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Supreme Court No. 98698-3
COA No. 79986-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DESHAWN LAVELLE WEATHERLY,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Deshawn Lavelle Weatherly requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Weatherly, No. 79986-0-I, filed on June 1, 2020. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Where the State presents evidence of multiple criminal acts, any one of which could satisfy the charge, the jury must be instructed they must unanimously agree on a particular act. Here, for both the malicious mischief and harassment charges, the State presented evidence of multiple acts that could satisfy the charges. But the jury was not instructed on the unanimity requirement. Was Mr. Weatherly's constitutional right to a unanimous jury verdict violated?

2. To prove unlawful imprisonment, the State bore the burden to prove Mr. Weatherly *knew* the restraint was unlawful. No evidence showed that Mr. Weatherly was aware his conduct was illegal. Did the State fail to prove the charge?

3. Jury instructions must adequately inform the jury of the State's burden to prove the elements. To prove unlawful imprisonment, the State bore the burden to prove Mr. Weatherly *knew* the restraint was

unlawful. The instruction defining knowledge contradicted this, telling the jury the State need not prove that a person knows their conduct is unlawful. Was the prosecution relieved of its burden of proof?

C. STATEMENT OF THE CASE

Deshawn Weatherly and Kamari Thompson became a romantic couple in March 2017. RP 410-11. According to Ms. Thompson, by April, Mr. Weatherly started to suspect she might be seeing other men. RP 413-14. He regularly examined her iPhone to see if she was communicating with other men. RP 413-14, 418.

Ms. Thompson said that one day in July 2017, Mr. Weatherly asked to examine her phone. RP 421-22. When she refused, he got angry, grabbed the phone, and threw it at the brick fireplace. RP 421-22. The phone broke in half. RP 421-22. Mr. Weatherly then chased Ms. Thompson through the house. RP 423. She ran into the garage and tried to lock herself inside. RP 423. Mr. Weatherly forced himself through the door, breaking the door frame. RP 423, 770-71. He immediately apologized and soon afterward, fixed the door frame. RP 428, 772. He also helped her pay for a new iPhone. RP 429, 773.

On August 14, 2017, Mr. Weatherly and Ms. Thompson were sitting together in Mr. Weatherly's truck while parked at a park. RP

432, 435. A man Ms. Thompson had recently met sent her a text message. RP 431. Mr. Weatherly went through her phone and saw the message. RP 431. According to Ms. Thompson, he got angry and put his hands around her neck, cutting off her air supply. RP 436-38.

Ms. Thompson said that between March and October 30, 2017, she tried to break up with Mr. Weatherly multiple times but he would not accept it. RP 473. He would threaten to “have girls come up to [her] place of work, [her] school, and [her] house, and he mentioned [her] family as well.” RP 474. Specifically, he threatened to have the “girls” “fight,” “attack” and “physical[ly] harm” her. RP 474. She believed Mr. Weatherly could carry out the threats and she was afraid for her and her family’s safety. RP 475-81.

Ms. Thompson said Mr. Weatherly made these threats “[c]onsistently . . . throughout the weeks.” RP 476. He would “bring it up every time” he got frustrated with her. RP 476. The threats became more frequent in September and October 2017. RP 477-78.

On October 29, 2017, Ms. Thompson went to a club with some friends to celebrate Halloween. RP 482-85. Mr. Weatherly met her there. RP 487. When the club closed, they all gathered outside, where a man approached and spoke to Ms. Thompson. RP 492. Later, as Mr.

Weatherly drove Ms. Thompson home, he asked her why she had been talking to the man. RP 495. Mr. Weatherly became angry, pulled over, and assaulted her, hitting her in the head and biting her chest. RP 496.

Ms. Thompson said Mr. Weatherly also restrained her “from trying to leave the vehicle.” RP 496. He locked the door and when she tried to open it, he ran around to her side of the truck and prevented her from leaving. RP 496-97, 502, 660. He took her phone and purse and threw them out of the truck so that she could not contact anyone or get home on her own. RP 498-501, 504-05. Eventually she fell asleep in the truck. RP 506. The next morning, Mr. Weatherly drove her home. RP 507.

