

NO. 43855-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN DUNN,

Appellant.

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

The Honorable Barbara Johnson, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information was defective because it omitted essential elements of the crime of unlawful imprisonment.

2. The jury instruction informing jurors they could find each element of unlawful imprisonment if the accused acted “intentionally” misstated the law and requires reversal of all four convictions.

3. The prosecutor committed flagrant, prosecutorial misconduct in closing argument that denied the appellant a fair trial.

4. The trial court violated the appellant’s right to present a defense by excluding evidence crucial the appellant’s defense and to rebutting the State’s theory of the case.

5. The trial court violated appellant’s constitutional right to a public trial by taking peremptory challenges in a proceeding closed from public view.

6. The trial court violated the appellant’s constitutional right to be present at all critical stages of trial.

Issues Pertaining to Assignments of Error

1. To convict an accused of unlawful imprisonment, the State must prove an accused knowingly (1) restricted another's movements; (2) did so without that person's consent; by physical force, intimidation, or deception; or by acquiescence if the person was under 16 and her parent

did not acquiesce; (3) did so without legal authority; and (4) did so in a manner that substantially interfered with that person's liberty. Where the information failed to allege the essential elements of unlawful imprisonment, should the appellant's three unlawful imprisonment convictions be reversed?

2. Where the jury instruction defining "knowingly" and "with knowledge" erroneously informed jurors they could also find each element of unlawful imprisonment was established if the accused acted "intentionally," should this Court reverse the appellant's convictions for unlawful imprisonment?

3. Where residential burglary requires "intent to commit a crime" and the jury was misinformed as to the elements of unlawful imprisonment, should the appellant's residential burglary conviction also be reversed?

4. Did the prosecutor commit flagrant, prejudicial misconduct in closing argument, denying the appellant a fair trial?

5. Did the trial court err in excluding cell phone video crucial to the defense and vital to rebutting the State's theory of the case?

6. During jury selection, the parties made peremptory challenges by passing a chart back and forth at the clerk's station.

Because the trial court did not analyze the Bone-Club¹ factors before conducting this important portion of jury selection privately, did the court violate appellant's constitutional right to a public trial?

7. Did the appellant's absence from exercise of peremptory challenges violate his constitutional right to be present at all critical stages of trial?

B. STATEMENT OF THE CASE²

1. Procedural facts

The State charged Bryan Dunn with first degree burglary and three counts of unlawful imprisonment based on an incident occurring May 13, 2012. CP 1-2. The State amended the first charge to residential burglary after the court found insufficient evidence to support the first degree charge. CP 11-12; 3RP 89-105. The complainants as to the unlawful imprisonment charge were sisters A.P. and J.P. and family friend M.C., who were between 11 and 14 years old at the time of the incident. CP 11-12.

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

² This brief refers to the verbatim report of proceedings as follows: 1RP – 8/13/12; 2RP – 8/14/12; 3RP – 8/15/12; 4RP – 8/16 and 8/22/12; and Supp. RP – 8/13/12 (jury selection).

Following trial, a jury convicted Dunn of all four charges, and the court sentenced him to concurrent standard range terms of incarceration. CP 40-44, 50-59.

2. Trial testimony and Dunn's statement³

A.P. was 11 years old in May of 2012. 1RP 53-54. The morning of May 13, A.P. woke up while sister J.P., 14 years old, and friend M.C., 13 years old, were still sleeping. 1RP 56-57; 2RP 11, 106. The girls planned to go swimming that day with some friends. 1RP 57; 2RP 95. The sisters' mother, Anita, was at work. 1RP 66.

The girls heard voices and then a knock at the door. J.P. told A.P. to open the door because J.P. thought it was the apartment complex's maintenance man. 1RP 59; 2RP 18, 25, 112 A Hispanic man, referred to at trial as "Luciano," and two non-Hispanic "white" men were at the door. 1RP 60. One of the white men was tall and thin; the other was shorter and heavier and had a ponytail. 1RP 60-61; 2RP 110-11. Two of the girls later identified Dunn as the man with the ponytail. 1RP 73-74; 2RP 23-24, 58; 3RP 21-26.

³ Facts related to appellant's claims of prosecutorial misconduct, the exclusion of evidence, and the violations of the right to public trial and the right to be present at all critical stages of prosecution are outlined in the argument section below.

Luciano, who A.P. recognized slightly, told A.P. he was her mother's "manager."⁴ 1RP 60. Unsure what to do, A.P. closed the door and told J.P. the men at the door were looking for Anita. 1RP 61-62; 2RP 27.

When the girls emerged from the bedroom, the men were already inside and sitting on the couches. 1RP 64. When J.P. asked why the men were in her house, the men laughed. 1RP 65; 2RP 27-29. One of the men said he wanted to talk to J.P.'s mom. 2RP 28. According to M.C., Luciano was doing most of the talking. 2RP 209-10.

Luciano directed Dunn to call Anita and told him to say her daughters "need[ed] water." 2RP 113-14. Dunn was laughing as he left a message.⁵ 2RP 29. J.P. was surprised Luciano had Anita's phone number and knew other details about the family. 2RP 65.

When J.P. told the men to leave the house, they laughed. 2RP 31-32, 65. Luciano said the other men were his bodyguards, and Dunn and the other man agreed. 2RP 32. J.P. felt threatened by the statements about bodyguards. 2RP 33.

