69077-9 69077-9

COA NO. 69077-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHANE SKJOLD,

Appellant.

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

The Honorable Harry McCarthy, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

THE INFORMATION IS DEFECTIVE IN FAILING TO INCLUDE ALL THE ESSENTIAL ELEMENTS OF THE UNLAWFUL IMPRISONMENT OFFENSE.

The issue is controlled by this Court's recent decision in State v. Johnson, __Wn. App.__, 289 P.3d 662 (2012), as modified by Order On Motion For Reconsideration and Order Modifying Opinion (filed Feb. 13, 2013) (attached as App. A).[1] Knowledge that the restraint is without legal authority is an essential element of the crime of unlawful imprisonment and its omission from the charging document requires reversal. App. A. at 5-6.

The State complains Johnson was wrongly decided. Brief of Respondent (BOR) at 9-10. It was not. Relying on State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000), this Court correctly recognized the definition of "restrain" in RCW 9A.40.010(6) sets forth essential elements of the crime of unlawful imprisonment. Johnson (App. A at 5-6). Even if one could fairly infer some of the knowledge requirements attached to "restrain" from the information, there is no way to reasonably conclude from the charging language that the restraint must be

[1] The Court's order modifying the opinion in Johnson is not reflected in Westlaw as of the filing of this reply brief and is therefore attached as Appendix A.

accomplished with knowledge that it was "without legal authority." Johnson (App. A. at 5).

That conclusion is sound. Knowledge that the restraint was without legal authority is an essential element because, under Warfield, it 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)). The unlawful imprisonment conviction in Warfield was reversed due to insufficient evidence where the State failed to prove the defendants knowingly restrained someone without lawful authority: "knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand." Warfield, 103 Wn. App. at 159.

Knowledge that the restraint was without lawful authority is an essential element because it is one of the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime of unlawful imprisonment. Johnson (App. A. at 3-6). The State cannot obtain a conviction without proving a defendant knowingly acted without legal authority.

The Supreme Court has counseled "[i]mposing the responsibility to include all essential elements of a crime on the prosecution should not

prove unduly burdensome since the 'to convict' instructions found in the Washington Pattern Jury Instructions—Criminal (WPIC) delineate the elements of the most common crimes." State v. Kjorsvik, 117 Wn.2d 93, 102 n.13, 812 P.2d 86 (1991). The WPIC "to convict" instruction for unlawful imprisonment recognizes the definition of "restrain" as modified by the adverb "knowingly" creates elements of the crime that need to be proved. WPIC 39.16. Yet the State failed to allege all of them here.

Knowledge of the law is a constituent part of the crime. The State's contrary argument is an illustration of the discredited reasoning found in cases like State v. Smith, which held the information need not contain knowledge as an element of possession of stolen property (a vehicle) because the knowledge requirement was contained in a definitional statute.[2] State v. Smith, 49 Wn. App. 596, 599, 744 P.2d 1096 (1987), review denied, 110 Wn.2d 1007 (1988), overruled by, State v. Moavenzadeh, 135 Wn.2d 359, 956 P.2d 1097 (1998). The Supreme

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[2] RCW 9A.56.160(1)(d) provided "A person is guilty of possessing stolen property in the second degree if: . . . He possesses a stolen motor vehicle of a value less than one thousand five hundred dollars." RCW 9A.56.140(1) defined "possessing stolen property" as "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto."

Court later held the knowledge requirement is an essential element that must be set forth in the information. State v. Moavenzadeh, 135 Wn.2d 359, 362, 361-64, 956 P.2d 1097 (1998).

The State's attempt to draw a line between essential elements and the definition of essential elements makes no sense when applied to Skjold's case. It is undisputed that the State was required to prove knowledge of the law in order to convict Skjold of unlawful imprisonment. The State's information is deficient under the established rule for what constitutes an essential element of a crime that must be contained in the information. See State v. Johnstone, 96 Wn. App. 839, 843-46, 982 P.2d 119 (1999) (statutory definition of "enterprise" for sabotage offense contained two essential elements of crime; information deficient because conviction not possible without proving those elements).

The State primarily relies on "true threat" cases involving harassment in drawing its asserted distinction between elements that must be set forth in the information and definition of elements. BOR at 11-13. The "true threat" cases are inapposite.

The Supreme Court held a "true threat" is not an essential element of the crime of harassment that must be included in the information. State v. Allen, __Wn.2d__, 294 P.3d 679, 688-89 (2013). The Court relied on State v. Tellez for the proposition that the constitutional concept of true

threat "merely defines and limits the scope of the essential threat element" in the harassment statute and "is not itself an essential element of the crime." Allen, 294 P.3d at 689 (quoting State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007)).

