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COA NO. 66624-0-1

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

REC'D

APR 23 2012

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

J.C. JOHNSON,

Appellant.

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

The Honorable Michael Heavey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. IMPROPER ADMISSION OF PRIOR BAD ACTS
DENIED JOHNSON HIS RIGHT TO A FAIR TRIAL.

The State contends evidence of prior abuse was admissible to show Jena's reasonable fear under ER 404(b). Brief of Respondent (BOR) at 13-16. The State relies on State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008) in support of its contention. BOR at 15-16. The State, however, misreads Magers and its significance in relation to Johnson's case.

Magers was charged with second degree assault, unlawful imprisonment, and violation of a no-contact order for holding his girlfriend, Ray, at her home against her will, threatening her with a sword, and having contact with her despite a court order. Magers, 164 Wn.2d at 177-179. Ray subsequently recanted her allegations against Magers. Id. at 179-180.

At trial, over a defense objection, the court admitted evidence of Magers's prior arrest in 2003 for domestic violence against Ray, the resulting entry of the no-contact order at issue, and the fact Magers had spent time in prison for fighting. Id. at 178, 180. The evidence was admitted under two theories: (1) it was relevant to prove Ray's reasonable fear of injury for the assault and (2) it was relevant in assessing Ray's credibility, i.e., why she may have recanted her allegations. Id. at 180.

The Court of Appeals reversed Magers's assault and unlawful imprisonment convictions. Magers, 164 Wn.2d at 181. In a split opinion, the Supreme Court reinstated them.

A four-justice plurality held the evidence surrounding entry of the 2003 no-contact order was properly admitted because Magers was charged with violating that very order. Id. at 181. Regarding the prior fighting, the plurality held the evidence admissible to establish Ray's state of mind. The judges noted that in order to prove assault, the State had to establish "reasonable apprehension and imminent fear of bodily injury." Id. at 183. Analogizing to harassment cases — where lower courts held evidence of prior misconduct relevant to establish reasonable fear the defendant would carry out a threat — the plurality held evidence of prior violent misconduct was admissible to show "Ray's apprehension and fear of bodily injury was objectively reasonable[.]" Id. The plurality also held the evidence admissible against Magers "to assist the jury in judging the credibility of a recanting victim." Id. at 186.

Two justices concurred in the result. They agreed evidence surrounding the 2003 no contact order was properly admitted as *res gestae* of the charged crimes, but disagreed with the plurality's legal analysis on the prior fighting. Id. at 194-195 (Madsen, J., concurring; joined by Fairhurst, J.). Notably, regarding state of mind, Justice Madsen wrote:

First, the majority holds that Kha Magers's prior fighting incident was properly admitted to show Ms. Carissa Ray's state of mind, i.e., that she reasonably feared bodily injury. But under the State's theory of second degree assault it was not required to prove that Ms. Ray reasonably feared bodily injury. Rather, the State was required to prove that a reasonable person under the same circumstances would have a reasonable fear of bodily injury. Thus, the State did not have a burden to demonstrate Ms. Ray's state of mind as an element of assault.

Id. at 194.

The concurrence also took issue with the plurality's conclusion the evidence was admissible in Magers's case to explain Ray's recantation. Id. Ultimately, however, the concurrence agreed Magers's convictions should be reinstated because the improper admission of the fighting evidence was harmless error. Id. at 195.

Three judges dissented and would have affirmed the Court of Appeals. Magers, 164 Wn.2d at 195-199 (Johnson, J., dissenting; joined by Sanders, J., and Chambers, J.).

Johnson's case does not involve a recanting witness. Thus, that portion of Magers discussing the admissibility of prior acts of misconduct to assist jurors in assessing the credibility of a recanting victim does not apply. Res gestae is not at issue here either. The trial court did not admit evidence of prior abuse on that ground and the State does not assert res gestae as a basis for admissibility on appeal.

The only relevant portion of Magers is that pertaining to state of mind. Only four judges found the prior misconduct evidence admissible for the purpose of showing the victim's reasonable fear. For the reasons explained by Justice Madsen in her concurrence, the evidence is not admissible under that theory. Magers, 164 Wn.2d at 194.

