

NO. 71197-1-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY D. LUSSIER,

Appellant.

---

BRIEF OF RESPONDENT

---

MARK K. ROE  
Prosecuting Attorney

SETH A. FINE  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

2011 SEP 23 AM 11:20  
COURT OF APPEALS, DIV. I  
STATE OF WASHINGTON

**TABLE OF CONTENTS**

I. ISSUES ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT .....4

    A. UNDER CASES FROM THIS DIVISION, A DEFENDANT CAN  
    BE CONVICTED OF UNLAWFUL IMPRISONMENT FOR  
    CONDUCT THAT IS “INCIDENTAL” TO COMMISSION OF  
    ANOTHER CRIME. ....4

    B. THE SUPREME COURT HAS REPEATEDLY APPROVED A  
    DEFINITION OF “REASONABLE DOUBT” THAT INCLUDES  
    REFERENCE TO AN “ABIDING BELIEF.” ..... 8

IV. CONCLUSION ..... 10

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

State v. Berg, 177 Wn. App. 119, 310 P.3d 866 (2013), review granted, 179 Wn.2d 1028 (2014)..... 4, 5, 6

State v. Butler, 165 Wn. App. 820, 269 P.3d 315 (2012).....5

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012).....9

State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2006) .....5, 6

State v. Larkin, 70 Wn. App. 349, 853 P.2d 451 (1993) .....6

State v. Phuong, 174 Wn. App. 494, 299 P.3d 37 (2013).....5

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995) .....9

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).....6

State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959) .....8

**FEDERAL CASES**

Victor v. Nebraska, 511 U.S. 14, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).....9

## **I. ISSUES**

(1) The defendant entered a store to rob it. Two customers entered during the robbery. Ultimately, the defendant's accomplice sprayed the store owner with so much pepper spray that it permeated the store. The defendant then locked the store owner and the customers inside the store. Could the jury find the defendant guilty of unlawfully imprisoning the two customers?

(2) In its instruction defining reasonable doubt, the court used standard language referring to "an abiding belief in the truth of the charge." Was this instruction proper?

## **II. STATEMENT OF THE CASE**

Shortly before 10 p.m. on May 29, 2013, Devin Lynch and the defendant, Timothy Lussier, entered Tobacco Hut, a convenience store in Everett. Nadeem Pasha, the store owner, was getting ready to close. The defendant and Mr. Lynch identified themselves as police officers. They showed Mr. Pasha a document that purported to be a search warrant. They told him to lock the door so they could conduct a search. They quickly located some glass pipes, which they claimed were illegal. They handcuffed Mr. Pasha, read him his Miranda, rights, and placed him in a back

room. They then started searching the store for things to steal. 10/14 RP 30-38; 10/15 RP 254-57.

At around 10:45 p.m., Julia McCracken and Curtis Letzkus arrived at the store. They had made an appointment with Mr. Pasha to complete the sale of a DSHS food card. After Mr. Letzkus knocked for some time, the defendant opened the door. He asked Mr. Letzkus what he needed. Mr. Letzkus said that he had business with Mr. Pasha about a food card. The defendant told Mr. Letzkus and Ms. McCracken to come inside. He then identified himself as a federal agent and told them they were under arrest. He told them to sit on the floor. They complied. 10/15 RP 136-40, 186-88.

The defendant and Mr. Lynch continued taking things from the store. Mr. Pasha eventually realized that they were not police. He became increasingly agitated and started yelling that he wanted to call his wife. The defendant told Mr. Lynch to stop him. Mr. Lynch took out a can of pepper spray and sprayed it in Mr. Pasha's face. As they were leaving, Mr. Pasha tried to shove Mr. Lynch, and Mr. Lynch sprayed him again. 10/14 RP 45-48; 10/15 RP 146-47, 193, 243-45.

