COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Lahaie, 2019 ONCA 899
DATE: 20191114
DOCKET: C57695 and C57696

Watt, Huscroft and Jamal JJ.A.

Docket: C57695

BETWEEN

Her Majesty the Queen

Respondent

and

Sylvain Lahaie

Appellant

Docket: C57696

AND BETWEEN

Her Majesty the Queen

Respondent

and

Olga Lahaie

Appellant

Andrew Menchynski, for the appellant Sylvain Lahaie

Cristina Candea, for the appellant Olga Lahaie

Michael Perlin, for the respondent

Heard: August 22, 2019

On appeal from the convictions entered on May 6, 2013 and the sentences imposed on September 6, 2013 by Justice Gordon D. Lemon of the Superior Court of Justice, sitting with a jury.

Huscroft J.A.:

[1] This is an unusual case.

[2] What began with a lawful citizen's arrest by homeowners defending their property ended with their conviction for unlawful confinement of the two young men whom they caught stealing from them.

[3] The appellant homeowners, Sylvain and Olga Lahaie, caught the complainants, Paul Taylor and James Reid, while they were in the midst of stealing their property, made a citizen's arrest, and bound them with zip ties. Instead of calling the police immediately, they called the complainants' parents, who came to the appellants' property some time later. The police were called only after the complainants' parents arrived, by which time the complainants were no longer bound.

[4] The complainants were charged with theft, but serious charges were also brought against the appellants. They were charged with pointing a firearm, extortion, and unlawful confinement. Sylvain Lahaie was also charged with assault. Following a jury trial in 2013, the appellants were found guilty of unlawful

confinement but acquitted of all other charges. They received suspended sentences.

[5] The appellants appeal from their conviction. Sylvain Lahaie informed the court that he abandoned his appeal from sentence.

[6] The appellants argue that the trial judge erred in instructing the jury concerning the requirements of unlawful confinement. The appellants also contend that the jury should have been instructed that they could acquit based on self-defence and defence of their property.

[7] I have concluded that a combination of errors in Crown counsel's closing address, the trial judge's failure to correct those errors, and errors in the trial judge's instructions caused the jury to be charged inadequately on the key issue in this case — whether the complainants consented to their confinement. As a result, the appellants' conviction cannot stand. There is no need to consider the alternative grounds of appeal, namely, self-defence and defence of property.

[8] I would allow the appeal and order a new trial for the reasons that follow.

BACKGROUND

[9] The complainants unlawfully entered the appellants' secluded, rural property on several occasions prior to the events in question. On August 14, 2008, the complainants came to the appellants' property intending to steal from them for the third night in a row.

[10] The theft was brazen: the complainants simply drove their van onto the appellants' property in the middle of the night and started helping themselves to a pile of stainless steel. They planned to sell the steel to a scrap metal dealer, as they had done on prior occasions.

[11] The complainants were in the midst of loading their van when the appellants caught and confined them. The circumstances of the confinement, and what followed, were disputed at trial.

[12] The complainants testified that the appellants confronted them with a firearm, held them hostage, assaulted them, and demanded money from them in exchange for not calling the police. The appellants testified that they had no firearms with them when they arrested the complainants, denied that they assaulted the complainants, and denied that any extortion occurred. According to the appellants, they did not call the police after arresting the complainants because the complainants pleaded with them not to do so, offering to pay compensation for their previous thefts. The appellants claimed that Sylvain Lahaie asked whether the complainants were proposing they be cut loose on a promise of repayment, and the complainants confirmed that was not what they were proposing. Reid suggested the van be left as collateral, Taylor eventually agreed, and the complainants asked that their parents be called.

[13] The appellants called the complainants' parents and released Taylor after his father arrived on the scene. Taylor left the appellants' property with his father on the understanding that they were going to return with money for the appellants. Reid's mother also attended the property and then left to go to the bank. Reid remained at the property. Taylor returned with his father and mother. His mother wanted to call the police. The appellants called the police and the complainants were arrested.

