

Court of Appeals No. 40703-5-II

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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

MATTHEW RICHARD WHITE,

Defendant/Appellant.

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STATE OF WASHINGTON
DEPUTY
COURT OF APPEALS
DIVISION TWO

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 08-1-03121-9**

The Honorable Stephanie Arend, Presiding Judge

**Sheri Arnold, WSBA No. 18760
Attorney for Appellant
P.O. Box 7718
Tacoma, Washington 98417
(253) 759-5940**

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I. ASSIGNMENT OF ERROR

The State presented insufficient evidence to support a verdict that Mr. White was guilty of unlawfully imprisoning Ms. Bergstrom.

II. ISSUE PRESENTED

Did the State present sufficient evidence to support a jury verdict that Mr. White was guilty of unlawfully imprisoning Ms. Bergstrom where Mr. White did not participate in the assault or the imprisonment of Ms. Bergstrom and did not assent to her being physically restrained?

III. STATEMENT OF THE CASE

A. Factual Background

S.R. was born in February of 1996. RP 239. S.R.'s father was sent to prison and her mother was deemed mentally unfit to have custody of S.R., so S.R. was put into the care of other family members at the age of 9.¹ RP 50, 241, 409-410. Around May 17, 2009, S.R. moved into the home of her grandmother, Ms. Linda Bergstrom. RP 48-50, 240. S.R. had been living with her other grandparents but she had been running away from them and it was too difficult for them to take care of her. RP 51. S.R. was also abusing prescription drugs. RP 51.

In June of 2009, S.R. met P.D. during a period when she had run away from Ms. Bergstrom's house. RP 344. During the following month, S.R. and P.D. entered into a romantic and then sexual relationship. RP

¹ Numerous parties involved in this case are juveniles. All juveniles will be referred to by their initials.

244-245, 466-467. Around July 4, 2009, P.D. moved into and began living in a shed on Ms. Bergstrom's property. RP 52, 243, 465. When P.D. moved into the shed he brought Mr. Matthew White with him and both men began living in the shed. RP 242-243, 469.

During the next week, P.D. and Mr. White would sneak out of the shed early in the morning to avoid being discovered by Ms. Bergstrom and would return to the home after she had left for work. RP 467-468. The men would then return to the home to shower, watch T.V., eat, drink beer, and consume Vicodin and Oxycodone pills found in Ms. Bergstrom's medicine cabinet. RP 262, 266-267, 467-468, 470.

Despite only living with Ms. Bergstrom since May 17, by mid-July S.R. had run away from Ms. Bergstrom's home three times. RP 271. On July 14, 2009, S.R. was planning on running away again. RP 480. P.D. told S.R. that if she wanted to run away she needed a car and money. RP 480. S.R. and P.D. planned for P.D. to sneak into the house at night, steal the keys to Ms. Bergstrom's car and steal money from Ms. Bergstrom's purse. RP 480. The plan was for R.S., P.D., Mr. White, and C.W., a friend of R.S. from school, to all run away together in Ms. Bergstrom's car. RP 246-247, 480-481. Mr. White was not present when S.R. and P.D. began talking about stealing the car, but P.D. told Mr. White about the plan shortly after he and R.S. came up with the plan. RP 481. P.D. asked

Mr. White if he wanted to go and Mr. White responded that if P.D. stole the car, Mr. White would go. RP 482.

J.D. knew Mr. White from her uncle's halfway house. RP 369. On July 14, 2009, J.D. was living on the streets. RP 364. Mr. White and P.D. met up with J.D. on the evening of July 14 at a transit center and Mr. White invited her to stay in the shed with he and P.D. RP 247-248, 364, 370-373.

During the day of July 15, 2009, S.R., P.D., Mr. White, and J.D. took Oxycontin and Vicodin. RP 267. C.W. also arrived at Ms. Bergstrom's home. 268. In addition to taking Oxycontin and Vicodin, the group discussed the plan to steal Ms. Bergstrom's car and money and run away to Georgia. RP 267, 275-276, 482-483, 510-511. No solid plan was ever decided upon, but a general idea was formed of what would happen. PR 483.

