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STATE OF WASHINGTON
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No. 96457-2

**IN THE SUPREME COURT OF THE STATE OF
WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

CLEVE GOHEEN-RENGO, Appellant.

**ANSWER TO MOTION FOR
DISCRETIONARY REVIEW**

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A. IDENTITY OF RESPONDENT

Respondent, State of Washington, by Kimberly Thulin, Appellate Deputy Prosecutor for Whatcom County, responds to Goheen-Rengo's motion for discretionary review.

B. DECISION BELOW

The Court of Appeals issued an unpublished opinion affirming Goheen-Rengo's convictions for two counts of unlawful imprisonment. See, Slip. Op. 76424, attached to MDR. Thereafter, Goheen-Rengo filed a motion for discretionary review asserting the court of appeals erred and that its decision conflicts with other appellate court decisions. The State in this response, asserts the court of appeals did not err and its decision is in accord with Washington precedent.

C. ISSUES PRESENTED FOR REVIEW

1. Whether Goheen-Rengo's motion for discretionary review should be denied because the record reflects sufficient evidence supports his convictions for unlawful imprisonment. Goheen Rengo knowingly restrained and substantially interfered with two social workers who were trying to safely leave a supervised visitation between Goheen –Rengo and his three young children by physically trapping them in an elevator and not letting them safely leave.

2. Whether discretionary review for alleged prosecutor error is warranted when it is predicated on an isolated statement in closing that Goheen-Rengo failed to object to and failed to request that any curative measures be taken that could have neutralized any of the prejudice he now asserts.

D. STATEMENT OF THE CASE

Goheen-Rengo was convicted following a jury trial of two counts of unlawful imprisonment for preventing two child protective services social workers, Angela Paull and Emilie Regan from leaving a supervised visit at a courthouse by stopping and trapping them along with his three young children, then under their protective care, in an elevator thereby preventing them from leaving the supervised visit. CP 49-57. Goheen-Rengo not only physically trapped the two social workers he was also agitated and yelling at them, while simultaneously and alternatively trying to get his three young children to smile at him. Both social workers testified they were terrified during this encounter and did not feel they had any reasonably safe means of escaping. Goheen-Rengo appealed, asserting the evidence presented below was insufficient to support the jury's determination that his actions and behavior substantially interfered with either Angela and Emilie's liberty as to constitute unlawful restraint, as required to support his convictions. Br. of App. at 2. Goheen-Rengo also alleged for the first time on appeal the prosecutor argued improperly during closing argument. Id.

In an unpublished opinion, the court of appeals affirmed Goheen-Rengo's convictions finding in part, that the evidence sufficient to support his unlawful imprisonment convictions and that alleged prosecutor error did not warrant a new trial. Goheen-Rengo now petitions this Court for further review of these two issues. The State respectfully responds further review of either the sufficiency of the evidence claim or prosecutorial error in closing is not warranted.

E. ARGUMENT

Goheen Rengo argues the court of appeals erred concluding there was sufficient evidence of restraint in the record to support his conviction for two counts of unlawful imprisonment and second asserts the court erred concluding an isolated statement made in closing did not warrant a new trial. Neither issue warrants further review by this Court.

When the facts are viewed in the light most favorable to the State, the record reflects both social workers were terrified, reasonably felt trapped and unable to safely leave with Goheen-Rengo's three young children when Goheen-Rengo followed them after his supervised visitation had ended, stopped the elevator doors from closing and then stood in the elevator door jam yelling, calling one of the social workers a bitch, while alternatively stating he would not leave until he could get his three small children to smile at him. These facts sufficiently reflect the

jury could conclude the social workers were unlawfully restrained and had no reasonable available means of safely escaping the elevator with three small children in tow. The evidence therefore sufficiently supports the jury's determination Goheen-Rengo unlawfully restrained and imprisoned both social workers in the elevator.

