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Division III
State of Washington

No. 34744-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TODD MICHAL, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The evidence was insufficient to establish beyond a reasonable doubt that Defendant 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 Defendant knew W.O. was under 16.
3. The court erred in concluding Defendant substantially interfered with W.O.'s liberty merely because W.O. was in a vehicle he was driving.
4. The court erred in concluding Defendant knowingly restrained W.O.
5. In the absence of substantial evidence in the record, the court erred in finding Defendant guilty of unlawful imprisonment."

II. ISSUES PRESENTED

1. Whether the evidence, when viewed in the light most favorable to the State, was sufficient for any rational trier of fact to find beyond a reasonable doubt that Defendant restrained W.O. without consent.
2. Whether the evidence, when viewed in the light most favorable to the State, was sufficient for any rational trier of fact to find beyond a reasonable doubt that Defendant restricted W.O.'s movements in a manner that substantially interfered with her liberty.

3. Whether appellate costs should be imposed pursuant to RAP 14.2, as amended effective January 31, 2017?

III. STATEMENT OF THE CASE

Factual Background

On October 23, 2014, W.O. walked to Ferris High School in the morning, but did not return home that evening. RP 76. She was fifteen-years-old. RP 69. Her father filed a police report with the Spokane Police Department. RP 77. Four months later, on January 25, 2015, W.O. called her grandmother and asked for a ride. RP 78-79. W.O.'s mother, Holly Kent, testified that W.O. had spent all or part of those four months at Defendant's home. RP 80-81. Ms. Kent did not know Defendant, had never spoken with him on the telephone, and had never had any communication with him whatsoever. RP 82.

Ms. Kent testified that she would never have given W.O. permission to stay with Defendant, she would never have given Defendant permission to provide W.O. with a home, and she would never have given Defendant permission to take W.O. anywhere in his car. RP 82. Ms. Kent stated that she and W.O.'s father had an amicable relationship. RP 75. They respected each other's opinions and made decisions jointly regarding W.O.'s care, education, and medical situation. RP 75. Ms. Kent testified that she did not

believe W.O.'s father would have given W.O. permission to stay with Defendant either, and that if he had, he would have told her. RP 83.

After calling her grandmother for a ride, W.O. went to Sacred Heart Medical Center to receive medical treatment. RP 79. She was released, and then moved to Bonner's Ferry, Idaho, to live with her mother. RP 79-80. W.O. stayed in Bonner's Ferry with her mother for approximately one month. RP 84. On February 27, 2015, W.O. went out for a walk and did not return. RP 84. Ms. Kent believed W.O. might have returned to Defendant's home. RP 84-85. She filed a runaway report with Boundary County, Idaho, where she resided. RP 85. Spokane County Sheriff's Detective Jeffrey Mitchell advised north Spokane County Sheriff's deputies that W.O. was a reported runaway and that her mother believed she may be staying at Defendant's home. RP 115.

On March 4, 2015, at approximately 9:35 a.m., Detective Mitchell asked Deputy Alan Rollins to respond to Defendant's home and inquire whether W.O. was there. RP 116. He informed Deputy Rollins that W.O. was a runway. RP 52, 116. Deputy Rollins arrived at Defendant's home, located in Deer Park, Spokane County, Washington, shortly thereafter. RP 52, 116. He asked Defendant if W.O. was at the residence. RP 58. Defendant indicated that he knew W.O., but stated she was not there. RP 58. He suggested that she might be at her boyfriend's home. RP 58-59.

Deputy Rollins then called Detective Mitchell at approximately 10:51 a.m. and asked Defendant if he would be willing to speak with the detective on the phone. RP 59, 116. Defendant agreed. RP 59.

On the phone, Detective Mitchell again asked Defendant if W.O. was at his residence, and Defendant stated she was not. RP 117. Detective Mitchell then informed Defendant that W.O. was a reported runaway, and that if she were found in his custody or care, Defendant possibly could face criminal charges. RP 117. Detective Mitchell referenced "harboring a runaway." RP 117. He advised that Defendant should immediately call the police if he had any contact with W.O. RP 117. During the conversation, Defendant did not express any confusion or ask Detective Mitchell any questions. RP 117-18. He appeared to understand what Detective Mitchell said. RP 118. He stated that he did not want W.O. around, and again suggested that W.O. might be staying with her boyfriend. RP 118.

On March 19, 2015, Deputy Daniel Dutton was working routine patrol in Deer Park, Washington. RP 97-98. He knew W.O. was a reported juvenile runaway and that law enforcement believed she might be with Defendant. RP 98. Deputy Dutton was familiar with Defendant and with the vehicle he drove. RP 98. He observed Defendant's truck driving just outside of Deer Park city limits, in Spokane County. RP 99. It was dark outside, and

he could not see how many people were in the car. RP 99. He activated his emergency lights and the vehicle came to a stop. RP 99. When he approached the driver's side door of the truck, Deputy Dutton observed a person lying down in the front bench seat of the truck. RP 99-100. The passenger was not visible to people outside of the truck and would not have been visible to other people driving by. RP 100.

