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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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The "to convict" instructions for the two counts of kidnapping omitted elements of the crime, thereby relieving the State of its burden of proof. CP 103, 105.

Issue Pertaining to Assignment of Error

To convict appellant of kidnapping, whether the State needed to prove appellant (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 and, if so, whether reversal is required because the "to convict" instruction for each count of kidnapping omitted those elements of the crime?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Jeffrey Saunders with second degree kidnapping (count I), first degree kidnapping (count II), two counts of second degree assault (counts III and IV), and one count of unlawful possession of a firearm. CP 70-71. Counts I through IV included a firearm enhancement allegation. CP 70.

Saunders was tried with co-defendant Robin Davis. 1RP¹ 1. After the State rested its case, count II was amended to second degree kidnapping after the court found insufficient evidence to support a first degree kidnapping charge. 1RP 374. A jury acquitted Saunders of assault and unlawful possession of a firearm, but convicted him on the two counts of second degree kidnapping and the corresponding firearm enhancements. CP 58-68. The trial court imposed an exceptional sentence downward of no confinement on the standard range sentence, with the two mandatory firearm enhancements resulting in a total sentence of 72 months confinement. CP 18-19, 30-33. The court set an appeal bond. 1RP 819-20. This appeal follows. CP 1-15.

2. Trial

a. Saunders Is Hired to Repossess The Vehicles

Salvador Valdez lived in Mount Vernon with his 15-year-old son J.V. 1RP 92-93, 211-12. His wife, Rachel Valdez, lived with her parents. 1RP 93. They previously lived in Texas for about a year, where the family struggled financially and one of their vehicles was repossessed. 1RP 92, 135-37. Shortly before returning to Washington, they bought a

¹ The verbatim report of proceedings is referenced as follows: 1RP - four consecutively paginated volumes consisting of 2/27/12, 2/28/12, 2/29/12, 3/1/12, 3/2/12, 4/13/12, 4/26/12; 2RP - 3/6/12.

red Explorer and an Expedition in Texas, for which they owed \$11,000. 1RP 93, 137.

Jeffrey Saunders owned a business named Allstate Recovery. 1RP 386. Robin Davis and his son, Chet Davis,² worked with Saunders. 1RP 518, 524. Their work consisted of vehicle repossession, vehicle transport and fugitive recovery activities. 1RP 386, 524-25.

Leobardo Rios was employed as a repossession agent in Texas. 1RP 375. On September 10, 2010, JP Motors contacted him to repossess two vehicles in Washington. 1RP 375-76. Rios in turn hired Saunders to repossess the red Explorer and white Expedition and sent the requisite paperwork to him. 1RP 376-77, 390-93.

Rios was on the phone with Saunders as he tracked the two vehicles through the global positioning system (GPS) installed in each. 1RP 376-78. Working through Rios, Saunders located the Explorer in the drive-through at a Kentucky Fried Chicken (KFC). 1RP 395-96. Saunders was in a gray Ford truck. 1RP 397. Robin Davis was the driver. 1RP 397, 531-33. Chet Davis was in the backseat. 1RP 397. Witnesses gave conflicting accounts of subsequent events.

² For clarity, this brief will refer to Robin Davis as "Davis" and Chet Davis as "Chet."

b. Testimony of Saunders and Davis

Davis pulled into the parking lot and stopped at the mouth of the drive-through exit without blocking it. 1RP 398, 429. With paperwork in hand, Saunders walked behind the Explorer and saw the JP Motors license plate frame. 1RP 398-99. He then went to the passenger side window, knocked, and asked the woman in the front seat if she was Rachel Valdez. 1RP 399. After the woman did not answer, the driver, later identified as Salvador Valdez, responded that she was not. 1RP 400. Saunders announced "This vehicle is wanted out of Texas" and that he needed to check the vehicle identification number (VIN). 1RP 400.

