NO. 47506-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID MICHAEL KALAC,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-01246-1

BRIEF OF RESPONDENT

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	Richard Wayne Lechich 1511 3rd Ave Ste 701 Seattle, Wa 98101-3647 Email: richard@washapp.org; wapofficemail@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 11, 2016, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID # 91103 kcpa@co.kitsap.wa.us**

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II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

David Michael Kalac was charged by information filed in Kitsap County Superior Court with attempted Murder in the First Degree. CP 1. Later, a first amended information charged attempted First Degree Murder, Burglary in the First degree, and Unlawful Imprisonment. CP 10. The matter proceeded to trial on these three counts. RP 3.

Verdicts were announced on March 27, 2015. CP 110. The jury made no finding on the attempted Murder count. Id. Kalac was found guilty of Burglary in the First Degree, Unlawful Imprisonment, and, as a lesser included of attempted Murder, attempted Fourth Degree Assault. CP 111. By special verdict the jury found that Kalac had restrained victim Wayne Carlson without his consent and by physical force, intimidation, or deception. CP 112.

Sentencing was done on April 24, 2015. CP 147. Kalac received concurrent standard range sentences for the three counts. CP 149. The trial court assessed only mandatory legal financial obligations. CP 153. Kalac timely appealed. CP 158.

B. FACTS

Defendant David Kalac and victim Wayne Carlson were inmates in the Kitsap County Jail in December, 2014. RP 591-92. Both were housed in a jail pod denominated Unit B. RP 592, 891. Unit B consists of two

tiers of 13 cells each--one the upper tier, the other the lower tier. RP 563. Kalac's cell was in the lower tier and Carlson's in the upper. RP 592. The two tiers share a common dayroom. RP 562-63. But the two tiers use the day room at different times; upper and lower tier inmates are not out in the dayroom at the same time. RP 592-93. Each cell in Unit B has an emergency intercom for communication with jail officers. RP 586-87.

In this setting, Kalac and Carlson became embroiled in a dispute, the substance of which was not disclosed to the jury. RP 882. This dispute arose when Kalac was locked in and Carlson was out in the dayroom. Id. Kalac was unhappy with Carlson over this exchange and hatched a plot to get even by fighting Carlson. RP 900-01. In order to carry out his plot, Kalac had to be out at the same time Carlson was out. Id. Jail rules control where an inmate can and cannot go during time out of the cell. RP 593. Lower tier inmates are not allowed on the upper tier. RP 594. Inmates are not allowed to go into another's cell. Id.

Jail cell doors lock automatically when closed. RP 659. A person inside cannot open the door when it gets shut. RP 573. Kalac knew that if the door is closed "you're stuck in there until jail staff comes by the next time." RP 894. This can take up to an hour. RP 918. On December 9, 2014, Kalac defeated the automatic lock by placing a playing card over his cell door locking mechanism. RP 900. Kalac then waited for Carlson to

return to his cell, observing his movements by a reflection on the glass dayroom wall. RP 900. He did not want to attack Carlson in the dayroom because he did not want other inmates involved. RP 901.

After Carlson ate, he returned to his cell leaving the door ajar so it would not lock him in. RP 604-05. Kalac put his plan into action leaving his cell via the tampered lock and proceeding to the upper tier and Carlson's cell. RP 917. Once there, "I closed the door behind me and pulled him off his top bunk." RP 904. Carlson was unaware of Kalac's plan and had not invited Kalac to his cell. RP 605. Carlson was taking a nap after dinner when he heard the cell door close and he was grabbed by Kalac. RP 606. Carlson was forcefully pulled down, his head landing on a steel table and his back landing on a stool. RP 607. Kalac said to Carlson "I'm going to kill you." RP 608. Kalac stomped Carlson's head. Id.