The "true threat" cases are special because they arise out of the First Amendment overbreadth concern that such statutes could be interpreted to encompass a substantial amount of protected speech. Allen, 294 P.3d at 689. In light of that constitutional concern, threat-based statutes are construed to be limited to "true threats." Id. The "true threat" requirement is a limitation on the essential "threat" element. Id.

Unlike "true threat" cases, the knowledge requirement attached to restraint, included the requirement that the accused knew the restraint was unlawful, does not *limit* the scope of the restraint element. As construed in Warfield, the restraint definition contains additional mens rea requirements of what the accused must know in order to be convicted. The restraint definition at issue here is akin to the statutory definition found to contain an essential knowledge element in Moavenzadeh. Moavenzadeh, 135 Wn.2d at 359 (overruling Smith, 49 Wn. App. 596).

To be convicted of unlawful imprisonment, one must knowingly do a number of things. One of those things is to "knowingly restrain" someone. But there are also other knowledge requirements, including

knowledge of the law. Johnson (App. A at 5-6). Case law recognizes that even when knowledge as to some aspect of an offense is alleged, an information is still deficient it if fails to include knowledge as to another aspect of the offense that must be proven beyond a reasonable doubt. See State v. Simon, 120 Wn.2d 196, 197-99, 840 P.2d 172 (1992) (information charged that Simon "did knowingly advance and profit by compelling Bobbie J. Bartol by threat and force to engage in prostitution; and did advance and profit from the prostitution of Bobbie Bartol, a person who was less than 18 years old" was constitutionally inadequate because "[n]o one of common understanding reading the information would know that knowledge of age is an element of the charge of promoting prostitution of a person under 18.").

The Court in Allen also recognized the charging language of "knowingly threaten," left to its ordinary meaning, satisfied the mens rea element as to the result encompassed within the meaning of "true threat." Allen, 294 P.3d at 688 n.11 (citing State v. Schaler, 169 Wn.2d 274, 287-88, 236 P.3d 858 (2010)). The "knowingly restrains" language of the unlawful imprisonment charge, left to its ordinary meaning, does not set forth all of the specific mens rea requirements of restraint.

"The primary goal of the 'essential elements' rule is to give notice to an accused of the nature of the crime that he or she must be prepared to

defend against." Kjorsvik, 117 Wn.2d at 101. "[D]efendants are entitled to be fully informed of the nature of the accusations against them so that they can prepare an adequate defense." State v. Leach, 113 Wn.2d 679, 695, 782 P.2d 552 (1989).

With that goal in mind, it becomes clear that an essential element of unlawful imprisonment is that the accused not only knowingly restrained someone, but also that he knowingly violated the law in so doing. Warfield, which involved bounty hunters that restrained a man on an outstanding arrest warrant and checked with local police before returning him to jail, illustrates the kind of case where knowledge of the law obviously makes a difference in terms of defending against the charge. Warfield, 103 Wn. App. at 153-54.

The State nonetheless argues "[i]t cannot be said that the State failed to allege 'without lawful authority' when explicit in the charge itself is the accusation that the imprisonment was '*unlawful*.'" BOR at 23. The State's argument fails because it misconstrues the element at issue here.

Contrary to the State's contention, the issue is not whether the information contained the element that the restraint was without lawful authority. Rather, the issue is that the information needed to convey the element that Skjold *knew* the restraint was without lawful authority. The State's argument overlooks the mens rea requirement.

There is no dispute the information alleged the restraint was without lawful authority as conveyed through the name of the crime itself: "unlawful imprisonment." See Leach, 113 Wn.2d at 695 (the letters "DWI" in citation have come into common usage as referring to "driving while intoxicated," a phrase which is a complete statement of the statutory elements constituting the offense charged).

But what is not contained in the information is notice that the accused needed *to know* that he acted without lawful authority in restraining the victim. Knowledge "can in some instances be fairly implied from the manner in which the offense is described or even from commonly understood terms." Moavenzadeh, 135 Wn.2d at 363. Such is not the case here. Accusing someone of committing the crime of "unlawful imprisonment" does not carry with it the same meaning and import as knowing the imprisonment or restraint is without authority of law.

Ignorance of the law is usually no excuse. Warfield, 103 Wn. App. at 159. The proposition is so basic as to be commonly understood. Indeed, the rule has been described as "universal." Leschner v. Dep't of Labor & Indus., 27 Wn.2d 911, 926, 185 P.2d 113 (1947).

