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King County Prosecutor
Appellate Unit

NO. 69077-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

SHANE SKJOLD,

Appellant.

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

The Honorable Harry McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information is constitutionally defective because it fails to include all the essential elements of the unlawful imprisonment charge.

2. The court erred by convicting Skjold of first degree burglary because there is insufficient evidence that Skjold “unlawfully remained”.

Issues Pertaining to Assignments of Error

1. Is the information constitutionally defective where it fails to include all the essential elements of the unlawful imprisonment charge?

2. Is there sufficient evidence to support the first degree burglary conviction where the State failed to prove Skjold “unlawfully remained” within the apartment?

B. STATEMENT OF THE CASE

On December 2, 2011, at around 5:30 p.m., Richard Romero, Jr. reported he had been assaulted in the early hours of the morning. 1RP 68-79.¹ Romero identified the assailant as

¹ The VRP will be referred to consecutively as follows: 1RP—6/21/12; 2RP—6/29/12; 3RP—6/26/12; 4RP—6/27/12; 5RP—6/28/12; 6RP—7/23/12.

Shane Skjold, a tenant of the apartment building in which he worked as a maintenance man. 2RP 16, 22.

Romero testified that around 1-2 a.m., he heard a loud knock on his door. 2RP 28-29. Romero opened the door and saw Skjold and a friend, Jeff Shultz, standing outside. 2RP 29, 102. Romero said that Skjold seemed "very upset" and when he entered, he pushed Romero to the ground demanding to know where his "stuff" was. 2RP 33. Skjold pulled a "little knife" from under his shirt and waved it in front of Romero. 2RP 34-35.

The men then stood up and Skjold repeated that there was "stuff" missing from his apartment and accused Romero of taking it. 2RP 37. Skjold asked Romero to return the key he kept for Skjold's apartment. 2RP 38. Romero got the key and gave it to Skjold. 2RP 39.

Skjold then asked Romero to come with him to his apartment to see where his property was missing. 2RP 37. Romero said he did not want to leave his apartment because his young son, Jaden, would be left alone. 2RP 37. At first, Romero asked if Shultz, a friend, could remain behind with Jaden. 2RP 81. Romero said Skjold wanted Shultz to come with them to Skjold's apartment. 2RP 81. Romero testified that he agreed to go with Skjold to his

apartment to distance Jaden from the conflict. 2RP 38. Although Skjold did not demand that he go with him, Romero nevertheless felt he did not have a choice. 2RP 44-45. Skjold did not force Romero to go to his apartment or threaten him with the knife to get him to go. 2RP 105.

Romero did not see the knife after leaving his apartment. 2RP 43-44, 47. He never saw Skjold with a knife in Skjold's apartment. 2RP 99.

Once in Skjold's apartment, Romero said Skjold showed him his bedroom closet and said the stolen money was kept there, and again accused Romero of taking it. 2RP 41. Romero denied stealing the money. 2RP 41. Skjold suddenly punched Romero on the side of the head. 2RP 42-43. Romero was bleeding profusely and asked Skjold if he could go. 2RP 82-83. Skjold did not stop Romero from leaving. 2RP 83.

Back at his own apartment, Romero waited until morning, then called his father and asked to be taken to the hospital. 2RP 84. Romero had suffered several small fractures to his orbital socket and nose, which eventually required surgery to repair. 2RP 85-86. At the hospital, Romero told staff that he injured himself when he slipped. After discharge, Romero returned to his father's

home, then later to his own apartment. 2RP 13. He did not call the police until that evening. 2RP 87. Police arrested the following day. 1RP 89-90.

Skjold was "calm" and "cooperative" with police. 1RP 90. He denied being in the apartment building when Romero said he was assaulted. 2RP 145. Skjold said he went to a bar with his girlfriend, Abigail Pitblado, where he remained until the early morning. 2RP 145. He got into an argument with Pitblado, then called a friend to pick him up from the bar. He stayed with his friend and did not return to his residence until the early afternoon of December 2. 2RP 145, 3RP 17.

Skjold also reported that Pitblado was missing \$5,000 in cash from their apartment. 2RP 146. Skjold suspected someone had entered while they were away. There was no sign of forced entry, but he did find a key on the floor. 2RP 146-47, 161. The key he found was in his pocket when he was arrested. 1RP 91-92. Skjold denied being in Romero's apartment or punching him. 2RP 170-71.

Skjold had no injury to his hands. 2RP 163. No blood was found in Skjold's apartment. 1RP 64, 2RP 77.

Skjold's neighbors testified that they heard a dispute between a man and a woman at 5 a.m. 3RP 40-41; 1RP 63-64. They thought the man's voice was Skjold's, but never saw him. 3RP 42, 56.