Ms. Thompson obtained a protection order against Mr. Weatherly. RP 533, 536. But the two continued to have contact by text and in person throughout the following months. RP 538.

Mr. Weatherly was charged and convicted of one count of second degree assault by strangulation, one count of unlawful imprisonment, one count of fourth degree assault, one count of harassment, one count of third degree malicious mischief, and one count of violation of a court order. CP 58-61, 77-85.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Mr. Weatherly’s constitutional right to a unanimous jury verdict was violated in regard to the malicious mischief and harassment convictions.

- a. Where the State presents evidence of multiple criminal acts, any one of which could satisfy the charge, the jury must be instructed it must unanimously agree on a particular act.

In Washington, an accused may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). If the prosecution presents evidence of multiple acts that could form the basis of the charge, either the State must tell the jury which act to rely upon in its deliberations, or the court must instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984). Failure to follow one of these options is “violative of a defendant’s state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.” Kitchen, 110 Wn.2d at 409; Const. art. I, § 22; U.S. Const. amend VI. “The error stems from the possibility that some jurors may have relied on one act or incident and

some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” Kitchen, 110 Wn.2d at 411.

- b. Mr. Weatherly’s constitutional right to jury unanimity was violated in regard to the malicious mischief conviction.

To prove third degree malicious mischief, the State bore the burden to prove that between July 1 and July 31, 2017, Mr. Weatherly “knowingly and maliciously caused physical damage to the property of another.” CP 130; RCW 9A.48.090(1)(a).

The State relied upon the alleged incident in July 2017. RP 942-43. Ms. Thompson testified that on that day, she and Mr. Weatherly argued, he grabbed her iPhone, and threw it at the brick fireplace. RP 421-22. The phone broke in half. RP 421-22. Ms. Thompson then ran into the garage and locked the door. RP 423. Mr. Weatherly ran after her, forced himself through the door, and broke the door frame. RP 423, 770-71.

Thus, the evidence showed two distinct acts that could form the basis for the malicious mischief charge: Mr. Weatherly’s alleged act of throwing the iPhone against the fireplace and breaking it, or the alleged act of barging through the garage door and damaging the door frame. RP 421-23.

The State did not elect a particular act it was relying upon. In closing argument, the prosecutor discussed both possible acts and did not say the jury must choose one act or the other. RP 942-43. The prosecutor said Mr. Weatherly went through Ms. Thompson's iPhone, got bothered about her possibly talking to other men, and "him being really bothered by this resulted in him taking her iPhone 7 and throwing it against a brick fireplace inside of her mother's home." RP 942. The prosecutor then said Ms. Thompson "ran from him down the stairs into the downstairs living room area and through the door that separates the main living area from the garage. It was this area that he damaged in pursuit of her at that time." RP 943.

Because the State presented evidence of two possible acts that could form the basis of the malicious mischief charge but did not choose one act or the other, and the jury was not instructed it must agree on one particular act, Mr. Weatherly's constitutional right to jury unanimity was violated. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 570.

- c. Mr. Weatherly's constitutional right to jury unanimity was violated in regard to the harassment conviction.

To prove harassment, the State bore the burden to prove that between October 1 and 30, 2017, Mr. Weatherly, without lawful authority, "knowingly threatened to cause bodily injury immediately or in the future" to Ms. Thompson, and his words or conduct placed her in reasonable fear the threat would be carried out. CP 126; RCW 9A.46.021(a).

The State presented evidence that Mr. Weatherly threatened Ms. Thompson multiple times during October 2017. The State relied upon Mr. Weatherly's alleged threat to "send females to [Ms. Thompson's] job, to her house, and to her school, and that those females would cause her trouble, beat her up, and cause her harm." RP 952. Ms. Thompson said Mr. Weatherly communicated this threat to her repeatedly throughout the charging period. RP 473-74. She said he would "bring it up every time" he got frustrated with her. RP 476. She said "[t]he threats did happen often" during the month of October. RP 478.

