NO. 43855-1-II

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

STATE OF WASHINGTON, Respondent

v.

BRYAN VANCE DUNN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01071-4

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

Bryan Vance Dunn (hereafter "Dunn") was charged by Amended Information with Residential Burglary and three counts of Unlawful Imprisonment. CP 5-6. For each count of Unlawful Imprisonment, the Amended information read:

> "...on or about May 13, 2012...did knowingly restraint [victim], a human being; contrary to Revised Code of Washington 9A.40.040(1), and/or was an accomplice to said crime pursuant to RCW 9A.08.020."

CP 6. The case proceeded to jury trial wherein Dunn was convicted of all four charges. CP 40-44.

At trial, the testimony shows that 3 girls, A.P., J.P., and M.C., were at the residence of A.P. and J.P. the morning of May 13, 2012. 1 RP at 53-54, 56-57; 2 RP at 11, 95, 106. The girls, A.P., J.P., and M.C., heard a knock at the door. A.P. went to answer the door. 1 RP at 59; 2 RP at 18, 25, 112. A Hispanic man and two non-Hispanic men were at the door. 1 RP at 60. Dunn was identified as one of the non-Hispanic men. 1 RP 73-74; 2 RP at 23-24, 58; 3 RP at 21-26. The Hispanic man, later referred to as "Luciano" told A.P. that he was her mother's manager. 1 RP at 60. A.P. closed the door and got her older sister, J.P. 1 RP at 61-62; 2 RP at 27. All three girls then came out to the living room where they saw the three men already inside sitting on the couches. 1 RP at 64. J.P. asked why the men were in the house and the men laughed. 1 RP at 65; 2 RP at 27-29. It appeared to the girls that Dunn called their mother and left her a voice mail. 2 RP at 29. Luciano appeared to know details about the girls' family. 2 RP at 65.

J.P. told the men to leave the house, but they laughed. 2 RP at 31-32, 65. Luciano called the two white men his bodyguards. 2 RP at 32. J.P felt threatened by the statements referring to the men as his bodyguards. 2

RP at 33. The men told the girls to get ready to leave and to hurry. The girls went to their room to put on clothes. 1 RP at 66; 2 RP at 122-23.

The girls were scared of the men and followed their directions to get in the car. 1 RP at 67; 2 RP at 34. The girls all testified that one of the girls picked up a knife and wrapped it in a shirt to hide it. 1 RP at 93; 2 RP at 42, 123-24. Dunn drove the vehicle. 1 RP 77-78; 2 RP at 36. Dunn drove to a house where Luciano and the passenger got out. 1 RP at 79; 2 RP at 38, 125, 147, 212. The girls remained in the vehicle with Dunn, and spoke to each other in Spanish so that Dunn could not understand. 1 RP 79-81; 2 RP 39-40, 127. The girls debated whether to call the police, but decided to run away instead. 2 RP 41-42.

Luciano came back to the vehicle with a plate of cucumbers and hot sauce. 1 RP at 85. He spilled some sauce on A.P.'s leg and used his finger to wipe it off and then licked the sauce off of his finger. 1 RP at 86, 99; 2 RP at 44, 191-93. The girls told Luciano not to touch A.P. 1 RP at 86; 2 RP at 44. Dunn then drove to Burgerville and ordered a lot of food for everyone. The girls denied eating the food they were offered. 1 RP 87-88; 2 RP 46.

The girls told the men to stop at a pink house, which the girls said was M.C.'s residence. 1 RP at 84. The house was not M.C.'s residence. 1 RP at 84. The girls did not want the men to know where M.C. lived. 1 RP

at 88; 2 RP at 47, 65-66, 101, 103, 196-97. The girls got out of the car and ran away through a field. 1 RP at 84, 102; 2 RP at 49, 67. The girls hid in bushes because they believed the men were looking for them. 1 RP at 90, 105-06; 2 RP at 49-50. The car sped after them. 2 RP at 49, 100. The girls then went to a store called Taboo Video nearby where they called A.P. and J.P.'s older sister. 1 RP at 91; 2 RP at 50-52, 95. The older sister picked the girls up and took them back to the apartment where they called police. 1 RP 91.

