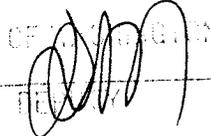


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 37579-6-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD MARTIN BARNES,

Appellant.

BRIEF OF APPELLANT

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F.M. 10-6-2008

ORIGINAL

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	1
C. STATEMENT OF THE CASE	
1. Factual History	2
2. Procedural History	5
D. ARGUMENT	
THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT ON THE OFFENSE OF UNLAWFUL IMPRISONMENT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CHARGE	7
E. CONCLUSION	17
F. APPENDIX	
1. Washington Constitution, Article 1, § 3	18
2. United States Constitution, Fourteenth Amendment	18
3. RCW 9A.40.010	18
4. RCW 9A.40.040	19

TABLE OF AUTHORITIES

Page

Federal Cases

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 7

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 8

State Cases

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996) 12-14

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 7

State v. Johnson, 12 Wn.App. 40, 527 P.2d 1324 (1974) 8

State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982) 8, 9

State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972) 7

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) 8

Constitutional Provisions

Washington Constitution, Article 1, § 3 7

United States Constitution, Fourteenth Amendment 7

Statutes and Court Rules

RCW 9A.40.010 9, 10

RCW 9A.40.040 9, 10

ASSIGNMENT OF ERROR

Assignment of Error

The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment against him on the jury's verdict that he was guilty of unlawful imprisonment because substantial evidence does not support this conviction.

Issues Pertaining to Assignment of Error

Does a trial court violated a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it enters judgment of conviction against a defendant that is unsupported by substantial evidence.

STATEMENT OF THE CASE

Factual History

Crystal Martin and her husband Shannon live at 2443 Hickory Avenue in Longview, Washington. RP 82-83, 171.¹ At about 11:00 on the evening of August 19, 2007, Crystal went out onto the front porch to smoke a cigarette before going to bed. RP 82-83. While she was standing on the porch, she heard a woman screaming from a house next to the house directly across the street from her. RP 82-83. She did not know who lived at that location and she noted that the house was dark. RP 84. Upon hearing the screaming, she went in and got her husband to see if he could verify that she had identified the correct house. RP 85-86. After he came out on the porch, they both heard a woman say either “Let go of me,” or “Let me go,” stated once or twice. RP 85-86, 174. Shannon Martin then walked out in the street to verify the house from which the shouting was coming, and he then called the police. RP 85-86, 173, 175. After he did, the shouting and screaming stopped. RP 85-86.

About 10 minutes later three police officers arrived, spoke with the Martins, and then went over to the house the Martins had identified as the source of the noise. RP 133-134. The address was 2240 Hickory Avenue.

¹The record in this case includes two volumes of continuously numbered verbatim reports, referred to herein as “RP.”

RP 93, 133-134, 159. Once at the house, the officer knocked loudly on the front door, announced who they were, and demanded entry. RP 133-134, 160. No one answered the door. RP 134-135. After waiting a few minutes, the officer walked around the house heading toward the back. RP 135-137. As they got to the side of the house, they found an open window with the blinds pulled. RP 95-96, 162. As they walked by, they heard a male voice say “shut up.” RP 96, 158-161.

Upon hearing the voice, one officer took the screen off the window and pushed the blinds out of the way. RP 162-163. The officers were then able to see into the room and see that a television was on and providing some illumination. RP 138-139. They then saw a woman they later identified as the defendant’s wife standing in the door way to a bathroom. RP 97-99, 139-144, 162-163. She appeared scared, but responded that she was not hurt when asked. RP 139-144, 163, 164. The officer then told her to go to the front door and let them enter the house. RP 99-100, 145-146, 163, 164. She complied, but first pointed down toward the floor. One of the officer believed that she then said or motioned as if to say “there he is.” RP 163-164. As Ms Barnes went to open the door, two of the officers returned to the front of the house. RP 99-100, 164-165. Ms Barnes then let them in. RP 99-100, 164-165. As they did this, the officer still at the window saw the defendant moving from the bathroom area to a bedroom and he informed the

other officers of this fact. RP 139-144.

