

SUPREME COURT NO. 90000-1  
COURT OF APPEALS NO. 43528-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

**RICHARD WALKSONTOP,**

Petitioner.

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

The Honorable Rich Melnick, Judge

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**PETITION FOR REVIEW**

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A. IDENTITY OF PETITIONER

Petitioner Richard Walksontop asks this Court to review the decision of the Court of Appeals referred to in Section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' decision in *State v. Richard Walksontop*, COA No. 43528-4-II, filed February 4, 2014. Specifically, Mr. Walksontop asks this Court to review that portion of the Court of Appeals' opinion ruling that Count 6, Unlawful Imprisonment, as charged in the Third Amended Information, was legally sufficient to put Mr. Walksontop on notice of each element of the crime.

C. ISSUE PRESENTED FOR REVIEW

Whether under *State v. Johnson* currently pending before this Court, Mr. Walksontop is entitled to have his unlawful imprisonment conviction reversed and remanded because the Information failed to adequately apprise Mr. Walksontop of the essential "restraint" element of that charge?

D. STATEMENT OF THE CASE

Richard Walksontop was tried on the Third Amended Information charging various crimes to include Count 6, Unlawful Imprisonment. Count 6 reads:

COUNT 06 – UNLAWFUL IMPRISONMENT – 9A.40.040

That he, RICHARD LOUIS WALKSONTOP, AKA RICHARD LEWIS WALKSONTOP, in the County of Clark, State of Washington, on or about November 4, 2011, did knowingly restrain Stephen C. Irby, a human being; contrary to Revised Code of Washington 9A.40.040(1).

CP 10. Mr. Walksontop did not object to the content of the Third Amended information.

The jury found Mr. Walksontop guilty of Unlawful Imprisonment based on the following testimony.

Mr. Walksontop forced his way through an apartment door. IRP at 150. Once inside the apartment, he spoke with one of the tenants, Ms. Bergh, in her bedroom. 2A RP at 237; 2B RP at 439-40. Mr. Walksontop and Ms. Bergh talked back and forth for a half hour. 2B RP at 461. When Stephen Irby checked on Ms. Bergh, Mr. Walksontop grabbed Mr. Irby and pushed him into a wall. 2B RP at 440. Mr. Walksontop threatened to kill Mr. Irby and told him he had to sit on a living room couch and not move. 2B RP at 440, 444. Mr. Irby believed Mr. Walksontop's threat. 2B RP at 453. Mr. Irby's fear increased when Mr. Walksontop punched him hard in the face after discovering that another person had "escaped" from the apartment. 2B RP at 444.

E. REASON WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted because this identical issue is currently pending before this Court in *State v. Johnson*, 88683-1. See *State v. Johnson*, \_\_\_ Wn. App. \_\_\_, 289 P.3d 662 (2012), review granted in part, 178 Wn.2d 1001 (2013). The decision in *Johnson* will control the outcome of Mr. Walksontop's Petition for Review.

The court heard the *Johnson* oral argument on January 21, 2014.

If the Court of Appeals' opinion in *Johnson* is affirmed, Mr. Walksontop is entitled to have his unlawful imprisonment conviction reversed and remanded for retrial. Like *Johnson*, Mr. Walksontop argued for the first time on appeal that the unlawful imprisonment information was deficient for failing to define the required element of "restraint." Brief of Appellant at 8-13. In *Johnson*, Court of Appeals Division I found the information charging unlawful imprisonment deficient because it failed to adequately define unlawful imprisonment's necessary element of "restrain." *Johnson*, \_\_\_ Wn. App. \_\_\_, 289 P.3d 662, 675 (2012). 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." *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The rationale underlying this rule is that a defendant must be

apprised of the charges against him and allowed to prepare a defense. *Id.* “An ‘essential element is one whose specification is necessary to establish the very illegality of the behavior’ charged.” *State v. Feeser*, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

This Court has stayed review of *State v. Phuong*, 174 Wn. App. 494, 545, 299 P.3d 37 (2013), pending its opinion in *Johnson*. In *Phuong*, Division I reached the opposite conclusion on the identical issue as in *Johnson*. In taking an opposite position in *Phuong*, Division I cited this Court’s decision in *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013). In *Allen* the court reviewed a sufficiency of an information but in the context of a felony harassment charge. Allen challenged the information arguing that only a true threat is criminalized and that the information was deficient for failing to include “true threat” language as an essential element in the information. *Allen* held the true threat requirement merely defined the essential threat element of the felony harassment statute. Thus it was not an error to omit the true threat requirement from the information.

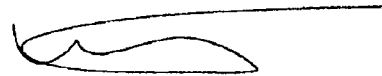
In Mr. Walksontop’s opinion, Division II, reasoned *Allen* implicitly overruled *Johnson* and “restrain” merely defined an essential element of unlawful imprisonment and was not itself an essential element.

Court of Appeals opinion at 3-4. However, it is only this Court's opinion in *Johnson* that will tell us whether that is true.