⁴ At some point, A.P. and J.P. realized they recognized Luciano because he had come to their apartment to fix their dryer. 1RP 96; 2RP 15, 57.

⁵ J.P. believed Dunn left her mother a voicemail because she could hear her mother's voice on the recorded message. 2RP 30.

The men eventually told the girls to get ready to leave, and the girls went to the bedroom to change. 1RP 66; 2RP 122-23. Luciano told the girls to “hurry” and unsuccessfully tried to open the bedroom door while they were changing. 2RP 35-36, 117-18, 231.

The girls got in the car with the men because they were scared that something bad would happen if they didn’t. 1RP 67; 2RP 34. M.C. acknowledged stating in an interview that she was scared of Luciano at first but later wasn’t scared because the sisters said they knew him. 2RP 226-27. The girls’ testimony agreed that one of them picked up a knife and wrapped it in a shirt to hide it, but each claimed it was another girl who did that. 1RP 93; 2RP 42, 123-24.

Dunn drove and the other white man sat in the passenger seat. 1RP 77-78; 2RP 36. Luciano sat in the back seat with the girls. 1RP 77-78. Dunn drove to a house about a half an hour away, where Luciano and the passenger got out. 1RP 79; 2RP 38, 125, 147, 212. While Dunn turned up the music and hummed, the girls – who had at least one cell phone with them – discussed calling the police. They spoke in Spanish so Dunn wouldn’t understand what they were talking about. 1RP 79-81; 2RP 39-40, 127. The girls decided not to call the police but instead to try to run away. 2RP 41-42.

M.C., for one, didn't fear Dunn. 2RP 226. She acknowledged the girls could have gotten out of the car at that house but decided not to leave because they weren't sure where they were.⁶ 2RP 212-13.

When Luciano returned from the house, he was carrying a plate of cucumbers and hot sauce. 1RP 85. He spilled some sauce on A.P.'s leg and then wiped it off with his finger, which he then licked. 1RP 86, 99; 2RP 44, 191-93. This bothered the girls, who told Luciano not to touch A.P. 1RP 86; 2RP 44.

Back on the road, Luciano asked if anyone was hungry, and A.P. said she was. 2RP 194. Dunn drove to a Burgerville drive-through near the Vancouver mall. 1RP 86-87; 2RP 46. The men ordered a lot of food. Accounts differed on whether the girls ate the food they were offered. 1RP 87-88; 2RP 46, 214-15.

Shortly thereafter, the girls told the men to stop at a pink house, which the girls lied was M.C.'s residence. 1RP 84. Luciano had been talking about wanting to meet M.C.'s mother and/or sister, but the girls did not want him to know where M.C. lived. 1RP 88; 2RP 47, 65-66, 101, 103, 196-97. After Luciano went to the door, apparently planning to offer M.C.'s family member some food, the girls got out of the car and ran

⁶ M.C. later provided arguably inconsistent testimony that the girls did not get out of the car because they were too scared. 2RP 232-33.

through a field. 1RP 84, 102; 2RP 49, 67. They hid in the bushes because they thought the car was following. 1RP 90, 105-06; 2RP 49-50. According to J.P., the car sped after them while Luciano remained at the house. 2RP 49, 100. M.C. did not see the car following them, but A.P. thought she saw it. 2RP 221.

Accounts of what happened next differ. A.P. said the girls avoided M.C.'s nearby house and ran to a nearby "Taboo" store, then called A.P.'s older sister Anahi. 1RP 91. J.P. said M.C. went inside and talked to her sister, but not her mother, and then the girls ran to Taboo. 2RP 50-52, 95. J.P. thought M.C. was deliberately avoiding her mother because she did not want to get in trouble. 2RP 51. M.C. said the girls went to Taboo first, then back to M.C.'s, then back to Taboo. 2RP 201-02.

Anahi had trouble locating the girls at first but eventually drove the girls back to the apartment, where Anita was waiting for them. 1RP 91; 2RP 53-54. J.P. was visibly frustrated with Anita for not responding promptly to her messages. 2RP 175, 228-29.

Anita testified she was at work when she started receiving phone calls from J.P. When she finally answered, J.P. said she couldn't "talk very much" and that men were taking J.P. and the other girls from the home. J.P. also sent text messages to that effect. 2RP 167, 169, 172. Rather than calling the police, Anita returned to the apartment. 2RP 175.

Anita did not give the men permission to drive A.P. and J.P. anywhere.⁷ 2RP 169. Anita acknowledged she met Luciano at a gym years earlier. She might have given him her phone number and some details about her family because he had helped her fix her dryer. 2RP 169-71.

The police contacted Dunn after the girls identified him, and he voluntarily met with police and provided a statement. 3RP 30. Portions of his statement were introduced at trial.⁸ Exs. 47, 50; 3RP 63. In the interview, Dunn explained he met Luciano only a few days before the incident leading to the charges. Ex. 50 at 10. Luciano owed a landscaping business and needed some automotive work done. Ex. 50 at 3. The morning of the incident, Dunn and an acquaintance, Rick, were working on Luciano's truck when Luciano asked Dunn to drive him on business errands because Luciano had been drinking and could not drive. Ex. 50 at 10-11. The men stopped at an arborist and some other apartments before eventually stopping at the girls' apartment, where Dunn was told that Luciano had previously installed a dryer. Ex. 13, 24.

⁷ Like Anita, M.C.'s mother testified she did not give permission for the men to drive M.C. anywhere. 2RP 154-59.