Anita is A.P's and J.P.'s mother. She was at work when she started receiving phone calls and text messages about men being in the home. 2 RP at 167, 169, 172. Anita returned to the apartment. 2 RP at 175. Anita did not give Dunn or the other two men permission to drive A.P. and J.P. anywhere. 2 RP at 169. M.C.'s mother also testified that she did not give permission for the men to drive M.C. anywhere. 2 RP at 154-59. All three girls were under the age of 16. 1 RP at 53-57; 2 RP at 11, 106.

The girls identified Dunn as the driver of the vehicle. The police contacted him and he provided a statement which was admitted at trial. 3 RP at 30.

At trial the court instructed the jury on the following instruction regarding knowledge:

> A person knows or acts knowingly or with knowledge with respect 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.

The Court conducted voir dire and jury selection in the presence of the defendant and in open court. Supp. RP 1-102. The actual selection of jurors and preemptory challenges occurred by written document at clerk's station. Supp. CP (See Appendix A).

During trial, defense attempted to introduce evidence of a video that one of the girls took on her cell phone during the car ride. 2 RP 81-83. The trial court excluded this evidence after finding that the video was of poor quality, unclear and would be distracting and confusing to the jury. 2 RP at 82-83.

C. ARGUMENT

I. THE INFORMATION INCLUDES ALL THE ESSENTIAL ELEMENTS OF UNLAWFUL IMPRISONMENT

Dunn alleges the information charging Unlawful Imprisonment was defective for failing to include all the essential elements of the crime. An information must include all essential elements of a crime in order to afford notice to an accused of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). As Dunn is challenging the sufficiency of the information for the first time on appeal, the information shall be construed "quite liberally." *State v. Moavenzadeh*, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998) (quoting *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992)). Dunn contends that the information is deficient for failing to define the word "restraint." In *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013), the Washington Supreme Court rejected the defendant's contention that the definition of an element of an offense is an essential element that must be alleged in the charging document. *Allen*, 176 Wn.2d at 630.

Unlawful Imprisonment is set by statute as "[a] person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040. The term "restrain" is defined in a separate statute as

"...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). The State charged Dunn with multiple counts of unlawful imprisonment, using the statutory language under RCW 9A.40.040. For an information to be constitutionally sufficient, the essential elements must "appear[] in any form, or by fair construction can be found" in the information. *Kjorsvik*, 117 Wn.2d at 108. If all the essential elements are in the information, the court inquires as to whether the defendant "has shown that he was nonetheless prejudiced by any vague or inartful language in the charge." *Kjorsvik*, 117 Wn.2d at 111.

Dunn relies in part on a recent Division One holding in *State v. Johnson*, 172 Wn. App. 112, 297 P.3d 710 (2012). However, Division One reversed its holding in *Johnson, supra* after the Supreme Court issued its opinion in *State v. Allen, supra.* In its holding in *State v. Phuong*, ___ Wn. App. ___, 299 P.3d 37 (2013), Division One found that the defendant's contention that the statutory definition of 'restrain' is an essential element of the crime of Unlawful Imprisonment fails. *Phuong*, 299 P.3d at 86. The defendant in *Phuong*, claimed that a statutory definition, not a constitutional imperative, was required to be in the charging document. *Id.* Division One relied upon the Supreme Court's holding in *Allen, supra* to

deny the defendant in *Phuong*'s claim and upheld the information as constitutionally sufficient. *Id.*

In *State v. Allen, supra*, the Supreme Court addressed whether, in a case involving the crime of Felony Harassment, the true threat requirement is an essential element of the statute. *Allen*, 176 Wn.2d at 626. The Court rejected the defendant's contention that the true threat requirement is an essential element of felony harassment, and relied upon Court of Appeals' cases that found the true threat requirement is not an essential element of harassment. *Id.* at 628-30 (citing *State v. Tellez*, 141 Wn. App. 479, 170 P.3d 75 (2007); *State v. Atkins*, 156 Wn. App. 799, 236 P.3d 897 (2010)).

As in the cases above in which the Court found it sufficient to instruct the jury on the definition of "true threat" (referring to *Allen, supra, Tellez, supra,* and *Atkins, supra*), it was sufficient for the trial court in Dunn to instruct the jury on the definition of "restrain." Dunn was sufficiently notified of the crime for which he was charged, including all essential elements, by the information, which reflects the statutory language of the Unlawful Imprisonment statute. As in *Phuong, supra*, the information was sufficient, and the necessary elements of unlawful imprisonment are found and fairly implied by the charging document. Dunn's convictions for Unlawful Imprisonment should be affirmed.