Carlson was eventually able to get to his emergency intercom button and call for help. RP 609-10. But Kalac, who had Carlson trapped in the cell, was not done, grabbing him and smashing his head against a sink. RP 610. Despite attempts to defend this action, Carlson could not prevent his head from hitting the sink. Id. As Carlson continued to attempt to call for help, Kalac continued to taunt him and continued to stomp him. RP 611. Carlson sat up so Kalac could not stomp him further

but undeterred Kalac grabbed him by the neck. RP 612. Kalac had his forearm under Carlson's chin and applied sufficient pressure to cut off Carlson's circulation. RP 612-13. Carlson was unable to breath. RP 613. Eventually, guards responded and the attack was stopped. RP 614.

III. ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO ESTABLISH THAT KALAC UNLAWFULLY ENTERED CARLSON'S CELL AND THAT THAT CELL IS WITHIN THE DEFINITION OF THE TERM "BUILDING" AS DEFINED IN THE BURGLARY STATUTE.

Kalac challenges his Burglary conviction arguing that evidence is insufficient to establish that Carlson's jail cell is a "building" that he entered unlawfully. This claim is without merit because the jail cell is within the definition of "building" and Kalac clearly unlawfully entered with intent to commit assault therein.

Kalac's claims implicate two standards of review. The sufficiency claim alleges that the state did not prove an essential element beyond a reasonable doubt.

> Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

State v. Cordero, 170 Wn.App. 351, 361, 284 P.3d 773 (2012) (internal citation omitted). Kalac also claims that statutory construction is necessary. Statutory construction is a question of law that is reviewed de novo. *State v. Evans,* 177 Wn.2d 186, 191, 298 P.3d 724 (2013). Such review is intended to "determine and give effect to the intent of the legislature." Id. That intent is to be found from the plain language of the statute with consideration to the text of the provision, the context in which the statute is found, related provisions, and the statutory scheme as a whole. Id. at 192. "Plain language that is not ambiguous does not require construction." Id. Ambiguity is found if the statute is amenable to more than one reasonable interpretation. Id. at 192-93. Lenity requires that ambiguous criminal statutes be interpreted in favor of the defendant unless the legislature clearly intended a different result. Id.

> The unambiguous burglary statute provides that
>
> > A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.
>
> RCW 9A.52.020 (1). The term "building" is defined as
>
> > in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building

RCW 9A.04.110 (5). Next, ""Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." RCW 9A.04.110 (7). These provisions control the meaning "building" as applied in the present case.

Kalac also challenges the finding that he entered unlawfully. The term "enter," as used here, simply means "entrance of a person." RCW 9A.52.010 (4). And, "[a] person "enters or remains unlawfully" in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010 (5). That provision also includes a lengthy explanation of these principles in application to open land and the like which explanation has no application in the present case. Id. Finally, ""[p]remises" includes any building, dwelling, structure used in commercial aquaculture, or any real property." RCW 9A.52.010 (6).

1. ***The jail cell falls within the definition of building.***

Kalac argues that the cell does not meet the burglary statute definition because the jail is a single structure and because jail inmates have little or no privacy while incarcerated. He needs the second argument because the plain language of the statute is broad enough to include the cell. Moreover, no case holds that the having or not of a privacy interest in the structure is dispositive.

First, consideration of the plain language should be sufficient. RCW 9A.52.04.110 (5) is very broad by its terms, applying to fenced areas, vehicles, railway cars and cargo containers. More to the point for the present case, it applies to *"any other structure used for the lodging of persons."* Id.(emphasis added). This completely clear and plain phrase applies to a jail cell. The same is in fact a structure and is in fact used to lodge persons. *See State v. Wentz*, 149 Wn.2d 342, 349, 68 P.3d 282 (2003)(ordinary meaning of "structure" broad enough to include anything from a building to an apple box.). No interpretation is required to understand the phrase.

Moreover, the definition of "dwelling" both adds more clarity and provides temporal context. A jail cell is "used or ordinarily used by persons for lodging" whether a person wants to be lodged there or not. Further, the length of the stay is irrelevant because the definition applies to "temporary" use. A jail cell is a structure used to lodge persons on a temporary basis. A person may not want to be lodged in a jail or to be sleeping in her vehicle or a railway car. But the definition applies regardless of where the victim wants to be. The subjective desires of the victim are not relevant to the definitions. It applies to where she is when victimized.

