

NO. 34744-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

TODD MICHAL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable John O. Cooney, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE STATE BORE THE BURDEN TO PROVE MICHAL KNOWINGLY RESTRAINED W.O.....	1
2. THE STATE FAILED TO PROVE MICHAL RESTRICTED W.O.'S MOVEMENTS.....	4
B. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

Page

Washington Cases

Hildahl v. Bringolf,
101 Wn. App. 634, 5 P.3d 38 (2000).....1

Protect the Peninsula’s Future v. City of Port Angeles,
175 Wn. App. 201, 304 P.3d 914 (2013)).....1

Ruse v. Dep’t of Labor & Indus.,
138 Wn.2d 1, 977 P.2d 570 (1999).....1

State v. Billups,
62 Wn. App. 122, 813 P.2d 149 (1991).....2, 3, 4

State v. Dillon,
163 Wn. App. 101, 257 P.3d 678 (2011).....2, 3, 4

State v. Johnson,
180 Wn.2d 295, 325 P.3d 135 (2014).....1

State v. Semakula,
88 Wn. App. 719, 946 P.2d 795 (1997).....2

State v. Warfield,
103 Wn. App. 152, 5 P.3d 1280 (2000).....1, 2

State v. Williams,
125 Wn. App. 335, 103 P.3d 1289 (2005),
aff’d, 158 Wn.2d 904 (2006).....2

Rules, Statutes, and Other Authorities

RCW 9A.40.010.....2

RCW 9A.40.040.....1

A. ARGUMENT IN REPLY

1. THE STATE BORE THE BURDEN TO PROVE MICHAL KNOWINGLY RESTRAINED W.O.

To convict him of unlawful imprisonment the State was required to prove Michal “knowingly restrain[ed]” W.O. RCW 9A.40.040. Without knowledge that his conduct amounted to restraint, he lacked the mens rea required by law for his conviction. The State’s reliance on State v. Johnson, 180 Wn.2d 295, 302, 325 P.3d 135 (2014), is misplaced.

In addition to the reasons discussed in the opening Brief of Appellant, the Johnson court’s discussion rejecting this argument is dicta. A statement is dicta when it is not necessary to the court’s holding in a case. Ruse v. Dep’t of Labor & Indus., 138 Wn.2d 1, 8-9, 977 P.2d 570 (1999). Because the only question before the court in Johnson was the sufficiency of the charging document, the court’s discussion of the sufficiency of the evidence was unnecessary to that holding and is, therefore, dicta. “Dicta is not binding authority.” Protect the Peninsula’s Future v. City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914 (2013) (citing Hildahl v. Bringolf, 101 Wn. App. 634, 650-51, 5 P.3d 38 (2000)).

The State argues it is only the decision in State v. Warfield, 103 Wn. App. 152, 5 P.3d 1280 (2000), that requires the State to prove knowledge as

to all parts of the definition of restrain. Brief of Respondent at 14. This argument is inaccurate. It is the legislature that has required the State to prove knowledge. Warfield merely interpreted the statutory element according to the rules of grammar.

In order to “knowingly restrain” as the legislature has required, it is logical that a person must be aware of all aspects of the definition of restraint. In this case, that includes the age of the person. Michal is not arguing he must be aware of the law. Although a person need not be aware his or her conduct is unlawful, he or she must, for a criminal conviction to stand, be aware of the facts or circumstances that make that conduct unlawful. State v. Williams, 125 Wn. App. 335, 340, 103 P.3d 1289 (2005), aff’d, 158 Wn.2d 904 (2006); Warfield, 119 Wn. App. at 878-79; State v. Semakula, 88 Wn. App. 719, 726, 946 P.2d 795 (1997). In this case, the circumstance that makes Michal’s conduct unlawful is W.O.’s age. RCW 9A.40.010(6). Without knowledge of her age, he is guilty of nothing more than permitting someone to ride in his car.