II. THE JURY INSTRUCTION DEFINING KNOWLEDGE WAS PROPER AND DID NOT RELIEVE THE STATE OF ITS BURDEN OF PROOF

Dunn argues that the jury instruction defining knowledge relieved the State of its burden of proving all the elements of the crimes of Unlawful Imprisonment and Residential Burglary. The instruction given in this case was proper and it accurately reflects the law. Dunn's argument fails.

Generally, appellate courts do not address alleged instruction errors raised for the first time on appeal unless the appellant demonstrates a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Dunn's contention that the 'knowledge' instruction relieved the State of its burden of proof, if true, concerns a manifest error of constitutional magnitude. *See State v. Goble*, 131 Wn. App. 194, 203-04, 126 P.3d 821 (2005); *see State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). If this alleged error relieved the State of its burden of proving the knowledge element by allowing the jury to assume that an essential element need not be proved, then this error is of constitutional magnitude which this court may review despite his failure to object. *State v. Goble*, 131 Wn. App. at 203 (citing to *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001) (citing *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) and *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996))).

Alleged errors of law in jury instructions are reviewed de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when as a whole properly inform the trier of fact of the applicable law." *State v. Gerdts*, 136 Wn. App. at 727, 150 P.3d 627 (2007) (internal quotation marks omitted) (quoting *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005)). When reviewing the effect of specific jury instruction phrasing, the court considers the instruction as a whole and within the context of all the instructions given. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Dunn relies upon the court's holding in *Goble, supra*, to support his claim that the knowledge instruction given was inappropriate and led to conflation of the mens rea elements of the crimes of Unlawful Imprisonment and Residential Burglary. In Dunn's case, the trial court instructed the jury on 'knowledge' as follows:

> A person knows or acts knowingly or with knowledge with respect 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 (emphasis added). The italicized portion of the above instruction is at issue here. In *Goble*, supra, the relevant portion of that instruction stated, "acting knowingly or with knowledge is also established if a person acts intentionally." *Goble*, 131 Wn. App. at 202. The addition of the language "as to a particular fact" solves the issue presented in *Goble*, *supra*, and clarified the issue for Dunn's jury. Therefore, Dunn's reliance on *Goble, supra* is misplaced.

It was not possible from these instructions, taken as a whole, that the jury convicted Dunn of Unlawful Imprisonment for simply intending to drive a vehicle. The 'to convict' instruction on each count of Unlawful Imprisonment is clear, the defendant must have acted "knowingly" with regard to elements 1, 2 and 3. CP 31-36. This "knowledge" instruction given in Dunn's case differs significantly from the instruction given to the jury in *Goble, supra*, and simply does not allow for conflation of the mens rea as the instruction did in *Goble, supra.*

Cases interpreting *Goble*, *supra*, have narrowed *Goble*'s application to those cases where two mens rea are elements of a single crime. *See State v. Gerdts*, 136 Wn. App. 720, 150 P.3d 627 (2007); *see State v. Boyd*, 137 Wn. App. 910, 924, 155 P.3d 188 (2007). The holding

in *Goble, supra* only applies when the jury has to consider more than one mental state. *Gerdts*, 136 Wn. App. at 728; *Boyd*, 137 Wn. App. at 924. The conflation of mental states is possible only when the mental states are being evaluated with respect to the same fact. So knowledge about one fact cannot be inferred from an intent about a separate fact. In *Goble, supra*, there were two mental states at issue with regard to one crime. The jury in *Goble* was instructed on both intent and knowledge and applied those instructions to the singular crime of Assault in the Third Degree. From the instructions given in that case, the jury was able to convict the defendant for an intentional assault without finding that he knew the victim was a police officer. *Goble*, 131 Wn. App. at 203.

In *Gerdts, supra*, the defendant was charged with Malicious Mischief in the Second Degree and the jury was instructed on "knowledge" as follows:

> A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.
>
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

> Acting knowingly or with knowledge also is established if a person acts intentionally.

