68771-9



68771-9

NO. 68771-9-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

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STATE OF WASHINGTON

Respondent

v.

JEFFREY S. SAUNDERS,

Appellant

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# BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## I. ISSUES

1. The court instructed the jury on the elements of second degree kidnapping using the pattern instruction which was written in the language of the statute. Did the "to convict" instruction include all of the elements of the crime?

2. If the to-convict instruction omitted an element of the offense was the error harmless?

## II. STATEMENT OF THE CASE

Salvador Valdez, his wife Rachel, and their children, including J.V. (DOB 2-15-95) lived in Texas from sometime in 2009 until July 2010. At that time they moved to Washington State, settling in Mount Vernon and Lake Goodwin. Prior to coming to Washington Mr. and Mrs. Valdez purchased two cars; a red Ford Explorer that Mr. Valdez typically drove and an Expedition that Mrs. Valdez drove. Mrs. Valdez was in charge of making payments on both cars. 1 RP 92-93, 134-37, 211.

On September 10, 2010 Mr. Valdez and J.V., along with Mr. Valdez' niece and sister, picked J.V. up from a football game at Mount Vernon High School around 6 to 7 p.m. On the way home Mr. Valdez went to the drive through at the Kentucky Fried Chicken store for his son to get something to eat. While in the drive through

lane Jeffery Saunders approached Mr. Valdez's car, yelling at Mr. Valdez and directing him to pull forward. As he followed the drive through lane Mr. Valdez saw a big truck. The lights on the truck were shining directly at Mr. Valdez's car. The truck was positioned so that there was only room for one car to pass by. Mr. Valdez saw Saunders, Robin Davis and Chet Davis standing by the truck. Those men were all directing him to get out of the car. Mr. Valdez did not converse with any of the men. He did not hear any of the men state that the car was being repossessed and he was not shown any paperwork for repossessing the car. Mr. Valdez was not aware at the time that Mrs. Valdez had been late on the car payments. Mr. Valdez then drove off, going over a curb as he quickly left the area. He did not hit any of the men who were standing by the truck at the drive through exit. He did not call the police because he thought the episode was over. 1 RP 103, 109-11, 117-20, 128, 228-31; 2 RP 397-400; 3 RP 538-41.

Mr. Valdez drove to his sister's home in Mount Vernon where he dropped his sister and niece off. He then went toward Stanwood to go to his in-laws' home at Lake Goodwin. On his way he stopped at a Burger King located in Arlington. As he was entering the parking lot he saw the defendant's truck driving slowly

behind him. Saunders and Robin Davis quickly got out of the truck and ran toward Mr. Valdez's car. Robin Davis pointed a shotgun at the Valdez's. Both Davis and Saunders swore and ordered Mr. Valdez and J.V. out of the car at gunpoint. Either Saunders or Davis noticed Amber Spady and Janessa Rhodes in the parking lot. They yelled to the two women that they were "bounty hunters." While Ms. Spady and Ms. Rhodes quickly left the area they called 911 because they were concerned for the Valdez's safety. 1 RP 63-74, 94-99, 121-122, 126, 194-99; 2 RP 410-12; 3 RP 545-551.

After Saunders and Robin Davis got Mr. Valdez and J.V. out of the Explorer Saunders ordered Mr. Valdez to put his hands on the car. Saunders then patted Mr. Valdez down looking for weapon. Saunders took Mr. Valdez's wallet, looked inside it, and then gave it to Robin Davis, telling him to "hold this in case he runs." Saunders told Mr. Valdez that he was going to jail. Saunders got into the driver's seat of the Explorer, and ordered Mr. Valdez into the passenger seat. He asked Mr. Valdez where the other car was located. Saunders threatened Mr. Valdez if Mr. Valdez did not tell Saunders where the other car was. Saunders did not tell him that the cars were being repossessed. Rather Mr.

Valdez thought that he was being car-jacked. 1 RP 100-105, 215-17, 221; 2 RP 410-11, 416.

J.V. was ordered into the truck at gunpoint. Mr. Valdez asked if J.V. could ride with him in the Explorer, but the men refused to let Mr. Valdez and J.V. ride together. Robin Davis then drove J.V., following the Explorer driven by Saunders. 1 RP 218-19; 2 RP 417-18.

Mr. Valdez is a diabetic. When his blood sugar is too low he has seizures. After Saunders got Mr. Valdez in the Explorer Mr. Valdez told Saunders about his condition. Mr. Valdez stated that he thought he was going into diabetic shock and that he might have a seizure. Saunders said he did not want Mr. Valdez having a seizure in the car. He drove to a Shell gas station located about one mile from the Burger King and stopped. There Saunders allowed Mr. Valdez to get out and get something to drink. 1 RP 93-94, 104-06; 2 RP 416, 420.

