

FILED
January 5, 2017
Court of Appeals
Division III
State of Washington

NO. 34076-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

RICHARD EUGENE YALLUP,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant sets forth three assignments of error. These can be summarized as follows;

ISSUE 1: When the evidence permitted the inference that Yallup restrained the individuals in the home to seek refuge from approaching police and did not intend to hold them as hostages, did the trial court err in declining to give Yallup's proffered instruction on unlawful imprisonment as to two charges of kidnapping?

ISSUE 2: When no evidence of monetary damage was presented at trial, and when the defendant expressly requests a restitution hearing at sentencing, is it error for the trial court to impose restitution in the judgment and sentence?

ISSUE 3: When the trial court sentences a defendant to 45 years in prison, finds him indigent for purposes of trial and appeal, and strikes discretionary legal financial obligations on the grounds that the defendant will be unable to pay them, is it clearly erroneous for the court to impose costs of incarceration on the defendant?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

Yallup has assigned error to three issues, the State's answer to those three allegation is as follows:

Issue 1: The facts presented support the charge of kidnapping. The court trial court's ruling denying the inclusion of was not error.

Issue 2: This case should be remanded to allow the defendant the restitution hearing that he is entitled to.

Issue 3: The State will agree to amend the original judgment and sentence, ex parte, to remove the costs of incarceration from the defendant's financial obligations rather than incur the cost of returning the defendant and conducting a resentencing hearing.

II. STATEMENT OF THE CASE

Yallup's crime spree began when he confronted Mr. Wilson Alvarado pointing a shotgun at his chest and while armed with that shotgun. RP 80-2, 84, 98. He stole, "carjacked" a red Honda Prelude car of Evoni Alvarado and Wilson Alvarado. RP 84-5, 96-7, 98. Both of the owners were physically working on or sitting in that red Prelude. RP 80, 83, 96. He drove the vehicle from their home being followed by Mr. Alvarado. RP 85-6, 91-2. Both Evoni and Wilson Alvarado called 911 to report this armed robbery. RP 79. He was soon being cases by numerous police officers in marked vehicles with the lights and sirens being used. RP

During this chase, which lasted over 24 miles (RP 106-08, 151, 312) he accelerated at and rammed two police cars, completely disabling one of the police cars. RP 111-13, 131. The officer who was driving the second police car that was rammed testified that he was actually able to see the undercarriage of the stolen Prelude after it rammed his car, the impact was that violent. RP 132. Yallup also drove the stolen car through the fence, the yard and a done kennel at private residence. RP 70-4, 117-19, 154-5, 165-6.

Officer Paganelli testified that he was part of the group of police

chasing Yallup. That he followed the red Prelude into an orchard when that car left the road and drove into the orchard. RP 168-9. The driver of the red Prelude left the car and ran into the orchard, the officer was at that time giving chase on foot. RP 169. Soon after Officer Paganelli began chasing Yallup he observed a muzzle flash and heard a gun being fired. RP 169-70. He testified that the weapon had to be pointed in his direction because he was able to see that muzzle flash. RP 169-70. Officer Paganelli return fire, firing four shots, moved a short distance then fired two more shots before returning to his police car because he had lost his radio in the chase. RP 170. While calling for assistance this officer heard one, possibly two more shots from the suspect. RP 171.

It was directly from the area that Yallup wrecked the Prelude and continued to flee the officers on foot where he took hostages in another private residence. RP 171. Office Paganelli was able to observe Yallup as he fled the crashed out car and head towards the home where he took the hostages. RP 172-3.

Mr. Nickolas Cervantes is the owner of a residence located on Cherry Lane in Yakima County. On the night that Yallup fled from the police, October 23, 2013, Mr. Cervantes was at home. In the home on that evening were he, his fiancé Corina Barrera, two sons, Emilio and Efrain. The other residents of the home, a daughter, Dominique, and two

grandkids where not home that evening. RP 185, 202. He and the occupants of the home had completed dinner and were watching the World Series when they heard gun shots outside the home. RP 186-7.

