SUPREME COURT NO. 90238-1

NO. 43855-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRYAN DUNN,

Petitioner.

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

The Honorable Barbara Johnson, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Bryan Dunn asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' part-published decision in State v. Dunn, filed April 8, 2014, attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court violate the petitioner's right to a public trial by taking peremptory challenges in a private proceeding?

2. Did the instructions telling jurors they could find each element of unlawful imprisonment if the accused acted intentionally misstate the law?

3. Did the prosecutor commit misconduct in closing argument denying the appellant a fair trial?

D. STATEMENT OF THE CASE[1]

1. Charges, verdicts, and facts at trial

The State charged Dunn with residential burglary and three counts of unlawful imprisonment based on an incident occurring May 13, 2012.

[1] The verbatim reports are referred to as follows: 1RP – 8/13/12; 2RP – 8/14/12; 3RP – 8/15/12; 4RP – 8/16 and 8/22/12; and Supp. RP – 8/13/12.

The complainants were sisters A.P. and J.P. and friend M.C. CP 1-2, 11-12; 3RP 89-105. A jury convicted Dunn as charged. CP 40-44, 50-59.

The morning in question, 11-year-old A.P. was at her apartment with sister J.P., 14, and friend M.C., 13. 1RP 54-53, 56-57; 2RP 11, 106. The sisters' mother, Anita, was at work. 1RP 66. The girls heard voices and a knock. 1RP 59; 2RP 18, 25, 112. A Hispanic man, "Luciano," and two non-Hispanic men were at the door. 1RP 60. On of the two was tall and thin; the other had a ponytail. 1RP 60-61; 2RP 110-11. Two of the girls identified Dunn as the man with the ponytail. 1RP 73-74; 2RP 23-24, 58; 3RP 21-26.

Luciano, whom A.P. recognized, told A.P. he was Anita's manager. 1RP 60. Unsure what to do, A.P. closed the door and told J.P. the men were looking for Anita. 1RP 61-62; 2RP 27. When the girls emerged from the bedroom, the men were seated inside. 1RP 64. When J.P. asked why the men were there, they laughed. 1RP 65; 2RP 27-29. One said he wanted to talk to J.P.'s mom. 2RP 28.

Luciano did most of the talking. 2RP 209-10. He told Dunn to call Anita, and Dunn left a message. 2RP 29-30, 113-14. Luciano had Anita's phone number and knew other details about the family. 2RP 65. When J.P. told the men to leave the house, they laughed. 2RP 31-32, 65. When Luciano said the other men were his bodyguards, J.P. felt

threatened. 2RP 32-33. The men told the girls to get ready to leave. 1RP 66; 2RP 122-23. The girls got in the car because they were scared something bad would happen if they didn't. 1RP 67; 2RP 34.

Dunn drove and the other white man sat in the passenger seat. 1RP 77-78; 2RP 36. Luciano sat in the back with the girls. 1RP 77-78. Dunn drove to a house half an hour away where Luciano and the passenger got out. 1RP 79; 2RP 38, 125, 147, 212. While Dunn turned up the music, the girls – who had at least one cell phone – discussed calling the police. They spoke in Spanish so Dunn wouldn't understand. 1RP 79-81; 2RP 39-40, 127. The girls decided to run away instead. 2RP 41-42.

Back on the road, Luciano asked if anyone was hungry, and A.P. said she was. 2RP 194. Dunn drove to a drive-through restaurant near the Vancouver mall and ordered food. 1RP 86-87; 2RP 46.

Shortly thereafter, the girls told the men to stop at a pink house, which the girls lied was M.C.'s residence. 1RP 84. Luciano had been talking about wanting to meet M.C.'s mother and/or sister, but the girls did not want him to know where M.C. lived. 1RP 88; 2RP 47, 65-66, 101, 103, 196-97. After Luciano went to the door planning to offer M.C.'s family some food, the girls got out and ran through a field. 1RP 84, 102; 2RP 49, 67. They hid in the bushes because they thought the car was following. 1RP 90, 105-06; 2RP 49-50. According to J.P., the car sped

after them while Luciano remained at the house. 2RP 49, 100. M.C. did not see the car following them, but A.P. thought she saw it. 2RP 221.

The girls called A.P.'s older sister. 1RP 91. The sister had trouble finding the girls but eventually drove the girls back to the apartment, where Anita was waiting. 1RP 91; 2RP 53-54. Anita was at work when she started receiving calls from J.P. When she finally answered, J.P. said she couldn't "talk very much" and that men were taking J.P. and the other girls from the home. J.P. also sent text messages. 2RP 167, 169, 172.

Anita did not give the men permission to drive A.P. and J.P. anywhere. 2RP 169. Like Anita, M.C.'s mother testified she did not give permission for the men to drive M.C. anywhere. 2RP 154-59. Anita met Luciano at a gym years earlier. She might have given him her phone number and told him about her family. 2RP 169-71.

The police contacted Dunn after the girls identified him. 3RP 30. The State introduced portions of Dunn's statement. Exs. 47, 50; 3RP 63. Dunn explained he met Luciano a few days before the incident. Ex. 50 at 10. Luciano owed a landscaping business and needed automotive work done. Id. at 3. The morning of the incident, Dunn and an acquaintance, Rick, were working on Luciano's truck when Luciano asked Dunn to drive him on business errands because he had been drinking. Id. at 10-11. The men stopped at an arborist and some other apartments before eventually

stopping at the apartment, where Dunn was told Luciano previously installed a dryer. Id. at 13, 24. Luciano went into the apartment and returned with the girls, whom Dunn estimated to be in "[j]unior high [or] high school." Luciano and the girls invited him in. Luciano seemed to know the girls; they at first wanted a ride to the mall, but one talked to her mother and needed to go home. Id. at 14. Luciano "volunteered" Dunn to drive the girl. Id. at 15.

