Supreme Court No. 99453-6

In the
Supreme Court of the State of Washington

STATE OF WASHINGTON,
Respondent,
v.
TSAI-FEN LEE.
Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 78512-5-I
King County Superior Court No. 16-1-02293-2 SEA

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I. IDENTITY OF PETITIONER

Tsai-Fen Lee (Lee) is the Petitioner in this Petition for Discretionary Review. Lee was charged by Information with one count of Felony Stalking alleged to have occurred against one Cassandra L. Mitchell. CP 1-2. This was later revised in an Amended Information to one count of Unlawful Imprisonment. CP 13. Ms. Lee pled guilty to this charge. RP 5/8/18 at 23-24.

II. DECISION

Ms. Lee seeks this Court's review of the decision of the Court of Appeals, Division I, in Case No. 78512-5-I, dated November 16, 2020, affirming Ms. Lee's Guilt Plea. A true copy of the Court of Appeals' decision is appended hereto as *Attachment "A"*.

III. ISSUES PRESENTED FOR REVIEW

Lee seeks review of the Court of Appeals' decisions pursuant to RAP 13.4 based on the following issues:

1. WAS THE PETITIONER'S GUILTY PLEA INVALID BECAUSE IT LACKED A FACTUAL BASIS FOR THE CAUSATION ELEMENT OF UNLAWFUL IMPRISONMENT WHERE THERE WAS NOTHING IN THE RECORD BEFORE THE PLEA JUDGE TO SHOW THE DEFENDANT RESTRAINED THE VICTIM BY MEANS OF FORCE, THREAT OF FORCE, INTIMIDATION, OR DECEIT?

2. WAS THE PETITIONER'S GUILTY PLEA INVALID BECAUSE IT LACKED A FACTUAL BASIS FOR THE RESTRAINT ELEMENT OF UNLAWFUL IMPRISONMENT

BECAUSE THERE WAS NOTHING IN THE RECORD TO SHOW A SUBSTANTIAL RESTRICTION ON THE VICTIM'S FREEDOM OF MOVEMENT?

3. WAS THE PETITIONER'S GUILTY PLEA INVALID BECAUSE IT LACKED A FACTUAL BASIS FOR THE KNOWLEDGE ELEMENT OF UNLAWFUL IMPRISONMENT WHERE THERE WAS NOTHING IN THE RECORD BEFORE THE PLEA JUDGE TO SHOW DEFENDANT "KNOWINGLY" RESTRAINED THE ALLEGED VICTIM?

4. SINCE THERE WAS NO FACTUAL BASIS FOR THE CHARGE OF UNLAWFUL IMPRISONMENT, WAS THE PETITIONER'S GUILTY PLEA INVALID BECAUSE IT WAS NOT MADE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY?

IV. STATEMENT OF THE CASE

1. Introduction

Petitioner Tsai-Fen Lee (Lee) pled guilty to the felony offense of Unlawful Imprisonment. The record contains the sworn declarations of a deputy prosecuting attorney and a detective which recite the following chronology of events:

September 15, 2015	The King County Superior Court issues a Stalking Protection Order that prohibits Lee from contacting Cassandra L. Mitchell.	CP 6.
January 22, 2016	Officer M. Newsome serves Lee with a copy of the Stalking Protection Order.	CP 3, 7.
February 18, 2016	Mitchell claims that she saw Lee "looking at her" while "standing on the corner of the street near [Mitchell's] yoga studio."	CP 3.

March 27, 2016	Mitchell claimed that Lee sent her messages threatening to kill her if Mitchell did not refund money that Lee said she was entitled to.	CP 7.

The crime of Unlawful Imprisonment requires proof the accused *knowingly* caused a *substantial restriction on the movement* of another person *by means of a threat*. There is nothing in the record to show Mitchell's movement was *substantially restricted*. Even assuming the record contains something showing Mitchell's freedom of movement was substantially restricted, the record contains nothing to show Lee *knowingly* restricted Mitchell's liberty of movement by standing outside her place of employment.

Finally, the record contains nothing from which a court could find a factual basis for the element of *causation*. The record before the plea judge shows the death threats Mitchell claims Lee made came more than one month *after* Lee allegedly restrained Mitchell by looking at her while standing outside her studio. Any substantial restriction on Mitchell's movement occurring on February 18 cannot possibly have been caused by threats that were *not made until late March*.

2. Initial charge of Felony Stalking.

On April 8, 2016, the State charged Tsai-Fen Lee with one count of Felony Stalking alleged to have occurred against one Cassandra L.

Mitchell. CP 1-2. The State requested bail be set at $150,000. CP 3. The State's bail request was supported by the statement of Kimberly Wyatt, Deputy Prosecuting Attorney. CP 3-4. The Superform filed in Superior Court along with the motion and affidavit for an order setting bail, incorrectly identified Lee as a U.S. citizen. CP 8.

