SUPREME COURT NO. 90022-1
COURT OF APPEALS NO. 69517-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ROBERT EUGENE DEAN, III,

Respondent.

PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court review an issue raised by the decision below; an issue that is already pending in this Court in State v. J.C. Johnson, No. 88683-1.

B. ISSUE PRESENTED FOR REVIEW

Whether the jury instruction defining "reckless" was correct in repeating verbatim the statutory definition of "reckless," where the "to convict" instruction made clear that the "wrongful act" in question was an assault resulting in substantial bodily harm.

C. STATEMENT OF THE CASE

The summary of the facts provided in the Court of Appeals opinion is sufficient to frame the issue presented. State v. Dean, No. 69517-7-I, slip op. at 1-3 (Wash.Ct.App. Jan. 27, 2014).

Ibrahim Al–Sebah worked as a security guard at Safeway. Al-Sebah testified that on the evening of July 21, 2012, he saw Robert Eugene Dean, III, put grocery items into his backpack. Al–Sebah confronted Dean and told him to either return the items or pay for them. As Al–Sebah was removing the items from the backpack, Dean cut him

with a small knife on his face and wrist. Dr. Craig Nattkemper testified that the laceration to Al–Sebah's left ear required 15 sutures and the laceration on the right wrist required four stitches.

The State charged Dean with assault in the second degree, alleging that he intentionally and recklessly inflicted substantial bodily harm and assaulted Al–Sebah with a deadly weapon.

The court instructed the jury on assault in the second degree and the lesser-included offense of assault in the fourth degree. The to-convict instruction for assault in the second degree states:

> To convict the defendant of the crime of assault in the second degree, each of the following two elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 21, 2012, the defendant:
>
> (a) intentionally assaulted Ibrahim Al–Sebah and thereby recklessly inflicted substantial bodily harm; or
>
> (b) assaulted Ibrahim Al–Sebah with a knife, and that such knife constituted a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that element (2) and either of alternative elements (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

The jury instruction defining "reckless" states:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act or result may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

The jury convicted Dean of assault in the second degree.

Dean appealed his conviction and argued that the jury instruction defining "reckless" should have said that a person is reckless if he disregards the risk of "substantial bodily harm" rather than simply that he is guilty if he disregards the risk of a "wrongful act." The Court of Appeals accepted his argument and reversed his conviction, relying on its prior decision in State v. Johnson, 172 Wn.2d 112, 297 P.3d 710 (2012), review granted, 178 Wn.2d 1001 (2013).

D. REVIEW SHOULD BE ACCEPTED BECAUSE THE ISSUE PRESENTED IS CURRENTLY BEING CONSIDERED BY THIS COURT IN A DIFFERENT CASE.

RAP 13.4(b) permits review by this Court where a decision by the Court of Appeals is in conflict with a decision of the Court of Appeals or the Supreme Court, raises a question of law under the Washington State or

United States Constitutions, or deals with an issue of substantial public interest. These criteria are met as to the issue presented in this case. The precise issue presented in this case is already pending before this Court in the case of State v. J.C. Johnson, No. 88683-1. The issue concerns the continued vitality of a pattern jury instruction in an oft-occurring circumstance.

Jury instructions are read in a common-sense manner and are sufficient if they properly inform the jury of the applicable law. State v. Bowerman, 115 Wn.2d 794, 809 P.2d 116 (1990). An appellate court will "review the instructions in the same manner as a reasonable juror." State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994). There are no "magic words" that must be used. State v. Coe, 101 Wn.2d 772, 787, 684 P.2d 668 (1984).

The "to convict" instruction in this case included all elements of assault defined in statutory terms, and recklessness is also defined in statutory terms. The recklessness instruction is identical to the pattern instruction used for over thirty years to define this term. WPIC 10.03; State v. Smith, 331 Wn. App. 226, 229, 640 P.2d 25 (1982).

This Court is presently considering whether the Court of Appeals erred in State v. J.C. Johnson. The case has been fully briefed and was argued on January 21, 2014. It is anticipated that a decision will be filed

in the coming months. Because this Court is poised to issue an opinion on this very topic in the coming months, the issue plainly meets the criteria of RAP 13.4, and the interests of justice and judicial economy would not be served by remanding the case for a needless retrial.

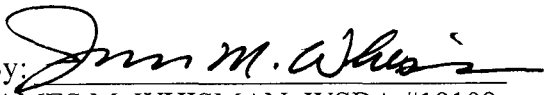
E. CONCLUSION

For these reasons, the State respectfully asks this Court to either grant review and stay this matter pending a decision in State v. J.C. Johnson, or to stay consideration of the petition for review until after J.C. Johnson has been decided.

DATED this 26th day of February, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Petition for Review, in STATE V. ROBERT EUGENE DEAN III, Cause No. 69517-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

C Brame
Name

2/26/14
Date 2/26/14

Done in Seattle, Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT EUGENE DEAN, III, Appellant.	)	No. 69517-7-I DIVISION ONE UNPUBLISHED OPINION FILED: January 27, 2014

SCHINDLER, J. — Robert Eugene Dean, III seeks reversal of his conviction for assault in the second degree. Dean contends the jury instruction defining "reckless" as "a wrongful act" rather than using the specific statutory language of "substantial bodily harm" requires reversal. We adhere to our decisions in State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011), and State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012), and reverse and remand for a new trial.

