NO. 89702-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

ANSWER TO PETITION FOR REVIEW

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A. ISSUE PRESENTED

Does the unpublished Court of Appeals opinion, which relied on one Supreme Court opinion, three published Court of Appeals opinions, and a modified WPIC instruction, misstate the law so as to warrant this Court's review? RAP 13.4(b).

B. STATEMENT OF THE CASE

The Court of Appeals opinion adequately provides the facts of this case for purposes of this Answer.

C. LEGAL AUTHORITY AND ARGUMENT

THIS COURT ALREADY DENIED REVIEW OF THIS ISSUE IN STATE v. JOHNSON. IT SHOULD DO SO AGAIN.

The issue in this case is controlled by State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012), review granted on other grounds,[1] 178 Wn.2d 1001 (2013).

As here, Johnson was convicted of second degree assault for intentionally assaulting and thereby recklessly inflicting substantial bodily

[1] This Court granted review in Johnson solely on the State's defective information issue and Johnson's ineffective assistance of counsel issue. State v. Johnson, Supreme Court No. 88683-1 (Order Granting Review In Part, 9/3/2013).

harm on another. The instructions given in Johnson were the same as given here.

As here, the Court of Appeals in Johnson relied on this Court's decision in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005); and the Court of Appeals opinions relying on Gamble: State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011), and State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011).

The Court of Appeals here even noted the WPIC instructions reflect the reasoning of these decisions. State v. Miller, Court of Appeals No. 68574-1-I (10/28/2013) (Slip Op. at 7).

The State argued against the Court's reasoning below. It made the same argument in State v. Johnson in its Petition for Review.[2] Nonetheless, this Court denied review on this issue.

The Court of Appeals clearly relied on Johnson. It required supplemental briefing from both parties on the effect of Johnson on this case. Although it held oral argument on May 31, 2013, it carefully waited to decide this case until after this Court denied review of this issue in Johnson.

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[2] A copy is attached as Appendix A.

See Order Granting Review In Part (9/3/2013); Slip Op. (10/28/2013).

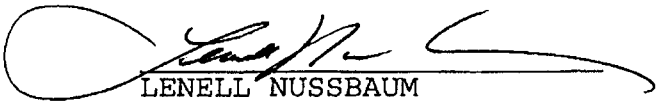
The State makes no new arguments here. For the same reason it denied review in Johnson, this Court should deny review in this case.

D. CONCLUSION

The Court of Appeals opinion in this case is controlled by established case law. This Court has denied review on this same issue, with the same facts and arguments presented. It should deny review in this case for the same reasons.

DATED this 30th day of December, 2013.

Respectfully submitted,



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APPENDIX A

COPY

SUPREME COURT NO. _____
COURT OF APPEALS NO. 66624-0-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

J.C. JOHNSON,

Appellant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court review two issues from the Court of Appeals' published decision.

B. ISSUES PRESENTED FOR REVIEW

1. 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.

2. Whether an information charging unlawful imprisonment, when liberally construed, fairly puts a defendant on notice that the restraint was "without legal authority" when it alleges that he committed "unlawful imprisonment" by "knowingly restraining" his victim.

C. STATEMENT OF THE CASE

Between May 4, 2010 and May 7, 2010, J.C. Johnson held his wife, J.J., in their apartment against her will. 7RP 63-63.[1] Convinced that she was unfaithful, he interrogated, threatened, and strangled her. 7RP 63-64. J.J. believed that Johnson was going to murder her and that

[1] The verbatim report of proceedings consists of 15 volumes: 1RP (11/29/10), 2RP (11/30/10 - morning), 3RP (11/30/10 - afternoon), 4RP (12/1/10 - voir dire), 5RP (12/1/10), 6RP (12/2/10), 7RP (12/6/10), 8RP (12/7/10), 9RP (12/8/10), 10RP (12/13/10), 11RP (12/14/10), 12RP (12/15/10), 13RP (12/16/10), 14RP (12/17/10), 15RP (1/26/11).

her corpse would be left for her children to find. 7RP 64. For three days, Johnson kept her nearly nude in the apartment, using his Rottweiler to contain her movements. 7RP 67-68, 70, 92. J.J. left the house only if accompanied by Johnson. 7RP 66. Eventually, J.J. fled the apartment in her underwear, bolting to her neighbor's home to call the police. 7RP 70, 92. When police arrived, they found J.J. covered in bruises and marked with strangulation injuries and dog bites. 6RP 21-22; 8RP 93-94.

