COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 37579-6-II
Cowlitz Co. Cause NO. 07-1-01115-1

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD MARTIN BARNES,

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

I. STATE'S REPONSE TO ASSIGNMENT OF ERROR 1

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 8

THERE WAS SUFFICIENT EVIDENCE PRESENTED BY THE STATE TO CONVICT THE DEFENDANT OF UNLAWFUL IMPRISONMENT 8

V. CONCLUSION 19

TABLE OF AUTHORITIEST

Page

Cases

State v. Allen, 116 Wa. App. 454, P.3d 653 (Div 3, 2003) 10, 15

State v. Aten, 130 Wn.2d 640, P.2d 210 (1996) 18

State v. Atkins, 130 Wa.App. 395 P.3d 126 (Div 3, 2005) 12, 15

State v. Camarilla, 115 Wn.2d 60, P.2d850 (1990) 9

State v. Davis, 133 Wa.App 415, P.3d 132 (Div 3, 2006) *rev'd on other grounds*, 163 Wa.2d 606 P.3d 639 (2008) 12, 15

State v. Kinchen, 92 Wn.App. 442, n.16, 963 P.2d 928 (1998). 13

State v. Mace, 97 Wn.2d 840, P.2d 217 (1982) 16, 17

State v. Partin, 88 Wa.2d 899, {/2d 1136 (1977) 8

State v. Price, 127 WA.App. 193, P.3d 1171, 1175 (Div. II 2005) 9

State v. Robinson, 92 Wa.2d 357, P.2d 892 (1979) 9, 15

State v. Salinas, 119 Wa.2d 192, P.2d 1068 (1992) 8

State v. Walton, 64 Wn.App. 410, P.2d. 533, review denied, 119 Wn.2d 1011 (1992) 8

State v. Washington, 135 Wa.App. 42, P.3d 606 (2006) 12

State v. Zamora, 63 Wn.App. 220 (1991) 8, 16

Statutes

RCW 9A.08.010(1)(b) 9

RCW 9A.40.040 9

I. STATE'S REPONSE TO ASSIGNMENT OF ERROR

1. The trial court properly entered the guilty judgment as sufficient evidence supported the jury's finding the defendant guilty of Unlawful Imprisonment.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

1. Whether the jury correctly found the defendant guilty of unlawful imprisonment when the evidence showed he confined the victim in her home against her will.

III. STATEMENT OF THE CASE

Procedural History

The State concurs with the defendant's rendition of the case's procedural history.

Factual History

On August 19, 2007, at approximately 11 p.m., Crystal and Shannon Martin were at home getting ready for bed. RP 82-83, 171.[1] Crystal Martin went onto her porch for a cigarette, when she heard a female screaming loudly and crying. RP 82-83. The screaming continued for thirty seconds and Mrs. Martin described it as "freaky." RP 84. Concerned about the screams, Crystal went inside and grabbed her husband Shannon. RP 83. They both went outside and Mrs. Martin clearly heard someone screaming two times "Let go of me." RP 84-85.

[1] The record in this case consists of two volumes of continuously numbered verbatim reports, referred to herein as "RP."

Under cross-examination, Mrs. Martin admitted she was pretty sure the woman screamed let go of me, but also said that it had been seven months since the incident and it was either let me go or let go of me. RP 90.

Mrs. Martin did say the person sounded upset, was still crying, and her screaming sounded terrified. RP 84-85. She testified she determined the screams came from the completely dark house directly across the street. RP 84. Mrs. Martin estimated their house was approximately 50 to 75 feet between the two houses. RP 85.

Mrs. Martin did not know who lived at the house across from her and had never met anyone who lived there. RP 85. Mr. Martin went over to the house to investigate the screams and crying. RP 86. The entire time he was gone, Mrs. Martin could still hear the female crying. RP 86. Mrs. Martin estimated the woman's screams and cries lasted 10 minutes. RP 86. When Mr. Martin returned to his home, he immediately called 911. RP 86. Mr. and Mrs. Martin remained outside and didn't see anyone enter or exit the home across the street. RP 87. The police arrived approximately 15 minutes later. RP 86.