Deputy Dutton asked Defendant who the passenger was in his truck, and Defendant replied, identifying W.O. using her first name. RP 100. Deputy Dutton then asked the female passenger who she was, and she identified herself as W.O. Deputy Dutton then confirmed with dispatch that W.O. was a runaway, detained her, and took her into custody. RP 101. Defendant did not give Deputy Dutton any indication that he was trying to bring W.O. back to her home in Idaho, RP 101, but he did state that he was taking W.O. to the Bob Mart in Deer Park so she could use a phone to call her mother, RP 108. Deputy Dutton testified that Defendant had a cell phone in his possession at the time, but could not state whether it was functional. RP 111.

Procedural Background

On April 29, 2015, the State charged Defendant with one count of rape of a child in the third degree, one count of unlawful imprisonment with sexual motivation, and one count of commercial sexual abuse of a minor,

all based on events occurring between October 23, 2014, and March 19, 2015. CP 1-2. The State amended the information on July 27, 2016, dismissing the enhancements and changing the date of the offense for unlawful imprisonment to March 19, 2015. CP 44-45. The State then moved to sever counts I and III from count II, and to dismiss counts I and III without prejudice. RP 9-11. The trial court denied the motion to sever, but granted the motion to dismiss counts I and III without prejudice. RP 43-45.

Defendant waived his right to a jury trial, and a bench trial before the Honorable John Cooney of Spokane Superior Court began on July 27, 2016, and concluded the same day. CP 32; RP 4. The court heard testimony from W.O.'s mother, Holly Kent, Deputy Alan Rollins, Deputy Daniel Dutton, and Detective Jeffrey Mitchell, all of the Spokane County Sheriff's Department. Defense counsel argued in closing that the evidence was insufficient for the court to find that Defendant had restrained W.O. without consent, or that Defendant had restricted W.O.'s movements in a manner that substantially interfered with her liberty. RP 131-35.

Judge Cooney issued his decision on August 25, 2016, finding Defendant guilty of one count of unlawful imprisonment. RP 151. In doing so, he addressed defense counsel's arguments regarding the sufficiency of the evidence and noted his reliance on *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014), and *State v. Billups*, 62 Wn. App. 122, 124,

813 P.2d 149 (1991). RP 149-50. Defendant now assigns error to Judge Cooney's legal and factual findings regarding the sufficiency of the evidence.

IV. ARGUMENT

Defendant challenges the sufficiency of the evidence supporting two required elements: (1) that Defendant restrained W.O. without consent; and (2) that Defendant restrained W.O.'s movements in a manner that substantially interfered with her liberty. Defendant does not dispute that the evidence was sufficient to prove that the offense happened on March 19, 2015, in Spokane County, Washington. Defendant also does not contest the sufficiency of the evidence to prove that Defendant did not have legal authority to restrain W.O. on March 19, 2015.

Appellate courts review the sufficiency of the evidence "to guarantee the fundamental protection of due process of law." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In determining whether the evidence is sufficient, the Court views the evidence in the light most favorable to the State and considers whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). 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*. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id*. Circumstantial and direct evidence are deemed equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence." *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989) (citing *State v. Lawson*, 37 Wn. App. 539, 543, 681 P.2d 867 (1984)).

A. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT FOR ANY RATIONAL TRIER OF FACT TO FIND BEYOND A REASONABLE DOUBT THAT DEFENDANT RESTRAINED W.O. WITHOUT CONSENT.

RCW 9A.40.040 criminalizes unlawful imprisonment and states that "[a] person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040(1). The legislature defined the verb "restrain" in RCW 9A.40.010 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). Restraint "without consent" may be accomplished by alternative means: (1) by physical force, intimidation, or deception; or (2) "by 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).

Defendant contends that the trial court erred by not requiring the State to prove that Defendant knew W.O. was under sixteen years of age at the time of the crime. Appellant's Br. at 5-16. In so arguing, Defendant improperly relies on abrogated and unpublished opinions of the court of appeals, and disregards precedential authority issued by the Washington Supreme Court. Moreover, even if this Court applies Defendant's improper legal standard to this case, the evidence was sufficient for any rational trier of fact to find beyond a reasonable doubt that Defendant knew he needed the consent of W.O.'s parent or legal guardian to give her a ride, and that he knowingly acted without that requisite consent.

1. *State v. Warfield* does not apply to this case because it pertains to the question of legal authority to restrain the victim, not the question of consent.