3. Deputy Prosecutor Wyatt's April 8, 2016 declaration and statement.

On April 8, 2016, the State filed DPA Wyatt's declaration under penalty of perjury. CP 3. In Wyatt's declaration she declared on February 18, 2016 Lee violated a Stalking Protection Order by standing outside Mitchell's place of work and staring at her:

> I further declare that according to the Stalking Protection Order records associated with this defendant (15-2-18274- 9), the defendant was served with notice of the final stalking protection order on January 22, 2016, by SPD Officer Matt Newsome. Additionally, according to SPD Incident report 16-58880, on February 18, 2016, the victim reported a stalking protection order violation when the defendant was standing on the corner of the street near the yoga studio. The victim reported that the defendant was looking at her. CP 3 (bold italics added).

In DPA Wyatt's April 5, 2016 statement in support of the State's bail request, Wyatt stated that "initially" the harassment did not involve any threats of harm, but that "recently" death threats had allegedly been made:

> Pursuant to CrR 2.2(b)(2)(ii), the State requests bail set in the amount of $150,000.00. The defendant was a former yoga student, and our victim was her instructor. They have never been in a

> dating relationship. The victim had made 11 SPD incident reports in the past 9 months. The victim obtained a Stalking Protection Order, and the defendant continues to violate the order. Initially the defendant's contact was harassing and annoying but did not involve direct threats (the defendant would send repeated texts and messages on social media, despite the victim blocking the defendant's contact information). In some of the messages, the defendant would profess her love for the victim. The defendant also attacked the victim's boyfriend, calling him a "murderer". After the stalking protection order was obtained and served, the defendant escalated in her contact. Recently the defendant threatened to kill the victim, **"I will have to kill you before I go to jail."** CP 3-4 (bold emphasis in original).

4. Detective McCammon's certificate of probable cause incorporated by reference.

Wyatt's declaration also stated in part:

> The State incorporates by reference the Certification for Determination of Probable Cause prepared by Detective Pamela K. McCammon of the Seattle Police Department for case number 2016-113300. CP 3.

In her certificate, Detective McCammon related the following events which occurred on January 22, 2016:

> On 1/22/16 at approximately 1724 hours Officer's [sic] responded to the Urban Yoga Spa (4th AV and Stewart Street) to a Violation of a Stalking Protection Order. S/ Tsai Lee was inside the Spa participating in a class. Mitchell stated that she has repeatedly advised Lee not to contact her or show up at her workplace. Spa employees stated that Lee has been told numerous times that she is not welcome at the Yoga studio/spa.

5. Amended information charging Unlawful Imprisonment filed and the plea judge's confusion regarding a factual basis for a guilty plea given the absence of anything to indicate any restriction of liberty.

On May 8, 2018, the State filed an amended information replacing the charge of Felony Stalking with one count of Unlawful Imprisonment. CP 13. The amended information charged:

> That the defendant Tsai Fen Lee in King County, Washington, between July 29, 2015 and March 27, 2016, did knowingly restrain Cassandra L. Mitchell, a human being, by knowingly restricting that person's movements in a manner that interfered substantially with his or her liberty, knowing that the restriction was without consent and knowing that the restriction was without legal authority. CP 13.

On that day, Tsai-fen Lee appeared with her attorney and entered a plea of guilty to that charge. CP 26.

In paragraph No. 11, Lee made the following statement:

> I, Tsai-fen Lee, did, without intent to threaten, harm, frighten, or injure Cassandra Mitchell, knowingly prevented Cassandra Mitchell from leaving her yoga studio on or around March 27, 2016, in King County, Washington. CP 27 (emphasis added).

At the plea hearing, the Honorable Catherine Moore expressed confusion and asked the prosecutor where in the record there was anything to indicate there was a factual basis for the element of restraint. Because the prosecutor[1] was not familiar with the case, Judge Moore asked the defense attorney for the facts of the case:

> THE COURT: All right. Thank you. May I see the certification? All right. Is this a bar [sic] plea or? I'm sorry. **I'm missing the, uh, restricting the movement**.

[1] In this case, the prosecutor and the defendant/petitioner both have the same last name – Lee – and the defense attorney's name is Ly.

> MR. S. LEE: Your Honor, I do apologize. **I'm not familiar with the specific facts of this case**.
> THE COURT: **Counsel, can you direct me to where this - this March 20 -- where these acts are alleged**?
> MR. D. LEE: Um, Your Honor, yeah, **there is an allegation, um, regarding how there was statements made. Which then caused the alleged victim to not enter into the yoga studio**.
> THE COURT: **Okay. There it is**. Thank you. Sorry. Took me a little time to see that. **All right. Having reviewed certification of probable cause there does appear to be a factual basis for the amended information**. State has demonstrated good cause for the filing, uh, of an amended information. . .. RP 5/8/18 at 5 (emphasis added).

However, there is no support in the record for the statement made by Lee's defense attorney. There is nothing in the record indicating Mitchell decided not to enter the studio, or, alternatively, she decided not to leave it. The record before the plea judge is completely silent on the subject of where Mitchell was when she allegedly saw Lee "standing on the corner of the street near the yoga studio." CP 3. This statement demonstrates Lee was outside the yoga studio on the street, but it doesn't indicate whether Mitchell was also outside on the street, or whether she was inside the studio. Regardless of whether she was inside or outside the studio, nowhere in the detective's certificate of probable cause is there any statement Lee prevented Mitchell from going either in or out. Thus, there is nothing to show any restriction on Mitchell's freedom of movement and nothing to indicate Mitchell even wanted to make any movement at all.