[14] The Ontario Provincial Police discovered that the appellants were registered gun owners and obtained search warrants for their property. They seized a Glock handgun, arrested the appellants, and charged them with pointing a firearm, extortion, assault (against Sylvain Lahaie only), and unlawful confinement. The jury convicted the appellants of unlawful confinement, but acquitted them of all of the other charges.

The *Criminal Code*

[15] The events giving rise to the appellants' conviction occurred in 2008. The relevant provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, then in force, provided as follows:

> **279 …**
>
> **Forcible confinement**
>
> (2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

> (a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
>
> (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.
>
> …
>
> **Arrest without warrant by any person**
>
> 494 (1) Any one may arrest without warrant
>
> (a) a person whom he finds committing an indictable offence; or
>
> (b) a person who, on reasonable grounds, he believes
>
> (i) has committed a criminal offence, and
>
> (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.
>
> **Arrest by owner, etc., of property**
>
> (2) Any one who is
>
> (a) the owner or a person in lawful possession of property, or
>
> (b) a person authorized by the owner or by a person in lawful possession of property,
>
> may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.
>
> **Delivery to peace officer**
>
> (3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.

DISCUSSION

[16] It is not disputed that the appellants' arrest of the complainants was lawful under s. 494(1) of the *Criminal Code*, at least initially. The Crown concedes as

much. The appeal centres on the continuing legality of the complainants' confinement.

[17] At trial, Crown counsel argued that the appellants' confinement of the complainants became unlawful when they failed to deliver them to the police "forthwith", as required by s. 494(3). It was common ground that this meant as soon as reasonably possible. The Crown's theory was that the appellants chose not to call the police for a period of several hours and attempted to extort money from the complainants at gunpoint during this time.

[18] The appellants argued that the complainants persuaded them to call their parents, rather than the police, and agreed to remain bound until their parents arrived. According to the appellants, the complainants consented to their continuing confinement and as a result were not confined unlawfully.

[19] These arguments do not meet up. On the Crown's argument, a lawful confinement became unlawful as a result of the appellants' failure to deliver the complainants to the police forthwith, while on the appellants' argument, a lawful confinement never became unlawful because the complainants consented to it continuing.

[20] The problem stems from a lack of clarity concerning the relevance of consent to the complainants' continuing confinement. As I will explain, the trial judge erred by failing to instruct the jury that if they had a reasonable doubt as to

whether the complainants consented to their continued confinement, the appellants could not be found guilty of unlawful confinement.

The offence of unlawful confinement

[21] The parties disagree about the role played by the absence of consent in the *actus reus* of the offence of unlawful confinement.

[22] The appellants submit that the absence of consent to confinement is one of three components of the *actus reus* of unlawful confinement, citing *R. v. Niedermier*, 2005 BCCA 15, 193 C.C.C. (3d) 199, at para. 48, leave to appeal refused, [2005] S.C.C.A. No. 103. The British Columbia Court of Appeal described the three components as follows: "(1) a confinement, (2) the confinement is without lawful authority, and (3) a lack of consent by the complainant to the confinement. Proof of the first two elements is objective; the third, subjective."

[23] The Crown says that only the first two are components of the *actus reus*, and that the lack of consent requirement is subsumed under either or both of those components, citing the decision of the Supreme Court in *R. v. Magoon*, 2018 SCC 14, [2018] 1 S.C.R. 309, at para. 64.

[24] In *Magoon*, at para. 64, the Supreme Court stated that "[u]nder s. 279(2) of the *Criminal Code*, the Crown must establish that (1) the accused confined the victim, and (2) the confinement was unlawful." At para. 72, the court concluded:

> There is no doubt that [the deceased child] was confined on Sunday. She was coercively restrained and directed contrary to her wishes. And the confinement was clearly unlawful. The acts of "discipline" were grossly disproportionate, cruel, degrading, deliberately harmful, and far exceeded any acceptable form of parenting. [Emphasis added.]