The State did not elect a particular act it was relying upon. In closing argument, the prosecutor stated Ms. Thompson testified "the threats became more consistent during those last few months and,

particularly, she remembers it at least being conveyed to her one time in the month of October.” RP 952. But the prosecutor did not inform the jury which particular alleged threat it was relying upon as the basis for the charge.

Because the State presented evidence of multiple possible acts that could form the basis of the harassment charge but did not elect a particular act, and the jury was not instructed it must agree on a particular act, Mr. Weatherly’s constitutional right to jury unanimity was violated. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 570.

- d. The error is not harmless beyond a reasonable doubt, requiring the convictions be reversed.

An error in failing to provide a unanimity instruction is presumed prejudicial and the conviction will be upheld only if the error is harmless beyond a reasonable doubt. State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007); Kitchen, 110 Wn.2d at 411-12. The error is not harmless if a rational juror could have a reasonable doubt as to whether at least one alleged act supporting the charge occurred. Coleman, 159 Wn.2d at 510.

Here, a rational juror could have a reasonable doubt as to whether at least one act supporting both the malicious mischief and

harassment charges occurred. The error in failing to provide a unanimity instruction is not harmless beyond a reasonable doubt and the convictions must be reversed. Coleman, 159 Wn.2d at 512; Kitchen, 110 Wn.2d at 411-12.

2. The State did not prove all of the elements of unlawful imprisonment because it did not prove Mr. Weatherly knew the restraint was unlawful.

Due process and the right to a jury trial require that the prosecution prove every element of an offense to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 499, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Const. art. I, §§ 3, 21, 22; U.S. Const. amends. VI, XIV.

Unlawful imprisonment requires proof the restraint was without legal authority. State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000). The prosecution must additionally prove the defendant *knew* the restraint was without legal authority.¹ Id. at 159 (“knowledge of the

¹ This Court has remarked that “Warfield’s holding is limited to those unique cases where the defendant had a good faith belief that he or she had legal authority to imprison a person.” State v. Johnson, 180 Wn.2d 295, 304, 325 P.3d 135 (2014). Regardless, here, under the law of the case doctrine, the State assumed the burden to prove Mr. Weatherly knew the restraint was without legal authority because it was included as an element in the to-convict instruction. State v. Johnson, 188 Wn.2d 742, 756, 399 P.3d 507 (2017); State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

law is a statutory element of the crime of unlawful imprisonment”). This is unusual because, in general, “ignorance of the law is no excuse.” *Id.* (internal quotation omitted). Consistent with the law, the jury was instructed that to convict Mr. Weatherly of unlawful imprisonment, the State must prove beyond a reasonable doubt he *knew* the restraint was without legal authority. CP 121-22.

The element of “knowledge” requires proof of *actual* knowledge. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); CP 120 (“[a] person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result”).

The State did not prove beyond a reasonable doubt that Mr. Weatherly actually knew he was acting without legal authority when he allegedly restrained Ms. Thompson. The State relied upon the incident in the early morning of October 30, when Mr. Weatherly purportedly restrained Ms. Thompson from leaving his truck. RP 496-506, 957-59. No evidence shows he was aware of the offense of unlawful imprisonment as set out in RCW 9A.40.040. No evidence shows he knew he was acting without legal authority when he restrained Ms. Thompson’s movements. *Cf. State v. Rich*, 184 Wn.2d 897, 909, 365

P.3d 746 (2016) (statements from defendant showed she knew conduct in driving drunk and speeding was reckless).

The prosecution failed to prove the essential element that Mr. Weatherly knew any restraint he imposed was without legal authority. The conviction must be reversed and the charge dismissed with prejudice. Burks v. United States, 437 U.S. 1, 11, 96 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

3. The jury instructions improperly relieved the prosecution of its burden to prove all of the elements of unlawful imprisonment.

- a. The jury must be clearly instructed on the prosecution's burden to prove all of the elements of the charge.

