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NO. 52439-2-II

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

STATE OF WASHINGTON,
Respondent,

v.

ISAAC JOHN GUSMAN,
Appellant.

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

THE HONORABLE RAY KAHLER, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- 1. There is sufficient evidence to support the Appellant's conviction for Attempted Kidnapping in the Second Degree.**
- 2. The State concedes that all discretionary Legal Financial Obligations (LFOs) should be stricken.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The trial court made detailed findings of fact in this matter. CP 75-79. The Appellant does not challenge these findings. A party that offers no argument in its opening brief on an assignment of error to a finding of fact waives the assignment of error. *State v. Radcliffe*, 139 Wn.App. 214, 220, 159 P.3d 486 (2007). Waived findings of fact are treated as verities on appeal. *See State v. Alexander*, 125 Wn.2d 717, 723, 888 P.2d 1169 (1995) (because State failed to properly contest findings of fact, they were treated as verities on appeal).

The State believes these facts are sufficient and the appropriate basis for appellate review.

ARGUMENT

1. There is sufficient evidence to support the Appellant's conviction for Attempted Kidnapping in the Second Degree.

The Appellant asserts that there is insufficient evidence to support the trial court's finding that he committed Attempted Kidnapping in the Second Degree. This argument fails.

Standard of Review

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, 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, 1074 (1992) citing *State v. Green*, 94 Wash.2d 216, 220–22, 616 P.2d 628 (1980). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* citing *State v. Partin*, 88 Wash.2d 899, 906–07, 567 P.2d 1136 (1977).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* citing *State v. Theroff*, 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wash.2d 385, 622 P.2d 1240 (1980). Appellate courts “defer to the trier of fact for

purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence.” *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson*, 129 Wash.App. 95, 109, 117 P.3d 1182 (2005)).

Attempted Kidnapping in the Second Degree

In order to convict the Appellant of Attempted Kidnapping in the Second Degree, the trial court had to find beyond a reasonable doubt that he took a substantial step towards intentionally abducting the victim, Ms. Shuck. RCW 9A.40.030; RCW 9A.28.020.

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation. WPIC 100.05 Attempt—Substantial Step—Definition

"Abduct" means to restrain a person by either (a) secreting or holding him or her 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(1).

"Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty 9A.40.010(6). As applied in the case at bar, restraint is "without consent" if it is accomplished by physical force, intimidation, or deception. RCW 9A.40.010(6).

The critical element of abduction, as required for kidnapping, can take three forms, all of which necessarily involve restraint: (1) restraint by secreting the victim in a place where he or she is not likely to be found, (2) restraint by threats of deadly force, or (3) restraint by the use of deadly force. *State v. Berg*, 177 Wash.App. 119, 310 P.3d 866 (2013), review granted in part 179 Wash.2d 1028, 320 P.3d 720, reversed on other grounds 181 Wash.2d 857, 337 P.3d 310 (2014).

The trial court specifically did not find a use or threatened use of deadly force, so the only issue is whether or not there is sufficient evidence that the Appellant took a substantial step to restrain the victim and was going to secrete or hold her in a place she was not likely to be found. CP 81. The evidence shows that the Appellant “grabbed Ms. Shuck and held her such that she was unable to leave, and told her to get in the truck.” CP 75, Findings of Fact #3. This is sufficient to prove Attempted Kidnapping in the Second Degree.

The Appellant physically restrained the victim and attempted to force her into his truck. The Appellant was not known to the victim, he was not from the area, and if Ms. Shuck had been forced into the vehicle it was not likely that she could have been found. The Appellant appears to

argue that forcing a victim into a vehicle is not sufficient to support this conviction, but his argument is erroneous.

In *State v. Stubsjoen*, the defendant met up with a group, including a 6-month-old baby, and joined them hanging out in a park for several hours. *State v. Stubsjoen*, 48 Wash.App. 139, 141, 738 P.2d 306 (1987). Eventually, Stubsjoen was left alone in a vehicle with the baby, when the other adults returned to the car, Stubsjoen had left. *State v. Stubsjoen*, 48 Wash App. at 142. Upon arriving home several minutes later, the adults discovered the baby was also missing. *Id.*

Stubsjoen and the baby were picked up by a passing motorist who drove them to a local fire station. *Id.* at 143. Stubsjoen lied about her identity and an officer arranged for a police chaplain to give her and the baby a ride. *Id.* While on the freeway, the chaplain's pager went off and he stopped to use the telephone. Stubsjoen left his car and got into a cab with the baby as she assumed the police were calling the chaplain about the missing child. *Id.*

Stubsjoen was convicted of second degree kidnapping, and, on appeal, she argued the evidence was insufficient "because the State did not prove she secreted or held the baby in a place where she was not likely to

be found. She argues that virtually all of the time she had the child, they were in public areas where the child could easily be seen.” *Id.* at 144.