In *State v. Thomson*, 71 Wn.App. 634, 861 P.3d 492 (1993), in interpreting the phrase "each unit of a building consisting of two or more units separately secured or occupied is a separate building" this Court held that this phrase applies to "multi-unit buildings in which two or more rooms are occupied or intended to be occupied *by different tenants separately*, but not to dwellings wholly occupied by a single tenant." Id.; at 646 (italics added). Supporting this holding is the notion that in the case of a single family house, each family member has a privacy interest in the entire house that is no different from any other family member; family members are not different tenants occupying the family home separately. Id. at 645. Lenity applies here so that a defendant who burglarizes a single home is not separately charged for each room from which he might steal. Id.

The same sentiment controlled in *State v. Deitchler*, 75 Wn.App. 134, 876 P.2d 970 (1994). There, a community service worker attempted to gain access to or remove items from an evidence locker in a police station. There, this Court explained the definition

> RCW 9A.04.110 (5) has two parts, one preceding and one following the semicolon. The first deals with "buildings" not within a larger "building". The second deals with "buildings" within a larger building. According to the second, a structure or space within a larger building will be a "separate building" if the larger building has "two or more units separately secured or occupied", and the structure or space being considered is one of those "units". By negative implication, a structure or space within a larger building will not be a "separate building" unless the larger

> building has "two or more units separately secured or occupied", and the structure or space being considered is one of those "units".

75 Wn.App. at 137. It was held that the evidence locker was not a separate unit because the police station had a single tenant (like the house in *Thompson*) and the evidence locker was not one of two or more units separately secured or occupied. Id. Notably, the *Deitchler* court took no pause to consider the police department's privacy interest in the evidence locker. Assuming that the police would have such an interest, focusing on privacy would likely change the result as *Deitchler* violated an area of privacy in reaching into the locker.

Again, in *State v. Miller*, 91 Wn.App. 869, 960 P.2d 464, this Court considered RCW 9A.04.110 (5) in the context of a burglary of an apartment building storage area. "The storage areas are door-fronted and padlocked units used by different tenants." Id. at 871. The court reviewed *Deitchler* and *Thomson*. The court found that *Thomson* held that the term "building" applied to a multi-unit building "where each unit is occupied by a different individual." Id. at 872. Thus, "each tenant has a privacy interest in his or her own room." Id. From *Deitchler*, the *Miller* court derived the rule that a "charge of burglary is ordinarily supported if the premises entered are large enough to accommodate a human being." Id. at 873. Accordingly, it was held that

> Here, the testimony and photographs admitted at trial indicate that the storage locker Miller broke into was large enough to accommodate a human being, that is, to allow entry or occupation. Moreover, the padlocked, door-accessed unit was secured from other tenants, the manager or building owners of the apartment complex, indicating a separate privacy interest.

Id. So, unlawful entry of a storage area supports burglary if it is sufficiently separate and distinct from other such areas and thus constitutes one of multiple units. This even if a person does not in fact reside there; it is sufficient that a person could live there. The breath of the burglary statute's "building" definition is manifest. It may apply to nearly any distinct unit in which a person might stay no matter how fleeting the occupancy may be.

In *State v. Wentz*, 149 Wn.2d 342, 68 P.3d 282 (2003), Justice Madsen concurring explored the historical roots of the definition of "building" in the burglary statutes. There, the issue was whether Wentz's unlawful entry into a fenced backyard supported a burglary conviction. Id. at 346. That is, is the fenced area a "building" under RCW 9A.04.110? The majority found that it is by the plain language of the statute that includes the term "fenced area" and because factually the fence in question was solid, six-feet high, and had padlocked gates. Id. at 352. The court overruled previous cases that required that there be proof that the fence was erected for a purpose, like protecting property, that made it analogous to "building." Id.

