69077-9

69077-9

NO. 69077-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHANE ALLEN SKJOLD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HARRY McCARTHY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A charging document is sufficient if it contains all of the essential elements of the crime. Here, the charging document contained the essential elements of unlawful imprisonment, but did not further define the elements. Where the essential elements of the charge were contained in the charging document, was the document sufficient?

2. A charging document that was unchallenged at trial must be liberally construed in favor of validity. Where the necessary elements appear in any form, or can be found by fair construction in the charging document, and the defendant cannot show actual prejudice, the document is sufficient. Here, the name of the crime itself, "unlawful imprisonment" as charged in the charging document, put Skjold on notice that the crime was committed without lawful authority. All of the other definitions of "restrain" can be inferred from the plain language of the statute. Where the necessary elements appear in the charging document or are found by fair construction, is the document sufficient?

3. Evidence is sufficient if, considered in a light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.

Burglary in the First Degree requires the State to prove, among other elements, that Skjold entered and remained unlawfully in the building. Here, the victim testified that the defendant pounded on his door in the middle of the night. Once the victim answered the door, Skjold entered the apartment, grabbed him by the neck and threw him to the ground before holding up a knife. Here, in the light most favorable to the State, was there sufficient evidence for a reasonable jury to convict Skjold of Burglary in the First Degree?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

In the amended information, the State charged Shane Allen Skjold with three different crimes: count I, burglary in the first degree with a deadly weapon enhancement; count II, assault in the second degree, with a deadly weapon enhancement; and count III, unlawful Imprisonment. CP 10-11. After trial, the jury found him guilty of all counts and enhancements. CP 77-81. The trial court sentenced Skjold to an exceptional sentence of 229 months based on a "free crimes" aggravator (his standard range was 123-152 months). CP 84-104.

2. SUBSTANTIVE FACTS.

During the very early morning of December 2, 2011, Richard Romero awoke to a loud pounding on his apartment door. 2RP 28.[1] Romero testified that he was still groggy with sleep when he opened the door, and saw Skjold, who grabbed him by the throat and pushed him to the ground: "He came and, very upset, grabbed me – grabbed me by the throat and pushed me down to the ground and just was very upset ..." 2RP 32-33.

Romero's nine-year-old son, who had been asleep on the couch, awoke to pounding on the door and saw Skjold attack his father. 2RP 125-27. Both Romero and his son testified that Skjold held a knife in his hand and threatened Romero with it, demanding the return of $5,000 he believed Romero had stolen from his apartment. 2RP 36, 127-28. Romero testified that Skjold held the knife "close" to him, that it appeared "sharp," and that he was "scared." 2RP 35.

Romero, who was the maintenance man for the apartment complex, had a key to Skjold's apartment and Skjold suspected that Romero had used this key to steal cash he had stashed in his apartment. 2RP 39-41. Romero insisted that he had not taken

[1] The Verbatim Report of Proceedings will be designated as follows: 1RP (6/21/12, 6/25/12); 2RP (6/26/12); 3RP (6/27/12); 4RP (6/28/15.

anything and that he did not know what Skjold was talking about. 2RP 36. In response to Skjold's demands, Romero returned the extra key he had to Skjold's apartment (this key was later found on Skjold when he was arrested). 1RP 91; 2RP 39. As his son watched in tears, Romero begged Skjold to "stop, please," and told him that he was scaring the boy. 2RP 36.

But Skjold wanted to take Romero to his nearby apartment in the same building, to show him where the money had been taken from. 2RP 41. Romero testified that he did not want to accompany Skjold back to his apartment, but that he feared for his own safety and did not want his son to see him get hurt:

> I didn't want to go, but I didn't have much of a choice, I don't think, because he was pretty – you know, he really wanted me to go down there for some reason, and I didn't want to leave [my son], you know, alone... I didn't want him to, you know, hurt me in front of my son. So I figured well, if I can get him out, at least [my son] won't see him, you know, hurt me or whatever and so...
>
> ...it wasn't really up to me to leave. I didn't want to leave...But I wanted to get out of there because I didn't want anything to happen to me in front [of my son]... I didn't want him to see anything happen to me.