⁸ The court played those portions of the CD corresponding to the following portions of the transcript: (1) Beginning until page 28, line 17 and (2) page 31, lines 1 through 7. All other portions were excluded. 3RP 34-39, 63.

Luciano went into the apartment and then returned with the girls, whom he estimated to be in “[j]unior high [or] high school.” Ex. 14. Luciano and the girls invited him in. Ex. 50 at 14. Luciano appeared to know the girls; the girls at first wanted a ride to the mall, but one talked to her mother and needed to go home. Ex. 50 at 15. Luciano “volunteered” Dunn to take the girl home. Ex. 50 at 15.

Luciano had Dunn stop at the home of business associate along the way, but there was a barbecue going on, and Luciano returned with a plate of food. Ex. 50 at 17. After one of the girls said she was hungry, Luciano offered to buy lunch. Ex. 50 at 16. Dunn did not realize anything was amiss until the girls ran across a field rather than approaching the house where they told him to stop. Ex. 50 at 16, 19-22. Dunn found the situation odd and feared the girls were playing some sort of game. Ex. 50 at 22-23.

Afterward, Luciano didn’t offer Dunn any explanation for the morning’s events, other than to suggest he wanted a relationship with the girls’ mother. Ex. 50 at 25. Dunn didn’t understand much of the conversation between Luciano and the girls because it was conducted in Spanish. Ex. 50 at 26-28. Other than that, the girls were talking about boyfriends and other things Dunn was not interested in. Ex. 50 at 28.

C. ARGUMENT

1. THE INFORMATION IS DEFECTIVE FOR FAILING TO INCLUDE ALL THE ESSENTIAL ELEMENTS OF UNLAWFUL IMPRISONMENT.

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); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. Dunn's conviction for unlawful imprisonment must be reversed because the charging document does not set forth the essential elements of the crime. CP 1-2, 5-6, 11-12.

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) (formerly codified as subsection (1)). To restrain a person "without consent" is accomplished by "physical force, intimidation, or deception" or "by any means including acquiescence" if the restrained person's parent has not consented. RCW 9A.40.010(6).

Thus, for purposes of unlawful imprisonment, "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 all components of restraint. Id. at 153-54, 157. The modified components of “restraint” are thus elements of the crime of unlawful imprisonment. Id. at 158-59.

In Warfield, three defendants’ convictions were reversed for insufficient evidence where the State failed to prove Warfield and two other men knowingly restrained someone without lawful authority. This Court held “knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants’ convictions cannot stand.” Id. at 159.

The elements of a crime are commonly defined as “[t]he constituent parts of a crime – [usually] consisting of the actus reus, mens rea, and causation – that the prosecution must prove to sustain a conviction.” State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). “An ‘essential element is one whose specification is necessary to establish the very illegality of the behavior’ charged.” State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

To convict Dunn 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. As Division One of this Court recently held, moreover, mere use of the term “restraint” in the charging document is inadequate to provide notice of each of the elements of the crime of unlawful imprisonment. See State v. Johnson, ___ Wn. App. ___, 289 P.3d 662, 674 (2012) (common understanding of “restraint” fails to convey statutory definition, and in particular, requirement of knowledge that such restraint occur “without legal authority”).

In accord with Warfield and Johnson, the pattern "to convict" instruction for unlawful imprisonment recognizes the elements of the crime that need to be proved. WPIC 39.16; see State v. Davis, 116 Wn. App. 81, 96 n.47, 64 P.3d 661 (2003) ("While the WPICs are not binding on the court, they are persuasive authority."), aff'd, 154 Wn.2d 291, 111 P.3d 844 (2005), aff'd sub nom., Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

The "to convict" instructions in Dunn's case were modeled on WPIC 39.16. CP 31-36 (Instructions 16-18).⁹ The jury was correctly instructed that "with regard to [the elements] the defendant acted knowingly." CP 31 (Instruction 16).

⁹ Instructions 16-18 are attached as Appendix A.

Proper jury instructions, however, cannot cure a defective charging document. Vangerpen, 125 Wn.2d at 788. The State charged Dunn with unlawful imprisonment as follows:

That [Dunn], in the County of Clark, State of Washington, on or about May 13, 2012 . . . did knowingly restrain [one of the three complainants], a human being; contrary to [RCW] 9A.40.040(1),¹⁰ and/or was an accomplice to the crime. . . .

CP 12 (second amended information, containing identical language to previous charging documents).

The information does not contain all essential elements of the crime. It does not allege Dunn 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

¹⁰ The citation is to the 1975 version of the statute.

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. McCarty, 140 Wn.2d at 425.

2. THE JURY INSTRUCTION DEFINING KNOWLEDGE RELIEVED THE STATE OF THE BURDEN OF PROVING AN ELEMENT OF UNLAWFUL IMPRISONMENT, AS WELL AS AN ELEMENT OF RESIDENTIAL BURGLARY.

The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof. Mandatory presumptions, however, may violate due process if they relieve the State of its obligation to prove all of the elements of the crime charged. State v. Deal, 128 Wn2d 693, 911 P.2d 996 (1996) (citing Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)). A jury instruction that relieves the State of its burden of proof is reversible error. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

As discussed above, to find Dunn guilty of unlawful imprisonment, the State was required to prove he acted *knowingly* as to each element of the crime, including knowledge that his acts were unlawful. Warfield, 103 Wn. App. at 159.

