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Appellate Unit

COURT OF APPEALS DIV I
STATE OF WASHINGTON

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NO. 70508-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT WOLD,

Appellant.

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

The Honorable Bruce E. Heller, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Robert Wold's due process right to a fair trial by placing the burden on him to prove he was not competent to face trial.

2. Wold did not knowingly and voluntarily plead guilty to unlawful imprisonment because the State failed to include each element of the offense in the information.

3. The trial court exceeded its statutory sentencing authority by imposing a 15-year no-contact provision as part of a sentence for class B felonies.

Issues Pertaining to Assignments of Error

1. After a contested hearing involving the testimony of several mental health experts, the trial court held Wold failed to prove he was not competent to face trial. By requiring Wold to shoulder the burden of proof, did the trial court violate his constitutional right to due process?

2. Did the State fail to allege each element of the crime of unlawful imprisonment by failing to include the definition of "restrain" in the information?

3. Did the trial court exceed its statutory sentencing authority by imposing a 15-year no-contact provision as part of a sentence for class B felonies?

B. STATEMENT OF THE CASE

The State charged Robert Wold with felony harassment, unlawful imprisonment, and two counts of second degree assault (reckless infliction of substantial bodily harm and strangulation) against his former girlfriend, Melinda Hopper. The State alleged the crimes against Ms. Hopper involved domestic violence and there was evidence of an ongoing pattern of abuse of multiple victims over a prolonged period of time. RCW 9.94A.535(3)(h)(i).¹ The State also charged second degree assault against Ms. Hopper's father and two counts of fourth degree assault, one each against Ms. Hopper's two sons. CP 154-57. Finally, the State charged second degree assault against an individual not related to any of the other alleged victims or to Wold. CP 158.

¹ "The current offense involved domestic violence, as defined in RCW 10.99.020 . . . and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time[.]"

During jury selection, Wold's counsel moved the trial court to order Wold evaluated for competency. RP (3/21/12) at 19-20. By this time, counsel had obtained the services of forensic neuropsychologist Dr. Beaver and planned to present his testimony in support of a diminished capacity defense. CP 57-60. The court granted the motion. RP (3/21/12) at 32-34.

At the competency return hearing, the prosecutor explained Wold was sent to Western State Hospital (WSH) for evaluation by a neuropsychologist. RP (5/30/12) 18-20. The WSH evaluators found Wold incompetent and not restorable. Id. at 35; Review Hearing Ex. 3.

The prosecutor complained that Wold was not evaluated by a neuropsychologist and that the WSH evaluators did not have sufficient information to form a conclusion as to Wold's competency. RP (5/30/12) 19-23, 32-33. The prosecutor requested a continuance to allow the State to hire an expert to conduct an independent evaluation. RP (5/30/12) 32-33. The trial court granted the State's motion. Supp. CP __ (sub. no. 121, Order on Criminal Motion, filed 5/30/2012); RP (5/30/12) 33-34.

At the later competency return hearing, the trial court heard testimony from the State's independent expert, Dr. Judd, WSH evaluators

Dr. Leisenring and Dr. Sharrette, and defense expert Dr. Beaver. RP (9/27/12); RP (11/9/12); RP (12/6/12); RP (12/11, 19/12).

The court concluded the WSH report had been discredited and that its conclusion that Wold was not competent was "entitled to little, if any, weight." RP (4/4/13) 97. The court noted both Judd and Beaver agreed Wold was capable of understanding the proceedings against him. Id. The court found Judd's inability to interview Wold was a legitimate concern. Id. at 97-98. But because Beaver did not perform a formal competency evaluation, and because Judd analyzed medical records and listened to Wold's jail phone conversations, the court chose to weight their competing conclusions against each other. Id. at 98-99.

The court agreed with Judd and Beaver that Wold understood the proceedings, relying primarily on Wold's statements in the jail calls. Id. at 99-102. With respect to the second prong of the competency test, the court acknowledged the existence of "myriad mental health issues." Id. at 102-05. The court found the evidence relating to traumatic brain injury inconclusive. Id. at 106-07. The court concluded Wold did not meet his burden of demonstrating he lacks the capacity to assist in his own defense because of a mental disease or defect. Id. at 107.