2RP 44, 81. Romero, testified that Skjold still had his knife in hand when he ordered him to leave his own apartment and accompany

him to Skjold's. 2RP 43. After telling Skjold that he did not want to go and attempting to negotiate to have someone stay with his son, Romero finally obeyed Skjold and accompanied him to his apartment, leaving his son behind. 2RP 41.

Once in Skjold's apartment, Skjold showed Romero where his money had been hidden, and began throwing drawers around and screaming, "it's gone." 2RP 41. Romero testified that Skjold was pacing around his bedroom while Romero tried to calm him down, pleading with him, trying to convince him that he had done "nothing." 2RP 42. It was during this pleading that Skjold punched Romero on the left side of his face. 2RP 42. The assault caused eight separate but major fractures in Romero's face, which bled profusely. 2RP 82; 4RP 13-14.

After the punch, Romero promised Skjold he would not report him, and begged for his release: "Look, I won't say anything." 2RP 82. He testified that he "felt trapped" and just wanted to "get back" to his son, promising Skjold that he would not report him and reassuring him that he had not stolen the money. 2RP 83. Romero testified that he was in Skjold's apartment for somewhere between 30 minutes to an hour before he was permitted to return to his apartment, where he hugged his son.

2RP 84. His son testified that he waited awake in the apartment for his father to return, and then described the "huge," "bleeding," "black eye" on his father's face when he finally came back. 2RP 129. The two spent the remainder of the night barricaded inside their apartment. 2RP 85.

Later that day, Romero visited the hospital for his injuries, which eventually required reconstructive surgery. 2RP 86. En route to the hospital, Skjold called Romero to ask him not to report him; Romero later showed the log of the phone call to the police. 2RP 95-97. Although Romero initially told the doctors that he had slipped on ice, he reported the incident to police later that same day. 2RP 94.

Besides hearing from Romero and his son, jurors also heard from some neighbors who had heard screaming from Skjold's apartment on the night of the attack; Skjold's live-in girlfriend was screaming, "please don't hurt me... I don't have your money." 3RP 41, 56-57. Another neighbor testified that Skjold wore a small knife around his neck. 2RP 64. Romero's father testified that he drove his son to the hospital and that initially, his son was afraid to call the police. 2RP 12. Skjold's attorney called several alibi witnesses, one of whom testified that Skjold was at a bar until after

11:30 PM on the night of the assault, and another who testified that she picked up Skjold from Tony's Bar at about 1:30 AM and he spent the night with her. 3RP 21, 87.

3. FACTS REGARDING THE UNLAWFUL IMPRISONMENT CHARGING LANGUAGE, THE HALFTIME MOTION TO DISMISS, AND THE JURY INSTRUCTIONS.

After the State rested its case, Skjold's attorney made a motion to dismiss count III, contending that, even in the light most favorable to the State, the allegation of unlawful imprisonment had not been proven, because Romero had voluntarily agreed to accompany Skjold to his apartment. 4RP 32-33. The trial court denied the motion, ruling that there was sufficient evidence for the charge to proceed to the jury:

> ...there is testimony in the record that... the defendant burst into [Mr. Romero's] apartment that evening and that during that period of time, according to Mr. Romero, the defendant had his hand on his throat, and that during the course of that interaction that he did pull out a little knife and waved the knife close to his face and insisted that ...Mr. Romero go to his apartment with him.
>
> There is testimony that Mr. Romero said it was not his idea to go, that he was concerned, worried about his son who was there with him, and that given all the circumstances, the coercive, violent circumstances that existed at that time, at the very

least, it's a jury question to determine whether or not the defendant imposed unlawful restraints upon Mr. Romero in insisting that he go with him to the apartment of the defendant.