The defendant and Mr. Lynch left the store. The defendant locked the door from the outside and took the key with him. 10/14

RP 48-49; 10/15 RP 147, 196, 246. The defendant and Mr. Lynch took with them boxes of cigarettes, Mr. Pasha's wallet and cell phone, money from the cash register, and Mr. Letzkus's cell phone. They left in Mr. Pasha's car. 10/14 RP 39-40, 51-52; 10/15 RP 139, 145, 245-46.

The air inside the store was permeated with pepper spray.

Mr. Letzkus described the effects as follows

We couldn't breathe. We were completely overtaken by it. We had snot completely all the way to the floor, coming out of your nose. Your eyes felt like they were bleeding, and there was nothing you could do. You couldn't put anything over your face to stop it. We were just completely overtaken. And we were locked in.

10/15 RP 147. Ms. McCracken testified that "it was getting hard to breathe. My eyes were burning, my chest, my throat, my nose."

10/15 RP 195.

Mr. Pasha had a spare key in the back room. He could not, however, reach it because of the handcuffs. He pointed to the location with his head. Mr. Letzkus found the key and opened the door, allowing the three of them to escape. 10/14 RP 48-50; 10/15 RP 148.

Police arrived shortly thereafter. When they tried to enter the store, they were unable to remain inside for more than 30 seconds.

seconds. The fire department brought fans to air out the store. After the fans had operated for 20 minutes, an officer was able to remain inside to take photographs. 10/14 RP 92-93; 10/15 RP 112. A day later, the odor still burned a detective's throat as soon as he entered. 10/15 RP 282.

The defendant was charged with one count of first degree robbery and two counts of unlawful imprisonment. The information named Mr. Pasha as the victim of the robbery. The victims of the unlawful imprisonments were Ms. McCracken and Mr. Letzkus. CP 101. A jury found the defendant guilty as charged. CP 60-62.

### **III. ARGUMENT**

#### **A. UNDER CASES FROM THIS DIVISION, A DEFENDANT CAN BE CONVICTED OF UNLAWFUL IMPRISONMENT FOR CONDUCT THAT IS "INCIDENTAL" TO COMMISSION OF ANOTHER CRIME.**

The defendant claims that there was insufficient evidence of unlawful imprisonment. He relies on a series of cases from Division Two dealing with kidnapping. These cases hold that "when the State presents only evidence of conduct that was merely incidental to the commission of another crime, no rational trier of fact could find that the evidence proves beyond a reasonable doubt that the conduct was a restraint." State v. Berg, 177 Wn. App. 119, 132 ¶¶ 32, 310 P.3d 866 (2013), review granted, 179 Wn.2d 1028 (2014)

(argued 5/27/14); see State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2006). Both this Division and Division Three have rejected this “incidental restraint” doctrine. State v. Phuong, 174 Wn. App. 494, 299 P.3d 37 (2013) (Division One); State v. Butler, 165 Wn. App. 820, 828-33 ¶¶ 16-26, 269 P.3d 315 (2012) (Division Three). Phuong upheld a conviction for unlawful imprisonment based on conduct that was allegedly incidental to an attempted rape. Phuong, 174 Wn. App. at 542 ¶ 73. Under Phuong, the convictions in the present case were proper.

Furthermore, even under Division Two’s analysis, a jury could find that the restraint in this case was not incidental. This is true for two reasons. First, Berg and Korum both involve situations in which the robbery victims were also the people restrained. Here, the unlawful imprisonments involved two people who happened to come by while the robbery was in progress. The information identified Mr. Pasha as the victim of the robbery, while Ms. McCracken and Mr. Letzkus were the victims of the unlawful imprisonments. CP 101.

Under a Double Jeopardy analysis, this court has recognized that crimes against multiple victims have an independent purpose

or effect. State v. Larkin, 70 Wn. App. 349, 358, 853 P.2d 451 (1993). The same analysis should apply under the “incidental restraint” doctrine. A person who commits a robbery is not free to restrain any number of people that he chooses, without fear of additional punishment.