Police responded to the 911 call made by Ms. Spady and Ms. Rhodes within minutes. They located Saunders and the Davis' at the Shell station. Saunders was still in the driver's seat of the Explorer. Robin Davis was driving the truck, with J.V. in the front passenger seat and Chet Davis in the back seat. Everyone was

removed from the vehicles and handcuffed pending an investigation. Mr. Valdez was also handcuffed as he walked out of the station. 1 RP 108-09, 225; 2 RP 259-66, 273-76,.

Officer Paxton searched Robin Davis and found three rounds of ammunition in his front pocket. Davis asked the officer what was going on. When she told him that she was trying to figure out why they kidnapped people he asserted that they were just giving the Valdez's a ride home. Officer Paxton challenged that assertion stating that was not the case when they ordered the Valdez's into the vehicles a gunpoint. Robin Davis responded by chuckling and saying, "yeah, I've been working with him on that, trying to work on that." Davis then explained that they were repossessing the car. Davis did not ask the officer to arrest Mr. Valdez. 2 RP 291-92.

Police also searched the truck. They found a pistol and a shotgun on the back seat on the driver's side. Both firearms were tested and determined to be operable. 2 RP 315-16, 342.

Jeffery Saunders and Robin Davis were charged with a variety of crimes including two counts of kidnapping.[1] Saunders and

[1] Jeffery Saunders was charged by amended information with second degree kidnapping (Salvador Valdez victim), first degree kidnapping (J.V. victim), second degree assault (2 counts), and unlawful possession of a firearm. Counts

Robin Davis were tried together. At trial Saunders testified that he owned Allstar Recovery, a vehicle repossession business. In addition he performed fugitive recovery, although he was not licensed to that in Washington. On the date of this offense he, Robin Davis, and Davis' son Chet Davis were in Western Washington delivering a vehicle that had been repossessed when they were hired to repossess the Valdez's cars. 2 RP 385-391.

Saunders testified that they located the Explorer in the Kentucky Fried Chicken drive-through in Mount Vernon. He said that he approached the car and informed the occupants that the car was wanted out of Texas. He said he saw the driver make a hand movement that was consistent with putting the car in gear. The car accelerated out of the drive through as he jumped back. He did not call the police at that time because he perceived the police were biased against repossession agents. 2 RP 399-404.

Saunders then testified that they were on their way to repossess the Expedition when they spotted the Explorer again. They decided to make a second attempt at repossessing the Explorer when it pulled into the Burger King parking lot. Saunders

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1-4 carried firearm allegations. 1 CP 70-71. Robin Davis was charged with second degree kidnapping, first degree kidnapping, and two counts of second degree assault. See no. 68679-8-I, 1 CP 111-12.

stated that he and Chet Davis got out of the truck. While Saunders approached the Explorer it accelerated. The driver nearly ran Chet Davis down. At that point Saunders decided to arrest Mr. Valdez for attempted vehicular assault. When Mr. Valdez stopped Saunders approached the Explorer and ordered Mr. Valdez and J.V. out of the car. Saunders ordered Mr. Valdez to put his hands on the car and then Saunders patted Mr. Valdez down for weapons. Saunders pulled Mr. Valdez's wallet out of his pocket and handed it to Robin Davis. Saunders told Mr. Valdez that he was going to jail. While he was doing that he heard a shotgun racking, turned, and saw Robin Davis pointing a gun at the Explorer. 2 RP 404-413.

Saunders testified that Mr. Valdez then became emotional and said he was going into diabetic shock. Saunders then changed his mind about arresting Mr. Valdez. Instead he decided to take him to the Shell station to let him get something for his diabetes. Before leaving the Burger King Saunders directed J.V. to get in the truck with Robin Davis to follow them. 2 RP 415-420.

At the conclusion of the State's case the trial court found there was insufficient evidence to support kidnapping first degree. It permitted the State to amend the charge to kidnapping second degree. 2 RP 372-73. The jury found the defendant guilty of two

counts of second degree kidnapping while armed with a firearm. 1 CP 65-68. It found the defendant not guilty of the remaining counts. 1 CP 59-64.

## III. ARGUMENT

### A. THE JURY WAS PROPERLY INSTRUCTED REGARDING THE ELEMENTS OF SECOND DEGREE KIDNAPPING.

#### 1. The Court Has Created An Exception To The General Rule That Failure To Object Waives Review For Challenges To The To-Convict Instruction.