4RP 36.

The charging language for count III, unlawful imprisonment, read as follows:

> That the defendant SHANE ALLEN SKJOLD, in King County, Washington, on or about December 2, 2011 did knowingly restrain Richard Romero, a human being;
>
> Contrary to RCW 9A.40.040 and against the peace and dignity of the State of Washington.

CP 11.

The definitional jury instruction for unlawful imprisonment read as follows:

> A person commits the crime of unlawful imprisonment when he or she knowingly restrains the movements of another person in a manner that substantially interferes with the other person's liberty if the restraint was without legal authority and was without the other person's consent or accomplished by physical force, intimidation, or deception. The offense is committed only if the person acts knowingly in all these regards.

CP 68. The "to convict" instruction for unlawful imprisonment mirrored the definitional instruction. CP 69.

For count I, the jury was instructed that a person commits the crime of burglary in the first degree when he:

> enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person is armed with a deadly weapon or assaults any person.

CP 54. In the "to convict" instruction for this count, the jury was told that, to convict Skjold of burglary in the first degree, they would have to find, among other things, that he "unlawfully entered or remained unlawfully in a building." CP 55. They were further instructed that a person "enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." CP 60. The term "enter" included the "entrance of the person, or the insertion of any part of the person's body..." CP 62.

C. ARGUMENT

1. THE INFORMATION WAS SUFFICIENT BECAUSE IT INCLUDED THE ESSENTIAL ELEMENTS OF THE CHARGE OF UNLAWFUL IMPRISONMENT. DEFINITIONS OF ELEMENTS NEED NOT BE INCLUDED IN THE CHARGING DOCUMENT.

Relying on State v. Johnson, __ Wn. App. __, 289 P.3d 662 (2012), Skjold contends that the charging language for count III, unlawful imprisonment, was deficient because it failed to include the definition of the term "restraint." But that aspect of Johnson

was wrongly decided.[2] The charging document here, never objected to by Skjold at trial, provided him with adequate notice of the elements of unlawful imprisonment, and the conviction should be affirmed.

A charging document is sufficient if it sets forth all essential elements of the offense. State v. Kjorsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). The purpose of the rule is to ensure that defendants are sufficiently apprised of the charges against them so that they may prepare a defense. Id. at 101.

RCW 9A.40.040 provides that: "(1) A person is guilty of unlawful imprisonment if he or she knowingly restrains another person."

RCW 9A.40.010(6) defines "restrain" as follows:

> 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. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he or she is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him or her has not acquiesced.

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[2] The State has petitioned for reconsideration and this Court has requested an answer from the Appellant.

In Johnson, this Court found that the definition of restrain adds three essential elements that must appear in the charging language: (1) that the person being restrained have his or her liberty restricted without consent; (2) that the person restraining not have legal authority to do so; and (3) that the restraining substantially interfere with the victim's liberty. 289 P.3d at 674. But these additional features of the crime are not elements of the crime of unlawful imprisonment; they are components of the definition of restraint.

The distinction between essential elements and their definitions is fundamental to the analysis of a charging document's sufficiency. This distinction is long-standing and is well-illustrated in several different contexts, including harassment cases, jury instruction cases, alternative means cases, and firearm enhancement cases.

In the harassment context, courts have consistently distinguished between elements and definitions. RCW 9A.46.020 provides that a person is guilty of harassment where:

> (a) Without lawful authority, the person knowingly threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or
(iii) To subject the person threatened or any other person to physical confinement.

In defining the constitutional limits of the harassment statute, courts have stated that, to avoid unconstitutional infringement on protected speech, the harassment statute must be read as prohibiting only "true threats." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001); State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001). A "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Kilburn, 151 Wn.2d at 43.

