

NO. 68679-8-1

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

STATE OF WASHINGTON

Respondent

v.

ROBIN L. DAVIS,

Appellant

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STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENT

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I. SUPPLEMENTAL ISSUE

Whether State v. Lorenz, 152 Wn.2d 22 (2004) and State v. Stevens, 158 Wn.2d 304 (2006) provide guidance in determining whether the “to convict” instructions for second degree kidnapping were adequate to inform the jury of the essential elements of that crime?

II. ARGUMENT

Similar to the issue presented here, the Court in Lorenz considered whether jury instructions in a child molestation case were adequate to inform the jury of every element of the crime. Lorenz, 152 Wn.2d at 30. A person commits child molestation when the person has, or knowingly causes another person to have sexual contact with another when the other person is not married to the perpetrator.¹ “Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party. RCW 9A.44.010(2). The trial court in Lorenz rejected a proposed “to convict” instruction that incorporated sexual gratification as an element of the crime. Id. at 29. The Supreme Court affirmed,

¹ RCW 9A.44.083, RCW 9A.44.086, RCW 9A.44.089. The differences between first, second, and third degree child molestation relate to the ages of the parties. It is not relevant to the discussion here.

reasoning that had the Legislature intended the phrase “for the purpose of sexual gratification” to be an element of child molestation it would have been included in the child molestation statute, rather than a separate statute defining terms. Id. at 35. Because a plain reading of the statute showed “sexual gratification was a definition clarifying the essential element ‘sexual contact’ it was not itself an essential element of the crime.” Id.

The Court’s reasoning in Lorenz applies equally to the question presented here. The elements of second degree kidnapping include intent to “abduct.” RCW 9A.40.030(1). “Abduct” is separately defined to include the term “restrain”. RCW 9A.40.010(1). “Restrain” in turn is also defined by a separate statute. RCW 9A.40.010(6). Like “sexual gratification” as it relates to child molestation, had the Legislature intended the definition of restrain to be an essential element of kidnapping it could have included that in the statute setting out the elements of kidnapping. Since it did not, the definition of “restrain” is not a separate element of kidnapping, but simply clarifies the essential element of abduct. It was thus not necessary to include it in the “to convict” instruction.

The defendant attempts to distinguish Lorenz on its facts noting there the defendant was charged on the basis of accomplice

liability. The Court's discussion regarding the defendant's status as an accomplice to reject Lorenz's position was an additional reason, to uphold the trial court. It does not take away from the foregoing analysis supporting the conclusion that restrain was not a necessary element to be included in the "to convict" instruction. Additionally, the defendant was both a principal and an accomplice to Saunders. The jury was instructed on accomplice liability in this case. 1 P 59. The facts and circumstances in Lorenz are not meaningfully different from those presented here.

Stevens reiterated that Lorenz stood for the proposition that sexual gratification need not be included in the "to convict" instruction as an essential element, but must still be proved as a part of its burden to prove sexual contact. Stevens, 158 Wn.2d at 309. It thereby distinguished between sufficient jury instructions and sufficient evidence. Stevens supports the conclusion that the "to convict" instruction that set out the elements of kidnapping as provided in the statute, and giving separate instructions defining the elements of that offense was not error.

Davis joins his co-defendant Saunders in asserting that the State was required to prove he knew he was acting without consent and without legal authority and therefore the "to convict" instruction

that omitted that language was not sufficient. Supp. BOA at 3. When considering the sufficiency of jury instructions the court will read the challenged instruction as an ordinary reasonable juror would. State v. Killingsworth, 166 Wn. App. 283, 288, 269 P.3d 1064, review denied, 174 Wn.2d 1007 (2012). The jury was instructed in the language of the second degree kidnapping statute. 1 CP 103, 105. The mens rea for kidnapping was intent, not knowledge. Intent was defined for the jury. 1 CP 106. Jurors are presumed to follow the court's instructions. State v. Montgomery, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). An ordinary reasonable juror would have applied the instruction defining the greater mental state of intent to the kidnapping charge and not the instruction defining knowledge. The instructions held the State to its burden of proof for second degree kidnapping.

Finally, the defendant argues the asserted error was not harmless because the evidence was contested citing Neder v. United States, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L. Ed. 2d 35 (1999). Supp BOA at 4-5. The test for error in jury instructions is whether it appears beyond a reasonable doubt that the asserted error did not contribute to the verdict. Id. at 15. While that test may be met if the evidence is uncontroverted as to a missing element,

errors in jury instructions may also be harmless if they do not relieve the State of its burden to prove every element of the charged crime. State v. Brown, 147 Wn.2d 330, 332, 58 P.3 889 (2002). Here the defendant contends the State was required to prove the defendant knew he was acting without consent and unlawfully. One who acts intentionally necessarily acts with knowledge. RCW 9A.08.010(2). Taken together the instructions required the jury to find the defendant acted with intent as to all the components of "abduct." If the defendant's premise is correct, then the jury necessarily found he knew he acted without consent and lawful authority. The State was not relieved of its burden of proof.

III. CONCLUSION

For the foregoing reasons and those previously argued the State asks the Court to affirm the convictions.

Respectfully submitted on June 28, 2013.

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