

NO. 44186-1-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

DAVID DARLING,

Appellant.

---

---

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

The Honorable Barbara Johnson, Judge

---

---

REPLY BRIEF OF APPELLANT

---

---

CHRISTOPHER H. GIBSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENTS IN REPLY</u> .....	1
1. THE STATE IGNORES CONTROLLING AUTHORITY FROM THIS COURT IN ARGUING THE CHARGING DOCUMENT WAS ADEQUATE. ....	1
2. THE TRIAL COURT MISAPPLIED THE LAW IN CALCULATING DARLING'S OFFENDER SCORE.....	8
B. <u>CONCLUSION</u> .....	9

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

<u>State v. Allen</u> 176 Wn.2d 611, 294 P.3d 679 (2013).....	4, 6, 7
<u>State v. Campbell</u> 125 Wn.2d 797, 888 P.2d 1185 (1995).....	7
<u>State v. Chesnokov</u> __ Wn. App. __, __ P.3d __, 2013 WL 3421905 (July 8, 2013).....	8
<u>State v. DeRyke</u> 110 Wn. App. 815, 41 P.3d 1225 (2002).....	8
<u>State v. Graciano</u> 176 Wn.2d 531, 295 P.3d 219 (2013).....	8
<u>State v. J.M.</u> 144 Wn.2d 472, 28 P.3d 720 (2001).....	2
<u>State v. Johnson</u> 119 Wn.2d 143, 829 P.2d 1078 (1992) <u>cert. denied</u> , 554 U.S. 922 (2008).....	2, 3, 5
<u>State v. Johnson</u> 172 Wn. App. 112, 289 P.3d 662 (2012).....	1, 2, 3
<u>State v. Kier</u> 164 Wn.2d 798, 194 P.3d 212 (2008).....	8
<u>State v. Kjorsvik</u> 117 Wn.2d 93, 812 P.2d 86 (1991).....	4, 5
<u>State v. Lindsay</u> 171 Wn. App. 808, 288 P.3d 641 (2012).....	8
<u>State v. McCarty</u> 140 Wn.2d 420, 998 P.2d 296 (2000).....	7

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Nonog</u> 169 Wn.2d 220, 237 P.3d 250 (2010).....	5
<u>State v. Phuong</u> 174 Wn. App. 494, 299 P.3d 37 (2013).....	2, 4, 5, 6
<u>State v. Recuenco</u> 163 Wn.2d 428, 180 P.3d 1276 (2008).....	4
<u>State v. Schaler</u> 169 Wn.2d 274, 236 P.3d 858 (2010).....	7
<u>State v. Simms</u> 171 Wn.2d 244, 250 P.3d 107 (2011).....	4
<u>State v. Studd</u> 137 Wn.2d 533, 973 P.2d 1049 (1999).....	4
<u>State v. Taylor</u> 90 Wn. App. 312, 950 P.2d 526 (1998).....	8
<u>State v. Vangerpen</u> 125 Wn.2d 782, 888 P.2d 1177 (1995).....	3
<u>State v. Warfield</u> 103 Wn. App. 152, 5 P.3d 1280 (2000).....	1, 2, 3, 4, 5, 7
<u>State v. Yates</u> 161 Wn.2d 714, 168 P.3d 359 (2007).....	3, 5
 <u>FEDERAL CASES</u>	
<u>United States v. Baker</u> 16 F.3d 854 (8th Cir.1994) .....	8

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
U.S. Const. Amend. VI.....	3
Wash. Const. Art. I, § 22 .....	3
WPIC 39.16 .....	4

A. ARGUMENTS IN REPLY

1. THE STATE IGNORES CONTROLLING AUTHORITY FROM THIS COURT IN ARGUING THE CHARGING DOCUMENT WAS ADEQUATE.

The State argues that the information contained all elements of the crime. Brief of Respondent (BOR) at 3-6. Darling was charged with unlawful imprisonment as follows:

That he, DAVID LAWRENCE DARLING, in the County of Clark, State of Washington, on or about and between August 26, 2012 and August 27, 2012, did knowingly restrain another person, to-wit: Julie Ann Barnes; contrary to Revised Code of Washington 9A.40.040 and 9A.40.10(6).

CP 7.

In arguing the information is adequate, the State ignores, and fails to address, the primary authority supporting Darling's argument, State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000). There, this Court held that for purposes of unlawful imprisonment, "restraint" has four primary components: "(1) restricting another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty." Id. at 157. "Knowingly" modifies all four components of restraint. Id. at 153-54, 157. The modified components of "restraint" are thus elements of the crime of unlawful imprisonment. Id. at 158-59. This proposition was

later cited with approval in State v. J.M., 144 Wn.2d 472, 480-81, 28 P.3d 720 (2001).