Generally the court will not review an error raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The rule is designed to promote the efficient use of judicial resources. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." Id.

An alleged error that was not raised in the trial court may be reviewed if it constitutes a "manifest constitutional error." RAP 2.5(a)(3). In addition, the Court has carved out an exception for alleged errors in the "to convict" instruction, even in the absence of a showing that the alleged error is manifest. State v. Davis, 154 Wn.2d 291, 305-06, 111 P.3d 844 (2005), affirmed, 547 U.S. 813

(2006). Thus, despite the defendant's failure to object, thereby denying the trial court the opportunity to correct the error he now alleges, this Court may review the claim that the to-convict instruction for kidnapping second degree was deficient.

**2. The "To Convict" Instruction Included All Of The Elements Of Kidnapping Second Degree.**

The defendant argues the "to convict" instruction relieved the State of its burden to prove the elements of kidnapping second degree, relying on recent amendments to the standard to-convict instruction for unlawful imprisonment. Because the amendments to that instruction only clarified that instruction, and because the to-convict instruction given in this case followed the language of the statute, the instructions did not relieve the State of its burden of proof.

The "to convict" instruction must include all of the elements of the crime charged. State v. Fisher, 165 Wn.2d 727, 753, 202 P.3d 937 (2009). An "element" is defined as "'the constituent parts of a crime—usu[ally] consisting of the actus reus, mens rea, and causation—that the prosecution must prove to sustain a conviction." Id. at 754 quoting Black's Law Dictionary 559 (8th ed. 2004). The statutory elements of a crime constitute the essential

elements. Id. A constitutionally adequate "to convict" instruction need not contain all pertinent law such as the definition of terms. Id.

This Court rejected an argument similar to that advanced here in State v. Jain, 151 Wn. App. 117, 210 P.3d 1061 (2009). There the defendant was charged with money laundering. An element of that offense is that the defendant's conduct involves "specified unlawful activity." RCW 9A.83.020. "Specified unlawful activity" is defined by RCW 9A.83.010(7). This Court held a "to convict" instruction written in the language of the statute, accompanied by separate definitional instructions adequately set out the elements of the offense, and did not relieve the State of its burden of proof. Id. Like the instructions in Jain, the to-convict instructions given in this case for kidnapping second degree held the State to it burden to prove every element of the offense.

The court gave the following instruction setting out the elements of second degree kidnapping:

> To convict the defendant, Jeffrey Saunders, of the crime of kidnapping in the second degree as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

> (1) That on or a about the 10th day of September, 2010, the defendant intentionally abducted Salvador Valdez; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

1 CP 103.

An identical instruction was given for count II charging second degree kidnapping of J. V. 1 CP 105. The jury was also instructed on the definition of intent, abduct, restrain, and knowledge. 1 CP 106, 107, 116. These instructions were written in the language of their respective statutes. RCW 9A.40.030(1), RCW 9A.40.010(1) and (6). The jury was adequately instructed regarding what the State was required to prove, even though the definition of "abduct" was not included in the "to convict" instruction.

The defendant argues the instruction was inadequate because it failed to set out as elements that the defendant (1) knowingly acted without consent, (2) knowingly acted without lawful authority, and (3) knowingly acted in a manner that substantially

interfered with another's liberty. BOA at 18. He supports his argument by reference to State v. Warfield, 103 Wn. App. 152, 5 P.3d 1280 (2000).

Warfield considered the sufficiency of the evidence for unlawful imprisonment. To convict the defendant of unlawful imprisonment the State was required to prove that the defendant knowingly restrained another. RCW 9A.40.040. The statutory definition of restraint has four components: (1) restricting another's movements, (2) without the person's consent, (3) without legal authority, and (4) in a manner that substantially interferes with that person's liberty. Warfield, 103 Wn. App. at 157. The Court reasoned that under the plain language of the statute and legislative history, the mens rea of knowledge modified all four components of the actus reus of restraint. Id.

The defendant points to the pattern instruction for unlawful imprisonment, noting that it was modified to separately inform jurors that the knowledge requirement applied to each of the components set out in the statutory definition for "restrain." The former version of the pattern instruction for unlawful imprisonment only required the jury find the defendant knew that he was restraining another movements in a manner that substantially interfered with his or her

liberty. It did not require that the jury find the defendant knew he was acting without the person's consent or without legal authority. See comments to WPIC 39.16. The modification to that pattern instruction incorporated the court's decision in Warfield, but it says nothing about the elements of kidnapping.