Defendant relies on *State v. Warfield* to argue that the State is required to prove that Defendant knew W.O.'s age at the time of the crime. Defendant's Br. at 6-9. In *Warfield*, Division II of the Court of Appeals examined the State's burden of proof as it pertains to the term "knowingly restrain." 103 Wn. App. 152, 5 P.3d 1280 (2000). *Warfield* involved three defendants who worked as bounty hunters. *Id.* at 154. They arrested the

victim in Washington pursuant to an active misdemeanor warrant from Maricopa County, Arizona. *Id.* After arresting him, the defendants called the local city police who arrived, verified the validity of the warrant, and authorized the defendants to transport the victim to Arizona. *Id.* Upon arriving in Arizona, the defendants learned that the misdemeanor warrant had no legal effect in Washington, and that they did not have lawful authority to arrest and transport the victim to Arizona. *Id.* at 154-55. The State of Washington charged and convicted all three defendants of unlawful imprisonment, despite evidence that the defendants subjectively believed they had lawful authority to restrain the victim.[1] *Id.*

On appeal, the court held that RCW 9A.40.040's adverb "knowingly" modifies all parts of the definition of "restrain" provided in RCW 9A.40.010. *Id.* at 157.[2] Thus, *Warfield* held the State must prove that a defendant (1) knowingly restrained the movements of the victim in a manner that substantially interfered with his or her liberty; (2) knowingly effectuated said restraint by physical force, intimidation, or deception, or

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[1] The evidence presented at trial showed that the defendants had restrained the victim by physical force. *Warfield*, 103 Wn. App. at 154. It was clear the victim did not consent to the restraint.

[2] The Washington Supreme Court affirmed the general concept of *Warfield* in *State v. J.M.*, 144 Wn.2d 472, 480-82, 28 P.3d 720 (2001), wherein it held that the adverb "knowingly" modified both parts of the definition of "threaten" for the crime of felony harassment.

without consent; and (3) knowingly effectuated said restraint without legal authority. *Id.*

In 2014, the Washington Supreme Court seized an opportunity to limit the scope of *Warfield*'s holding in *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014). In *Johnson*, the defendant kept his wife in their apartment under his control for three days. *Id.* at 298. He did not allow her to wear clothes while inside, and he only permitted her to go outside when accompanied by him. *Id.* He used a knife, an ice pick, a Rottweiler, physical assaults, threats of harming her children, and threats of suffocating her to intimidate and control her.[3] *Id.* at 299. The State charged the defendant with unlawful imprisonment, alleging in the charging document that the defendant did "knowingly restrain" the victim. *Id.* at 301. The information did not set forth the definition of "restrain" as provided in RCW 9A.40.010. *Id.*

The defendant appealed, arguing that under *State v. Warfield,* all components of the definition of "restrain" were essential elements of unlawful imprisonment that the State was required to include in the information. *Id.* The Court disagreed, holding that the definition of

[3] As in *Warfield*, the State in *Johnson* proved lack of consent by physical force and intimidation. *Johnson*, 180 Wn.2d at 298-99. There was no allegation that the victim consented to the restraint.

"restrain" was not, on its own, an essential element that must be included in the information. *Id.* at 302. Instead, the definition simply "defines and limits the scope of the essential elements." *Id.* Additionally, although the issue presented to the Court was rather narrow – whether the State was required to include the definition of "restrain" in the Information – the Court intentionally utilized the opportunity to significantly limit the scope of *Warfield*'s holding.[4]

After reviewing the particular facts of *Warfield*, the Court noted that the defendants in *Warfield* had a "good faith belief that they had legal authority to restrain the victim." *Id.* at 304. The Court noted that this good faith belief made *Warfield* a particularly "unique case." *Id.* The Court held:

> 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.

Id. (emphasis added). Thus, *Warfield*, as limited by *Johnson*, does not address the question of consent to restrain the victim, nor does it address or

[4] The Court noted that the Defendant's argument relied entirely on *Warfield*, and stated, "We take this opportunity to examine that case further." *Johnson*, 180 Wn.2d at 303.

require the State to prove that Defendant knew the victim's age when he gave her a ride.

Defendant discounts *Johnson* and argues that the *Johnson* holding is limited strictly to the question of sufficiency of the charging document – whether an information must contain the definitions of essential elements of a crime. Appellant's Br. at 10-11. Defendant distinguishes this question from the question presented in *Warfield*, which addressed sufficiency of the evidence to convict. Appellant's Br. at 10-11. However, a plain reading of *Johnson* negates this argument.