“[J]ury instructions must make the relevant legal standard manifestly apparent to the average juror.” State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). An error in failing to properly instruct the jury on the State's burden to prove every element of the offense is a manifest constitutional error that may be raised for the time on appeal. RAP 2.5(a)(3); State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); State v. Clark-El, 196 Wn. App. 614, 619, 384 P.3d 627 (2016).

- b. The knowledge instruction contradicted the to-convict instruction, relieving the prosecution of its burden to prove all of the elements of unlawful imprisonment.

As stated, “knowledge of the law is a statutory element of the crime of unlawful imprisonment.” Warfield, 103 Wn. App. at 157. The prosecution must prove the defendant knew the restraint was without legal authority. Id.

Consistent with this requirement, the to-convict instruction informed the jury that the State must prove beyond a reasonable doubt that Mr. Weatherly “acted knowingly” with regard to the element that “such restraint was without legal authority.” CP 121-22.

The court’s instruction on knowledge, however, contradicted the to-convict instruction. It told the jury that to act knowingly, it is not necessary that the person know the fact, circumstance, or result is unlawful:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result, when he or she is actually aware of that fact, circumstance, or result. *It is not necessary that the person know that the fact, circumstance, or result, is defined as being unlawful or an element of a crime.*

CP 120 (emphasis added).

The emphasized language is part of the pattern instruction on knowledge. See 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.02 (4th Ed). As explained in a comment, the purpose of the highlighted language is to tell the jury that “ignorance of the law is no excuse.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.02, cmt. (4th Ed).²

By issuing conflicting instructions, the court did not make the relevant law manifestly apparent to the jury. See Walden, 131 Wn.2d 473. The court’s knowledge instruction improperly relieved the prosecution of its burden to prove beyond a reasonable doubt that Mr. Weatherly knew the restraint was unlawful. The instruction affirmatively told the jury they need not find what the law actually required them to find to convict Mr. Weatherly.

Thus, the trial court erred in issuing its knowledge instruction to the jury. See Clark-El, 196 Wn. App. at 619-20 (instructions relieved prosecution of burden of proof because to-convict instruction did not require jury to find that controlled substance was methamphetamine).

² The pattern instruction puts the highlighted language in brackets. These “brackets signify that the enclosed language may or may not be appropriate for a particular case.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 0.10 (4th Ed). They “alert the judge and attorneys that a choice in language needs to be made.” Id.

- c. The error is not harmless beyond a reasonable doubt.

A jury instruction misstating an element of the crime is presumed prejudicial and, to uphold the conviction, the Court must conclude the error is harmless beyond a reasonable doubt. Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The error is harmless only if the element is supported by uncontroverted evidence. Neder, 527 U.S. at 15; Brown, 147 Wn.2d at 341.

The error is not harmless beyond a reasonable doubt in this case. The State presented *no* evidence that Mr. Weatherly knew the restraint was unlawful. The conviction must be reversed.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 26th day of June, 2020.

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DESHAWN LAVELLE WEATHERLY,

Appellant.

No. 79986-0-I

DIVISION ONE

UNPUBLISHED OPINION

MANN, C.J. — Deshawn Weatherly appeals his jury convictions for third degree malicious mischief, felony harassment, and unlawful imprisonment. Weatherly argues that he was denied his right to a unanimous jury verdict because multiple acts could have supported the malicious mischief and harassment convictions. He also contends that the evidence was insufficient to support the unlawful restraint conviction and that the jury instructions relieved the State of its burden to prove that he knowingly restrained the victim. We affirm.

I.

Kamari Thomas met Weatherly at her younger brother's high school basketball game in January 2017. They began seeing each other every day, and by March they were involved romantically. Thomas described the beginning of the relationship as

“really good” because Weatherly bought her food and gave her rides to school and work.

Shortly after their relationship began, Weatherly began demanding to look at Thomas’s cell phone to determine if she was talking to other men. Weatherly also took Thomas’s phone while she slept and even changed the password so that Thomas had to ask him for permission to use her own phone.

