

SUPREME COURT NO. 88683-1
COURT OF APPEALS NO. 66624-0-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
J.C. JOHNSON,
Appellant.

FILED
APR 12 2013
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CRF
FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
APR 12 2013 PM 3:04

PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney

TOMÁS A. GAHAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER</u>	1
B. <u>ISSUES PRESENTED FOR REVIEW</u>	1
C. <u>STATEMENT OF THE CASE</u>	1
D. <u>REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT</u>	3
1. REVIEW IS NEEDED BECAUSE THE COURT OF APPEALS DECISION ERRONEOUSLY CHANGES THE WAY MENTAL STATES ARE DEFINED IN JURY INSTRUCTIONS.....	3
2. REVIEW IS NEEDED BECAUSE THE COURT OF APPEALS HAS CREATED A NEW OBLIGATION TO CHARGE DEFINITIONS AS WELL AS ESSENTIAL ELEMENTS	11
a. <u>Johnson</u> Contradicts The Long-standing Distinction Between Elements And Their Definitions.....	12
b. Under A Liberal Reading Of The Information, A Lack Of Legal Authority To Restrain Was Fairly Alleged	18
E. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Allen, ___ Wn.2d ___,
294 P.3d 679
(Wn. Supreme Court, Jan 24, 2013)13

State v. Borrero, 147 Wn.2d 353,
58 P.3d 245 (2002).....15, 16

State v. Bowerman, 115 Wn.2d 794,
809 P.2d 116 (1990).....4

State v. Campbell, 125 Wn.2d 797,
888 P.2d 1185 (1995).....18

State v. Coe, 101 Wn.2d 772,
684 P.2d 668 (1984).....4

State v. Easterlin, 159 Wn.2d 203,
149 P.3d 366 (2006).....15

State v. Gamble, 154 Wn.2d 457,
114 P.3d 646 (2005).....4, 5, 6, 8

State v. Garvin, 28 Wn. App. 82,
621 P.2d 215 (1980).....15

State v. Hanna, 123 Wn.2d 704,
871 P.2d 135 (1994).....4

State v. Harris, 164 Wn. App. 377,
263 P.3d 1276 (2011).....4, 7, 8, 10

State v. J.M., 144 Wn.2d 472,
28 P.3d 720 (2001).....13, 17

State v. Johnson, No. 66624-0-I,
slip op. 19 (Wn. App. Dec. 3, 2012).....2-4, 8-12, 15, 16, 18

<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	18
<u>State v. Laico</u> , 97 Wn. App. 759, 987 P.2d 638 (1999).....	15
<u>State v. Linehan</u> , 147 Wn.2d 638, 56 P.3d 542 (2002).....	14
<u>State v. Marko</u> , 107 Wn. App. 215, 27 P.3d 228 (2001).....	15
<u>State v. O’Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	13, 14
<u>State v. Peters</u> , 163 Wn. App. 836, 261 P.3d 199 (2011).....	4, 6, 7, 8, 10
<u>State v. Schaler</u> , 169 Wn.2d 274, 236 P.3d 858 (2010).....	13, 17
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	14
<u>State v. Sibert</u> , 168 Wn.2d 306, 230 P.3d 142 (2010).....	6
<u>State v. Strohm</u> , 75 Wn. App. 301, 879 P.2d 962 (1994), <u>aff’d</u> , 126 Wn.2d 1002 (1995).....	15
<u>State v. Warfield</u> , 103 Wn. App. 152, 5 P.3d 1280 (2000).....	16, 17

Statutes

Washington State:

RCW 9A.28.020.....15
RCW 9A.36.021.....3, 8, 10
RCW 9A.36.045.....10
RCW 9A.36.050.....10
RCW 9A.40.010.....11
RCW 9A.40.040.....11
RCW 9A.42.030.....9
RCW 9A.48.050.....9

Rules and Regulations

Washington State:

RAP 13.4.....3, 8, 11, 12, 17, 19, 20

Other Authorities

WPIC 10.03:.....5, 6, 9

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, painful 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,

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

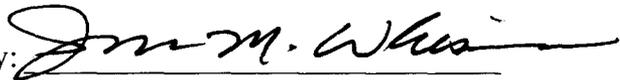
The Court of Appeals erred in holding that the jury instruction defining “reckless” must be modified where the “to convict” instruction made clear that the “wrongful act” at issue was an assault resulting in “substantial bodily injury.” The court also erred in holding that the definition of restrain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

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney

By: 
TOMAS A. GAHAN, WSBA #32779
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX 1
Slip Opinion for Initial Published Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 66624-0-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
J.C. JOHNSON,)	PUBLISHED
)	
Appellant.)	FILED: <u>December 3, 2012</u>
)	

Cox, J. — J.C. Johnson appeals his judgment and sentence of life without the possibility of parole as a persistent offender following his conviction of three counts of second degree assault. He was sentenced to a concurrent 60 months term for his unlawful imprisonment conviction. The court also imposed sentencing enhancements for certain convictions.

We hold that the trial court properly admitted under ER 404(b) evidence regarding Johnson's acts of domestic violence toward the victim that occurred prior to the charging period. Johnson's challenge to a jury instruction was not preserved for appeal. And he fails to demonstrate that his trial counsel performed deficiently by proposing that instruction at trial. The information charging unlawful imprisonment is deficient, and we dismiss that conviction

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 DEC -3 AM 10:52

No. 66624-0-1/2

without prejudice as the proper remedy. The remaining matters raised on appeal do not require relief. We affirm.

J.C. Johnson and J.J. married in 2007 after what she described as a “whirlwind” romance. J.J. testified at trial that after six months into their relationship, it began to worsen. She testified that she began to wake up to find Johnson sitting on her chest and choking her in bed. The frequency of the strangulations increased. Johnson also began hitting her, pulling her hair, and hitting her with rocks.