After the two officers entered the house, they went to a bedroom where they found the defendant lying face down on the floor between a bed and the wall with one arm under his body. RP 108, 165. They announced that they were the police, which they had also done at the window, and ordered the defendant to show them his hands. RP 108, 166-167. When the defendant did not move, one of the officers kicked him in the foot, but again got no reaction. RP 108-111. The other officer then took out her flashlight and hit the defendant three times on the thigh. RP 108-111, 166-167. She also pulled out her taser and threatened to shoot the defendant if he did not comply with their orders. RP 108-111. With this still getting no response, the first officer put his knee down on the defendant's back, pulled his arms out from under him, and handcuffed him. RP 108-111. According to the officers, during this time the defendant was feigning sleep. RP 111-112. He also had the strong odor of intoxicants about his person and appeared to be drunk, although not so inebriated that he could not walk. RP 149, 168.

After getting cuffs on the defendant, the officers took him out to the third officer who had returned from outside the window to the front of the house. RP 147-148. This officer put the defendant in the patrol car, read him his Miranda rights, and asked him what had been happening at the house. RP 150. The defendant responded that he had been watching television, that he

had not tried to hide from anyone, and that nothing had happened. RP 151-152. While the defendant was in the patrol vehicle, one of the other officers looked in the house and found that the telephone had been unplugged from the wall and that the telephone junction box had been disconnected in the garage. RP 112-119.

Procedural History

By information filed August 22, 2007, the Cowlitz County Prosecutor charged the defendant Richard Martin Barnes with one count of unlawful imprisonment, one count of felony harassment, and one count of interfering with the reporting of a domestic violence offense. RP 1-2. The case was later called for trial before a jury. RP ii. However, just prior to trial Ms Barnes appeared before the court through her own counsel, who stated that under his advise she would refuse to testify because any statement she gave would had a tendency to incriminate her. RP 1-4. Neither the defendant's counsel nor the prosecutor claimed that this assessment was incorrect. *Id.* Consequently, the court excused her from responding to the subpoena with which the state had served her. *Id.* Given this development, the court dismissed the charge of felony harassment in Count II upon the state's motion. RP 6, 11.

The case then proceeded to trial before a jury with the state calling the Martins and the three responding officers as its only witnesses. RP 82, 91, 131, 158, 171. These witnesses testified to the facts set out in the proceeding *Factual History*. After the state rested its case. RP 177. The defense then rested without calling any witnesses. RP 199. The court then instructed the jury without objection or exception by the defense. RP 199-210. Following argument, the jury retired for deliberation, eventually returning verdicts of

“guilty” to the charge of unlawful imprisonment and “not guilty” to the charge of interfering with the reporting of a domestic violence offense. RP 210-241; CP 43-45. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 50-61, 62.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT ON THE OFFENSE OF UNLAWFUL IMPRISONMENT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CHARGE

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that the defendant’s fingerprints were also found on a piece of paper located by

a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

In the case at bar, the state charged the defendant with unlawful imprisonment under RCW 9A.40.040. This statute states:

(1) A person is guilty of unlawful imprisonment if he knowingly restrains another person.

(2) Unlawful imprisonment is a class C felony.

RCW 9A.40.040.

Subsection (1) of RCW 9A.40.010 defines the term "restrains" as it is used in RCW 9A.40.040, and states as follows:

(1) “Restrain” means to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is “without consent” if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.

RCW 9A.40.010(1).

By substituting the definition for “restrain” from RCW 9A.49.010 into the place of the word “restrain” from RCW 9A.40.040, the latter statute reads as follows:

(1) A person is guilty of unlawful imprisonment if he knowingly restrict[s] a person’s movements without consent and without legal authority in a manner which interferes substantially with [the] liberty [of] another person.

RCW 9A.40.040 (modified).