While Washington courts agree that, before convicting a defendant of harassment, the State must prove that a threat is "true," they have uniformly rejected the argument that the definition of "threat" must be included in the information. State v. Allen, __ P.3d __ (Wn. Supreme Court Jan 24, 2013) (No. 86119-6), Slip Op. at 18-23 (felony harassment); State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006) (threats to bomb); State v. Tellez, 141

Wn. App. 479, 170 P.3d 75 (2007) (telephone harassment). No court has ever found that the definition of a threat is an essential element that must be explicitly stated in the information. The charging document need only include the essential elements. Still, the jury must find that the threat was "true" to convict. Allen, Slip Op. at 21-23.

In concluding that the definition of restrain is an essential element of unlawful imprisonment, this Court, and Skjold in his briefing here, relied on State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000), where the court held that the word "knowingly" modifies "all of the components of the definition of 'restrain.'" For this Court, Warfield's ruling "seem[ed]" to imply that the definition of 'restrain' contains essential elements of the crime." Johnson, Slip Op. at 26-27. This conclusion does not follow from its premise. While "knowing" does modify "restrain" and both are elements of the crime, it does not follow that each sub-definition of "restrain" is thereby transformed into an element of the crime. It simply means that proof of each sub-definition is subject to the "knowing" requirement.

Moreover, this Court's analysis is inconsistent with supreme court precedent. In J.M., the Washington Supreme Court

performed a similar statutory analysis of the harassment statute. 144 Wn.2d at 480-81. There, the court found that "knowingly threatens" modified both components of the definition of threat: a defendant must *know* that he is communicating a threat and *know* that the communication is a true threat. Yet, in State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010), the same court upheld the long-enforced rule that the various components of the definition of "threat" were not essential elements of the crime of harassment. Thus, a holding that "knowingly" modifies both the essential elements and the definitional terms does not mean that the definitions *become* elements.

The same is true for Warfield's holding. The fact that the mens rea element of the charge modified both the essential elements *and* the definitional components of a crime did not indicate that the definition and the elements were one and the same. Warfield merely clarified the intent requirements for unlawful imprisonment; this Court's use of Warfield in Johnson to imply the creation of additional elements for unlawful imprisonment is misplaced.

Courts have also distinguished between definitions and elements in jury instruction cases. In State v. O'Hara, 167 Wn.2d

91, 217 P.3d 756 (2009), the Washington Supreme Court considered the trial court's failure to provide a definition in a self-defense claim. In the trial court's instruction defining "malice," it omitted the second half of the definition. Id. at 97. On appeal, O'Hara argued that the incomplete definition created a manifest constitutional error. The court found that the jury need only be "instructed as to each element of the offense charged, and the failure of the trial court to further define those elements is not within the ambit of the constitutional rule." Id. at 105 (citing State v. Fowler, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990)). Ultimately, the court held that the failure to fully define malice was, "at most, a failure to define one of the elements," showing the fundamental difference between a definition and an element. O'Hara, 167 Wn.2d at 107 (citing State v. Ng, 110 Wn.2d 32, 44-45, 750 P.2d 632 (1988) and State v. Scott, 110 Wn.2d 680, 690-91, 757 P.2d 492 (1988)).

In Scott, the jury instructions failed to define the term "knowledge," an element of the crime charged. 110 Wn.2d at 683-84. On appeal, Scott claimed a manifest constitutional error under Rules of Appellate Procedure (RAP) 2.5(a). The court held that the "constitutional requirement is only that the jury be

instructed as to each element of the offense charged." Id. at 689. Because the missing jury instruction was for a definition and not an element, the claimed error was not "of constitutional magnitude." Id.

Washington courts have similarly distinguished between elements and definitions in the context of alternative means analysis. In State v. Linehan, 147 Wn.2d 638, 56 P.3d 542 (2002), the court discussed whether definitional statutes could create additional alternative means for committing the same offense – in other words, whether the definitions of elements can themselves be elements, creating alternative means for committing the same offense. The court again emphasized the distinction between elements and definitions, citing a list of cases to support its holding that "[d]efinition statutes do not create additional alternative means of committing an offense."[3] Id. at 646.