Unlawful imprisonment is one of the few crimes that require the State to prove the offender knew his conduct was without authority of law:

"knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand." Warfield, 103 Wn. App. at 159. That is not a commonly understood proposition and the charging language here failed to apprise Skjold of that element of the State's case. Johnson is on point. Johnson (App. A at 5). The State's argument fails. The unlawful imprisonment conviction must be reversed.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Skjold requests reversal of the convictions.

DATED this 14th day of March 2013.

Respectfully Submitted,

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APPENDIX A

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

STATE OF WASHINGTON,	)	No. 66624-0-I
Respondent,	)	ORDER ON MOTION FOR RECONSIDERATION AND
v.	)	ORDER MODIFYING OPINION
J.C. JOHNSON,	)	
Appellant.	)	

Respondent, State of Washington, moved for reconsideration of this court's decision filed December 3, 2012. Now, therefore, it is hereby

ORDERED that

1. the motion for reconsideration is denied, and

2. the slip opinion shall be modified as follows:

At page 20, second full paragraph of the slip opinion which reads:

Though we hold that the "to convict" instruction here was error, for Johnson's ineffective assistance of counsel claim, the question is whether trial counsel's performance was defective for failing to predict the outcome in Peters and Harris. Given the strong presumption of effective representation, we cannot say that the performance in this case was deficient.

shall be changed to read:

Though we hold that the instruction defining recklessness here was error, for Johnson's ineffective assistance of counsel claim, the question is whether trial counsel's performance was defective for failing to predict the outcome in Peters and Harris. Given the strong presumption of effective representation, we cannot say that the performance in this case was deficient.

At pages 22 to 27, the **SUFFICIENCY OF INFORMATION** section of the slip opinion shall be deleted in its entirety and replaced with the following revised section:

SUFFICIENCY OF INFORMATION

Johnson argues that the information for the unlawful imprisonment and felony harassment charges were insufficient because they were missing elements of the crime. Because the trial court vacated the felony harassment conviction and we do not reverse the assault convictions, we need not address his argument regarding felony harassment.[74] Johnson also challenges the deadly weapon enhancement for the felony harassment conviction. But for the reasons stated above, we also need not address this argument.

Unlawful Imprisonment

Johnson challenges the sufficiency of the second amended information charging him with the crime of unlawful imprisonment. We hold that the information is deficient and dismiss this conviction without prejudice.

The adequacy of a charging document is reviewed de novo.[75] A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington state constitution if it fails to include "all essential elements of a crime."[76] The rationale underlying this rule is that a defendant must be apprised of the charges against him or her and allowed to prepare a defense.[77] "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged."[78]

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[74] Johnson acknowledges that his felony harassment conviction was vacated on double jeopardy grounds. Johnson explains that he is challenging this conviction because the State could attempt to reinstate it in the event that the greater conviction of second degree assault with a deadly weapon was reversed on appeal.

[75] State v. Allen, 161 Wn. App. 727, 751, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011).

[76] State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

[77] Id.

[78] 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)).

Where, as here, the adequacy of a charging document is challenged for the first time on review, "it will be construed liberally and will be found sufficient if the necessary elements appear in any form, or by fair construction may be found, on the face of the document."[79] But "[i]f 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."[80] The court employs a two-part test:

> (1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so, (2) can the defendant show he or she was actually prejudiced by the inartful language.[81]

"If the necessary elements are not found or fairly implied, however, we presume prejudice and reverse without reaching the question of prejudice."[82]

Here, the information for unlawful imprisonment provided:

> And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse J.C. JOHNSON of the crime of **Unlawful Imprisonment – Domestic Violence**, based on a series of acts connected together with another crime charged herein, committed as follows:
>
> That the defendant J.C. JOHNSON in King County, Washington, during a period of time intervening between May 4, 2009 through May 6, 2009, did ***knowingly restrain*** [J.J.], a human being;
>
> Contrary to RCW 9A.40.040, and against the peace and dignity of the State of Washington.[83]

Johnson argues that this information failed to include all of the "essential elements" of the crime because they are neither expressly stated nor fairly implied. We agree.

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[79] State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

[80] State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (quoting State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995)).

[81] McCarty, 140 Wn.2d at 425.

[82] Id.

[83] Clerk's Papers at 18 (emphasis added).