He heard shots outside his home and the occupants crouched down on the floor. Two of the shots were from his back porch and they were aimed into his home through his French doors. RP 186, 203-4. Mr. Cervantes heard someone come into his home yelling and head his fiancé screaming. He went over and locked the front door and made his way to his fiancé who he found was bleeding. After the shots were fired 911 was called by Ms. Barrera. RP 189. He then began to drag her towards a bedroom. RP 187. Mr. Cervantes drug Corina into a bathroom and tried to find where she was bleeding from. He testified there was blood pooling up and he could not find the source of the blood. RP 188-90. Nickolas testified that Ms. Barrera had been shot and still had three shotgun pellets in her. RP 207. As he was looking for her injury he heard Yallup order him out of the bathroom or Yallup would shoot Mr. Cervantes's son. RP 188-90.

Nickolas exited the bathroom with his hands up and was telling Yallup that he was not armed. RP 190. He observed Yallup, a person he did not know and whom he positively identified in open court, pointing a shotgun at his son. RP 190. Both Nickolas and Emilio Cervantes feared

for their lives. RP 190. The son, victim, Emilio told Yallup that there were keys for a truck on the counter and that he should just take them and leave. RP 191-2

Yallup was in the home for over an hour and during that time he pointed the shotgun at Nickolas on multiple occasions. Yallup threatened to kill, to shoot, Nickolas and Emilio numerous times during the kidnapping. RP 191-2. Yallup had Nickolas place his face on a window and Yallup yelled at the police outside that they needed to stay or he would “shoot this fucker.” RP 192-3. Nickolas’ goal was to keep Yallup calm and focused on him not the others in the house. RP 193. They were forced to take items such as mattresses and furniture and barricade the windows so that no one could see in. RP 193-4.

When Yallup was initially in the Cervantes home the only people who were present were Nickolas and Emilio. Yallup was told that there was no one else present in the home. This was done to protect the others from Yallup. Eventually Yallup discovered that Ms. Barrera was in the home and she was ordered out of the bathroom. RP 195. Ms. Barrera pleaded with Yallup to let Emilio go, the response by Yallup was “...he’s a fucking adult. He’s going to stay right there.” RP 194-5. Eventually Ms. Barrera was able to escape from the home. RP 195.

Throughout the Cervantes’ were ordered to continue to barricade

the home. Eventually Yallup ordered Nickolas onto his knees stating “he was getting tired of it.” Nickolas got onto his knees in an area between the bedroom and the bathroom where he was initially ordered out. He believed that his life was over at that point. Nickolas purposefully distracted Emilio so that he would not see his father being shot. It was at this time that Nickolas saw that the gun was pointed down and Yallup was not looking at him. Nickolas grabbed the gun and moved it down to the floor yelling for Emilio to come help. Emilio wrapped his arm around the throat of Yallup and wrapped his legs around Yallup. Nickolas was trying to pull the shotgun from Yallup’s hands but Yallup was resisting. At this time the second son, Efrain, came out of hiding and the three members of the Cervantes family began to kick and beat and hit Yallup trying to get the gun. They were eventually able to get the gun from Yallup. One of the sons ran from the home and officers entered and subdued Yallup. RP 197-8.

Nickolas testified that they were ordered to move throughout the home making barricades. RP 200-1, 208-10. He also testified that when ordered to his knees Yallup was pointing the shotgun right at this face. RP 216. Nickolas testified that the house had been damaged by the shotgun blasts, that the walls had pellets in them, the floor had been damaged and the French Doors were shot out. RP 207.

Emilio testified that he and his brother, Efrain, were outside when the first shots were fired and he saw the flashes from the early shots. When they heard and saw this they ran into their home. RP 221-2. He too testified that there were two additional shots that came through the backdoor of the home. That they all hit the floor when those shots were fired but that his mother also started screaming. RP 222-3. Emilio tried to get Yallup to leave by throwing his truck keys at him and telling him to just take the truck and leave. He further testified that Yallup ordered his father from the bathroom. RP 224.5.

Emilio testified that during what he estimated was two hours he and his father were ordered to go throughout the house and barricade windows and doors. RP 225. He testified that Yallup threatened to shoot he and his father if they did not do what he told them to do. RP 226-7, 234-5.

Emilio testified that when Yallup determined that Ms. Barrera was in the home he ordered her out of the bathroom. RP 227. He testified that he was very scared when Yallup ordered his father onto his knees. And, that was when his father was able to grab the gun. He and his father and his brother then beat on Yallup and were able to get the gun away. RP 229.

