

71197-1

71197-1

NO. 71197-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY LUSSIER,

Appellant.

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

APPELLANT'S OPENING BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

RECEIVED
COURT OF APPEALS
DIVISION ONE
JAN 11 2011
11:45 AM

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT..... 5

 1. The unlawful imprisonment convictions are based on insufficient evidence because the only restraint involved was incidental to the first degree robbery 5

 a. Our courts, like the majority of jurisdictions, hold that due process requires the State to prove unlawful restraint beyond that which is merely incidental to a simultaneously occurring robbery 5

 b. The State failed to prove unlawful restraint that was beyond that which was merely incidental to the robbery..... 8

 c. The remedy for this due process violation is to dismiss the two unlawful restraint convictions with prejudice against refiling 11

 2. The court’s instruction equating the reasonable doubt standard with an abiding belief in the truth of the charge diluted the State’s burden of proof in violation of Timothy Lussier’s due process right to a fair trial..... 12

E. CONCLUSION 17

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007)	12, 15
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995).....	6
<i>State v. DeVries</i> , 149 Wn.2d 842, 72 P.3d 748 (2003).....	12
<i>State v. Drum</i> , 168 Wn.2d 23, 225 P.3d 237 (2010)	5
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012)	passim
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	5, 6, 8
<i>State v. Lindsay</i> , __ Wn.2d __, 2014 WL 1848454 (May 8, 2014).....	12
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	16
<i>State v. Tvedt</i> , 153 Wn.2d 705, 107 P.3d 728 (2005).....	11

Washington Court of Appeals Decisions

<i>State v. Anderson</i> , 153 Wn. App. 417, 220 P.3d 1273 (2009)	12
<i>State v. Berg</i> , 177 Wn. App. 119, 310 P.3d 866 (2013).....	6
<i>State v. Berube</i> , 171 Wn. App. 103, 286 P.3d 402 (2012)	12
<i>State v. Butler</i> , 165 Wn. App. 820, 269 P.3d 315 (2012).....	6
<i>State v. Castle</i> , 86 Wn. App. 48, 935 P.2d 656 (1997).....	15
<i>State v. Elmore</i> , 154 Wn. App. 885, 228 P.3d 760 (2010)	8
<i>State v. Grant</i> , 172 Wn. App. 496, 301 P.3d 459, 467 (2012)	6, 8
<i>State v. Korum</i> , 120 Wn. App. 686, 86 P.3d 166 (2004).....	7, 8, 10
<i>State v. McCreven</i> , 170 Wn. App. 444, 284 P.3d 793 (2012)	12
<i>State v. Phuong</i> , 174 Wn. App. 494, 299 P.3d 37 (2013)	6

<i>State v. Washington</i> , 135 Wn. App. 42, 143 P.3d 606 (2006).....	7
--	---

United States Supreme Court Decisions

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	5
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	5
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	5, 11
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993))	13, 17

Decisions of Other Courts

<i>New York v. Levy</i> , 15 N.Y.2d 159 (1965).....	9
<i>New York v. Lombardi</i> , 20 N.Y.2d 266, 229 N.E.2d 206 (1967).....	8
<i>State v. Goodhue</i> , 833 A.2d 861, 865 (Vt. 2003)	8
<i>United States v. Ruiz</i> , 462 F.3d 1082 (9th Cir. 2006).....	13

Constitutional Provisions

Const. art. I, § 3	5
Const. art. I, § 21	17
Const. art. I, § 22	17
U.S. amend. VI	17
U.S. Const. amend. XIV	5, 17

Statutes

RCW 9A.40.040	7
---------------------	---

Other Authorities

Frank J. Wozniak, *Annotation, Seizure or Detention for Purpose of Committing Rape, Robbery, or Other Offense as Constituting Separate Crime of Kidnapping*, 39 A.L.R.5th 283 (1996) 8

Ninth Circuit Court of Appeals, *Manual of Model Criminal Jury Instructions* (2014) 13

Washington Pattern Instruction: Criminal 4.01 14, 15

A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence that the restraint underlying Timothy Lussier's convictions for two counts of unlawful imprisonment was more than simply incidental to the robbery for which he was also convicted.