The court held that “a reasonable interpretation of the current kidnap statute, which is consistent with its purpose, is that a child is abducted when held in areas or under circumstances where it is unlikely those persons directly affected by the victim's disappearance will find the child.” *Id.* at 145. The court found that “Stubsjoen in effect concealed the child by acting as though the child was her own.” *Id.*

Stubsjoen's narrow interpretation of the kidnapping statute was rejected as it would mean that a child could be taken, and so long as the child was held in public places and transported in public conveyances such as airlines and buses, there would be no kidnapping within the meaning of the statute. “Reasonable statutory interpretation forbids such strained and absurd results.” *Id.* at 145-46.

In reaching this conclusion, the *Stubsjoen* court cited to *State v. Missmer* which the court was asked to construe the former kidnapping statute. *Id.* at 145. This statute read in pertinent part:

Every person who shall wilfully,

(2) Lead, take, entice away or detain a child under the age of sixteen years with intent to conceal him from his ...

parents ... shall be guilty of kidnaping in the second degree
...

Former RCW 9.52.010(2); *State v. Missmer*, 72 Wash.2d 1022,
1023, 435 P.2d 638 (1967).

The defendant in *Missmer* enticed a 14-year-old girl into his automobile and drove around with her before being apprehended. *Missmer* argued that there was no evidence of concealment since it was not shown that the child was concealed from her parents because at all times he drove on main, well-traveled thoroughfares in and around the area. *State v. Missmer*, 72 Wash.2d. at 1022.

The court presented the common definition of the word “conceal” as being “to hide or withdraw from observation; to cover or keep from sight.” It does not necessarily mean that the concealed individual or hidden object may not be located or found by reasonable means of discovery. *Id.* at 1026.

Thus, “the girl could have been as well concealed from her parents in defendant's automobile traveling along one of our high-speed freeways as she could have been in a deserted cabin in the country.” *Id.*

In *State v. Harris*, the defendant was convicted of two counts of first degree rape. *State v. Harris*, 36 Wash.App. 746, 747, 677 P.2d 202

(1984). The first victim, Patricia Smith, got into a car with Harris, his co-defendant (Gibbs), and another couple. After dropping off the couple, Harris and Gibbs refused to let Smith out of the car. *State v. Harris*, 36 Wash.App. at 747. They eventually took her to Gibbs' house where she was repeatedly raped. *Id.*

The second victim, Tina Jones, was offered a ride by Harris, Gibbs, and another unknown male. *Id.* at 748-49. Jones acted, but instead of taking her home, Harris drove to a dead end street. *Id.* Jones was also repeatedly raped. *Id.* Jones was eventually allowed to leave the car. *Id.*

Harris argued that the evidence on each count was no sufficient to prove a kidnapping as an element of first degree rape. *Id.* at 752. The defendant argued that there was no abduction "because each victim voluntarily got in the car and the restraint and movement before and during the rapes was merely incidental to the rapes." *Id.* at 753.

However, the court found that Smith "was kept in the car against her will for a period of time prior to being raped" and Jones was told the defendants "would take her home; instead they began driving in the opposite direction from her house." *Id.* at 753-54. "This evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that all the elements of a kidnapping were present." *Id.*

Leon Billups approached two girls, ages 10 and 11, as they were walking toward the Ballard Locks. He leaned out his van's window and offered the girls money if they would go to Shilshole with him. *State v. Billups*, 62 Wash.App. 122, 124, 813 P.2d 149 (1991). Billups was convicted on two counts of attempted kidnapping in the second degree. *State v. Billups*, 62 Wash.App. at 124. The defendant appealed, claiming there was insufficient evidence that he intended to abduct the girls. *Id.* at 125.