The general idea was that S.R. would take Ms. Bergstrom into Ms. Bergstrom's bedroom and distract her while P.D. and J.D. snuck into the home, grabbed Ms. Bergstrom's purse and went back outside. RP 483-484. S.R. would then throw her bags outside the house and everybody would wait a little while and then take the car and leave. RP 484-484. During the planning of the crimes, the only reference to restraining Ms. Bergstrom was made by S.R. when she mentioned to P.D. that it would be

funny to tie Ms. Bergstrom up with duct tape. RP 497. S.R. did not make these comments to Mr. White. RP 497. There was no other discussion of tying anyone up. RP 504.

At one point, P.D., Mr. White, and J.D.² were in the shed and J.D. asked P.D. what she should do if Ms. Bergstrom came out while P.D. was in the house. RP 484. J.D. said, "I don't know, you think of something, you deal with it." RP 484. J.D. responded by whispering, "Okay, if I have to, I will hit her." RP 484. There was no discussion about weapons or any other items the group would need to carry out the plan. RP 486. Mr. White said that hitting Ms. Bergstrom was a "stupid idea" and that J.D. shouldn't do it. RP 392-393, 400.

During the day of July 15, all five people at Ms. Bergstrom's house searched the house and the garage for items they could steal and pawn later. RP 276-277, 507-509. The group took money, jewelry, blank checks, drugs, and a DVD player. RP 222-223, 276-280, 507-509.

On the evening of July 15, Ms. Bergstrom returned home around 7:30. RP 56. S.R. and C.W. were inside the residence and signaled the people in the shed to begin the theft of Ms. Bergstrom's keys and purse. RP 487. Before leaving the shed, J.D. armed herself with a garden trowel that she found in the shed. RP 221. Before J.D. entered the residence, she

² At this point in the transcript, P.D. refers to J.D. as "Bunny," her nickname. RP 477.

became nervous, and returned to the shed, and asked P.D. and Mr. White to go with her. RP 221. P.D. and J.D. entered the residence through a garage door that allowed access to the kitchen area. RP 221. Mr. White entered the residence through a sliding glass door that opened into the dining room/living room area. RP 221.

Ms. Bergstrom saw Mr. White, confronted him, and asked him who he was and what he was doing in her house. RP 221. Mr. White said his name was Matt and that he was there to pick up his shirt from S.R. RP 221. Ms. Bergstrom called to S.R. who came out of her room and said that she knew Mr. White and that Mr. White was there to pick something up. RP 221-222. S.R. then went back in her room and closed the door. RP 222.

Ms. Bergstrom began to walk towards Mr. White and saw J.D. and P.D. who were in the residence but trying to hide from Ms. Bergstrom. RP 222. Ms. Bergstrom called out, "Who else is in my house?" RP 222. J.D. responded by hitting Ms. Bergstrom on the head with the trowel, breaking it, and then by grabbing a pan from the kitchen and striking Ms. Bergstrom with it repeatedly. RP 385, 489-493. P.D. also grabbed a pan and hit Ms. Bergstrom on the head with it. RP 489-493. Mr. White left the residence because he did not want to see Ms. Bergstrom get hit. RP 222.

J.D. and P.D. struck Ms. Bergstrom with the pans as she retreated into her bedroom and finally collapsed. RP 70-71. Ms. Bergstrom was tied up and left in her bedroom while J.D., P.D., C.W., S.R., and Mr. White loaded the items that had taken from the home into Ms. Bergstrom's car and drove away. RP 75-79, 222-223, 385-388.

Ms. Bergstrom was tied up by J.D. alone. RP 223, 385, 401-404, 500.

The group drove to Forks, Washington because P.D. liked the *Twilight* book series and wanted to see the area which was the setting of the books. RP 514.

Ms. Bergstrom was able to contact a neighbor who called the police and medical aid services. RP 83-84, 118-126. Ms. Bergstrom told police what had happened and gave them a partial license plate of her stolen car. RP 128-138. Police searched records and got the full plate as well as a description of the car and immediately broadcast and alert that the car was stolen. RP 137-138.

Early on the morning of July 16, the car was stopped leaving a gas station in Forks, Washington and all the occupants were arrested. RP 308-311, 336-345.

B. Procedural Background

On July 17, 2009, Mr. White was charged with first degree robbery while he or an accomplice was armed with a deadly weapon. CP 1-2.