All family members who were in the house during the commission

of this crime testified that they had reviewed the 911 tape and that it was accurate and that it contained their voices and the voices of other members of the family. This tape was a continuous recording of what occurred inside the home during the commission of these crimes. This record was made when Ms. Barrera called 911 and then left the phone on and out after the call was made and she was dragged into the bathroom. RP 199, 229, 271. This recording was admitted and played for the jury. RP 392.

Efrain Cervantes testified that he was home on the night of the home invasion and that he was present when Yallup shot his way into the home. RP 246-8. He testified that after the shots came through the French doors he crawled into his sisters room and hid there until his father managed to subdue Yallup. RP 249. He was able to listen to the conversation between Yallup, his father, brother and mother throughout the time Yallup was in his home. RP 246-9. He testified that when he heard his father and brother struggling with Yallup he came out and began to hit and kick Yallup to assist getting the gun from him. He then went outside to get the police. RP 249-50.

Corina Barrera testified that she was home on the night of the home invasion and was on the phone calling 911 when there were shots fired through the French doors in her home. RP 261-2, 263. She testified that she was hit when the shots came through the French doors and

realized that she had been shot when she saw the blood as Nickolas was dragging her from the room. RP 263-4. She testified that she told 911 that there was someone shooting in her house and that that person was inside the house. RP 264. She purposefully left the phone on and hidden in an area outside the bathroom because; “I wanted somebody to hear what was going on to make sure somebody knew.” RP 264.

She testified that she remained in the bathroom after her husband left but she was able to hear conversation and some of the threats made by Yallup such as “[d]on’t F’ing move or I’m going to fucking kill you.” RP 265.

She testified that eventually Yallup came into the bathroom on two occasions and that she could see him with the gun. She overheard Yallup tell Nickolas that “she can come out.” RP 268. She asked Yallup if she could take her kids but Yallup stated that Emilio was a “fucking adult” and that he was staying. Ms. Barrera eventually left the house. RP 269.

She was found to have been shot twice in her arm and on her chest. RP 269-70.

Det. Perrault testified that he took a video of the interior of the Cervantes home after the crime scene was secure, the video, exhibit 95, was played for the jury. RP 352. This officer also took numerous photographs of the interior of the home. These included pictures of the

item that were used to barricade the home. RP 352-55, 364-74. These included photographs of the shotgun blast through the French doors, this blast was at the location of the door locks. RP 364-5. There were also photographs of the blood droplets, smears and pools that were found inside the Cervantes home. These were found from the kitchen into the master bedroom and then extended into the master bathroom. RP 366-67. Det. Perrault also testified that he seized the shotgun found in the Cervantes home, it was admitted as exhibit 6. RP 368. This officer also found two spent shotgun shells outside of the Cervantes home outside the French doors. RP 369-72.

The parties addressed the various issues regarding the jury instructions. The Court indicated that it would not give an instruction for the lesser included offense of unlawful imprisonment. RP 401-20 During this discussion counsel for Yallup discussed both unlawful imprisonment and kidnap in the second degree at the conclusion this exchange occurred:

THE COURT: So I'm not going to give the unlawful imprisonment as a lesser included offense of the two remaining counts of kidnapping. I think that satisfies that.

MR. DOLD: I have not offered them at this point, and I haven't done the mental gymnastics of a Kidnapping 2.

Yallup did supply the trial court with a proposed instruction for unlawful imprisonment. CP 15-4

III. ARGUMENT

Response to Allegation I – The trial court properly denied the use of a lesser included offense instruction for unlawful imprisonment.

This court will review a trial court's refusal to give a requested jury instruction de novo where the refusal is based on a ruling of law. State v. White, 137 Wn. App. 227, 230, 152 P.3d 364 (2007) (citing State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)). This court will review a trial court's refusal to give instructions to a jury, if based on a factual dispute, for abuse of discretion. Walker, 136 Wn.2d 767,771-72. A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615(1995).

The trial court need only allow those instructions which correctly apprise the jury of the law and enable a defendant to argue his defense theory. State v. Rice, 102 Wn.2d 120, 123, 683

As the trial court discussed over and over with the parties the error in the proposed instruction for Unlawful Imprisonment is that the case law in this State clearly mandates that such an instruction need only be included if the proof of the lesser included is to the exclusion of the greater. The trial court pointed out to both parties that the **facts** did not support giving the now challenged instruction, the trial court was correct:

THE COURT: Well, doesn't there have to be some evidence that there was no abduction? An (sic) deduction means to restrain a person by either secreting or holding a person in a place where that person is not likely to be found or using or threatening to use deadly force.