The prosecutor asked Lee, "[Do] [y]ou understand the elements of that crime and what the State would have to prove if we went to trial?" and she answered that she did." *Id*. at 8. No one, however, ever stated on the record what those elements were.

Nothing was said on the record explaining how a threat made on March 27, 2016 could have restrained the physical movement of the victim on February 18, 2016, the date on which Mitchell claimed Lee stood outside her yoga studio and stared at her.

The plea judge asked Lee if she understood she was giving up her right to go to trial and to force the State to prove the charge; Lee said she did and she was pleading guilty *because she had no other option*, not because she was freely admitting to the alleged crime.

> THE COURT: This Friday. Okay. Well, that's good. All right. Ms. Lee, um, this statement here that you've adopted as your own, so you're aware that if you were to go to trial, you would - - the State would have to prove this statement beyond a reasonable doubt, which is our highest burden of proof. Do you understand that?
> MS. LEE: Yes.
> THE COURT: Okay. And you're giving up that right today?
> MS. LEE: Yeah. I – yeah, **I have no option,** because my parents they are very old, and they want me to go home as soon as possible.
> THE COURT: I'm so sorry, I'm not able to hear you.
> INTERPRETER: **Yes. I don't have other choice because my parents both are very old, and they wanted me to go home as soon as possible.**
> THE COURT: Okay.

MS. LEE: And **this is the only way I can go home as soon as possible.**
THE COURT: Okay. Um, is the only reason you're pleading guilty today is so you can be released at an earlier - -
MS. LEE: Yeah.
THE COURT: – an earlier time?
MS. LEE: Because I have been in jail for – for almost four month. Okay. I want to go home.
THE COURT: Okay. I think you need to take some time to talk to your attorney.
MS. LEE: But I plead guilty. Yeah, I plead guilty.
THE COURT: Okay.
MR. D. LEE: Your Honor, it's -- you know, 1 understandably that she gets emotional, considering how 2 long she's been, um, in custody for. Um, her parents did 3 come to visit her on two separate occasions.
MS. LEE: They fly here -- I think their flight is 5 almost (inaudible) from Taiwan.
THE COURT: Okay. Well, so I just want you to know -- you're making that --
MS. LEE: Yeah. I know.
THE COURT: It is a choice, even though it isn't a choice. I mean, you could stay longer and have a right to trial.
MS. LEE: But my -- I don't know what -- because **my lawyer they don't want to bail me out, so I have to stay in jail.**
THE COURT: Right. But, I guess, what I'm trying to say is you -- you do have a choice in that you can choose to stay in jail longer and go to --
MS. LEE: I go --
THE COURT: -- trial.

RP 5/8/18 at 14-16. (emphases added).

Lee was in a hopeless and helpless situation. The law firm representing her did not help bail her out even though Lee's family wired them money for bail. They kept her in jail months longer than they should have. Their reasoning was that a correctional officer told them she had an ICE hold,

but this was untrue. This misconception is supported by the record where Lee's counsel erroneously contends that Lee had an ICE hold:

> THE COURT: Does she have some place to stay?
> TRIAL COUNSEL: Um, I don't believe she does, Your Honor. And, Your Honor, as an officer of the court, I do have to disclose that it's my understanding that, um, from the King County Jail employees that there is some sort of immigration hold, um, in her record. So, I do think I should let the Court know about that, as an officer of the court.
>
> 5/8/2018 at 25.

The aforementioned is why Lee said on the record that the only way she could get out was by pleading guilty. Despite having money for bail, her attorneys refused to bail her out of jail:

> MS. LEE: But my -- I don't know what -- because **my lawyer they don't want to bail me out, so I have to stay in jail.**
> THE COURT: Right. But, I guess, what I'm trying to say is you -- you do have a choice in that you can choose to stay in jail longer and go to --
> MS. LEE: I go --
> THE COURT: -- trial.
>
> 5/18/2018 at 16.

It does not appear the judge understood or tried to understand. The plea judge asked Lee, "Do you wish to plead -- do you wish to maintain your plea of guilty today? Your sentencing is going to be on Friday." *Id*. at 17. Lee replied, "Yeah. I just want to get – get out of jail and go home." *Id*.

> MS. LEE: But because I am in jail, I cannot fight for myself. I mean, I cannot find information by myself. I have to listen to what lawyer told me. And, yeah, this is my situation.
> THE COURT: Mm hmm.
> MS. LEE: Because I can – I want to fight for myself, but I can't, because I'm in jail. So, the only way I can fight for myself is if I get out of jail. But if I get out of jail, I have to plead guilty. And if I plead guilty, I have to go home. Yeah. So, it's very complex.
> THE COURT: Mm hmm. It is very complex.
> MS. LEE: Yeah.
> THE COURT: So, you have to tell me what your choice is.
> MS. LEE: I want to go home, because my parents, they are 70 years old, and I want to go home with them.
>
> RP 5/8/18 at 18-19.

