No. 33174-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JOSEPH FELIX DELGADO,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable Evan E. Sperline, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information charging appellant with felony stalking is constitutionally deficient.

2. The "to convict" instruction pertaining to felony stalking misstates an essential element of the offense.

3. The evidence was insufficient to support the conviction for felony stalking.

Issues Pertaining to Assignments of Error

1. To pass constitutional muster, an information charging a criminal offense must notify the defendant of every essential element of that offense. In count 2, appellant was charged with felony stalking. The information misstated an essential element pertaining to the victim's fear. Is reversal required?

2. This same misstatement was included in the "to convict" instruction for count 2. Does this error also require reversal?

3. Was the evidence insufficient for any rational trier of fact to find the essential elements of the crime of felony stalking?

B. STATEMENT OF THE CASE

Procedural facts. The Grant County Prosecutor's Office charged appellant Joseph Felix Delgado as follows: (count 1) intimidating a witness; (count 2) felony stalking; (count 3) felony violation of a court order; (counts 4 and 5) gross misdemeanor violations of a court order; and (count 6) gross misdemeanor harassment. CP 69–73. Count 6 was dismissed after close of the state's case-in-chief. RP[1] 454; CP 116. A jury found Delgado not guilty of counts 1 and 4 and guilty of counts 2, 3 and 5. CP 101, 103–06. The court imposed a standard range sentence, and Delgado timely filed his notice of appeal. CP 115, 117, 121, 131–32.

Substantive facts. Delgado and Lisa Jacobs-Delgado had an increasingly rocky relationship following their marriage in 2013. RP 249–52. Count 3, violation of a court order, was based on assaultive conduct at Newton's Car Center in Moses Lake on November 20, 2013, in violation of a protective order issued October 26, 2013. RP 177–85. Count 5, violation of a court order, stemmed from phone message contacts on January 13, 2014, in violation of a protective order issued November 21, 2013. RP 233–37, 270–72. Count 2, the stalking charge, encompassed the

period from December 26, 2013, to January 22, 2014, and included the conduct charged in count 5. CP 70–71; RP 535–38.

Within a week or so after the November 20, 2013, car lot incident, Ms. Jacobs and Delgado were living together again in her recreational vehicle (RV) in Warden, Washington. RP 298, 301. Ms. Jacobs left and moved in with a girlfriend shortly before Christmas because she and Delgado continued to argue and fight. RP 303. On January 5, 2014, they went to the trailer to pick up some of her belongings. RP 304. Delgado, who had been asked to repossess the trailer for its owner and was sleeping inside, yelled at her as he left the trailer. RP 305, 368–70, 472, 474–75. Over the course of the following week Delgado left a number of messages on Ms. Jacobs' phone, which she erased. RP 307, 389.

On January 13 Ms. Jacobs reported three of Delgado's recent phone contacts to the police department. RP 307–08. One was a recording of her and Delgado's favorite country music song, Sweet Annie. Ms. Jacobs described it as "their" song and one they'd listened to many times. While the recording irritated her, it did not "put [her] in fear." She believed the message was meant only to intimidate her. RP 307–09, 395–

[1] The trial proceedings transcribed by Tom Bartunek will be cited to as "RP __." Citations to the earlier proceedings and sentencing hearing transcribed by Ken Beck will reference the hearing date, e.g., "2/23/15 RP __."

96. A second message had the sound of someone preaching in the background. This "irritated [her], using God's name in it," but did not put Ms. Jacobs in fear. She didn't believe the call was meant to injure her. RP 307–08, 395–96. The third message asking Ms. Jacobs not to contact Delgado's ex-girlfriend or his brother was "really, really offensive" and upsetting. It "did" put her in fear and cause emotional distress such that she called a girlfriend who recommended Ms. Jacobs contact law enforcement. Ms. Jacobs did not interpret this or any of the messages as a threat of injury. RP 253, 307–08, 395–97.

Shortly after providing the recordings to police, Ms. Jacobs moved back with Delgado into her trailer that had been moved to the Moses Lake RV Park. RP 311–12. Around January 21 or 22, Ms. Jacobs wrote a letter to Delgado's attorney recanting her account of the November car lot incident and asking to "rescind" [sic] the case and the charges. RP 312–15. Delgado told her to write the letter because CPS was threatening to take away his daughter. RP 313, 407. Ms. Jacobs said he told her three or four times there "would be consequences" if she didn't and described those as "probably another beating, another hair pulling, another dramatic verbal, hour-long verbal abuse." RP 313–14. Ms. Jacobs believed he would follow through with physical harm because "[h]e's made it clear,

anything that stands between him and his daughter, there will be consequences." RP 314, 326–27. On her own, Ms. Jacobs wrote a similar letter to the prosecutor's office pertaining to everything she'd told police. RP 315–16, 404–05.

In closing the state argued the intimidating a witness charge (count 1) was based on Delgado's conduct in obtaining the letters of recantation on January 21 and 22, 2014. RP 529–34. It argued the stalking (count 2) and violation of a court order (count 5) charges were based on the three phone messages left on Ms. Jacob's phone on January 13, 2014. RP 535–38, 544–45.

Delgado was indigent for purposes of defending against the charges. CP 20–21. Because of his continued indigency, the court determined Delgado was entitled to counsel on appeal and the costs of preparing the appellate record at public expense.[2] *See* 2/23/15 RP 13. The judgment and sentence provides that "[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations." CP 120.