The neighbors called 911 and Police arrived 15 minutes after the call. 3RP 43. Pitblado was the only one there. 1RP 59. Pitblado said she arrived home at 5 a.m. from a bar. 1RP 61. She said "Shane" and "Jeffy" were there with her, but left. 1RP 61. Pitblado was intoxicated and upset because someone stole money from her dresser. 1RP 60. After talking with Pitblado, the police left without further investigation. 1RP 62.

Two witnesses, Travis Guthrie and Josh Melde, confirmed that Skjold, Pitblado, and Shultz were still at the bar when Guthrie and Melde left around 11:30 p.m. 3RP 20-22, 29-31. Benjamin Southard and his wife, Megan Southard, testified that Ms. Southard picked up Skjold at a bar around 2:30 a.m. 3RP 88. Skjold told them he had argued with Pitblado. 3RP 92. Mrs. Southard brought Skjold to the Southard's home 30 minutes away and he stayed there until Ms. Southard drove him home around noon. 3RP 89.

Skjold was charged with first degree burglary, second degree assault and unlawful imprisonment. CP 10-11. The State

submitted special verdicts for a deadly weapon enhancement on the burglary and assault charges. CP 78, 80. The jury returned guilty verdicts for all three charges, and returned deadly weapon findings for two counts. CP 77-81.

The court sentenced Skjold to an exceptional sentence because Skjold's offender score was greater than 9. 6RP 25. The court ordered the sentences for first degree burglary and second degree assault to run consecutively, amounting to a total sentence of 229 months, including the deadly weapon enhancements. 6RP 25. This appeal timely follows. CP 82.

C. ARGUMENT

1. THE INFORMATION IS DEFECTIVE BECAUSE IT FAILS TO INCLUDE ALL THE ESSENTIAL ELEMENTS OF THE UNLAWFUL IMPRISONMENT CHARGE.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. Skjold's conviction for unlawful imprisonment must be reversed because the charging document does not set forth the essential elements that Skjold knowingly (1) restricted another's movements; (2) without that person's consent;

(3) without legal authority; and (4) in a manner that substantially interfered with that person's liberty. CP 11.

To establish the crime of unlawful imprisonment, the State must prove the defendant "knowingly restrain[ed] 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(1).

The definition of "restrain" has four primary components: "(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." State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000). 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." Warfield, 103 Wn. App. at 153-54, 157. The modified components of the "restrain" definition are thus elements of the crime. Id. at 158, 159.

The information charging Skjold is therefore defective. It simply alleged Skjold "did unknowingly restrain" Romero. CP 11. The information does not contain all essential elements of the

crime; i.e., that Skjold knowingly (1) restricted 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.

The "to convict" instruction in Skjold's case refers to the four components of the "restrain" definition, and the jury was correctly instructed that the offense is committed only if the person acts knowingly as to all three elements. CP 69-71 (Instructions 21 & 22). Proper jury instructions, however, cannot cure a defective information. Vangerpen, 125 Wn.2d at 788.

Skjold attacks the adequacy of the information for the first time on appeal. This Court, therefore, asks (1) whether the required facts appear in any form, or by fair construction can be found, in the charging document; and, if so, (2) whether the defendant can show he was nonetheless actually prejudiced by the inadequate language that caused a lack of notice? State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The language used in the information in this case was found deficient in State v. Johnson, ___ P.3d ___, 2012 WL 5992099, 11 (2012). The court held that the information was deficient because it did not state that the restraint was without legal authority. Johnson, at 11. The court held that the statutory definition of “restrain,” including “restricting ‘a person’s movements without consent,’ ‘without legal authority,’ or by ‘interfer[ing] substantially with his or her liberty’” are essential elements of the crime of unlawful imprisonment. Johnson, at 11 (quoting RCW 9A.40.010). The court held that the mere use of the word “restrain” in the information “does not encompass the entire statutory definition for this word, so the definition of ‘restrain’ is an essential element of the crime.” Johnson, at 11. Therefore, the court reversed Johnson’s unlawful imprisonment conviction. Johnson, at 12.

As in Johnson, the necessary elements of unlawful imprisonment are neither found nor fairly implied in the charging document in this case. Therefore, this Court must presume prejudice and reverse Skjold’s conviction. See McCarty, 140 Wn.2d at 425; Johnson, at 11-12.

2. THERE IS INSUFFICIENT EVIDENCE TO CONVICT SKJOLD OF FIRST DEGREE BURGLARY.

A criminal conviction requires proof beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). On review, evidence is not sufficient to support a conviction unless, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003).

RCW 9A.52.020 provides that:

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she **enters or remains unlawfully in a building** and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

(Emphasis added). The term “enters or remains unlawfully” is defined in RCW 9A.52.010(3) as follows:

A person enters or remains unlawfully in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.

Romero testified that he answered the door when Skjold knocked and opened it to him. 2RP 28-29. Romero never asked Skjold to leave. 2RP 44-45. Because Skjold entered by invitation

and that invitation was not revoked, there is no evidence that Skjold “entered or remained unlawfully.”

