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Court of Appeals  
Division II  
State of Washington  
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NO. 52439-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ISAAC GUSMAN,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Ray Kahler, Judge

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BRIEF OF APPELLANT

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LISE ELLNER, WSBA No. 20955  
ERIN C. SPERGER, WSBA No. 45931  
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070  
(206) 930-1090

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the following conclusions of law:

The fact that the Defendant restrained Ms. Shuck, combined with the Defendant telling Ms. Shuck to get in his truck and the circumstantial evidence that the Defendant had followed Ms. Shuck as she walked home, establishes beyond a reasonable doubt that the Defendant had the intent to commit the crime of Kidnapping and that he took a substantial step toward the commission of that crime. CP 82 (unnumbered CL).

2. The trial court erred when it found Gusman guilty of attempted kidnapping in the second degree.

3. The state failed to prove beyond a reasonable doubt that Gusman committed attempted second degree kidnapping.

4. The trial court erred when it imposed a \$200 criminal filing fee and a \$650 court appointed attorney fee as part of Gusman's judgment and sentence contrary to RCW 10.01.160(3).

B. ISSUES PRESENTED ON APPEAL

1. Did the state fail to prove beyond a reasonable doubt that Gusman intended to abduct Shuck, under RCW

9A.40.010(2)(b), and that he took a substantial step toward completing the kidnapping, when the state presented no evidence Gusman made any threats with a deadly weapon?

2. Did the state fail to prove beyond a reasonable doubt that Gusman intended to abduct Shuck under RCW 9A.40.010(2)(a), and that he took a substantial step toward completing the kidnapping, when the evidence did not support these elements and the trial court conflated the elements of “restraint” and “secreting or holding in a place where the victim is not likely to be found”?

3. Did the trial court improperly impose the \$200 criminal filing fee and the \$650 court appointed attorney fee under RCW 10.01.160(3) when Gusman was indigent and the fees were discretionary?

#### C. STATEMENT OF THE CASE

##### 1. Procedural History

Issaac Gusman was charged by amended information with first degree kidnapping. CP 20. After a bench trial the court found Gusman guilty of attempted second degree kidnapping under both RCW 9A.40.010(2)(a) and (b). CP 58. This timely appeal follows. CP

87.

2. Substantive Facts

Issac Gusman was camping in the Olympic National Forest when he left his campsite to obtain supplies in the town of Shelton. RP 138, 181. Due to a construction detour, Gusman travelled through the town of Montesano where Ann Marie Shuck was walking home from work. RP 64, 138, 144.

According to Shuck, she was walking on a sidewalk in the direction of traffic when a truck drove past her. RP 66. A few minutes later, the same truck pulled to the side of the road slightly ahead of her. RP 67. Gusman exited the driver's side and walked to the back of the truck. RP 67 He told Shuck he had a flat tire. RP 67. Shuck moved to the opposite side of the sidewalk and the two walked parallel to each other from the back of the truck to the passenger door. RP 67. When they reached the passenger door, Gusman opened it, used his left hand to grab Shuck's right arm, and told her to get into the vehicle. RP 67.

Shuck felt a hard, cylindrical object in her right rib cage which she thought was a gun. RP 67. Shuck dropped to the ground and screamed. RP 68. This caused Gusman to fall. RP 68. When

Gusman lifted himself to his feet, entered his vehicle and drove away, Shuck ran home. RP 68-69. During this incident Shuck did not observe a firearm on Gusman's person. RP 78. Gusman did not verbally threaten Shuck or tell her he had a firearm. RP 68.

After a bench trial, the court found Gusman guilty of attempted second degree kidnapping. CP 58.

As part of Gusman's judgment and sentence the court imposed a \$200 criminal filing fee and a \$650 court appointed attorney fee. CP 63. This timely appeal follows. CP 87.

#### D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT GUSMAN COMMITTED ATTEMPTED SECOND DEGREE KIDNAPPING UNDER RCW 9A.40.010(a) or (b)

The state failed to prove beyond a reasonable doubt that Gusman committed attempted second-degree kidnapping under RCW 9A.40.010(a) or (b).

"Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law."

*State v. Yallup*, 3 Wn. App. 2d 546, 552, 416 P.3d 1250 (2018)

(quoting *State v. Homan*, 181 Wn.2d 102, 105–06, 330 P.3d 182 (2014) (other citations omitted)). “‘Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *Yallup*, 3 Wn. App. 2d at 552 (quoting *Homan*, 181 Wn.2d at 106). In reviewing insufficiency claims, the appellant necessarily admits the truth of the state’s evidence and all reasonable inferences drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In a criminal prosecution, the state must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. *State v. Sundberg*, 185 Wn.2d 147, 152, 370 P.3d 1 (2016) (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (quotations omitted)).