As Saunders started to walk in front of the Explorer, Valdez accelerated towards him. 1RP 400. Saunders jumped out of the way. 1RP 400-01. Saunders was shocked that Valdez had tried to run him over.³ 1RP 402. Davis, who had stayed by the truck, saw the Explorer barrel around the corner of the restaurant. 1RP 539. The Explorer then jumped the curb and Chet leapt out of the way. 1RP 541. Valdez drove over the grass and sidewalk into oncoming traffic. 1RP 401-02.

A plan was then made to go after the Expedition for repossession. 1RP 403-05. As they were heading toward the location of the Expedition,

³ Rios testified Saunders told him over the phone at the time that the "[s]on of a bitch tried to run me over." 1RP 379.

they noticed the Explorer in front of them on the freeway. 1RP 405, 433-34. Both vehicles took the same exit. 1RP 406. Saunders assumed the Explorer was heading to where the Expedition was located. 1RP 434.

Valdez pulled into a Burger King. 1RP 406. Davis followed the Explorer into the parking lot. 1RP 406, 435, 545. Their intent at this point was to again attempt repossession of the Explorer. 1RP 494. Davis stopped the truck opposite the Explorer, separated by a landscaping island. 1RP 545-46.

Saunders got out of the passenger side of the truck with paperwork in hand and started walking to the driver's door of the Explorer. 1RP 408-09, 546. Davis stood by the door of the truck. 1RP 546. Chet got out and came up behind Davis. 1RP 546.

When Saunders had just about reached the Explorer, Valdez gassed it, looped around and drove right at them. 1RP 546. Davis maintained Valdez made a U-turn and drove at Chet. 1RP 409-10, 436-38, 470, 494. Saunders also thought Valdez was trying to run Chet over. 1RP 409-10. Chet barreled toward Davis. 1RP 546. At that point, Saunders decided to make a citizen's arrest of Valdez for what he described as attempted vehicular assault. 1RP 410, 494.

Concerned for his son's safety, Davis grabbed his unloaded shotgun from the truck,⁴ slid the slide forward, threw it on his shoulder, walked in front of the Explorer and it came toward his son, and yelled at Valdez to stop the vehicle. 1RP 496, 546-48, 563-64, 592, 594. He took out the gun to defend himself and his son from being hit by the vehicle, not to further the repossession. 1RP 564-65. Davis said he pointed the unloaded shotgun as a bluff. 1RP 548, 564.

Saunders heard the racking of a shotgun and looked over to see Davis pointing the shotgun at the grill of the Explorer. 1RP 412, 438-39, 470. Saunders did not know Davis was going to take out the gun and was surprised he did so. 1RP 425, 491. Saunders told Davis to secure his weapon as soon as he noticed it was out. 1RP 490-91, 496. Saunders testified he himself did not have a gun. 1RP 412, 479, 488. Davis testified there was a pistol in the truck, but that no one ever took it out. 1RP 549.

Valdez stopped the Explorer five feet away from Davis. 1RP 547, 549. Davis put the shotgun back in the truck after the vehicle stopped but before Valdez got out. 1RP 445, 473, 497, 549, 565, 595-96. Davis yelled at Valdez to shut the vehicle off. 1RP 547. He did. 1RP 547. Chet

⁴ Davis had a concealed weapons permit. 1RP 526.

obtained the key from Valdez. 1RP 549. When asked if he used the weapon for repossession, Davis replied "No. That's illegal." 1RP 549.

Once the Explorer came to a stop, Saunders went to the passenger side of the car and told the occupants to "get the fuck out of the car." 1RP 410. The passenger, later identified as J.V., got out of the car first and stood off to the side. 1RP 411, 550-51. Valdez then got out, at which point Saunders told him to put his hands on top of the car. 1RP 411. Saunders patted Valdez down, searching for a weapon. 1RP 411, 413. He was concerned for everyone's safety. 1RP 411. Saunders located Valdez's wallet and handed it to Davis, saying, "Hold this in case he runs." 1RP 416, 551.