J.J. testified that during the three-day charging period, May 4 to 6, 2009, Johnson held her in their apartment while he physically abused and threatened her. J.J. further testified that on the last day of the charging period, she was able to escape to a neighbor’s house to call the police.

The State charged Johnson with five criminal acts (in five separate counts): second degree assault by strangulation (count I); second degree assault by intentionally assaulting another and recklessly inflicting substantial bodily harm (count II), second degree assault with a deadly weapon (count III), felony harassment (count IV), and unlawful imprisonment (count V). The State also alleged that Johnson used a deadly weapon for counts III and IV for purposes of deadly weapon enhancements. It also alleged aggravating factors: that the crimes were committed with deliberate cruelty and there was a pattern of domestic abuse.

A jury convicted Johnson of all charges as well as the deadly weapon allegations. For the deadly weapon allegation for felony harassment, the jury

returned a special interrogatory that indicated that the deadly weapon used was a “knife” instead of “duct tape,” as charged. The jury found the aggravating factor of a pattern of domestic violence but not deliberate cruelty.

The court vacated the felony harassment conviction on double jeopardy grounds. The related enhancement was not imposed.

The court sentenced Johnson to life without the possibility of parole as a persistent offender for the three counts of assault in the second degree, each of which is a most serious offense. The court also imposed a concurrent sentence of 60 months confinement for the unlawful imprisonment conviction.

Johnson appeals.

404(b) EVIDENCE

Johnson argues that the trial court abused its discretion in admitting testimony about his prior misconduct. We hold that the trial court properly exercised its discretion by admitting the evidence.

This court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion.¹ A trial court abuses its discretion if it acts on untenable grounds or for untenable reasons.² “Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.”³

¹ State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

² State v. Fualaau, 155 Wn. App. 347, 356, 228 P.3d 771, review denied, 169 Wn.2d 1023 (2010), cert. denied, 131 S. Ct. 1786, 179 L. Ed. 2d 657 (2011).

³ State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (citing State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001)).

Under Evidence Rule (ER) 404(b), a court is prohibited from admitting “[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith.” But such evidence is admissible for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”⁴

Prior to admitting ER 404(b) evidence, a trial court must:

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.^[5]

The trial court must conduct this analysis on the record.⁶ If the evidence is admitted, the trial court must give a limiting instruction to the jury.⁷

State of Mind

Johnson argues that evidence regarding his prior controlling and domineering behavior was not relevant to prove any element of any charged crime. We disagree.

A person is guilty of felony harassment if he or she knowingly threatens to “cause bodily injury immediately or in the future to the person threatened or to any other person.”⁸ Additionally, felony harassment occurs where “[t]he person

⁴ ER 404(b).

⁵ Foxhoven, 161 Wn.2d at 175.

⁶ Id.

⁷ Id.

⁸ RCW 9A.46.020(1)(a)(i).

by words or conduct places ***the person threatened in reasonable fear*** that the threat will be carried out."⁹ Whether the threat created a "reasonable fear" is an essential element of the crime of felony harassment.¹⁰ Washington courts allow evidence of prior misconduct to show that the victim's fear was reasonable.¹¹ The jury must be able to "consider the defendant's conduct in context and [] sift out idle threats from threats that warrant the mobilization of penal sanctions."¹²

Here, the State charged Johnson with felony harassment for threatening to kill or cause J.J. bodily injury with duct tape. The trial court admitted testimony of the defendant's prior controlling and domineering behavior, including testimony that Johnson isolated J.J. from others, monitored her conversations, and accused her of infidelity. J.J. testified that Johnson threatened to put duct tape on her hands, feet, mouth, and nose if she did not tell him "who [she] was sleeping with." This evidence shows that J.J.'s fear regarding Johnson's threats was reasonable, and thus established an element of felony harassment.

The State also charged Johnson with three counts of second degree assault. A person is guilty of second degree assault if he or she "[a]ssaults another with a deadly weapon."¹³ In State v. Magers, the supreme court, in a

⁹ RCW 9A.46.020(1)(b) (emphasis added).

¹⁰ State v. Ragin, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999).

¹¹ State v. Binkin, 79 Wn. App. 284, 292, 902 P.2d 673 (1995), abrogated by State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).

¹² Ragin, 94 Wn. App. at 411 (quoting State v. Alvarez, 74 Wn. App. 250, 261, 872 P.2d 1123 (1994), aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995)).

¹³ RCW 9A.36.021(1)(c).

plurality decision, affirmed the trial court's admission of the defendant's prior misconduct.¹⁴ The trial court admitted the evidence for an assault charge because "reasonable fear of bodily injury" was at issue.¹⁵ The court pointed to the jury instructions to conclude that the defendant's prior misconduct was "necessary to prove a material issue."¹⁶ Thus, the victim's state of mind was a necessary element that the State was required to prove in that case.

Here, as in Magers, J.J.'s "fear of bodily injury"—her state of mind—was also at issue. Thus, evidence of Johnson's prior bad acts was admissible to prove J.J.'s state of mind, a necessary element for the assault charge (count III).

It is noteworthy that Jury Instruction 7 was the limiting instruction that the court gave to the jury that memorialized both the basis for admission of the evidence of prior misconduct and how the jury should use the evidence:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony regarding alleged acts of domestic violence committed by the defendant against [J.J.] prior to May 4, 2009. This evidence may be considered by you only for the purposes of assessing [J.J.'s] **state of mind with respect to counts III, IV and V, and if you find the defendant guilty of any of the charged offenses or the lesser included offense of Assault in the Third Degree on count II. You may not consider it for any other purpose.** Any discussion of the evidence during your deliberations must be consistent with this limitation.^{17]}

Moreover, Jury Instruction 8 provided:

¹⁴ 164 Wn.2d 174, 183, 189 P.3d 126 (2008).

¹⁵ Id.

¹⁶ Id.

¹⁷ Clerk's Papers at 38 (emphasis added).

