

69005-1

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NO. 69005-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LUIS ANDRE PEREZ,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH ANDRUS

**BRIEF OF RESPONDENT
ADDRESSING SUPPLEMENTAL ASSIGNMENT OF ERROR**

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A. SUPPLEMENTAL ISSUE PRESENTED

Whether the charging document contains all of the essential elements of unlawful imprisonment.

B. ARGUMENT

1. DEFINITIONS OF ELEMENTS ARE NOT ESSENTIAL ELEMENTS OF THE CRIME, AND THUS, THEY NEED NOT BE INCLUDED IN THE INFORMATION.

In a supplemental assignment of error, Perez contends that the charging document in this case was deficient because it did not contain all of the essential elements of unlawful imprisonment. More specifically, Perez claims that the information should have alleged that the restraint of the victim was “without legal authority” in accordance with State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012), rev. granted in part, 178 Wn.2d 1001 (2013).¹ This claim should be rejected. Definitions of elements are not elements, and thus, they need not be included in a charging document. Therefore, Johnson is wrongly decided. This Court should follow well-settled precedent, and its recent decision in State v. Saunders, ___ Wn. App. ___, 311 P.3d 601 (2013), holding that definitions of

¹ The charging issue Perez raises is one of the issues that has been accepted for review. Oral argument occurred on January 21, 2014, and may be viewed at: http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2014010018C.

elements are not elements themselves. In accordance with this well-settled precedent, Perez's claim fails.

A criminal defendant is entitled to notice of the nature and cause of the accusation against him or her, and thus, all "essential elements" of the crime must be pleaded in the information and proved beyond a reasonable doubt. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The "to convict" instruction to the jury must also contain all essential elements of the crime. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). However, *definitions* of elements are not essential elements of the crime that must be included in a charging document or a "to convict" instruction. See, e.g., State v. Allen, 176 Wn.2d 611, 227, 294 P.3d 679 (2013) (holding that the definition of a "true threat" need not be alleged in the information or included in the "to convict" instruction, even though the State is required to prove that the threat in question was a true threat); see also State v. Smith, 159 Wn.2d 778, 785, 154 P.3d 873 (2007) (three common-law definitions of assault do not create alternative means of committing assault).

In this case, Perez was charged with unlawful imprisonment in Count VI as follows:

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse LUIS ANDRE PEREZ and CHRISTAPHER TARENCE WHITE, and each of them, of the crime of **Unlawful Imprisonment**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendants LUIS ANDRE PEREZ and CHRISTAPHER TARENCE WHITE, and each of them, together with others, in King County, Washington, during a period of time intervening between January 20, 2010 through January 22, 2010, did knowingly restrain E.C., a human being

CP 66 (bold in original).

This charging language is entirely consistent with RCW 9A.40.040(1), which provides that a "person is guilty of unlawful imprisonment if he or she knowingly restrains another person." This statute establishes that the essential element of unlawful imprisonment is knowing restraint. "Restrain" is then separately defined as "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(6). Although the information must allege that the defendant knowingly restrained the victim, it need not allege the full definition of the term "restrain,"

because definitions of elements are not elements in accordance with the case law cited above. Otherwise, the information (and the “to convict” instruction) might also have to include notions of consent, age, physical force, intimidation, deception, competency, guardianship, and/or lawful control or custody.² In sum, the information is sufficient in this case because it contains the essential elements of unlawful imprisonment.

Nonetheless, the Johnson court held that an information charging unlawful imprisonment must allege that the restraint of the victim is without legal authority. In reaching this conclusion, the Johnson court relied primarily upon State v. Borrero, 147 Wn.2d 353, 58 P.3d 245 (2002), and State v. Warfield, 103 Wn. App. 152, 5 P.3d 1280 (2000). But neither case leads to the conclusion that the definition of restraint is an essential element of unlawful imprisonment.

In Borrero, the information accusing the defendant of attempted murder in the first degree omitted the essential element that the defendant took a “substantial step” toward the commission of the completed crime. Borrero, 147 Wn.2d at 358. By statute, a “substantial step” is not merely a definition; rather, it is the essential

² These terms also appear in the statutory definition of “restrain.” See RCW 9A.40.010(6).

actus reus of criminal attempt. RCW 9A.28.020. Accordingly, Borrero is consistent with the cases cited above that the essential elements of a crime must be alleged in the information, and it does not support the Johnson court's conclusion that definitions of elements are essential elements as well.

In Warfield, the defendant did not challenge the sufficiency of the charging document alleging unlawful imprisonment. Instead, he claimed that the State had presented insufficient evidence to prove the essential element of knowledge. The Warfield court held that the word "knowingly" in the unlawful imprisonment statute modified "all of the components of the definition of restrain." Warfield, 103 Wn. App. at 157. Accordingly, because the defendant had acted in good faith in relying on an arrest warrant when detaining the victim, the evidence was not sufficient to prove that the defendant had knowledge that his restraint of the victim was unlawful. Id. But it does not follow from the fact that the State must prove something contained in a definition that the definition itself then becomes an essential element of the crime that must be charged in the information. See State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004) ("sexual gratification" is not an essential element of child molestation, "but a definitional term that clarifies

the meaning of the essential element, 'sexual contact"). Again, only essential elements must be charged, and the Johnson court erred in holding otherwise.