The State correctly notes, however, that Division One's decision in State v. Johnson, 172 Wn. App. 112, 289 P.3d 662, 674 (2012), which holds that the common understanding of "restraint" fails to convey statutory definition, and in particular, requirement of knowledge that such restraint occur "without legal authority," is at odds with the two-judge majority in another recent decision of that Court, State v. Phuong, 174 Wn. App. 494, 299 P.3d 37 (2013). The Phuong dissent is consistent with this Court's decision in Warfield. Phuong, 174 Wn. App. at 549-52 (Becker, J., dissenting). The appellant in that case has filed a petition for review, which is set for consideration on October 1, 2013 under Supreme Court case no. 88889-2.

Warfield was correctly and logically decided and supports Darling's claim. This Court carefully analyzed legislative intent and concluded the statutory definition of unlawful imprisonment, to "knowingly restrain," causes the adverb "knowingly" to modify all components of the statutory definition of "restrain." Warfield, 103 Wn. App. at 153-54. This Court explained that "knowledge of the law is a statutory element of the crime of unlawful imprisonment, without proof of which, defendants' convictions cannot stand." Id. at 159.

Relying on Warfield, the Johnson opinion correctly recognized that even if an accused could fairly infer some of the knowledge requirements attached to "restrain" from the charging document, one could not infer from the charging language that the restraint must be accomplished with knowledge it was "without legal authority." Johnson, 172 Wn. App. at 139-40.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); see also U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. "An element is 'essential' if its 'specification is necessary to establish the very illegality of the behavior.'" State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)), cert. denied, 554 U.S. 922 (2008). Knowledge that the restraint was without lawful authority is an essential element of unlawful imprisonment because it is one of the facts the State must prove beyond a reasonable doubt. Johnson, 172 Wn. App. at 139-40.

The State claims the statutory language is sufficient and it should not be required to provide more. BOR at 6. The State is mistaken. "[T]his court has specifically referred prosecutors to the criminal pattern instructions for the purpose of identifying, in many cases, the essential

elements that must be included in a charging document." State v. Studd, 137 Wn.2d 533, 554, 973 P.2d 1049 (1999) (Madsen, J., concurring). As the Supreme Court has noted, the responsibility to include all essential elements of a crime is not unduly burdensome, considering the WPICs list the elements of the most common crimes. State v. Kjorsvik, 117 Wn.2d 93, 102 n.13, 812 P.2d 86 (1991). Following this Court's 13-year-old decision in Warfield, the standard "to convict" instruction for unlawful imprisonment recognizes the definition of "restrain," as modified by the adverb "knowingly," creates elements of the crime that need to be proven, including the element that the person know the restraint was without legal authority. WPIC 39.16. The State nonetheless failed to allege all of the essential elements here. CP 7.

As the State notes, in holding to the contrary the Phuong majority relied on State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013). But in doing so, the Phuong majority simplifies the issue to the point of error, reformulating the question as whether the definition of an element of the offense must be alleged in the charging document.

The essential elements rule, however, requires a charging document to "allege facts supporting every element of the offense." State v. Simms, 171 Wn.2d 244, 250, 250 P.3d 107 (2011) (citing State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008)). The first step is to

determine what constitutes an essential element. The second step is to determine whether all of the essential elements are contained in the information. Kjorsvik, 117 Wn.2d at 105-06. Again, an element is essential if it is necessary to establish the illegality of the behavior. Yates, 161 Wn.2d at 757.

The charging document in this case is deficient under this standard. The State was required to prove knowledge that the restraint was unlawful in order to convict Darling of unlawful imprisonment. Warfield, 103 Wn. App. at 159; Johnson, 172 Wn. App. at 135-40. The Phuong majority's attempt to draw an absolute line between a "definition" and an essential element makes little sense in the present context.

The rationale behind requiring all "essential elements" be included is to give the accused proper notice of the nature of the crime so that the accused can prepare an adequate defense. State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). With that goal in mind, it becomes clear that an essential element of unlawful imprisonment is that the accused not only knowingly restrained someone, but also that he knowingly violated the law.

Warfield, which involved bounty hunters that restrained a man on an outstanding arrest warrant and checked with local police before returning him to jail, illustrates the kind of case where knowledge of the

law obviously makes a difference in terms of defending against the charge. Warfield, 103 Wn. App. at 153-54. Unlawful imprisonment is one of the few crimes that require the State to prove the offender knew his conduct was without authority of law. Id. at 159. The charging language here failed to apprise Darling of that element of the State's case.

The State also argues that the Phuong majority is amply supported by the reasoning of Allen. BOR at 5-6. Again, the State is mistaken. In Allen, the Court held a "true threat" was not an essential element of the crime of harassment. 176 Wn.2d at 628-30. The constitutional concept of true threat "merely defines and limits the scope of the essential threat element" in the harassment statute and is not itself an essential element. Id. at 630.