F. CONCLUSION

This Court should accepted review of Mr. Walksontop's Petition for Review. Ideally, depending on the outcome of *State v. Johnson*, Mr. Walksontop's unlawful imprisonment conviction will be reversed and remanded to the trial court.

Respectfully submitted this 6<sup>th</sup> day of March 2014.



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LISA E. TABBUT/WSBA #21344  
Attorney for Richard Walksontop



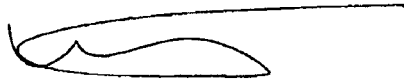
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Petition for Review to (1) Rachel Probstfelt, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it Richard Walksontop, DOC#904190, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed March 6, 2014, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344  
Attorney for Richard Walksontop

# APPENDIX



## FACTS

The State charged Walksontop with first degree burglary, two counts of second degree robbery, two counts of harassment—death threats, unlawful imprisonment, and three counts of fourth degree assault after he forcibly entered an apartment and threatened and attacked the occupants. The State also alleged that Walksontop was armed with a deadly weapon, a knife, when he committed the crimes. The trial court dismissed the deadly weapon enhancement at the close of the State's case.

After a four-day trial, a jury convicted Walksontop of all counts except one count of second degree robbery. The trial court determined that an aggravating circumstance applied because Walksontop's offender score resulted in some of the crimes going unpunished, but it sentenced him within the standard range. The trial court sentenced him to 364 days' confinement for each of the misdemeanor assaults and 110 months' confinement for the felonies. The misdemeanor judgment and sentence did not indicate whether the sentences are to be served consecutively or concurrently and the felony judgment and sentence stated that a deadly weapon enhancement applied even though the trial court dismissed that enhancement. The court also imposed several LFOs on Walksontop. Walksontop appeals.

## ANALYSIS

### I. INFORMATION

First, Walksontop alleges that the information is defective because it does not include the essential elements of unlawful imprisonment. Specifically, he argues that the information fails to include the statutory definition of "restrain." Division One recently held that the definition of "restrain" is not an essential element of unlawful imprisonment. *State v. Phuong*, 174 Wn. App. 494, 545, 299 P.3d 37 (2013). We agree. Accordingly, the information here is sufficient.

“All essential elements of a crime, statutory or otherwise, must be included in a charging document 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). When the information is challenged for the first time on appeal, we liberally construe the information in favor of its validity. *Kjorsvik*, 117 Wn.2d at 105. In determining the sufficiency of the information, we apply a two-prong test: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” *Kjorsvik*, 117 Wn.2d at 105-06. We review this issue de novo. *State v. Campbell*, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995).

A person is guilty of unlawful imprisonment if he knowingly restrains another person. RCW 9A.40.040(1). The legislature defines “restrain” as “restrict[ing] a person’s movements without consent and without legal authority in a manner [that] interferes substantially with his or her liberty.” RCW 9A.40.010(6). The information alleged that Walksontop “did knowingly restrain [S.I.], a human being; contrary to Revised Code of Washington 9A.40.040(1).” Clerk’s Papers at 10. Walksontop argues that the information must also include the statutory definition of “restrain.”

Walksontop relies on *State v. Johnson*, \_\_\_ Wn. App. \_\_\_, 289 P.3d 662 (2012), review granted in part, 178 Wn.2d 1001 (2013), a Division One case holding that charging language identical to the language here was constitutionally deficient. But, based on a recent Supreme Court case, *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013), Division One has since implicitly overruled *Johnson*. In *Allen*, the State charged the defendant with felony harassment, and the defendant argued that the information was deficient because only “true threats” are

criminalized and the information did not include a true threat requirement. 176 Wn.2d at 626-27. Our Supreme Court disagreed, holding that the true threat requirement merely defined the essential threat element in the felony harassment statute, and, thus, it was not error to omit the true threat requirement from the information. *Allen*, 176 Wn.2d at 629-30.

Division One applied this same reasoning in *Phuong*, 174 Wn. App. 494. There, the State charged the defendant with unlawful imprisonment and the defendant argued that the information was deficient because it did not include the definition of “restrain.” *Phuong*, 174 Wn. App. at 542. The court reversed its position in *Johnson* and held that, based on *Allen*, the information was sufficient because the statutory definition of “restrain” merely defined an essential element of unlawful imprisonment and was not itself an essential element. *Phuong*, 174 Wn. App. at 545.

We follow *Allen* and *Phuong* here and hold that the information is sufficient. The statutory definition of “restrain” is not an essential element of unlawful imprisonment; rather, it merely defines an essential element of the crime.

## II. ALLOCUTION

Walksontop next argues that he is entitled to resentencing before a new judge because he was denied his right of allocution at sentencing. At sentencing, “[t]he court shall . . . allow arguments from the . . . offender . . . as to the sentence to be imposed.” RCW 9.94A.500(1). The trial court did not give Walksontop a chance to address the court before imposing the sentence, but Walksontop failed to object to this omission.