Moreover, in Saunders, a different panel of this Court very recently concluded that the definition of "restrain" was not an essential element of unlawful imprisonment for purposes of the "to convict" instruction. Saunders, 311 P.3d at 604-06. Admittedly, the Saunders court did not repudiate Johnson, but rather attempted to distinguish it on grounds that the purpose of a charging document is notice, whereas a "to convict" instruction serves as the "'yardstick" by which the jury measures the evidence to determine guilt or innocence.'" Id. at 606 (quoting State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003), which quotes State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). Although the Saunders court is correct that a charging document and a "to convict" instruction serve different purposes, this Court should hold that the essential elements of unlawful imprisonment are the same in both contexts, as there is no rational reason to distinguish between them.

In sum, the Johnson court erred in failing to distinguish between essential elements and definitions of elements. The information in this case alleged the essential elements of unlawful imprisonment as defined by the legislature, and Perez's claim should be rejected.

2. THE INFORMATION PROVIDES ADEQUATE NOTICE THAT THE VICTIM WAS UNLAWFULLY RESTRAINED AND PEREZ CANNOT DEMONSTRATE PREJUDICE.

Furthermore, even if unlawful restraint *were* an essential element of unlawful imprisonment, the Johnson court erred in concluding that an information charging unlawful imprisonment in accordance with the language of the statute is insufficient to allege unlawful restraint because the court failed to read the information liberally and as a whole.

A charging document that has not been challenged at trial must be liberally construed in favor of validity. State v. Kjorsvik, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). Therefore, "if the necessary facts appear in any form, or by a fair construction can be found within the terms of the charge, then the charging document will be upheld on appeal." Id. at 104. In determining whether the

charging document provides adequate notice, a court should be “guided by common sense.” State v. Campbell, 125 Wn.2d 797, 881, 888 P.2d 1185 (1995). Moreover, if there is “at least some language in the information giving notice of the allegedly missing element(s),” the defendant must show actual prejudice resulting from the inartful or vague charging language in order to prevail on appeal. Kjorsvik, 117 Wn.2d at 106.

In this case, as set forth above, the information accused Perez of committing “**Unlawful Imprisonment**” by “knowingly restrain[ing]” the victim. CP 66 (bold in original). A fair reading of “restrain” includes notice that the restraint is unlawful, particularly when the document is liberally construed in a common-sense manner to determine whether the allegedly missing element appears “*in any form.*” Kjorsvik, 117 Wn.2d at 104 (emphasis supplied). The name of the charge itself, which is written in bold, is “**Unlawful Imprisonment.**” A reasonable person of average intelligence reading those words would conclude that the alleged restraint was not lawful. Stated in the converse, no reasonable person would conclude that he or she was accused of unlawfully restraining a person that he or she had lawful authority to restrain. Accordingly, when the information is liberally construed, it supplies

notice of the allegedly missing element of unlawful restraint, and the first prong of the Kjorsvik test is satisfied.

Furthermore, Perez cannot demonstrate prejudice resulting from the claimed defect in the charging language. Perez did not request a bill of particulars to clarify the basis for the unlawful imprisonment charge, and there was no evidence presented at trial that Perez believed that his restraint of the victim was lawful as in Warfield. Rather, the dispute at trial was whether or not the victim was restrained by the defendants at all. On the one hand, E.C. testified that both Perez and White prevented her from leaving the basement after beating and raping her, and that she did not attempt to leave because she was afraid that they were going to kill her. RP (12/12/11) 1792-96. On the other hand, Perez testified at trial that Troy O'Dell was responsible for harming E.C. and that he had not told anyone about O'Dell's involvement because he was afraid of O'Dell. RP (12/14/11) 2281; RP (12/15/11) 2575-77. In sum, Perez cannot show prejudice arising from any claimed defect in the information because there is none. Thus, the second prong of the Kjorsvik test (lack of prejudice) is satisfied as well.

In sum, the information in this case contained sufficient information to provide notice of the allegedly missing element under

the liberal construction rule, and Perez suffered no prejudice from the claimed inadequacy in the charging language.

C. CONCLUSION

For the reasons stated above, and for the reasons stated in the Brief of Respondent and the State's Response to Pro Se Statement of Additional Grounds, this Court should affirm.

DATED this 6th day of February, 2014.

Respectfully submitted,

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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 Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent Addressing Supplemental Assignment of Error, in STATE V. LUIS PEREZ, Cause No. 69005-1-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.



Name
Done in Seattle, Washington

Date

02-06-14