Luciano had Dunn stop at the home of business associate, but there was a barbecue and Luciano returned with a plate of food. Id. at 17. After one of the girls said she was hungry, Luciano offered to buy lunch. Id. at 16. Dunn did not realize anything was amiss until the girls ran. Id. at 16, 19-22. Dunn found the situation odd. Id. at 22-23.

Afterward, Luciano offered Dunn little explanation. Id. at 25. Dunn didn't understand much of the conversation between Luciano and the girls because it was in Spanish. Id. at 26-28. Otherwise, the girls were talking about things Dunn was not interested in. Id. at 28.

2. Court of Appeals' Decision

Dunn made six arguments on appeal, three of which he now raises. He argued the trial court violated his constitutional right to a public trial by taking peremptory challenges privately. He argued the jury instructions informing jurors they could find each element of unlawful

imprisonment if the accused acted "intentionally" misstated the law. Similarly, he argued the prosecutor committed misconduct in closing.

In its April 8, 2014 part-published opinion, the Court of Appeals rejected each of these arguments. Opinion (Op.) at 4-10.

E. REASONS REVIEW SHOULD BE ACCEPTED

1. WHERE THE OPINION CONFLICTS WITH THIS COURT'S PUBLIC TRIAL DECISIONS AND THE DIVISION'S OWN DECISION IN *STATE v. WILSON*, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1) AND (2).

Jury selection occurred on August 13, 2012. Supp. RP at 13. After questioning was complete, the court directed counsel to the clerk's station and the attorneys exercised peremptory challenges by handing a chart back and forth between the attorneys at the clerk's station. Supp. RP at 11-12, 95. The court then excused certain jurors and seated other veniremembers in the excused jurors' seats. Supp. RP at 96-97.

In rejecting Dunn's argument that this practice violated his public trial rights, Division Two primarily relied on the decision of Division Three in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013).[2] Op. at 4-5. Contrary to the decision in Love, this Court's decisions in Strode, State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), and Division Two's

[2] A petition for review was filed in Love under case no. 89619-4. On April 4, 2014 this Court stayed consideration of the petition.

own decision in State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013) support the conclusion that peremptory challenges must be made in open court, not at a private bench conference or by passing a sheet of paper back and forth. This Court should accept review because, in relying on Love, Division Two disregarded opinions by this Court and its own prior decision. RAP 13.4(b)(1) and (2)

Jury selection in a criminal case is considered part of the public trial right and is typically open to the public. State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009). In State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), this adopted an "experience and logic" test for determining whether an event constitutes a courtroom closure. This Court examines (1) whether the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process. Id. at 73. It is well settled, however, that the right to a public trial extends to jury selection. In re Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring).

Other than Love, there are no Washington cases directly addressing this issue. This Court's decision in Strode, however, supports the conclusion that the public trial right attaches to parties' challenges of jurors. There, jurors were questioned, and "for-cause" challenges conducted, in chambers. This Court treated the "for-cause" challenges in

the same manner as individual questioning and held exercise in chambers violated the public trial rights. Strode, 167 Wn.2d at 224, 227, 231.

Division Two's Wilson decision also supports that the public trial right attaches not only to "for-cause" but also to peremptory challenges. There, the court applied the experience and logic test to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. The court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, Division Two expressly differentiated between those and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches). Thus, Division Two correctly recognized that "for-cause" and peremptory challenges are part of voir dire, which must be conducted openly.

But the result of analysis under the experience and logic test is no different. The right of an accused to a public trial "keep[s] his triers keenly alive to a sense of their responsibility" and "encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more

responsibly in an open court than in secret proceedings." Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of jury selection (including which side exercises which challenge) enhances core values of the public trial right – "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see In re Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system"). While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that there is no inappropriate discrimination. Thus, it is just as important for the public to be able to scrutinize the parties' exercise of peremptory challenges as it is for "for-cause" challenges.

As to the historic practice, Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas

predates Bone-Club by nearly 20 years. Moreover, the fact Thomas challenged the practice suggests it was atypical even at the time. Labeling Thomas "strong evidence" is an overstatement.

Finally, the fact that a jury information sheet is part of the record does not remedy the public trial right violation with regard to the parties' exercise of peremptory challenges. CP 98. For example, it would be difficult for a layperson to understand the document or for a member of the public with access the document at some later time to draw a correlation between the names of the jurors and the person excused. In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1. Filing a juror information sheet or similar document is therefore insufficient to protect the public trial right.

Because the opinion conflicts with this Court's decisions as well as Wilson, this Court should accept review. RAP 13.4(b)(1) and (2).

2. WHERE THE JURY INSTRUCTIONS DEFINING KNOWLEDGE RELIEVED THE STATE OF THE BURDEN TO PROVE AN ELEMENT OF UNLAWFUL IMPRISONMENT, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(2) AND (4).

This Court should accept review where the opinion convicts with the division's own decision in State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000). RAP 13.4(b)(2). To the extent that this Court's recent

decision in State v. Johnson, ___ Wn.2d ___, ___ P.3d ___, 2014 WL 1745768 (May 1, 2014) abrogates Warfield, this Court should weigh in on the extent to which "knowledge" modifies each component of restraint in a situation where acquiescence of not the restrained person, but a parent, is required. RAP 13.4(b)(4).

To establish 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 [her] liberty. RCW 9A.40.010(6). To restrain a person "without consent" is accomplished by "physical force, intimidation, or deception" or *"by any means including acquiescence" if the restrained person is a child less than sixteen years old and his or her parent has not acquiesced.* Id. (emphasis added). Thus, "restraint" 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. Although Johnson held the components need not be alleged in the information, the adverb "knowingly" modifies all components of restraint. Id. at 153-54, 157; see also WPIC 39.16 (pattern instruction); CP 31-36 (Instructions 16-18) (Appendix B).