MR. DOLD: Yes, but you have to go the one step further in Kidnap 1 to be a second degree.

THE COURT: Well, I'm saying there's no -- what's the evidence that there was no deadly force used?

MR. DOLD: There isn't. RP 402.

...

THE COURT: Yeah. I'm not talking elements. I'm talking evidence. One of the elements of kidnapping as opposed to unlawful imprisonment is abduction. Abduction occurs when you secrete or hold a person in a place where that person is not likely to be found or by using or threatening to use deadly force.

MR. DOLD: Okay.

THE COURT: So I think in order for the jury to be able to find that there was no abduction, the jury would have to find that there was no deadly force and there was. There is no evidence that the force that was employed was anything other than deadly force. RP 403

...

MR. CAMP: Unlawful imprisonment is a lesser included.

THE COURT: There still has to be evidence to support it.

MR. CAMP: Right. So that would mean that is there evidence that would support that on or about the defendant restraining –

THE COURT: Support it to the exclusion of the greater. My view, in order to make that case, if you would, there has to be some evidence that the force that was employed was something less than deadly force, and there is no such evidence of that. RP 404

...

THE COURT: You know, the analysis is a legal prong. The factual prong may well be that the legal prong is satisfied here but the factual is not.

MR. DOLD: Okay.

THE COURT: So I'm not going to give the unlawful imprisonment as a lesser included offense of the two remaining counts of kidnapping. I think that satisfies that.

MR. DOLD: I have not offered them at this point, and I haven't done the mental gymnastics of a Kidnapping 2. RP 408.

Whether a defendant is entitled to a lesser included instruction is analyzed under the two-pronged test outlined in State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). First, each of the elements of the lesser offense must be a necessary element of the charged offense (the "legal prong"). State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997) (citing Workman, 90 Wn.2d at 447-48). Second, the evidence must raise an inference that only the lesser offense was committed to the exclusion of the charged offense (the "factual prong"). State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150(2000). When analyzing the factual prong, we view the evidence in the light most favorable to the party who requested the instruction at trial. Fernandez-Medina, 141 Wn.2d at 455-56. However, "the evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." Fernandez-Medina, 141 Wn.2d at 456. This court will review a trial court's refusal to give instructions to a jury, if based on a factual dispute, for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses

its discretion if its decision "is manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Further, the court did allow, at the State's request, the inclusion of the lesser included of kidnapping in the second degree. The jury found the greater offense and not the lesser. For the sake of this argument even if the State were to concede that both the legal and the factual prongs supported the inclusion of the unlawful imprisonment charge there is still not error. State v. Condon, 182 Wn.2d 307, 332-3, 343 P.3d 357 (2015)

But Parker is not controlling because in this case, the jury was not given an all-or-nothing choice. Other Washington courts have found the failure to give a lesser included instruction harmless where the jury was not presented with an all-or-nothing choice, and an omitted instruction would have been necessarily rejected because it is logically inconsistent with the verdicts the jury actually reached. State v. Guilliot, 106 Wn.App. 355, 368-69, 22 P.3d 1266 (2001); State v. Hansen, 46 Wn.App. 292, 296, 730 P.2d 706 (1986). We should follow this analytical approach.

State v. Hansen, 46 Wn.App. 292, 730 P.2d 706 (1986) cited in Condon, was first to address this very issue. There the court agreed with the State when it conceded that the factual and legal prongs had been met, determining there was no error. "An error in failing to instruct on a lesser included offense does not require reversal if the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant

under other, properly given instructions. People v. Ramkeesoon, 39 Cal.3d 346, 702 P.2d 613, 616, 216 Cal.Rptr. 455, 458 (1985)...In the case at bar, the jury was instructed on the intermediate offense of second degree kidnapping. If the jury believed that Hansen was less culpable because of his drug-induced mental disorder, logically it would have returned a conviction on the lesser crime of second degree kidnapping.... In our view, the jury's verdict on the highest offense was an implicit rejection of all lesser included offenses..."

Condon and Hansen are directly on point and controlling in this case. Condon was cited by the state when it agreed with the trial court that the lesser included of unlawful imprisonment was unwarranted and it cited it later when the State argued to the court that the trial court needed to include the lesser included of kidnapping in the second degree. RP 407, 419-20.