Saunders was upset and cursed at Valdez, but denied using racial slurs. 1RP 414, 439-40. He yelled, "You're going to jail" and "why you running people down?" 1RP 551. Saunders also said "I hope this is worth it, because you're fucking going to jail over a repossession." 1RP 413. His intent was to make a citizen's arrest of Valdez because he tried to run Saunders and Chet down. 1RP 413-14, 416 439, 472. He did not intend to take them to the police, but would have called the police. 1RP 439.

Valdez was crying and apologizing, saying he did not want to go to jail. 1RP 414, 551. He also said he was going into a diabetic shock. 1RP 414. Saunders changed his mind about arresting him primarily because he

became concerned about Valdez's health. 1RP 415, 417, 495. Saunders offered to call 911. 1RP 415. Valdez declined, saying he needed a soda. 1RP 415-16.

Saunders still intended to repossess both the Explorer and the Expedition. 1RP 439-40, 495. Saunders told J.V. "You ride with him." 1RP 417, 551. Saunders did this because it was standard in the industry (or with his company) to make sure no debtor was sitting behind him in the repossessed vehicle because of potential safety problems. 1RP 417-18, 452. Davis likewise explained J.V. was put into the truck for safety reasons: "If you don't know the person, you don't want to get them behind you. We did just repossess their vehicle." 1RP 559. At the same time, they did not want to leave J.V. stranded. 1RP 559.

Saunders did not threaten J.V. in any way. 1RP 418-19. Davis never heard Valdez ask to ride with J.V. 1RP 569. J.V. walked to the truck on his own and got in the front passenger seat. 1RP 419, 551, 607. Saunders said he did not know J.V. was a minor. 1RP 417. Chet was in the back of the truck. 1RP 551. No one touched J.V. 1RP 551-52.

Saunders told Davis to follow him. 1RP 551. Their intent was to go where the Expedition was located and repossess it, taking Valdez and J.V. back home in the process. 1RP 553, 560-61. Saunders got into the driver's seat of the Explorer, followed by Valdez. 1RP 419. He did not

threaten Valdez to get into the vehicle. 1RP 419. Saunders planned to drive to the Expedition. 1RP 418. Valdez offered to take him there. 1RP 419. Saunders said he already knew where it was. 1RP 419.

While Davis followed Saunders in the truck, J.V. asked what repossession meant and Davis explained. 1RP 560. J.V. was calm and did not express fear. 1RP 560. He did not indicate that he wanted to go in the same vehicle as his father. 1RP 560-61.

Saunders stopped at a Shell station so Valdez could get a soda. 1RP 420, 443. The Shell station was in the direction of where they were heading to repossess the Expedition. 1RP 442. Davis was following behind in the truck. 1RP 420. Davis testified that J.V. had a choice to get out of the truck at the Shell station if he wanted to: "I never imprisoned him." 1RP 603, 607-08. The Shell station was a little under a mile from the Burger King.⁵ 1RP 420. It took about two minutes to get there. 1RP 480. The police showed up after Valdez went inside to buy a soda. 1RP 422.

Saunders had a repossession license for Washington. 1RP 389-90. He believed there was no law in Washington that applied to repossession and that there was no legal training on repossession in the state. 1RP 447.

⁵ One officer testified the between the Burger King and the Shell station was three fourths of a mile. 1RP 297-98. Another officer testified the distance was a mile and a half. 1RP 274.

He was familiar with the term "breach of peace," which in the industry means the repossession stops if there is a conflict. 1RP 448. He was unaware of anything that prevented him from reinitiating a repossession attempt at another location. 1RP 469.

c. Testimony of Valdez and J.V.

Valdez and J.V. gave a different account of what happened that evening. Valdez, his son J.V., his niece and his sister were at the drive-through of the KFC. 1RP 109-10. A man approached, looked at the license plate, and asked for Valdez's name. 1RP 252-53. The man yelled or signaled at them to come forward. 1RP 110, 116-17, 131-32, 228. Valdez pulled forward and saw a truck with flashing lights facing him. 1RP 110-11, 118. Two or three people stood next to the truck, telling him to get out of the car. 1RP 118-19, 132, 229. The truck blocked the way around the corner. 1RP 229.

