

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

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>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENTS</u>	4
1. THE STATE FAILED TO PROVE MICHAL ACTED KNOWINGLY WITH RESPECT TO THE STATUTORY DEFINITION OF RESTRAINT.....	4
a. <u>The Knowledge Requirement of Unlawful Imprisonment Applies to Every Aspect of the Statutory Definition of Restrain</u>	5
i. <u>Under J.M. and Warfield, the adverb “knowingly” modifies all parts of the definition of the verb “restrain.”</u>	6
ii. <u>Johnson’s holding that the definition of restraint need not be included in the charging document does not affect the validity of the analysis in Warfield or J.M.</u> 10	
iii. <u>The law of the case doctrine, at issue in State v. Price, does not affect the validity of the analysis in Warfield or J.M. as applied to this case.</u>	12
b. <u>The State Failed to Present Evidence Establishing Beyond a Reasonable Doubt that Michal Knew W.O.’s Age.</u>	17

TABLE OF CONTENTS (CONT'D)

	Page
2. THE STATE FAILED TO PROVE MICHAL RESTRAINED W.O. WHEN HE DID NOT SIGNIFICANTLY RESTRICT HER FREEDOM OF MOVEMENT.	20
D. <u>CONCLUSION</u>	23

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Welfare of A.B.</u> 168 Wn.2d 908, 232 P.3d 1104 (2010).....	19
<u>State v. Barbee</u> 187 Wn.2d 375, 386 P.3d 729 (2017).....	6
<u>State v. Berg</u> 181 Wn.2d 857, 337 P.3d 310 (2014).....	17
<u>State v. Billups</u> 62 Wn. App. 122, 813 P.2d 149 (1991).....	22, 23
<u>State v. Bunker</u> 169 Wn.2d 571, 238 P.3d 487 (2010).....	7
<u>State v. Crocker</u> 196 Wn. App. 730, 385 P.3d 197 (2016).....	6, 15
<u>State v. Crowder</u> 196 Wn. App. 861, 385 P.3d 275 (2016).....	11, 16
<u>State v. Dillon</u> 163 Wn. App. 101, 257 P.3d 678 (2011).....	20, 21, 22, 23
<u>State v. Dunn</u> 180 Wn. App. 570, 321 P.3d 1283 (2014).....	9
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980).....	17
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998).....	15, 19, 23
<u>State v. Hughes</u> 166 Wn.2d 675, 212 P.3d 558 (2009).....	6

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. J.M.</u> 144 Wn.2d 472, 28 P.3d 720 (2001).....	6, 7, 9, 10, 12, 14, 16
<u>State v. Johnson</u> 180 Wn.2d 295, 325 P.3d 135 (2014).....	4, 10, 11, 12
<u>State v. Levage</u> 23 Wn. App. 33, 594 P.2d 949 (1979).....	13
<u>State v. McKague</u> 172 Wn.2d 802, 262 P.3d 1225 (2011).....	12
<u>State v. Ong</u> 88 Wn. App. 572, 945 P.2d 749 (1997).....	22, 23
<u>State v. Price</u> 33 Wn. App. 472, 655 P.2d 1191 (1982).....	12, 13, 14, 15, 16
<u>State v. Rich</u> 184 Wn.2d 897, 365 P.3d 746 (2016).....	12, 17, 19, 23
<u>State v. Robinson</u> 20 Wn. App. 882, 582 P.2d 580 (1978).....	21
<u>State v. Sims</u> 14 Wn. App. 277, 539 P.2d 863 (1975).....	14
<u>State v. Stevens</u> 158 Wn.2d 309, 143 P.3d 817 (2006).....	12, 16
<u>State v. Varnell</u> 162 Wn.2d 165, 170 P.3d 24 (2007).....	6
<u>State v. Vasquez</u> 178 Wn.2d 1, 309 P.3d 318 (2013).....	17
<u>State v. Warfield</u> 103 Wn. App. 152, 5 P.3d 1280 (2000).....	4, 6, 7, 9, 10, 11, 12, 14, 16

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

In re Winship

397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 17

Jackson v. Virginia

443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... 17

RULES, STATUTES AND OTHER AUTHORITIES

GR 14.1 9

RCW 9A.40.010 2, 5, 6, 13, 15, 16, 19, 20, 21

RCW 9A.40.040 1, 4, 5, 14, 16, 19, 20

U.S. Const. amend. XIV 17

Const. art. I, § 3..... 17

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to establish beyond a reasonable doubt that appellant knowingly restrained W.O., a person under the age of 16.