FACTS

Ibrahim Al-Sebah worked as a security guard at Safeway. Al-Sebah testified that on the evening of July 21, 2012, he saw an individual, later identified as Robert Eugene Dean, III, put a bottle of ketchup and a box of frozen chicken into his backpack. Al-Sebah confronted Dean and told him to either return the items or immediately pay for the ketchup and frozen chicken. Al-Sebah said that as he was removing the items from

the backpack, Dean cut him with a small knife on his face and wrist. Dr. Craig Nattkemper testified that the laceration to Al-Sebah's left ear required 15 sutures and the laceration on the right wrist required four stitches.

The State charged Dean with assault in the second degree. The State alleged Dean intentionally and recklessly inflicted substantial bodily harm and assaulted Al-Sebah with a deadly weapon.

The court instructed the jury on assault in the second degree and the lesser-included offense of assault in the fourth degree. The to-convict instruction for assault in the second degree states:

> To convict the defendant of the crime of assault in the second degree, each of the following two elements of the crime must be proved beyond a reasonable doubt:
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> (2) That this act occurred in the State of Washington.
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> If you find from the evidence that element (2) and either of alternative elements (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.
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> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

The jury instruction defining "reckless" states:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act or result may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

> When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

The jury convicted Dean of assault in the second degree. Dean appeals his conviction.

ANALYSIS

Dean contends the jury instruction defining "reckless" as "a wrongful act" rather than using the statutory definition of "substantial bodily harm" misstates the law and impermissibly relieved the State of its burden of proof. Because the State concedes Dean is not barred from raising this issue for the first time on appeal, we do not analyze whether the issue was properly preserved in the trial court.

RCW 9A.36.021(1) defines assault in the second degree as follows:

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
> . . . .
> (c) Assaults another with a deadly weapon.

In Harris, we followed the reasoning in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005), in reversing the assault conviction because the jury instruction defining "reckless" misstated the law and relieved the State of its burden of proof. Harris, 164 Wn. App. at 385-88. The to-convict instruction in Harris correctly stated the jury had to find the State proved beyond a reasonable doubt that the defendant "intentionally assaulted [the victim] and recklessly inflicted great bodily harm," but the instruction defining "reckless" referred to "a wrongful act" rather than "great bodily harm." Harris, 164 Wn. App. at 383-84.[1] We held that a jury instruction defining "reckless" to mean "a

[1] (Emphasis omitted) (internal quotation marks omitted).

wrongful act" misstated the law because it relieved the State of its burden to prove that the defendant "knew and recklessly disregarded that great bodily harm could result." Harris, 164 Wn. App. at 388. We concluded the court erroneously instructed the jury that a person acts recklessly when they know of and disregard a substantial risk that a wrongful act may occur. Harris, 164 Wn.App. at 385.

> In instructing a jury, a trial court should use the statute's language "where the law governing the case is expressed in the statute." State v. Hardwick, 74 Wn.2d 828, 830, 447 P.2d 80 (1968). Here, the law governing Harris's child assault charge is expressed in RCW 9A.36.120(1)(b)(i), the statute defining first degree child assault. And a jury instruction defining RCW 9A.36.120(1)(b)(i)'s recklessness requirement must account for the specific risk contemplated under that statute, here great bodily harm, and not some undefined wrongful act. See Gamble, 154 Wn.2d at 468 ("the risk contemplated per the assault statute is of 'substantial bodily harm' ").

Harris, 164 Wn. App. at 387-88.

In Johnson, we agreed with the decision in Harris and held that for assault in the second degree, the trial court should have used the specific statutory language of "substantial bodily harm" rather than "wrongful act." Johnson, 172 Wn. App. at 132-33. The to-convict instruction and instruction defining "reckless" in Johnson are nearly identical to those here. See Johnson, 172 Wn. App. at 129-30.

Nonetheless, the State argues that Harris and Johnson are wrongly decided. The State also points to the to-convict instruction that correctly states the specific statutory language of "substantial bodily harm." In Harris, we considered and rejected the same argument:

> [T]he definitional instruction that told the jury it need only find that Harris disregarded the risk of a "wrongful act," even read with the "to convict" instruction, did not properly state the law and these instructions relieved the State of its burden to show that Harris knew and recklessly

> disregarded that great bodily harm could result from his picking [the victim] up and shaking him.

Harris, 164 Wn. App. at 388; see also Johnson, 172 Wn. App. at 132-33.

We adhere to the decisions in Harris and Johnson and conclude the jury instruction defining "reckless" misstated the law and lowered the State's burden of proof.[2]

Reversed and remanded.

WE CONCUR:

[2] An erroneous jury instruction that misstates the law is subject to a harmless error analysis. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). We presume that a jury instruction that clearly misstates the law is prejudicial. Harris, 164 Wn. App. at 383. Here, the State does not argue that the trial court's instruction was harmless.