[25] These passages suggest that the lack of consent is not a separate component of the *actus reus*, but is instead an aspect of the component of confinement. However, there is also authority suggesting that lack of consent is an aspect of the component of lawful authority: see *e.g.* David Watt, *Watt's Manual of Criminal Instructions*, 2nd ed. (Toronto: Carswell, 2015), at p. 885.

[26] The matter need not be resolved for purposes of this appeal. Whether it is subsumed within one or both of the components of confinement and unlawfulness, there is no doubt that a lack of consent is an element of the offence of unlawful confinement that the Crown must prove beyond a reasonable doubt: *R. v. Gough*, (1985) 18 C.C.C. (3d) 454 (Ont. C.A.), at p. 458. This appeal succeeds because the jury was not adequately informed of this requirement.

The positions of the parties at trial

The defence

[27] The defence theory was that the appellants did not call the police immediately because the complainants begged them not to do so. In other words, following what began as their lawful confinement pursuant to the citizen's arrest,

the complainants consented to their continued confinement while the appellants arranged for their parents to come. On this theory of events, the continued lawfulness of the complainants' confinement did not depend on whether the police were called forthwith. Counsel for Sylvain Lahaie made the following point to the jury:

> [A]lthough they – Paul Taylor and James Reid didn't necessarily consent to being bound, they complied with the demand and when they gave the number to, for the parents to be called, it was because of the proposal that they were offering. So, in my submission, that evidence supports the proposition that, in fact, from the circumstances that they were in at the time, they consented to that delay. They consented to a delay of their being bound. And the reason why that is important is because, in my submission, subject to His Honour's instructions on the point, you don't have an intentional confining or an unlawful confining if the [persons] involved are consenting to it. And, in my submission, if you believe the evidence presented by Sylvain and Olga, it does support, in my submission, the proposition that that delay was actually consented to. [Emphasis added.]

Discussions following the defence address

[28] In pre-charge discussions with the trial judge following defence counsel's address, Crown counsel focused on the requirement that the appellants deliver the complainants to the police forthwith following their arrest of the complainants, without consideration of the separate issue of consent:

> The question isn't was it reasonable for the confinement to continue without calling the police, because the Section 494 [arrest without warrant power] imposes a duty. They must call the police. There is a duty on them

> there. … Because the question is, did they fulfill their duty or not. … [T]he question is, did they call the police quote at the first reasonable opportunity, or did they call the police reasonably soon in the circumstances. [Emphasis added.]

[29] Crown counsel deprecated the defence's consent argument, asserting that there was no air of reality to it:

> At the very end of his submissions, I think [counsel for Sylvain Lahaie] suggested that, he suggested the defence of consent. Which is the first time that I had heard of that. And in my respectful submission, Your Honour, there is simply no air of reality to the defence of consent. It ought not to be left with them. Well, it's not in your charge, but it's just not available, in my submission.

[30] Crown counsel's reference to the "defence of consent" appears to reflect a misunderstanding of the relevance of consent to the offence of unlawful confinement. Consent was not a "defence" that required an air of reality in order to be put to the jury. On the contrary, the absence of consent was an essential part of the offence the Crown was required to prove beyond a reasonable doubt in order to prove unlawful confinement in the circumstances of this case.

[31] The trial judge stated to Crown counsel that "it would be a lawful confinement because they [the appellants] agreed with Taylor and Reid that they would work out this deal". However, Crown counsel insisted that "it's still not a lawful confinement because they failed in their duty [to deliver to the police forthwith]". The following exchange then occurred:

> THE COURT: Because they didn't go fast enough.