2. The court erred in concluding the State did not have to prove whether appellant knew W.O. was under 16. CP 54 (Conclusion of Law 4).

3. The court erred in concluding appellant substantially interfered with W.O.'s liberty merely because W.O. was in a vehicle he was driving. CP 54 (Conclusion of Law 5).

4. The court erred in concluding appellant knowingly restrained W.O.

5. In the absence of substantial evidence in the record, the court erred in finding appellant guilty of unlawful imprisonment.

Issues Pertaining to Assignments of Error

1. Under RCW 9A.40.040, a person commits the crime of unlawful imprisonment by knowingly restraining another person. Restraint is defined as restricting a person's movements without consent. The statutory term "without consent" includes the person's acquiescence only if the person is under the age of 16. Appellant was found driving a car with a passenger, W.O., who was 15 years old. When there was no

evidence appellant knew W.O. was under 16, did the State fail to prove he knowingly restrained her?

2. For purposes of unlawful imprisonment under RCW 9A.40.010, restraint requires a restriction of freedom of movement that constitutes a substantial interference with the person's liberty. When the only evidence of restricted movement was riding in a moving vehicle and there was no sign appellant would not have stopped to let W.O. get out if she wished, did the State fail to prove appellant substantially interfered with her liberty?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Spokane County prosecutor charged appellant Todd Michal with unlawful imprisonment.¹ CP 1, 44. After a bench trial, the court found Michal guilty. CP 1, 44, 60. The court concluded that, as a matter of law, the State did not have to prove Michal knew W.O., the passenger in his truck was under the age of 16 and deemed W.O. restrained by virtue of being in a moving vehicle. CP 54. Notice of appeal was timely filed. CP 73.

2. Substantive Facts

Michal was pulled over by law enforcement while driving his truck just outside Deer Park, Washington. RP 98-99. Deputy Daniel Dutton

¹ The prosecutor moved to dismiss charges of third-degree rape of a child and commercial sexual abuse of a minor. CP 1, 44; RP 41-45.

recognized Michal's truck and had been told that a runaway teenager might be with him. RP 98. When Dutton approached the driver's door, he saw Michal in the driver's seat and a young woman lying down on the bench seat next to him. RP 99-100.

Dutton asked Michal who the young woman was, and Michal responded with W.O.'s name. RP 100. Dutton then asked the young woman her name, and she confirmed her identity. RP 101. Michal told Dutton he was taking W.O. to a local convenience store to call her mother. RP 108.

W.O.'s mother testified her daughter was born July 15, 1999, making her 15 years old on March 19, 2015 when she was found in Michal's truck. RP 69. She testified W.O. was a smart, talented, outgoing young woman. RP 69. She also explained that W.O. had run away before, the first time in 2012 at age 13. RP 70. The mother testified that she did not give permission for W.O. to ride in a car with Michal. RP 81-83.

Detective Jeffrey Mitchell had spoken with Michal by phone a few weeks earlier. RP 117. Mitchell asked Michal if W.O. was with him; Michal said she was not. RP 117. Mitchell warned Michal that she was a runaway and he could be charged if she were found in his company. RP 117. Nothing in Mitchell's report indicated whether or not he told Michal W.O.'s age. RP 123.