In late July 2017, Weatherly was visiting Thomas at her home in Beacon Hill where she lived with her family. Weatherly demanded to look through Thomas’s cell phone. When Thomas refused, Weatherly became angry. He took her phone and threw it against a brick fireplace, breaking it in half. Terrified, Thomas tried to get away from Weatherly, but he chased her throughout the house. Ultimately, Thomas locked herself in the garage. Weatherly forced his way through the door, breaking the door frame in the process. Once inside, Weatherly apologized and hugged Thomas.

In mid-August 2017, Thomas and her family were in Las Vegas for her brother’s basketball tournament. While there, Thomas and her mother went to a nightclub together. They met a group of people and Thomas exchanged phone numbers with one of the men who said that he would suggest things for Thomas to do while she was in town. After she returned home, the man sent Thomas a text message. Weatherly found the text message on Thomas’s cell phone. He became furious and called Thomas names. He then wrapped his hands around Thomas’s neck and choked her severely enough to rupture blood vessels in her eyes. Thomas was terrified, believing Weatherly was going to kill her. Weatherly begged Thomas to forgive him, and she did not call the police.

Throughout the relationship, Weatherly threatened Thomas with physical harm. The threat was always the same: Weatherly told Thomas that he would have girls come to her school, her work, or her home, and attack her. Weatherly made this threat “consistently” every time he became angry or frustrated at Thomas. He also made the threat when Thomas tried, on several occasions, to end the relationship.

On the evening of October 29, 2017, Thomas met some friends at an apartment in West Seattle to get ready for a Halloween party held at a nightclub. Weatherly joined Thomas at the party around midnight. When the nightclub closed around 2:00 a.m., Thomas and her friends hailed an Uber back to West Seattle so Thomas could retrieve some of her belongings. Weatherly followed in his work truck so that he could pick Thomas up afterwards.

While driving Thomas home, Weatherly became upset about Thomas talking to her cousin’s boyfriend at the nightclub. He pulled over and began to physically assault Thomas by hitting her in the head, biting her chest and pulling out some of her hair. He grabbed Thomas’s arms to prevent her from leaving the vehicle. At some point, Weatherly took Thomas’s shoes, purse and cell phone. He also locked the vehicle doors so that Thomas could not leave. Thomas manually unlocked the door but Weatherly got out of the vehicle, came around to the passenger side, and locked it from the outside, preventing Thomas from exiting.

Thomas begged Weatherly to free her, stating: “Can you please let me out? I just want to go home.” At one point, Thomas successfully escaped the vehicle. However, because she was far from her home and did not have her shoes, her cell phone or her purse, she returned to the car. She asked Weatherly to return her

belongings but he refused. Weatherly began driving and threw Thomas's purse and shoes out the window. Eventually, Weatherly parked, and Thomas, realizing Weatherly would not let her leave, fell asleep. In the morning, Weatherly drove Thomas home. Thomas and her mother went to the hospital for Thomas's injuries, and hospital staff called the police.

The State charged Weatherly with second degree assault by strangulation, unlawful imprisonment, fourth degree assault, harassment, and third degree malicious mischief.¹ A jury convicted Weatherly as charged. Weatherly appeals.

II.

Weatherly first contends that he was deprived of his right to a unanimous jury. He argues that multiple acts could have formed the basis for both the malicious mischief and the harassment convictions, but the State did not elect the act upon which the jury could rely on and the trial court did not give a unanimity instruction. As to the harassment conviction, Weatherly claims that the State presented evidence of multiple threats throughout his relationship with Thomas. As to the malicious mischief conviction, Weatherly contends that the evidence showed two distinct acts of property destruction: breaking Thomas's cell phone by throwing it against the fireplace and damaging the garage door frame by barging through it.

We disagree. Because the multiple acts of harassment were part of a continuing course of conduct, and only one act of property destruction supported the malicious mischief conviction, no election or unanimity instruction was needed.

¹ The State also charged Weatherly with witness tampering and two counts of violation of a court order, which are not at issue in this appeal.