An assault is also an act, with unlawful force, done with the intent to create in another ***apprehension and fear of bodily injury***, and which in fact creates in another a ***reasonable apprehension and imminent fear of bodily injury*** even though the actor did not actually intend to inflict bodily injury.^[18]

Likewise, Jury Instruction 28 provided:

To convict the defendant of the crime of felony harassment as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the time intervening between May 4, 2009 and May 6, 2009, the defendant knowingly threatened to kill [J.J.] immediately or in the future;

(2) ***That the words or conduct of the defendant placed [J.J.] in reasonable fear that the threat to kill would be carried out,***

(3) That the defendant acted without lawful authority; and

(4) That the threat was made or received in the State of Washington.^[19]

These instructions show that the purpose of the admission of the prior misconduct evidence was for the state of mind of the victim. And we presume the jury follows the court's instructions.²⁰ Thus, this evidence was necessary for the State to prove elements for both the assault charge and the felony harassment charge. The trial court properly exercised its discretion under controlling case law.

¹⁸ Id. at 39 (emphasis added).

¹⁹ Id. at 60 (emphasis added).

²⁰ State v. Montgomery, 163 Wn.2d 577, 596, 183 P.3d 267 (2008).

The State also argues that intimidation, as an element of unlawful imprisonment, required the State to prove J.J.'s state of mind. Johnson does not challenge the admission of the evidence on that basis.

Johnson points to the concurrence of two justices to the lead opinion in Magers to challenge the admissibility of the evidence here. His reliance is misplaced.

There, the two justices explained that the State was not required to prove the victim's state of mind under the theory of second degree assault advanced in that case.²¹ According to these justices, the prior misconduct was not actually offered to demonstrate the reasonableness of the victim's fear.²² Rather, it was offered to explain why the victim had changed her testimony—impeachment.²³

Notably, they did not disagree with the proposition in the lead opinion that admission of evidence of the victim's state of mind would be proper under the right circumstances. Rather, they disagreed with that opinion's application of that proposition to the facts of that case.²⁴

Here, the facts show admission of the evidence on a proper basis: state of mind. The evidence was offered to demonstrate J.J.'s reasonable fear of Johnson. It was not offered to impeach her testimony. Thus, the point raised by the two justices' concurrence in Magers has no bearing on this case.

²¹ Magers, 164 Wn.2d at 194.

²² Id.

²³ Id.

²⁴ Id.

Johnson also argues that the cases cited to support the State's argument are distinguishable because they involved acts of physical violence, not controlling or domineering behavior. This argument is not persuasive.

Controlling or domineering behavior, whether considered alone or in the context of a history of physical abuse, may also tend to prove the victim's reasonable fear of an abuser. This is particularly true in the context of domestic violence.²⁵ We reject Johnson's argument that seeks to establish a material distinction between physical violence and controlling or domineering behavior in this domestic violence situation.

Johnson also argues that J.J. did not expressly testify that Johnson's controlling and domineering behavior contributed to her fear. But, her testimony, taken as a whole, implicitly shows that it did. For example, J.J. gave the following testimony: "I'd wake up and he would have the ice pick here like to scare me, threaten me. I didn't know what he was going to do."²⁶ Thus, this argument is not persuasive.

Aggravating Factors

The State also argues that Johnson's prior misconduct was relevant to prove the domestic violence aggravators. We agree.

The State alleged that all of the offenses were "part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims

²⁵ See State v. Grant, 83 Wn. App. 98, 107 n.5, 920 P.2d 609 (1996) (discussing how domestic violence victims often minimize the degree of violence when discussing it with others).

²⁶ Report of Proceedings (Dec. 6, 2010) at 78.

manifested by multiple incidents over a prolonged period of time."²⁷ As we previously discussed, Jury Instruction 7 states:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony regarding alleged acts of domestic violence committed by the defendant against [J.J.] prior to May 4, 2009. ***This evidence may be considered by you only*** for the purposes of assessing [J.J.'s] state of mind with respect to counts III, IV and V, and ***if you find the defendant guilty of any of the charged offenses*** or the lesser included offense of Assault in the Third Degree on count II. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.^[28]

In addition to admitting the prior misconduct evidence for counts III, IV, and V, the court also admitted the evidence to prove the domestic violence aggravators. This was a proper exercise of discretion by the trial court. There was no error.

Credibility

The State argues, in the alternative, that Johnson's prior misconduct was admissible, so the jury could assess J.J.'s credibility. It relies, in part, on this court's decision in State v. Baker.²⁹ There, this court expressly rejected Johnson's argument here that admission of evidence of prior misconduct to help the jury assess the credibility of a victim at trial and to permit the jury to

²⁷ RCW 9.94A.535(3)(h)(i).

²⁸ Clerk's Papers at 38 (emphasis added).

²⁹ 162 Wn. App. 468, 259 P.3d 270, review denied, 173 Wn.2d 1004 (2011).

understand why a victim told conflicting stories is limited to victims who recant at trial.³⁰

As we explained earlier in this opinion, the trial court limited the admission of prior misconduct evidence to the issue of the victim's state of mind for three of the charged counts and the domestic violence aggravators. Because the trial court correctly admitted the prior misconduct evidence on these bases, we need not address further whether it would also have been proper to admit the evidence to allow the jury to assess J.J.'s credibility.

ER 404(b) Balancing Test

Johnson argues that the trial court failed to properly balance the admission of his prior misconduct as required under 404(b). We disagree.

Under ER 404(b), the trial court must balance the probative value of the evidence against its potential prejudicial effect.³¹ The trial court must conduct this analysis on the record.³² Thus, the record must demonstrate that the trial court made a "conscious determination" that the evidence's probative value outweighed its prejudicial impact.³³

After hearing the parties' arguments and the specific acts of misconduct that the State sought to admit, the trial court engaged in the following analysis:

³⁰ Id. at 475.