This Court must reverse the conviction if there is insufficient evidence to prove an element of a crime. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005); *State v. Irby*, 187 Wn. App. 183, 204, 347 P.3d 1103 (2015). Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, 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.

In Washington a defendant charged with a crime may also be tried on a lesser degree or a lesser included offense. RCW 10.61.003, .006, .010; *In re Heidari*, 159 Wn. App. 601, 609–10, 248 P.3d 550 (2011), *aff'd*, 174 Wn.2d 288, 274 P.3d 366 (2012).

A person commits second degree kidnapping when he intentionally abducts another person under circumstances not amounting to first degree kidnapping. RCW 9A.40.030(1). Abduction may be established by proving that the defendant restrained a person “by either (a) secreting or holding a person in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force.” RCW 9A.40.010(2).

“‘Restraining’ means to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his liberty.” RCW 9A.40.010(6). “Restraint is ‘without consent’ if it is accomplished by ... physical force, intimidation, or deception...” RCW 9A.40.010(6).

It is well established that attempt consists of two elements: (1) intent, and (2) a substantial step. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). (internal citations omitted). A substantial step is an act that is “strongly corroborative” of the actor’s criminal

purpose. *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978). Both the substantial step and the intent must be established beyond a reasonable doubt. *Aumick*, 126 Wn.2d at 429-30.

Because Gusman was convicted of attempted second degree kidnapping the state was required to prove beyond a reasonable doubt that, with the intent to abduct Shuck, Gusman took a substantial step toward completing the kidnapping. RCW 9A.28.020(1).

- a. There was insufficient evidence to prove Gusman attempted to abduct Shuck either by (a) secreting or hold a person in a place they are not likely to be found or (b) by using or threatening to use deadly force. RCW 9A.40.010(2)

- i. Threatened Use of Force

No Washington Court has held that restraint coupled with a victim's subjective believe that the defendant possesses a weapon constitutes a substantial step toward completing the crime of kidnapping by use or threat to use deadly force. The only case that could be applicable is *State v. Majors*, 82 Wn. App. 843, 919 P.2d 1258, 1261 (1996) but that case is easily distinguishable.

In *Majors*, the defendant drove up to fifteen-year-old C.H. as she walked along the road, pointed a BB gun at her through an open

window, told her to get in the car, and said, “this is a real gun. Get in the car now or I’ll blow your head off.” *Majors*, 82 Wn. App. at 845. The court held that Majors’ actions coupled with his threat to use deadly force constituted a substantial step toward abducting C.H. even though Majors did not actually have the capability to inflict deadly force. *Majors*, 82 Wn. App. at 847.

The Court in *Majors* relied on *State v. Hentz*, 99 Wn. 2d 538, 544, 663 P.2d 476 (1983). Both cases are distinguishable from the facts here. In *Hentz*, while riding in the car, Hentz told the victim he would shoot her if she did not obey his commands. *Hentz*, 99 Wn.2d at 539. When Hentz and the victim arrived at Hentz’s apartment complex, Hentz again warned the victim to obey, showed her a gun, and took her inside where he sexually assaulted her. *Hentz*, 99 Wn.2d at 539-40. The police recovered a cap pistol from Hentz’s residence, which the victim identified as the one with which she was threatened. *Hentz*, 99 Wn.2d at 540.

The Washington Supreme Court held the threat to use a deadly weapon element of first degree rape by forcible compulsion was satisfied by Hentz’s threat to “shoot” the victim even though the firearm he possessed was not a real gun. *Hentz*, 99 Wn.2d at 541.

The cap pistol was “realistic-looking,” the victim believed it was real, and by threatening to “shoot” the victim Hentz “implied that he had access to a firearm capable of killing or seriously injuring his victim.” *Hentz*, 99 Wn.2d at 541.

Here, unlike *Majors* and *Hentz*, Gusman did not threaten any deadly force. Shuck did not observe a firearm, or any other deadly weapon, and Gusman did not hold any object out as a firearm. RP 67-68; CP 79-80. Further, the facts set forth in *Hentz* to support a credible fear that Gusman was armed are not present in Gusman’s case. Gusman did not make any threat, thus, there was no credible threat to use deadly force for Shuck to believe.