Justice Madsen concurred in the result and reviewed the history of the burglary statutes. Id. at 353. Justice Madsen found the majority's holding too broad, allowing prosecution for stepping over an 18-inch fence and picking a flower. Id. at 358. Her historical review included that

> The common law theory of protection of persons in their places of habitat from serious danger from criminals remains as part of our burglary statutes. Early in this state's history, the court observed in State v. Burton, 27 Wash. 528, 531, 67 P. 1097 (1902), that the crime of burglary is not one involving a disturbance of the fee as realty, but rather a disturbance to the "habitable security."

Id. at 356. Now,

> The burglary statutes, of course, go well beyond common law burglary because they now prohibit and punish invasions involving intent to commit crimes against property. Thus, the burglary statutes are intended to proscribe and punish conduct involving the risk of harm or actual harm to property, as well as persons.

Id. at 356-57. Justice Madsen found that present laws "still retain the principle that protection of persons and property is the key to determining whether a fenced area is a "building." Id.

Justice Madsen's concurrence is congruent with foundational Washington law. In *State v. Klein*, 195 Wash. 338, 80 P.2d 825 (1938), the Supreme Court considered a challenge to a burglary conviction brought because the state had not alleged ownership or occupancy of the premises. Id at 341. The court said

> 'It is true that the state did not attempt to prove who had the legal title to the building, and this was unnecessary, for occupancy is the element which must be alleged and proved, and the testimony in this case shows that the house was occupied at the time of the entry by a person who bore the name of 'Frank,' and was being used by him at that time as a place to live in. Possession is enough as against burglars, and this is true even though the possession may be wrongful.

State v. Klein, 195 Wash. 338, 341, 80 P.2d 825, 827 (1938). Thus, "ownership means any possession which is rightful as against the burglar." Id.

In the present case, Carlson's occupancy of his jail cell, his possession of that space, was rightful as against the unlawful entry of the burglar, Kalac. The cell was in fact being used by Carlson "as a place to live in." For Carlson, his cell was his habitat where he should receive protection from serious danger from criminals. Carlson lived, whether he wanted to or not, in a defined space that was separately secured and occupied, a unit separate and distinct from the other units in the jail where others inmates maintained units separate and distinct from Carlson's unit. Further, the cell was in fact used and intended to be used to lodge persons.

Finally, it is clear that a diminished expectation of privacy, like in a jail, should not control. The burglary statute's protection of persons and property would diminish if each case required a subjective inquiry into the privacy expectations of the victim. In the cases, privacy is viewed objectively as a means to determine the status of a particular place. No

burglary prosecution should be vetoed merely because a victim may concede that she did not feel all that private in some temporary abode or another. And, finally, inmates in jail cells do not surrender all as even incarcerated individuals, under the 14th Amendment to the United State Constitution, retain "freedom from unjustified intrusions on personal security." *Davidson v. Cannon*, 474 U.S 344, 352-53, 106 S.Ct. 668, 88L.Ed.2d 677 (1986). "In particular, it includes a prisoner's right to safe conditions and the security from attack by other inmates." Id., *citing*, *Youngberg v. Romeo*, 457 U.S. 301, 315-16, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).

At every turn, the statutes and the cases discussing them indicate a very broad reading of the term "building." The definitions are clearly broad enough to enclose a jail cell within the protections we all share from burglarious behavior. Kalac entered Carlson's house with intent to assault him.

2. ***Kakac's entry into Carlson's cell was unlawful.***

Even though Carlson's cell constitutes a building in this prosecution, Kalac claims that he did not enter Carlson's house unlawfully. Brief at 16. He argues that the state must prove jail regulations that forbid entry into the cells of others. Brief at 17. He concedes that testimony established that he "was not supposed to be in Mr.

Carlson's cell." Brief at 17. But he claims that that evidence meant only that Kalac was not supposed to be out of his own cell. Id.

