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NO. 68574-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH MILLER,

Appellant.

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

The Honorable Mariane Spearman, Judge

APPELLANT'S SUPPLEMENTAL BRIEF
RE: STATE v. JOHNSON

LENELL NUSSBAUM
Attorney for Appellant

Market Place One, Suite 330
2003 Western Ave.
Seattle, WA 98121
(206) 728-0996

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A. ARGUMENT RE: STATE v. JOHNSON

1. THE STATE DOES NOT DISTINGUISH JOHNSON OR DEMONSTRATE WHY IT DOES NOT CONTROL THIS CASE.

The State in no way distinguishes this case from the facts of State v. Johnson, ___ Wn. App. ___, 289 P.3d 662 (2012). It acknowledges the instruction defining recklessness was the same as that given and found erroneous in Johnson, State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011), and State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011). Supp'l Br. of Resp. at 9.

Instead, the State argues the Court of Appeals was "in error" in its Johnson opinion; and Division Two was equally in error in State v. Harris.

While the State provides a painstaking analysis, it candidly acknowledges that the Johnson Court considered and rejected its argument. Johnson, 289 P.3d at 672. However, it did not reject it "out of hand." Supp'l Br. of Resp. at 7. It explained quite patiently why it made a different decision in Johnson than in State v. Holzknecht, 157 Wn. App. 754, 238 P.3d 1233 (2010), review denied, 170 Wn.2d 1029 (2011). The Court thus gave the argument and analysis its considered

attention before rejecting it. Its reasoned distinction from Holzknecht applies equally to this case. See Reply Brief of Appellant at 7-8.

The State has filed a Motion for Reconsideration in Johnson. However, that motion addresses an issue regarding the unlawful imprisonment conviction, not the assault conviction. The State did not challenge the Court's opinion on the issue of the recklessness instruction.

There being no distinction, Johnson controls the issue in this case.

2. STATUTORY LANGUAGE DOES NOT SAVE THE INSTRUCTION IN THIS CONTEXT.

The State quotes many cases on the general rule that statutory language in instructions is an accurate statement of law. Many cases, however, have turned on specific facts requiring more specific language than the statute to instruct the jury completely and accurately. See Reply Brief of Appellant at 4-6.

Johnson, Harris, and Peters all stem from State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005). There the Supreme Court held the definition of recklessness in a manslaughter case

must specify the mental state required to prove the crime: knowing of and disregarding the specific risk of death.

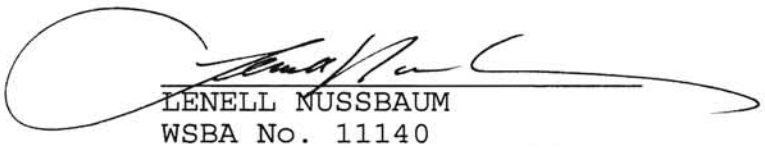
The Committee that prepares the Washington Pattern Instructions - Criminal recognized the effect of Gamble. It modified the instruction on recklessness and alerted the bar to consider the specific legal issue. 11 Wash. Prac., WPIC 10.03, Comment (3d Ed.). Reply Brief of Appellant at 5-6. If the Committee perceived the issue, as well as Divisions One and Two of this Court, Johnson cannot be all wrong.

B. CONCLUSION

For the reasons stated above, in the Brief of Appellant, and in the Reply Brief of Appellant, this Court should reverse this conviction.

DATED this 12th day of February, 2013.

Respectfully submitted,



LENELL NUSSBAUM
WSBA No. 11140
Attorney for Mr. Miller

DECLARATION OF SERVICE

ALEXANDRA FAST declares:

On this date I caused a copy of this document to be served on the following entities by depositing it in the United States Mail Service, postage prepaid, addressed as follows:

Mr. Dennis McCurdy
King County Prosecutor's Office
Appellate Unit
W-554, King County Courthouse
516 Third Ave.
Seattle, WA 98104

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

2/12/2013 SEATTLE, WA — Alex Fast
Date and Place — ALEXANDRA FAST