The supreme court has also addressed the distinction between elements and their definitions, discussing the criteria for a

[3] The court cited State v. Laico, 97 Wn. App. 759, 763, 987 P.2d 638 (1999) (citing State v. Strohm, 75 Wn. App. 301, 309, 879 P.2d 962 (1994), aff'd, 126 Wn.2d 1002 (1995). See also State v. Marko, 107 Wn. App. 215, 220, 27 P.3d 228 (2001) (the definitions of "threat" do not create alternative elements of the crime of intimidating a witness); State v. Garvin, 28 Wn. App. 82, 86, 621 P.2d 215 (1980) (the definitions of "threat," for purposes of the extortion statute, do not create alternative elements of the crime but merely define an element of the crime).

proper plea to a firearm enhancement. State v. Easterlin, 159 Wn.2d 203, 209, 149 P.3d 366 (2006). In his plea, Easterlin admitted to being "armed" with a firearm at the time of the charged principal crime, but later challenged the enhancement part of his plea, arguing that the plea judge did not establish the connection between the gun, the crime, and him. Id. at 208. The Supreme Court of Washington held, however, that "the connection between the defendant, the weapon, and the crime is not an element the State must explicitly plead and prove... Instead, it is essentially definitional." Id. at 209 (internal citations omitted).

In Johnson, this Court cited State v. Borrero, 147 Wn.2d 353, 58 P.3d 245 (2002) as support for its holding that definitional terms are essential elements, but Borrero is distinguishable. Johnson, 289 P.3d at 674. The charging document accusing Borrero of attempted murder in the first degree failed to charge him with taking a "substantial step" toward the commission of the crime. Id. at 358. Under RCW 9A.28.020, "a person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." By statute, a "substantial step" *is* the essential element of the crime of criminal attempt, it is not a definition. Id.

The definition of the element of "substantial step" is "conduct which strongly indicates a criminal purpose and which is more than mere preparation," and there is no holding in Borrero that this definition must be alleged in the information. Id. at 362. Borrero, then, is consistent with the rest of Washington case law in holding that essential elements of a crime must be alleged in the information but definitions need not be included.[4]

Here, the charging language for unlawful imprisonment did not need to provide the definition of "restrain" any more than the information in harassment cases needed to contain the definition of "threat," or the Borrero charging document needed to define "substantial step." The analysis should be parallel. The distinction between elements and definitions should apply here. It would make little sense to say that the constitution requires notice of non-elements, but that omission of a non-element from jury instructions is not constitutional error, and creates no new alternative means. This charging document mirrored the unlawful imprisonment statute, and the information served its function by

[4] Borrero is also distinguishable from the case at hand because defense counsel in Borrero objected to the missing element at halftime, changing the standard of review of the information from a "liberal" interpretation to a "strict one." Id. at 359-60.

adequately informing Skjold of the essential elements of the charge.

To require definitional terms in the charging language conflicts with an entire line of cases distinguishing between such terms and essential elements. This was the basis for the State's request that this portion of the published Johnson opinion be reconsidered, and also provides the basis for upholding the unlawful imprisonment conviction against Skjold here.

2. THE DEFINITION OF RESTRAINT CAN BE INFERRED FROM THE INFORMATION.

Skjold also relies on Johnson to contend that the elements of unlawful imprisonment are "neither found nor fairly implied in the charging document" here. Brief of Appellant at 9. But this Court's holding in Johnson failed to consider the language in the entire charging document, and did not fully consider the plain meaning of its language.

A charging document that was unchallenged at trial must be liberally construed in favor of validity. State v. Kjorsvik, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). This Court must ask whether (1) "the necessary facts appear in any form, or by fair construction can they

be found, in the charging document" and, if so, (2) whether the defendant can show that he was "actual[lly] prejudice[d] by the inartful language which caused a lack of notice." Id. at 105-06. In determining whether the charging language provides adequate notice, a court should be "guided by common sense and practicality." State v. Campbell, 125 Wn.2d 797, 881, 888 P.2d 1185 (1995).