After a short recess for Lee to speak with her attorney regarding US travel, the court resumed. Lee still wanted to plead guilty and she asked if the court could sentence her that same day, but the plea judge explained that the sentencing would have to wait for three days because the State had to notify the victim (Mitchell) of the date in case Mitchell wanted to attend the sentencing. *Id*. at 23. *Id*. The court then accepted the plea:

> THE COURT: So, I am going to find your plea of guilty to be knowingly, intelligently, and voluntarily made ***within the broad understanding of that word***. Um, that you understand the charges and consequences of your plea. And finding there is a factual basis for the plea. And that you are guilty as charged. And we're gonna set your sentencing date for Friday. RP 5/8/18 at 23-24. (emphasis added).[2]

[2] Even the plea court commented that "voluntary" was interpreted very broadly here.

Three days later, on May 11, 2018, Lee was sentenced. CP 39-46. She received a sentence of one month imprisonment in King County Jail. CP 42. Because she had already been in custody for almost four months, she had already served far more than one month; consequently, on the day of sentencing the sentencing judge entered an order directing she be released. CP 42, 47.

V. ARGUMENT

A. The Court of Appeals decision is in conflict with prior rulings by other Courts of Appeals, against the rulings of the Washington Supreme Court, and takes into account behaviors *after* the alleged incident.

The Court of Appeals in this case misapplied the law, and ignored, often in their entirety, cases on point and previously applied to similar cases, including *In re Restraint of Keene*, 95 Wn.2d 203, 622 P.2d 360 (1980), *State v. Dillon,* 12 Wn.App.2d 133, 456 P.3d 1199 (2020), *State v. Warfield*, 103 Wn.App. 152, 5 P.3d 1280 (2000), and *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014). Petitioner Lee therefore respectfully requests this Court Review the Court of Appeals decision pursuant to RAP 13.4(b)(1) and (2).

The Court of Appeals initially took issue with Ms. Lee's alleged posting of personal and inflammatory messages, such as accusing Mitchell's boyfriend of being a "murderer" and mocking the stillbirth of Mitchell's daughter. Opinion, page 1-2. The Appeals Court did not

suggest how these alleged statements contributed to the elements of the charge of Involuntary imprisonment. The Appeals Court also includes alleged behavior occurring *after* Ms. Lee's alleged actions on February 18, 2016 in its narrative. *Id*. at 2. The Appeals Court states "based on this conduct the State charged Lee with one count of felony stalking." *Id*. This charge was later amended to unlawful imprisonment. *Id*. By accepting this narrative, the Appeals Court clearly failed, as did the Trial Court, to understand it was using behavior *after* the alleged event to hold Ms. Lee guilty.

In finding for the State, the Appeals Court accepted the State's assertion Ms. Lee's statement she "knowingly prevented Cassandra Mitchell from leaving her yoga studio" provides sufficient evidence. *Id*. at 4. However, as explained below Ms. Lee was provided the words to say without ever being explained why such legal terms are important and whether they actually apply. It is the State's responsibility to provide evidence of the elements of the charged offense, not the Defendant's. In this case the State, and, apparently, the Defendant's own attorney, who provided Ms. Lee with the words to help her find herself guilty of the charged offense.

The Appeals Court further agrees with the State's assertion it need not rely on evidence of threats to prove intimidation, rather "a feeling of

inferiority or timidness could constitute intimidation." *Id*. at 5. However true this may or may not be, there is no evidence in the record the State proffered such an argument to the trial court in support of the charged offense. Lee correctly notes in her appeal the State improperly used post-event evidence to support their case, the State cannot later assert a different theory to the appeals court.

The Appeals Court further argues "[e]ven if Lee did not intend to intimidate Mitchell, a reasonable person would know that Lee's presence outside the yoga studio would intimidate Mitchell because she had obtained a protection order and she repeatedly asked Lee not to contact her. From this evidence, a rational jury could find beyond a reasonable doubt that Lee restrained Mitchell by intimidation." *Id*. Again, however true or not true this may be regarding the intimidation factor, restraint requires additional elements in which the Appeals Court did not take account. The additional elements would include substantially interfering with a person's liberty such as locking a person in a room and not letting them leave or grabbing on to a person without their consent and preventing them from leaving. These additional elements never came to fruition in Lee's case.

Finally, the Appeals Court argues Ms. Lee did understand the elements of unlawful imprisonment. *Id*. at 5. Where the Court arrived at

this conclusion is unknown, as there is no such discussion on the record. The Court seems to presume she must have discussed this with her attorney or gained the information through an interpreter because the interpreter read the information. This in no way suggests Ms. Lee actually had an understanding of the elements. The Appeals Court correctly states Washington State courts have held that a constitutionally adequate plea colloquy does not require the defendant admit each individual element of a crime, *id*., however the Court seems to ignore the defendant needs to be aware of the acts and the requisite state of mind in which they must be performed. *In re Restraint of Keene*, 95 Wn.2d 203, 206, 622 P.2d 360 (1980) citing *State v. Holsworth*, 93 Wn.2d 148, 153 n.3, 607 P.2d 845 (1980). The factual basis requirement protects a defendant "who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing his conduct does not actually fall within the charge." *Keene*, at 209.