The court found W.O. was a 15-year-old runaway when she was found in Michal's car. CP 50, 52. The court found neither of her parents gave Michal permission to have custody or control over her. RP 51. Although W.O. was not restrained in any way and nothing prevented her from opening the door, the court concluded her freedom of movement was restricted because it was unsafe to exit a moving car that was unsafe to exit. CP 52, 54. The court found Michal's statements not credible because he could have called W.E.'s mother without bringing her with him to the convenience store and because W.E. was lying in the front seat trying to hide. CP 52. The court entered a written conclusion of law that, under State v. Johnson² and State v. Warfield,³ the State was not required to prove Michal knew W.O. was under 16. CP 54. The court concluded Michal acted knowingly with respect to all elements except W.O.'s age. CP 54.

C. ARGUMENT

1. THE STATE FAILED TO PROVE MICHAL ACTED KNOWINGLY WITH RESPECT TO THE STATUTORY DEFINITION OF RESTRAINT.

A conviction for unlawful imprisonment cannot stand without proof beyond a reasonable doubt of the mental state that the person "knowingly" restrained another. RCW 9A.40.040. The necessary restraint can be

² State v. Johnson, 180 Wn.2d 295, 304, 325 P.3d 135 (2014).

³ State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000).

achieved by “acquiescence” under the statutory definition only if the person is under the age of 16. RCW 9A.40.010(6). Therefore, Michal could not have knowingly restrained W.O. without knowing she was under 16. Because the State failed to present evidence that Michal knew W.O.’s age, the State’s proof on this mental element fails, and Michal’s conviction must be reversed for insufficient evidence.

a. The Knowledge Requirement of Unlawful Imprisonment Applies to Every Aspect of the Statutory Definition of Restrain.

The crime of unlawful imprisonment is committed when a person “knowingly restrains another person.” RCW 9A.40.040. The statutory term “restrain” is defined as “to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his or her liberty.” RCW 9A.40.010(6). The statutory term “without consent” has a two-part definition. The first part comports with common understanding and defines “without consent” to mean “accomplished by (a) physical force, intimidation, or deception.” RCW 9A.40.010(6).

The second part is less intuitive, and applies only to certain persons. In addition to its ordinary meaning, restraint occurs “without consent” if it is achieved by “(b) any means including acquiescence of the victim, if he or she is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or

custody of him or her has not acquiesced.” RCW 9A.40.010(6). This second part of the definition is at issue in this case.

The court ruled that the element of “knowingly” applied only to the facts constituting the restraint, not to the age of the person. RP 149-50; CP 54. This interpretation of the statute is incorrect. Under the plain language of the statute, the rules of grammar, and the legislative intent, the adverb “knowingly” applies to every part of the applicable definition of restrain. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001); State v. Warfield, 103 Wn. App. 152, 5 P.3d 1280 (2000).

- i. Under J.M. and Warfield, the adverb “knowingly” modifies all parts of the definition of the verb “restrain.”

Statutory interpretation is a question of law reviewed de novo, with the goal of giving effect to the legislative intent. State v. Crocker, 196 Wn. App. 730, 735, 385 P.3d 197 (2016). Courts generally presume the Legislature means what it says, and statutory interpretation begins with the plain language of the statute. State v. Barbee, 187 Wn.2d 375, ___, 386 P.3d 729, 733 (2017) (citing State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007)). When the plain language is unambiguous, no further analysis is necessary. Id. (citing State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009)). “A statute that is clear on its face is not subject to judicial construction.” J.M., 144 Wn.2d at 480. Consideration of basic rules of

grammar is part of understanding the plain language of the statute. State v. Bunker, 169 Wn.2d 571, 578, 238 P.3d 487 (2010).

Here, the plain language, viewed through the lens of the basic rules of grammar, shows that the statute requires knowledge of the person's age. When an adverb such as "knowingly" modifies a verb, the knowledge requirement applies to every aspect of the definition of the verb. J.M., 144 Wn.2d at 480-81. At issue in J.M. was the felony harassment statute prohibiting threats to kill. Id. at 474. The question before the court was whether the accused must know or intend that the threat would be communicated to the person threatened. Id. The court rejected this proposition, but analyzed how much a person must know in order to knowingly threaten. The court concluded that the person must not only knowingly utter the words that constitute the threat, but must also know that he or she is imparting a communication that constitutes a threat of intent to cause bodily injury to the person threatened or to another person. Id. at 481. The court reasoned that, because the adverb "knowingly" modifies the verb "threaten," it necessarily "relates to each part of the applicable definition of 'threat.'" Id.