On September 17, 2009, the charges against Mr. White were amended to include first degree robbery while armed with a deadly weapon, first degree assault while armed with a deadly weapon, unlawful imprisonment, and second degree taking a motor vehicle without permission. CP 4-6. The first degree robbery and first degree assault charges were also charged with the aggravating factor that the crimes were committed to maintain membership in or advance position in the hierarchy of an organization, association, or identifiable group. CP 4-6.

On March 2, 2010, Mr. White stipulated that any statements he made while in police custody were made voluntarily, knowingly, and intelligently after the full advisement of the *Miranda* warnings. CP 7. Mr. White did not stipulate to the admissibility of any such statements. CP 7.

Trial began on March 3, 2010. RP 47.

Jury deliberations began on March 9, 2010. RP 697.

On March 11, 2010, the jury sent out a question asking whether or not the jury had to answer the special verdict forms if they could not unanimously agree on a yes or no verdict. CP 73. The trial court

instructed the jury to reread instructions 31, 32, and 33 and to continue deliberating. CP 73. Also on March 11, the jury requested, and was provided, a new blank verdict form B for the assault charge. CP 74.

The jury found Mr. White guilty of first degree robbery, not guilty of first degree assault but guilty of the lesser included crime of second degree assault, guilty of unlawful imprisonment, and guilty of taking a motor vehicle without permission in the second degree. CP 113, 115, 117, 120, 121. The jury found that Mr. White or an accomplice was armed with a deadly weapon at the time of the robbery and the assault, but did not find that any of the crimes were committed to maintain or advance his position in an organization. CP 114, 115, 118, 119.

On March 19, 2010, Mr. White moved to vacate his conviction of second degree assault on the basis that the conviction for second degree assault violated his right to be free from double jeopardy since he was also convicted of first degree robbery for the same incident. CP 127. The trial court granted the motion. CP 130-143.

On April 23, 2010, Mr. White stipulated to his prior record and offender score. CP 128-129.

Mr. White received a sentence of 87 months total confinement. CP 130-143.

Notice of Appeal was filed on May 12, 2010. CP 144-153.

IV. ARGUMENT

The State presented insufficient evidence to support a verdict that Mr. White was guilty of unlawfully imprisoning Ms. Bergstrom either as a principal or as an accomplice.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). Where a criminal defendant challenges the sufficiency of the evidence, appellate courts review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972). If there is insufficient evidence to prove an element, reversal is

required and retrial is 'unequivocally prohibited.' *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

1. *The State presented insufficient evidence to convict Mr. White as a principal actor in the crime of unlawfully imprisoning Ms. Bergstrom.*

Mr. White was charged with unlawful imprisonment in violation of RCW 9A.40.040. CP 4-6.

"A person is guilty of unlawful imprisonment if he knowingly restrains another person." RCW 9A.40.040. Per RCW 9A.40.010(1), the word "restrain" has four components, as explained by the Court of Appeals in *State v. Warfield*, 103 Wn.App. 152, 157, 5 P.3d 1280 (2000):

This definition [of "restrains"] has four primary components: (1) restricting another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty. Because the Legislature has seen fit to fold all four components into the definition of "restrain," then all four components are equally modified by the adverb "knowingly," which modifies "restrain" in the statutory definition of unlawful imprisonment.

Thus, to convict Mr. White of unlawfully imprisoning Ms. Bergstrom, the State's burden was to present sufficient evidence to permit a jury to find beyond a reasonable doubt that Mr. White knowingly restricted Ms. Bergstrom's movements without Ms. Bergstrom's consent and without legal authority in a manner that substantially interfered with Ms. White's liberty.

It is undisputed that Ms. Bergstrom was unlawfully imprisoned by being tied up in her bedroom by J.D. and possibly by P.D. RP 385-386, 389, 392, 394, 402-403, 493, 500, 502-503. However, no evidence suggested that Mr. White personally participated in the restraining of Ms. Bergstrom. In fact, the evidence introduced at trial was that Mr. White left the residence when J.D. and P.D. began beating Ms. Bergstrom and that he never went into Ms. Bergstrom's bedroom or tied her up. RP 222-223, 321-322, 389, 392, 515.

The State's evidence was insufficient to establish that Mr. White committed the crime of unlawfully imprisoning Ms. Bergstrom as a principal actor in the commission of the crime.