Gerdts, 136 Wn. App. at 725. The defendant in *Gerdts* argued that the holding in *Goble, supra* applied to his case and the knowledge instruction created a mandatory presumption and allowed the jury to convict him if he took any intentional act. *Gerdts*, 136 Wn. App. at 727. The Court in *Gerdts, supra* did not agree with the defendant and held that unlike the offense at issue in *Goble*, Malicious Mischief had but one mens rea element and therefore there was no second mens rea element to conflate.

Dunn's situation is similar to *Gerdts, supra*. Each crime charged, Unlawful Imprisonment and Residential Burglary, had a singular mens rea element and therefore the holdings in *Gerdts, supra* and *Boyd, supra* apply. Where one mental state is at issue, an instruction as was given here is not error. *See State v. Gerdts, supra* at 728; *see State v. Boyd*, 137 Wn. App. at 924. The instructions given in Dunn's case do not conflate the intent and knowledge elements required under separate "to convict" instructions into a single element under a single "to convict" instruction. The "knowledge" instruction did not allow the jury to presume that Dunn knowingly restrained the victims without lawful authority if the jury found that he remained in the house with the intent to commit a crime. *See Gerdts*, 136 Wn. App. at 728.

The reasoning in *Goble, supra* is inapposite here. As in *Gerdts, supra* at 728, there is no second mens rea element in the crime of Unlawful Imprisonment to conflate. Dunn's argument has no merit. The instructions to Dunn's jury allowed the jury to find Dunn guilty of Unlawful Imprisonment only if he acted knowingly with regard to elements 1, 2 and 3 of the to convict instructions for Unlawful Imprisonment, including the element of without lawful authority. Thus, presuming the jury followed the instructions, as we must, it is impossible for the jury to have convicted Dunn of Unlawful Imprisonment without finding that he knew he did not have lawful authority to take the victims in his car as Dunn suggests. The jury instructions were clear and the holding in *Goble, supra* is inapplicable

III. THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Dunn alleges prosecutorial misconduct for statements the prosecutor made during closing argument. The prosecutor did not commit misconduct during closing argument, and any potential misconduct was not so flagrant and ill-intentioned as to have denied Dunn a fair trial. Dunn's claim of prosecutorial misconduct is without merit.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v.*

Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d at 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158

Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

In Dunn's case, any potential misstatement by the prosecutor did not affect the jury verdict. Dunn was not denied a fair trial. The closing argument must be taken in the entire context in which it was given. The prosecutor's closing argument makes up 35 pages of the transcript of the trial proceedings. Dunn focuses his argument of prosecutorial misconduct on one sentence of the prosecutor's argument. See Am. Br. of Appellant, p. 27. This sentence must be taken in the entire context of the surrounding comments and the entire argument. *State v. Fisher*, 165 Wn.2d at 747. The very next sentence of the prosecutor's argument is discussing the residential burglary charge. 4 RP at 40. The statement to which Dunn

assigns error, alone, does not rise to the level of prosecutorial misconduct. It does not misstate the law. Though the prosecutor's argument could be described by some as awkward or difficult to follow, his argument was not evidence that this was made clear to the jury. CP 14.

Dunn's argument that the prosecutor instructed the jury that all he had to prove was the Dunn intentionally drove the vehicle and is therefore guilty is a narrow characterization of the prosecutor's overall argument. It is clear, when the argument is taken as a whole and in context, that the prosecutor's remarks were not a misstatement of the law, but rather an attempt to explain to the jury what intentional means. Nothing suggests the challenged argument was flagrant or ill-intentioned. Moreover, the jury was properly instructed on the elements in the to-convict instructions, and the prosecutor referred the jury to that instruction. 4 RP at 55-56. A jury is presumed to follow the court's instruction. *State v. Hutchinson*, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998) *cert. denied*, 525 U.S. 1157 (1999).