Because evidence of prior abuse was not logically relevant to prove any element of the offenses in Johnson's case, its admission fails under ER 404(b). The admission of this evidence over defense counsel's objection was an abuse of discretion.

The State asserts evidence of prior abuse was admissible under ER 404(b) to prove the aggravating factors. BOR at 17-19. In this regard, the State claims Johnson is arguing for the first time on appeal that the trial should have been bifurcated and that ER 404(b) evidence should have been excluded on that basis. BOR at 17-19.

The State misrepresents Johnson's argument. As pointed out in the opening brief, the significance of the bifurcation issue is that the trial court recognized it as an issue that would need to be addressed in the event the ER 404(b) evidence was deemed admissible only to prove the aggravators rather than the underlying offenses. 3RP 2, 4-5; Brief of Appellant (BOA) at 26. This point was made to preemptively undermine any argument made by the State in its response brief that the evidence would have been

admissible as part of the State's case in chief solely to prove the aggravating factors. Indeed, the trial court did not admit the evidence to prove the aggravators. It only admitted the evidence as relevant to demonstrate Jena's reasonable fear and gave a limiting instruction to that effect. 3RP 17-20; 11RP 63-64, 71; CP 38.

The State further contends the evidence was admissible to show Jena's credibility. BOR at 19-21. But again, the trial court did not admit the evidence on this basis even though the State argued for it. 3RP 17-20; 11RP 63-64, 71; CP 38. The State is essentially asking this Court to overturn the trial court's determination that prior misconduct evidence was either irrelevant or more prejudicial than probative in relation to determining Jena's credibility. Equally important, the limiting instruction did not allow the jury to consider the evidence for credibility purposes. CP 38. What the State is arguing on appeal is based on an alternate reality that was never before the jury in deciding whether Johnson was guilty.

Furthermore, whether error in admitting the ER 404(b) evidence under the trial court's reasonable fear theory was harmless does not turn on whether the evidence could also have been admitted for credibility purposes because the jury did not decide the case under that instructional directive. The jury was erroneously allowed to consider the evidence to show reasonable fear and convicted Johnson after being allowed to use the

evidence for that improper purpose. Prejudice must be addressed in that context. See BOA at 27-31.

2. THE TRIAL COURT GAVE AN INCORRECT JURY INSTRUCTION ON RECKLESSNESS AND DEFENSE COUNSEL WAS INEFFECTIVE IN PROPOSING IT.

The State contends the instruction defining "recklessness" in relation to the second degree assault charge under count II was proper and that this Court should not follow Division Two's contrary holding in State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011). BOR at 29-36.

Harris, however, agreed with this Court's analysis in State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011). Harris, 164 Wn. App. at 387. This Court in Peters held "the jury instruction given in this case that defines reckless to mean Peters knew of and disregarded 'a substantial risk that a wrongful act may occur,' rather than that 'a substantial risk that death may occur' is contrary to Gamble and WPIC 10.03." Peters, 163 Wn. App. at 849-50.¹

The State maintains Peters is distinguishable because the "to convict" instruction in that case did not require a reckless disregard of risk that a specific result would occur. BOR at 33-34. This Court's holding in Peters, however, did not in any way, shape or form turn on what was or

¹ The full citation referenced in Peters is State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005).

was not in the "to convict" instruction. Peters focused its analysis on the instruction defining recklessness and unequivocally held it was improper for requiring a mens rea as to "a wrongful act" as opposed to the specific result required by the charged offense. Peters, 163 Wn. App. at 847-52.

The instruction defining recklessness in Johnson's case is improper under Peters and Harris. The State, meanwhile, is simply wrong that Johnson cannot challenge the improper instruction on appeal because his attorney proposed it. BOR at 36-38. The invited error doctrine does not preclude review of a challenged jury instruction where, as here, defense counsel was ineffective in proposing the defective instruction. State v. Killo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). The supplemental opening brief sets forth argument for why defense counsel was ineffective in proposing this instruction. SBOA at 5-12. The argument need not be repeated here.