In Warfield, three defendants' convictions were reversed for insufficient evidence where the State failed to prove Warfield and two other men knowingly restrained someone without lawful authority. The court held "knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand." Id. at 159.

This Court's recent decision in Johnson, 2014 WL 1745768, abrogates but does not do away with this holding. In Johnson, this Court stated that Warfield does not apply to unlawful imprisonment cases "involving domestic violence . . . where there is no indication that the defendants believed they actually had legal authority to imprison the victim." 2014 WL 1745768 at *4. Unlike the defendant in Johnson, however, under one of the prongs under which Dunn was charged, the State was required to prove Dunn knew he needed a parent's acquiescence to drive the girls. The evidence at trial supported that Dunn was only aware of the girls' acquiescence rather than the use of "physical force, intimidation, or deception." In circumstances such as this, where there is evidence plausibly supporting a good faith belief that the conduct is lawful, Warfield should remain good law. Thus, to convict Dunn of unlawful imprisonment, the State still needed to prove each of the four components of restraint were satisfied. Warfield, 103 Wn. App. at 157-59.

The jury was instructed that as to the definition of "knowingly or with knowledge," the following was also the law of the case:

> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 26 (Instruction 11). The jury instructions defining knowledge relieved the State of the burden to prove an element of unlawful imprisonment.

The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof. Mandatory presumptions, however, may violate due process. State v. Deal, 128 Wn2d 693, 911 P.2d 996 (1996) (citing Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)).

To find Dunn guilty of unlawful imprisonment, the State was required to prove he acted *knowingly* as to each component of restraint, including that his acts were unlawful. Warfield, 103 Wn. App. at 159. Here, limiting Warfield to its precise facts ignores the holding. Op. at 8-9. Dunn was required to *know* he was acting without legal authority. Proving this is simpler when physical force, intimidation, or deception is involved. But under one of the prongs, the State was required to prove he knew it was unlawful to remove the girls without their mothers' acquiescence.

With that in mind, Instructions 10 and 11 (Appendix C), which did not explicitly attach to any particular charge, are erroneous for reasons

similar to instructions held unconstitutional in State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005). There, the instructions created an impermissible mandatory presumption, and the error was not harmless beyond a reasonable doubt. Id. at 203-04.

Goble was charged with third degree assault of a police officer. The to-convict instruction required the State to prove that Goble assaulted the officer and knew at the time of the assault that the victim "was a law enforcement officer . . . who was performing his or her official duties." Id. at 200. The instructions stated that "[a]cting knowingly or with knowledge also is established if a person acts intentionally." Id. at 202.

The instruction "allowed the jury to presume Goble knew [the officer's] status at the time of the incident if it found Goble had intentionally assaulted [the officer]," and therefore "conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew [the officer's] status if it found the assault was intentional." While there was no objection, the error could be raised for the first time on appeal. Id. at 203.[3]

[3] Defense counsel pointed out a typographical error in Instruction 11. 3RP 122-23. The court held it was precluded from reviewing the error because it was invited, although it goes on to discuss the merits. Op. at 7. However, the doctrine does not apply; pointing out a typo did not "set up"

Instructions 10 and 11 in this case were similarly problematic. They told jurors they could find the requisite mental state if they found Dunn was acting intentionally and if the intended action happened to constitute a crime. In other words, all Dunn had to do was to intend to take the girls for a ride. Yet the unlawful imprisonment statute requires the State to prove knowledge that the restraint is unlawful. Warfield, 103 Wn. App. at 159. The instructions violated due process by creating a mandatory presumption, relieving the State of its burden to prove each element beyond a reasonable doubt. Goble, 131 Wn. App. at 203.

Unless the error was harmless beyond a reasonable doubt, reversal is required. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State cannot show harmlessness beyond a reasonable doubt. The girls testified that, at times, they feared the men; but other times they did not. But the extent to which this was clear to Dunn – and the extent to which he would have been aware transporting the girls was wrongful – was less obvious. It was undisputed Dunn believed Luciano knew the girls. 1RP 60; 2RP 169-71; Ex. 50 at 15. It was undisputed the girls did not have to be forced into the car; while the girls testified they were afraid, they

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or "materially contribute" to the error. See State v. Hockaday, 144 Wn. App. 918, 924 n. 5, 184 P.3d 1273 (2008) (for doctrine to apply, defendant must have "materially contribute[d]" to the error "by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error").

conveyed this fear to each other in Spanish. 1RP 67; 2RP 33-34. The girls remained in the car at the first house; this may have conveyed to Dunn that they were in the car willingly. 2RP 226. When girls asked to stop, Dunn did so. 1RP 84. Luciano spoke to the girls in English and Spanish. 1RP 96. Dunn was not privy to portions of the conversation between the girls and Luciano, nor was he privy to the girls' private conversations in Spanish. 1RP 79-81; 2RP 39-42, 127.

The State relied in part on the third form of restraint – acquiescence / lack of parental acquiescence – to prove Dunn restrained the girls. But proof of "knowledge" depended on *possible* inferences, from Dunn's statement and the girls' testimony, regarding his knowledge of the girls' age, his knowledge of their mothers' lack of agreement, and his knowledge transporting the girls was against the law. Cf. 4RP 36-37 (closing argument by State that there was "no evidence" the girls were transported with anyone's permission). The jury was told, however, it need not even draw such inferences to convict. 4RP 38-70.