³¹ See Foxhoven, 161 Wn.2d at 175.

³² Id. at 175.

³³ State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981).

The fourth thing the Court looks at is does the—**403 says evidence may be excluded that's probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, et cetera.** So what I look at is, is there a danger of unfair prejudice.

And that gets into why do we have 404(b) anyway, because if a person did something in the past, they are more likely to do it again, it's very relevant. But because it's—but because it's so powerfully relevant, for some reason we exclude it.

If somebody had stole something five times before and this is a crime for theft, we wouldn't allow those in unless it was impeachment, even though it's very probative. So all evidence is prejudicial.

Relevant means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.^[34]

This analysis is sufficient to demonstrate that the trial court engaged in the balancing test required under ER 404(b). This statement, read in context, shows that the court was aware of the proper standard and applied it. There was no error.

Johnson argues that his prior misconduct was unfairly prejudicial because it was likely to elicit a strong emotional response from the jury, the jury had plenty of evidence during the three-day charging period with which it could assess J.J.'s state of mind, and the trial became a "trial on the relationship."

Obviously, the evidence was prejudicial, but that is not the test. Rather, the evidence must be *unfairly prejudicial*. We conclude from our review of this record that the court did not abuse its discretion in determining that there was no unfair prejudice here.

³⁴ Report of Proceedings (Nov. 30, 2010) at 18 (emphasis added).

JURY INSTRUCTION

Johnson next argues that the trial court's definitional instruction misstated the law and relieved the State of its burden of proof for the charge of second degree assault by recklessly inflicting substantial bodily harm. Because the "invited error doctrine" precludes us from reaching this issue and there is no demonstration that this issue falls within any RAP 2.5(a) exception, we do not consider his claim on this basis.

The "invited error doctrine" states that a "party may not request an instruction and later complain on appeal that the requested instruction was given."³⁵ This doctrine prevents review of instructional errors even if they are of "constitutional magnitude."³⁶ It applies when the trial court's instruction contains the same error as the defendant's proposed instruction.³⁷

Here, Johnson argues that there was an error in the definition of the term "reckless" in Jury Instruction 11. But the section of the first paragraph of Instruction 11 that defines "reckless" is the same as Johnson's proposed instruction. Accordingly, the invited error doctrine prevents review of this instructional error.³⁸

³⁵ City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002) (quoting State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999)).

³⁶ Id. at 720.

³⁷ State v. Bradley, 96 Wn. App. 678, 681-82, 980 P.2d 235 (1999).

³⁸ See Patu, 147 Wn.2d at 721.

We note that Johnson does not make a showing that this challenge falls within the narrow exceptions stated in RAP 2.5(a). Accordingly, we need not address this argument any further.

INEFFECTIVE ASSISTANCE OF COUNSEL

Johnson argues, in the alternative, that his counsel was ineffective because he proposed a flawed jury instruction regarding recklessness. Specifically, he claims that the definition in Jury Instruction 11 misstates the law that is properly reflected in Jury Instruction 18, the “to convict” instruction. While the trial court erred in giving Jury Instruction 11, trial counsel's performance was not deficient.

Standard of Review

An appellant may challenge a jury instruction that he proposed if it is in the context of an ineffective assistance claim.³⁹ The invited error doctrine does not preclude review.⁴⁰

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.⁴¹ The reasonableness inquiry presumes effective representation and requires the

³⁹ Bradley, 96 Wn. App. at 682; see also State v. Kylo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009).

⁴⁰ Kylo, 166 Wn.2d at 861.

⁴¹ Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.⁴² Failure on either prong defeats a claim of ineffective assistance of counsel.⁴³

Jury Instruction 11

"Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt."⁴⁴ "It is reversible error to 'instruct the jury in a manner' that would relieve the State of the burden of proof."⁴⁵

Here, there are two related instructions. Instruction 18, the "to convict" instruction, states:

To convict the defendant of the crime of assault in the second degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the time intervening between May 4, 2009 and May 6, 2009, the defendant intentionally assaulted [J.J.];

(2) That the defendant thereby recklessly inflicted **substantial bodily harm** on [J.J.]; and

(3) That the acts occurred in the State of Washington.

⁴² McFarland, 127 Wn.2d at 336.

⁴³ Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

⁴⁴ State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011) (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Schulze, 116 Wn.2d 154, 167-68, 804 P.2d 566 (1991)).

⁴⁵ Id. (quoting State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)).

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count II.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count II.^[46]

Jury Instruction 11 is a definitional instruction that states:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a **wrongful act** may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.^[47]

Johnson argues that trial counsel's proposal of an allegedly incorrect definition of recklessness in Jury Instruction 11 was deficient performance. He supports this argument by pointing to cases decided since his trial that have concluded that a definitional instruction should have been consistent with the correct "to convict" instruction.

In State v. Peters, decided in September of 2011, Peters was convicted of first degree manslaughter, which requires the State to prove that the defendant "**recklessly causes the death** of another person."⁴⁸ This court concluded that

⁴⁶ Clerk's Papers at 49 (emphasis added).

⁴⁷ Id. at 42 (emphasis added).

⁴⁸ 163 Wn. App. 836, 847, 261 P.3d 199 (2011) (quoting RCW 9A.32.060(1)(a)) (emphasis in original).

the jury instructions provided an improper definition of the word “reckless.”⁴⁹ The definitional instruction stated that the State only had to prove that Peters “knew of and disregarded ‘a substantial risk that a **wrongful act** may occur,’ rather than that ‘a substantial risk that **death** may occur.’”⁵⁰ This court then held that “[t]he instruction impermissibly relieved the State of the burden of proving beyond a reasonable doubt that Peters knew of and disregarded a substantial risk that death may occur, and allowed the jury to convict Peters of only a wrongful act.”⁵¹ This court’s decision was based on the supreme court’s holding in State v. Gamble, which also involved manslaughter.⁵² Thus, at the times those cases were decided, it was not clear whether a more specific definitional instruction was necessary for offenses other than manslaughter.