Mr. Shannon Martin testified that night Mrs. Martin asked him to come outside because she thought she heard something. RP 172. When Mr. Martin went outside he heard a female screaming and "yelling really loud." RP 172. He couldn't hear any words at first, but as he walked

across the street to the house where he heard the screams, he was able to hear a woman yell to let her go. RP 173-174. When he got in front of the house's garage, he heard the female say "let me go" a couple of times, and then "let go of me" once or twice. RP 173-174. He said the voice sounded scared and upset and the yelling lasted for a few minutes. RP 175. Mr. Martin didn't hear any other voices coming from the house and had never met the people who lived in the home. RP 174-175.

Mr. Martin returned to his own home, still hearing the screaming. RP 175. When he got home, he called the police. RP 175. Mr. Martin said the police arrived within seven or eight minutes. RP 175.

Longview Police Officers Taylor, Berndt and Webb arrived. Officer Berndt knocked loudly on the front door of the residence. RP 94, 134, 160. After a few minutes without an answer or hearing anything inside, all three officers went around to the back of the house. RP 94-96, 134-135. On the way to the back of the house, the officers noticed a light coming from inside the house and heard a television. RP 9, 136, 160. At the back of the house, the officers went to an open window and Officer Berndt announced "Longview Police." RP 96, 98, 137, 161. Officer Berndt removed the window screen and looked inside. RP 138-139. He didn't see anything at first and put the screen back on. RP 139-140. However, when he was about to walk away, he heard a door. RP 140. He

went back to the window, removed the screen again and looked inside. RP 140. This time he saw the Defendant walking "sneakily" back from the television he just turned off. RP 140. The Defendant walked towards the bathroom. RP 140. Officer Berndt noticed that the closet door, which was ajar when he looked earlier, was now closed and the bathroom door was now ajar when it was closer earlier. RP 139, 141-142. Officer Berndt lost sight of the Defendant and radioed the other officers that there was a male inside. RP 141-142. The decision was made to try to enter the room through the window, but before doing this, Officer Berndt announced "Longview Police," and told the occupant(s) to come to the window and answer them. RP 143.

Through the window, Detective Taylor and Officer Webb heard a stern and muffled male voice say more than two times "shut up." RP 96, 161-162. Detective Taylor and Officer Webb then heard movement inside the residence like a scuffle. RP 96-97. Officer Webb peeked through the window and saw a female, later identified as Tamara Barnes, open the bathroom door slightly and look at the officers. RP 163. Detective Taylor and Officer Berndt then peeked through the window blinds and saw the same female standing inside the bathroom doorway. RP 97-98, 143. Taylor testified she would never forget how Mrs. Barnes looked that night because her eyes were wide open and she appeared terrified. RP 98.

Officer Webb described Mrs. Barnes' face was really red and she looked upset. RP 163. Officer Berndt said Mrs. Barnes appeared distressed and he asked her if she was okay. RP 144. Officer Berndt saw Mrs. Barnes nod her head yes and all three officers testified they saw Mrs. Barnes point to the ground with her finger, indicating "he's down there." RP 98, 144, 163. Mrs. Barnes pointed the area between the bathroom door and the bed. RP 144. The officers could not see what she was pointing to, because the bed was between the window and where Mrs. Barnes stood. RP 164.

Officer Berndt told Mrs. Barnes to open the front door and Mrs. Barnes moved towards the front of the house. RP 99, 145. Officer Berndt then told the Defendant he needed to stand up and show his hands. RP 146. The Defendant did not comply. RP 146. Detective Taylor and Officer Webb ran to the front of the house, while Officer Berndt remained at the back window. RP 99, 164. When Mrs. Barnes opened the front door she still looked terrified. RP 99. Taylor asked Barnes where he was at and Barnes pointed down the hall. RP 99. Officers Taylor and Webb went to the back bedroom. RP 99-100, 165. Taylor and Webb peeked into the bedroom and saw a male, later identified as the defendant, lying on the floor next to a pedestal bed, between the bed and the bathroom doorway. RP 100-101, 165. From where Mrs. Barnes was standing in the

bathroom doorway, there was no window or any another way out, and the defendant was between her and any phone. RP 100-101, 119. Lastly, all the exits out of the house were locked. RP 120.

