the availability of a record of an improperly closed voir dire fails to cure the error. State v. Paumier, 176 Wn.2d 29, 32, 37, 288 P.3d 1126 (2012); see also Harris, 10 Cal.App.4th at 684 (holding, based on application of federal law, that after-the-fact availability of transcripts of peremptory challenges conducted in chambers does not public trial violation or render those proceedings "public); cf. People v. Williams, 26 Cal.App.4th Supp. 1, 6-8, 31 Cal.Rptr.2d 769 (1994) (peremptory challenge could be held at

[5] E.g., Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

sidebar if challenge and party making it was then *immediately* announced in open court).

The multitude of cases prohibiting private voir dire controls the result here. But should this Court hold that application of the "experience and logic" test is necessary, as the State argues, the result would be no different, as this Court recently held that not only voir dire, but also extensions of voir dire, must be conducted openly based on the application of the "experience and logic" test. State v. Jones, ___ Wn. App. ___, ___ P.3d ___, 2013 WL 2407119 at *7-8 (June 4, 2013) (off-the-record drawing to select alternate jurors violated public trial right, necessitating reversal of conviction).

Because the error was structural, prejudice is presumed, and reversal is required. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012).

For the reasons set forth in Dunn's opening brief, the sidebar practice also violated Dunn's right to be present at all critical stages of trial, and reversal is required for that reason as well. ABOA at 36-40.

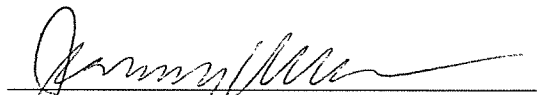
C. CONCLUSION

For the reasons set forth above and in the appellant's amended opening brief, each of Mr. Dunn's convictions should be reversed.

DATED this 20TH day of June, 2013.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON, Respondent, vs. BRYAN DUNN, Appellant.	)))))))))	COA NO. 43855-1-II

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 20TH DAY OF JUNE 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRYAN DUNN
1715 NE 116TH STREET #D
VANCOUVER, WA 98686

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JUNE 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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