Defendant is correct that *Warfield* addressed the sufficiency of the evidence to prove unlawful imprisonment, not sufficiency of the charging document. Defendant is also correct that the issue presented to the *Johnson* court pertained to the sufficiency of the charging document. *Johnson*, 180 Wn.2d at 301-02. However, the *Johnson* court addressed *both* issues. It answered the issue presented in the negative, holding that the State need not include the definitions of essential elements in the charging document. *Id.* at 302-03. It then went one step further and addressed *Warfield*'s holding as it pertains to the sufficiency of the evidence. The *Johnson* court did not have to reach the substantive issue addressed in *Warfield*; that issue was not presented to the Court in *Johnson*. The Court *chose* to examine *Warfield*

and limit its scope. This intentional act by the Washington Supreme Court essentially abrogated *Warfield*, creating a precedent that binds this Court.

It is easy to understand how *Warfield*'s holding might have concerned the Supreme Court. Our criminal justice system has held almost universally that ignorance of the law is not a defense. *Warfield* flipped this principle on its head, requiring the State to prove a defendant's knowledge of the law. Thus, in limiting *Warfield*'s holding, *Johnson* created an affirmative defense: defendants may now present evidence of a good faith basis to believe their actions were lawful. If this evidence is presented, the State must disprove the alleged good faith basis. Without evidence of a good faith belief, the defendant is presumed to know the law. Thus, in the typical case, the State is not required to prove the defendant's knowledge of the law, but only that there was no legal authority for the restraint, regardless of the defendant's knowledge.

In this case, Defendant did not present any evidence that he had a good faith basis to believe his actions were lawful. To the contrary, Detective Mitchell testified he informed Defendant that W.O. was a reported runway, and if she were found in Defendant's custody or care, he possibly could face criminal charges. RP 117. Detective Mitchell further testified that he referenced "harboring a runaway" when he spoke to Defendant. RP 117. Additionally, Detective Mitchell testified that he told

Defendant to immediately call the police if he had any contact with W.O. RP 117. This testimony is sufficient for any rational trier of fact to find beyond a reasonable doubt that Defendant knew he did not have lawful authority to give W.O. a ride.

Under *Johnson*, *Warfield*'s holding is limited to those unique cases where a defendant presents evidence demonstrating a good faith belief that he had lawful authority to restrain the alleged victim. *Warfield*, therefore, does not apply to this case. Defendant does not allege a good faith belief that he had lawful authority to restrain W.O., and the evidence at trial demonstrated that Defendant did not have, and knew he did not have, lawful authority to restrain W.O. Accordingly, Defendant's conviction for unlawful imprisonment should be affirmed.

2. Binding precedent holds that the State need not prove a defendant's knowledge of the victim's age in an unlawful imprisonment case.

The court's opinion in *Warfield* addressed the "legal authority" component of "restrain," and was so limited by the Supreme Court in *Johnson*. 180 Wn.2d at 304. Defendant now asks the Court to extend *Warfield*'s holding to the "consent" component of "restrain," and to further hold that the State must prove that Defendant knew the victim was under sixteen years of age. Appellant's Br. at 17-19. In the alternative, Defendant argues that the Court should apply basic principles of statutory construction

and find that the State must prove knowledge of a victim's age in an unlawful imprisonment case. Appellant's Br. at 6-7. Defendant's request must be denied because Washington courts have held previously that the State is not required to prove knowledge of a victim's age. This Court is bound by those prior holdings, and need not reexamine the plain language of the statute de novo.

In *State v. Price*, the defendant approached a fifteen-year-old girl on the street, grabbed her around the neck, and forced her to walk to a porch where he commanded that she take her clothes off. 33 Wn. App. 472, 473, 655 P.2d 1191 (1982). He then lay on top of her, and repeatedly choked and threatened her. *Id.* A witness heard the girl screaming and called the police. *Id.* When the police arrived, they found the defendant kneeling over the girl with his pants unzipped. *Id.* at 473-74.

Despite the evidence of force presented by the victim, the defendant claimed at trial that he had engaged in consensual sexual conduct with the victim. *Id.* at 474. Upon conviction, he appealed, arguing that the trial court should have required the State to prove that he knew the victim was under the age of sixteen, and that therefore he needed parental consent. *Id.* The court of appeals rejected this argument, noting that "neither the [jury] instruction nor the statute, RCW 9A.40.040, require knowledge of the victim's age." *Id.* at 475.

Defendant urges this Court to disregard the holding in *Price* because it is "inconsistent with the basic grammar rules reflected in the decisions in *J.M.* and *Warfield*." Appellant's Br. at 14. Defendant is incorrect. The holding in *Price* is not inconsistent with those of *J.M.* and *Warfield* because neither case addresses the issue presented in *Price* or explicitly requires the State to prove a defendant's knowledge of a victim's age in an unlawful imprisonment case. *Price*, however, does.