Valdez left as fast as he could by jumping a curb, driving over the lawn and sidewalk and speeding off into the street. 1RP 111, 118-20, 139, 157, 167, 230-31. Before doing so, Valdez did not hear any of the men say anything about repossession and they did not show him any papers. 1RP 119. He denied trying to hit any of the men with his vehicle. 1RP 120. J.V. similarly denied that Valdez drove toward the man or almost hit him. 1RP 231. Valdez had a cell phone but did not call 911. 1RP 128,

140. He tried to call his wife to tell her about the incident, but could not reach her. 1RP 140-41.

After dropping off his niece and sister, Valdez and his son pulled into the Burger King parking lot to use the bathroom. 1RP 94, 96-97, 122, 126. The truck from KFC entered the lot. 1RP 148, 213-14. When Valdez started moving his vehicle in an attempt to leave, the truck zoomed up. 1RP 97, 144, 146-50. The vehicles stopped ten feet apart. 1RP 149-50.

Three people jumped out of the truck and ran at them. 1RP 151. One had a pistol and another had a shotgun. 1RP 97. They pointed the guns at Valdez and J.V. 1RP 147. The man with the shotgun went to Valdez's side of the vehicle, pointed the gun in his face and told him to "Get the fuck out of the car." 1RP 98, 152, 215.

Davis claimed the other man with the pistol went to J.V.'s side and pointed the pistol in J.V.'s face. 1RP 98-99, 152. J.V. testified the man with the pistol stood in front of the Explorer, aiming it at the occupants. 1RP 215. The third person — described by J.V. as "the kid" — did not display a gun and went over to J.V.'s side. 1RP 215. Davis maintained his son was pulled out of the car and pushed toward the truck. 1RP 99-100, 154. J.V. testified he walked out rather than being pulled out. 1RP 221.

After Valdez got out, the man threw him against the car and searched him. 1RP 99-100. No gun was pointed at Valdez after he got out of the car. 1RP 171. As he patted Valdez down for weapons, the man kept on telling Valdez that he was going to put him in jail. 1RP 101-02, 156-57. The man asked Valdez if he realized that he was stealing the car. 1RP 171. He took Valdez's wallet and threw it to the man with the pistol, saying something to the effect of just in case they tried to leave. 1RP 99-100. Valdez did not see the shotgun after being searched. 1RP 157-59. They yelled at Valdez "Are you going to try to run over me again." 1RP 217, 255-56. They used racial slurs and profanities. 1RP 102, 217.

The man who searched Valdez got into the driver's seat of the Explorer and told Valdez to get in. 1RP 103, 105. The man told Valdez to tell him where the white Expedition was. 1RP 103, 173. Valdez said his wife had it. 1RP 103. The man ordered him to take him to the Expedition and said he was going to take both vehicles. 1RP 104-05, 129.

Up to that point, Valdez thought it was a carjacking. 1RP 103. He had earlier testified he thought the man was a cop. 1RP 168. Valdez claimed he did not know that payments were not up to date on the vehicles. 1RP 103-04, 182. He denied knowing anything about a repossession. 1RP 175. J.V. said he did not hear anything about repossession or see any papers. 1RP 221, 223. The men were yelling that they were going to get

the other car. 1RP 224. The man said he would kick Valdez's ass if he did not take him to the Expedition. 1RP 105. Valdez was scared and felt threatened. 1RP 104-05. J.V. was confused and in shock about what was happening. 1RP 217, 223. He agreed with the prosecutor that he was scared: "I really didn't have no idea what was going on." 1RP 221.