But here, the jury was instructed that:

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

CP 26 (Instruction 11) (emphasis added).¹¹ Instruction 10 informed jurors that “[a] person acts . . . intentionally when acting with the objective or purpose to accomplice a result that constitutes a crime.” CP 25.

The instructions here are similar to instructions this Court deemed unconstitutional in State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005). There, this Court held the instructions created an impermissible mandatory presumption, and such erroneous instructions were not harmless beyond a reasonable doubt. Id. at 203-04.

Goble was charged with third degree assault of a police officer. The to-convict instruction required the State to prove that Goble assaulted the officer and knew at the time of the assault that the victim “was a law enforcement officer . . . who was performing his or her official duties.” Id. at 200. The instructions stated that “[a]cting knowingly or with knowledge also is established if a person acts intentionally.” Id. at 202

The Court agreed with Goble that the knowledge instruction was confusing and relieved the State of its burden to prove Goble knew the

¹¹ Instructions 10 and 11 are attached as Appendix B.

victim was a police officer. Because the instruction “allowed the jury to presume Goble knew [the officer's] status at the time of the incident if it found Goble had intentionally assaulted [the officer],” the instruction “conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew [the officer's] status if it found the assault was intentional.” This Court held, moreover, that while there was no objection in the trial court, the error could be raised for the first time on appeal. Id. at 203.

The instructions in this case were no less problematic. Here, Instructions 10 and 11 informed jurors they could find the requisite mental state if they found Dunn was acting intentionally, and if the intended action happened to constitute a crime. CP 25-26. In other words, all Dunn had to do was to intend to take the girls for a ride -- he did not have to know it was illegal to do so. Yet the unlawful imprisonment statute explicitly requires, for example, the State to prove knowledge that the restraint is unlawful. Warfield, 103 Wn. App. at 159.

The substituted “intentionally” mental state was not associated with any to-convict in particular. Arguably, it could be properly applied to the first element of the residential burglary instruction. CP 29 (Instruction 14). But without language limiting its application to the unlawful

imprisonment to-convict instructions, Instructions 10 and 11 violated Dunn's right to due process by creating a mandatory presumption, and thus relieved the State of its burden to prove each element beyond a reasonable doubt. State v. Hayward, 152 Wn. App. 632, 646, 217 P.3d 354 (2009); Goble, 131 Wn. App. at 203.

Unless the error was harmless beyond a reasonable doubt, Dunn's convictions must be reversed. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). In considering whether this type of error is harmless, this Court (1) identifies the evidence the jury reasonably considered under the instructions given by the court, then (2) determines whether the evidence is so overwhelming that there is no reasonable doubt as to the verdict rendered. State v. Atkins, 156 Wn. App. 799, 813-14, 236 P.3d 897 (2010) (citing Yates v. Evatt, 500 U.S. 391, 403-06, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), disapproved of on other grounds by Estelle v. McGuire, 502 U.S. 62, 72 n. 4, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)); cf. Hayward, 152 Wn. App. at 647 n. 5 ("Because we hold that the jury instruction was harmful under the standard harmless error test, we need not consider the more stringent Yates test.").

Under either of the standards discussed in Atkins and Hayward, the State cannot demonstrate the erroneous instructions were harmless beyond a reasonable doubt. The girls testified that, at times, they feared the men; but other times they did not. But the extent to which this was clear to Dunn – and the extent to which he would have been aware that transporting the girls was potentially wrongful – was much less obvious.

It was undisputed that Dunn believed Luciano knew the girls. 1RP 60; 2RP 169-71; Ex. 50 at 15. It is also undisputed that the girls did not have to be forced into the car by explicit threat of violence; while the girls testified they were afraid, there was no testimony they conveyed this fear other than to each other, in Spanish. 1RP 67; 2RP 33-34. The girls remained in the car with Dunn at the first house even though Luciano was gone; this may have conveyed to Dunn that they were in the car willingly. 2RP 226. When girls asked to stop at a house, Dunn did so. 1RP 84. Luciano spoke to the girls in English and Spanish. 1RP 96. Dunn was not privy to portions of the conversation between the girls and Luciano, nor was he privy to the girls' conversation in Spanish when Luciano was not present. 1RP 79-81; 2RP 39-42, 127. Dunn told police that during the men's interaction with the girls, they discussed typical "girl" things, such as boyfriends; this further supports they did not openly convey any fear they felt. Ex. 50 at 28.

In addition to the other prongs, the State relied on the third form of restraint – “acquiescence” / lack of parental consent – to prove Dunn restrained the girls. But proof of “knowledge” depended on *possible* inferences, from Dunn’s statement and the girls’ testimony, regarding his knowledge of the girls’ age, his knowledge of their mothers’ lack of consent, and his knowledge that transporting the girls was against the law. Cf. 4RP 36-37 (closing argument by State, arguably shifting burden of proof, that there was “no evidence” the girls were transported with anyone’s permission).

The jury was told, however, it need not even draw such inferences to convict. 4RP 38-70. All the jury needed to do was to find Dunn was acting intentionally, i.e., not sleepwalking, when he drove the girls in his car.

The State’s closing argument, moreover, was arguably consistent with the instructions, yet likewise urged conviction on improper grounds. The prosecutor discussed the burglary count, then stated he was moving on to a discussion of unlawful imprisonment. 4RP 36. Discussing the “acquiescence” prong of restraint, he argued it was unnecessary for Dunn to know the girls’ age or even to know that he was engaging in criminal behavior. 4RP 36-37. The question, rather, was whether Dunn intended his acts. 4RP 38-39.