For this proposition, the J.M. court cited Warfield, 103 Wn. App. 152, a case involving the unlawful imprisonment statute at issue in this case. J.M., 144 Wn.2d at 480. Warfield held, "the statutory definition of unlawful

imprisonment, to ‘knowingly restrain,’ causes the adverb ‘knowingly’ to modify all components of the statutory definition of ‘restrain,’ including the ‘without lawful authority’ component.” 103 Wn. App. at 153-54.

In Warfield, private citizens detained a man believing they had lawful authority to do so based on a misdemeanor arrest warrant from Arizona. Id. at 154-55. On appeal, the State argued the “knowingly” element of the unlawful imprisonment statute applied only to the fact of restricting the person’s movement, not to any other aspect of the definition of restrain. Id. at 156. Division Two of this Court rejected that argument, declaring, “neither the plain language of the unlawful imprisonment statute nor the legislative history supports the State’s contention.” Id. The court concluded that the adverb “knowingly” modifies all four components of the statutory definition of restrain: “(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.” Id. at 157.

In addition to being “clear on its face,” the court found this reading was “supported by legislative history.” Id. at 156. The court analyzed the Model Penal Code provisions from which Washington’s modern criminal code is derived, and found that it supported the plain language that “knowingly” modifies all aspects of the definition of restrain. Id. at 158-59. Specifically, the comments to the analogous model penal code provisions

expressed the concern that, without requiring knowledge that the restraint was without lawful authority, peace officers might be hampered in the exercise of their official duties. Id. at 159. Without requiring knowledge of every aspect of the definition of restrain, innocent bus drivers may also be criminally implicated for unknowingly transporting underage persons without parental consent.

While acknowledging the general rule that, “ignorance of the law is no excuse,” the court held that knowledge is a statutory element of the offense of unlawful imprisonment. Id. at 159. Therefore, the court reversed and dismissed, finding the State had failed to present evidence the defendants knew their restraint was without lawful authority. Id.

Under both Warfield and J.M., the “knowingly” element of unlawful imprisonment requires proof of knowledge of every aspect of the applicable definition of restrain. J.M., 144 Wn.2d at 481; Warfield, 103 Wn. App. at 158-59. Division Two of this Court appears to agree. In the unpublished portion of its decision in State v. Dunn, 180 Wn. App. 570, 575, 321 P.3d 1283 (2014),⁴ the court applied this rule to declare precisely what knowledge must be proved in an unlawful imprisonment case:

Thus, the State needs to prove that Dunn knew that (1) he did not have lawful authority to restrict the girls’ movements

⁴The unpublished portion of this decision is cited under GR 14.1, has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate.

(i.e., Dunn was not the girls' parent or legal guardian), (2) the girls were under the age of 16, and (3) the girls' parents had not given their consent. Dunn did not need to know that these actions were a crime.

Id. (emphasis added).

- ii. Johnson's holding that the definition of restraint need not be included in the charging document does not affect the validity of the analysis in Warfield or J.M.

Despite Warfield and J.M., the trial court in this case concluded the State did not have to prove Michal knew W.O. was under 16. CP 54. It appears the court was led astray by the tangential, but not directly pertinent limiting of Warfield in State v. Johnson, 180 Wn.2d 295, 302, 325 P.3d 135 (2014).

In Johnson, the Court of Appeals had reversed an unlawful imprisonment conviction because the information did not contain the definition of "restrain." 180 Wn.2d at 298. The Supreme Court reversed and reinstated the conviction on the grounds that the charging document need only contain the essential elements of the offense, not statutory definitions. Id.