First, it is true that there was no particular testimony as to specific jail regulations in the record. The witnesses spoke of their understanding of jail rules. It was established that there are rules concerning where a person can and cannot go in the jail. RP (3/23) 593. On the question of whether lower tier inmates (Kalac) are allowed to go to the upper tier (Carlson), the answer was "you're not allowed to go up there. There is a red line you cannot cross." RP 593-94. In Kalac's own testimony he was asked "And you know that you're not supposed to go in someone else's cell, correct?" RP 913 Kalac responded "correct." Id. He was asked if he was invited and responded "no." Id. He was asked "should you have been in his cell?" RP 917. Kalac responded "no." Id.

As noted above, "A person "enters or remains unlawfully" in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010 (5). Kalac makes no argument that he was in fact licensed, invited, or privileged to enter Carlson's cell. As indicated, the testimony on this point established that he knew he was not so licensed, invited or privileged. Kalac was on notice that none of these reasons for lawful entry obtained. *See State v. Kutch,* 90 Wn.App. 244, 951 P.2d 1139 (1998). In *Kutch,* a shoplifter was

excluded from a mall by mall security officers because of his shoplifting. Id. at 246. This exclusion supported a burglary conviction when Kutch subsequently entered the mall and again shoplifted. Kutch claimed, *inter alia,* similar to Kalac, that there no evidence that mall owners or agents underwrote the exclusion and that he had not received a copy of the written exclusion order. Id. at 248. Nonetheless, Kutch had been presented with and signed the exclusion—he knew it existed and no authority found required that he be given a copy of it. Id. The court held that he had sufficient notice of the revocation of privilege to enter. Id. at 248-49.

Similarly, here, Kalac knew he was not allowed in the upper tier, knew he was not allowed in Carlson's cell, and knew that he was not invited into Carlson's cell. He was clearly on notice that any entry would be unlawful. Moreover, "it is the consent, or lack of consent, of the residence possessor, not the State's or the court's consent or lack of consent that drives the burglary statute's definition of who is not then licensed, invited, or otherwise privileged to so enter or remain in a building." *State v. Wilson,* 136 Wn.App. 596, 150 P.3d 144 (2007). *Wilson* involved a domestic violence no-contact order prohibiting Wilson from contacting his girlfriend. The burglary conviction for entering the house where the girlfriend lived was reversed because Wilson resided

there as well and the no-contact order had not prohibited him from the residence. Id. at 612.

In *State v. Cordero,* 170 Wn.App. 351, 284 P.3d 773 (2012), entry of a teenagers' boyfriend into a motel room was considered. Arguably, the teenage girl had consented to her boyfriend's entry but her mother clearly objected. The rule applied, as in *Wilson, supra,* was that "only the person who resides in or otherwise has authority over the property may grant permission to enter or remain." *Cordero,* 170 Wn.App. at 361-62. On review of cases involving a child's ability to allow entry over the parent's disagreement, the court held that the parent's objection prevailed and unlawful entry was established. Id. at 364. Important to the holding was the fact that "[the defendant] was aware at all times that [the mother] objected to his being in her home." Id. The mother had previously taken out a restraining order against the boyfriend, had moved to a different town to get her daughter away, and had told the boyfriend that if he came she would call the police. Thus, the boyfriend was "aware of what was. . .[the mother's] express and unequivocal disapproval of his presence in the home." Id at 364-65.

These cases, then, point out that it is the possessor's right to exclude or invite. *See also State v. Schneider,* 36 Wn.App. 237, 241, 673 P.2d 200 (1983) ("the law of burglary was designed to protect the dweller,

and, hence, the controlling question here is occupancy rather than ownership."). And, no external rules or regulations were required to sustain that right. Moreover, analysis of this issue ends with a finding that the defendant knew he was not allowed in a certain place. *Accord State v. Crist,* 80 Wn.App. 511, 515, 909 P.2d 1341 (1996) (juvenile otherwise allowed in father's home guilty of burglary of father's locked room when father had expressly excluded him from the room). In the present case, the record clearly establishes that Kalac knew he was not allowed on the upper tier and not allowed in Carlson's cell absent an effective invitation from Carlson. Any entry by Kalac is therefore unlawful no matter how fleeting—"[t]he criminal code does not establish a minimum duration for a burglary." *Cordero,* 170 Wn.App. at 367.