J.V. was searched and held for a minute. 1RP 217, 233. They said, "You're coming with us" and walked J.V. over to the truck. 1RP 218-19. When Valdez asked if J.V. could ride or stay with him, Valdez was told to no or to shut up. 1RP 187-88, 218. At that point, a pistol was pointed at J.V. 1RP 218. He felt a gun at his back. 1RP 219. J.V. was afraid he was going to be shot and killed. 1RP 233-34.

J.V., one of the men and "the kid" got into the truck. 1RP 220, 222-23. They followed the Explorer. 1RP 220. The shotgun was hanging on a gun rack in the back window of the truck. 1RP 222, 239. The pistol was on or near the driver, although he said he did not really remember. 1RP 222. The "kid" told J.V. to be calm, that everything was cool and to "just go along with it." 1RP 234. J.V. no longer felt afraid of being harmed at this point. 2RP 234.

Valdez has diabetes.⁶ 1RP 93. When his blood sugar runs low, he feels like he is going to have a seizure or pass out. 1RP 94. As they were driving off in the Explorer, Valdez said he needed to drink something or he was going to have a seizure. 1RP 105-06. The man stopped at a Shell station. 1RP 106, 174. Valdez got out and saw the truck behind them. 1RP 106. Valdez went inside the store by himself and bought a soda. 1RP 106, 160. He had a cell phone with him, but did not call 911. 1RP 106-07. He did not say anything to the cashier.⁷ 1RP 107. When he came out, police were everywhere. 1RP 106. J.V. looked pale and scared as police handcuffed Valdez. 1RP 108.

d. Bystander Testimony

On the evening of September 10, 2010, Amber Gratton (Spady) and her friend Janessa Rhodes were walking by the Burger King. 1RP 62-65, 194. Gratton noticed a speeding truck pull up next to a red Explorer in the parking lot "like they were going to crash into it." 1RP 65-66, 78-79.

⁶ Valdez was diagnosed with schizophrenia. 1RP 133. He said he was actually bipolar. 1RP 133. He told an officer that he heard voices. 1RP 133. He testified this was under control. 1RP 132-33. He denied that his perception was affected. 1RP 180.

⁷ The Shell station manager, who was present when Valdez entered the store and police arrived, testified Valdez did not appear upset or afraid when he was in the store and bought a soda, nor did he ask for help. 1RP 499-500, 502-03.

Rhodes saw two cars coming fast toward the Burger King parking lot, like one was chasing the other. 1RP 194, 202.

The Explorer stopped. 1RP 67, 195, 203. The driver of the truck got out with a long gun and pointed it at the Explorer. 1RP 67, 195-96, 203-04, 206. The two occupants were told to "get the f out of the truck." 1RP 195-96, 203. Gratton called 911. 1RP 70. There was yelling back and forth. 1RP 67. Gratton heard the person with the gun say "If you ever fucking do something like that . . ." and something to the effect of "you almost ran me over." 1RP 68, 84-85. The men told the women "Don't worry. We're bounty hunters." 1RP 70, 198. The men cursed at the occupants of the Explorer. 1RP 70. Rhodes did not hear anyone making racial slurs. 1RP 209.

The person with a long gun in his hands went up to the passenger in the red car and told him to get out. 1RP 68, 83-84. The passenger in the red car got out with the gun pointed at him and went into the truck with the man. 1RP 68-69, 85-86. By the time Gratton saw the gun, she and Rhodes were already running, looking over their shoulders. 1RP 86-87, 90. Gratton did not see anyone touch this person. 1RP 69, 85. Rhodes did not see anyone being pulled, yanked or otherwise touched. 1RP 206.

Gratton did not see the driver of the red car get out. 1RP 87. She did not see the passenger of the gray truck with a gun. 1RP 90. She was unsure whether the passenger in the gray truck got into the driver's seat of the red car, but he did get out and head towards the Explorer. 1RP 68-69, 87, 91. The vehicles pulled away fast. 1RP 71.

e. Police Response and Investigation

When police arrived at the Shell station, Saunders was in the driver's seat of the Explorer, Davis was in the driver's seat of the truck, J.V. was in the front passenger seat of the truck, and Chet was in the back seat. 1RP 275-76. Valdez was standing on the sidewalk. 1RP 276.