2. *The State's evidence was insufficient to support a finding that Mr. White was guilty as an accomplice to the crime of unlawfully imprisoning Ms. Bergstrom.*

A person is an accomplice to a crime if he knowingly "solicits, commands, encourages, or requests" the commission of a crime, or "aids or agrees to aid" the planning or commission of a crime. RCW 9A.08.020(3)(a)(i), (ii). Physical presence and assent alone are insufficient to establish accomplice liability. *In re the Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979) (aiding and abetting requires that one associate oneself with the undertaking, participate in it as

something one desires to bring about, and seek by one's action to make it succeed). But “[p]resence at the scene of an ongoing crime may be sufficient if a person is ‘ready to assist.’” *Wilson*, 91 Wn.2d at 491, 588 P.2d 1161.

“One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed.” *State v. J-R Distribs., Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), *cert. denied* 418 U.S. 949, 94 S.Ct. 3217, 41 L.Ed.2d 1166 (1974). Thus, the defendant must be ready to assist in the crime. *State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993).

Here, during the planning stages of this series of crimes, Mr. White repeatedly objected to the idea of assaulting Ms. Bergstrom and refused to participate in the assault, going so far as to leave the residence when the assault began. RP 222, 321-322, 392-393, 400. Even if this court was to assume that Mr. White was present at the time of the assault, he certainly was not ready to assist in the commission of the assault and took no action to make the assault succeed.

Mr. White was outside of the residence during the time J.D. and P.D. were taping and tying Ms. Bergstrom up. RP 222-224, 321-322, 389, 392, 515. During the planning of the crimes, the only reference to

restraining Ms. Bergstrom was made by S.R. when she mentioned to P.D. that it would be funny to tie Ms. Bergstrom up with duct tape. RP 497. S.R. did not make these comments to Mr. White. RP 497. There was no other discussion of tying anyone up. RP 504.

Mr. White was not present when Ms. Bergstrom was tied up, nor was he aware that Ms. Bergstrom would be tied up. Further, Mr. White actively opposed the beating of Ms. Bergstrom and never manifested assent to tying her up or physically restraining her. Thus, Mr. White was not present at the time Ms. Bergstrom was unlawfully imprisoned, had no knowledge that Ms. Bergstrom would be unlawfully imprisoned, did not assent to the restraint of Ms. Bergstrom, and took no actions to make the imprisonment succeed. The State presented insufficient evidence to establish that Mr. White was an accomplice to the unlawful imprisonment of Ms. Bergstrom.

VI. CONCLUSION

The State presented insufficient evidence to convict Mr. White of unlawfully imprisoning Ms. Bergstrom. This court should vacate Mr. White conviction for unlawful imprisonment and remand for dismissal of the charge with prejudice.

DATED this 15th day of March, 2011.

Respectfully submitted,

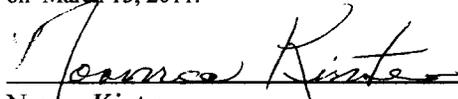


Sheri Arnold, WSBA No. 18760
Attorney for Appellant

11 MAR 15 AM 10:07
STATE OF WASHINGTON
BY DEPUTY
COURT REPORTER
MARTINSON

CERTIFICATE OF SERVICE

The undersigned certifies that on March 15, 2011, she delivered: in person to the Pierce County Prosecutor's Office, County-City Building, 910 Tacoma Avenue South, Tacoma, Washington 98402, and by United States mail to appellant, Matthew R. White, DOC # 340147 Washington State Corrections Center, Post Office Box 900, Shelton, Washington 98584, copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on March 15, 2011.


Norma Kinter

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

STATE OF WASHINGTON,)	
)	
Plaintiff,)	COURT OF APPEALS NO. 40703-5-II
)	
v.)	AMENDED CERTIFICATE
)	OF SERVICE
MATTHEW R. WHITE)	
)	
Appellant.)	
_____)	

The undersigned certifies that on March 15, 2011, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and on March 21, 2011, she re-mailed by United States mail to Matthew R. White, DOC # 340147, Stafford Creek Corrections Center, 191 Constantine, Aberdeen, Washington 98520, a true and correct copy of appellant's Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on March 21, 2011.

Dated this 21st day of March, 2011

Norma Kinter

AMENDED CERTIFICATE OF SERVICE

ARNOLD LAW OFFICE

March 22, 2011 - 12:54 PM

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Case Name: Matthew R. White

Court of Appeals Case Number: 40703-5

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