Johnson escaped in J.J.'s car. 6RP 20-22; 7RP 72. He was eventually captured, charged, and convicted of numerous crimes, including assault in the second degree (count II) and unlawful imprisonment (count V). CP 132-40, 144-46, 149-51.

Johnson raised multiple claims on appeal, most of which were rejected in a decision affirming his convictions and persistent offender sentence. State v. Johnson, No. 66624-0-I, slip op. (Wn. App. Dec. 3, 2012).[2] However, as to count II, the Court of Appeals held that the trial court improperly defined "reckless" in jury instructions. As to count V, the Court of Appeals held that the charging document was deficient. The State seeks review of these two claimed errors.

[2] On February 13, 2013, the Court of Appeals modified its decision. Order on Motion for Reconsideration and Order Modifying Opinion. The initial opinion and the order are attached as appendices 1 and 2, respectively.

D. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

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 both the instructional issue and the charging issue presented in this case.

1. REVIEW IS NEEDED BECAUSE THE COURT OF APPEALS DECISION ERRONEOUSLY CHANGES THE WAY MENTAL STATES ARE DEFINED IN JURY INSTRUCTIONS.

Johnson was charged in count II with assault in the second degree under RCW 9A.36.021(1)(a) for "intentionally assault[ing] another and thereby recklessly inflicting substantial bodily harm upon [J.J.]." CP 11. The "to convict" jury instruction required the State to prove beyond a reasonable doubt that Johnson "recklessly inflicted *substantial bodily harm* on [J.J.]" (emphasis added). CP 48. "Reckless" was defined in a separate instruction which stated in part that a "person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a *wrongful act* may occur..." (emphasis added). CP 11. The Court of Appeals held that the definition of "reckless" was deficient because it failed to specifically refer to the resulting bodily injury. Johnson, slip op.

18-20 (Wn. App. Dec. 3, 2012). In other words, the Court of Appeals held that the mental state instruction must explicitly link a mental state with the resulting harm. In this case, the Court of Appeals would require that the instruction say: ". . .person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that *substantial bodily harm* may occur." Id.

This holding was error. 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). Where, as here, the "to convict" instruction includes all elements of assault defined in statutory terms, and recklessness is also defined in statutory terms, it is difficult to see how the instructions can be incorrect.

The Court of Appeals' confusion on this issue stems from two previous flawed decisions that misinterpret this Court's decision in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). *See* State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011) and State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011). Review was not sought in either of these

published decisions so this Court has not yet had occasion to consider the analysis in the decisions. This case presents an excellent opportunity to correct important analytical errors in those decisions before the errors spread to other cases.

In Gamble, this Court held that manslaughter was not a lesser included offense of felony murder because the jury must find a direct connection between recklessness and death for manslaughter, but not for felony murder. 154 Wn.2d at 460. The court noted that in a manslaughter case, the wrongful act recklessly disregarded is "death." Id. at 467-68. This Court's decision in Gamble said nothing, however, as to how jury instructions defining "recklessness" must be drafted, whether in a manslaughter case or any other case.

There has been considerable confusion since Gamble as to the scope and import of the decision. In particular, courts and the WPIC committee have debated whether recklessness must always be defined with reference to the risk that is to be avoided. Responding to Gamble, the WPIC committee provided a recklessness definition with a fill-in-the-blank bracket permitting (but not requiring) a particularized definition. WPIC 10.03. The committee's uncertainty about Gamble was reflected in its commentary:

> The [Gamble] court gave no indication as whether more particularized standards would also apply to offenses other than manslaughter. The first paragraph of the instruction above is drafted in a manner that allows practitioners to more fully consider how Gamble applies to other offenses. If the instruction's blank line is used, care must be taken to avoid commenting on the evidence.

11 Wash. Practice: WPIC 10.03, Comment. Thus, the pattern instruction committee is unsure whether Gamble requires a change to jury instructions outside of the manslaughter context.

As noted above, the question of how to instruct juries on the definition of recklessness has arisen in two published Court of Appeals decisions. In State v. Peters, the defendant was convicted of manslaughter in the first degree. On appeal, he claimed that the jury instructions violated his due process rights by lowering the State's burden of proof. Peters, 163 Wn. App. at 847. Indeed, the defendant was correct insofar as the "to convict" instruction only asked the jury to find that Peters engaged in "reckless conduct" before convicting him, instead of saying that they had to find Peters "recklessly caused the death" of his victim. Id. A "to convict" instruction must contain all the elements of the crime because it "serves as a yardstick by which the jury measures the evidence to determine guilt or innocence." State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). By failing to provide the nexus between recklessness and death, the "to convict" instruction was incorrect.