2. The court's instruction misstated the definition of proof beyond a reasonable doubt and diluted the State's burden of proof.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Constitutional due process guarantees an accused may not be convicted unless the State proves every element of the crime beyond a reasonable doubt. Where the evidence shows restraint is merely incidental to another charged crime, such as robbery, the State does not meet its constitutional burden on additional unlawful restraint or kidnapping charges. Did the State fail to present sufficient evidence on two counts of unlawful imprisonment where the restraint of Curtis Letzkus and Julia McCracken was merely incidental to the robbery of the tobacco store where they were restrained, requiring the unlawful imprisonment convictions to be dismissed with prejudice?

2. It is the jury's role to decide whether the prosecution met its burden of proof; its duty is not to search for the truth. Over Lussier's

objection, the court instructed the jury that it could find the State met its burden of proof if it had an “abiding belief in the truth of the charge.” Did the court misstate and dilute the burden of proof in violation of due process by focusing the jury on whether it believed the charge was true?

C. STATEMENT OF THE CASE

Devin Lynch and Timothy Lussier walked into a tobacco store in Everett, Washington about ten minutes prior to closing time. RP 29-31, 235.¹ The owner, Nadeem Pasha, was in the store alone. RP 29-31. Lynch and Lussier told Pasha they were police investigating the resale of stolen cellular telephones. RP 32-36. They told Pasha to lock the store. RP 36. After looking around the store, they told Pasha he was under arrest and handcuffed him. RP 35-38. Lynch confined Pasha in a small room in the back of the store while Lussier took money from the cash register, cellular telephones, and cigarettes. RP 38-40, 64-65, 68-69, 166-67, 189, 233, 241. Pasha believes Lussier exited the store many times, loading the merchandise into a vehicle outside. RP 40, 42.

¹ The consecutively paginated volumes of the verbatim report of proceedings are referred to simply as “RP.” The separately paginated verbatim report of opening statements is referred to as “Op. St. RP.”

Several minutes after Lussier and Lynch entered, two of Pasha's regular drug addicted customers, Curtis Letzkus and Julia McCracken, arrived at the door to the store. They were there to provide Pasha with an electronic benefits transfer (EBT) food stamp card he could use to purchase food and merchandise and in turn provide Letzkus and McCracken with cash. RP 42-44, 53-55, 133-35, 149-51, 157-59, 184-85.² Lussier let Letzkus and McCracken into the store and told them to sit on the floor in between two aisles. RP 137-39, 186-88, 207.

When Pasha got restless in the back room, Lussier told Lynch to stop Pasha's restlessness and Lynch sprayed him with oleo capsaicin, commonly referred to as pepper spray. RP 44-46, 70-71, 142, 243-44, 277-78; *see* RP 143, 167-68, 193. Lynch also took a cellular telephone and wallet from Pasha. RP 51-52, 79-80, 86-87 (Pasha claims Lynch also took \$2,500 in cash from his pocket), 245, 258. At one point, Lussier asked for McCracken's help bringing merchandise outside, but she declined. RP 146. Lynch sprayed Pasha again with the pepper spray. RP 48, 194-96. Then, Lynch and Lussier exited the store, locking the door from the outside and leaving Pasha, McCracken and

² Letzkus had made similar deals with Pasha before where Pasha would provide Letzkus with 50 cents for every dollars worth of goods Pasha purchased with an EBT card Letzkus supplied him. RP 154-55, 200-03.

Letzkus inside. RP 47-49, 195-96; *see* RP 40-41. Pasha directed Letzkus to a spare key used to get out of the store and passersby contacted the police. RP 48-50, 76-77, 109, 147-49. Pasha was in pain from the pepper spray. RP 50, 91-92, 109-10.

After arresting Lynch for an unrelated offense, the police found Pasha's wallet in Lynch's possession and connected him with the above-described event. RP 52, 252, 281, 290-91. Although he was charged with robbery in the first degree for this incident, in exchange for his testimony against Lussier, he was allowed to plead guilty to robbery in the second degree, which carries a significantly reduced standard sentence. RP 250-52, 270-72. Prior to trial, neither Pasha nor Letzkus identified Lussier as a robber. RP 81-84, 289, 294-95, 310-12; *see* RP 55-56. After Lynch testified, Lussier was convicted of robbery in the first degree, unlawful imprisonment against Letzkus, and another count of unlawful imprisonment against McCracken. CP 15-25, 60-62, 101-02.

D. ARGUMENT

1. The unlawful imprisonment convictions are based on insufficient evidence because the only restraint involved was incidental to the first degree robbery.