Saunders and Davis were cooperative. 1RP 285. Saunders told Officer Smith that he was trying to repossess the vehicle from Valdez and that Valdez tried to run them over. 1RP 277. They followed Valdez to the Burger King, where Davis armed himself for protection, and they repossessed the vehicle. 1RP 277. He was escorting Valdez to a second vehicle to repossess. 1RP 277-78, 285-86.

When Officer Paxton asked Davis why he kidnapped someone, Davis said "how is it kidnapping someone when I'm giving them a ride home?" 1RP 291. Paxton said "I don't think that it's giving him a ride home when you point a gun at him and tell him to get the fuck in the car."

1RP 291. Davis chuckled "Yeah, I've been working with him on that, trying to work on that." 1RP 291.

Officer Shove recovered a shotgun and a pistol inside a holster on the back seat of the truck. 1RP 315-16. The guns were unloaded. 1RP 317. Valdez and J.V. told Officer Shove at the scene that the three men said they were repossessing the Explorer. 1RP 328-29. Valdez also told the officer that he was two months behind on his payments for the Explorer. 1RP 329.

As part of Detective Vinson's follow-up investigation, Valdez identified Davis as the one who had the shotgun and Saunders as the one with the pistol. 1RP 334, 337-38. He later flip-flopped on which one had which gun. 1RP 339-40, 355. J.V. said Saunders had the shotgun and Davis had the pistol. 1RP 340. Gratton identified Davis as the one with the big gun. 1RP 341. Rhodes identified Saunders as the one with the big gun. 1RP 341. Rhodes also said the driver of the truck had the big gun, and this turned out to be Davis. 1RP 356-57. The two men had similar appearances. 1RP 357. Neither Gratton nor Rhodes saw a pistol. 1RP 355-56.

C. ARGUMENT

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

The "to convict" instruction for the kidnapping counts omitted elements of the crime, including 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. The kidnapping convictions must therefore be set aside.

- a. The Instructions Relieved The State Of Its Burden Of Proving Knowledge Elements Of The Crime.

Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3. A conviction "cannot stand if the jury was instructed in a manner that would relieve the State of this burden." State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

A person can be convicted of second degree kidnapping if he or she intentionally "abducts" another person. RCW 9A.40.030(1) ("A person is guilty of kidnapping in the second degree if he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree."). "Abduct" is defined in terms of

"restrain." State v. Worrell, 111 Wn.2d 537, 539, 761 P.2d 56 (1988) (holding statutory definition of "restrain" in kidnapping statute gave adequate notice of proscribed conduct).

"Abduct" means "to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1). Unlawful restraint of another is therefore a necessary element of kidnapping. State v. Gatalski, 40 Wn. App. 601, 613, 699 P.2d 804 (1985), overruled on other grounds, State v. Harris, 121 Wn.2d 317, 849 P.2d 1216 (1993). "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(6).

The restraint issue at the core of kidnapping is also present in unlawful imprisonment. See State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000) ("For kidnapping and unlawful imprisonment crimes, the Legislature crafted its own definition of 'restrain' in RCW 9A.40.010(1)."). In order to establish the crime of unlawful imprisonment, the State must prove the defendant "knowingly restrain[ed] another person." RCW 9A.40.040(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." Warfield, 103 Wn. App. at 157.

Warfield held the statutory definition of unlawful imprisonment — to "knowingly restrain" — causes the adverb "knowingly" to modify all four components of the statutory definition of "restrain." Id. at 153-54, 157. The modified components of the "restrain" definition are thus elements of the crime of unlawful imprisonment. Id. at 158, 159.

Warfield acknowledged ignorance of the law is usually no excuse. Id. at 159. The conviction was nonetheless reversed due to insufficient evidence because the State failed to prove the defendants knowingly restrained someone without lawful authority: "knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand." Id.