The court held there was sufficient evidence to support the defendant's convictions. *Id.* at 126. "By offering the girls a dollar if they would go to Shilshole with him, Billups sought to entice the girls into his van. If the girls had complied, their movements would have been restrained by their presence in the van, and the restraint would have been "without consent" as they were both under age 16 and no parental consent had been given. See RCW 9A.40.010. Once they were restrained in the van, Billups would have been secreting or holding the girls in a place where they were not likely to be found. See RCW 9A.40.010(2)." *Id.* at 126-27.

Steven Ong only had permission to drive seven-year-old Christina to school, four blocks from her home. Instead, Ong drove Christina to a

remote location he described as a “good hiding place” that the police did not know about. *State v. Ong*, 88 Wash. App. 572, 576, 945 P.2d 749, 751 (1997). Based on this conduct, a jury convicted him of second degree kidnapping. *State v. Ong*, 88 Wash.App. at 573. Ong appealed, challenging the sufficiency of the evidence. *Id.* at 575.

The court found that Ong’s conduct was a material deviation, both in time and distance, from the trip for which Ong had permission. *Id.* at 576. The court also held “the jury could have found that the ‘good hiding place’ was a place where Christina was not likely to be found, and that “Christina was completely under Ong's control during the trip and the jury could have found that this substantially interfered with her liberty.” *Id.* at 576-77. Thus, the court held that the evidence was sufficient to convict Ong of second degree kidnapping. *Id.*

The Appellant relies on *Dillon* and *Michal*, however these cases are factually dissimilar to the case at bar, and are easily distinguishable.

In *Dillon*, the defendant was convicted of second degree child rape and first degree kidnapping with sexual motivation. *State v. Dillon*, 163 Wash.App. 101, 102, 257 P.3d 678 (2011). In this case, Dillon met L.M., a 13-year-old male, online and eventually made arrangements to meet. *State*

v. Dillon, 163 Wash.App. at 103. Dillon picked up L.M. at the child's request. *Id.*

Dillon took L.M. back to his apartment where a sexual encounter occurred. When L.M. requested that Dillon take him home, Dillon complied. *Id.* at 104.

The court held that there was “no evidence to infer that L.M.’s liberty was compromised or that Dillon intended to restrict L.M.’s movements.” *Id.* at 108. The court further reasoned, “it is pure speculation that Dillon would have refused to let L.M. get out of the car or return him to the rendezvous point anytime he wanted.” *Id.*

In *Michal*, the defendant was convicted of unlawful imprisonment after being found with Wendy Oldham, a 15-year-old runaway, in his vehicle. *State v. Michal*, No. 34744-3-III, 2018 WL 287502 at 1-2 (Wash.Ct.App. January 4, 2018, unpublished)¹. The court found that in order to “substantially restrict a passenger’s liberty” a defendant must do more than transport the passenger. *Id.* at 4.

In the *Michal* case, there was no evidence that Oldham did not wish to be in the truck or to travel with Michal, and there was no

¹ Unpublished opinion of the Court of Appeals are not precedential in value and are not binding on any court. However, they may be cited at non-binding authorities and accorded such persuasive value as the court deems fit. GR 14.1.

testimony that Michal compelled Oldham to enter the truck or forced her to remain. *Id.*

The State agrees that mere presence in a vehicle is not enough to prove restraint; however, the court must look at the totality of the circumstances. In this case, unlike *Dillon* and *Michal*, the victim was not a willing passenger. She did not know the Appellant, she physically fought his attempt to get her into his truck, and she immediately fled for help when she was able to break free.

It is clear that the rationale of *Stubsjoen*, *Missmer*, *Billups*, *Harris*, and *Ong* support a finding that the evidence in this case was sufficient to support the trial court's finding of guilt. There is substantial evidence to support the trial court's finding that the Appellant took a substantial step to abduct the victim. The Appellant physically grabbed the victim, thus restraining her. His intent was clearly to get her into his truck where she not likely have been found. This is especially true if the Appellant had been able to get the victim to his remote campsite, hidden in a heavily wooded area.

2. The State concedes that all discretionary Legal Financial Obligations (LFOs) should be stricken.

The State agrees that the discretionary LFOs in this case should be stricken, and this can be addressed upon remand to the trial court.

CONCLUSION

Taken in a light most favorable to the State, the evidence in this case is sufficient to support the trial court's findings of fact and conclusions of law. The Appellant's conviction for Attempted Kidnapping in the Second Degree should be affirmed.

DATED this 18th day of August, 2019.

Respectfully Submitted,

BY: 
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GRAYS HARBOR CO PROS OFC

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