The statute can then be further modified by substituting the definition for the words “without consent” from RCW 9A.40.040 with the definition for the words “without consent” found in RCW 9A.40.010(1)(a). This modification would read as follows:

(1) A person is guilty of unlawful imprisonment if he knowingly restrict[s] a person’s movements by physical force, intimidation, or deception and without legal authority in a manner which interferes substantially with [the] liberty [of] another person.

RCW 9A.40.040 (modified).

The insertion of these two definitions into RCW 9A.40.040 clarifies

that in order to sustain a conviction for unlawful imprisonment, the state has the burden of proving the following elements of the crime beyond a reasonable doubt:

- (1) that the defendant knowingly restricted another person's movements,
- (2) that the defendant accomplished this action by physical force, intimidation, or deception,
- (3) that the defendant acted without legal authority, and
- (4) that the defendant substantially interfered with the liberty of the other person.

In the case at bar, the evidence presented at trial does not rise to the level of substantial evidence on any of these elements, let alone on all of them. In analyzing this claim, the court should first look to the dearth of evidence relating to the elements of the crime. Defendant suggests that at best, the evidence can be summarized as follows:

- (1) Some 15 to 20 minutes before the police arrived, two people who did not know the defendant or his wife heard a female screaming from the general direction of the defendant's house,
- (2) At some point, the female voice said either "let me go" or "let go of me" once or twice,
- (3) The house was dark and the two witnesses did not see anyone leave out of the front of the house,
- (4) Neither the defendant nor his wife answered the door when the police knocked, and when the police walked around the side of the house they heard the defendant say "shut up,"

(5) When the police saw the defendant's wife through the window, she appeared scared and upset and pointed toward the area where the defendant was lying on the floor, although she was uninjured, and

(6) When the police took the uncooperative defendant into custody he was intoxicated and feigning sleep and he denied that anything had happened.

The problem with this evidence is that it fails to even prove that it was the defendant's wife who said either "let me go" or "let go of me" or that this comment was directed to the defendant. In addition, without further context, the statements themselves are incurably ambiguous. Was the person making the statements speaking metaphorically as in "let me have a divorce?" Or perhaps the person was upset because someone would not consent to her going to some type of event in the future. Certainly, one could speculate that this statement was made in response to physical restraint, but that is all it would be: speculation. As a review of the case in *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996), reveals, evidence that is just as consistent with non-criminal means as criminal means does not constitute substantial evidence. The following examines this case.

In *Aten, supra*, the defendant was convicted of the second degree manslaughter of a four-month-old child who had died while in her care. Although the original medical examination indicated that the child died of SIDS, the defendant later confessed on a number of occasions that she had

placed her hands on the mouth and nose of the child to keep her from crying, thereby causing the child's death.

At trial, the state offered the testimony of the medical examiner, who opined that the child's death could have been caused by SIDS, and could have been caused by manual suffocation as described by the mother. Either was equally as likely. The trial court then admitted the defendant's confession, holding that the state had adduced the "some evidence" necessary to prove a corpus and allow the admission of the defendant's statements. The jury convicted.

Defendant appealed her conviction, arguing that the court had erred in admitting her confessions, because the state failed to prove the *corpus delicti* of the crime. After a careful and detailed review of the *corpus delicti* rule and the evidence presented in the case, the Court of Appeals agreed with the defendant's argument and reversed, finding that the confession was improperly admitted, and that absent the confession, substantial evidence did not support the conviction. The court stated the following on this latter issue.

Evidence may lead to a reasonable inference of criminality, or it may lead to a reasonable inference of innocence. But evidence that simply fails to rule out criminality or innocence does not reasonably or logically support an inference of either. It would be speculative to conclude from the autopsy report that Aten was criminally negligent.

State v. Aten, 79 Wn.App. at 91.

Following this decision, the state sought and obtained further review.

However, the Washington Supreme Court agreed with the Court of Appeals, and affirmed the Court of Appeals' decision to vacate the conviction and dismiss the charges. The Supreme Court stated the following concerning the absence of substantial evidence.

Respondent argues the State did not present sufficient evidence at trial to sustain a conviction or to be presented to a trier of fact. In reviewing the sufficiency of evidence in a criminal case, the question is whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.”