- a. Our courts, like the majority of jurisdictions, hold that due process requires the State to prove unlawful restraint beyond that which is merely incidental to a simultaneously occurring robbery.

State and federal due process rights require that the government prove every element of the charged offense beyond a reasonable doubt to obtain a criminal conviction. *E.g.*, Const. art. I, § 3; U.S. Const. amend. XIV; *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

“In *Green*, our Supreme Court held that when the State presents only evidence of conduct that was merely incidental to the commission

of another crime, no rational trier of fact could find that the evidence proves beyond a reasonable doubt that the conduct was a restraint.” *State v. Berg*, 177 Wn. App. 119, 132, 310 P.3d 866 (2013) (citing *Green*, 94 Wn.2d at 227, 229–30), review granted 179 Wn.2d 1028, 320 P.3d 720 (2014) (oral arg. heard May 28, 2014);³ accord *State v. Brett*, 126 Wn.2d 136, 166, 892 P.2d 29 (1995) (interpreting *Green* similarly). The *Green* holding did not add an element to the restraint-based offense. Instead, the restraint required by statute to support a conviction for kidnapping or unlawful restraint must be interpreted narrowly to comport with due process. *Berg*, 177 Wn. App. at 132 n.10. This rule is referred to as the incidental restraint doctrine. *Id.* at 132. As applied to the facts in *Green*, a murder conviction subsumes all incidental restraint; thus, a kidnapping conviction can only stand if premised on restraint beyond that which was incidental to the homicide. *Id.* (citing *Green*, 94 Wn.2d at 229).

Our courts have also applied the rule to the overarching offense of robbery. That “all robberies necessarily involve some degree of forcible restraint . . . does not mean that the legislature intended

³ This Court reached a contrary conclusion in *State v. Phuong*, 174 Wn. App. 494, 299 P.3d 37 (2013); *State v. Grant*, 172 Wn. App. 496, 301 P.3d 459, 467 (2012); and *State v. Butler*, 165 Wn. App. 820, 269 P.3d 315 (2012). Only *Butler* was unanimous.

prosecutors to charge every robber with kidnapping.” *State v. Korum*, 120 Wn. App. 686, 705, 86 P.3d 166 (2004), *rev’d in part on other grounds and aff’d in part*, 157 Wn.2d 614, 620, 141 P.3d 13 (2006). In *Korum*, this Court held as a matter of law that kidnapping was incidental to robbery when (1) the restraint was for the sole purpose of facilitating robbery; (2) the restraint was inherent in the robbery; (3) the victims were not transported from their home; (4) the duration of restraint was not substantially longer than necessary to complete the robbery; and (5) the restraint did not create an independent, significant danger. 120 Wn. App. at 707.

Unlawful imprisonment is closely related to kidnapping. *See* Ch. 9A.40 RCW. “A person is guilty of unlawful imprisonment if he or she knowingly restrains another person.” RCW 9A.40.040(1). Thus, the mere incidental restraint of the victim, which might occur during the course of another crime and which has “no independent purpose or injury” cannot constitute the separate crime of unlawful imprisonment. *State v. Washington*, 135 Wn. App. 42, 50-51, 143 P.3d 606 (2006), *review denied*, 160 Wn.2d 1017, 161 P.3d 1028 (2007).

Washington’s incidental restraint doctrine is enforced in the majority of jurisdictions. The “majority view is that ‘kidnapping

statutes do not apply to unlawful confinements or movements ‘incidental’ to the commission of other felonies.” *State v. Grant*, 172 Wn. App. 496, 301 P.3d 459, 467 (2012) (Becker, J. dissenting) (quoting Frank J. Wozniak, *Annotation, Seizure or Detention for Purpose of Committing Rape, Robbery, or Other Offense as Constituting Separate Crime of Kidnapping*, 39 A.L.R.5th 283, 356 (1996)). As one court noted, “the direction of the criminal law has been to limit the scope of the kidnapping statute . . . to true kidnapping situations and not to apply it to crimes which are essentially robbery, rape or assault and in which some confinement . . . occurs as a subsidiary incident.” *State v. Goodhue*, 833 A.2d 861, 865 (Vt. 2003) (quoting *New York v. Lombardi*, 20 N.Y.2d 266, 229 N.E.2d 206, 208 (1967)).

- b. The State failed to prove unlawful restraint that was beyond that which was merely incidental to the robbery.