This case presents a key opportunity to straighten the course of guilty plea jurisprudence and clarify what constitutes a "voluntary" plea and how broadly that word should extend in the plea context. This case has all the trappings of an involuntary plea – a non-native English speaker, a law firm that refused to bail her out despite receiving bail money from her family (because they negligently believed she had an immigration hold

after hearing it from a correctional officer, but not conducting their own research), and conduct in the sworn police report that does not actually fall within the elements of the charge.

The Appeals Court in this case is wrong on the facts and wrong on the law, and its decision should be reversed.

B. A guilty plea is not voluntary unless the defendant possesses an understanding of how the facts admitted relate to the required elements of the crime charged.

CrR 4.2(d) provides that when a court accepts a guilty plea it must first determine the plea has a factual basis. The rule provides:

> The court shall not accept a plea of guilty without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The purpose of CrR 4.2 "is to fulfill the constitutional requirement that a plea of guilty be made voluntarily." *Keene*, 95 Wn.2d 203, 622 P.2d 360 (1980), citing *McCarthy*, 394 U.S. 459 (1969).

"A guilty plea cannot be voluntary in the sense that it constitutes an intelligent admission unless the defendant is apprised of the nature of the charge, 'the first and most universally recognized requirement of due process.'" *Keene*, 95 Wn.2d at 207, quoting *Henderson v. Morgan*, 426 U.S. 637, 645 (1976). Apprising the defendant of the nature of the offense does not always require a description of every element of the offense. *Id.*

At a minimum, however, the defendant needs to be aware of the acts and the requisite state of mind in which they must be performed. *Id.* citing *State v. Holsworth*, 93 Wn.2d 148, 153 n.3, 607 P.2d 845 (1980).

The factual basis requirement protects a defendant "who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing his conduct does not actually fall within the charge." *Keene*, at 209 quoting *McCarthy*, at 467. For example, in *Keene* the defendant pled guilty to three counts of forgery. For one of those counts the defendant admitted he cashed a $100 check drawn by his employer. The employer signed the check but left the payee blank and gave it to Keene with permission to use it to pay business expenses. Keene admitted he completed the check by filling in his own name as the payee and instead of using the money for business purposes he had deposited it in his own account and used it for his own purposes. These admissions, however, did not support a conviction for forgery because they did not establish the check was either falsely made or falsely completed. *Id.* at 211. Thus, Keene's admitted conduct, his "unauthorized personal use of the $100 constituted third degree theft under RCW 9A.56.050, not forgery as defined in RCW 9A.60.020." *Id.* Although Keene thought he had committed forgery, he was mistaken because the facts he admitted did not constitute the crime charged; consequently, the

Court vacated this conviction for forgery. *Id.* at 312. Similarly, Lee's admission she committed unlawful imprisonment does not suffice to create a factual basis for a plea to that offense, and neither did any of the information contained in the documents put before the plea judge.

C. The factual basis does not have to be based on the defendant's admissions. It can also come from a source such as a certificate of probable cause, provided that source is before the court at the time the guilty plea is taken.

"The factual basis required by CrR 4.2(d) must be developed on the record [citation] at the time the plea is taken and may not be deferred until sentencing." *Keene*, at 210 (citations omitted). In this case, in addition to Lee's statement in paragraph 11 of the guilty plea form, the plea judge had a prosecutor's written statements made in the State's case summary and in its request for bail, and a detective's sworn statements made in a certificate of probable cause.

D. A conviction for unlawful imprisonment requires proof that by means of intimidation the defendant knowingly caused a substantial restriction on the victim's freedom of movement.

"A person is guilty of unlawful imprisonment if he knowingly restrains another person." RCW 9A.40.040(1); *State v. Scanlan*, 193 Wn.2d 753, 771, 445 P.3d 960 (2019).

As this Court has repeatedly held, "The word 'restrain' has four components: (1) restricting another's movement; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially

interferes with that person's liberty." *State v. Dillon*, 12 Wn. App.2d 133, 456 P.3d 1199, 1203 (2020). Accord *State v. Warfield*, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000).

The phrase "without that person's consent" is also statutorily defined. "Restraint is 'without consent' if it is accomplished by (a) physical force, intimidation, or deception." RCW 9A.40.010(6); *Scanlan*, 193 Wn.2d at 771. Thus, the crime of unlawful imprisonment requires proof of an element of causation. There must be evidence the restriction on movement was "accomplished by" one of three means: either by force, or by intimidation, or by deception.

Warfield held the word "knowingly" modified all parts of "restrain" including "without legal authority." *Dillon*, 456 P.3d at 1203, citing *Warfield*, 103 Wn.App. at 156. *State v. Johnson*, 180 Wn.2d 295, 304, 325 P.3d 135 (2014), limited the holding of *Warfield* by clarifying "the State does not have to prove a defendant knew he was acting without legal authority, unless facts exist to suggest the defendant had a good faith belief he had legal authority." *Dillon*, 456 P.3d at 1204, citing *Johnson*, 180 Wn.2d at 303-04.