Johnson argued Warfield required including the statutory definition of restrain in the information. The court rejected this argument for several reasons. First, the sufficiency of the charging document was not at issue in Warfield. Johnson, 180 Wn.2d at 303. Second, the court declined to apply

Warfield, a case of bounty hunters with a good faith belief in their lawful authority under an arrest warrant, to Johnson's case, which involved domestic violence and no possible good faith belief in any lawful authority to restrain. Johnson, 180 Wn.2d at 304.

In holding that the definition of restrain need not appear in the information, the Court declared that it was limiting Warfield to the unusual facts of that case:

Because the Warfield defendants had a good faith belief that they had legal authority to restrain the victim, Warfield is a unique case. The Warfield court's logic does not extend to most unlawful imprisonment cases—particularly those involving domestic violence—where there is no indication that the defendants believed they actually had legal authority to imprison the victim. Today we clarify that Warfield's holding is limited to those unique cases where the defendant had a good faith belief that he or she had legal authority to imprison a person.

Johnson, 180 Wn.2d at 304.

But Johnson's rejection of the Warfield rule in the context of gauging the sufficiency of the charging document has no bearing on the sufficiency of the evidence here. Johnson hinges on whether the absence of lawful authority to restrain constitutes an element of the offense or is merely definitional. 180 Wn.2d at 302. This distinction matters greatly in the context of the sufficiency of the charging document. State v. Crowder, 196 Wn. App. 861, 869, 385 P.3d 275 (2016). But it is of no moment in the

context of a challenge to the sufficiency of the evidence. Id. Every fact necessary to make a person’s conduct criminal must be proved, regardless of whether the fact is described as an element or a definition. See id. (citing State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006); State v. Rich, 184 Wn.2d 897, 365 P.3d 746 (2016); State v. McKague, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011)).

Under Johnson, the definition of restrain may perhaps be omitted from a charging document without compromising the validity of the conviction. But Johnson does not answer the question in this case: whether proof is required of the mental element of “knowingly” as to every part of the definition of restraint. Both J.M. and Warfield make clear that it does. J.M., 144 Wn.2d at 481; Warfield, 103 Wn. App. at 158-59.

- iii. The law of the case doctrine, at issue in *State v. Price*,⁵ does not affect the validity of the analysis in *Warfield* or *J.M.* as applied to this case.

In response, the State may argue J.M. and Warfield are in conflict with State v. Price, 33 Wn. App. 472, 474-75, 655 P.2d 1191 (1982). Price was charged with grabbing a young woman by the throat, choking her, and threatening her. Id. at 473. She claimed he forced her to walk to a nearby porch where he told her to take off her clothes and lay on top of her. Id. The jury was instructed that restraint without consent may be achieved by

⁵ 33 Wn. App. 472, 474-75, 655 P.2d 1191 (1982).

acquiescence of a minor or by physical force, intimidation or deception. Id. at 474. On appeal, Price challenged the jury instruction, which read in relevant part:

Restraint is without consent if it is accomplished by physical force, intimidation or deception or any means including acquiescence, if the victim is a child less than 16 years old and if the parent has not acquiesced.

Id. at 474 n. 1. Price argued the jury should have been specifically instructed it had to find that he knew the young woman was under 16. Id. at 474.

The court rejected this argument relying on the law of the case doctrine and the rule that jury instructions reflecting the language of the statute are not generally incorrect. Id. at 474-75. The court reasoned that the instruction was the law of the case on appeal because no objection had been raised at trial. Id. Next, the court stated that neither the instruction nor the statute specifically requires knowledge of the person's age. Id. at 475. The Price court's entire analysis of the question is as follows:

Defendant assigns error to instruction 10. It was given in conjunction with instruction 9, to define the elements of kidnapping in the first degree. The definition of "restraint" is substantially that contained in RCW 9A.40.010(1). An instruction essentially in the words of a statute is a proper instruction. State v. Levage, 23 Wn. App. 33, 35, 594 P.2d 949 (1979). Defendant argues that in order to be guilty of unlawful imprisonment, the State must prove that he had knowledge the person restrained was under 16 years of age. The elements of unlawful imprisonment were set out in instruction 16.2 No objection was made to this instruction and it, therefore, became the law of the case. State v. Sims, 14

Wn. App. 277, 281, 539 P.2d 863 (1975). Neither the instruction nor the statute, RCW 9A.40.040, require knowledge of the victim's age. Instruction 10 is not so inconsistent with 16 that when read together they require such knowledge. The court did not err by so instructing the jury.