3. THE INFORMATION IS DEFECTIVE IN FAILING TO INCLUDE ALL THE ESSENTIAL ELEMENTS OF THE UNLAWFUL IMPRISONMENT OFFENSE.

Johnson argued in the opening brief that his conviction for unlawful imprisonment must be reversed because the charging document does not set forth the essential elements that Johnson knowingly (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interfered

with that person's liberty. BOA at 31-36. The State acknowledges, as it must, that it was required to prove each of these elements of the crime in order to convict Johnson. BOR at 47-48. State v. Warfield, 103 Wn. App. 152, 153-54, 157-59, 5 P.3d 1280 (2000) establishes the point.

The State, however, contends these elements are merely "definitional" and therefore need not be included in the information. BOR at 47-48. The State claims the information alleged all of the essential elements of unlawful imprisonment because "definitional elements are not required to be alleged in the information." BOR at 46. For that proposition, the State relies on State v. Rhode, 63 Wn. App. 630, 821 P.2d 492 (1991), review denied, 118 Wn.2d 1022, 827 P.2d 1392 (1992). BOR at 46, 50.

The proposition for which the State cites Rhode does not control the outcome here and, taken out of context, is a misstatement of the law.

Rhode held the word "attempt" as used in the first degree felony murder statute sufficiently apprised the defendant of the "substantial step" element of the crime. Rhode, 63 Wn. App. at 636. Specifically, it held the term "attempt" "encompasses the statutory definition including the substantial step element." Id. It was in this context that Rhode stated "[t]hat the information in the instant case does not define every element that the State must prove at trial does not render the information

constitutionally defective." Id. at 635. The "attempt" element did not need to be defined in the charging document because the word itself gave sufficient notice of the underlying "substantial step" requirement of the offense. Id. at 636.

For the proposition that the information need not define every element that the State must prove at trial, Rhode relied on State v. Smith, 49 Wn. App. 596, 599, 744 P.2d 1096 (1987), review denied, 110 Wn.2d 1007 (1988). Rhode, 63 Wn. App. at 635-36. In Smith, the charged offense was possession of a stolen vehicle. Smith, 49 Wn. App. at 600. Smith held this language was sufficient to charge a crime, since the term possession necessarily encompassed the statutory definition, including the knowledge element. Id. In reaching that holding, Smith stated "a failure to include in the information every element and the concomitant legal definitions that must be instructed upon or proved at trial does not render the information constitutionally defective." Id. at 599.

However, the Supreme Court later overruled Smith in State v. Moavenzadeh, 135 Wn.2d 359, 361-64, 956 P.2d 1097 (1998), where the Court held the information was constitutionally defective in failing to include the essential element of "knowledge" for a possession of stolen property charge. In addressing the Court of Appeals flawed reasoning to the contrary, the Supreme Court disavowed the notion advanced in Smith

that "the failure to include in the information every element . . . that must be instructed upon or proved at trial does not render the information constitutionally defective." Moavenzadeh, 135 Wn.2d at 362. The Supreme Court reiterated a charging document is "constitutionally adequate only if it includes all of the essential elements of the crime, both statutory and nonstatutory." Id.

One thing is clear. Elements labeled as "definitional" are still required to be included in the charging document if they constitute essential elements of the crime and the charging language otherwise fails to fairly apprise a defendant of their presence. The question is whether all of the essential elements appear in any form, or by fair construction are found, in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991); State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The State cannot explain how a charging document that merely alleges Johnson "did knowingly restrain Jena Johnson" in committing the crime of unlawful imprisonment puts Johnson on fair notice that he knowingly did each of these four things: (1) restricted another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interfered with that person's liberty. Each of these four elements are essential elements because, under

Warfield, they are "necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). Because the necessary elements of unlawful imprisonment are neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse Johnson's conviction. McCarty, 140 Wn.2d at 425; State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010).

B. CONCLUSION

For the reasons stated above and in the previous briefs, Johnson requests reversal of the convictions.

DATED this 29 day of April, 2012

Respectfully Submitted,

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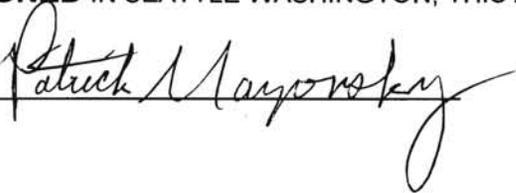
DECLARATION OF SERVICE

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 23RD DAY OF APRIL, 2012, 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] J.C. JOHNSON
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SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF APRIL, 2012.

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