The state may argue that the hard, cylindrical object Shuck felt pressed against her ribs constituted a believable and credible threat but no Washington court has extended *Majors* that far. Such an extension improperly relieves the state of its burden to prove that Gusman used or a threatened to use deadly force with intent to abduct Shuck. See *State v. Billups*, 62 Wn. App. 122, 125, 813 P.2d 149 (1991) (the specific intent required is the intent to abduct). Thus, even if Gusman momentarily restrained Shuck, that restraint alone, without indication he intended to use or threaten to use deadly force,

is insufficient to prove attempted kidnapping.

- ii. There was insufficient evidence to prove Gusman took a substantial step by secreting or holding Shuck in a place where she was not likely to be found

Gusman's actions did not strongly corroborate an intent to restrain Shuck by secreting or holding her in a place where she was not likely to be found.

Restraint requires more than the victim's mere presence in a vehicle. *State v. Dillon*, 163 Wn. App. 101, 109, 257 P.3d 678 (2011). In *Dillon*, this Court reversed Dillon's kidnapping conviction because even though, as a matter of practicality, the victim was somewhat restrained by his mere presence in Dillon's car. However, the victim's presence alone was insufficient to prove an intent to abduct. *Dillon*, 163 Wn. App. at 109. Because the Court of Appeals found the victim was not restrained the Court did not reach the question of whether Dillon had secreted or held the victim in a place where he was not likely to be found. *Dillon*, 163 Wn. App. at 108-09.

*State v. Ong*, 88 Wn. App. 572, 575-76, 945 P.2d 749 (1997) and *State v. Harris*, 36 Wn. App. 746, 754, 677 P.2d 202 (1984), demonstrate that abduction requires both "restraint" and "secreting

or holding in a place where he or she is not likely to be found". In *Ong*, without permission, the defendant drove a child to a place he described as a "good hiding place" the police did not know about, and when he arrived Ong took the child on a walk over rough terrain against her will. *Ong*, 88 Wn. App. at 575.

The Court of Appeals held the child was restrained because the child was completely under Ong's control, which substantially interfered with her liberty, and the restraint was without consent because Ong deviated from the permitted destination. *Ong*, 88 Wn. App. at 576. In addition, the "good hiding place" was a place the child was not likely to be found. *Ong*, 88 Wn. App. at 576-77. Thus, the Court of Appeals found the element of "restraint" for the purpose of "secreting" the child in a place where she was not likely to be found. *Id.*

Similarly, in *Harris*, the Court of Appeals found both elements of being restrained and being secreted or held in a place the victim is not likely to be found. There, the defendants offered to drive the victim home but instead drove her to a dead-end gravel road where they stopped the car, placed her in the back seat and sexually assaulted her. *Harris*, 36 Wn. App. at 754. The victim was physically

restrained inside the car but was held in a place where she was not likely to be found when they drove her to the dead-end secluded road. *Ong*, 88 Wn. App. at 576-77; *Harris*, 36 Wn. App. at 754.

Although the defendants in *Ong* and *Harris* completed the kidnapping, these cases demonstrate that abduction requires both restraint and secreting or holding in a place where the victim is not likely to be found. Without more, under *Ong* and *Harris*, Gusman's attempt to put Shuck in the car, does not establish an intent to restrain and does not include an attempt to secret or hold Shuck in a place she would not likely be found, because under *Dillon*, the attempt to put Shuck in the car does not satisfy the element of restraint. *Dillon*, 163 Wn. App. at 109; *Ong*, 88 Wn. App. at 576-77; *Harris*, 36 Wn. App. at 754.

In *Billups*, upon which the trial court relied, Division One of the Court of Appeals incorrectly conflated restraint with secreting or holding the victims in a place they were not likely to be found. *Billups*, 62 Wn. App. at 126-27. There, Billups offered two young girls a dollar to enter his van and accompany him to Shilshole Bay. *Billups*, 62 Wn. App. at 124. Division One reasoned that enticing the girls was a substantial step because if the girls complied their movements would

have been restrained by their presence in the van and that restraint would have amounted to secreting or holding the girls in a place where they were not likely to be found. *Billups*, 62 Wn. App. at 126-27.