Detective Taylor and Webb entered the bedroom. RP 108. Detective Taylor saw the defendant was laying on his stomach with one arm tucked underneath his chest and another arm in front of him. RP 108. She and Officer Webb announced that they were Longview Police and commanded him several times to show his hands. RP 108, 166. The defendant refused. RP 108. Concerned the Defendant may have a weapon, the officers advanced and Taylor drew her taser. RP 108-109. Given the Defendant's failure to comply with commands, Officer Webb kicked the Defendant's foot and Detective Taylor took her mag light and hit the Defendant in the back of the thigh three times. RP 110. As Taylor covered the Defendant with her taser, Officer Webb tried to pull the Defendant's hand out from under his chest. RP 110, 167. During this time, the Defendant was pretending he was asleep. RP 111, 166, 168. When the officers rolled him over, the Defendant started snoring. RP 111. The Defendant was eventually secured and Officer Berndt walked him to his patrol car. RP 148. The officers detected the odor of intoxicants from the Defendant and the Defendant's face was flushed and his eyes were

watery, but they said the Defendant had no problem walking. RP 148-149, 168-169.

Officer Berndt spoke to the Defendant after reading him his Miranda rights. RP 150-151. Officer Berndt asked the Defendant what happened that night. RP 151. The Defendant said, "they were only watching TV in the bedroom." RP 151. When Berndt then asked him why they were hiding in the bathroom and not answering the door, the Defendant responded that he wasn't hiding in the bathroom, she was. RP 151. The Defendant then said nothing happened and he was okay with her. RP 151.

After the officers secured the Defendant, Detective Taylor spoke with Mrs. Barnes. RP 112. Throughout this conversation, Mrs. Barnes was crying, her face was red and still appeared terrified. RP 112. Detective Taylor was looking around the house afterward and noticed the cordless phone was unplugged from the wall and a phone cord was located in the garage. RP 113-116. She took the cord from the garage and plugged it into the cordless phone base from the wall. RP 119. When Detective Taylor checked the phone box attached to the south side of the house, she found the main phone line had been removed. RP 117. During the entire time the police were at Mrs. Barnes home, they did not see anyone but the Defendant and Mrs. Barnes. RP 120.

IV. ARGUMENT

THERE WAS SUFFICIENT EVIDENCE PRESENTED BY THE STATE TO CONVICT THE DEFENDANT OF UNLAWFUL IMPRISONMENT.

The Defendant argues the State failed to prove the elements of unlawful imprisonment beyond a reasonable doubt. The standard of review for a claim of insufficient evidence is after viewing the evidence in the light most favorable to the prosecution, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880, 882 (1991). In such review, "circumstantial evidence is no less reliable than direct evidence [and] specific criminal intent may be inferred from circumstances as a matter of logical probability. *Id.*. Moreover, a claim for insufficiency admits the truth of the State's evidence and all inferences that can be drawn from it. *See State v. Salinas*, 119 Wa.2d 192, 201, 829 P.2d 1068 (1992). These inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *See State v. Partin*, 88 Wa.2d 899, 906-07, 567 {/2d 1136 (1977). Lastly, the reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *See State v. Price*, 127 WA.App. 193, 202, 110 P.3d 1171, 1175 (Div. II 2005), *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d. 533, review denied, 119 Wn.2d 1011

(1992), *State v. Camarilla*, 115 Wn.2d 60, 71, 794 P.2d850 (1990) (appellate court will not review credibility determinations).

To convict the defendant of Unlawful Imprisonment the State had to prove the defendant knowingly restrained another person. *See* RCW 9A.40.040 (2008). The Legislature defines restraint as restricting a person's movement without consent and without legal authority in a manner, which interferes substantially with their liberty. *See* RCW 9A.40.010(1) (2008). "Restraint is 'without consent' if it is accomplished by...physical force, intimidation, or deception." *Id.*

A person has knowledge when "he is aware of a fact, facts, or circumstances or result described by a statute defining an offense, or if he has information which would lead a reasonable man in the same situation to believe that facts exist which...are described by a statute defining an offense." RCW 9A.08.010(1)(b) (2008).