> [CROWN]: Right.
>
> THE COURT: But if the jury find that they acted forthwith, then they have a defence whether this idea of consent is in the air or not. Because they would have made a finding of fact that would make any consent irrelevant.
>
> …
>
> [THE COURT]: You can think about that overnight, because you are going to plug that somewhere in to your address, and we'll see whether I really have to do that. But I don't see it at present.
>
> …
>
> THE COURT: And I think the word "consent" was used almost like Mr. Lahaie used the word "duress". It might have legal connotations in a technical fashion, but it really wasn't meant that way. Right? Here really just saying it was an agreement.

[32] Counsel for Sylvain Lahaie interjected:

> [COUNSEL FOR SYLVAIN LAHAIE]: Your Honour, in my submission, in those circumstances, the fact that they would have agreed to the delay in having Stephen Taylor [Paul Taylor's father] attend, in my submission, that would be a basis to say that they were consenting to the position that they were in.
>
> THE COURT: But the consent would only really matter to an assault. And they are not charged with assault.
>
> [COUNSEL FOR SYLVAIN LAHAIE]: No. But, for example, intentional confinement is defined with the, without consent. And, in fact, unlawful confinement. It's not unlawful if the person agrees to it.

> THE COURT: Right. They would only have agreed to it if the jury – the jury could only find that they agreed to it if the jury accepted the Lahaie evidence.
>
> [COUNSEL FOR SYLVAIN LAHAIE]: Absolutely.
>
> THE COURT: And if they accept the Lahaie evidence the defences that are front and centre kick in long before an analysis of consent. If my pessimistic estimates work out, you can tell me more about that at the end of tomorrow afternoon, part way through the Crown's address, and I can deal with it in my charge tomorrow night before I give it on Wednesday.

[33] These exchanges reveal considerable confusion about the nature of the offence and the relevance of consent to its proof.

[34] Counsel for Olga Lahaie addressed the jury following these discussions, but did not discuss the defence of consent in relation to the offence of unlawful confinement. Instead, he took the position that, in all of the circumstances, the police were in fact called forthwith.

The Crown

[35] Crown counsel advised the court and counsel that he would be showing a PowerPoint presentation as part of his address. Counsel and the trial judge reviewed the presentation slides together in the absence of the jury and, among other issues, discussed Crown counsel's statements on the slides regarding the requirement to contact the police forthwith.

[36] One of the proposed slides stated: "WHY THEY DIDN'T CALL FORTHWITH DOESN'T MATTER". In discussing this slide, Crown counsel said:

> [The appellants'] motivation for not calling [the police] is utterly irrelevant. In fact, I am not going to say this, but it goes to sentence. It doesn't go to anything else. The question of whether or not they did meet [the requirement of] forthwith is alive. But the question of why they did it isn't.

[37] The trial judge challenged the Crown's position, stating that "if it is as the Lahaies say, because the deal was offered to them, then why is a big part of all the circumstances." Crown counsel and the trial judge then had the following exchange:

> [CROWN]: It's a big part of all the circumstances, but it's incorporated into the concept of what forthwith means. It is part of forthwith.
>
> THE COURT: Right.
>
> [CROWN]: It's not, it doesn't exist independent.
>
> THE COURT: But why, if it's part of forthwith, then it does matter why they didn't call forthwith.

[38] The trial judge instructed the Crown to remove the statement "WHY THEY DIDN'T CALL FORTHWITH DOESN'T MATTER" from the slide, explaining that "as it is, it's wrong. In context it might be entirely correct."

[39] Crown counsel then addressed the jury. His address focused on the appellants' obligation to call the police forthwith, with only passing references to the non-consent of the complainants:

> At the moment … that the Lahaie's did not comply with the duty to deliver Taylor and Reid to the police forthwith, at that moment they turned away from the required, they

> turned away from the duty and they lost the protection of the law. From that moment onwards any continued detention against their will was a forcible confinement. So, from the point of arrest, citizen's arrest made properly, onwards lawful authority, lawful authority, lawful authority, until the point of forthwith and anytime after the point of forthwith you lose lawful authority and if the other element to the offence is satisfied, which it is in this case, you are guilty of the offence of unlawful confinement. Forthwith is a requirement that speaks to time. Did they call the police soon enough? The question isn't were their actions reasonable from start to finish.