Finally, there must be proof there was a "substantial" restriction on the victim's liberty of movement:

> The word "substantial" is used here as an adjective to mean a "real" or "material" interference with the liberty of another as

> contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict. The fact that the legislature chose to make the restraint a felony is indicative of the serious nature of the act it contemplated when it inserted the word "substantial" in the definition of restraint. It intended more serious conduct than stopping someone on the street in a mistaken belief as to the person's identity or facetiously pushing an elevator button so as to take another occupant beyond the floor which he or she intended to go. *State v. Robinson*, 20 Wn. App. 882, 884-85, 582 P.2d 580 (1978), aff'd 92 Wn.2d 357, 597 P.2d 892 (1979).[3]

If the alleged victim has a means of escape from the place where he or she is allegedly "imprisoned," that can "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). There is no factual basis for a finding there was a substantial interference with Mitchell's liberty of movement since there is nothing in the record to show Mitchell was prevented from either entering or exiting the yoga studio.

There is nothing in the record to show Lee restrained Mitchell because there is nothing to show Lee substantially restricted Mitchell's freedom of movement. No facts were alleged to show Lee blocked Mitchell's path, or blocked any entrance or exit. Nothing in the record indicates how many

[3] In *Robinson,* a majority found the evidence sufficient to prove that the restriction on movement was "substantial" and one judge dissented reasoning that unlawful imprisonment "requires something more than mere assault by gripping and pulling." Id. at 886. In the present case, the State did not allege any touching at all.

entrances or exits there are to the studio. Nor has it ever alleged Mitchell was afraid to walk by or around Lee. Thus, there is nothing to point to constituting a factual basis for the element of restraint. While a person who wishes to avoid seeing or passing by an annoying person may decide to refrain from taking a path going close to them, that does not suffice to show the annoying person imposed a restraint by substantially restricting their freedom of movement.

In *Kinchen*, the defendant was convicted of unlawful imprisonment. The State presented two theories of imprisonment: (1) he left the children alone and unsupervised in their apartment for several hours and (2) he locked the children in the bathroom. The jury verdict did not disclose which theory the jury relied upon. The State argued that to sustain the conviction it was not necessary to prove the children were locked in the bathroom. This Court disagreed and reversed the conviction holding that without such proof there was a failure to prove the element of restraint:

> In this case, the State argued that Kinchen should be found guilty based on locking his children in the bathroom *or* by his actions of keeping them in the apartment.
>
> The State claims that the facts mandate a conviction even if there was no evidence that Kinchen locked the boys in the bathroom for periods of time while he was at work. We disagree. The evidence of locking them in the bathroom for some hours without supervision is the only evidence sufficient to support the conviction. Contrary to the State's argument, while generally left in the apartment, the boys could and did get out. Additionally, they had access to and used the phone to call their aunt and 911 in the event of an emergency. Although they were

> not given access to the refrigerator or to the cabinets containing food, they were given food to eat while their father was not at home and they had access to the bathroom and to a water supply. There was evidence that the boys were provided with keys which they lost, they went in and out a window in any event, and the sliding glass door was unlocked some of the time. ***We believe there is insufficient evidence to support the State's argument that the boys were unlawfully restrained from leaving or imprisoned in the apartment*** on those occasions when they were left alone there.
>
> Because there was no special verdict form, we do not know which of the alleged acts provided the basis for the jury's verdict, the act of locking the boys in the bathroom or the act of leaving them alone in the apartment. Because there is insufficient evidence to support a conviction by this second means, the case must be reversed and remanded for retrial. *State v. Kinchen*, 92 Wn. App. 442, 451-52, 963 P.2d 928 (1998) (emphasis added).

Here, as in *Kinchen*, the conviction cannot be sustained because the plea judge was offered nothing to show Lee substantially restrained Mitchell's liberty of movement. Mitchell was neither locked in nor locked out of her studio. The implied fact she didn't want to have to walk by Lee fails to provide a factual basis for the element of restraint.

E. There is no factual basis for the element of causation. There was no claim Lee used any physical force or deception to accomplish the alleged restriction on Mitchell's movement.

In the present case, the amended information alleged Lee restricted Mitchell's movements "knowing that the restriction was without consent," but it did not specify whether the lack of consent was caused by physical force, intimidation, or deception. The prosecutor's case summary and request for bail did not contain any factual allegations suggesting any use

of physical force or deception. It did, however, somewhat indirectly suggest or imply the restriction of Mitchell's movements was caused by intimidation.

Mitchell's assertion Lee sent her death threats in late March does not and cannot provide a factual basis for the element of causation for something that happened the prior month. The death threats made in late March cannot have caused a restriction in Mitchell's physical movement in February because they came more than a month *after* the supposed restriction on movement. In this case, even assuming there was some kind of restraint on Mitchell's liberty of movement on February 18, it could not possibly have been "accomplished by" a threat made on March 27. Thus, there was no factual basis for the element of causation.

F. There is no factual basis for the element of knowledge. There is nothing to indicate Lee knew she was restraining Mitchell's physical movement.

Pointing to the Model Penal Code, "from which our code was derived," and taking note of the commentary to the MPC, in *Warfield* this Court has held that a conviction for this offense "requires proof that the accused acted 'knowingly.'" *Warfield*, 152 Wn.App. at 159, citing ALI, Model Penal Code § 212.2, cmt. at 242. "Thus, [the accused] must have been aware that he was restraining his victim, [and] that the restraint was unlawful." *Id*.