Several Appellate court decisions have considered sufficiency of evidence under the Unlawful Imprisonment Statute. In *State v. Robinson*, 92 Wa.2d 357, 597 P.2d 892 (1979), the defendant was charged with unlawful imprisonment. The facts showed the defendant chased a young girl, grabbed her by the arm, said, "do what I say or else," and began dragging the girl to his car. *See id* at 360. After about a minute, the victim ended the incident when she kicked the defendant and stepped on

his toe. *See id.* The defendant released the girl and she ran home. *See id.* The victim said she was frightened, did not want to get in the car, and felt she was not free to leave. *See id.* The Supreme Court found the above facts were sufficient evidence of Unlawful Imprisonment, despite the short time frame. *See id.*

In *State v. Allen*, 116 Wa. App. 454, 66P.3d 653 (Div 3, 2003), the defendant faced charges of Rape in the first degree and Kidnapping in the first degree. The victim, L.S. testified she willingly went with the defendant when he picked her up at home. *See id.* at 457. They drove around for a few hours and she repeatedly told him she wanted to go home. *See id.* Eventually, the defendant met with two other men and went to an apartment where they conducted a drug deal. *See id.* L.S. stated she repeatedly asked to go home, but the defendant and another man told her that she wouldn't be able to leave until she performed oral sex on them. *See id.* at 458. L.S. testified she screamed throughout the events and tried to leave, but the men would not let her because they were standing near the door. *See id.* The jury found the defendant guilty of the lesser-included offenses of Assault in the second degree and Unlawful Imprisonment. *See id.* at 459.

In considering the question of sufficiency of the evidence, the Court of Appeals found two particular facts important. *See id.* at 466.

The Court stated that because (1) the victim screamed and tried to leave the room, and (2) the defendants stood in the door and would not let her leave, there were sufficient facts to prove the charge of Unlawful Imprisonment. *See id.* at 466.

In *State v. Davis*, 133 Wa.App 415, 138 P.3d 132 (Div 3, 2006) *rev'd on other grounds*, 163 Wa.2d 606,184 P.3d 639 (2008), the Court of Appeals upheld the defendant's conviction for unlawful imprisonment. In *Davis*, the evidence showed the defendant was assaulting T.B.'s mother, Bobbi Dewey. *See id.* at 420. T.B. went to the bedroom to see what the noise was. *See id.* When T.B. was inside the bedroom, Ms. Dewey asked T.B. to get help. *See id.* The defendant told T.B. not to go anywhere. *See id.* T.B. asked the defendant not to hurt her mom and grabbed the defendant's arm. *See id.* The defendant pulled T.B. down to the ground and she hit the wall. *See id.* He then told her to go sit in the living room. *See id.* at 425. T.B. testified she was scared and did not leave. *See id.*

Division Three found the defendant restrained T.B. and was not persuaded by the defendant's argument T.B. was free to leave. *See id.* The Court found that although T.B. was free to move around the apartment, given the defendant's order and intimidation she was unable to leave and get help. *See id.*

In *State v. Atkins*, 130 Wa.App. 395, 402, 123 P.3d 126 (Div 3, 2005), the Court of Appeals found sufficient evidence of unlawful imprisonment. The court cited to three specific facts supporting sufficiency. *See id.* They found that when the defendant told the victim in an intimidating voice that she was not going anywhere until he got what he wanted, forced her back into a car, and threatened her when she tried to turn on the lights to signal a passing car showed the defendant completed the crime. *See id.*

Division One considered the question of sufficiency in *State v. Washington*, 135 Wa.App. 42, 143 P.3d 606 (2006). In Washington the defendant became upset during a visit with the victim. *See id.* at 46. He asked her to go with him outside and once outside ordered the victim into a car. *See id.* She left the door open further enraging the defendant, who ordered her to shut the door. *See id.* When the victim attempted to leave, the defendant grabbed her clothing, pulled her into the car and then assaulted her. *See id.*

In its analysis, Division One stated, "a substantial interference is a 'real' or 'material' interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict." I*d.* at 49-50. Additionally, the "presence of a means of escape may help to defeat the prosecution, unless 'the known means of escape presents a

danger or more than a mere inconvenience." *See id.* citing *State v. Kinchen*, 92 Wn.App. 442, 452 n.16, 963 P.2d 928 (1998). Division One found the defendant unlawfully restrained the victim and the fact the car was inoperable and the doors were not locked did not amount to a means of escape, given that she tried to leave the car and was physically forced back inside. *See id.* at 51 n. 1.

