

COA NO. 68771-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SAUNDERS,

Appellant.

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

The Honorable Larry E. McKeeman, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT

1. THE "TO CONVICT" INSTRUCTION FOR KIDNAPPING OMITTED AN ELEMENT OF THE CRIME, THUS RELIEVING THE STATE OF ITS BURDEN OF PROOF.

The Court requested supplemental briefing on the applicability of State v. Lorenz, 152 Wn.2d 22, 93 P.3d 133 (2004) and State v. Stevens, 158 Wn.2d 304, 143 P.3d 817 (2006) in relation to the adequacy of the "to convict" instruction for kidnapping.

- a. Knowledge That The Restraint Is Unlawful Is A Statutory Element Of The Crime That Must Be Included In The "To Convict" Instruction; It Is Not Merely A Definition Of An Element.

Lorenz held "sexual gratification" did not need to be included in the "to convict" instruction for first degree child molestation because it is not an "essential element to the crime" but rather "a definitional term that clarifies the meaning of the essential element, 'sexual contact.'" Lorenz, 152 Wn.2d at 24, 36. Stevens recognized the holding in Lorenz. Stevens, 158 Wn.2d at 309.

Saunders's case is distinguishable. The mens rea requirement that a defendant know the restraint is unlawful is an element, not a definition of an element. The Court of Appeals, in carefully analyzing legislative intent on the matter, has already concluded knowledge of the law is a "statutory element" of the crime of unlawful imprisonment. State v.

Warfield, 103 Wn. App. 152, 159, 157, 5 P.3d 1280 (2000). For the reasons set forth in earlier briefing, that knowledge requirement applies to kidnapping, another restraint-based offense. See Brief of Appellant at 18-24; Reply Brief at 1-7.

The Supreme Court in Lorenz analyzed legislative intent and concluded the statutory definition of "sexual gratification" merely clarified the meaning of the essential element of "sexual contact." Lorenz, 152 Wn.2d at 34-35. The Court in Warfield analyzed the plain language of the unlawful imprisonment statute and its legislative history to conclude knowledge of the unlawfulness of the restraint is a statutory element. Warfield, 103 Wn. App. at 156-59. There is no need to reinvent the wheel in relation to this matter.

The "essential elements" of a crime that must be included in the "to convict" instruction are "[t]he constituent parts of a crime—[usually] consisting of the actus reus, mens rea, and causation—that the prosecution must prove to sustain a conviction." State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (quoting Black's Law Dictionary 559 (8th ed. 2004)). The prosecution must prove Saunders knew the restraint was unlawful to convict him of kidnapping. That mens rea component is a constituent part of the crime under the "essential element" standard. The "to convict"

instruction does not set forth the requirement and is therefore constitutionally defective.

b. The State Was Relieved Of Its Burden Of Proof Even If The Knowledge Requirement Did Not Need To Be Included In The "To Convict" Instruction.

Even if the requirement that Saunders knew the illegality of the restraint did not need to be included in the "to convict" instruction, the State was still relieved of its burden of proof on this issue because remaining instruction misinformed the jury that the State did not need to prove Saunders knew the restraint was unlawful.

The State's burden of proof extends farther than the "to convict" instruction. For example, the conclusion that the purpose of sexual gratification is not an essential element of first degree child molestation that must be included in the "to convict" instruction "does not . . . relieve the State of its burden to show sexual gratification as part of its burden to prove sexual contact." Stevens, 158 Wn.2d at 309. "[W]hile sexual gratification is not an explicit element of second degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification." Id. at 309-10.

Following that reasoning, even if the "to convict" instruction for kidnapping did not need to include the requirement that the State prove

knowledge that the restraint was unlawful, the State still needed to prove Saunders knew the restraint was unlawful in order to convict him.

Lorenz held "'sexual gratification' is properly included in the separate instruction defining 'sexual contact' and is not an essential element of first degree child molestation." Lorenz, 152 Wn.2d at 24. The trial court in fact gave an accurate instruction to the jury that defined "sexual contact." Id. at 29.

But in Saunders's case, there was no separate instruction that informed the jury of the requirement that the State needed to prove Saunders's knowledge that the restraint was unlawful. On the contrary, the instruction defining knowledge expressly told the jury "It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime." CP 116 (Instruction 23). That was an incorrect statement of the law in relation to the kidnapping counts. It affirmatively relieved the State of its burden of proving that Saunders knew the restraint was unlawful.

Lack of instruction on the definition of an element of a crime is not a constitutional error that may be raised for the first time on appeal. State v. Scott, 110 Wn.2d 682, 690-91, 757 P.2d 492 (1988). But where an instruction that is given incorrectly defines an element of a crime, the State is unconstitutionally relieved of its burden to prove all essential

elements. State v. Williams, 136 Wn. App. 486, 492-93, 150 P.3d 111 (2007). If the requirement that the State prove the defendant's knowledge of the illegality of the restraint is a definitional matter, then the affirmative misstatement of the law in the knowledge instruction presents a constitutional error because it relieved the State of its burden of proof. Definitional instructions that relieve the State of its burden of proof may be challenged for the first time on appeal under RAP 2.5(a)(3). State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011) (instruction defining recklessness); State v. Goble, 131 Wn. App. 194, 202-03, 126 P.3d 821 (2005) (instruction defining knowledge); cf. State v. Sibert, 168 Wn.2d 306, 315-17, 230 P.3d 142 (2010) (alleged error in instruction defining knowledge was not error of constitutional magnitude where the instructions, taken as a whole, accurately defined knowledge and did not create a mandatory presumption).

B. CONCLUSION

Saunders requests reversal of the convictions.

DATED this 24th day of June 2013.

Respectfully Submitted,

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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 68771-9-1
)	
JEFFREY SAUNDERS,)	
)	
Appellant.)	

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 24TH DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF JUNE, 2013.

x *Patrick Mayovsky*