The State's closing argument, moreover, was arguably consistent with the instructions, yet likewise urged conviction on improper grounds. The prosecutor discussed the burglary count, then stated he was moving on to a discussion of unlawful imprisonment. 4RP 36. Discussing the "acquiescence" prong of restraint, he argued Dunn did not have to know

the girls' age or know that he was engaging in criminal behavior. 4RP 36-37. The question, rather, was whether Dunn intended his acts. 4RP 38-39. The prosecutor then provided an example of someone who punched another person in the nose. Even if the assailant did not intend a resulting fracture, he could still be criminally liable for the result. 4RP 39. The prosecutor continued,

> . . . . If you're engaging . . . intentionally, which here means you're not walking around like a zombie, if you can drive, Mr. Dunn can drive, we know, because he drove. . . . He knows what he's doing, he's working on a car before he goes there. All those acts require intent. . . .
>
> He intended to take the girls from the home. He either did it himself or he was an accomplice to it. That's why the accomplice [instruction] is there or he's aiding or assisting an accomplice which is Mr. Luciano. All I have to show to you is that he himself did it intentionally or that his accomplice did it intentionally. I submit to you . . . that's what I have to prove to you.

4RP 39-40. The jury could have concluded that given Dunn's obviously goal-directed, non-zombie-like behavior, he must be guilty.

The error affected not only unlawful imprisonment but also the burglary conviction. Residential burglary required proof that "the entering or remaining was with intent to commit a crime." CP 22 (Instruction 7) (following WPIC 60.02.02). Criminal intent may be inferred only where it is "'plainly indicated as a matter of logical probability.'" State v. Johnson,

159 Wn. App. 766, 774, 247 P.3d 11 (2011) (quoting State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)).

The jury could have easily concluded Dunn's intent in entering or remaining in the apartment was "criminal" from the fact that he *intentionally* drove the girls away from the apartment; the prosecutor and the instructions informed the jury this was a crime. But contrary to the court's decision, Op. at 8-9, Dunn was required to *know* he was acting without legal authority, at least as to the acquiescence/lack of parental acquiescence prong. This Court should accept review because, as above, the court's decision conflicts with Warfield decision in this respect. RAP 13.4(b)(2). This Court should also accept review to weigh in on what, if any, is the continued viability of Warfield. RAP 13.4(b)(4).

3. WHERE THE PROSECUTOR SIMILARLY MISSTATED THE LAW IN CLOSING, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(2) AND (b)(4).

Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When the prosecutor mischaracterizes the law, and there is a substantial likelihood that the misstatement affected the jury verdict, the accused is denied a fair trial. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988).

Generally, where a defendant fails to object, reversal is required if the misconduct is so flagrant and ill intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). But where no corrective purpose would be served, lack of objection should not preclude review. State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996).

The prosecutor misstated the law when he argued Dunn was guilty of unlawful imprisonment regardless of whether he knew his own, or Luciano's actions, were unlawful. In addition to the closing argument set forth in the preceding section of this petition, the prosecutor argued, "All I have to show to you is that [Dunn] himself did it intentionally or that his accomplice did it intentionally. I submit to you . . . that's what I have to prove." 4RP 40. Yet under one statutory prong, the State was required to prove Dunn knew that he could not drive the girls without a parent's agreement. Moreover, the opinion's assertion that the argument dealt solely with the residential burglary charge is not supported by the record. 4RP 38-40.

This argument, as well as the closing argument set forth at pages 16-17, supra, misstated the law. Davenport, 100 Wn.2d at 764. It was reasonably likely this affected the jury's verdict. Gotcher, 52 Wn. App. at 355. The jury instructions confusingly reinforced such an argument.

Given the lack of objection, the next question would normally be whether a curative instruction could have cured the error. But where the record suggests that such an objection was unlikely to succeed, the lack of objection does not preclude a finding of reversible error. State v. McCreven, 170 Wn. App. 444, 473, 284 P.3d 793 (2012).

The Court of Appeals should have reversed Dunn's convictions on all counts. On grounds similar to section 2 above, this Court should accept review under RAP 13.4(b)(2) and (b)(4).

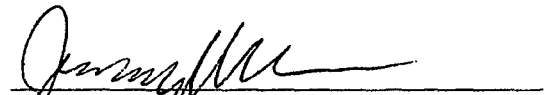
F. CONCLUSION

For the foregoing reasons, this Court should accept review.

DATED this 7TH day of May, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRYAN VANCE DUNN, Appellant.	No. 43855-1-II PART PUBLISHED OPINION

JOHANSON, J. — A jury found Bryan Vance Dunn guilty of one count of residential burglary and three counts of unlawful imprisonment. Dunn argues that (1) the trial court violated his right to a public trial, (2) the information was defective as to the unlawful imprisonment counts, (3) the jury instruction defining knowledge was erroneous, (4) the prosecutor engaged in misconduct during closing argument, (5) the trial court erred by excluding videos taken on a victim's cell phone, and (6) the trial court violated Dunn's right to be present. We address his arguments regarding the right to a public trial in the published portion of this opinion. Dunn's remaining arguments are addressed in the unpublished portion of this opinion. We affirm Dunn's convictions.

FACTS

On May 13, 2012, three minors, J.P., A.P., and M.C., were at J.P. and A.P.'s house.[1] J.P. was 14 at the time; A.P., J.P.'s younger sister, was 11; M.C., a close friend of J.P. and A.P., was 13. Shortly after the girls woke up, someone knocked on the door. A.P. answered the door and a Hispanic man she did not know, later identified as Luciano Cruz, was at the door. A.P. closed the door and went to ask J.P. what to do. J.P. returned to the living room with A.P. and M.C. and saw that Cruz and two white men had entered the house and were sitting on the couch. One of the white men was later identified as Dunn. J.P. repeatedly told the men to leave the house, but they just laughed at her. Cruz told the girls to go get dressed because they were leaving.

After the girls got dressed, Cruz, Dunn, and the third man took the girls to a two-door car. The three girls got into the car's backseat with Cruz. Dunn was driving and the third man sat in the front passenger seat. Dunn drove to a house on St. John's Street where Cruz and the other man got out of the car and went into the house. The three girls remained in the car and spoke to each other in Spanish. When Cruz and the other man returned to the car, Cruz was carrying a plate of food with hot sauce on it. Some hot sauce dripped onto A.P.'s leg, and Cruz wiped it off with his finger and then licked his finger.