Once again, there is nothing in the record of the plea hearing providing a factual basis for concluding Lee knowingly restrained Mitchell's freedom of movement. The plea judge was offered nothing to show Lee knew she was restricting Mitchell's movement in any way, much less show Lee knew she was substantially restricting her liberty of movement. Thus, there was no factual basis for the element of knowledge.

G. The record does not show Lee made the guilty plea knowingly, intelligently, and voluntarily.

For a guilty plea to be voluntary, the defendant has to know the nature of the charge. *Keene*, 95 Wn.2d at 207, citing *Henderson*, 426 U.S. at 645. In this case, the defendant is not a native English speaker. She appeared in court with an interpreter. She replied "yes" when asked, "[Do] [y]ou understand the elements of that crime and what the State would have to prove if we went to trial?" RP 5/8/18, at 8. But no one ever said what those elements were. The term "restrain" is a highly technical term defined by statute. There was no inquiry into whether Lee understood the legal definition of "restrain." Moreover, the record does not show anyone ever told her "restraint" was one of the elements of unlawful imprisonment. And finally, nothing in the record indicates Lee understood the State had to prove she knew she was "restraining" Mitchell.

Like *Keene*, this is a classic case where the failure to elicit a factual basis on the record prevents a court from concluding the defendant's plea was entered knowingly, intelligently, and voluntarily.

VI. CONCLUSION

For the reasons stated above, Petitioner Lee asks this Court to find her guilty plea was invalid. Lee did not make her plea voluntarily because she did not understand her conduct did not actually fall within the charge. Ms. Lee's guilty plea must be vacated.

Respectfully submitted this 26th day of January, 2021.

THE APPELLATE LAW FIRM

Corey Evan Parker

Corey Evan Parker, WSBA No. 40006
Attorney for Petitioner, Tsai-Fen Lee

Attachment “A”

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TSAI FEN LEE, Appellant.	No. 78512-5-I DIVISION ONE UNPUBLISHED OPINION

LEACH, J. —Tsai Fen Lee appeals her conviction for unlawful imprisonment. She claims her guilty plea was involuntary because the record does not contain sufficient factual support for this plea. We disagree and affirm.

BACKGROUND

Viewed in the light most favorable to the State, the record establishes these facts. Cassandra Mitchell is a yoga instructor who works in Seattle. Lee attended yoga classes at Mitchell's studio "over the past few years." Lee began harassing Mitchell using social media. Mitchell attempted to "block" Lee's accounts, but Lee would quickly create duplicate profiles and resume the harassment. Mitchell relied on social media to promote her business. Mitchell decided she could not simply ignore or avoid Lee's cyber harassment.

Lee posted personal and inflammatory messages. She accused Mitchell's boyfriend of being a "murderer" and mocked the stillbirth of Mitchell's daughter. Lee also sent messages professing love for Mitchell even though they never had any kind of

intimate relationship. Lee later began posting defamatory accusations on the social media pages of yoga studios where Mitchell taught. Mitchell obtained a protection order against Lee but the harassment continued. Mitchell reported at least 10 protection order violations by Lee to the police.

On January 22, 2016, Lee came to Mitchell's yoga studio and attempted to participate in a class. Lee had been repeatedly told by Mitchell and other employees that she was not allowed on the studio premises. After Mitchell called 911 to report this violation, Lee's harassment escalated. She began sending Mitchell death threats telling her "I will have to kill you before I go to jail." Mitchell lived in constant fear that Lee would carry out her threats of physical harm. Mitchell had to stop teaching yoga classes due to Lee's behavior.

Based on this conduct, the State charged Lee with one count of felony stalking. Pursuant to an agreement with the State, Lee pleaded guilty to the amended charge of unlawful imprisonment. Lee provided the following factual statement to express "in [her] own words" why she was guilty of the amended charge.

> I, Tsai Fen Lee, did, without intent to threaten, harm, frighten, or injure Cassandra Mitchell, knowingly prevented Cassandra Mitchell from leaving her yoga studio on or around March 27, 2016, in King County, Washington.

The trial court accepted Lee's guilty plea and sentenced her. Lee did not ask the trial court to allow her to withdraw her guilty plea. Lee timely appealed.

ANALYSIS

Lee claims her guilty plea was not voluntary because the record before the judge who accepted her plea did not contain sufficient evidence to show a factual basis for the plea. Specifically, Lee contends the record contains no evidence that she substantially

restricted Mitchell's movement, no evidence that she acted knowingly in restricting Mitchell's movement, and no evidence that Lee's intimidation caused any restriction in Mitchell's movement. We disagree.