In the present case there was sufficient evidence for the jury to find the defendant guilty of Unlawful Imprisonment. On the night in question, both Mr. and Mrs. Martin heard a female screaming and crying for approximately 10 minutes. RP 82-85, 172-175. The female said let me go and let go of me several times. RP 82-85, 172-175. The female sounded terrified. RP 84-85. The Martins were so concerned for the female they called the police. RP 175.

When the police arrived, knocking and announcing their presence, no one answered. RP 94-96, 134-135. They went to the back of home and Officer Berndt saw a man "sneakily" walk through the room. RP 140. Officer Berndt once again announced Longview Police and Officer Webb and Detective Taylor heard a man repeatedly say "shut-up." RP 96, 143, 161-162. After hearing a scuffle, all three officers saw Tamara Barnes standing inside the bathroom doorway, looking terrified. RP 96-98, 144, 163. Mrs. Barnes pointed downward indicating someone was just at her

feet. RP 98, 144, 163. The police directed Barnes to open the door and when officers entered the home, they saw the defendant lying right in front of where Mrs. Barnes was standing in the bathroom door. RP 99, 100-101,145, 165. This location placed the defendant between Mrs. Barnes and the exit of the room, as well as between her and a phone. RP 100-101, 119.

When the police contacted the defendant, he was uncooperative and pretending to be asleep. RP 108-111, 166-168. The police noticed he'd been drinking and when asked about what happened at the house, the defendant said they were watching TV in the bedroom and he wasn't hiding but Tamara was. RP 148-149, 151, 168-169. He then said nothing happened and he was okay with Tamara. RP 151.

When Detective Taylor spoke with Tamara she was still terrified and crying. RP 112. Detective Taylor noticed that the cordless phone was unplugged and the main house phone line was disconnected. RP 113-117. Lastly, no one came in or left the house before the police arrived. RP 120.

In considering the State's evidence in a light most favorable to the State and drawing inferences in favor of the State and against the Defendant, it is reasonable to infer that Tamara Barnes told the Defendant to let her go and let go of me. Secondly, given the terror that every person saw on Tamara's face or heard in her voice, it is reasonable to infer she

was scared and the statement of let go of me was in response to an act of restraint, which prevented her liberty. Third, the police heard the defendant tell the victim to "shut up" when the police were trying to get a response and found him directly blocking her path out of the bathroom. It is reasonable to infer the defendant was attempting to prevent the victim from contacting the police and was placing himself between her and the door for that very same reason.

According to *State v. Robinson*, it is not the amount of time a person's liberty is restricted, but the restriction itself that matters. *See State v. Robinson*, 92 Wa.2d 357, 360, 597 P.2d 892 (1979). Additionally, grabbing someone against their will is sufficient to show a restriction of a person's movement. *See id.*, State v. Atkins, 130 Wa.App. 395, 402, 123 P.3d 126 (Div. 3, 2005). Moreover, preventing someone from getting help is considered restraint under *State v. Davis* and *State v. Atkins*. *See Atkins* at 402, *State v. Davis*, 133 Wa.App 415, 138 P.3d 132 (2006) *rev'd on other grounds*, 163 Wa.2d 606,184 P.3d 639 (2008). Lastly, standing in front of a door and preventing someone from leaving is restraint under *State v. Allen*, 116 Wa.App. 454, 66 P.3d 653 (Div 3, 2003). Under all the above-cited case law and the facts, a reasonable jury could find the Defendant either physically held or prevented Mrs. Barnes from leaving the residence for approximately 10 minutes, he did so without legal

authority, and interfered with her liberty, and was guilty of unlawful imprisonment.

The Defendant cites *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982) for the proposition that inferences are insufficient evidence of a crime. *See* App. Bf. At 10. However, this is not what *Mace* says and goes against the tenets that "circumstantial evidence is no less reliable than direct evidence [and] specific criminal intent may be inferred from circumstances as a matter of logical probability. *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880, 882 (1991).