In State v. Harris, decided in October of 2011, Division Two of this court agreed with this court’s analysis in Peters and extended it to an assault charge.⁵³ In Harris, the defendant was convicted of first degree assault of a child, which required that the State prove that the defendant “[r]ecklessly inflict[ed] great bodily harm.”⁵⁴ The definition for “reckless” in the jury instruction was the same

⁴⁹ Id. at 849-50.

⁵⁰ Id. (emphasis added).

⁵¹ Id. at 850.

⁵² 154 Wn.2d 457, 114 P.3d 646 (2005).

⁵³ 164 Wn. App. 377, 387, 263 P.3d 1276 (2011).

⁵⁴ Id. at 383.

as the instruction in Peters.⁵⁵ The court concluded that the definition for “reckless” misstated the law because it stated “wrongful act” instead of “great bodily harm.”⁵⁶

In Peters and Harris, both courts pointed out that the WPIC’s definition for recklessness includes brackets around the term “wrongful act” with the direction to “[u]se bracketed material as applicable.”⁵⁷ Currently, the comment to the WPIC definition for recklessness explains the uncertainty of the law:

The [Gamble] court gave no indication as to 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.^[58]

At the time of Johnson’s trial in 2010, there was uncertainty whether the Gamble rationale would be extended beyond the crime of manslaughter. The comments to the WPIC reflect this uncertainty.

Harris appears to be the first case to extend a “particularized standard” to an assault offense. In Harris, Division Two explained that when a court is instructing a jury, “a trial court should use the statute’s language ‘where the law

⁵⁵ Compare Harris, 164 Wn. App. at 384 with Peters, 163 Wn. App. at 845.

⁵⁶ Harris, 164 Wn. App. at 387-88.

⁵⁷ Peters, 163 Wn. App. at 849 (quoting 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 10.03, Note on Use (3d ed. 2008) (WPIC)); see also Harris, 164 Wn. App. at 385.

⁵⁸ 11 WASH. PRACTICE: WPIC 10.03, Comment.

No. 66624-0-1/19

governing the case is expressed in the statute.⁵⁹ We agree with that principle. And we agree that the principle stated in Gamble should be extended and applied to the crime of second degree assault.

Here, Johnson was convicted of three second degree assaults. For one of the assault charges, RCW 9A.36.021 required the State to prove that Johnson “[i]ntentionally assault[ed] another and thereby recklessly inflict[ed] substantial bodily harm.” This language was reflected in the “to convict” jury instruction for this charge. There was no error and none claimed for this instruction.

However, the jury instruction that stated the definition of “reckless” included the same general “wrongful act” language as in Peters and Harris. The definition should have used the more specific statutory language of “substantial bodily harm,” not “wrongful act.” The trial court erred in giving this instruction.

The State argues that this court should reject Division Two's analysis and use this court's approach in State v. Holzkecht.⁶⁰ We decline this invitation.

As the State notes, the defendant in Holzkecht did not challenge the use of the term “wrongful act” in the definition of “reckless.” Instead, the issue was whether “[t]he instructions made clear that a different mental state must be determined for each element: intent as to assault, and recklessness as to

⁵⁹ Harris, 164 Wn. App. at 387 (quoting State v. Hardwick, 74 Wn.2d 828, 830, 447 P.2d 80 (1968)).

⁶⁰ 157 Wn. App. 754, 238 P.3d 1233 (2010), review denied, 170 Wn.2d 1029 (2011).

infliction of substantial bodily harm.”⁶¹ Since the issue was different in this case, the conclusion that the instructions were “clear” cannot be extended here.

The State also argues that Peters is distinguishable from this case because the “to convict” instructions were much different there. But, as Johnson points out, this court’s holding in Peters was focused on the definition of recklessness, not the “to convict” instruction itself.⁶²

Deficient Performance

Though we hold that the “to convict” instruction here was error, for Johnson’s ineffective assistance of counsel claim, the question is whether trial counsel’s performance was defective for failing to predict the outcome in Peters and Harris. Given the strong presumption of effective representation, we cannot say that the performance in this case was deficient.

In State v. Studd, the supreme court held that there was an instructional error regarding self-defense.⁶³ There, one of the defendants framed his argument on appeal in the context of an ineffective assistance of counsel claim to avoid the invited error doctrine.⁶⁴ The supreme court concluded that the defendant’s counsel was not deficient because a key case, clarifying the counsel’s error, was not decided at the time of trial.⁶⁵ The court explained that

⁶¹ Holzknicht, 157 Wn. App. at 766.

⁶² Peters, 163 Wn. App. at 849-50.

⁶³ 137 Wn.2d 533, 538, 973 P.2d 1049 (1999).

⁶⁴ Id. at 550-51.

⁶⁵ Id. at 551.

“counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC”⁶⁶

Here, Peters⁶⁷ and Harris⁶⁸ had not been decided at the time of trial. Thus, Harris had not yet clarified that the principle first stated in Gamble should be extended to cases other than manslaughter. The uncertainty of whether the principle of Gamble would be extended to other cases is reflected in the comments to WPIC 10.03, which we previously discussed in this opinion. Given the strong presumption of effective representation, as in Studd, we cannot say that Johnson’s trial counsel’s performance was deficient in this case.

Johnson points to State v. Kylo to support his argument that there were “several cases that should have indicated to counsel that the pattern instruction was flawed.”⁶⁹ We disagree.

Johnson cites State v. Gamble,⁷⁰ State v. R.H.S.,⁷¹ and State v. Keend⁷² to prove that Johnson’s counsel should have known that specific statutory

⁶⁶ Id.; see also State v. Summers, 107 Wn. App. 373, 383, 28 P.3d 780 (2001) (explaining that counsel’s performance was not deficient because “counsel can hardly be found to fall below acceptable standards by requesting an instruction based upon a WPIC instruction appellate courts had repeatedly and unanimously approved.”).