To support his argument for review, Goheen-Rengo asserts the court of appeals decision in this case should be reviewed because it conflicts with the opinion in State v. Kinchen, 92 Wn.App. 442, 442 n.16, 963 P.2d 928 (1998). In Kinchen, the defendant's children were locked alone in an apartment but had keys to the apartment and were able to enter and exit the apartment through a sliding door and window. In reviewing the sufficiency of the evidence, the Kinchen court held the defendant's children were not unlawfully restrained as contemplated by the unlawful imprisonment statute because they had a viable safe means of escaping the restraint. Goheen-Rengo argues based on this holding and his assessment of the evidence, that the social workers could have walked out of the elevator notwithstanding that Goheen-Rengo was blocking the door and yelling at them. Consequently, he asserts that as in Kinchen, the evidence is insufficient to support a finding of unlawful restraint.

Unlawful imprisonment requires evidence that the defendant knowingly restrained another person. RCW 9A.40.040. 'Restraint' means

to restrict a person's movement without consent and without legal authority in a manner which interferes substantially with her liberty. Restraint is 'without consent' if is accomplished by (a) physical force, intimidation, or deception. RCW 9A.40.040 (6). Substantial interference with a person's liberty requires, "a real or material interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict." State v. Robinson, 20 Wn.App. 882, 884, 582 P.2d 580 (1978).

Goheen-Rengo's argument requires this Court to examine the facts from his perspective, not in the light most favorable to the verdict. This isn't the applicable standard. State v. Joy, 121 Wn.2d 333, 338-9, 851 P.2d 654 (1993). Moreover, this court must defer to the jury on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. State v. Andy, 182 Wn.2d 294, 303, 340 P.3d 840 (2014). The jury was entitled to find the social workers testimony credible and to rely on their testimony to conclude Goheen-Rengo substantially interfered with their liberty and therefore unlawfully restrained them when they attempted to leave the supervised visitation area with Goheen-Rengo's three young children. Contrary to Goheen-Rengo's assessment of the facts, the evidence when viewed in the light most favorable to the verdict reflects both social workers were scared and reasonably felt trapped in the

elevator with Goheen-Rengo's three small children. Both testified they did not feel they could reasonably, safely exit the elevator because Goheen-Rengo was standing in the middle of the elevator doorway, yelling, calling one of them a bitch while also trying to simultaneously get his three children to smile back at him. Even when facts reflect a victim may have an exit available, the evidence may still support a jury's finding of restraint where a defendant deliberately uses threats and or intimidation to restrict a person's movements. State v. Landsdowne, 11 Wn.App. 882, 889, 46 P.3d 836 (2002).

Despite being terrified of Goheen-Rengo in these moments, the social workers tried to respond calmly and talk Goheen-Rengo down by reminding him they would try another visit soon and repeatedly asking him to let them leave. Nothing worked. The two social workers remained trapped until one of them realizing they needed to summon help, which required letting go of one of Goheen-Rengo's three children's hand so she could retrieve her phone to make a call. Only after one of the CPS social workers let go of one of the children and was able to retrieve her phone, did Goheen-Rengo finally step back from the elevator door and let the elevator doors close while telling them, "this isn't over."

These facts reflect in contrast to the facts presented in Kinchen, that it was Goheen-Rengo not the social workers, who held the keys to

their safe escape. Goheen-Rengo admitted he stopped the elevator to prevent them all from leaving. He also admitted he understood at that point, that the supervised visit with his children had been terminated. The social workers had already noticed that Rengo was agitated during the supervised visit. As the social workers and his children attempted to leave the area, Goheen-Rengo used his body and his intimidating behavior to restrict the social workers and consequently, his children's movement, thereby trapping them all in the elevator. This wasn't an imaginary conflict, this was a scary situation. Goheen-Rengo wasn't calm, he was upset and yelling and in contrast to the facts presented in Kinchen, neither social workers had a reasonable means of escape. While the presence of a means to escape *may* defeat a prosecution for unlawful imprisonment, it should not if, "the known means of escape...present[s] a danger or more than a mere inconvenience. Kinchen, 92 Wn. App. at 452 n.16. Further review of Goheen-Rengo's sufficiency of the evidence claim is not warranted.