Dunn took everyone to a Burgerville drive-thru. Dunn then stopped at a house the girls said was M.C.'s house although it was not M.C.'s house. When the car stopped, Cruz got out; then all three girls got out, jumped a fence, and ran across a field. The girls ran to a video store and they called J.P. and A.P.'s older sister to pick them up. About the same time, J.P. was able

[1] We refer to the minor victims by their initials to protect their privacy.

to contact her mother, Anita Carvajal, who immediately returned home. Carvajal and the girls arrived home at approximately the same time and they contacted the police.

Vancouver Police Department officers and detectives responded to Carvajal's home. Detective Julie Carpenter interviewed each girl separately. Then the girls directed the detectives to the St. John's Street house. A few days later, Detective Edward Letarte met A.P. and J.P. at school where both girls identified Dunn as the car's driver. Letarte spoke with each girl separately. After his arrest, Dunn gave a statement to the police.

The State filed a second amended information charging Dunn with one count of residential burglary and three counts of unlawful imprisonment. After a CrR 3.5 hearing, the trial court found that Dunn's statement to police was admissible. Dunn also asked to admit cell phone videos that J.P. had recorded during the incident. The trial court excluded the cell phone videos, ruling that the videos lacked relevance, contained nothing that would be helpful to the jury and that they were relevant only to collateral issues that "would simply distract from the evidence." Report of Proceedings (RP) (Aug. 14, 2012) at 83.

At trial, J.P., A.P., and M.C. testified to the facts related above, although there were some minor discrepancies in their testimony. For example, M.C. and A.P. testified that the girls ran to the video store, then went to M.C.'s house, then went back to the video store so that J.P. and A.P.'s older sister could pick them up. J.P. testified that the girls went to M.C.'s house and then to the video store. The girls' mothers testified that they never gave anyone permission to take their daughters anywhere.

Dunn's statement was played for the jury. In the statement, Dunn said that he had just met Cruz and was doing some work on Cruz's truck. He was driving Cruz because Cruz had been drinking and could not drive. Dunn stated that he picked up the girls from the house and

drove them around, first to the St. John's house, then to Burgerville, and then to the house the girls identified as M.C.'s house. However, he believed that Cruz had permission to pick the girls up and take them to M.C.'s house. He did not realize that something was wrong until the girls ran out of the car and across the field.

Jury voir dire was conducted in open court with Dunn present. After the prospective jurors were questioned and the attorneys exercised their challenges for cause, the trial court invited counsel to exercise peremptory challenges and to finalize jury selection at the clerk's station. The jury found Dunn guilty of one count of residential burglary and three counts of unlawful imprisonment. Dunn appeals.

ANALYSIS

Dunn argues that the trial court violated his right to a public trial and his right to be present by allowing the attorneys to exercise peremptory challenges during a side bar. Following Division Three's opinion in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013), we hold that the trial court did not violate Dunn's right to a public trial by allowing the attorneys to exercise peremptory challenges during a side bar.

PUBLIC TRIAL RIGHT

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). We review alleged violations of the public trial right de novo. *Wise*, 176 Wn.2d at 9. The threshold determination when addressing an alleged violation of the public trial right is whether the proceeding at issue even implicates the right. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). In *Sublett*, our Supreme Court adopted a two-part "experience and logic" test to address this issue: (1) whether the place and process

historically have been open to the press and general public (experience prong), and (2) whether the public access plays a significant positive role in the functioning of a particular process in question (logic prong). 176 Wn.2d at 72-73. Both questions must be answered affirmatively to implicate the public trial right. *Sublett*, 176 Wn.2d at 73.

Dunn argues that the trial court violated his public trial right because the trial court conducted the peremptory challenges portion of jury selection at the clerk's station. In *Love*, Division Three of this court addressed whether challenges during voir dire implicate the public trial right. There, the court held that neither "prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public." *Love*, 176 Wn. App. at 920. The public trial right does not attach to the exercise of challenges during jury selection. *Love*, 176 Wn. App. at 920. We agree with Division Three that experience and logic do not suggest that exercising peremptory challenges at the clerk's station implicates the public trial right. Accordingly, we hold that the trial court did not violate Dunn's public trial right and we affirm.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Dunn makes five additional arguments. First, he argues that the information charging the three counts of unlawful imprisonment was defective because it did not include the statutory language defining "restrain." Second, Dunn argues that the jury instructions were erroneous because the instruction defining knowledge created an improper mandatory presumption. Third, Dunn argues that the prosecutor committed misconduct during closing argument by misstating the law. Fourth, he argues that the trial court erred by excluding the video that J.P. recorded on

her cell phone during the incident. Fifth, he argues that the trial court violated his right to be present by allowing the attorneys to exercise peremptory challenges during a side bar. We reject Dunn's arguments.

DEFECTIVE INFORMATION

Dunn argues that the information charging him with three counts of unlawful imprisonment was defective because it did not include the statutory definition of "restrain." However, the case law on which Dunn relies has been overruled. Under the controlling law, the information charging Dunn with unlawful imprisonment is not constitutionally defective.

The second amended information[2] charged Dunn with three counts of unlawful imprisonment as follows:

> That BRYAN VANCE DUNN, in the County of Clark, State of Washington, on or about May 13, 2012 . . . did knowingly restrain [the victim], a human being, contrary to Revised Code of Washington 9A.40.040(1), and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

Clerk's Papers at 11. Dunn argues that the information is defective under *State v. Johnson*, 172 Wn. App. 112, 138-39, 297 P.3d 710 (2012), *review granted*, 178 Wn.2d 1001 (2013). In *Johnson*, Division One of this court held that definitional elements are essential elements of a crime which must be included in the charging document. 172 Wn.2d at 140.