Wold entered open pleas of guilty to each crime. CP 159-86. Wold chose not to contest the "history of domestic violence" aggravating factor. CP 187-89.

The trial court found the aggravating factor and used it to run the confinement time imposed on counts 1, 4 and 5 consecutively. CP 320-21; RP (6/7/13) 118, 129-30. The court imposed sentences totaling 228 months. CP 207-16; RP (6/7/13) 124-25. The court imposed maximum sentences of 364 days for the misdemeanors, and ran one sentence consecutive to the felony term. CP 217-19; RP (6/7/13) 124.

C. ARGUMENT

1. THE TRIAL COURT DEPRIVED WOLD OF DUE PROCESS BY PLACING ON HIM THE BURDEN OF PROVING INCOMPETENCE.

The trial court placed the burden of proving incompetence on Wold. 6RP 107. The court's decision violated Wold's due process right to a fair trial. This Court should reverse Wold's convictions.

"No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. The conviction of an accused while he is legally incompetent violates his constitutional right to a fair trial under the due process clause of the Fourteenth Amendment. Drope v. Missouri, 420 U.S. 162, 171, 95

S. Ct. 896, 43 L. Ed. 2d 103 (1975); In re Personal Restraint of Fleming, 142 Wn.2d 853, 861, 16 P.3d 610 (2001).

A person is competent if he can understand the nature of the proceedings against him and assist in his own defense. RCW 10.77.010(15); State v. Ortiz, 104 Wn. 2d 479, 482, 706 P.2d 1069, 1072 (1985), cert. denied, 476 U.S. 1144 (1986). Competence requires the mental awareness to comprehend the evidence and "the ability to communicate with counsel in helping prepare an effective defense." Odle v. Woodford, 238 F. 3d 1084, 1089 (9th Cir. 2001), cert. denied, 534 U.S. 888 (2001). A trial court's competency determination is reviewed for abuse of discretion. State v. Sisouvanh, 175 Wn.2d 607, 620, 290 P.3d 942 (2012).

Due process requires the trial court to comply with the procedures established by the Legislature in Chapter 10.77 RCW. State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). The United States Supreme Court accords great deference as to which party bears the burden of proving competency. Medina v. California, 505 U.S. 437, 445-46, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992).

In Washington, RCW 10.77 places the burden on the State to prove a defendant competent to stand trial after the court has found reason to

doubt his competency. In State v. Wicklund, our Supreme Court stated the burden of establishing competency under RCW 10.77.060 is placed on the State. 96 Wn.2d 798, 805, 638 P.2d 1241 (1982) ("The need for [complying with the procedures of RCW 10.77 by requiring two] expert opinions is even greater here, since the burden of establishing Mr. Wicklund's competency was placed on the State."). The burden has been similarly applied to the State under RCW 10.77.086 regarding restoration of competency. State v. Hurst, 158 Wn. App. 803, 805, 244 P.3d 954 (2010), aff'd. on other grounds, 173 Wn.2d 597 (2012). The State also bears the burden under RCW 10.77.090. See Born v. Thompson, 154 Wn.2d 749, 753-54 n.6, 117 P.3d 1098 (2005) (agreeing with State's concession that it bears the burden of proof under former RCW 10.77.090 and applying burden to State).

Wold expects the State will contend his argument should be rejected based on State v. Coley² and State v. P.E.T.³ In Coley, the court declared that because criminal defendants are presumed competent, it is the defendant's burden to show he is incompetent in the first instance. 171

² 171 Wn. App. 177, 179, 286 P.3d 712 (2012), review granted, 176 Wn.2d 1024 (2013).

³ 74 Wn. App. 590, 300 P.3d 456 (2013), petition for review stayed (No. 89157-5, 12/11/2013).

Wn. App. at 179. There are two reasons for this Court to reject Coley's pronouncement. First, it cited no authority for the proposition that a defendant shoulders the burden of proving incompetency. Second, this portion of the opinion is dicta. The question presented in Coley was whether the trial court erred by placing the burden on the defendant to show he remained incompetent *after* the court had previously adjudicated him incompetent. 171 Wn. App. at 186. The Court thus had no need to determine which party bears the burden in the first instance. See State v. Johnson, 159 Wn. App. 766, 777 n.6, 247 P.3d 11 (2011) (statements unrelated to issue before court and unnecessary to decision are dicta). Such statements need not be followed. In re Personal Restraint of Domingo, 155 Wn.2d 356, 366, 119 P.3d 816 (2005).