In accord with Warfield, the pattern "to convict" instruction for unlawful imprisonment recognizes the definition of "restrain" as modified by the adverb "knowingly" creates elements of the crime that need to be proved. WPIC 39.16. The pattern instruction was revised to comport with the holding in Warfield. WPIC 39.16, comment.

The issue here is whether the holding in Warfield compels the conclusion that, for the greater crime of kidnapping, the State must prove the defendant (1) knowingly acted in a manner that substantially interfered

with another's liberty; (2) knowingly acted without that person's consent; and (3) knowingly acted without legal authority. To be convicted of kidnapping, must the defendant do these three things knowingly?

The answer is yes. Unlawful imprisonment is a lesser included offense within kidnapping because both offenses require a person to be restrained. State v. Russell, 104 Wn. App. 422, 449 n.61, 16 P.3d 664 (2001); State v. Hansen, 46 Wn. App. 292, 296, 730 P.2d 706 (1986), aff'd as modified by 737 P.2d 670 (1987); Seth A. Fine & Douglas J. Ende, 13A Wash. Prac., Criminal Law § 1607 (2011-12) ("Since an 'abduction' necessarily includes a restraint, unlawful imprisonment is a lesser included offense of either degree of kidnapping.")

A crime can be a lesser offense only if the elements of that crime are "necessarily" and "invariably" included among the elements of the greater charged offense. State v. Porter, 150 Wn.2d 732, 736, 82 P.3d 234 (2004). Stated another way, if it is possible to commit the greater offense without committing the lesser offense, the lesser offense is not an included offense. Porter, 150 Wn.2d at 736.

Because unlawful imprisonment is a lesser offense of kidnapping, it follows that the elements of unlawful imprisonment are "necessarily" and "invariably" included among the elements of the greater offense of kidnapping. The general requirement of "knowingly restrains" for

unlawful imprisonment is included within kidnapping. It is not possible to commit kidnapping, which requires an intentional abduction, without "knowingly" restraining another person. See RCW 9A.08.010(2) (a person acts knowingly when he acts intentionally).

Following Warfield and the law regarding when a lesser offense is included within a greater offense, the State needed to prove not only that Saunders intentionally abducted another and thereby restrained another's movements, but also that he (1) knowingly acted without that person's consent; (2) knowingly acted without legal authority; and (3) knowingly acted in a manner that substantially interfered with that person's liberty.

The "to convict" instruction for Count I provided:

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 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.

CP 103 (Instruction 10).

The "to convict" instruction for Count II was identical, except that the instruction referred to J.V. instead of Salvador Valdez. CP 105 (Instruction 12). The jury was further instructed "Abduct means to restrain a person by using or threatening to use deadly force. Restraint or restrain means to restrict another's movements without consent and without legal authority in a manner that interferes substantially with that person's liberty." CP 107 (Instruction 14).

Where the court issues a summary instruction setting forth each element of the crime necessary to convict, the instruction "must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). The adequacy of a "to convict" is reviewed de novo. DeRyke, 149 Wn.2d at 910.

The "to convict" instructions for the two counts of kidnapping omit the elements that Saunders (1) knowingly acted without that person's consent; (2) knowingly acted without legal authority; and (3) knowingly acted in a manner that substantially interfered with that person's liberty. Thus, the "to convict" instructions relieved the State of its burden to prove all of the elements of the crime beyond a reasonable doubt.

b. The Error May Be Raised For The First Time On Appeal.

Trial counsel's lack of objection to the "to convict" instructions did not waive the issue for review. 1RP 670. A "to convict" instruction that omits an element presents an issue of constitutional magnitude that may be raised for the first time on appeal. State v. Fisher, 165 Wn.2d 727, 753, 202 P.3d 937 (2009) (citing State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005)).

c. The Remedy Is Reversal Of The Convictions.