In *Mace*, the Supreme Court reviewed the facts solely under the charges of Burglary and Possession of Stolen Property. *See Mace* at 843. There was no direct evidence linking the defendant to the entry into the victim's home. *See id.* at 842. The State proved the victim's purse was stolen in the burglary and defendant had possession of the victim's credit cards shortly after the burglary. *See id.*

The Court said, [i]t is well settled law in Washington that proof of possession of recently stolen property, unless accompanied by other evidence of guilt is not prima facie evidence of burglary." *Id.* However, proof of "possession, if accompanied by 'indicatory evidence on collateral matters,' will support a burglary conviction." *Id.* The Court then stated that other corroborative evidence could be exculpatory circumstances

tending to show guilt, circumstantial evidence of entry, being near the scene of the crime, flight, the giving of a false or improbable explanation, the failure to explain, or the giving of a fictitious name. *See id.* at 843-44. In *Mace*, the Court found the defendant's failure to explain the possession of the bankcard to the police was a comment on his right to silence and not evidence. *See id.* at 844-45. Thus other than his connection with the stolen property, there was no evidence he entered the building. *See id.*

The present case does not involve Burglary or Possession of Stolen Property. So the well-settled case law as to those crimes does not apply. Secondly, should the court apply the inference test in *Mace*, there was sufficient circumstantial evidence beyond unconnected inference.

In the present case, the only two people in the home were the defendant and the victim, Tamara Barnes. There is circumstantial evidence she was yelling at him to let her go and she was highly upset. She was fearful and knew immediately to point out where the defendant was to the police when they saw her in the bathroom door. If there was nothing going on as the Defendant said to the police, why was Tamara Barnes terrified, upset, and pointing out the Defendant to the police? These add up to circumstantial evidence of the crime and the defendant gave an improbable explanation to the police.

The Defendant also cites to *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996), for the proposition the evidence is equally consistent with a reasonable inference of innocence. *See* App. Br. 13-15. *Aten* centered around a corpus delicti issue in the death of a four-month old child. *See State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996). The State presented evidence from a pathologist that the infant died from Sudden Infant Death Syndrome (SIDS) or acute respiratory failure. *See id.* at 643. The pathologist explained he could not conclude a logical and reasonable inference the child died from any human action. *See id.* at 647. Because of the inability to determine the cause of death was anything other than accidental, the court found there was insufficient information to show corpus delicti and thus, the defendant's statements were inadmissible and there was insufficient evidence to convict. *See id.* at 658-663.

The Defendant argues the statements "let me go" and "let go of me" are equally consistent with an innocent interpretation as one of guilt. *See* App. Bf. At 15. The Defendant wants the court to consider the statements in a vacuum. However, this argument is not consistent with *Aten*. In *Aten*, the court had only the pathologist's opinion as to the cause of death and was considering the evidence in light of corpus delicti. *See supra*. In the present case the statements "let me go" and "let go of me" should be considered in light of the totality of the circumstances,

particularly the countenance of Tamara Barnes and the defendant's actions. Taken together, the reasonable inference is Tamara Barnes told the defendant to let her go.

The Defendant argues there are many possibilities that the defendant acted with legal authority and didn't substantially interfere with Mrs. Barnes' liberty. See App. Bf. At 16-17. He says the defendant could have been trying to physically prevent Mrs. Barnes from hurting herself or defending himself. There was no indication that Mrs. Barnes was suicidal, was hurting herself, and the defendant does not claim self-defense at trial. The Defendant is once again using speculation in a vacuum.

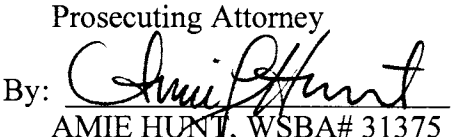
The reasonable inferences from the evidence and under case law is that the Defendant was preventing Mrs. Barnes from going where she wanted, and was guilty of unlawful imprisonment.

V. CONCLUSION

The State requests the Court affirm the trial court and deny the appeal based upon the above arguments.

Respectively submitted this 9 day of January, 2009.

SUSAN I. BAUR
Prosecuting Attorney

By: 
AMIE HUNT, WSBA# 31375
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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	**NO. 37579-6-II**
	)	**Cowlitz County No.**
Respondent,	)	**07-1-01115-1**
	)	
vs.	)	**CERTIFICATE OF**
	)	**MAILING**
RICHARD MARTIN BARNES,	)	
	)	
Appellant.	)	
	)	

I, Michelle Sasser, certify and declare:

That on the 9th day of January, 2009, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

John Hays
Attorney at Law
1402 Broadway, Suite 103
Longview, WA 98625

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of January, 2009

Michelle Sasser
MICHELLE SASSER