J.M. dealt with felony harassment and did not address the charge or elements of unlawful imprisonment. *J.M.*, 144 Wn. 2d at 475-76. Therefore, *J.M.* does not require the State to prove a defendant's knowledge of a victim's age in an unlawful imprisonment case. To the extent that the Court's reasoning in *J.M.* was based on the holding in *Warfield*, *Johnson* strictly limited *Warfield*, as discussed, *supra*. *Johnson*, 180 Wn.2d at 303-04. Unlike *J.M.*, *Johnson* was an unlawful imprisonment case. Therefore, *Johnson*, not *J.M.*, is controlling here. As limited by *Johnson*, *Warfield* does not require the State to prove a defendant's knowledge of a victim's age either.

Defendant also argues that this Court should disregard the holding of *Price* because the specific facts in *Price* supported a finding that he had restrained the victim by physical force or intimidation, regardless of consent. Appellant's Br. at 14. Yet Defendant points to *Warfield* as a more

applicable case – a case in which the specific facts *also* supported a finding that the three bounty hunters had restrained the victim by physical force, knowing they did not have his consent. *Warfield*, 103 Wn. App. at 154. *Price* is relevant despite facts showing that the defendant restrained the victim by physical force because the defendant affirmatively raised the defense of consent. *Price*, 33 Wn. App. at 474. In so doing, he required the State to prove that the victim or her legal guardian had not consented to the restraint. On appeal, he argued that the State had failed to meet its burden in that regard, thereby forcing the court to consider the State's burden to show lack of consent. *Id.* at 474-75. That the facts in *Price* also support a finding of physical force or intimidation does not nullify the court's decision that the State need not prove knowledge of a victim's age to show lack of consent.

In 1991, Division I of the Court of Appeals again had the opportunity to analyze the definition of "to restrain." In *State v. Billups*, two girls, ages ten and eleven, were walking to a picnic. 62 Wn. App. 122, 124, 813 P.2d 149 (1991). They approached an intersection to cross the street when a Volkswagen van pulled up. *Id.* As they prepared to cross the street, the driver of the van said, "Hi girls. I'll pay you a dollar if you'll come down to Shilshole with me." *Id.* The driver was convicted of two counts of attempted kidnapping in the second degree. *Id.*

Second degree kidnapping requires proof that the defendant intentionally "restrain[ed]" the victim, as defined in RCW 9A.40.010 – the same statute at issue here.[5] On appeal, the court analyzed the definition of "restrain," and held that if the two girls had entered the van, even willingly, "the restraint would have been 'without consent' as they were both under age 16 and no parental consent had been given." *Billups*, 62 Wn. App. at 126-27. Evidence that the girls were under the age of sixteen and that their parents had not consented to them riding in the Volkswagen was sufficient to establish lack of consent. The court did not require the State to prove that the driver knew the girls were under the age of sixteen or knew that he did not have parental consent to drive them anywhere.

More recently, and notably, eleven years after *Warfield*, the court of appeals reviewed a defendant's conviction for first degree kidnapping of a thirteen-year-old boy. *State v. Dillon*, 163 Wn. App. 101, 257 P.3d 678 (2011).[6] Like second degree kidnapping, first degree kidnapping also requires proof that the defendant intentionally "restrain[ed]" the victim, as

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[5] Unlawful imprisonment is a lesser-included offense of kidnapping. *State v. Davis*, 177 Wn. App. 454, 311 P.3d 1278 (2013).

[6] Defendant cites to *Dillon* in support of his argument that there was insufficient evidence to show a substantial interference with W.O.'s liberty, but fails to mention *Dillon*'s holding regarding consent. Appellant's Br. at 20-23.

defined in RCW 9A.40.010. *Id.* at 107. In *Dillon*, the thirteen-year-old victim, L.M., had represented himself to the defendant as being eighteen-years-old. *Id.* at 103. He asked the defendant to pick him up, and he willingly entered the defendant's car. *Id.* at 103. After returning home, L.M.'s mother learned that he had been out of the house without her permission and she called the police. *Id.* at 104. When interviewed by law enforcement, the defendant stated that he believed L.M. was at least eighteen-years-old because L.M. had repeatedly stated that he was, they had met on a chat service that required users to be eighteen-years-old, and L.M. had claimed he worked full time at a nursing home. *Id.*

On appeal for his conviction for first degree kidnapping of a victim under fifteen-years-old, the defendant argued that the State had failed to prove two components of the definition of "restrain": "(1) that he restricted L.M.'s movements and (2) that the action was taken without consent." *Id.* at 106. The court quickly disposed of the question of consent, stating: "[i]t is undisputed that the State proved the 'without consent' element of the restraint by virtue of L.M.'s age." *Id.* at 107. Despite evidence that the defendant reasonably believed L.M. was eighteen-years-old, the court did not require the State to prove that the defendant knew L.M. was under sixteen-years-old or that he knew he did not have parental consent. The fact

that L.M.'s mother had not consented to the restraint was sufficient for the State to meet its burden of proof.