Further, even if there is some doubt as to the entry itself, Kalac's remaining in the cell with assaultive intent suffices. Unlawful remaining can occur even though the initial entry was lawful. *State v. Allen,* 127 Wn.App 125, 133, 110 P.3d 849 (2005). Thus, "[r]egardless of whether the defendant possessed an intent to commit a crime at the time of the unlawful entry, if the defendant unlawfully remains with the intent to commit a crime, we see no reason such conduct does not satisfy the requirements for burglary." Id. Moreover, no precise regulatory code was necessary to sustain the convictions in *Allen.* Things like required check-

in of visitors, signs, and the restrictive lay-out of the buildings involved were sufficient to establish unlawful remaining even though the buildings were otherwise open to the public. Id. at 137-38.

Kalac entered Carlson's habitat in violation of rules that he was aware of. He entered with clearly stated intent to assault Carlson and upon entry he immediately proceeded to do so. The conviction for Burglary in the First Degree should be affirmed.

B. THE EVIDENCE IS SUFFICIENT TO SUPPORT UNLAWFUL IMPRISONMENT WHERE KALAC KNOWINGLY LOCKED CARLSON IN A SMALL SPACE WITH NO POSSIBILITY OF ESCAPE.

Kalac next claims that insufficient evidence makes his unlawful imprisonment conviction infirm. Brief at 18. He argues that the state did not prove beyond a reasonable doubt that Kalac "substantially interfered with his liberty." Id. This claim is without merit because Kalac did in fact substantially interfere with Carlson's liberty by purposefully locking Carlson in the cell. As noted more fully above, Kalac must show that taking the evidence in a light most favorable to the state, no rational trier of fact would have found all the essential elements of the crime beyond a reasonable doubt.

RCW 9A.40.040 provides that "A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." Further,

""Restrain" means to restrict a person's movements without consent and without legal authority in a manner that interferes substantially with his or her liberty." RCW 9A.40.010 (6). Restraint is without consent when accomplished by "physical force, intimidation, or deception," or by "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)(a) and (b). Unlawful imprisonment is in the same statutory scheme as kidnapping and is a lesser included of kidnapping. *State v. Davis,* 177 Wn.App. 454, 461, 311 P.3d 1278 (2013). The term "substantial" has been recently defined by the Washington Supreme Court, in context of second degree assault, as "considerable in amount , value, or worth." *See State v. McKague,* 172 Wn.2d 802, 806, 262 P.3d 1225 (2011).

The evidence at trial of the unlawful imprisonment charge was sufficient. First, it should be noted that the state in no way conceded that merely closing the door to Carlson's cell was inadequate. Appellant's Brief at 21. The prosecutor merely responded to a defense argument saying that "the State could not have proven—an unlawful imprisonment. . .if he slammed the door as he went by." RP 1039. That would have been a mere annoyance. Id. However, that is not what Kalac did. Kalac said

in his own words "I closed the door behind me and pulled him off of his top bunk." RP 904. He closed the door behind him in order to trap Carlson so as to continue his burglarious, assaultive attack of Carlson.

And Kalac trapped Carlson because he did not want other inmates involved in his assault. RP 901. Further, Kalac knew that closing the door would further imprison Carlson. Testimony established that the cell doors cannot be opened once shut. RP 573. If the door closes while you are inside "you're stuck in there." RP 604. Further, you're stuck until jail staff comes by the next time. RP 894. This can take up to an hour. RP 918. Kalac testified that "if it closes, it locks." RP 894. And he knew this on December 9, 2014. Id. His knowledge is further proven by his manipulation of his own cell door by placing a playing card over the lock. Clearly, then, Kalac knew what he was doing when he closed the door. He knew that Carlson would be stuck in the cell with him with no ability to flee Kalac's attack. He knew no one else could intervene until jail staff responded.