Next, Goheen-Rengo argues the court of appeals erred concluding alleged prosecutorial misconduct during closing does not warrant a new trial. MDR at 10. Goheen-Rengo did not object to any statement or arguments during closing. Moreover, the reference to past acts Goheen-Rengo complains the prosecutor argued was, as the court of appeals noted,

made in the context of special rules that had been set up for governing Goheen-Rengo's supervised visits; limited evidence that trial court properly admitted. See, RP 37, Br. of Resp. at 27. In context to arguing the reasonableness of the social workers fear and arguing that trapping them in the elevator amounted to unlawful restraint, the prosecutor argued:

We heard testimony from two CPS employees, Angela Paull and Emilie Regan. They talked about their visitations and that they have to provide for this defendant so he can see his children. They talked about how these visitations are set up in the courthouse for safety reasons, and they talk about fear, fear of this defendant. You heard about there being special rules for this defendant that have been placed upon him by a court commissioner. There are rules that are designed just for him for safety, for safety of his children, and to make sure those visitations go well, and you heard about how he violated those rules, and you heard about how he's acted out in the past, and I would submit to you you've heard good reasons why Angela Paul and Emilie Regan feel fear for this defendant. We talked about—I mean, we were talking about this being a real or material interference.

Now I would submit to you this was a substantial interference. This was something that affected their liberty. It affected their physical liberty. The people that were on the elevator in the back of the elevator that had already been there, they didn't have this background. They didn't have the same knowledge of the defendant. They didn't—I would submit to you, they may not have had the same fear not having known the defendant, not knowing what was going on here. Now, those people they might have been subject to a petty annoyance, a slight inconvenience, but Angela and Emilie, this was a substantial interference with their liberty.

RP 240-241. This argument was not improper in light of the limited evidence properly admitted by the trial court to give context to the allegations made in this case. The court of appeals did not err.

Goheen-Rengo also argues the prosecutor improperly appealed to the jury's emotions by arguing at one point for the jury to put "yourself in these shoes a little bit." RP 251-52. Again, Goheen-Rengo did not object to this passing argument. The court of appeals appropriately concluded consequently, this isolated statement was not so flagrant and ill-intentioned as to be immune to a curative instruction.

A prosecutor has a duty to ensure a verdict is "free of prejudice and based on reason." State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012), *citing* State v. Clafin, 38 Wn. App. 847, 847, 690 P.2d 1186 (1984). In this context, a prosecutor cannot make arguments intended only to inflame the prejudice of the jury. In Pierce, for example, the prosecutor repeatedly made improper arguments including, using a first person narrative to argue what the defendant could have been thinking while committing his crimes or that the victims could not have imagined they would be murdered in their own homes. The reviewing court found this narrative was speculative and not based on inferences from the evidence presented and therefore, this argument was used inappropriately to inflame the prejudice of the jury.

In contrast to Pierce, the isolated statement Goheen-Rengo complains of was fleeting at best and could have easily been neutralized with a limiting instruction. In context, the record reflects the prosecutor statement was not ill-intended but instead trying to argue that a reasonable person in the social workers shoes would have felt their liberty was substantially interfered with by Goheen-Rengo's conduct. In other words, the prosecutor was not making an improper "golden rule" argument in order to improperly appeal to the passion or prejudice of the jury. In light of this context, the error was isolated and could easily have been cured had Goheen-Rengo objected below. The alleged error asserted in this case does not amount to the errors reflected in Pierce. Further review is therefore not warranted.

F. CONCLUSION

Respondent respectfully requests that this Court deny Goheen-Rengo's motion for discretionary review.

Respectfully submitted this 16 day of November, 2018.

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