Even if there was prosecutorial misconduct for improper argument, a case will not be reversed because of an improper argument of law "unless such error is prejudicial to the accused and only those errors which may have affected the outcome of the trial are prejudicial." *Davenport*, 100 Wn.2d at 762 (citing *State v. Estill*, 80 Wn.2d 196, 200, 492 P.2d

1037 (1972) and *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)). This court should inquire as to whether the improper argument influenced the jury and whether it could have been cured by instructing the jury to disregard the remark. *Id.* at 762 (citing *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983)). If there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, the defendant was denied a fair trial. *State v. Wheeler*, 95 Wn.2d 799, 807, 631 P.2d 376 (1981). But if a curative instruction would have obviated any prejudicial effect on the jury, then the case should not be reversed. *See State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2011) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). Dunn did not object and did not request a curative instruction. This goes far in showing the context of the prosecutor's argument was not improper and was not flagrant or ill-intentioned. Further, any misstatement was minor and fleeting, one sentence in 35 pages of argument. Surely a curative instruction would have cured any improper argument made.

The instructions given to the jury were proper. The court must presume, absent any contrary showing, that the jury followed the court's instruction. *State v. Cerny*, 78 Wn.2d 845, 480 P.2d 199 (1971), *vacated*, 408 U.S. 939 (1972). There is no evidence, as there was in *Davenport*, *supra*, that the jury was mislead by the prosecutor's argument. The

evidence of the defendant's guilt was overwhelming, and he was properly convicted after a fair trial. Dunn's claim of prosecutor misconduct should be denied.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF A CELL PHONE VIDEO

Dunn alleges error for the trial court's failure to admit video evidence at trial. A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 135 L. Ed. 2d 1084, 116 S. Ct. 2568 (1996). A trial court abuses its discretion only when it bases its decision on untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 140 L. Ed. 2d 323, 118 S. Ct. 1193 (1998). A defendant does not have a right to have irrelevant evidence admitted. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

The trial court in Dunn refused to allow admission of the cell phone video because it was likely to result in confusion of the jury. 2 RP at 82. Evidence Rule (ER) 403 dictates that jury confusion is a permissible reason for excluding evidence. The trial court is the court in the best position to determine, in the context of the entire trial, whether the video evidence Dunn wished to introduce would lead to confusion of the jury.

As the court noted, the video was confusing, unclear and it was difficult to understand what was happening on the video. The judge likened it to a very, very blurry photograph. 2 RP at 83.

Even if the video had been admitted, it would not have affected the outcome of the case. Some errors are so insignificant as to be harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). In reviewing the evidence presented at trial, there was overwhelming, untainted evidence of Dunn's guilt. Dunn suggests the video would have shown the jury the casual nature of the victims' demeanors. Neither fear nor physical restraint are elements of the crime of Unlawful Imprisonment. All three victims were under the age of 16, and as such, as the prosecutor argued, acquiescence without parental consent was sufficient to constitute the crime. 4 RP at 55. All three victims testified that based on statements made at the house they feared the three men, and that is why they got in the vehicle with the men. The mothers of the victims testified they did not know the men involved, including the defendant, and that they did not give them permission to take their children. This evidence overwhelmingly established Dunn's guilt. Whether the victims had a casual demeanor would not have made his acts any less criminal. The overwhelming amount of evidence and its credibility would lead to the same result whether the video evidence had been admitted or not. As such,

this error was harmless beyond a reasonable doubt and Dunn's convictions should be affirmed. *See State v. Guloy*, 104 Wn.2d at 426.

V. THE TRIAL COURT DID NOT VIOLATE DUNN'S RIGHT TO A PUBLIC TRIAL

Dunn alleges that the performance of the preemptory challenges on paper, rather than spoken out loud, violated his right to a public trial. Many things are filed with the court by paper document, as opposed to being spoken out loud in open court. Simply because the prosecutor and defense attorney did not say out loud who they struck from the jury did not render this proceeding private or deny the public access.

Article I, section 22 of the Washington State Constitution, and the Sixth Amendment to the United States Constitution provide a criminal defendant with a right to a public trial. Article I, section 10 of the Washington State Constitution provides that "justice in all cases shall be administered openly." This grants both the defendant and the public an interest in open, accessible proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The first part of an open courts violation analysis is to consider whether there was even a closure. *State v. Sublett*, 176 Wn.2d 58, 71, 292 p.3d 715 (2012). A closure occurs "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may