[40] Crown counsel took the position that the appellants were guilty on their own evidence, stating, "Even if you disagree completely with everything that I have to say about the facts, even on the defence version of the facts, I put it to you, that Sylvain and Olga Lahaie are guilty of the offence of forcible [sic] confinement."

[41] Crown counsel later told the jury:

> Importantly, why [the appellants] didn't deliver Taylor and Reid forthwith doesn't matter. … [For] [t]he purpose of unlawful confinement … if you find that they [the appellants] did not deliver them [the complainants] forthwith then they're guilty of the offence.

The trial judge's instructions

[42] The trial judge addressed the relevance of consent in his instructions to the jury, but only summarily. His focus was on the appellants' obligation to contact the police.

[43] The trial judge addressed the requirement of physical restraint as follows:

> To intentionally confine another person is to physically restrain that person contrary to his wishes thereby depriving that person of his liberty to move from one place to another. … It seems to me and it seems from the submissions given to you that there is little doubt that Mr. Reid and Mr. Taylor were confined. [Emphasis added.]

[44] The trial judge then addressed the requirement of lawful authority:

> Lawful authority means just what it says. Authority granted by law. For example, a police officer has a lawful authority to restrain someone he or she has arrested. However, the lawful authority ends when the reason for the arrest ceases. And any unnecessary further confinement is unlawful unless consented to by the complainant. If the restraint is or becomes unlawful then the restraint is without lawful authority. Again it is agreed that the person may bind someone for the purposes of safety, and the initial binding of Mr. Taylor and Mr. Reid, as part of the arrest was lawful. The question is did [the appellants] call the police as soon as reasonably possible or practicable having regard to all of the prevailing circumstances? [Emphasis added.]

Errors in the instructions

[45] As the trial judge noted, there was no doubt that the complainants were physically restrained — all parties accepted that they were tied with zip ties following their arrest. The question was whether the complainants consented to remaining confined, and this issue needed to be specifically addressed and explained by the trial judge.

[46] Although the trial judge referred to this issue, read as a whole his instructions focused on the wrong issue. Even if the appellants failed to call the police forthwith — an issue that went to the continuing lawfulness of the complainants' arrest —

their confinement of the complainants was unlawful only if the complainants did not consent to it. Consent in no way depended on whether or when the appellants called the police. If the appellants' evidence were accepted, or if it at least left the jury in a state of reasonable doubt as to whether the complainants consented, they were entitled to be acquitted, and any concern about their failure to call the police forthwith was irrelevant.

[47] The trial judge's instructions in this regard were inadequate. Although his brief mention of consent was accurate, he did not instruct the jury that it was for the Crown to prove a lack of consent beyond a reasonable doubt, nor did he review the evidence relevant to consent and relate it to this issue. Moreover, his instructions conflated the lawfulness of the complainants' confinement with the lawfulness of their arrest, as the following passage indicates:

> [A]ny unnecessary further confinement is unlawful unless consented to by the complainant. If the restraint is or becomes unlawful then the restraint is without lawful authority. Again it is agreed that the person may bind someone for the purposes of safety, and the initial binding of Mr. Taylor and Mr. Reid, as part of the arrest was lawful. The question is did Mr. and Mrs. Lahaie call the police as soon as reasonably possible or practicable having regard to all of the prevailing circumstances? And again you will consider all of the evidence, along with my comments on citizen's arrest. Here it comes again, but it's important. Do you accept the [Lahaies'] evidence that they had a lawful authority to confine Mr. Taylor and Mr. Reid? If not, does it raise a reasonable doubt? If not, does the rest of the evidence persuade you beyond a reasonable doubt that they did not have a lawful authority? [Emphasis added.]