For the same reason, it was not necessary for this Court in P.E.T. to address the defendant's contention that the State has the burden of proving competence in the first instance. State v. P.E.T., 174 Wn. App. 590, 600, 300 P.3d 456 (2013), petition for review stayed (No. 89157-5, 12/11/2013). Furthermore, this Court observed that an oft-cited commentator wrote the defendant bears the burden of proving incompetence "by a preponderance of the evidence." P.E.T., 174 Wn. App. at 597 (quoting 12 Royce A. Ferguson, Jr., Washington Practice:

Criminal Practice & Procedure § 907 (3d ed. 2012). The commentator relied on Medina and Cooper v. Oklahoma, 517 U. S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996).

Neither Medina nor Cooper, however, support the assertion because neither placed the burden on the accused. The Medina Court held only that a state could constitutionally place the burden on the defendant, not that it was required to do so. 505 U.S. at 449. The Cooper Court followed Medina in that regard, but the real question was whether the State could require the accused to prove incompetence by clear, cogent and convincing evidence. 517 U.S. at 355-56.

For these reasons, this Court should find the trial court erred by placing the burden of proving incompetency in the first instance on the accused. The court's error deprived Wold of due process.

2. WOLD'S GUILTY PLEA TO UNLAWFUL IMPRISONMENT WAS NOT KNOWINGLY MADE.

A criminal defendant has a constitutional right to notice of the alleged offense the State intends to prove. Wash. Const. art. I, § 22; U.S. Const. amend. VI; State v. Kosewicz, 174 Wn.2d 683, 691, 278 P.3d 184, cert. denied, 133 S. Ct. 485 (2012). A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177

(1995). The State failed to allege every element of unlawful imprisonment. Wold's guilty plea statement also fails to include every element.⁴ This Court should reverse Wold's conviction for the offense and remand for trial.

In count 3, the State alleged in pertinent part that Wold "in King County, Washington, on or about July 21, 2010, did knowingly restrain Melinda Hopper, a human being[.]" CP 155. In his plea statement, Wold admitted that "[o]n or about July 21, 2010, I knowingly restrained Melinda Hopper, my girlfriend, by demanding that she not leave the RV where we were with her father after her father and I had a fight and she was afraid to leave." CP 182.

The elements of a crime are its components -- usually the actus reus, mens rea, and causation -- the State must prove to sustain a conviction. State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). An "essential element" is one whose specification is required to establish

⁴ This argument has caused a split between different panels of Division One of the Court of Appeals. See State v. Johnson, 172 Wn. App. 112, 140, 297 P.3d 710 (2012) (definition of "restrain" contains essential elements of unlawful imprisonment that must be alleged in information), as modified on denial of reconsideration (2013), review granted in part, 178 Wn.2d 1001 (2013); cf. State v. Phuong, 174 Wn. App. 494, 545, 299 P.3d 37 (2013) (statutory definition of "restrain" is not a constitutional imperative that must be alleged in the information), petition for review stayed pending Johnson, No. 88889-2 (Oct. 3, 2013).

the illegality of the conduct alleged. State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007), review denied, 163 Wn.2d 1007 (2008).

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 his or her liberty." RCW 9A.40.010(6). In pertinent part, restraint without consent is accomplished by "physical force, intimidation, or deception[.]" RCW 9A.40.010(6)(a).

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." State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000). The adverb "knowingly" modifies each component. Id. at 153-54, 157. The modified components are thus elements of the crime of unlawful imprisonment. Id. at 158-59.

To convict Wold of unlawful imprisonment, the State needed to prove he knowingly accomplished each of the four elements. Warfield, 103 Wn. App. at 157-59; Feeser, 138 Wn. App. at 743. Mere use of the term "restraint" in the information fails to provide notice of each element

of the crime. See Johnson, 172 Wn. App. at 140 (common understanding of "restraint" fails to convey statutory definition and, in particular, requirement of knowledge that such restraint occur "without legal authority").