. . . . Because the old adage about ignorance of the law not being an issue here, well, when you look at intent intend and I submit to your read it [closely], *you won't find anything in there that says you have to know that it's a crime.* In fact, let's look at that. This causes people confusion sometime[s] and I just don't want anybody to be confused by this part.

When you're acting with the objective or purpose to accomplish a result, that constitutes a crime.

4RP 38-39 (emphasis added). The prosecutor then provided an example of someone who punched another person in the nose. Even if the assailant did not intend a resulting fracture, he could still be criminally liable for the result. 4RP 39. The prosecutor continued,

. . . . If you're engaging . . . intentionally, which here means you're not walking around like a zombie, if you can drive, Mr. Dunn can drive, we know, because he drove. . . . He knows what he's doing, he's working on a car before he goes there. All those acts require intent. . . .

He intended to take the girls from the home. He either did it himself or he was an accomplice to it. That's why the accomplice [instruction] is there or he's aiding or assisting an accomplice which is Mr. Luciano. All I have to show to you is that he himself did it intentionally or that his accomplice did it intentionally. I submit to you . . . that's what I have to prove to you.

4RP 39-40.

Again, this argument not only permitted an erroneous conviction, it encouraged the jury to convict if jurors found Dunn was acting intentionally, i.e., not sleepwalking, when he transported the girls. The jury could have concluded that given Dunn's obviously goal-directed,

non-zombie-like behavior, he must be guilty. But that is not what is required to prove unlawful imprisonment. The State cannot prove the evidence considered by the jury was “so overwhelming that there is no reasonable doubt as to the verdict.” Atkins, 156 Wn. App. at 817.

The error affected not only unlawful imprisonment, but the burglary conviction as well. As charged and instructed, residential burglary required proof not only that an accused or an accomplice “entered or remained unlawfully in a dwelling,” but also that “the entering or remaining was with intent to commit a crime.” CP 22 (Instruction 7) (following WPIC 60.02.02).¹²

The State can prove a crime either through direct or circumstantial evidence or some combination of both. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). But criminal intent may be inferred only where the conduct of the defendant is “plainly indicated as a matter of logical probability.” State v. Johnson, 159 Wn. App. 766, 774, 247 P.3d 11 (2011) (quoting Delmarter, 94 Wn.2d at 638). An inference must be reasonably based on the evidence presented. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Criminal intent may be inferred from certain acts. For example, in State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985), the court affirmed

¹² The instruction is attached as Appendix C.

an attempted burglary conviction where the defendant's conduct — breaking out a basement window at 3:15 a.m. and fleeing when police arrived — plainly indicated criminal intent. Id. at 20. And in State v. Bencivenga, 137 Wn.2d 703, 705-06, 709, 974 P.2d 832 (1999), where, despite the defendant's claim of an innocent purpose of a bet with a friend, the defendant's actions of prying open a store's back door at 3:30 a.m. allowed a logical inference of criminal intent.

In contrast, under some circumstances, a defendant's behavior does not lead to a logical inference of criminal intent. State v. Woods, 63 Wn. App. 588, 592, 821 P.2d 1235 (1991). There, two juveniles went to an apartment where one had formerly lived and his mother caught the two boys trying to kick in the door. The boys claimed they went to the apartment to get a rain jacket, they did not steal anything else, and most of the one boy's belongings were still in the apartment. Id. at 589-90. The Court found it plausible that the boys fled the scene when the mother yelled because they feared her anger rather than because they intended to commit a crime. Id. at 591. Thus, although the Court held that the defendant entered the apartment unlawfully, it found the evidence insufficient to support an inference of criminal intent necessary to support the residential burglary conviction. Id. at 591-92.

Here, the jury could have easily concluded Dunn's intent in entering or remaining in the apartment was "criminal" from the fact that he *intentionally* drove the girls away from the apartment without their mother's consent; the prosecutor and the instructions informed the jury was informed that this was a crime. But this, in itself – as discussed above – was not necessarily a crime. More was required; Dunn was required to *know* his acts were illegal, including, arguably, that even if the girls acquiesced to being driven, such was unlawful unless a parent specifically consented.

In summary, because the erroneous "knowledge" instruction lessened the State's burden in proving unlawful imprisonment, and residential burglary as well, each of Dunn's convictions should be reversed.

3. FLAGRANT, PREJUDICIAL PROSECUTORIAL MISCONDUCT DENIED THE APPELLANT A FAIR TRIAL.

Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). Prosecutors, like judges, are servants of the law. State v. Gorman, 219 Minn. 162, 175, 17 N.W.2d 42 (1944).

When a prosecutor commits misconduct, he may deny the accused the fair trial guaranteed by the state and federal constitutions. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005); see U.S. Const. amend. 14; Wash. Const. art. 1, § 3. A prosecutor's argument must be confined to the law. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). When the prosecutor mischaracterizes the law, and there is a substantial likelihood that the misstatement affected the jury verdict, the accused is denied a fair trial. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity that may mislead the jury. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

This Court reviews the State's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Boehning, 127 Wn. App. at 519. Generally speaking, where a defendant fails to object to prosecutorial misconduct, reversal is required if the misconduct is so flagrant and ill intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). But where no corrective purpose would be served by objecting at trial, the lack of objection should not preclude

appellate review. State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996).