But after our Supreme Court's decision in *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013), Division One overruled its decision in *Johnson*. *State v. Rattana Keo Phuong*, 174 Wn. App. 494, 545 n.42, 299 P.3d 37 (2013). In *Rattana Keo Phuong*, the court held that the statutory definition of "restrain" is not an essential element of the crime of unlawful

[2] The language regarding unlawful imprisonment is consistent throughout all three informations filed in this case.

imprisonment and, thus, does not need to be included in the charging document. 174 Wn. App. at 545.

Dunn's argument relies exclusively on the information's failure to include the statutory definition of "restrain." But under *Rattana Keo Phuong*, the information contains all the essential elements of unlawful imprisonment (i.e., knowingly restrained). Therefore, the information was not constitutionally defective. *Rattana Keo Phuong*, 174 Wn. App. at 544-45.

JURY INSTRUCTIONS

Dunn alleges that the jury instruction defining knowledge created a mandatory presumption that relieved the State of its burden of proof. The instructional error is invited error that Dunn may not challenge on appeal. "Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005).

Here, Dunn did not propose the knowledge instruction he now objects to; however, he did affirmatively agree to its wording. During the discussion regarding jury instructions, Dunn noted an error in the knowledge instruction. After the error was corrected, Dunn stated he had no other exceptions to the instructions. By noting an error in the instruction and then stating there were no additional problems with the instruction, Dunn agreed to the knowledge instruction as given and, thus, invited the error. Accordingly, we are precluded from reviewing the alleged error.

Although we do not reach the merits of Dunn's claim, we note that Dunn's claims regarding both the jury instructions and prosecutorial misconduct are based on an incorrect premise. Specifically, Dunn posits that under the unlawful imprisonment statute, Dunn was

required to know that taking a child under the age of 16 without a parent's consent was a crime. RCW 9A.40.010(6). Dunn is mistaken.

The unlawful imprisonment statute requires that the defendant knowingly restrains 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. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he or she is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him or her has not acquiesced.

RCW 9A.40.010(6). Thus, the State needs to prove that Dunn knew that (1) he did not have lawful authority to restrict the girls' movements (i.e., Dunn was not the girls' parent or legal guardian), (2) the girls were under the age of 16, and (3) the girls' parents had not given their consent. Dunn did not need to know that these actions were a crime. *See* RCW 9A.08.010(1)(b) ("A person knows or acts knowingly or with knowledge when: (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense.").

Dunn relies on *State v. Warfield*, 103 Wn. App. 152, 5 P.3d 1280 (2000), to support his proposition, but Dunn's reliance on *Warfield* is misplaced. In *Warfield*, the defendants were private citizens who believed that they had the lawful authority to arrest, detain, and transport the victim based on the victim's arrest warrant from Arizona. 103 Wn. App. at 155. However, it was discovered that the misdemeanor warrant had no lawful effect in Washington. *Warfield*, 103 Wn. App. at 155. The court held that "knowingly" applied to all the elements of restraint, not simply the restriction of a person's movement. *Warfield*, 103 Wn. App. at 156. Because the defendants acted under the good faith belief that the Arizona warrant gave them the authority to arrest, detain, and transport the victim, they did not knowingly act without lawful authority.

Warfield, 103 Wn. App. at 159. *Warfield* does not require that a defendant know that his actions constitute the crime of unlawful imprisonment.

PROSECUTORIAL MISCONDUCT

Dunn argues that the prosecutor engaged in misconduct during closing argument by misstating the law. Specifically, Dunn argues that the prosecutor argued that the jury could find Dunn guilty of unlawful imprisonment simply for intentionally driving the car. Dunn mischaracterizes the prosecutor's argument. The prosecutor's argument, although inartful, was not improper. Further, Dunn cannot show that an instruction to the jury could not have cured the error. Accordingly, Dunn's prosecutorial misconduct claim fails.

To prevail on a prosecutorial misconduct claim, a defendant must show that in the context of the record and all the trial circumstances, the prosecutor's conduct was improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice, a defendant must show a substantial likelihood that the misconduct affected the verdict. *Thorgerson*, 172 Wn.2d at 442-43. In analyzing prejudice, we do not look at the comment in isolation but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008). If a defendant fails to object to misconduct at trial, he fails to preserve the issue unless he establishes that the misconduct was so flagrant and ill intentioned that it caused an enduring prejudice that could not have been cured with an instruction to the jury. *Thorgerson*, 172 Wn.2d at 443. The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remark. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

> Dunn identifies one instance in which he alleged the prosecutor misstated the law:[3]
>
> All I have to show to you is that he himself did it intentionally or his accomplice did it intentionally. I submit to you that both fit and that's what I have to prove to you.

RP (Aug. 16, 2014) at 40. However, the prosecutor's statement was not made in relation to the unlawful imprisonment charge. The prosecutor made the statement while discussing the elements of the residential burglary charge. To prove residential burglary, the State is required to prove that the defendant entered or remained unlawfully *with the intent to commit a crime*. RCW 9A.52.025. In this case, the predicate crime for the residential burglary charge was unlawful imprisonment (i.e., removing the girls without permission). The State was explaining that to meet the required element of residential burglary he had to show that Dunn intentionally committed unlawful imprisonment (i.e., intentionally removed the girls from the house without permission). Although the State's argument may have been inartful, it was not a misstatement of the law when considered in the context of the entire argument.

Further, Dunn cannot show that the prejudice from the comment would not have been cured by an objection and curative instruction. Here, the prosecutor's statement was a brief statement made within an extensive closing argument. Had Dunn objected, any prejudice could have been cured by referring the jury back to the proper elements of the charged crimes. Accordingly, Dunn cannot meet his burden to show prosecutorial misconduct.