Other than *Warfield*, which does not explicitly require the State to prove knowledge of a victim's age, the only legal authority Defendant has provided in support of his argument is a partially published court of appeals opinion, *State v. Dunn*, 180 Wn. App. 570, 321 P.3d 1283 (2014). In the *unpublished* portion of the opinion, the court set forth the elements of unlawful imprisonment as follows:

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

Id. at 575.

This Court should disregard *Dunn* for two reasons. First, under GR 14.1, "Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions." GR 14.1(c). Second, *Dunn* relied on *Warfield*, and was decided on April 8, 2014. Just three weeks later, on May 1, 2014, the Washington Supreme Court limited the scope of *Warfield* significantly in *Johnson*, as explained in detail, *supra*, effectively overruling the unpublished portion of *Dunn*.

Apart from *Warfield* and *Dunn*, no statute or case requires the State to prove that Defendant knew W.O. was under the age of sixteen at the time

of the offense. Therefore, under *Price*, *Billups*, and *Dillon* the State need not prove that Defendant knew W.O.'s age, and the trial court did not err in failing to require proof that Defendant knew W.O.'s age. Defendant's conviction should be affirmed.

3. The evidence is sufficient for any rational trier of fact to find beyond a reasonable doubt that Defendant restrained W.O. without consent.

Based on *Price*, *Billups*, and *Dillon*, evidence demonstrating that W.O. was under sixteen years of age and that her parents did not consent to Defendant giving her a ride in his truck meets the State's burden of proof. 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. *Salinas,* 119 Wn.2d at 201. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id*.

At trial, W.O.'s mother, Holly Kent, testified that W. O. was fifteen at the time of the offense. RP 69. Ms. Kent also testified that she did not know Defendant, she had never spoken with him on the telephone, and she had never had any communication with him whatsoever. RP 81-82. She testified that she would not have given W.O. permission to stay with Defendant if W.O. had asked, and she would not have given Defendant permission to take W.O. anywhere in his car. RP 82. Ms. Kent also testified

that she did not believe W.O.'s father would have given W.O. permission to stay with Defendant either, and that if he had, he would have told her. RP 83. This seems especially likely given W.O.'s runaway history and the fact that she had been missing for two weeks. RP 85.

When viewed in the light most favorable to the State, the evidence admitted at trial established that W.O. was fifteen-years-old and thus was under the age of consent at the time of the offense. The evidence also showed that neither of W.O.'s parents gave Defendant permission to give W.O. a ride. Therefore, the evidence was sufficient for any rational trier of fact to find that Defendant restrained W.O. without consent.

For the sake of argument, even if this Court were to require the State to prove that Defendant knew that he did not have parental consent when he gave W.O. a ride, the evidence admitted at trial was sufficient for the State to meet that burden. Deputy Rollins went to Defendant's house looking for W.O. RP 58. Defendant indicated that he knew W.O., but that she was not at his home. RP 58. Detective Mitchell informed Defendant that W.O. was a reported runway and that he could be criminally charged if he was found harboring her. RP 117. Detective Mitchell instructed Defendant to call the police immediately if he had contact with W.O. RP 117. Defendant appeared to understand these instructions and did not express any confusion to Detective Mitchell. RP 117-18.

A reasonable person, having heard that he could be charged with a crime if law enforcement discovered him with W.O., would not give W.O. a ride anywhere. A reasonable person in that situation would call the police immediately, as instructed, or would suggest that W.O. return home to her parents. But Defendant did not behave like a reasonable person. Instead, Defendant gave W.O. a ride, allegedly, to the Bob Mart so that she could use a phone to call her mother. RP 108. Despite Defendant's claimed innocuous motive, W.O. lay down in the front seat of Defendant's truck to avoid detection. RP 99-100. Deputy Dutton testified that W.O. was not visible to people outside of the car. RP 100. The only reasonable inferences to be drawn from W.O. laying down in the truck are that Defendant knew he should not have W.O. in his truck and that Defendant did not have a legitimate motive for her presence in his truck, for *e.g.*, that he was driving W.O. to the Bob Mart to call her mother.[7]

Finally, upon contacting Defendant, Deputy Dutton asked Defendant who the young, female passenger was in the truck. RP 100. Defendant responded that the passenger was W.O., using only her first

[7] Although the law does not require the State to prove that Defendant knew W.O. was under sixteen years of age, *supra* Part IV.A.2, Defendant's claimed excuse for giving W.O. a ride is wholly inconsistent with any contention that Defendant did not know W.O. was under sixteen-years-old. An adult likely would not need a ride to call her mom.