Neither State v. Billups, 62 Wn. App. 122, 813 P.2d 149 (1991), nor State v. Dillon, 163 Wn. App. 101, 106-07, 257 P.3d 678 (2011), expressly considered the legal question of whether the State needed to prove knowledge of the person’s age when the State relied on the acquiescence of a minor prong of the restraint definition. Billups was an attempt case, and the

sufficiency argument only went so far as to show intent to kidnap and a substantial step. 62 Wn. App. at 126-27. Dillon did not analyze the legal question because, in that case, it was “undisputed that the State proved the ‘without consent’ of the restraint by virtue of L.M.’s age.” 163 Wn. App. at 107. The court did not discuss the knowledge element or what knowledge was required because Dillon disputed only whether the young man’s movements were actually restricted. Id. at 106-09.

Moreover, both cases are factually distinguishable. As the State points out, there was evidence the adolescent in Dillon had actively misrepresented his age. 163 Wn. App. at 103. And, the court concluded Dillon had not restricted his freedom of movement. Therefore, there was no need to discuss whether proof of knowledge would be required without that evidence.

In Billups, on the other hand, the girls were ages 10 and 11, in other words, young enough for their youth to be obvious. 62 Wn. App. at 124. Anyone who saw a child of that age could reasonably be assumed to know they were under 16, thus, the mere fact of having seen them was clear and convincing circumstantial evidence of the requisite knowledge. With this circumstantial evidence so obvious, there was, again, no need for the case to discuss that element.

By contrast, this case deals with an adolescent, mere months away from the age at which she could freely consent to riding in anyone's car that she chose. There was no basis to infer that anyone who saw her would automatically know she was under 16. And the State is correct that there is no evidence whether or not W.O. attempted to mislead Michal about her age. Therefore, in this case, unlike Dillon or Billups, the question of precisely what knowledge the State must prove is squarely presented.

2. THE STATE FAILED TO PROVE MICHAL RESTRICTED W.O.'S MOVEMENTS.

The State also argues there was no evidence W.O. was willingly or voluntarily in Michal's car. Brief of Respondent at 26. First, the State did not seek to prove there was actual coercion or force used to restrain her. RP 128. It relied on the acquiescence prong of the definition, arguing that any control, however slight amounted to the necessary restraint because the parents did not consent. RP 128. It did not argue there was any conduct that could have overcome a lack of consent on W.O.'s part.

Moreover, there is evidence from which a reasonable jury could infer she was willingly in the car. First, as the State points out, W.O.'s mother testified she believed W.O. voluntarily spent long periods of time away from her family and with Michal. RP 80-81, 84-85. When asked why she was in the car, Michal told police he was taking her to call her mother. RP 108.

Whether his statement is believable or not, it is inferable that he was doing her a favor, i.e., driving her to a phone at her request.

The State also argues there is no evidence Michal would have let her get out of the car if she had asked to do so. Brief of Respondent at 29. Doing a favor for someone, as he claimed to be doing, indicates a willingness to act at that person's behest. If Michal were willing to drive her somewhere at her request, it is reasonable to infer he would also be willing to stop driving her somewhere at her request. Merely transporting someone in a car was insufficient to prove restraint in Dillon, and it is insufficient here. 163 Wn. App. at 108-09. Michal's conviction should be reversed.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Michal requests this Court reverse his conviction.

DATED this 12th day of June, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON
JENNIFER M. WINKLER

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI
E. RANIA RAMPERSAD

State V. Todd Michal

No. 34744-3-III

Certificate of Service

On June 12, 2017 I e-filed and e-served the reply brief of appellant directed to:

Brian O'Brien
bobrien@spokanecounty.org
SCPAappeals@spokanecounty.org

Todd Michal
41121 N Short Rd
Deer Park, WA 99006

Re: Michal
Cause No., 34744-3-III in the Court of Appeals, Division III, for the State of Washington.

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



John Sloane
Office Manager
Nielsen, Broman & Koch

06-12-2017
Date
Done in Seattle, Washington

NIELSEN, BROMAN & KOCH P.L.L.C.

June 12, 2017 - 1:53 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34744-3
Appellate Court Case Title: State of Washington v Todd Robert Michal
Superior Court Case Number: 15-1-01659-9

The following documents have been uploaded:

- 347443_Briefs_20170612135125D3991625_8200.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was RBOA 34744-3-III.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- nielsene@nwattorney.net
- scpaappeals@spokanecounty.org

Comments:

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Jennifer J Sweigert - Email: SweigertJ@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20170612135125D3991625