We review constitutional errors de novo. State v. Jorgenson, 179 Wn.2d 145, 150, 312 P.3d 960 (2013). Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a criminal defendant has a right to a unanimous jury verdict. State v. Fisher, 165 Wn.2d 727, 755, 202 P.3d 937 (2009) (citing State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)). When the State presents evidence of several distinct acts that could constitute a charged crime, the jury must agree unanimously on which act constituted the crime. Kitchen, 110 Wn.2d at 411. Either the State must elect the act on which it relies on or the court must instruct the jury to agree unanimously as to what act or acts the State proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411. Failure to do so is constitutional error because of “the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” Kitchen, 110 Wn.2d at 411.

However, an election or unanimity instruction is only required if the State presents evidence of “several distinct acts.” State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). There is no such requirement if the evidence shows the defendant was engaged in a “continuing course of conduct.” Fiallo-Lopez, 78 Wn. App. at 724. A continuing course of conduct is “an ongoing enterprise with a single objective.” State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). To determine whether criminal conduct constitutes one continuing act, the trial court must evaluate the facts in a commonsense manner. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). A reviewing court will consider “(1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate

purpose.” State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010) (citing Love, 80 Wn. App. at 361).

“[E]vidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts.” Fiallo-Lopez, 78 Wn. App. at 724. A continuing offense may exist even when it takes place over a long period. See, e.g., State v. Knutz, 161 Wn. App. 395, 409, 253 P.3d 437 (2011) (numerous acts of fraud against the same investor over a period of 29 months constituted a continuing course of conduct because the purpose was “‘to promote an enterprise with a single objective’—to obtain money through deceit.”); State v. Barrington, 52 Wn. App. 478, 761 P.2d 632 (1988) (multiple incidents of promoting prostitution over three months was a continuing course of conduct when it involved one woman and a “single objective—to make money.”).

As to the harassment conviction, the information alleged that Weatherly threatened Thomas between October 1 and October 30, 2017. Weatherly claims that the State presented evidence of multiple threats during the charging period that could have formed the basis for the crime. But the evidence showed a pattern of threatening conduct, not a series of discrete threats. The form of the threat was always the same: that Weatherly would tell his female friends to assault Thomas. And the purpose of each threat was the same: to control Thomas and prevent her from ending the relationship. Because the threats happened so frequently, Thomas was unable to identify specific dates or times that Weatherly threatened her. She knew only that it must have happened at least once in October because Weatherly made the threats

“consistently,” each time he was angry with her. Because the evidence clearly showed that Weatherly’s threats were part of a continuing course of conduct, no election or unanimity instruction was needed.

As to the malicious mischief conviction, the information alleged that Weatherly maliciously caused damage to Thomas’s cell phone:

That the defendant Deshawn Lavelle Weatherly in King County, Washington, between July 1, 2017 and July 31, 2017, did knowingly and maliciously cause physical damage to a phone, the property of Kamari J. Thompson;

Weatherly argues that the act of breaking the garage door frame could also have supported the charge of malicious mischief. We disagree.

“A person is guilty of malicious mischief in the third degree if he or she: knowingly and maliciously . . . [c]auses physical damage to the property of another.” RCW 9A.48.090(1)(a). To be malicious, an act must evince “an evil intent, wish, or design to vex, annoy, or injure another person.” RCW 9A.04.110(12).

The damage to the door frame was not malicious because Weatherly did not intentionally cause the damage to upset Thomas. Instead, the damage was a result of Weatherly forcing his way into the garage. The deputy prosecutor explained in closing argument that only the breaking of Thomas’s cell phone constituted malicious mischief because he chose to throw the cell phone at a hard surface in order to break it. Because only a single act supported the charged crime, no election or unanimity instruction was required.

III.

Weatherly next contends that the evidence was insufficient to convict him of unlawful imprisonment because the State failed to prove that he knew his restraint of Thomas was “without legal authority.” We disagree.

Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact can find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in favor of the State and against the defendant. Salinas, 119 Wn.2d at 201. A claim of insufficiency of the evidence “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A person is guilty of unlawful imprisonment “if he or she knowingly restrains another person.” RCW 9A.40.040(1). “Restrain” means “to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his or her liberty.” RCW 9A.40.010(6). A person knows or acts knowingly or with knowledge when “he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b)(i), (ii).

Relying on State v. Warfield, 103 Wn. App. 152, 5 P.3d 1280 (2000), Weatherly argues that the State must prove not only that the restraint was without legal authority,

but also that the defendant knew it was without legal authority. Warfield involved bounty hunters who had a good faith belief that they had the legal authority to apprehend and return a person to Arizona, where there was a warrant for the person's arrest. Because the Arizona warrant was for a misdemeanor, it had no lawful effect in Washington. Division Two of this court reversed the conviction for unlawful imprisonment, holding that the State was required to prove the bounty hunters knew they lacked legal authority to restrain the victim.

But in State v. Johnson, 180 Wn.2d 295, 325 P.3d 135 (2014), the Washington Supreme Court limited the holding of Warfield "to those unique cases where the defendant had a good faith belief that he or she had legal authority to imprison a person." Johnson, 180 Wn.2d at 304. It held that the logic of Warfield "does not extend to most unlawful imprisonment cases—particularly those involving domestic violence—where there is no indication that the defendants believed they actually had legal authority to imprison the victim." Johnson, 180 Wn.2d at 304. Consequently, "where no claim of a good faith belief of lawful authority is raised, the State need only prove that the defendant acted knowingly to restrain." State v. Dillon, 12 Wn. App. 2d 133, 142, 456 P.3d 1199 (2020).

Weatherly argues the State was nonetheless required to prove he knew the restraint was without legal authority under the law of the case doctrine. The law of the case doctrine provides that "the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

Weatherly is correct that the jury instructions informed the jury that they must find Weatherly knew he was acting without legal authority. Jury instruction 18, defining unlawful imprisonment, provided as follows:

A person commits the crime of unlawful imprisonment when he or she knowingly restrains the movements of another person in a manner that substantially interferes with the other person's liberty if the restraint was without legal authority and was without the other person's consent or accomplished by physical force, intimidation, or deception.

The offense is committed only if the person acts knowingly in all these regards.

(Emphasis added). Jury instruction 20, the to-convict instruction, provided that the jury was required to find each of the following elements beyond a reasonable doubt:

(1) That between October 29, 2017, and October 30, 2017, the defendant restrained the movements of KAMARI J. THOMPSON in a manner that substantially interfered with her liberty;

(2) That such restraint was

(a) without KAMARI J. THOMPSON'S consent or

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

(Emphasis added).

However, the State presented sufficient evidence such that a reasonable juror could conclude beyond a reasonable doubt that Weatherly knew he was acting without legal authority. Unlike Warfield, where the defendants apprehended the victim in order

to turn him over to law enforcement, Weatherly had no conceivable lawful purpose to restrain Thomas. The evidence showed that Weatherly restrained Thomas solely to punish and frighten her for talking to another man. Weatherly did not say anything that indicated he thought he had legal authority to restrain Thomas. Thus, sufficient evidence exists to support that Weatherly knew he was acting without legal authority.

Finally, Warfield contends that the knowledge instruction conflicted with the to-convict instruction and misinformed the jury that the State did not need to prove he knew the restraint was unlawful. Jury instruction 19, which defined knowledge, provided as follows:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she 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.

(Emphasis added). This instruction is identical to 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.02 (4th ed. 2016). But we have held that this instruction is an accurate statement of the law with regard to unlawful imprisonment, and thus a trial court does not err by giving the instruction. Dillon, 12 P.3d at 143, n.2. As discussed previously, the State was required to prove that Weatherly knew that he lacked legal authority to restrain Thomas. The State did not have to prove that

Weatherly knew that unlawful imprisonment is a crime. The jury instructions did not relieve the State of its burden of proof.

Affirmed.

Mann, C.J.

WE CONCUR:

Chun, J.

Luppelwick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79986-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: June 26, 2020

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