name. RP 110. A rational trier of fact would infer that by using only her first name, not her association with him (*e.g.* my niece, my girlfriend, or my friend), Defendant understood W.O. to be the same runaway that law enforcement had been looking for at his house only two weeks earlier. He thus demonstrated that he knew W.O. was a runaway, and by default, that her parents had not consented to her being with him in his truck. Any rational trier of fact would draw these inferences from the evidence presented at trial and conclude that Defendant knew he did not have the consent of W.O.'s parents when he gave her a ride. Indeed, the trial court *did draw* these inferences from the evidence presented and concluded that Defendant knew he did not have consent. RP 147-148.

Defendant implies that W.O. may have lied about her age and given consent. Appellant's Br. at 18, 20. If evidence had been admitted demonstrating that Defendant had a good faith basis to believe that W.O. was at least sixteen-years-old and that she had consented to riding in his truck, perhaps the Court would be presented with the question of whether, under those circumstances, the State must disprove this alleged good faith basis.[8] But no evidence was admitted at trial demonstrating that Defendant

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[8] *But see State v. Ayala*, 108 Wn. App. 480, 485, 31 P.3d 480 (2001) (holding that "RCW 9A.40.010(1) clearly strips away a 14-year-old victim's acquiescence as a defense."), and *State v. Thomas*, 35 Wn. App. 598, 603-04, 668 P.2d 1294 (1983) ("Thus, in the case of a

had a good faith basis to believe he had consent. Defendant's allegation that because W.O. had run away before, she "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," is purely speculative. Appellant's Br. at 18. Nothing of the sort was testified to or admitted at trial. Similarly, Defendant's contention that "[i]t was undisputed that W.O. appeared to be voluntarily in [Defendant's] car," is also incorrect. Appellant's Br. at 20. No evidence was admitted at trial suggesting that she entered Defendant's car voluntarily. No witness testified regarding how she entered the car at all.

Therefore, whether the Court imposes on the State the burden of proving knowledge of consent or not, the evidence admitted at trial was sufficient for any rational trier of fact to find beyond a reasonable doubt that Defendant restrained W.O. without consent. Therefore, Defendant's conviction should be affirmed.

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child under 16 years of age, consent of the victim is not a defense to unlawful imprisonment").

B. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT FOR ANY RATIONAL TRIER OF FACT TO FIND BEYOND A REASONABLE DOUBT THAT DEFENDANT RESTRICTED W.O.'S MOVEMENTS IN A MANNER THAT SUBSTANTIALLY INTERFERED WITH HER LIBERTY.

Defendant argues that the State failed to show "any meaningful restriction of [W.O.'s] liberty." Appellant's Br. at 20. RCW 9A.40.010 states that "restrain" means "to restrict a person's movements … in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(6). "Substantial" means "a 'real' or 'material' interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or imaginary conflict." *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978). This Court has distinguished a "substantial" interference with one's liberty from "stopping someone on the street in a mistaken belief as to the person's identity," or "facetiously pushing an elevator button so as to take another occupant beyond the floor which he or she intended to go." *Id.* at 884-85.

In *Billups*, *supra*, Division I of the Court of Appeals held that placing someone under the age of sixteen in a vehicle constitutes restraint. 62 Wn. App. at 126-27. When analyzing whether the girls would have been restrained if they had willingly entered the Volkswagen, the court held that "[i]f the girls had complied [with the driver's request to enter the van], their

movements would have been restrained by their presence in the van." *Id.* at 126-27. The court further stated that merely by their presence in the van, the driver would have been "secreting or holding the girls in a place where they were not likely to be found." *Id.* at 127.

The court in *Billups* found the facts sufficient to meet the elements of kidnapping. Unlawful imprisonment is a lesser-included offense of kidnapping. *State v. Davis*, 177 Wn. App. 454, 311 P.3d 1278 (2013). The facts in *Billups* are very similar to the facts in this case. If two girls willingly entering a van where they are unlikely to be found is sufficient to constitute kidnapping, then one girl entering a truck, even if willingly, where she lays down to avoid detection, is sufficient to constitute unlawful imprisonment, and perhaps even kidnapping.

Yet Defendant disregards *Billups*, and instead, points to *Dillon*, as controlling authority in this case. Appellant's Br. at 22-23. In *Dillon*, *supra*, thirteen-year-old L.M. willingly entered the defendant's car after representing himself to be eighteen-years-old. *Dillon*, 163 Wn. App. at 103-04. When L.M. asked to be taken home, the defendant complied and drove L.M. back to the same intersection where he had picked him up. *Id.* at 104. On appeal, the defendant argued that the evidence was insufficient to show a substantial interference with L.M.'s liberty. *Id.*at 106. The Court agreed, finding that there was no evidence that the defendant intended to restrain

L.M. *Id.* at 108. The court noted that the specific facts present in *Dillon* were distinguishable from those in *Billups*, where there was sufficient evidence to infer that the defendant *intended* to restrain and secrete the girls in his van.