The defendant points out that under the jury instructions, the jury could have treated Ms. McCracken and Mr. Letzkus as victims of the robbery. CP 75, inst. no. 10. The issue raised on appeal, however, involves sufficiency of the evidence. In determining this issue, all reasonable inferences from the evidence must be drawn in favor of the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The jury could have decided that the defendant detained Ms. McCracken and Ms. Letzkus to facilitate a robbery of Mr. Pasha. Viewed in this light, the restraint of two people cannot properly be considered “incidental” to the robbery of a third person.

Even if the restraint of one person can be considered incidental to the robbery of another person, the “incidental restraint” doctrine still would not apply. Under Division Two’s analysis, restraint is considered incidental only if it “did not create a significant independent danger.” Berg, 177 Wn. App. at 137 ¶ 48; Korum, 120 Wn. App. at 707. Here, such a danger did exist. After

the robbery was completed, the victims were left locked inside a store that was permeated with pepper spray. Mr. Letzkus testified that he had “snot completely all the way to the floor” and his “eyes felt like they were bleeding.” 10/15 RP 147. Mc. McCracken testified that she was drooling, she couldn’t breathe, and her eyes were watering so badly that she couldn’t see. 10/15 RP 196-97.

The defendant locked the victims inside this noxious environment and took the key with him. 10/14 RP 48; 10/15 RP 147, 196. Although the victims were able to escape by means of a spare key, nothing in the record indicates that the defendant knew this key existed. The defendant’s guilt should not depend on the happenstance of how long it took the victims to escape. Confining a person in an environment that is physically painful creates an independent danger to that person.

The defendant points out that first degree robbery, as charged in this case, requires the infliction of bodily harm. He therefore argues that restraining the victims in a painful environment is still incidental to the robbery. The “bodily harm” element of robbery, however, requires only harm to one person – not three. Moreover, the crime of robbery contains no element involving the infliction of continuing harm to the victim by restraining

him in a noxious environment. Such restraint involves an independent effect on the victims, beyond what is inherent in the robbery. The evidence is therefore sufficient to allow a jury to conclude that the unlawful imprisonment of Ms. Letzkus and Ms. McCracken was not incidental to the robbery.

**B. THE SUPREME COURT HAS REPEATEDLY APPROVED A DEFINITION OF “REASONABLE DOUBT” THAT INCLUDES REFERENCE TO AN “ABIDING BELIEF.”**

The defendant also challenges part of the trial court’s definition of “reasonable doubt”:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 69, inst. no. 4. The defendant claims that this instruction “diluted the State’s burden of proof.” Brief of Appellant at 12.

The “abiding belief” language comes from an instruction that was approved by the Supreme Court in State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959). The court said that this was a standard instruction which had been accepted as a correct statement of the law for many years. Id. at 178-79.

Similar language was again reviewed in State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995). The court held that the inclusion of this language “does not diminish the definition of reasonable doubt.” Although the sentence referring to “abiding belief” is unnecessary, including it in an instruction is not error. Id. at 658. As the court pointed out, the U.S. Supreme Court has likewise upheld an instruction that refers to “an abiding conviction as to guilt.” Id., citing Victor v. Nebraska, 511 U.S. 14-15, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). The defendant does not cite a single case from any jurisdiction that disapproves of this kind of language in a jury instruction.

The defendant does point out that courts have disapproved closing arguments that refer to a trial as “a search for the truth.” This is because a jury’s job is not to determine the truth of what happened, but to determine whether the State has proved the crime beyond a reasonable doubt. State v. Emery, 174 Wn.2d 741, 760 ¶¶ 36, 278 P.3d 653 (2012). This does not mean, however, that truth must be separated from the concept of reasonable doubt. A charge that has been proved beyond a reasonable doubt is true. One that has not been so proved may or may not be true. In the latter situation, it is not the jury’s job to determine what the truth is. Truth

has not been banished from criminal trials. The instruction given in this case is proper.

**IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on September 22, 2014.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
SETH A. FINE, WSBA # 10937  
Deputy Prosecuting Attorney  
Attorney for Respondent