Moreover, locking Carlson in clearly involved a "considerable" restraint of his liberty. Contrary to Kalac's assertion that "Carlson had no right to be outside the cell," (Brief at 22) it was in fact Carlson's out time and the cell door was left ajar. RP 593, 605. Otherwise, if Carlson was locked down, Kalac could not have entered his cell. And, Carlson's

intention to remain therein is of no import; his intention certainly would have changed quite quickly when the necessity of fleeing from Kalac's attack arose. But since Kalac knowingly eliminated his ability to flee, he could only press the emergency call button to address the attack. RP 609. He was otherwise restrained and there was no escape from Kalac.

Further, the duration of the imprisonment is not an element. Kalac argues that closing the door was a mere annoyance "which lasted only about two minutes." Brief at 21. In *State v. Robinson,* 92 Wn.2d 357, 597 P.2d 892 (1979), a man attempted to drag a young girl into his car. Id. at 360. There, under the same statutory scheme as in the present case, unlawful imprisonment was affirmed when "[t]he act of dragging her toward the car may have taken approximately one minute." Id. Kalac's argument that his restraint of Carlson was fleeting and therefore not substantial is thus unavailing. Brief at 21.

Taking the evidence in the light most favorable to the state, Kalac substantially restrained Carlson. It can be naught but considerable restraint to knowingly lock a person in a very small space so as to proceed with assaultive intentions. Kalac knew Carlson would have no escape. The evidence is sufficient.

C. KALAC WAS IMPLICITLY ACQUITED OF ATTEMPTED MURDER IN THE FIRST DEGREE CHARGE BY THE JURIES SILENCE AND FURTHER PROSECUTION THEREFORE IS BARRED BY THE GUILTY FINDING ON THE LESSER-INCLUDED OFFENSE (CONCESSION OF ERROR).

Kalac next claims that the trial court erred when it signed an order dismissing his attempted murder charge "without prejudice." The jury had reached no decision on that charge and had convicted of the lesser charge. The state herein failed to seek cross review of the propriety of the lesser included. The record does not disclose the reason for the jury's failure to make a finding on the attempted murder charge. No mistrial was declared. Under these circumstances, retrial of the attempted murder charge is barred as double jeopardy.

The dismissal order erroneously included the words "without prejudice," implying the power of the state to seek to retry the matter. The state concedes that on this record it may not retry Kalac on that charge. The state believes that the inclusion of the word "out" is essentially a scrivener's error and agrees that the trial court should be ordered to excise that word from the order or enter a corrected order.

Kalac fails to argue how this order prejudiced him. In light of this disposition, he can show no prejudice. His ineffective assistance claim on this point is, therefore, without merit.

D. THE STATE DOES NOT INTEND TO SEEK APPELLATE COSTS AND DEFERS TO THE COURT'S DISCRETION ON KALAC'S ARGUMENT TO DISALLOW APPELLATE COSTS.

Kalac argues that he is indigent and does not have the present or future ability to pay discretionary legal financial obligation. The trial court so found at sentencing of the present case.

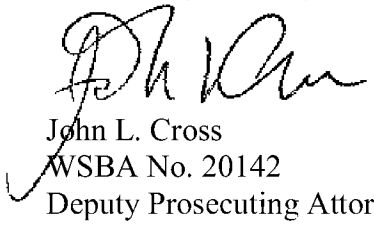
The state believes that it is just and equitable for criminal defendants or appellants to be held accountable for the significant amounts of public funds that expended in addressing their crimes. However, the state, by and through this prosecutor's office, takes a rather more pragmatic view. Since assessments of appellate costs are very rarely actually collected, it is nearly useless to expend argument advancing their imposition or public resources seeking collection. Thus, this office has no intention of seeking appellate costs in this case and we defer to this Court's discretion.

IV. CONCLUSION

For the foregoing reasons, Kalac's conviction and sentence should be affirmed with orders to correct the error in the attempted Murder dismissal order.

DATED February 11, 2016.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney



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KITSAP COUNTY PROSECUTOR

February 11, 2016 - 1:23 PM

Transmittal Letter

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Court of Appeals Case Number: 47506-5

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