In holding that the term "restrain" did not provide adequate notice of the charge against Johnson, this Court quoted the American Heritage dictionary definition of "restrain" to find its "plain meaning":

> (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
> (3) To hold, fasten, or secure so as to prevent or limit movement.

Johnson, 289 P.3d at 674. This Court added that absent from the dictionary definition is "any mention of restricting 'a person's movements without consent,' 'without legal authority,' or by 'interfer[ing] substantially with his or her liberty.'" Id.

The harassment comparison is again helpful here because the dictionary definition of "threat"[5] does not mirror the statutory definition. Among other things, it omits the subjective test for a "true threat." The definition's failure to mimic the dictionary definition has never been grounds for any Washington court to hold that the definition itself is an element of "threat" that must be stated in the charging document.

Similarly, the statutory definition of "restrain," while not a direct parroting of the dictionary, remains in accord with the "plain meaning" of the term. After all, it can readily be inferred that one who is "held back" or "prevented" from doing something, is "prevented" against one's "consent." Another "plain meaning" understanding of "restrain" cited by this Court is to "keep in check," which means to "impede" or "arrest." Johnson, 289 P.3d at 674. An ordinary reading of these words is that a person who is kept "in check" *has not consented* to the restraint. Burton's Legal Thesaurus (4 ed. 2007).

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[5] **1.** An expression of an intention to inflict pain, harm, or punishment.
2. An indication of impending danger or harm: *a threat of frost in the air.*
3. One that is regarded as a possible source of harm or danger: *viewed the stranger as a threat to the community.*
4. The condition of being in danger or at risk: *under threat of attack.*
http://www.ahdictionary.com/word/search.html?q=threat.

That "restrain" involves a "substantial interference with [the victim's liberty]" is also easily inferred. A synonym for restrain is "fasten," which is defined as "to attach firmly to something else." http://ahdictionary.com/word/search.html?q=fasten. Another definition for "restrain is "to hold," which means "to keep in one's grasp... to keep from moving... to keep from departing or getting away." http://ahdictionary.com/word/search.html?q=restrain; http://ahdictionary.com/word/search.html?q=hold. Skjold's information accused him of "imprisonment." CP 11. "Prison" is defined as "confinement," and to "confine" means: "1) To keep within bounds; restrict;" "2) To shut or keep in, especially to imprison;" and "3) To restrict in movement." http://ahdictionary.com/word/search.html?q=imprison. http://ahdictionary.com/word/search.html?q=confine. The plain language of any of these terms implies the "unlawful restricting of someone's movement without their consent" or by "substantially interfering" with their "liberty."

In Johnson, this Court appears to acknowledge some of the permissible inferences of "restrain" in its opinion, indicating that even if one could "reasonably infer" two of the statutory definitions, "there is no way to reasonably conclud[e] that the restraint must be

'without legal authority.'" Johnson, 289 P.3d at 674. But Johnson's charging documents, like Skjold's, accused him of "**unlawful imprisonment.**" CP 11 (bold in original). It 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.*" This Court in Johnson appears to have overlooked this aspect of the charge.

Skjold knew that he was being charged with forcing Romero to abandon his son and visit Skjold's apartment against his will, and the trial court recited these very facts when it denied the defense attorney's halftime motion to dismiss count III. 4RP 36. This satisfies both prongs of the Kjorsvik test – Skjold had notice in the charging document itself and, even if the language is considered "inartful," he was not prejudiced. 117 Wn.2d 93, 105. The State respectfully asks this Court to overrule its decision in Johnson, and find that this information charging unlawful imprisonment was adequate.

3. IN THE LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD FIND THAT SKJOLD ENTERED OR REMAINED UNLAWFULLY IN ROMERO'S HOME.