Again, the State has the burden to prove every element of the crime beyond a reasonable doubt. Winship, 397 U.S. at 364. "It is reversible error to instruct the jury in a manner that would relieve the State of this burden." State v. Byrd, 125 Wn.2d 707, 714, 887 P.2d 396 (1995); see, e.g., State v. Seek, 109 Wn. App. 876, 880-84, 37 P.3d 339 (2002) (bigamy conviction reversed where WPIC "to convict" instruction failed to instruct jury on the wrongful intent element).

The failure to instruct the jury on all the elements of an offense results in automatic reversible error. DeRyke, 149 Wn.2d at 912. Examination of the other instructions here reveals the jury was nowhere informed that the State was required to prove Saunders knowingly acted without consent, knowingly acted without legal authority, and knowingly

acted in a manner that substantially interfered with liberty.⁸ The kidnapping convictions are subject to automatic reversal.

Even if the instructional error is not subject to automatic reversal, a reviewing court must still reverse unless the State proves the error was harmless beyond a reasonable doubt. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 15, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). "An instructional error is presumed to [be] prejudicial unless it affirmatively appears that it was harmless." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). "From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Brown, 147 Wn.2d at 344.

Saunders and Davis were acting in their capacity as repossession agents when the event occurred that formed the basis for the kidnapping charges. 1RP 376-77, 390-93, 439-40, 494-95. Saunders believed there was no law in Washington that applied to repossession. 1RP 447.

The State presented rebuttal evidence that there were laws regulating repossession in Washington, and that the industry standard for repossession did not include using a weapon to facilitate the repossession,

⁸ In closing argument, the prosecutor told the jury that "intentionally abduct" required only intent to do the act, not intent to commit the crime. 1RP 685. Defense counsel argued the restraint needed to be "knowing." 1RP 733-34.

driving the occupants of the repossessed vehicle away from the scene, or otherwise causing a breach of the peace during the repossession attempt. 1RP 619-23. The State presented this evidence to expose Saunders's ignorance of the appropriate standards. Under these circumstances, the failure to instruct the jury that it must find beyond a reasonable doubt that Saunders or Davis knew their restraining conduct was unlawful cannot be deemed harmless beyond a reasonable doubt.

Furthermore, testimony conflicted regarding the extent of the use of a firearm and under what circumstances it was used. According to Saunders and Davis, Davis only pointed the gun at the grill and bumper of the Explorer to stop the vehicle and then put the gun away. 1RP 412, 438-39, 445, 470, 473, 497, 549, 565, 595-96. Not only were Saunders and Davis attempting to repossess the vehicles, both also testified Valdez almost ran over one or more of them with his vehicle not once but twice during the course of the attempted repossession. 1RP 400-02, 409-10, 436-38, 470, 494, 546.

Moreover, Saunders testified he did not threaten J.V. in any way and did not threaten Valdez to get into the Explorer. 1RP 418-19. Their intent was to take Valdez and J.V. home during the process of repossessing the Expedition. 1RP 553, 560-61. Saunders and Davis agreed it was standard practice to put J.V. in their truck during the course

of the repossession for safety reasons. 1RP 417-18, 452, 559. When confronted by Officer Paxton, Davis wondered "how is it kidnapping someone when I'm giving them a ride home?" 1RP 291.

The evidence allowed for differing interpretations of whether Saunders or Davis knew what they were doing was unlawful in light of those circumstances, and also whether they knew the restraint was without consent and substantially interfered with the liberty of Valdez and J.V.

In order to hold the error harmless, the reviewing court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Brown, 147 Wn.2d at 341 (quoting Neder, 527 U.S. at 19). That conclusion cannot be reached here. The kidnapping convictions must be reversed.

D. CONCLUSION

Saunders requests reversal of the convictions.

DATED this 7th day of October 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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 31ST DAY OF OCTOBER, 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] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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EVERETT, WA 98201

- [X] JEFFREY SAUNDERS
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SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER, 2012.

x *Patrick Mayovsky*