Since Johnson challenges the information for the first time on appeal, it must be liberally construed.[84] Even with a liberal reading, however, all of the essential elements of unlawful imprisonment do not appear in the document. Since the information fails to set forth all of the essential elements of the crime, prejudice is presumed under the two-part test.[85]

In State v. Borrero, the supreme court considered whether an information charging a defendant with attempted first degree murder was sufficient.[86] There, the information failed to include the statutory definition of "attempt," which included the essential element of "substantial step."[87] The court determined the common meaning of "attempt" by looking at a dictionary definition and synonyms.[88] The court concluded that "the element of 'substantial step' is conveyed by the word 'attempt' itself" because the words had the "same meaning and import."[89]

Here, the statute for unlawful imprisonment provides that "[a] person is guilty of unlawful imprisonment if he or she knowingly ***restrains*** another person."[90] Under RCW 9A.40.010, to "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***."[91] To restrain a person "without consent" is accomplished by "physical force, intimidation, or deception."[92] The statute does not otherwise define the remainder of the last clause of the definition of restrain.[93]

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[84] See McCarty, 140 Wn.2d at 425.

[85] See State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991).

[86] 147 Wn.2d 353, 359, 58 P.3d 245 (2002).

[87] Id.

[88] Id. at 363; see also State v. Morgan, 163 Wn. App. 341, 346-47, 261 P.3d 167 (2011), review denied, 175 Wn.2d 1013 (2012) (taking the same "common meaning" approach to the word "attempt").

[89] Borrero, 147 Wn.2d 363.

[90] RCW 9A.40.040 (emphasis added).

[91] (Emphasis added.)

[92] RCW 9A.40.010(6).

[93] See id.

Because the information refers only to "restrain," we look to its plain meaning in a dictionary. The American Heritage Dictionary states the following definitions: (1) "To hold back or keep in check; control"; (2) "To prevent (a person or group) from doing something or acting in a certain way"; and (3) "To hold, fasten, or secure so as to prevent or limit movement."[94] Noticeably absent from these definitions is any mention of restricting "a person's movements without consent," "without legal authority," or by "interfer[ing] substantially with his or her liberty." While one could reasonably infer the first and last phrases, there is no way to reasonably conclude that the restraint must be "without legal authority." In short, the information is deficient because this essential element cannot be reasonably inferred from the information.

In State v. Warfield, Division Two of this court held that "the statutory definition of unlawful imprisonment, to 'knowingly restrain,' causes the adverb 'knowingly' to modify all components of the statutory definition of 'restrain,' including the 'without lawful authority' component."[95] There, three bounty hunters knowingly restrained Mark DeBolt for the purpose of arresting him on a 1987 misdemeanor warrant out of Maricopa County, Arizona.[96] The three did not know that the Arizona warrant "had no lawful effect in Washington."[97]

The court explained that "knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand."[98] Then, the court reversed the defendants' unlawful imprisonment convictions because "[i]t is uncontroverted that defendants believed they were acting lawfully because they had a warrant for DeBolt's arrest" and a Washington police officer "appeared to ratify the lawfulness of their actions."[99]

Warfield supports the conclusion that an essential element of unlawful imprisonment is that a person have knowledge that the restraint was "without legal authority."

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[94] THE AMERICAN HERITAGE DICTIONARY 1538 (5th ed 2011), http://www.ahdictionary.com/word/search.html?q=restrain.

[95] 103 Wn. App. 152, 5 P.3d 1280 (2000).

[96] Id. at 154.

[97] Id. at 155.

[98] Id. at 159.

[99] Id.

The State argues that definitional elements cannot be essential elements of a crime. The State is mistaken.

The State cites State v. Rhode to support this proposition.[100] Rhode addressed a similar issue as Borrero: whether the "'substantial step' element of attempt" could be found in the defendant's information.[101] There, the court explained that the issue was whether the statutory definition was "encompassed" by the term used in the information.[102] As discussed above, "restrain" does not "encompass" the essential element that a person had knowledge that the restraint was "without legal authority." In this case, part of the definition of "restrain" contains an essential element of unlawful imprisonment.

Johnson's unlawful imprisonment conviction must be vacated without prejudice.[103]

It is further ORDERED that the remaining footnote shall be renumbered accordingly.

DATED this 13th day of February 2013.

Cox, J.

Becker, J.

[100] 63 Wn. App. 630, 821 P.2d 492 (1991).

[101] Compare Rhode, 63 Wn. App. at 633 with Borrero, 147 Wn.2d at 359.

[102] Rhode, 63 Wn. App. at 636 (quoting State v. Smith, 49 Wn. App. 596, 600, 744 P.2d 1096 (1987)).

[103] See McCarty, 140 Wn.2d at 428.

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

STATE OF WASHINGTON, DSHS,	)	
Respondent,	)	
v.	)	COA NO. 69077-9-I
SHANE SKJOLD,	)	
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 13TH DAY OF MARCH, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SHANE SKJOLD
DOC NO. 748218
COYOTE RIDGE CORRECTION CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF MARCH, 2013.

X Patrick Mayovsky