The State may attempt to argue that Skjold’s alleged assault inside Romero’s apartment is proof of “unlawfully remaining.” However, if proof of criminal intent alone constitutes “unlawfully remaining,” then the element itself becomes superfluous because it merges with the other necessary element of proof of intent to commit a crime within. The legislature is presumed not to have included superfluous language and therefore each element listed in a statute is presumed to have independent purpose. State v. Wanrow, 88 Wn.2d 221, 228, 559 P.2d 548 (1977). Furthermore, inferring “remains unlawfully” from the showing of intent would transform every crime committed indoors into a burglary.

“Washington courts have never held that violation of an implied limitation as to purpose only is sufficient to establish unlawful entry or remaining.” State v. Miller, 90 Wn. App. 720, 954 P.2d 925 (1998). While the defendant’s purpose may be considered by the court, criminal intent alone is not proof that the invitation is revoked. State v. Thomson, 71 Wn. App. 634, 640, 861 P.2d 492 (1993).

In State v. Collins, 110 Wn.2d 253, 258, 751 P.2d 837 (1988), the Court rejected a rule that would hold that criminal intent is sufficient proof of “unlawfully remaining.” The Court instead preferred to apply what it called a “case by case” approach. “While the formation of criminal intent per se will not always render the presence of the accused unlawful, that presence may be unlawful because of an implied limitation on, or revocation of, his privilege to be on the premises.” Id., at 258.

Examination of the facts in Collins illustrates the Court's chosen approach. Two women invited Collins, a stranger, into their home to use the telephone. 110 Wn.2d at 254–55. After Collins used the telephone, he dragged the women into a bedroom and assaulted them. Collins, 110 Wn.2d at 255. The Court held that the invitation to enter was impliedly limited to place (front room) and purpose (use of the telephone):

The record supports an inference that the license extended to Collins was limited to a specific area and a single purpose. Collins was a total stranger. Charlotte made an offer only of the use of her telephone. She led him to one particular telephone and handed it to him herself. No reasonable person could construe this as a general invitation to all areas of the house for any purpose.

110 Wn.2d at 261.

Key to the reasoning of the court in Collins was that the defendant's criminal purpose was merely a circumstance that helped establish that he had violated implied limitations as to place and time. See also, State v. Davis, 90 Wn. App. 776, 781, 954 P.2d 325 (1998) ("The implied revocation of license should only apply in cases where the license to enter was limited to a specific purpose.") Thus, Collins illustrates the difference between illegal entry and illegally "remaining." A person illegally remains in a premises when:

- (1) a person has lawfully entered a building pursuant to invitation, license or privilege;
- (2) the invitation, license or privilege is expressly or impliedly limited;
- (3) the person's conduct violates such limits; and
- (4) the person's conduct is accompanied by intent to commit a crime in the building.

Thomson, 71 Wn. App. at 640-41.

Miller further illustrates this point. The court found there was insufficient evidence to support Miller's conviction for second degree burglary where he entered a carwash and stole money out of the coin boxes in the wash bays. 90 Wn. App at 722. The State, citing Collins, argued that Miller "remained unlawfully" because his theft negated or exceeded the scope of any license, invitation or privilege to remain because no owner consents to illegal activity.

Miller, at 723, 727. The court disagreed: “Nothing in Collins supports the argument that harboring of criminal intent is in itself sufficient to violate an implied limitation or to establish revocation of any license, invitation or privilege.” Miller, at 727. The court held that because the invitation was not limited as to place and time, Miller did not exceed its scope by committing theft, and therefore did not enter or remain unlawfully within the definition of the burglary statute. Miller, at 724, 728. Miller’s burglary conviction was reversed. *Id.*, at 730.

As in Miller, Romero’s invitation was not limited to place or time. Romero testified he let Skjold into his apartment. 2RP 28-29. Skjold did not leave the main room, nor did Romero ask him to leave. 2RP 44-45. Thus, the circumstances here do not meet the test for “unlawfully remaining” because: (1) Skjold entered by invitation; (2) that invitation was not expressly or impliedly limited, and (3) Skjold did not exceed the scope of that invitation, even though he committed assault. In short, the State failed to prove Skjold unlawfully remained within Romero’s apartment. His conviction for first degree burglary must therefore be reversed.

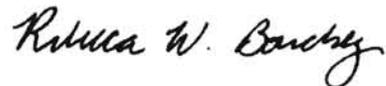
D. CONCLUSION

Skjold's conviction for unlawful imprisonment must be reversed because the information was constitutionally defective for failing to include all essential elements of the crime. Skjold's conviction for first degree burglary must also be reversed because there is insufficient evidence to find he entered or remained unlawfully.

DATED: December 21, 2012

Respectfully submitted,

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COA NO. 69077-9-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF DECEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SHANE SKJOLD
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SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF DECEMBER, 2012.

X Patrick Mayovsky

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