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[3] At oral argument, Dunn's appellate counsel argued that she incorporated all the prosecutor's closing arguments that she referenced in earlier sections of her briefing into her argument regarding prosecutorial misconduct. Counsel's argument is not well taken. Even assuming her brief adequately assigned error to the additional sections of the State's closing arguments for the purposes of prosecutorial misconduct, counsel fails to present any argument supporting her contention that the additional sections of the prosecutor's argument were misconduct. RAP 10.3(a)(6).

EXCLUSION OF CELL PHONE VIDEOS

Dunn argues that the trial court improperly excluded the cell phone videos because they were relevant to impeach the girls' testimony that (1) they were fearful while in the car, (2) inappropriate touching occurred in the car, and (3) the girls cowered in the car at the first house. Further, Dunn argues that the trial court erred by excluding the cell phone videos because they were of poor quality and there would be difficulty showing them to the jury. Because the videos were irrelevant, the trial court did not abuse its discretion by excluding the cell phone videos.

We review the trial court's decision to exclude evidence for an abuse of discretion. *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). A trial court abuses its discretion when its decision is "manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Lord*, 161 Wn.2d at 283-84.

Criminal defendants have a constitutional right to present evidence in their defense. *State v. Hawkins*, 157 Wn. App. 739, 750, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). The evidence must be admissible; there is no constitutional right to present irrelevant evidence. *State v. Lord*, 161 Wn.2d at 294. "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999), *review denied*, 140 Wn.2d 1017 (2000).

Dunn moved for admission of four separate cell phone videos that J.P. recorded on her cell phone.[4] In one of them, the screen is black for almost the entire video. Two of the other videos are only a few seconds long and, at best, the video establishes the cell phone was either in

[4] The cell phone videos were designated as part of the record on appeal. During oral argument both attorneys stated that they were able to play the video with sound; however, it does not appear that the video designated with the record contained the proper audio files. Even accepting Dunn's allegations regarding the audio as true (i.e., the girls were giggling and talking), our analysis regarding the relevance of the videos does not change.

the house or in the car. Dunn argued that one of the videos was relevant as impeachment evidence because it showed the three girls getting in the car after stopping at the St. John's Street house when all three girls testified they did not leave the car, although one video shows the girls getting into the car. However, there is no indication where the car is or when this occurred. Furthermore, all the girls testified that when Cruz returned from the St. John's Street house, he had a plate of food and there was no plate of food in the video. Therefore, it is unknown what the video shows. Further, the entire video is approximately two minutes long and, at best, shows the girls getting into the back of a car. There is no dispute that Dunn drove the girls around in a car. The dispute was whether Dunn knew or should have known that he did not have the legal authority to drive the girls. The video was not relevant on this point.

Moreover, the State did not have to prove that the girls were fearful while they were in the car with Dunn. The State had to prove that Dunn knew he did not have legal authority to take the girls, that the girls were under the age of 16, and that he did not have the girls' parents' permission to take the girls. The trial court did not abuse its discretion by finding that the cell phone videos were irrelevant to the facts at issue in this case.

Dunn points specifically to the trial court's statement referring to the videos as the equivalent of a "blurry photograph" and argues that the videos "show far more than a blurry photograph and demonstrate the girls' casual demeanor in the men's presence." Br. of Appellant at 30. The only video in which the viewer can even see the girls only shows one of the girls for a few brief seconds. The videos do not show the girls interacting with any of the men in the car. The only thing that can be discerned from the video is that the girls got into the car with the men and a brief glimpse of a girl's face. Nothing in the video establishes that the girls had a casual

demeanor with the men or that they lacked fear as Dunn suggests. The trial court did not abuse its discretion by excluding the cell phone video.

RIGHT TO BE PRESENT

Dunn argues that the trial court violated his right to be present by allowing the attorneys to exercise peremptory challenges at the clerk's station. Here, the record is unclear whether Dunn was present when the attorneys exercised their peremptory challenges. Dunn was present during jury voir dire, and it appears that Dunn's claim is based on the allegation that he did not join counsel at the clerk's station when they exercised their peremptory challenges. At best, this allegation is supported by the trial court's statement,

> All right, very well. It sounds like we're ready to proceed with peremptory challenges. So when you're ready, Counsel, I'll ask you to step up to the clerk's station and she will be passing a chart back and forth.

RP (Aug. 13, 2012 Jury Voir Dire) at 95. Although the trial court did not specifically call Dunn to the clerk's station with his attorney, there is no indication that he did or did not accompany counsel when counsel exercised the peremptory challenges. Because the record is unclear whether Dunn was present at the clerk's station during the exercise of peremptory challenges, the claim relies, at least in part, on facts outside the record on appeal. We do not address issues on direct appeal that rely on facts outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Accordingly, we affirm Dunn's convictions.

JOHANSON, J.

We concur:

WORSWICK, C.J.

LEE, J.

APPENDIX B

INSTRUCTION NO. 16

To convict the defendant of the crime of unlawful imprisonment, as charged in count 2, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 13, 2012, the defendant, or an accomplice, restrained the movements of J[redacted] P[redacted] in a manner that substantially interfered with her liberty;

(2) That such restraint was

(a) without J[redacted] P[redacted]'s consent or

(b) accomplished by physical force, intimidation, or deception or

(c) accomplished by any means, including acquiescence, if Jasmine Piedra was a child less than 16 years old and the parent, guardian, or person or institution having lawful control or custody of J[redacted] P[redacted] had not acquiesced; and

(3) That such restraint was without legal authority;