The statutory elements of unlawful imprisonment are (1) knowingly (2) restraining another person. RCW 9A.40.040. Knowledge and restraint are defined by other statutes. RCW 9A.08.010(1)(b), RCW 9A.40.010(6). The modification to the to-convict instruction for unlawful imprisonment incorporated the definition of restrain previously set out in WPIC 39.31. Once the modification to the to-convict instruction had been adopted the definition in WPIC 39.31 was superfluous and was therefore withdrawn. See comments to WPIC 39.16 and WPIC 39.31.

The pattern instruction committee's decision to modify the unlawful imprisonment to-convict instruction did no more than clarify the instructions. "Clarification of the standard instruction does not amount to an indictment of earlier versions." State v. Holzknecht, 157 Wn. App. 754, 765, 238 P.3 1233 (2010) review denied, 170 Wn.2d 1029, 249 P.3d 623 (2011). Nor does it create additional elements to the crime where those elements did not

previously exist. The to-convict instruction for kidnapping second degree, written in the language of the statute, adequately set out the elements of that crime.

**B. ANY DEFICIENCY IN THE TO-CONVICT INSTRUCTION WAS HARMLESS BEYOND A REASONABLE DOUBT.**

A jury instruction that omits or misstates an element of the crime may be harmless error. State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002), Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The error is harmless if the court is convinced beyond a reasonable doubt that the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 704 (1967). That standard is met when the element at issue is supported by uncontroverted evidence. Brown, 142 Wn.2d at 341, Neder, 152 U.S. at 18.

In Brown, an erroneous accomplice liability instruction was harmless as to certain crimes charged where the evidence established the defendant acted as a principal, but not harmless where the evidence showed the defendant acted as an accomplice. Brown, 142 Wn.2d 342-43. In Neder failure to instruct the jury that a taxpayer's misstatement was material was harmless where the evidence showed the defendant failed to report over $5 million in

income. The Court said "no jury could reasonably find that Neder's failure to report substantial amounts of income on his tax returns was not 'a material matter.'" Neder, 527 U.S. at 16.

The defendant argues omission of an element of a crime in the "to convict" instruction entitles him to automatic reversal, citing State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995), State v. Seek, 109 Wn. App. 876, 37 P.3d 339 (2002), and State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003). Byrd and Seek pre-dated Brown. Neither case addressed the question whether an error in the to-convict instruction could be harmless. The Court in DeRyke employed the harmless error analysis it articulated one year earlier in Brown. DeRyke, 149 Wn.2d at 912. Under the current state of the law, if this Court finds error in the to-convict instruction, it should address whether that error was harmless.

The defendant argues error in the jury instruction was not harmless because the evidence showed that he was acting as a repossession agent and was unaware of any law governing that field. This relates to the "knowingly acted without legal authority" portion of the legal definition of restraint. While the evidence showed that at the time Saunders and the Davis' first approached Mr. Valdez at Kentucky Fried Chicken they intended to repossess

the car, it did not show that they intended to forcefully take the Valdez's anywhere. Only later when the kidnapping occurred did the defendant's intent change from repossessing the car to making an arrest. The defendant himself testified that at the point that he pulled Mr. Valdez and J.V. from the car, searched Mr. Valdez and took his wallet, and then ordered each person into the vehicles his intent was to affect an arrest. The defendant testified that he took Mr. Valdez's wallet in case Mr. Valdez attempted to escape. He checked Mr. Valdez's wallet for identification "so if he runs, I know who he was," even though his identity was immaterial to the vehicle repossession. 2 RP 416-17. There is no evidence the defendant believed he had any lawful authority to effect an arrest in the manner that he did.

The defendant also argues evidence regarding use of a firearm was conflicting; the defendant and Davis testified the gun was pointed at the grill of the Explorer. BOA at 26. Regardless of where the gun had been pointed, it had been used to get Mr. Valdez and J.V. out of their car. All of the evidence, including the defendants' testimony, established the victims were intimidated by the defendants. They only accompanied the defendants because they were forced to do so. The uncontroverted evidence showed

the defendant and Davis did not give Mr. Valdez or J.V. a choice as to where they were going at the moment they were ordered into the vehicles. The defendant admitted that he would not let Mr. Valdez and J.V. ride in the same vehicle for his own reasons. 2 RP 417-18. It is highly unlikely that if the jury would not have found that the defendant knowingly restricted another's movements, knowing it was without their consent, and knowingly acted in a manner that substantially interfered with another's personal liberty under the evidence presented in this case.

Given the uncontroverted evidence, should this Court find the to-convict instruction should have included the elements the defendant claims were necessary, any error was harmless beyond a reasonable doubt.

## IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on January 16, 2013.

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