Here, the prosecutor misstated the law when he argued Dunn was guilty of unlawful imprisonment regardless of whether he knew his own, or Luciano's actions, were unlawful. All that was required to convict was that Dunn assist in removing the girls from the apartment and that Dunn actually intend his actions, rather than sleepwalk through them. Specifically, the prosecutor argued, "All I have to show to you is that [Dunn] himself did it intentionally or that his accomplice did it intentionally. I submit to you . . . that's what I have to prove to you." 4RP 40. As discussed above, this was patently incorrect. According to statute and well-established case law, the State was required to prove that Dunn knew, among other things, that his actions were unlawful.

The prosecutor's argument was a misstatement of the law. Davenport, 100 Wn.2d at 764. It was, moreover, reasonably likely such argument affected the jury's verdict. Gotcher, 52 Wn. App. at 355. As argued above, the jury instructions were confusing and only reinforced such an argument.

Given the lack of defense objection, the next question would normally be whether a curative instruction could have cured the error. But, under the circumstances, such an objection would have been futile:

The prosecutor's argument was arguably consistent with the court's own confusing instructions. Where the record suggests that such an objection was unlikely to succeed, the lack of objection does not preclude a finding of reversible error. State v. McCreven, 170 Wn. App. 444, 473, 284 P.3d 793 (2012); see also Moen, 129 Wn.2d at 547 (where no corrective purpose would be served by objecting at trial, lack of objection should not preclude appellate review).

Because the argument was reasonably likely to lead to a conviction absent proof of all the elements of the crime; and because, given the deficiencies of the court's own instructions, any objection would have been futile, reversal is required on all counts.¹³ Gregory, 158 Wn.2d at 841; McCreven, 170 Wn. App. at 473.

4. THE COURT ERRED IN EXCLUDING CELL PHONE VIDEO THAT WOULD HAVE SUPPORTED DUNN'S DEFENSE THAT HE DID NOT KNOW HE WAS ENGAGING IN WRONGFUL BEHAVIOR BY TRANSPORTING THE GIRLS

The Sixth and Fourteenth Amendments and article 1, § 21 of the Washington Constitution guarantee an accused the right to defend against the State's allegations. This is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d

¹³ As discussed above, the residential burglary conviction is inseparable from the unlawful imprisonment counts because the former charge required the State to prove intent to commit a crime.

297 (1973); Washington v. Texas, 338 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990).

Additionally, under the Rules of Evidence, an accused has the right to present relevant evidence tending to establish or rebut the State's proof of a material fact. ER 401.

The right to present evidence is subject only to the following limitations: (1) the evidence sought to be admitted must be relevant; and (2) the accused's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. Washington, 388 U.S. at 16; State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Gallegos, 65 Wn. App. 230, 236-37, 828 P.2d 37, review denied, 119 Wn.2d 1024 (1992).

In other words, a court must permit an accused to present even minimally relevant evidence unless the State demonstrates a compelling reason for exclusion. But no State interest is compelling enough to preclude evidence with high probative value. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Here, Dunn moved to admit videos captured on J.P.'s cell phone to impeach the girls' testimony by showing (in the case of one relatively lengthy video) the girls did not appear to be fearful while in the car with the men. Defense counsel also argued the videos could impeach specific testimony about the inappropriate touching by Luciano and whether the girls cowered in the car at the first house, as they claimed. 2RP 78-82; Ex. 36 (proffered videos and defense counsel's argument).

The court ruled the videos were of extraordinarily poor quality akin to a "very, very blurry photograph" and the events transpiring in them unclear. 2RP 82-83. The court also ruled it would be too difficult to show the videos to the jury. 2RP 82.

While the videos were indeed not of professional quality, they show far more than a blurry photograph and demonstrate the girls' casual demeanor in the men's presence. Ex. 36. This tends to undermine the State's claims the girls were fearful, and to bolster Dunn's claims that he was unaware anything strange was afoot until the girls ran from the car. And, given that the video could obviously be played on a laptop, the court's ruling that it would be impossible to play the video for the jury makes little sense.

Exclusion of evidence material to an accused's defense violates his due process right to present a defense. State v. Austin, 59 Wn. App. 186,

194, 796 P.2d 746 (1990). Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. Guloy, 104 Wn.2d at 425. Even under a non-constitutional harmless error standard, reversal is required where there is a reasonable likelihood that such evidence could have led to a different result on all charges. See State v. Fankhouser, 133 Wn. App. 689, 695, 138 P.3d 140 (2006) (trial court's ruling excluding testimony was not harmless because it hampered defendant's ability to challenge credibility of key State witness).

Here, exclusion of the videos was not harmless. The videos could have shown the girls apparent lack of fear, which would have bolstered Dunn's claims lack of awareness anything was amiss until the girls ran away. Ex. 50 at 16, 19-23. Such evidence was vitally important given that the State was required to show Dunn *knew* his, or at very least Luciano's, acts were unlawful to prove unlawful imprisonment. Warfield, 103 Wn. App. at 159; see also 4RP 67 (defense counsel's argument in closing that to be liable as an accomplice Dunn had to know Luciano was engaging in wrongful activity, and it appeared to Dunn that Luciano was only taking the girls for a ride).

Because the court erred in excluding the video evidence, and because, for the reasons given, such exclusion was not harmless, each of

Dunn's convictions should be reversed. Fankhouser, 133 Wn. App. at 695.

5. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES PRIVATELY.