However, the Peters court misidentified the error. It rightfully held that the jury was not properly instructed, but it mistakenly held that the "reckless" definition, rather than the "to convict" instruction, was flawed. The definition of "reckless" correctly used the statutory language. 163 Wn. App. at 845. Had the "to convict" instruction actually tracked the statute, it would have informed the jury that Peters needed to have recklessly caused the death of the victim, and the State would not have been relieved of its burden of proving an element of the crime. Thus, the Peters court erred by requiring a change to the definition of reckless rather than by requiring the "to convict" instruction to establish the appropriate nexus.

A version of this erroneous analysis was imported into a non-manslaughter case in State v. Harris, supra. Harris was charged with assault of a child and the jury was provided the standard instruction defining recklessness, i.e., disregarding the risk that a "wrongful act" may occur. Unlike Peters, the "to convict" instruction in Harris used the precise language of the statute and contained the required nexus between recklessness and the harm to be avoided. The instruction required the jury to find that the defendant "recklessly inflicted *great bodily harm.*" Harris, at 384 (emphasis added). The Harris court apparently failed to realize that the "to convict" instruction in Peters was deficient. It simply followed the

holding of Peters, and held that by failing to include "great bodily harm" in the definition of "reckless," the State was relieved "of its burden to prove that Harris acted" with disregard of the risk that his actions would result in "great bodily harm." Id. at 387. This was error. The "to convict" instruction in Harris specifically informed the jury that it had to find that the defendant recklessly inflicted a defined level of harm, "great bodily harm. " Id. at 384. Thus, there was no need to insert the phrase "great bodily harm" into the definition of recklessness.

The Court of Appeals decision in Johnson extends the errors in Peters and Harris to the oft-charged crime of assault in the second degree under RCW 9A.36.021(1)(a). The basic reason underlying the result in Peters – that there was a violation of due process because the State was relieved of proving an element of the crime – is altogether absent in both Harris and Johnson because the link between recklessness and harm was made clear in the "to convict" instructions. Thus, there is no due process violation and the "reckless" definition may simply repeat the statutory language rather than be tailored to fit each charged crime.

This Court's opinion in Gamble never required a wholesale change in the way mental states are defined in jury instructions. In fact, Gamble never addressed the sufficiency of the jury instructions at all. Johnson provides this Court with an opportunity to resolve this conflict between

Gamble and Peters, Harris and Johnson. Review is warranted under RAP 13.4(b)(1).

Moreover, if the errors in Peters, Harris and Johnson are not corrected, this flawed analysis will cause confusing and redundant jury instructions. For example, the "reckless" definition for criminal mistreatment, if modified to satisfy Johnson, would read:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that *an imminent and substantial risk of death or great bodily harm may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.*

WPIC 10.03 (2010); RCW 9A.42.030(1) (criminal mistreatment language in italics). By replacing the simple "wrongful act" language with the language pertinent to a specific crime, the definition of reckless becomes redundant with language from the "to convict" instruction, and creates its own, pained internal redundancy, where knowing of and disregarding "a substantial risk that a... substantial risk... may occur," defines reckless. This hampers rather than helps the trier of fact.

Another example of needless redundancy occurs with the charge of reckless burning in the second degree, where "reckless" would be defined as knowing of and disregarding a substantial risk of "danger of destruction or damage of a building or other structure." RCW 9A.48.050(1). With

effectively no difference between "danger" and "risk," the definition of "reckless" for "reckless burning" creates an unwieldy and confusing definition that contrasts sharply with the clarity of the "wrongful act" instruction.

More confusing still, in cases where a defendant is charged with more than one non-homicide crime that involves a reckless definition, a separate definition of the single term "reckless" would be required for each count. For example, a case charging drive-by shooting, assault in the second degree, and reckless endangerment (a not unrealistic scenario), would require three separate definitional instructions as to "reckless" since each alternative charge would have a different "reckless" add-on from the various crimes. RCW 9A.36.045; RCW 9A.36.021; RCW 9A.36.050.

These are just a few examples of the many harmful complications that will result as to the definition of "reckless" if Peters, Harris and Johnson are not corrected.