leave." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Not every interaction between the court, counsel and defendant will implicate the right to public trial or constitute a closure if the courtroom is closed to the public. *Sublett*, 176 Wn.2d at 71. The resolution of whether the public trial right attaches to a particular proceeding cannot be resolved based on the label given to the proceeding. *Id.* at 73 (citing to *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press II*)). If the proceeding does not fall within a specific category of trial proceedings that the Supreme Court has already established implicated the public trial right, the next question is whether or not the proceeding satisfies the newly established "experience and logic" test. *State v. Wilson*, ___ Wn. App. ___, 298 P.3d 148, 152 (2013). In *Sublett, supra*, the Washington Supreme Court adopted the experience and logic test to determine whether the core values of the public trial right are implicated. *Id.* at 73. This test requires the court to ask "whether the place and process have historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* (citing to *Press II, supra* at 8). If the answer to both questions is yes, the public trial right attaches. *Id.* The Court in *State v. Wilson*, applied this "experience and

logic test" to the excusal of jurors prior to the start of voir dire. *Wilson*, 298 P.3d at 152.

The first question is whether the proceeding squarely falls within a specific category of proceeding that implicates the public trial right. Existing case law does not hold that a defendant's public trial right applies to every component of the broad "jury selection" process. *Wilson*, 298 P.3d at 153. The existing case law addresses application of the public trial right only to the "voir dire" of prospective jurors. *Id.* As noted in *Wilson*, established case law has not characterized the entire jury selection process as "courtroom closures," and no case has held that administrative components of the jury selection process implicate the public trial right. *Id.* at 154. The Court in *Wilson, supra* held that the preliminary excusal of ill jurors by the bailiff prior to the commencement of voir dire does not implicate the public trial right. *Id.* at 158. As in *Wilson*, the issue here is administrative. The entire venire panel was questioned in open court. No part of voir dire was handled in chambers or off the record. The preemptory challenges were made in writing by the prosecutor and the defense attorney. This is administrative and does not implicate the public trial right.

As this part of jury selection has not been addressed, the court should apply the "experience and logic" test. The experience and logic test

allows the determining court to consider the actual proceeding at issue for what it is. *Sublett, supra* at 73. First, the State contends the entire voir dire process, including preemptory challenges was done in open court. The document that the prosecutor and defense attorney used to note their challenges was filed in the court file and thus is a public document accessible to the public. See Appendix A (Supp. CP). Second, the experience prong of this test would show it is extremely common to hold preemptory challenges in such a fashion. All challenges for cause are put on the record, out loud, but preemptory challenges are often done in the same way they were done in Dunn's case. The second part of the test, the logic prong, also shows this process was not violative of the defendant's or the public's rights. Would openness "enhance[] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system?" *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press I*). In this situation speaking the strikes out loud would serve no necessary purpose.

In *Sublett, supra*, the Supreme Court found that answering a jury question in chambers was not a closure under the experience and logic test. *Sublett, supra* at 75. The situation to which Dunn assigns error is similar to that in *Sublett, supra*. In *Sublett*, the jury question was filed in the public file and accessible to the public. *Id.* at 77. Here, the document

filled out by the prosecutor and defense making their preemptory challenges is filed in public file. See Appendix A (Supp. CP). The public has full access to the decisions and preemptories that each side made during this process. It is clear from the record in Dunn that the judge asked for any for cause challenges on the record and out loud. The performance of the preemptory challenges afterwards are not necessary to be done out loud. Just as many motions are filed in court and not read verbatim into the record, so are jury preemptories handled. Dunn's right to a public trial was not violated, and the public's right to a public trial was not violated. None of the values served by the public trial right are violated under the facts of this case. No witnesses were involved at this stage, no testimony was involved, no risk of perjury exists. The appearance of fairness was satisfied by having the preemptories placed on the record by filing in the court file. The jury preemptory challenges portion of voir dire is not a proceeding so similar to the trial itself that the same rights attach. Dunn has not established that a closure or public trial right violation occurred.

VI. THE TRIAL COURT DID NOT VIOLATE DUNN'S RIGHT TO BE PRESENT

Dunn argues his right to be present at a critical stage of trial was violated when preemptory challenges to the jury pool were conducted on a sheet of paper at clerk's station. Dunn was present during jury selection

and was able to confer with his attorney if he desired. Dunn's right to be present was not violated.