Id. at 474-75 (footnote omitted).

This Court should reject the Price court's conclusion that the statute does not require knowledge of the victim's age for three reasons. First, as mentioned, it is inconsistent with the basic grammar rules reflected in the decisions in J.M. and Warfield. The Price court engaged in no analysis or reasoning to counter the general rule that the adverb "knowingly" applies to "each part of the applicable definition" of the verb that it modifies. J.M., 144 Wn.2d at 481.

Second, based on the facts in Price, the court was likely correct that the statute did not require proof of the victim's age. Based on the facts (in which it was alleged he grabbed the woman by the throat, choked her, and threatened her), the jury could have found the restraint was achieved by "physical force, intimidation, or deception." 33 Wn. App. at 473-74. If the jury based its decision on this part of the definition of restraint, the young woman's age was of no moment. The jury, in fact, did not need to find Price knew she was under 16 if it found he used physical force, intimidation, or deception.

But that is not the case here, where Michal's conviction rests entirely on the "acquiescence" part of the definition. There was no indication whatsoever of any physical force, intimidation, or deception. The only possible definition of restraint that could apply was the "acquiescence" prong. That definition requires that the person be under 16. RCW 9A.40.010(6). If acquiescence had been the only possible basis for conviction in Price, the Price court may well have reached a different conclusion.

Finally, the law of the case doctrine, which undergirded the Price court's decision, has no bearing on this court's de novo construction of the plain language of the statute. The law of the case doctrine applies to jury instructions that are given without objection in the trial court. Such instructions become the "law of the case" on appeal, even if they exceed the actual requirements of the statute. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). In this bench trial, there was no jury instruction; there was only the trial court's interpretation of the statute, which is a legal question reviewed de novo on appeal. Crocker, 196 Wn. App. at 735. In sum, this Court should not follow Price because the decision lacks meaningful analysis of the legal question in this case and is substantially different in terms of both the factual and procedural underpinnings.

Moreover, the Warfield Court specifically considered Price and found that it “does not address the issue before us.” Warfield, 103 Wn. App. at 159 n. 11. The Warfield court acknowledged that its decision “may cast doubt” on the propriety of the pattern jury instruction at issue in Price, but the propriety of that instruction was not before the court. Warfield, 103 Wn. App. at 159 n. 11.

It is well established that the State must prove definitions as well as elements: “The State is obliged to present sufficient evidence to establish that a defendant’s conduct falls within the scope of a criminal statute, regardless of whether the statute’s requirements are elemental or definitional.” Crowder, 196 Wn. App. at 869 (citing, inter alia, Stevens, 158 Wn.2d at 309-10). The fact that two definitions are nestled within this statute like nesting dolls does not alter the nature of the facts that must be proved in order to render a person’s conduct criminal. Unless he knew W.O. was under 16, Michal’s conduct does not fall within the scope of the unlawful imprisonment statute because he did not knowingly restrain her without her consent. RCW 9A.40.040; RCW 9A.40.010(6); J.M., 144 Wn.2d at 481; Warfield, 103 Wn. App. at 158-59.

b. The State Failed to Present Evidence Establishing Beyond a Reasonable Doubt that Michal Knew W.O.'s Age.

Due process requires that every criminal conviction be supported by proof beyond a reasonable doubt of every element of the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. The sufficiency of the evidence is a question of constitutional law that appellate courts review de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (citing State v. Berg, 181 Wn.2d 857, 867, 337 P.3d 310 (2014)). A conviction based on insufficient evidence cannot stand. Jackson v. Virginia, 443 U.S. 307, 317-18, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

To determine if sufficient evidence supports a conviction, appellate courts consider “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson, 443 U.S. at 319). A mere “modicum” of evidence fails to meet this standard. Rich, 184 Wn.2d at 903 (citing Jackson, 443 U.S. at 319). Speculative inferences from circumstantial evidence are likewise insufficient. Rich, 184 Wn.2d at 903 (citing State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)).