The *Billups* holding is not only contrary to *Ong* and *Harris* but it required the Court of Appeals to adopt a strict definition of restraint which both Division Two and Three have declined to follow. *Dillon*, 163 Wn. App. at 109; See also *State v. Michal*, No. 34744-3-III, 2018 WL 287502, at 2, 4 (Wash. Ct. App. Jan. 4, 2018), unpublished.<sup>1</sup>

In its recent unpublished opinion, Division Three declined to follow the *Billups* court's "terse analysis of 'restraint'" and instead followed this Court's analysis in *Dillon* to hold that a defendant does not substantially restrict a passenger's liberty when he transports the passenger in a moving motor vehicle. *Michal*, 2018 WL 287502, at \*2, 4 (Ct. App. Jan. 4, 2018). While the Court in *Michal* recognized that a vehicle's passenger, in a strict sense, experiences a restriction

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<sup>1</sup> Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. See GR 14.1.

of movement, this alone does not create a substantial interference with the passenger's liberty. *Michal*, No. 34744-3-III, 2018 WL 287502, at 3-4.

Here, under *Ong* and *Harris* the state was required to prove Gusman intended, and took a substantial step toward restraining and secreting or holding Shuck in a place where she was not likely to be found. *Ong*, 88 Wn. App. at 576-77; *Harris*, 36 Wn. App. at 754. Even when reviewing the evidence in the light most favorable to the state, Gusman's command to "get in the truck" coupled with Gusman grabbing Shuck's arm does not strongly corroborate an intent to abduct. RCW 9A.40.010(2).

Even if Gusman was successful in getting Shuck into his vehicle her mere presence in the vehicle would not constitute restraint. *Dillon*, 162 Wn. App. at 109. And even if Shuck had been briefly restrained on the street and the restraint continued inside the vehicle that restraint would not be elevated to abduction merely because it took place inside a vehicle. *Ong*, 88 Wn. App. at 576-77; *Harris*, 36 Wn. App. at 754.

As in *Ong* and *Harris* the restraint must be accompanied by

evidence the defendant intended to hold her in a place she was not likely to be found which requires more than showing the victim was in the vehicle against her will. *Harris*, 36 Wn. App. at 754. At most, the evidence may have been sufficient to show an attempt to commit unlawful imprisonment.

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). Therefore, this Court must reverse Gusman’s conviction and remand for dismissal with prejudice because there was insufficient evidence of attempted second degree kidnapping this court must reverse and remand for dismissal with prejudice. *Hickman*, 135 Wn.2d at 103.

2. THE \$200 CRIMINAL FILING FEE AND  
THE \$650 COURT APPOINTED  
ATTORNEY FEE SHOULD BE  
STRICKEN FROM GUSMAN’S  
JUDGMENT AND SENTENCE

The Legislature enacted House Bill 1783, which amends former RCW 10.01.160(3) to categorically prohibit the imposition of any discretionary costs on indigent defendants and it went into effect on June 7, 2018. LAWS OF 2018, ch. 269, § 6(3). Fees for a court

appointed attorney are discretionary. See RCW 9.94A.760. House Bill 1783 also amended the criminal filing fee statute, former RCW 36.18.020(2)(h) (2015), to prohibit courts from imposing the \$200 filing fee on indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h).

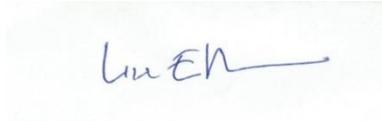
Gusman is indigent, and his judgment was entered after the effective date of RCW 10.01.160(3). Accordingly, the criminal filing fee and the court appoint attorney fee imposed must be stricken from the judgment and sentence.

#### E. CONCLUSION

Isaac Gusman respectfully requests that this court reverse his conviction for attempted second degree kidnapping and remand for dismissal with prejudice. Gusman also requests that the \$200 criminal filing fee and the \$650 court appointed attorney fee be stricken from his judgment and sentence.

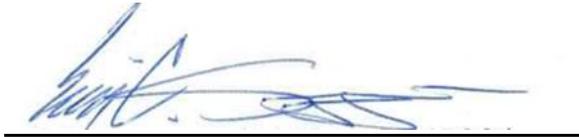
DATED this 23<sup>rd</sup> day of May 2019.

Respectfully submitted,



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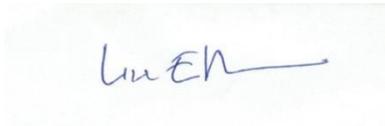
LISE ELLNER, WSBA No. 20955  
Attorney for Appellant



---

ERIN C. SPERGER, WSBA No. 45931  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor's Office [appeals@co.grays-harbor.wa.us](mailto:appeals@co.grays-harbor.wa.us) and Isaac Gusman, 2546 113th Way SW, Olympia, WA 98512 a true copy of the document to which this certificate is affixed on May 23, 2019. Service was made by electronically to the prosecutor and Isaac Gusman by depositing in the mails of the United States of America, properly stamped and addressed.



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**LAW OFFICES OF LISE ELLNER**

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