Jury selection in this case occurred on August 13, 2012. Supp. RP at 13. After questioning was complete, the court directed counsel, but not Dunn, to the clerk's station, and the attorneys exercised peremptory challenges by handing a chart back and forth between the attorneys at the clerk's station. Supp. RP at 11-12, 95. The court then excused certain jurors and seated other veniremembers in the excused jurors' seats. Supp. RP at 96-97.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.¹⁴ Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be

¹⁴ The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" Article I, section 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury"

administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 259. Before a trial judge can close any part of a trial, it must first apply on the record the five factors set forth in Bone-Club. Orange, 152 Wn.2d at 806-07, 809. A violation is presumed prejudicial and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The public trial right applies to “‘the process of juror selection,’ which ‘is itself a matter of importance, not simply to the adversaries but to the criminal justice system.’” Orange, 152 Wn.2d at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The right to a public trial includes “‘circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures,

reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny.” State v. Slert, 169 Wn. App. 766, 772, 282 P.3d 101 (2012)¹⁵ (quoting State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012)).

The peremptory challenge process, an integral part of jury selection,¹⁶ is one such proceeding: While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties’ exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Based on these crucial constitutional limitations, public scrutiny of the exercise of peremptory challenges is more than a procedural nicety; it is required by the constitution. See Slert, 169 Wn. App. at 772 (explaining need for public scrutiny of proceedings).

The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Even though the procedure occurred in an otherwise open

¹⁵ In Slert, this Court reversed Slert’s conviction, holding that an in-chambers conference at which various jurors were dismissed based on their answers to a questionnaire violated his right to a public trial. 169 Wn. App. at 778-79.

¹⁶ People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992).

courtroom, any assertion that the procedure was in fact public should be rejected. The procedure was similar to a sidebar, which occurs outside of the public's scrutiny, and thus violates the appellant's right to a fair and public trial. Slert, 169 Wn. App. at 774 n. 11 (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating "if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"); see also Harris, 10 Cal.App.4th at 684, (exercise of peremptory challenges in chambers violates defendant's right to a public trial); cf. People v. Williams, 26 Cal.App.4th Supp. 1, 7-8, 31 Cal.Rptr.2d 769 (1994) (peremptory challenges could be held at sidebar to permit party opponent to make motion based on state version of Batson, 476 U.S. 79, if challenges and party making them were then announced in open court).

The trial court violated appellant's constitutional right to a public trial by taking peremptory challenges during a private proceeding at the clerk's station. And while there is no Washington case containing identical facts, the private proceeding was no less a violation of the right to a public trial than the closed voir dire sessions that Washington courts have repeatedly held to violate the public trial right. Because the error is

structural, prejudice is presumed, and thus reversal is required. Wise, 176 Wn.2d at 16-19.

6. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES WHEN COUNSEL MADE PEREMPTORY CHALLENGES AT THE CLERK'S STATION.

“A criminal defendant has a fundamental right to be present at all critical stages of a trial.” State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). This includes the right to be present during voir dire and empanelling of the jury. Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912). The right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Id.¹⁷

Jury selection is “the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability.” Irby, 170 Wn.2d at 884 (quoting Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)). “[A] defendant's presence at jury selection ‘bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend’ because ‘it

¹⁷ In situations in which the accused is not actually confronting witnesses or evidence against him, this right is protected by the Due Process Clause. Irby, 170 Wn.2d at 880-81 (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)).

will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.” Irby, 170 Wn.2d at 883 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964))). This right attaches from the time empanelment of the jury begins. Irby, 170 Wn.2d at 883.

Irby requires reversal in this case. In Irby, the State and Irby agreed to the trial court’s suggestion that neither party attend the first day of jury selection and that they appear and begin questioning jurors on the following day. Id. at 877.

As agreed, on the first day of jury selection, the judge swore in the venire members and gave them a jury questionnaire. After the potential jurors completed questionnaires, the judge sent an email to the prosecutor and defense counsel suggesting that 10 venire members be removed from the panel for various reasons. The judge asked for input, indicating that if any jurors were going to be released, he would like to do it that day. Id.

Irby's counsel agreed to release all ten potential jurors. The prosecutor objected to the release of three. The court then released the remaining seven. Irby, however, was in custody at the time of the exchange and there was no indication that he was consulted about the dismissal of any potential jurors. Id. at 878-79.

Jury selection continued on the following day in Irby's presence. Id. at 878. At the conclusion of trial, the jury convicted Irby as charged. Id. at 879. Irby appealed to this Court, arguing that the trial court's dismissal of the seven potential jurors via email exchange violated his right to be present at all critical stages. This Court agreed, and was affirmed by the Supreme Court. Id. at 887.

This case is like Irby in all important respects. Counsel made their peremptory challenges at the clerk's station, and there is no indication that Dunn was present or permitted to participate.¹⁸ See Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) (“[W]here the [defendant's] personal presence is necessary in point of law, the record must show the fact.”); see also People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violates right to be present; court refuses to speculate that defendant could overhear conversations). The fundamental purpose of a defendant's right to be present during jury selection, including the exercise of peremptory challenges, is to allow him to give advice or suggestions to counsel or even to supersede counsel's decisions. Here, as in Irby, because Dunn was not present for this portion of jury selection, he was unable to

¹⁸ Supp. RP at 95.

exercise that right. See Commonwealth v. Owens, 414 Mass. 595, 602, 609 N.E.2d 1208 (1993) (defendant “has a right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in the exercise of his peremptory challenges”) (citing Lewis, 146 U.S. at 372).