It is unclear whether the Johnson reasoning will also spread to other *mens rea* definitions like intent, knowledge, and negligence. Those definitional instructions currently stand alone without express reference to the "to convict" instructions that they define. Peters, Harris and Johnson create a whole new model for instructing on mental states, blurring the

lines between definitions of mental states and the "to convict" instructions as to elements.

Finally, this novel approach to defining mental states may needlessly call into question many past prosecutions.

For all these reasons, the issue presented is also one of substantial public interest, warranting review under RAP 13.4(b)(4).

2. REVIEW IS NEEDED BECAUSE THE COURT OF APPEALS HAS CREATED A NEW OBLIGATION TO CHARGE DEFINITIONS AS WELL AS ESSENTIAL ELEMENTS.

Count V charged unlawful imprisonment and the information included the following language:

> And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse J.C. Johnson of the crime of **Unlawful Imprisonment – Domestic Violence**, based on a series of acts connected together with another crime charged herein, committed as follows:
>
> That the defendant J.C. Johnson in King County, Washington, during a period of time intervening between May 4, 2009 through May 6, 2009, did knowingly restrain [J.J.], a human being. . .

CP 13 (bold in original). RCW 9A.40.040 provides that a "person is guilty of unlawful imprisonment if he knowingly restrains another person." "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." RCW 9A.40.010.

The Court of Appeals held that the "without legal authority" definition of "restrain" must be included in the charging language. Johnson, No. 66624-0-I (Order Modifying, Feb.13, 2013). Specifically, the court found that the information did not put Johnson on notice that he was accused of restraining his victim while knowing that he lacked legal authority to do so. Id. This holding conflicts with the well-established precedent from this Court that definitions are not elements of the crime that must be included in the information.

In addition, even assuming that knowledge of lack of legal authority must be alleged, the Court of Appeals still failed to liberally construe the charging language. Under a liberal construction, the allegation that Johnson acted with knowledge that he lacked legal authority is contained in the charging language. Review is warranted under RAP 13.4(b)(1) and (3).

a. Johnson Contradicts The Long-standing Distinction Between Elements And Their Definitions.

This Court has long held, in a wide variety of contexts, that definitions of terms used in a criminal statute are not essential elements of the crime that must be included in a charging document. By treating the definition of "restrain" as an essential element of the crime of unlawful imprisonment, the Court of Appeals ignored this precedent. The decision

threatens to cause a great deal of confusion over what must be *alleged* as opposed to what must be *proved.*

The distinction between definitions and elements is well-illustrated in many different contexts, including harassment cases, jury instruction cases, alternative means cases, and firearm enhancement cases. In the harassment context, courts have consistently made this distinction to avoid unconstitutional infringement on protected speech. The harassment statute is read as prohibiting only "true threats," a threat that a reasonable person would believe would actually be carried out. State v. Allen, __ Wn.2d __, 294 P.3d 679 (Jan 24, 2013) (as amended Feb. 8, 2013). The State must *prove* that a threat is "true" but the definition of "threat" need not be *alleged* in the information. Id.

In State v. J.M., another felony harassment case, this Court found that the term "knowingly" before "threatens" in the information modified both components of the definition of threat: a defendant must *know* that he or she is communicating a threat and *know* that the communication is a true threat. 144 Wn.2d 472, 480-81, 28 P.3d 720 (2001). In State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010), this Court upheld the long-enforced rule that the various components of the definition of "threat" were not essential elements of that definition. Viewed together, these decisions establish that simply because a *mens rea* applies to some

aspect of a definition, it does not follow that the definition becomes an essential element.

This Court has also distinguished between definitions and elements in other contexts. In State v. O'Hara, 167 Wn.2d 91, 97, 217 P.3d 756 (2009), this Court considered the trial court's failure to provide a definition for the essential elements of a self-defense claim where it omitted the second half of the definition of "malice." Ultimately, this 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 essential element. Id. (emphasis added).

In State v. Scott, the jury instructions failed to define the term "knowledge," an element of the crime charged. 110 Wn.2d 682, 683-84, 757 P.2d 492 (1988). But, because the missing jury instruction was for a definition and not an element, the claimed error was not "of constitutional magnitude." Id.

This Court has 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), this 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, citing a list of cases to support its holding that "[d]efinition statutes do not create additional alternative means of committing an offense." Id. at 646.[3]

This Court has also addressed the distinction between elements and their definitions when discussing the criteria for a proper plea to a firearm enhancement. State v. Easterlin, 159 Wn.2d 203, 209, 149 P.3d 366 (2006). This Court held 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) (emphasis added).