It may have been error to include this instruction, "it is error to give an instruction which is not supported by the evidence." State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993) (citing State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)).

Starting with the unsupported premise that this was somehow an error, the facts presented are sufficient to uphold the convictions for kidnapping, the standard of review if this was error is; would any

reasonable jury have found Yallup guilty of the kidnapping despite the alleged error. State v. Clark, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001) “The test for harmless error is whether the state has overcome the presumption of prejudice when a constitutional right of the defendant is violated when, from an examination of the record, it appears the error was harmless beyond a reasonable doubt or whether the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached.” (Citations omitted.) State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985) is applicable in this case “Under the "overwhelming untainted evidence" test, the appellate court; looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” In reviewing a challenge to the sufficiency of the evidence, this court will view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

Yallup must admit the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas,

119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt.

While the defendant has the absolute right not to take the stand that presents the jury with only the State's witnesses and their testimony on both direct and cross-examination. The rule of law says that credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The State has set out a detailed statement of facts in this case in order for this court to see that the trial court was correct, the facts do not support the giving of a lesser included instruction to unlawful imprisonment. The facts do not establish this lesser charge to the exclusion of the greater a fact that was pointed out numerous times by the trial court during the long and detailed discussion between that court and the parties regarding this issue.

While the defendant did not grab the victims and literally use them as a shield they were held hostage and they were the only people that the

officers were able to see moving about the interior of the home barricading it from the police, thereby shielding the defendant. There is and was absolutely no dispute from any witness that Yallup was armed with a shotgun, that he literally used that weapon, twice, to blast his way into the Cervantes's home. He then proceeded to use that weapon to threaten the lives of all of the victims. He was even overheard by the police outside the residence and he was recorded on the 911 tape threatening to once again use this weapon.

The evidence does NOT, support the proposed lesser included offense unlawful imprisonment to the exclusion of the greater. The evidence supported no other charge than kidnapping. The State correctly proposed that the lesser included offense of kidnapping in the second degree be presented to the jury. That jury considered the evidence and even when given the choice of finding second degree kidnapping refused that choice and found Yallup guilty of the greater offense. As Condon and Hansen set forth, this determination by the jury negates any possible error for "failing" to present the jury with the lesser included offense of unlawful imprisonment.

Response to issue 2 – Failure to conduct restitution hearing.

The defendant had a right to have a hearing to determine the amount of restitution for which he was liable. His counsel

specifically requested that if the court was going to impose restitution that a hearing be conducted, this did not occur.

This case should be remanded to allow the defendant the restitution hearing that he is entitled to.

Response to Issue 3: Costs of incarceration.

In order to present the scarce resources of the court, the State and the trial court the State would request leave of this court to file an order, ex parte, amending the Judgment and Sentence which simply strikes section 4.D.4 from the original judgment and sentence. This solution is proposed so that rather than incurring the cost of returning the defendant to the custody of Yakima County, appointing counsel, setting a hearing date and time and conducting that hearing the one section shall simply be struck and the defendant shall not be liable for any costs of incarceration.

Response to Issue 4 – Appellate costs.

State v. Sinclair, 192 Wn.App. 380, 385-86, 388-90, 367 P.3d 612 (quoting RAP 14.2), review denied 185 Wn.2d 1034 (2016) “The commissioner or clerk “will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs otherwise in its decision terminating review. "... When a party raises the issue in its brief, we will exercise our discretion to decide if costs are

appropriate.... We base our decision on factors the parties set forth in their briefs rather than remanding to the trial court.”

While the State has the legal right to request costs in this case and the State fully expects to “substantially prevail” the State has not asked for nor will it ask for appellate costs in this case when it prevails.

IV. CONCLUSION

For the reasons set forth above this court should deny this appeal.

Respectfully submitted this 5th day of Janu 2016,

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DECLARATION OF SERVICE

I, David B. Trefry state that on January 3, 2017 emailed a copy, by agreement of the parties, of the Respondent's Brief, to Andrea Burkhardt at andrea@burkhartandburkhart.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of January, 2017 at Spokane, Washington.

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AMENDED DECLARATION OF SERVICE

I, David B. Trefry state that on January 5, 2017 I emailed a copy, by agreement of the parties, of the Respondent's Brief, to Andrea Burkhart at andrea@burkhartandburkhart.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of January, 2017 at Spokane, Washington.

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