Nonetheless, violation of the right to be present is subject to harmless error analysis. Irby, 170 Wn.2d at 885. The State bears the burden of proving beyond a reasonable doubt that the error is harmless. Id. at 886.

The Irby Court found Irby’s absence from the portion of jury selection at issue was not harmless:

[T]he State has not and cannot show that three of the jurors who were excused in Irby's absence ... had no chance to sit on Irby's jury. Those jurors fell within the range of jurors who ultimately comprised the jury, and their alleged inability to serve was never tested by questioning in Irby's presence Had [those jurors] been subjected to questioning in Irby's presence . . . the questioning might have revealed that one or more of these potential jurors were not prevented by reasons of hardship from participating on Irby's jury Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence [was harmless].

Id. at 886-87.

Thus, the Irby Court considered whether the same jurors would have inevitably sat on the jury regardless of Irby’s participation and

concluded the answer was no. Accordingly, the State could not show the error was harmless. Id. As in Irby, the State cannot show that the venire members excused during the discussion at sidebar had no chance to sit on this jury; indeed, peremptory challenges are largely based on subjective decision-making, albeit with some obvious limitations as set forth in Batson and its progeny.

Indeed, it is difficult to imagine a portion of jury selection more appropriate for the input of an accused than during the exercise of peremptory challenges. Such challenges are “a tool that may be wielded in a highly subjective and seemingly arbitrary fashion, based upon mere impressions and hunches.” State v. Evans, 100 Wn. App. 757, 774, 998 P.2d 373 (2000) (quoting United States v. Annigoni, 96 F.3d 1132, 1144-45 (9th Cir. 1996)). The State cannot show that Dunn's absence during this critical stage was harmless beyond a reasonable doubt.

D. CONCLUSION

Because the State failed to list all essential elements of the crime of unlawful imprisonment, this Court should reverse and dismiss counts 2, 3, and 4 without prejudice.

Moreover, reversal of all counts is required because the catchall “knowledge” instruction improperly relieved the State of the burden to prove an element of unlawful imprisonment, which in turn lessened the

State's burden to prove Dunn committed residential burglary. The prosecutor's argument regarding intentionality was also flagrant, prejudicial misconduct. With its grave potential to confuse the jury, the argument denied the appellant a fair trial on all counts. In addition, the trial court's improper exclusion of cell phone video, which was crucial to rebutting the State's case, denied the appellant a fair trial on all counts. Finally, the trial court violated the appellant's rights to a public trial and to be present at all critical stages by having counsel exercise peremptory challenges at the clerk's station, removed from public scrutiny.

DATED this 12TH day of March, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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WSBA No. 35220
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Attorneys for Appellant

APPENDIX A

INSTRUCTION NO. 16

To convict the defendant of the crime of unlawful imprisonment, as charged in count 2, each of the following five elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 13, 2012, the defendant, or an accomplice, restrained the movements of Jasmine Piedra in a manner that substantially interfered with her liberty;

(2) That such restraint was

- (a) without Jasmine Piedra's consent or
 - (b) accomplished by physical force, intimidation, or deception or
 - (c) accomplished by any means, including acquiescence, if Jasmine Piedra was a child less than 16 years old and the parent, guardian, or person or institution having lawful control or custody of Jasmine Piedra had not acquiesced;
- 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.

If you find from the evidence that elements (1), (3), (4), and (5), and any of the alternative elements (2)(a), (2)(b), or (2)(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), (2)(b), or (2)(c), has

been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

To convict the defendant of the crime of unlawful imprisonment, as charged in count 3, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 13, 2012, the defendant, or an accomplice, restrained the movements of America Piedra in a manner that substantially interfered with her liberty;
- (2) That such restraint was
 - (a) without America Piedra's consent or
 - (b) accomplished by physical force, intimidation, or deception or
 - (c) accomplished by any means, including acquiescence, if America Piedra was a child less than 16 years old and the parent, guardian, or person or institution having lawful control or custody of America Piedra had not acquiesced; and
- (3) That such restrained 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.

If you find from the evidence that elements (1), (3), (4), and (5), and any of the alternative elements (2)(a), (2)(b), or (2)(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), (2)(b), or (2)(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

To convict the defendant of the crime of unlawful imprisonment, as charged in count 4, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 13, 2012, the defendant, or an accomplice, restrained the movements of Marla Marilyn Chacon in a manner that substantially interfered with her liberty;
- (2) That such restraint was
 - (a) without Marla Marilyn Chacon's consent or
 - (b) accomplished by physical force, intimidation, or deception or
 - (c) accomplished by any means, including acquiescence, if Marla Marilyn Chacon was a child less than 16 years old and the parent, guardian, or person or institution having lawful control or custody of Marla Marilyn Chacon had not acquiesced; and
- (3) That such restrained 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.

If you find from the evidence that elements (1), (3), (4), and (5), and any of the alternative elements (2)(a), (2)(b), or (2)(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), (2)(b), or (2)(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

APPENDIX B

INSTRUCTION NO. 10

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 11

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

APPENDIX C

INSTRUCTION NO. 7

To convict the defendant of the crime of residential burglary, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 13, 2012, the defendant or an accomplice entered or remained unlawfully in a dwelling;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 43855-1-II
)	
BRYAN DUNN,)	
)	
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 12TH DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRYAN DUNN
DOC NO. 294273
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF MARCH 2013.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

March 12, 2013 - 1:39 PM

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