Here, the State failed to prove the requisite mens rea, whether Michal knew W.O. was under the age of 16. It was undisputed at trial that W.O. was 15 years old when she was found in the car with Michal on March 19, 2015. RP 69. She would turn 16 roughly four months later on July 15, 2015. RP 69. Deputies Alan Rollins and Jeffrey Mitchell both testified that, in their reports, they did not note ever telling Michal of W.O.'s age. RP 67, 123. W.O.'s mother testified she had never met or spoken to Michal. RP 81-82. She also told the jury her daughter is very outgoing and smart. RP 90. On cross-examination, she was asked whether W.O. had her birth date tattooed on her anywhere. RP 94. The answer was "No." RP 94. There was no testimony indicating Michal knew W.O. was under 16.

Nor does circumstantial evidence lead to a reasonable inference of the requisite knowledge. W.O. was not so young that it would be obvious she was under 16. On the contrary, she was only 4 months from turning 16. RP 69. Her mother's testimony indicated nothing about her behavior that would mark her as particularly young. RP 90. She had run away before, and likely was aware that revealing her true age would result in people calling the police or her parents, and thus had a motive to conceal or lie about her age. RP 70. The mere fact that W.O. was, apparently voluntarily and willingly, lying on the seat of Michal's car to avoid being seen, does not establish beyond a reasonable doubt that he knew her age. He had been told

she was a runaway; that alone could cause him to understand she would not want to be found. RP 117. To infer from this that he knew she was under 16 is purely speculative and therefore insufficient as proof beyond a reasonable doubt. Rich, 184 Wn.2d at 903.

It also bears noting that the State did not argue, and the court did not find, that Michal knew W.O.'s age. RP 130, 135, 149-50; CP 49-55. “[L]ack of an essential finding is presumed equivalent to a finding against the party with the burden of proof.” In re Welfare of A.B., 168 Wn.2d 908, 927, 232 P.3d 1104 (2010). Instead, the State argued and the court found that such evidence was not necessary. RP 130, 135, 149-50; CP 49-55.

The plain language of the unlawful imprisonment statute requires proof of knowledge that the person is under the age of 16 when the restraint is accomplished by acquiescence. RCW 9A.40.040; RCW 9A.40.010(6). The State failed to present any evidence that Michal had the requisite knowledge. When there is insufficient evidence to support a conviction, the remedy is to reverse the conviction and dismiss the charge with prejudice. Hickman, 135 Wn.2d at 103. Michal's conviction must, therefore, be reversed, and the unlawful imprisonment charge must be dismissed with prejudice. Id.

2. THE STATE FAILED TO PROVE MICHAL RESTRAINED W.O. WHEN HE DID NOT SIGNIFICANTLY RESTRICT HER FREEDOM OF MOVEMENT.

The evidence was also insufficient to support a finding that Michal restrained W.O. because the evidence fails to show any meaningful restriction of her liberty. It was undisputed that W.O. appeared to be voluntarily in Michal's car. RP 102, 105-06. The court found she was not physically restrained in any way. CP 52. Nevertheless, the court concluded the necessary restraint was established because it would have been unsafe to exit a moving car. CP 54. The fact that she was voluntarily in a moving car with Michal as the driver is insufficient as a matter of law to show the necessary restraint.

To sustain a conviction, the unlawful imprisonment statute requires proof that the defendant knowingly restrained another person. RCW 9A.40.040. 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." RCW 9A.40.010(6). Thus, the plain language of the statute requires that the restriction of movement must represent a substantial interference with liberty. State v. Dillon, 163 Wn. App. 101, 106-07, 257 P.3d 678 (2011). The requirement of substantial interference with liberty is separate from the requirement that restraint can

occur by acquiescence if a minor's parent does not consent. Id. at 107. “[E]ven if a child victim acquiesces to being taken or held by a defendant, there must be some evidence that the defendant in fact limited the victim’s liberty.” Id.