Admitted at trial were Respondent's statements that she suffocated the infant. She had also indicated she was only trying to calm Sandra, but did not intend to kill her. Dr. Schiefelbein testified the autopsy revealed the infant died of SIDS. But he also hesitatingly stated he might possibly make a reasonable and logical inference the infant died from suffocation when considering the infant's history. Viewing that evidence in the light most favorable to the State, it still can not be concluded there was sufficient evidence at trial for a rational trier of fact to find beyond a reasonable doubt that Respondent caused the child's death through criminal negligence. The corpus delicti issue permeates any conclusion on sufficiency of the evidence. That is the critical issue in this case.

State v. Aten, 130 Wn.2d at 666-67 (footnotes omitted).

As both the Court of Appeals and the Supreme Court explain in *Aten*, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. The same situation exists in the case at bar. “Let me go,” or “let go of me” is equally consistent with an innocent interpretation as it is with a guilty interpretation.

Thus, even were the court to find sufficient evidence that the defendant's wife made the statement and directed it toward the defendant, this evidence still does not prove beyond a reasonable doubt that the defendant restricted his wife movements. Consequently, the evidence presented at trial did not prove the first element of the offense.

In addition, the evidence presented at trial also fails to prove the second, third, and fourth elements of unlawful imprisonment, which are:

(2) that the defendant accomplished this action by physical force, intimidation, or deception,

(3) that the defendant acted without legal authority, and

(4) that the defendant substantially interfered with the liberty of the other person.

The evidence is particularly deficient as to the third and fourth elements. Even were it proven that the defendant held onto his wife physically, thereby occasioning her to yell "let me go," no evidence proved the context of this actions. Perhaps she was trying to do herself an injury, and he was trying to physically prevent her from doing so. Perhaps she was trying to do him an injury and he was trying to physically prevent her for doing so. Perhaps she was in the process of attempting to destroy his or their property, and he was trying to physically prevent her for doing so. Or perhaps he was simply holding her and would not let her go. The problem is that any one of the explanations is equally likely under the evidence presented at trial, and on

the last of the four possibilities would be “without legal authority.” Thus, the evidence on this element is insolubly ambiguous also.

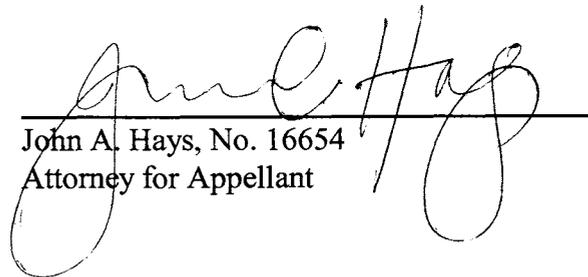
Finally, even if substantial evidence supported the first three elements, it does not support the fourth because there is no evidence from which to conclude that any restraint “substantially” interfered with Ms Barnes’ liberty. In other words, even were it proven that the defendant physically held his wife, that he acted knowingly, and that he acted without legal authority, there is no evidence on the nature of that restraint. Thus, there is no evidence that the restraint was substantial. Consequently, the trial court erred when it entered judgment of conviction against the defendant because substantial evidence does not support all of the elements of the crime. Based upon this fact, the defendant’s conviction should be reversed and the case remanded with instructions to dismiss with prejudice.

CONCLUSION

This court should reverse the defendant's conviction and remand with instructions to dismiss with prejudice based upon the lack of substantial evidence to prove the elements of the crime.

DATED this 6th day of October, 2008.

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**RCW 9A.40.010
Definitions**

The following definitions apply in this chapter:

(1) “Restrain” means to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is “without consent” if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.

(2) “Abduct” means to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force;

(3) “Relative” means an ancestor, descendant, or sibling, including a relative of the same degree through marriage or adoption, or a spouse.

RCW 9A.40.040
Unlawful Imprisonment

(1) A person is guilty of unlawful imprisonment if he knowingly restrains another person.

(2) Unlawful imprisonment is a class C felony.