RAP 2.5(a) states that “[t]he appellate court may refuse to review any claim of error [that] was not raised in the trial court.” RAP 2.5(a)(3) further states that a party may raise particular types of errors for the first time on appeal, including “manifest error[s] affecting a

constitutional right.” But Walksontop fails to argue that any of the exceptions listed in RAP 2.5(a) apply. Therefore, we do not address his claims that the trial court erred when it did not give him a chance to address the court. *See State v. Hatchie*, 161 Wn.2d 390, 406, 166 P.3d 698 (2007) (holding that defendant failed to preserve any error regarding his right of allocution); *State v. Hughes*, 154 Wn.2d 118, 153, 110 P.3d 192 (2005) *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (holding that the right of allocution is statutory and not constitutional; thus, defendant’s failure to object at trial precludes review).

### III. SENTENCING ERRORS

Next, Walksontop argues that we should remand for the sentencing court to indicate on the misdemeanor judgment and sentence whether his assault sentences are to be served consecutively or concurrently and to remove the dismissed deadly weapon enhancement from the felony judgment and sentence. The State concedes that remand is appropriate, and we agree.

Regarding the misdemeanor sentence, the sentencing reform act applies only to felony offenders; accordingly, the trial court has discretion to impose consecutive sentences on misdemeanor convictions. *State v. Langford*, 67 Wn. App. 572, 587, 837 P.2d 1037 (1992); RCW 9.94A.010. Here, the court did not indicate how the misdemeanor sentences will be served. Because the sentencing court’s intent is unclear, we remand for clarification.

Additionally, the trial court marked that a deadly weapon enhancement applied on the felony judgment and sentence, but it had dismissed this enhancement at the close of the State’s case. A trial court may correct a clerical error in the judgment and sentence. *State v. Snapp*, 119 Wn. App. 614, 626, 82 P.3d 252 (2004). The trial court’s failure to remove the mark indicating

that a deadly weapon enhancement applies is a clerical error. On remand, the sentencing court should also correct this error in the felony judgment and sentence.

IV. LFOs

Finally, Walksontop argues that the trial court erred when it imposed LFOs without finding that he had the ability to pay them. Because he did not object at trial, Walksontop has waived this issue on appeal.

At sentencing, the trial court stated that it was entering standard fines, fees, and costs. The felony judgment and sentence contained the following LFOs: \$412.10 restitution, \$500 victim assessment fee, \$200 criminal filing fee, \$250 jury demand fee, \$1,500 court appointed attorney fees, \$2,400 trial per diem, \$500 fine, and \$100 DNA collection fee.<sup>1</sup> The trial court did not check the box on the judgment and sentence stating that the defendant has the ability to pay. But Walksontop did not object to the court's imposition of the fines or fees. Therefore, he has waived his ability to challenge the trial court's imposition of LFOs. RAP 2.5(a); *Snapp*, 119 Wn. App. at 626 n.8.

Walksontop contends that he may raise this issue for the first time on appeal, citing *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011). But *Bertrand* is distinguishable. The defendant in that case was disabled and the sentencing court ordered her to begin payment on her LFOs 60 days after entry of the judgment and sentence, while she would still be in confinement for her 36-month sentence. *Bertrand*, 165 Wn. App. at 398. Based on these facts, we reversed the trial court's finding that the defendant had the ability to pay the LFOs. *Bertrand*, 165 Wn.

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<sup>1</sup> Several of these LFOs are mandatory, and Walksontop concedes that he cannot challenge their imposition.



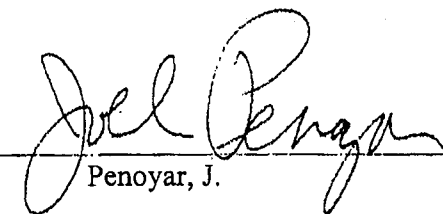
App. at 404. By contrast, here, there is no evidence that Walksontop would be similarly unable to pay. Therefore, we affirm the trial court's imposition of LFOs.

V. SAG

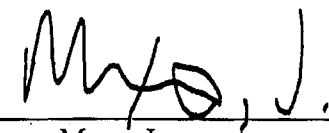
Walksontop alleges several sources of error in his SAG. But he fails to provide any argument regarding the errors; he merely lists the page numbers in the record where the errors allegedly occurred. A defendant may file a SAG to identify and discuss those matters that he believes were not adequately addressed by counsel's brief. RAP 10.10(a). We will not consider a defendant's SAG if it does not inform the court of the nature and occurrence of alleged errors. RAP 10.10(c). Here, Walksontop did not discuss or inform the court of the nature of the alleged errors. Consequently, we decline to review his SAG.

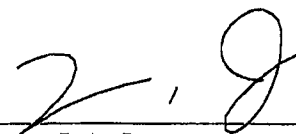
We affirm the convictions, but remand to the sentencing court to clarify and correct errors in both judgment and sentences.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
Penoyar, J.

We concur:

  
\_\_\_\_\_  
Maxa, J.

  
\_\_\_\_\_  
Lee, J.

# COWLITZ COUNTY ASSIGNED COUNSEL

**March 06, 2014 - 3:54 PM**

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