Before a court accepts a plea of guilt, it must be satisfied that the plea is supported by a sufficient factual basis. This rule protects the defendant by ensuring the admitted facts actually satisfy the elements of the crime and that the defendant understands what she is pleading guilty to.[1] Our Supreme Court has defined a sufficient factual basis as the minimum evidence necessary for a jury to find guilt; the reviewing court itself need not be convinced of guilt beyond a reasonable doubt.[2] Sufficient evidence supports a jury verdict when, viewing the evidence in the light most favorable to the State, a rational juror could have found the essential elements of the crime proved beyond a reasonable doubt.[3] A factual basis can be established by "any reliable source," so long as the material relied upon is made part of the record at the time of the plea.[4] This means the court can rely on both the defendant's admissions and information supplied by the prosecution.[5]

A person commits the crime of unlawful imprisonment if they "knowingly restrain[] another person."[6] To "restrain" someone means to "restrict a person's movements without consent and without legal authority in a manner which interferes substantially

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[1] CrR 4.2(d); State v. Arnold, 81 Wn. App. 379, 383, 914 P.2d 762 (1996).
[2] State v. Newton, 87 Wn.2d 363, 370, 552 P.2d 682 (1976); State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991).
[3] State v. Luther, 157 Wn.2d 63, 77-78, 134 P.3d 205 (2006).
[4] State v. Osborne, 102 Wn.2d 87, 95, 684 P.2d 683 (1984).
[5] State v. Powell, 29 Wn. App. 163, 167, 627 P.2d 1337 (1981).
[6] RCW 9A.40.040(1).

with his or her liberty."[7] Restraint occurs "without consent" if a person accomplishes it by either force, intimidation, or deception.[8]

Lee first claims the record includes no evidence she substantially restrained Mitchell. The State answers that Lee's own statement that she "knowingly prevented Cassandra Mitchell from leaving her yoga studio" provides sufficient evidence. Lee responds that this statement is insufficient because it does not show Mitchell could not have taken a different route or door to leave her studio. Evidence of a reasonable means of escape may be a defense to a charge of false imprisonment. But, this is a defense and not an element of unlawful imprisonment.[9] So, the State does not have to present evidence about the absence of a reasonable means of escape to provide sufficient evidence of restraint.[10] Lee's statement provides sufficient evidence of restraint.

Lee next claims that no evidence shows she acted knowingly. We disagree. In her statement quoted above, she says she acted knowingly.

Finally, Lee claims that evidence shows her intimidation of Mitchell caused the restraint. Lee correctly notes the State must show Lee accomplished Mitchell's restraint by either force, intimidation, or deception. The State makes no claim that Lee used force or deception. It contends that Lee's months of cyberstalking provide sufficient evidence of intimidation. Lee responds that her threats occurred after the unlawful

[7] RCW 9A.40.010(6).
[8] RCW 9A.40.010(6).
[9] State v. Dillon, 12 Wn. App. 2d 133, 145, 456 P.3d 1199, 1205-06 review denied, 195 Wn. 2d 1022, 464 P.3d 198 (2020).
[10] State v. Dillon, 12 Wn. App. 2d at 145.

imprisonment occurred and could not have caused an earlier event. But, as the State correctly notes, it need not rely on evidence of threats to prove intimidation, rather "a feeling of inferiority or timidness could constitute intimidation."[11]

Lee's cyberstalking and other behavior before the charged event caused Mitchell enough apprehension to motivate her to obtain a protection order. Even if Lee did not intend to intimidate Mitchell, a reasonable person would know that Lee's presence outside the yoga studio would intimidate Mitchell because she had obtained a protection order and she repeatedly asked Lee not to contact her. From this evidence, a rational jury could find beyond a reasonable doubt that Lee restrained Mitchell by intimidation.

Lee also suggests her plea was not voluntary because she did not understand the elements of unlawful imprisonment. The record does not support this claim. Her statement on plea of guilty states the elements of unlawful imprisonment are set forth in the amended information, which she has discussed with her lawyer. During a colloquy with the court about Lee's plea, she agreed an interpreter had read every word of the information to her. She also agreed she had an opportunity to have the interpreter and her lawyer answer any questions she had. Lee suggests the court was required to include in its colloquy a discussion of the elements of unlawful imprisonment to ensure she understood each element. Lee has not cited to any authority for this proposition. Washington State courts have held that a constitutionally adequate plea colloquy does not require the defendant admit each individual element of a crime.[12] "Apprising the

[11] State v. Avila, 102 Wn. App. 882, 889, 10 P.3d 486 (2000).
[12] Matter of Ness, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993).

defendant of the nature of the offense need not 'always require a description of every element of the offense.'"[13]

CONCLUSION

We affirm. The record shows Lee's plea was voluntary.

Leach, J.

WE CONCUR:

Chun, J.

Cuppelwick, J.

[13] State v. Keene, 95 Wn.2d 203, 207, 622 P.2d 622 (quoting Henderson v. Morgan, 426 U.S. 637, 645, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976)).

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

STATE OF WASHINGTON, Respondent, v. TSAI-FEN LEE, Appellant.	)	No. 78512-5-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Tsai-Fen Lee, having filed a motion for reconsideration herein, and a majority of the panel having determined the motion should be denied; now, therefore, it is hereby

ORDERED the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Leach, J.

CERTIFICATE OF SERVICE

I, Dave Evanson, certify under penalty of perjury under the laws of the United States and of the State of Washington that on January 26th, 2021, I caused to be served the document to which this is attached to the parties listed below in the manner shown next to their names:

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THE APPELLATE LAW FIRM

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