⁶⁷ 163 Wn. App. 836, 261 P.3d 199 (2011).

⁶⁸ 164 Wn. App. 377, 263 P.3d 1276 (2011).

⁶⁹ 166 Wn.2d 856, 866, 215 P.3d 177 (2009).

⁷⁰ 154 Wn.2d 457, 114 P.3d 646 (2005).

⁷¹ 94 Wn. App. 844, 974 P.2d 1253 (1999).

⁷² 140 Wn. App. 858, 166 P.3d 1268 (2007).

language should have been used for the definition of recklessness instead of the generic “wrongful act” language. Johnson also argues that pattern instructions must be “individually tailored for a particular case.”⁷³ While this latter statement is true, we are not persuaded that this means trial counsel’s performance here was deficient. At most, at the time of trial in this case, there was uncertainty about the issue now before us. Trial counsel’s choice to use the bracketed language of the WPIC, though incorrect, was not objectively unreasonable.

We need not address the prejudice prong, given the lack of deficient performance of counsel. In sum, Johnson’s ineffective assistance of counsel claim fails.

SUFFICIENCY OF INFORMATION

Johnson argues that the information for the unlawful imprisonment and felony harassment charges were insufficient because they were missing elements of the crime. Because the trial court vacated the felony harassment conviction and we do not reverse the assault convictions, we need not address his argument regarding felony harassment.⁷⁴ Johnson also challenges the deadly weapon enhancement for the felony harassment conviction. But for the reasons stated above, we also need not address this argument.

⁷³ 11 WASH. PRACTICE: WPIC 0.10.

⁷⁴ Johnson acknowledges that his felony harassment conviction was vacated on double jeopardy grounds. Johnson explains that he is challenging this conviction because the State could attempt to reinstate it in the event that the greater conviction of second degree assault with a deadly weapon was reversed on appeal.

Unlawful Imprisonment

Johnson challenges the sufficiency of the second amended information charging him with the crime of unlawful imprisonment. We hold that the information is deficient and dismiss this conviction without prejudice.

The adequacy of a charging document is reviewed *de novo*.⁷⁵ A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington state constitution if it fails to include "all essential elements of a crime."⁷⁶ The rationale underlying this rule is that a defendant must be apprised of the charges against him or her and allowed to prepare a defense.⁷⁷ "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged."⁷⁸

Where, as here, the adequacy of a charging document is challenged for the first time on review, "it will be construed liberally and will be found sufficient if the necessary elements appear in any form, or by fair construction may be found, on the face of the document."⁷⁹ But "[i]f the document cannot be construed to

⁷⁵ State v. Allen, 161 Wn. App. 727, 751, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011).

⁷⁶ State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

⁷⁷ Id.

⁷⁸ 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)).

⁷⁹ State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it.”⁸⁰ The court employs a two-part test:

(1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so, (2) can the defendant show he or she was actually prejudiced by the inartful language.^[81]

“If the necessary elements are not found or fairly implied, however, we presume prejudice and reverse without reaching the question of prejudice.”⁸²

Here, the information for unlawful imprisonment provided:

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;

Contrary to RCW 9A.40.040, and against the peace and dignity of the State of Washington.^[83]

Johnson argues that this information failed to include all of the “essential elements” of the crime because they are neither expressly stated nor fairly implied. We agree.

Since Johnson challenges the information for the first time on appeal, it must be liberally construed.⁸⁴ Even with a liberal reading, however, the essential elements of the crime of unlawful imprisonment do not appear in the document.

⁸⁰ State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (quoting State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995)).

⁸¹ McCarty, 140 Wn.2d at 425.

⁸² Id.

⁸³ Clerk’s Papers at 18 (emphasis added).

⁸⁴ See McCarty, 140 Wn.2d at 425.

Since the information fails to set forth the essential elements of the crime, prejudice is presumed under the two-part test.⁸⁵

In State v. Borrero, the supreme court considered whether an information charging a defendant with attempted first degree murder was sufficient.⁸⁶ There, the information failed to include the statutory definition of "attempt," which included the term "substantial step."⁸⁷ The court determined the common meaning of "attempt" by looking at a dictionary definition and synonyms.⁸⁸ The court concluded that "the element of 'substantial step' is conveyed by the word 'attempt' itself" because the words had the "same meaning and import."⁸⁹

Here, the statute for unlawful imprisonment provides that "[a] person is guilty of unlawful imprisonment if he or she knowingly *restrains* another person."⁹⁰ Under RCW 9A.40.010, to "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.*"⁹¹ To restrain a person "without

⁸⁵ See State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991).

⁸⁶ 147 Wn.2d 353, 359, 58 P.3d 245 (2002).

⁸⁷ Id.

⁸⁸ Id. at 363; see also State v. Morgan, 163 Wn. App. 341, 346-47, 261 P.3d 167 (2011), review denied, 175 Wn.2d 1013 (2012) (taking the same "common meaning" approach to the word "attempt").

⁸⁹ Borrero, 147 Wn.2d at 363.

⁹⁰ RCW 9A.40.040 (emphasis added).

⁹¹ (Emphasis added.)

consent” is accomplished by “physical force, intimidation, or deception.”⁹² The statute does not otherwise define the remainder of the last clause of the definition of restrain.⁹³

Because the information refers only to “restrain,” we look to its plain meaning in a dictionary. The American Heritage Dictionary states the following definitions: (1) “To hold back or keep in check; control”; (2) “To prevent (a person or group) from doing something or acting in a certain way”; and (3) “To hold, fasten, or secure so as to prevent or limit movement.”⁹⁴ Noticeably absent from these definitions is any mention of restricting “a person’s movements without consent,” “without legal authority,” or by “interfer[ing] substantially with his or her liberty.” Even if one could reasonably infer the first and last phrases, there is no way to reasonably concluded that the restraint must be “without legal authority.” In short, the information is deficient in this respect.