Moreover, the "true threat" cases are distinguishable because they arise out of the First Amendment over breadth concern that such statutes could be interpreted to encompass a substantial amount of protected speech. Id. at 626. In light of that constitutional concern, threat-based statutes are construed to be limited to "true threats." Id. The "true threat" requirement is a limitation on the essential "threat" element. Id.

Darling's case does not implicate First Amendment concerns. Unlike First Amendment cases where the "true threat" definition limits the scope of the threat element, the knowledge requirement attached to

restraint, including the requirement that the accused knew the restraint was unlawful, does not limit the scope of the restraint element. As construed in Warfield, the provision defining restraint, when coupled with the definition of the crime, expands the mens rea requirement, that is, what the accused must know in order to be convicted. Knowledge of the unlawfulness of the act is an element of the crime.

Significantly, Allen also recognized the charging language including to "knowingly threaten" left to its ordinary meaning satisfied the mens rea element as to the result encompassed within the meaning of "true threat." Allen, 176 Wn.2d at 629 n.11 (citing State v. Schaler, 169 Wn.2d 274, 287-88, 236 P.3d 858 (2010)). The "knowingly restrains" language of the unlawful imprisonment charge, left to its ordinary meaning, does not set forth all of the specific mens rea for each element of the crime.

If the charging document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary elements of unlawful imprisonment are neither found nor fairly implied by the charging document, this Court must presume prejudice and reverse Darling's convictions. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

2. THE TRIAL COURT MISAPPLIED THE LAW IN CALCULATING DARLING'S OFFENDER SCORE.

As the State correctly notes, the recent decision in State v. Graciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2013), places the burden squarely on the defendant to prove crimes constitute 'same criminal conduct' for offender score purposes. BOR at 7. Graciano also reiterates the well-established rule that a trial court's 'same criminal conduct' determination is subject to reversal if it resulted from an abuse of discretion or misapplication of the law. 176 Wn.2d at 537.

Both the State in its response brief and the Washington Supreme Court in Graciano, however, failed to acknowledge much less discuss another well-established rule, which is that ambiguous jury verdicts must be interpreted in favor of the defendant. State v. Kier, 164 Wn.2d 798, 811, 194 P.3d 212 (2008); State v. Chesnokov, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2013 WL 3421905 at 6 (Slip Op. filed July 8, 2013); State v. Lindsay, 171 Wn. App. 808, 288 P.3d 641, 660 (2012); State v. DeRyke, 110 Wn. App. 815, 824, n.22, 41 P.3d 1225 (2002)(citing State v. Taylor, 90 Wn. App. 312, 317, 950 P.2d 526 (1998) (interpreting ambiguous verdict in defendant's favor) and United States v. Baker, 16 F.3d 854, 857-58 (8th Cir.1994) (“When a defendant is convicted by an ambiguous verdict that is susceptible of two interpretations for sentencing purposes, he may not be

sentenced based upon the alternative producing the higher sentencing range.”)). When that rule is properly taken into consideration, it is clear Darling's sentencing court misapplied the law by failing to interpret the otherwise ambiguous jury verdicts in favor of finding that the harassment offense was based on the evidence of pre-arrest death threats, rather than the post-arrest death threats. Had the sentencing court done so, Darling would have necessarily met his burden of proving all three of his offenses constituted the 'same criminal conduct' for purposes of sentencing because it would have resolved the timing issue in his favor, which was the only element of the 'same criminal conduct' analysis in dispute. RP 349-60.

B. CONCLUSION

For the reasons stated here and in the opening brief, this Court should reverse Darling unlawful imprisonment conviction and remand for resentencing based on a correct offender score.

DATED this 17<sup>th</sup> day of September 2013



---

CHRISTOPHER H. GIBSON  
WSBA No. 25097  
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 44186-1-II
	)	
DAVID DARLING,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11<sup>TH</sup> DAY OF SEPTEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]     DAVID DARLING  
          DOC NO. 353110  
          COYOTE RIDGE CORRECTIONS CENTER  
          P.O. BOX 769  
          CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 11<sup>TH</sup> DAY OF SEPTEMBER 2013.

x *Patrick Mayovsky*

# NIELSEN, BROMAN & KOCH, PLLC

## September 11, 2013 - 3:17 PM

### Transmittal Letter

Document Uploaded: 441861-Reply Brief.pdf

Case Name: David Darling

Court of Appeals Case Number: 44186-1

**Is this a Personal Restraint Petition?** Yes  No

#### The document being Filed is:

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

#### Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: [mayovskyp@nwattorney.net](mailto:mayovskyp@nwattorney.net)

A copy of this document has been emailed to the following addresses:  
[prosecutor@clark.wa.gov](mailto:prosecutor@clark.wa.gov)