The information did not contain all essential elements of the crime. It did not allege Wold knowingly: (1) restricted 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.

Where, as here, the adequacy of an information is challenged for the first time on appeal, the appellate court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The information did not fairly imply each of the four elements. At most, the language "knowingly restrain" as used in the information notifies

the accused that an essential element of the crime is that a person knowingly restricted the movements of another.

The other three elements at issue here cannot be found by any fair construction. The information provides no notice that knowledge of lack of consent, knowledge of lack of legal authority to restrain, and knowledge of the degree of restriction (substantial interference) are all essential elements of the crime. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary elements of unlawful imprisonment are neither found nor fairly implied by the charging document, this Court must presume prejudice and reverse Johnson's conviction. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

This poses a problem for the State despite Wold's guilty plea. A guilty plea is not knowing and intelligent when the accused has been misinformed as to the nature of the charge. Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976); State v. R.L.D., 132 Wn. App. 699, 705, 133 P.3d 505 (2006) (citing Bousley v. United States, 523 U.S. 614, 618, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)). A defendant must know the elements of the offense and must understand the

alleged criminal conduct satisfies the elements. R.L.D., 132 Wn. App. at 705.

The sufficiency of other sources of the elements of the offense, such as the jury instructions, closing argument, a separate but similar count in the same information, and a discussion of the elements with the accused's counsel, "have all been rejected if the information itself does not include all essential elements of the crime." State v. Courneya, 132 Wn. App. 347, 354, 131 P.3d 343, review denied, 158 Wn.2d 1023 (2006); see also, Vangerpen, 125 Wn.2d at 788 (proper jury instructions cannot cure a defective information).

The State cannot, therefore, rely on Wold's guilty plea statement to argue he had sufficient notice of each element of unlawful imprisonment. And even if it could, Wold did not state he knew the lack of legal authority to restrain was an essential element of the crime.

Wold anticipates the State may argue he waived his right to challenge the information because he pleaded guilty to the charged crime. A guilty plea waives all constitutional violations that preceded the plea except those related to the circumstances of the plea or to the State's legal authority to prosecute regardless of factual guilt. In re Personal Restraint of Bybee, 142 Wn. App. 260, 268, 175 P.3d 589 (2007). The violation

here relates directly to the circumstances of the plea. The challenge has not been waived.

Wold's conviction for unlawful imprisonment must be reversed because the charging document did not set forth the essential elements of the crime.

3. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY BY PROHIBITING WOLD FROM HAVING CONTACT WITH CERTAIN PERSONS FOR 15 YEARS.

As a part of its sentence, the trial court ordered Wold to have no contact with Ms. Hopper, Kristin Winter and his estranged wife, Vanessa Wold, for 15 years. The women testified for the State at sentencing for purposes of establishing a pattern of physical abuse against multiple victims. RP (6/7/13) at 15-59, 70-90.

A sentencing court may impose crime-related prohibitions, including no-contact provisions, when sentencing an offender for a felony conviction. RCW 9.94A.505(8). The prohibition must be for a period of time not longer than the statutory maximum sentence for the crime. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). The most serious crime for which Wold was sentenced was second degree assault, a class B felony. RCW 9A.36.021(2)(a). The statutory maximum punishment for a class B felony is 10 years. RCW 9A.20.021(b).

By imposing a no-contact provision for 15 years, the trial court exceeded its statutory sentencing authority. An illegal sentence may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). This Court should therefore reach this issue, reverse the judgment and sentence, and remand for imposition of a no-contact provision not to exceed 10 years.

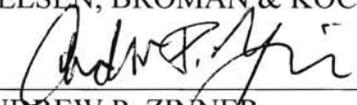
D. CONCLUSION

For the above reasons, this Court should reverse Wold's convictions or, in the alternative, reverse his conviction for unlawful imprisonment. At a minimum, this Court should reverse the judgment and sentence and remand for imposition of a no-contact provision not to exceed 10 years.

DATED this 15 day of January, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 70508-3-1
)	
ROBERT WOLD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF JANUARY, 2014 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROBERT WOLD
DOC NO. 714288
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JANUARY, 2014.

X Patrick Mayovsky