Further, a review of Washington courts’ opinions involving the crime of unlawful imprisonment reveals that the definition of “restrain” is often referred to when outlining the elements of the crime.⁹⁵ For example, as Johnson argues, in State v. Warfield, Division Two of this court held that the word “knowingly”

⁹² RCW 9A.40.010(6).

⁹³ See id.

⁹⁴ THE AMERICAN HERITAGE DICTIONARY 1538 (5th ed 2011), <http://www.ahdictionary.com/word/search.html?q=restrain>.

⁹⁵ See, e.g., State v. Washington, 135 Wn. App. 42, 49, 143 P.3d 606 (2006).

modifies “all four components” of the definition of “restrain,” which seems to imply that the definition of “restrain” contains essential elements of the crime.⁹⁶

The State argues that definitional elements are not essential elements of a crime. The State is mistaken.

The State cites State v. Rhode to support this proposition.⁹⁷ Rhode addressed a similar issue as Borrero: whether the “substantial step” element of attempt” could be found in the defendant’s information.⁹⁸ There, the court explained that the issue was whether the statutory definition was “encompassed” by the term used in the information.⁹⁹ As discussed above, “restrain” does not “encompass” the entire statutory definition for this word, so the definition of “restrain” is an essential element of the crime.

Johnson’s unlawful imprisonment conviction must be vacated without prejudice.¹⁰⁰

OFFENDER SCORE

Johnson argues that the judgment and sentence contain incorrect offender scores. We disagree.

⁹⁶ 103 Wn. App. 152, 157, 5 P.3d 1280 (2000).

⁹⁷ 63 Wn. App. 630, 821 P.2d 492 (1991).

⁹⁸ Compare Rhode, at 633 with Borrero, 147 Wn.2d at 359.

⁹⁹ Rhode, 63 Wn. App. at 636 (quoting State v. Smith, 49 Wn. App. 596, 600, 744 P.2d 1096 (1987)).

¹⁰⁰ See McCarty, 140 Wn.2d at 428.

No. 66624-0-1/28

Offender scores are reviewed de novo.¹⁰¹ Here, there is no error.

Johnson states that the offender score for the assault convictions should be "18," not "19," and both parties state the score for the unlawful imprisonment conviction should be "14," not "15." The judgment and sentence reflect these scores.

We vacate, without prejudice, the unlawful imprisonment conviction and otherwise affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Jay, J.

Becker, J.

¹⁰¹ State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

APPENDIX 2
Modified Opinion

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

STATE OF WASHINGTON,)	No. 66624-0-1
)	
Respondent,)	ORDER ON MOTION FOR
)	RECONSIDERATION AND
v.)	ORDER MODIFYING OPINION
)	
J.C. JOHNSON,)	
)	
Appellant.)	
)	

Respondent, State of Washington, moved for reconsideration of this court's decision filed December 3, 2012. Now, therefore, it is hereby

ORDERED that

1. the motion for reconsideration is denied, and
2. the slip opinion shall be modified as follows:

At page 20, second full paragraph of the slip opinion which reads:

Though we hold that the "to convict" instruction here was error, for Johnson's ineffective assistance of counsel claim, the question is whether trial counsel's performance was defective for failing to predict the outcome in Peters and Harris. Given the strong presumption of effective representation, we cannot say that the performance in this case was deficient.

shall be changed to read:

Though we hold that the instruction defining recklessness here was error, for Johnson's ineffective assistance of counsel claim, the question is whether trial counsel's performance was defective for failing to predict the outcome in Peters and Harris. Given the strong presumption of effective representation, we cannot say that the performance in this case was deficient.

At pages 22 to 27, the **SUFFICIENCY OF INFORMATION** section of the slip opinion shall be deleted in its entirety and replaced with the following revised section:

SUFFICIENCY OF INFORMATION

Johnson argues that the information for the unlawful imprisonment and felony harassment charges were insufficient because they were missing elements of the crime. Because the trial court vacated the felony harassment conviction and we do not reverse the assault convictions, we need not address his argument regarding felony harassment.⁷⁴ Johnson also challenges the deadly weapon enhancement for the felony harassment conviction. But for the reasons stated above, we also need not address this argument.

Unlawful Imprisonment

Johnson challenges the sufficiency of the second amended information charging him with the crime of unlawful imprisonment. We hold that the information is deficient and dismiss this conviction without prejudice.

The adequacy of a charging document is reviewed de novo.⁷⁵ A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington state constitution if it fails to include "all essential elements of a crime."⁷⁶ The rationale underlying this rule is that a defendant must be apprised of the charges against him or her and allowed to prepare a defense.⁷⁷ "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged."⁷⁸

⁷⁴ Johnson acknowledges that his felony harassment conviction was vacated on double jeopardy grounds. Johnson explains that he is challenging this conviction because the State could attempt to reinstate it in the event that the greater conviction of second degree assault with a deadly weapon was reversed on appeal.

⁷⁵ State v. Allen, 161 Wn. App. 727, 751, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011).

⁷⁶ State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

⁷⁷ Id.

⁷⁸ 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)).

Where, as here, the adequacy of a charging document is challenged for the first time on review, "it will be construed liberally and will be found sufficient if the necessary elements appear in any form, or by fair construction may be found, on the face of the document."⁷⁹ But "[i]f the 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."⁸⁰ The court employs a two-part test:

(1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so, (2) can the defendant show he or she was actually prejudiced by the inartful language.^[81]

"If the necessary elements are not found or fairly implied, however, we presume prejudice and reverse without reaching the question of prejudice."⁸²

Here, the information for unlawful imprisonment provided:

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;

Contrary to RCW 9A.40.040, and against the peace and dignity of the State of Washington.^[83]

Johnson argues that this information failed to include all of the "essential elements" of the crime because they are neither expressly stated nor fairly implied. We agree.