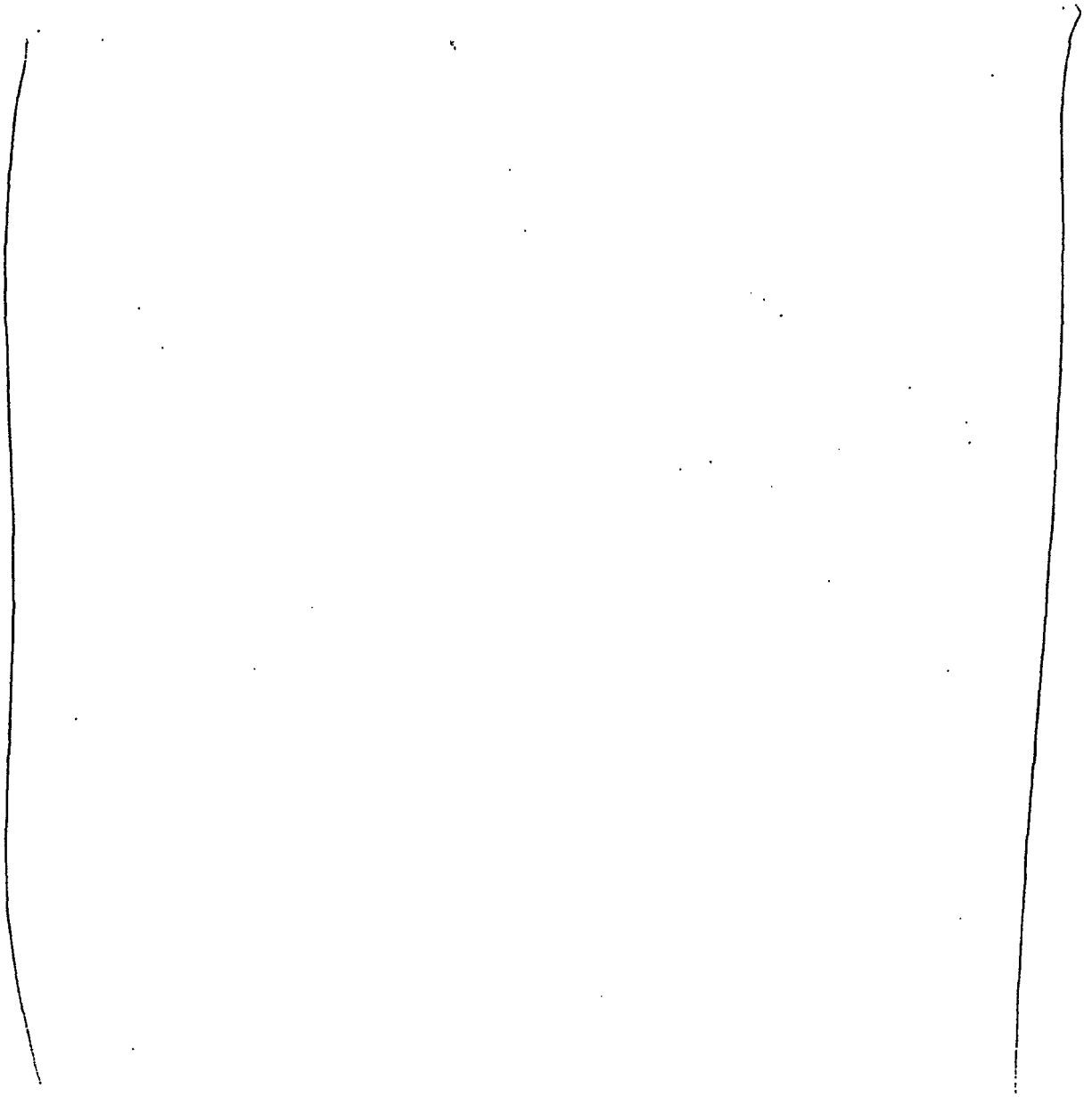
(4) That, with regard to elements (1), (2), and (3), the defendant acted knowingly; and

(5) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (3), (4), and (5), and any of the alternative elements (2)(a), (2)(b),or (2)(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), (2)(b),or (2)(c), has

been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.



INSTRUCTION NO. 17

To convict the defendant of the crime of unlawful imprisonment, as charged in count 3, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 13, 2012, the defendant, or an accomplice, restrained the movements of A[redacted] P[redacted] in a manner that substantially interfered with her liberty;

(2) That such restraint was

(a) without A[redacted] P[redacted]'s consent or

(b) accomplished by physical force, intimidation, or deception or

(c) accomplished by any means, including acquiescence, if America Piedra was a child less than 16 years old and the parent, guardian, or person or institution having lawful control or custody of A[redacted] P[redacted] had not acquiesced; and

(3) That such restrained was without legal authority;

(4) That, with regard to elements (1), (2), and (3), the defendant acted knowingly; and

(5) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (3), (4), and (5), and any of the alternative elements (2)(a), (2)(b), or (2)(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), (2)(b), or (2)(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

To convict the defendant of the crime of unlawful imprisonment, as charged in count 4, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 13, 2012, the defendant, or an accomplice, restrained the movements of M[redacted] M[redacted] C[redacted] in a manner that substantially interfered with her liberty;

(2) That such restraint was

(a) without M[redacted] M[redacted] C[redacted]s consent or

(b) accomplished by physical force, intimidation, or deception or

(c) accomplished by any means, including acquiescence, if Marla Marilin Chacon was a child less than 16 years old and the parent, guardian, or person or institution having lawful control or custody of M[redacted] M[redacted] C[redacted] had not acquiesced; and

(3) That such restrained was without legal authority;

(4) That, with regard to elements (1), (2), and (3), the defendant acted knowingly; and

(5) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (3), (4), and (5), and any of the alternative elements (2)(a), (2)(b), or (2)(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), (2)(b), or (2)(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

APPENDIX C

INSTRUCTION NO. 10

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 11

A person knows or acts knowingly or with knowledge with respect to a fact , circumstance, or result when he is aware of that fact , circumstance, or result. 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.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. BRYAN DUNN, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 43855-1-II

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 7TH DAY OF MAY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRYAN DUNN
1101 WEST 13TH STREET
VANCOUVER, WA 98660

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF MAY 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

May 07, 2014 - 1:09 PM

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