Similarly, the facts in *Dillon* are clearly distinguishable from those in the present case, where there is sufficient evidence to infer that Defendant intended to restrain and secrete W.O. in the truck. L.M. represented himself to be an adult who worked full time at a nursing home. *Id.* at 104. In this case, there is no evidence that W.O. misrepresented her age to Defendant. In *Dillon*, L.M. asked to be taken home and the defendant did so willingly, letting L.M. out of the car in the same place he had picked him up. *Id.* In this case, there is no evidence that W.O. requested to be let out of the truck, nor is there evidence demonstrating that Defendant would have permitted her to exit the truck at her request. In *Dillon*, the defendant had a good faith basis to believe that he was lawfully transporting an adult in his car. Therefore, he did not ask L.M. to lie down to avoid detection, and L.M. did not do so voluntarily. *Id.* By contrast, Defendant knew that he could be charged with a crime if he was found harboring W.O., and so she was lying down in the truck to avoid detection.

Defendant claimed that he simply was giving W.O. a ride to call her mother. RP 108. Yet, if Defendant truly had only innocuous intentions when

he gave W.O. a ride, there would be no reason for her to lie down to avoid detection. The only reasonable inference that can be drawn from W.O.'s posture in the truck is that Defendant intended to restrain and secrete her in the truck. Thus, the evidence in this case is sufficient for any rational trier of fact to conclude that Defendant intended to restrain W.O. in his truck by hiding her in a manner that would inhibit her being found.

In *State v. Ong*, Division II of the Court of Appeals again considered whether riding in a vehicle constitutes restraint when the passenger is under the age of sixteen. 88 Wn. App. 572, 576-77, 945 P.2d 749 (1997). The court noted that the passenger was "completely under [the defendant's] control during the trip and the jury could have found that this substantially interfered with her liberty." *Id.* at 577.

This is significant because the trial court in this case considered the control that a driver of a moving vehicle has over a passenger. The court stated, "the level of restraint is enhanced when the motor vehicle is traveling down the road. While in a motor vehicle, especially a moving motor vehicle, an occupant's movements are restricted thereby interfering with their liberty. A moving motor vehicle does not allow an occupant a safe means of escape." RP 150-151.

Indeed, anyone who has ever been a passenger in a moving vehicle understands that the driver has complete control over the movement of the

car, and ultimately, over the passenger's freedom of movement. If the driver does not want to stop, he can keep driving, even if requested to stop by the passenger. If the driver wants to drive to a different location than that requested by the passenger, he can do so, regardless of the passenger's wishes. The restriction of one's liberty resulting from being a passenger in a car is much more substantial than the restriction of one's liberty resulting from being stopped on the street by someone who is mistaken about one's identity, or being forced to ride an elevator up an additional floor. [9] *See Robinson*, 20 Wn. App. at 884-85.

Just as the trial judge here concluded, the evidence admitted at trial was sufficient to find beyond a reasonable doubt that, by driving W.O. in his truck, Defendant substantially interfered with her liberty, and that he did so knowingly. Accordingly, Defendant's conviction should be affirmed.

C. UNLESS DEFENDANT'S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE APPEAL.

Effective January 31, 2017, RAP 14.2 reads:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless

[9] The fact that many of us willingly submit to a substantial interference of our liberty when we consent to ride as passengers in a car does not mean that the restriction of liberty is anything less than substantial. It simply means that we have consented to the restriction.

> the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

(Emphasis added).

The trial court determined Defendant to be indigent for purposes of his appeal on September 22, 2016, based on a declaration provided by Defendant. CP 92-93. The State is unaware of any change in Defendant's circumstances. Should Defendant be unsuccessful on appeal, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

V. CONCLUSION

The evidence admitted at trial was sufficient for any rational trier of fact to find beyond a reasonable doubt that Defendant knowingly restrained

W.O. on March 19, 2016, in violation of RCW 9A.40.040. Accordingly, the State respectfully requests that this Court affirm Defendant's conviction for unlawful imprisonment.

Dated this 12th day of May, 2017.

Respectfully Submitted,

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

STATE OF WASHINGTON, Respondent, v. TODD MICHAL, Appellant,	NO. 34744-3-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 12, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jennifer J. Sweigert
sweigertj@nwattorney.net; sloanej@nwattorney.net

5/12/2017	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

May 12, 2017 - 9:28 AM

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