There is no evidence here that, by transporting her in his vehicle, Michal substantially restricted W.O.’s freedom of movement. “Substantial means ‘a real or material interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or imaginary conflict.’” Id. (quoting State v. Robinson, 20 Wn. App. 882, 884, 582 P.2d 580 (1978)). Dillon illustrates the difference between substantial interference on the one hand, and mere slight inconvenience or imaginary conflict on the other. In Dillon, a 13-year-old boy contacted Dillon by phone and asked him to pick him up. 163 Wn. App. at 103. Dillon did so and brought the boy to his apartment. Id. When the boy asked to be returned to their initial rendezvous point, Dillon did so. Id. The court held there was no unlawful restraint and reversed the conviction for first-degree kidnapping. Id. at 107-09.

The definition of restraint used for first-degree kidnapping is the same statutory definition that applies to unlawful imprisonment in this case. RCW 9A.40.010(6); Dillon, 163 Wn. App. at 107. The Dillon court reversed the kidnapping conviction on the grounds that the State failed to

prove Dillon significantly restricted the boy's liberty, as required by the statutory definition of restrain. 163 Wn. App. at 107-09. The court held that merely transporting the boy in the car did not amount to restraint: "Even assuming that L.M. was somewhat restrained when he got into Dillon's car, 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. at 108. This case is on all fours with Dillon. It is "pure speculation" that Michal would have refused to let W.O. get out of the car.

The trial court in this case relied on State v. Billups, 62 Wn. App. 122, 126-27, 813 P.2d 149 (1991), to conclude that the mere fact of transporting a person in a moving vehicle constitutes restraint. CP 54. But the Dillon court considered Billups and concluded it did not apply to Dillon's facts. Dillon, 163 Wn. App. at 108. In Billups, the defendant had attempted to lure two girls, ages 10 and 11, into his van by promising them money. 62 Wn. App. at 124. From this attempted luring, the court found the requisite intent to abduct, and concluded the girls would have been restrained had they, in fact, entered the van. Id. at 126-27. The Dillon court likewise distinguished State v. Ong, 88 Wn. App. 572, 576-77, 945 P.2d 749 (1997), where the defendant was found to have restrained a seven-year-old child in a vehicle when he deviated from the scope of the mother's permission by

taking her to an out-of-the-way hiding spot instead of to school. Dillon, 163 Wn. App. at 108-09.

This case is far more like Dillon than Billups or Ong. Under Dillon, transporting a willing adolescent without any attempt to restrict her movement is not a substantial interference with her freedom of movement. The idea that Michal may not have stopped to let her out if she had requested is pure speculation, insufficient as a matter of law to sustain a criminal conviction. Rich, 184 Wn.2d at 903; Dillon, 163 Wn. App. at 108. Michal's conviction must be reversed and the case dismissed with prejudice. Hickman, 135 Wn.2d at 103.

D. CONCLUSION

For the foregoing reasons, Michal's conviction should be reversed and the charge dismissed with prejudice.

DATED this 13th day of March, 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 March 13, 2017 I e-filed and e-served the 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

03-13-2017
Date
Done in Seattle, Washington

NIELSEN, BROMAN & KOCH, PLLC
March 13, 2017 - 1:21 PM
Transmittal Letter

Document Uploaded: 347443-BOA 34744-3-III.pdf

Case Name: Todd Michal

Court of Appeals Case Number: 34744-3

Party Represented:

Is This a Personal Restraint Petition? Yes No

Trial Court County: Spokane - Superior Court #: _____

Type of Document being Filed:

- Designation of Clerk's Papers / Statement of Arrangements
- Motion for Discretionary Review
- Motion: _____
- Response/Reply to Motion: _____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill / Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition / Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to SCPAappeals@spokanecounty.org, bobrien@spokanecounty.org, and Sweigertj@nwattorney.net.

Sender Name: John P Sloane - Email: sloanej@nwattorney.net