Skjold contends that Romero "entered by invitation and that invitation was not revoked," so the State did not prove that Skjold "entered or remained unlawfully." Brief of Appellant at 10-11. But this contention is altogether contrary to the facts in the record, which flatly contradict the notion that Skjold was "invited" into Romero's home.

Every element of a crime must be proven beyond a reasonable doubt. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). When an appellant challenges the sufficiency of the evidence, the reviewing court views the evidence in the light most favorable to the State, drawing all reasonable inferences from the evidence in the State's favor and interpreting them "most strongly against the defendant." State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

In order to prove burglary in the first degree, the State must prove, among the other elements, that a defendant "entered or remained unlawfully in a building." RCW 9A.52.020. A person "enters or remains unlawfully in or upon premises when he is not

then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(3).

Skjold analogizes the evidence in his case to two other burglary cases: State v. Collins, 110 Wn.2d 253, 258, 751 P.2d 837 (1988) and State v. Miller, 90 Wn. App. 720, 954 P.2d 925 (1998). In Collins, the court found that an invitation can be impliedly revoked once a crime is committed where the invitation was for a particular area and for a particular purpose (*e.g.*, the living room, to use the telephone). In Miller, the court found that where there is a general invitation to an entire area (*e.g.*, a public car wash during business hours), the commission of a crime in and of itself does not impliedly revoke the general invitation. Collins, 110 Wn.2d at 261; Miller, 90 Wn. App. at 727.

These cases are inapposite. Romero's testimony was clear: he was awoken from a deep sleep in the dead of night by a very angry Skjold pounding on his door. 2RP 28-33. When Romero opened the door to see who it was, Skjold "walked in" and grabbed him. 2RP 32-33. Later, during cross examination, Romero was asked, "...Mr. Skjold burst in the door; is that correct," and he responded, "I opened the door, and he came in." 2RP 104. Once past the threshold, Skjold pushed Romero to the ground, placed

one hand on his throat and with another pulled out "his little knife." 2RP 33. In his findings during the halftime motion, even the trial judge summarized Romero's testimony by saying that Skjold "burst into [Romero's] apartment..." 4RP 36.

The only other testimony regarding Skjold's entrance into Romero's apartment came from Romero's son:

> Um, I remember Shane pounding on the door. My dad woke up, walked over and opened it, and I can't remember what happened then, but I saw Shane have a knife and they were kind of yelling.

2RP 125. Nowhere in the record is there any evidence to suggest that Skjold was invited into the apartment. That Skjold can now characterize his entry into Romero's home in the middle of the night under these circumstances as "invited" strains credulity.

The evidence that Skjold's initial entry was unlawful was overwhelming: Skjold went to the apartment because he believed that Romero had stolen from him; he pounded loudly on Romero's door late at night; he brought a knife with him that he used the moment he had Romero on the ground; he accused Romero from the start of stealing and demanded the return of his money; he threw him to the ground and grabbed him by the neck; he did all of this in front of Romero's nine-year-old son, who was weeping.

Even after throwing him to the ground, Skjold ordered Romero out of his own home and forced him to abandon his son at that early hour. Once in his own apartment, Skjold caved in Romero's face with one punch. There is simply no rational argument that Skjold was somehow "invited" into Romero's home, and the "unlawfulness" of his presence extended throughout their contact.

Particularly when viewed in a light most favorable to the State and with all inferences in the State's favor, any rational juror would have found that Skjold's initial entry into Romero's apartment was unlawful, as was his "remaining" after violently "bursting" his way inside. His conviction should be affirmed.

D. CONCLUSION

For the foregoing reasons, the defendant's conviction should be affirmed.

DATED this 1 day of February, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
TOMÁS A. GAHAN, WSBA #32779
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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 Rebecca Wold Bouchey, 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 BRIEF OF RESPONDENT, in STATE V. SHANE SKJOLD, Cause No. 69077-9 -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.

Dated this 4 day of ~~January~~ February, 2013

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Name Bora Ly
Done in Seattle, Washington