Dunn likens the situation in his case to that of *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). In *Irby*, the trial court dismissed several jurors based on answers to their juror questionnaires, but did the dismissal with agreement from the prosecutor and defense attorney over email without opportunity for defense to consult with the defendant. *Irby*, 170 Wn.2d at 878. These facts are starkly different from the facts of Dunn's case. The preemptory challenges were done in the courtroom while Dunn was present. Though Dunn's attorney went to the clerk's station while Dunn remained at counsel table, his attorney had the ability to walk back and forth between the clerk's station and the counsel table. Dunn and his attorney had the opportunity, if they wished, to consult prior to, during and after the preemptory challenges were made. This is significantly different from the occurrence in *Irby, supra*, which happened without any ability or opportunity for defense to consult with the defendant.

Also, unlike *Irby, supra*, it is provable that any potential violation of Dunn's right to be present was harmless beyond a reasonable doubt. The only possible prejudice to Dunn was the ability to object to a preemptory challenge by the State on the basis of *Batson v. Kentuckey*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Dunn has had access

to the jury selection document which shows which jurors the prosecutor struck, as it is a public document, and has raised no such issue. It is also worth noting that there is no discussion by the defense attorney, no issue raised at the time of the jury selection, that the State made some inappropriate choices in jury selection. This is strong evidence to suggest that the defendant, the defense attorney, and the court, did not see evidence of inappropriate jury selection at the time of trial.

Dunn was not absent during this stage of trial as he was present in the courtroom and had access to his attorney during the entire voir dire and jury selection process. Dunn's claim fails and his convictions should be affirmed.

D. CONCLUSION

Dunn's assignments of error lack merit. The information charging Unlawful Imprisonment was not defective; the jury instruction on "knowledge" did not impermissibly shift the burden; the prosecutor did not commit misconduct as his closing argument must be taken in context and read as a whole; the court did not conduct any part of voir dire outside the presence of the defendant or the public and the court did not abuse its discretion in failing to admit proffered evidence when its admission would unduly confuse and possibly mislead the jury. Dunn received a fair trial,

with proper instructions and was able to effectively confront witnesses and present his defense. Dunn's convictions for Residential Burglary and three counts of Unlawful Imprisonment should be affirmed.

DATED this _____ day of May, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
RACHAEL R. PROBSTFELD
WSBA #37878
Deputy Prosecuting Attorney

APPENDIX A

CASE NUMBER	12-1-01071-4		TRIAL DATE	08-13-2012
PLAINTIFF	State of Washington	VS	DEFENDANT	Bryan Dunn
ATTORNEY	x [signature] AIMEE HARVEY		ATTORNEY	x [signature] Anthony Lowe

1.	2.	3.	4.	5.	6.	7.
P1 Wilhelm, Cynthia	CAUSE Mundy, Viktoria	Schoof, Sandra	D-1 Beaman, Jennifer	CAUSE Greenaway, Jennifer	CAUSE Heilweck, Linda	Cayne, Sabrina
Riner, Christopher P-3	Arellano, Alvaro P-2		Ekdahl, Carol	Nelson, Derek	Ernst, Rachael	
Chandler, Debra P-4	Brown, Deborah P-5					
D3 Landon, Gloria	Black, Scott P6					
Diaz, Sara	Foell, Judy					

8.	9.	10.	11.	12.	ALT.
Codron, Jack	Hunter, Deborah	Niebauer, Martha	Melara, Charles	D2 Skinner, James	Smolen, Emily
				Gompertz, Ronald	Warner, Natalie

Jury Duly Impaneled and Sworn by the Court @ 12:33pm

ALTERNATES

1. Pass on Smolen, Emily / Pass on Warner, Natalie	NO	1. Emily Smolen	NO
2.	NO	2.	NO

CHALLENGES

PLAINTIFF		DEFENDANT	
1. Wilhelm, Cynthia #1	NO	1. Jennifer Beaman #4	NO
2. Arellano, Alvaro #2	NO	2. James Skinner #12	NO
3. Riner, Christopher #1	NO	3. Pass	NO
4. Chandler, Debra #1	NO	4. Gloria Landon 1	NO
5. Brown, Debra #2	NO	5. Pass	NO
6. Black, Scott #2	NO	6. Pass	NO

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mb

CLARK COUNTY PROSECUTOR

May 21, 2013 - 1:49 PM

Transmittal Letter

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Case Name: State v. Bryan Dunn

Court of Appeals Case Number: 43855-1

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Affidavit

Letter

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Personal Restraint Petition (PRP)

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