The Court of Appeals 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, No. 66624-0-I (Order Modifying, Feb.13, 2013). The information 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,

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[3] *See* 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 in* 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 means of the crime but merely define an element of the crime).

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. Thus, Borrero is consistent with the rest of Washington case law in holding that essential elements, but not definitions, must be alleged. Borrero does not support the conclusion reached in Johnson.[4]

In concluding that the definition of restrain is an essential element of unlawful imprisonment, the Court of Appeals also relied on State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000). In Warfield, the defendants were bounty hunters charged with unlawful imprisonment; they detained a victim with an outstanding warrant to return him to jail in Arizona. 103 Wn. App. at 154-55. The court held that the word "knowingly" in the unlawful imprisonment statute modified "all of the components of the definition of restrain." Id. at 157. Because the defendants relied in good faith on an arrest warrant, the court held that the

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

evidence was not sufficient to prove the defendants knew they were not legally authorized to restrain the victim. Id. at 157.

But Warfield was a proof case, not a charging case. Even if knowledge of a lack of legal authority must be proved, it does not follow that it must be charged. Particularly when viewed in light of J.M. and Schaler, Warfield does not require charging some aspect of the definition of "restrain." "Knowing" does modify "restrain" but it does not follow that each sub-definition of "restrain" is thereby transformed into an essential element of the crime.

Thus, the Court of Appeals' decision in this case conflicts with an entire line of cases distinguishing between definitions and essential elements. An error on such a fundamental point will have important ramifications for how prosecutors will be required to charge all manner of crimes in past and future cases. The decision raises a fundamental due process question of whether (or which) definitions must be considered essential elements for charging purposes. Review by this Court is warranted under RAP 13.4(b)(1) and (3).

b. Under A Liberal Reading Of The Information, A Lack Of Legal Authority To Restrain Was Fairly Alleged.

Even if this Court holds that lack of authority to restrain must be alleged, the failure to expressly allege it here is not fatal to the charge. A 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). In determining whether the charging language provides adequate notice, a court should be "guided by common sense." State v. Campbell, 125 Wn.2d 797, 881, 888 P.2d 1185 (1995).

The Court of Appeals in Johnson held that while one could reasonably infer that "restrain" entails restricting a person's movements "without consent" and "interfere[ing] substantially" with their liberty, there is no way to reasonably conclude that the restraint must be "without legal authority." Johnson, No. 66624-0-I (Order Modifying, Feb.13, 2013). This holding fails to read the information liberally, and as a whole. The information accused Johnson of committing "**Unlawful Imprisonment**" by "knowingly restrain[ing]" his victim. CP 18 (bold in original). A fair reading of "restrain" in this context includes notice that the restraint is unlawful, and satisfies notice pleading requirements.

Because the name of the charge itself, written in bold on the charging document is "**Unlawful Imprisonment,**" it strains credulity to conclude that the document, liberally construed, did not provide notice that restraint was not "lawful," or that "knowingly" did not apply to the charge itself. Any other interpretation would be absurd, as it would suggest that a defendant might think he could properly be accused of unlawfully restraining someone when he had lawful authority to restrain that person. Particularly in the context of this case, there is no question that Johnson knew that he was being charged for keeping J.J. in an apartment for three days against her will, while he beat her, threatened her, and sicced his dog on her. Johnson had notice in the charging document itself and, even if the language is considered "inartful," he was not prejudiced. Kjorsvik, 117 Wn.2d 93, 105. This Court should review this issue under RAP 13.4(b)(1) and (3).

E. CONCLUSION

The Court of Appeals erred in holding that the jury instruction defining "reckless" must be modified where the "to convict" instruction made clear that the "wrongful act" at issue was an assault resulting in "substantial bodily injury." The court also erred in holding that the definition of restrain is an essential element that must be listed in the

charging document. The State asks this Court to grant review in accordance with RAP 13.4(b)(1), (2) (3), and (4).

DATED this 15th day of March, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this date I mailed a copy of the Answer to Petition for Review, postage prepaid, to the following individual, postage prepaid, addressed as indicated:

Mr. Dennis J. McCurdy
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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.

12/30/2013 - SEATTLE, WA
Date and Place

ALEXANDRA FAST

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Rec'd 12/30/13

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Sent: Monday, December 30, 2013 3:53 PM
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Subject: Miller, Kenneth 89702-6

Please accept for filing the attached "Answer to Petition for Review." A certificate of service is attached to the pleading.

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