As our Supreme Court held in *Green*, restraint and movement of a victim that are merely incidental and integral to commission of another crime do not constitute an independent, separate crime like kidnapping. 94 Wn.2d at 226-27. Whether a restraint was incidental to the commission of another crime is a fact-specific determination. *State v. Elmore*, 154 Wn. App. 885, 901, 228 P.3d 760 (2010). But *Korum*

set up the above-recited per se rule: restraint is incidental to a robbery when (1) the restraint was for the sole purpose of facilitating robbery; (2) the restraint was inherent in the robbery; (3) the victims were not transported from the place being robbed; (4) the duration of restraint was not substantially longer than necessary to complete the robbery; and (5) the restraint did not create an independent, significant danger. 120 Wn. App. at 707.

Here the State only proved the “common occurrence in robbery . . . that the victim[s were] confined briefly at gunpoint or bound and detained, or moved into and left in another room or place.” *New York v. Levy*, 15 N.Y.2d 159, 164 (1965). Pasha, Letzkus and McCracken were restrained in the tobacco store that the co-defendants robbed. *E.g.*, RP 36-39, 138-39, 141, 187-88. They were not transported beyond the store. The co-defendants evinced no intent to hold Pasha in the back room other than to accomplish the robbery. The same is true of Letzkus and McCracken. The State’s evidence showed that upon letting them into the store, Lussier asked them to sit in between two aisles. RP 136-38, 188. Lussier told McCracken and Letzkus the same story as Pasha. RP 138-39, 187. The co-defendants even used McCracken and Letzkus to assist in the robbery. RP 140-41, 145-46

(asked Letzkus to take cigarettes; asked McCracken to help move merchandise out of store; asked Letzkus for a hat from store shelves); *see* RP 139 (Lussier took Letzkus's mobile telephone from him). The first three *Korum* factors demonstrate only incidental restraint.

Additionally, the duration of the restraint was closely correlated with the time necessary to complete the robbery. While the three individuals were restrained, the co-defendants only committed acts inherent in first degree robbery: taking merchandise, inflicting bodily injury. Conversely, the co-defendants ceased to control Letzkus and McCracken's movements when the co-defendants fled the store with the seized merchandise. RP 147. The co-defendants did not move Pasha, Letzkus and McCracken from the scene of the robbery. Moreover, the three quickly escaped the store when Pasha directed Letzkus to the spare key. RP 147-48.

Finally, the restraint did not create an independent, significant danger to McCracken or Letzkus beyond that imposed by the robbery in the first degree. McCracken and Letzkus indicated they were affected by the pepper spray Lynch used against Pasha. RP 143-44, 147, 194-95. This was inherent in the robbery conviction, which was premised upon bodily injury. While the State charged Lussier with

robbery against Pasha, the instructions were not so limited. *See* CP 101 (amended information). The first degree robbery to-convict instruction did not limit the jury's consideration of victims. CP 75. The jury was not told that robbery must be from the person or in the presence of a person who has a possessory interest in the items taken. *See State v. Tvedt*, 153 Wn.2d 705, 714-15, 107 P.3d 728 (2005) (the unit of prosecution for robbery is each separate forcible taking of property from or in the presence of a person having an ownership, representative, or possessory interest in the property, against that person's will). Thus nothing limited the jury from treating Letzkus or McCracken as victims of the robbery.

Because the State's only evidence of unlawful restraint of Letzkus and McCracken was incidental to the tobacco store robbery, the evidence is insufficient to support the unlawful imprisonment convictions.

- c. The remedy for this due process violation is to dismiss the two unlawful restraint convictions with prejudice against refiling.

Convictions based upon insufficient evidence must be reversed. *E.g., Jackson*, 443 U.S. at 319. On remand, the charges must be

dismissed with prejudice to comport with double jeopardy protections.

E.g., *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

2. The court’s instruction equating the reasonable doubt standard with an abiding belief in the truth of the charge diluted the State’s burden of proof in violation of Timothy Lussier’s due process right to a fair trial.

“The jury’s job is not to determine the truth of what happened; a jury therefore does not ‘speak the truth’ or ‘declare the truth.’” *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (emphasis added) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)); accord *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012); *State v. McCreven*, 170 Wn. App. 444, 472-73, 284 P.3d 793, 807-08 (2012). “[A] jury’s job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760. Therefore, “[t]elling the jury that its job is to ‘speak the truth,’ or some variation thereof, misstates the burden of proof and is improper.” *State v. Lindsay*, __ Wn.2d __, 2014 WL 1848454, *7-8 (May 8, 2014).