[48] In this passage, the trial judge correctly states that “any unnecessary further confinement is unlawful unless consented to by the complainant”, but he countermands this instruction later in the same passage by stating that the lawfulness of the further confinement depended on whether the appellants called the police as soon as reasonably possible in the circumstances.

[49] Whether the appellants failed to call the police forthwith and whether the jury had a reasonable doubt about whether the complainants consented to their continued confinement were separate issues. The trial judge failed to make this clear for the jury; failed to instruct the jury adequately on consent; and failed to review the evidence and relate it to the consent issue. As a result, the jury may well have convicted the appellants despite having a reasonable doubt about consent.

[50] The risk that this occurred was magnified by the trial judge’s failure to correct erroneous comments made by Crown counsel in his closing submissions. Counsel had by this point told the jury that “[i]mportantly, why they didn’t deliver Taylor and Reid forthwith doesn’t matter” — the comment the trial judge had required Crown counsel to remove from his PowerPoint slides — and stated that the appellants were guilty of the offence of unlawful confinement any time after they failed to call the police forthwith. Although Crown counsel made passing references to the complainants being held against their will (as set out previously), the clear thrust of his submissions would have left the jury with the impression that the appellants

were guilty of unlawful confinement simply if they did not call the police forthwith. The problem is evident in the trial judge's summary of the Crown's argument:

> [T]he [Lahaies] are guilty of unlawful confinement because they failed in their duty to deliver Mr. Taylor and Mr. Reid to the police forthwith and, in fact, took no steps to do so for over five hours from the time they were detained. The clearest point of departure from their duty occurred when they called the parents and not the police.

[51] Again, this summary is erroneous because it ignores the fact that the jury was required to acquit the appellants if they had a reasonable doubt as to whether the complainants consented to their continued confinement. It was incumbent on the trial judge to correct the Crown's erroneous remarks, lest the jury be left with a misunderstanding of the law, but he failed to do so.

[52] Moreover, Crown counsel told the jury that the Lahaies were guilty of unlawful confinement even on the defence version of the facts. But as the trial judge put it in his jury instruction, Sylvain Lahaie's version of the facts was that he decided not to call the police because the complainants begged him not to. He claimed that he specifically asked the complainants if they were proposing that they be cut loose on a promise that they would return and pay for what they had previously stolen. He said that the complainants confirmed this was <u>not</u> what they were proposing, and they instead proposed that their parents be called, and compensation paid.

[53] On this version of events, the appellants would not be guilty of unlawful confinement because the complainants consented to their continued confinement. The trial judge should have corrected the Crown's assertion to the contrary and made it clear that it is the Crown's obligation to prove lack of consent beyond a reasonable doubt: the appellants were not guilty of unlawful confinement if the jury found, or had a reasonable doubt about whether, the complainants consented.

[54] Although the trial judge provided a fair description of the issue of consent in summarizing Sylvain Lahaie's position for the jury, this description appeared only in his summary of the defence's position, and not in the trial judge's own instruction on the law of consent. This was inadequate, given that counsel for Sylvain Lahaie expressly qualified his statements on the consent issue, describing them as "subject to His Honour's instructions on the point".

[55] In summary, the consent of the complainants was a live issue on these facts. The combination of the erroneous statements in the Crown's closing submissions, the trial judge's failure to correct them, and the errors in the trial judge's instructions gives rise to a real risk that the jury may have convicted the appellants of unlawful confinement despite having a reasonable doubt about whether the complainants consented to their continuing confinement. The absence of an objection to the charge by defence counsel is no reason to deny relief for the errors in this case. The convictions cannot stand.

CONCLUSION

[56] I would allow the appeal, set aside the convictions, and order a new trial.

Released: November 14, 2019 (“D.W.”)

“Grant Huscroft J.A.”
“I agree. David Watt J.A.”
“I agree. M. Jamal J.A.”