⁷⁹ State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

⁸⁰ State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (quoting State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995)).

⁸¹ McCarty, 140 Wn.2d at 425.

⁸² Id.

⁸³ Clerk's Papers at 18 (emphasis added).

Since Johnson challenges the information for the first time on appeal, it must be liberally construed.⁸⁴ Even with a liberal reading, however, all of the essential elements of unlawful imprisonment do not appear in the document. Since the information fails to set forth all of the essential elements of the crime, prejudice is presumed under the two-part test.⁸⁵

In State v. Borrero, the supreme court considered whether an information charging a defendant with attempted first degree murder was sufficient.⁸⁶ There, the information failed to include the statutory definition of "attempt," which included the essential element of "substantial step."⁸⁷ The court determined the common meaning of "attempt" by looking at a dictionary definition and synonyms.⁸⁸ The court concluded that "the element of 'substantial step' is conveyed by the word 'attempt' itself" because the words had the "same meaning and import."⁸⁹

Here, the statute for unlawful imprisonment provides that "[a] person is guilty of unlawful imprisonment if he or she knowingly *restrains* another person."⁹⁰ Under RCW 9A.40.010, to "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.*"⁹¹ To restrain a person "without consent" is accomplished by "physical force, intimidation, or deception."⁹² The statute does not otherwise define the remainder of the last clause of the definition of restrain.⁹³

⁸⁴ See McCarty, 140 Wn.2d at 425.

⁸⁵ See State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991).

⁸⁶ 147 Wn.2d 353, 359, 58 P.3d 245 (2002).

⁸⁷ Id.

⁸⁸ Id. at 363; see also State v. Morgan, 163 Wn. App. 341, 346-47, 261 P.3d 167 (2011), review denied, 175 Wn.2d 1013 (2012) (taking the same "common meaning" approach to the word "attempt").

⁸⁹ Borrero, 147 Wn.2d 363.

⁹⁰ RCW 9A.40.040 (emphasis added).

⁹¹ (Emphasis added.)

⁹² RCW 9A.40.010(6).

⁹³ See id.

Because the information refers only to "restrain," we look to its plain meaning in a dictionary. The American Heritage Dictionary states the following definitions: (1) "To hold back or keep in check; control"; (2) "To prevent (a person or group) from doing something or acting in a certain way"; and (3) "To hold, fasten, or secure so as to prevent or limit movement."⁹⁴ Noticeably absent from these definitions is any mention of restricting "a person's movements without consent," "without legal authority," or by "interfer[ing] substantially with his or her liberty." While one could reasonably infer the first and last phrases, there is no way to reasonably conclude that the restraint must be "without legal authority." In short, the information is deficient because this essential element cannot be reasonably inferred from the information.

In State v. Warfield, Division Two of this court held that "the statutory definition of unlawful imprisonment, to 'knowingly restrain,' causes the adverb 'knowingly' to modify all components of the statutory definition of 'restrain,' including the 'without lawful authority' component."⁹⁵ There, three bounty hunters knowingly restrained Mark DeBolt for the purpose of arresting him on a 1987 misdemeanor warrant out of Maricopa County, Arizona.⁹⁶ The three did not know that the Arizona warrant "had no lawful effect in Washington."⁹⁷

The 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."⁹⁸ Then, the court reversed the defendants' unlawful imprisonment convictions because "[i]t is uncontroverted that defendants believed they were acting lawfully because they had a warrant for DeBolt's arrest" and a Washington police officer "appeared to ratify the lawfulness of their actions."⁹⁹

Warfield supports the conclusion that an essential element of unlawful imprisonment is that a person have knowledge that the restraint was "without legal authority."

⁹⁴ THE AMERICAN HERITAGE DICTIONARY 1538 (5th ed 2011), <http://www.ahdictionary.com/word/search.html?q=restrain>.

⁹⁵ 103 Wn. App. 152, 5 P.3d 1280 (2000).

⁹⁶ Id. at 154.

⁹⁷ Id. at 155.

⁹⁸ Id. at 159.

⁹⁹ Id.

The State argues that definitional elements cannot be essential elements of a crime. The State is mistaken.

The State cites State v. Rhode to support this proposition.¹⁰⁰ Rhode addressed a similar issue as Borrero: whether the “substantial step” element of attempt” could be found in the defendant’s information.¹⁰¹ There, the court explained that the issue was whether the statutory definition was “encompassed” by the term used in the information.¹⁰² As discussed above, “restrain” does not “encompass” the essential element that a person had knowledge that the restraint was “without legal authority.” In this case, part of the definition of “restrain” contains an essential element of unlawful imprisonment.

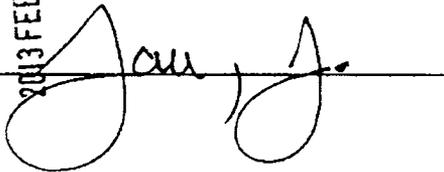
Johnson's unlawful imprisonment conviction must be vacated without prejudice.¹⁰³

It is further ORDERED that the remaining footnote shall be renumbered accordingly.

DATED this 13th day of February 2013.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2013 FEB 13 AM 10:47



Cox, J.

Becker, J.

¹⁰⁰ 63 Wn. App. 630, 821 P.2d 492 (1991).

¹⁰¹ Compare Rhode, 63 Wn. App. at 633 with Borrero, 147 Wn.2d at 359.

¹⁰² Rhode, 63 Wn. App. at 636 (quoting State v. Smith, 49 Wn. App. 596, 600, 744 P.2d 1096 (1987)).

¹⁰³ See McCarty, 140 Wn.2d at 428.

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 Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Petition for Review, in STATE V. J.C. JOHNSON, Cause No. 66624-0-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.

U Brame
Name
Done in Seattle, Washington

3/15/13
Date 3/15/13