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The court bears the obligation to vigilantly protect the presumption of innocence.

Id. “[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice.”
Emery, 174 Wn.2d at 757 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

Although the “beyond a reasonable doubt” standard may be a complicated one to explain, it is not beyond explanation. For example, the United States Court of Appeal for the Ninth Circuit recommends the following model language:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Ninth Circuit Court of Appeals, *Manual of Model Criminal Jury Instructions* § 3.5 (2014); see *United States v. Ruiz*, 462 F.3d 1082, 1087 (9th Cir. 2006) (upholding use of model instruction).

Washington has also adopted a model instruction. It provides, in relevant part:

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [*If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*]

Washington Pattern Instruction: Criminal 4.01. The final sentence is optional; that is, it is not necessary to the defining the beyond a reasonable doubt standard. *Id.* (Comment).

The trial court here included this language, instructing the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had “an abiding belief in the truth of the charge.” CP 69 (instruction # 4). This language was proposed by the State and excepted to by Lussier, who proposed an instruction without reference

to the abiding belief in the truth language. RP 334, 345-47; CP 92; CP ___ (Sub # 33, p.8).⁴

By equating proof beyond a reasonable doubt with a “belief in the truth” of the charge, the court confused the critical role of the jury. The “belief in the truth” language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d at 741.

In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be “problematic” because it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its “inherent supervisory powers,” the Supreme Court directed trial courts to use WPIC 4.01 in future cases. *Id.* at 318. As discussed, WPIC 4.01 includes the “belief in the truth” language only as a potential option by including it in brackets. *See* WPIC 4.01 & Comment. The *Bennett* Court did not comment on the bracketed “belief in the truth” language. Notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved.

⁴ A supplemental designation of clerk’s papers has been filed requesting the Superior Court forward the State’s proposed jury instructions to this Court for inclusion in the clerk’s papers.

Recent cases demonstrate the problematic nature of such language. In *Emery*, the prosecution told the jury that “your verdict should speak the truth,” and “the truth of the matter is, the truth of these charges, are that” the defendants are guilty. 174 Wn.2d at 751. Our Supreme Court clearly held these remarks misstated the jury’s role. *Id.* at 764. However, the error was harmless because the “belief in the truth” theme was not part of the court’s instructions and because the evidence was overwhelming. *Id.* at 764 n.14.

The Supreme Court reviewed the “belief in the truth” language almost 20 years ago in *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in *Pirtle*, the issue before the Court was whether the phrase “abiding belief” differed from proof beyond a reasonable doubt. 127 Wn.2d at 657-58. Thus the Court did not determine whether the “belief in the truth” phrase minimizes the State’s burden and suggests to the jury that they should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Emery demonstrates the danger of injecting a search for the truth into the definition of the State’s burden of proof. Improperly instructing the jury on the meaning of proof beyond a reasonable doubt

is structural error. *Sullivan*, 508 U.S. at 281-82. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an “abiding belief in the truth of the charge,” misstates the prosecution’s burden of proof, confuses the jury’s role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. VI, XIV; Const. art. I, §§ 21, 22.

The erroneous instruction diluted the burden of proof. *Emery*, 174 Wn.2d at 741 (error where jury told its job is to search for the truth). Because the State was not held to the standard of proof beyond a reasonable doubt, Lussier was denied his constitutional right to a fair trial. His convictions should be reversed and the matter remanded.

E. CONCLUSION

This Court should vacate Lussier’s convictions for unlawful imprisonment, which are without sufficient evidence because any restraint was incidental to the concurrently charged robbery in the first degree, and the charges should be dismissed with prejudice.

Furthermore, the faulty beyond a reasonable doubt instruction requires

remand for a new trial on any remaining convictions because the instruction misstated the law and diluted the burden of proof.

DATED this 30th day of May, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Mark L. Zink', written over a horizontal line.

Mark L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71197-1-1
)	
TIMOTHY LUSSIER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MAY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|---|-------------------|-------------------------------------|
| [X] SETH FINE, DPA
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] TIMOTHY LUSSIER
765582
MCC-WSR
PO BOX 777
MONROE, WA 98272 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAY 30 PM 4:46

SIGNED IN SEATTLE, WASHINGTON, THIS 30TH DAY OF MAY, 2014.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711