[2] Grant County did not include in its Clerk's Papers a copy of the order of indigency filed on the day of sentencing, February 23, 2015, although it was designated as a clerk's paper. See Designation of Clerk's Papers filed in this Court on April 20, 2015. The Order of Indigency was previously submitted to this Court in connection with opening the appeal and is on file.

C. ARGUMENT

1. The Information charging felony stalking is constitutionally deficient.

Under both the Federal and Washington Constitutions, a charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art I, § 22 (amendment 10)[3]; *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); *Seattle v. Norby*, 88 Wn. App. 545, 558–59, 945 P.2d 269 (1997), *overruled on other grounds*, *State v. Robbins*, 138 Wn.2d 486, 497, 980 P.2d 725 (1999).

A challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal. *Kjorsvik*, 117 Wn.2d at 102. Where, as here, the challenge is raised initially on appeal, this Court applies the "liberal construction" test. Under that standard, if the information is missing an essential element, it satisfies constitutional requirements only if the missing element is "fairly implied from language within the charging document." *Kjorsvik*, 117 Wn.2d at 104.

[3] U.S. Const. amend. VI provides, "In all criminal prosecutions, the accused shall … be informed of the nature and cause of the accusation …." Const. art I, § 22 (amendment 10) provides, "In criminal prosecutions, the accused shall have the right to … demand the nature and cause of the accusation …."

For count 2, felony stalking, the information in this case alleges in relevant part:

> Between the 26th day of December, 2013 through the 22nd day. of January, 2014, both days inclusive, in the State of Washington, the above -named Defendant, with intent to frighten, intimidate, or harass another person, to- wit: LISA MAE JACOBS, or with knowledge that said person was afraid, intimidated or harassed even if the Defendant did not intend to frighten, intimidate or harass said person, did intentionally and repeatedly harass said person and /or did repeatedly follow said person, and as a result said person was placed in a reasonable fear that the Defendant intended to injure said person and /or another person and/ or said person's property and /or another person's property, and at the time this occurred … ii) the stalking violated any protective order protecting the person being stalked, … contrary to the Revised Code of Washington 9A.46. 110(1) and (5)(b).

CP 70–71.

The language critical to this appeal is underlined and says that the victim "was placed in a reasonable fear." The relevant portion of the stalking statute provides:

> (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:
>
> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
>
> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; …

RCW 9A.46.110(a)–(b) (emphasis added).

Whereas the statute requires that a victim's fear is also one that a reasonable person would experience under the identical circumstances, the information says only that the victim was "placed in a reasonable fear." The difference is one of subjectively reasonable versus objectively reasonable fear.

The charging language only requires proof of a subjective reasonable fear—fear that is reasonable based solely on the victim's perceptions and experiences. The information gives no indication that that fear must be compared to what a reasonable person would experience. The statutory language, in contrast, requires proof that the victim's fear was not only reasonable for that person, but reasonable when compared to what a reasonable person would experience under the same circumstances.

The distinction is illustrated with a hypothetical. A defendant repeatedly follows another person on the streets of Spokane. The defendant has no intention of harming the other individual. As it turns out, the person being followed is particularly paranoid and, based on that paranoia, believes the defendant intends to harm her. Although the victim's belief is understandable in light of her paranoia, a "reasonable person" in the same situation would not have been fearful.

Under the language charging count 2 in this case, Delgado would

be guilty of stalking were he the defendant in the hypothetical because according to that language, all the State need prove is a subjectively reasonable fear. There is no mention in the information of the objectively reasonable person standard the State is required to satisfy at trial.

The information misinformed Delgado that any subjectively reasonable fear on the victim's part would suffice. And the fact that the information cites to the relevant statute does not save it. "The primary goal of a charging document is to give notice to the accused so that he or she can prepare an adequate defense, without having to search for the violated rule or regulations." *State v. Armstrong*, 69 Wn. App. 430, 433, 848 P.2d 1322 (citing *Kjorsvik*, 117 Wn.2d at 101–02), *review denied*, 122 Wn.2d 1005 (1993). Merely citing to the pertinent statutes and naming the offense is insufficient unless that name informs the defendant of each of the essential elements. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The title of the charged offense here did not inform Delgado of the objective element.

Delgado's conviction must be reversed. *See State v. Simon*, 120 Wn.2d 196, 199, 840 P.2d 172 (1992) (proper remedy is reversal without prejudice to the State refiling the information).

2. Delgado was denied his right to due process when the "to convict" instruction relieved the state of its burden to prove every element of the offense beyond a reasonable doubt.

Due process requires that an instruction "purporting to list all of the elements of a crime must in fact do so." *State v. Smith*, 131 Wn.2d 258, 262–63, 930 P.2d 917 (1997) (citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)); *State v. Hilsinger*, 167 Wash. 427, 432–34, 9 P.2d 357 (1932); *State v. Rader*, 118 Wash. 198, 203–04, 203 P. 68 (1922). A "to convict" instruction that fails to set forth every essential element of the charged crime is error of constitutional magnitude that may be raised for the first time on appeal. *State v. Eastmond*, 129 Wn.2d 497, 502–03, 919 P.2d 577 (1996); *State v. Aumick*, 126 Wn.2d 422, 429–30, 894 P.2d 1325 (1995); *State v. Scott*, 110 Wn.2d 682, 689–90, 757 P.2d 492 (1988).

The error is not cured by reference to other jury instructions. *State v. Miller*, 131 Wn.2d 78, 90–91, 929 P.2d 372 (1997); *Smith*, 131 Wn.2d at 262–63. Moreover, the error is never harmless "because it affect[s] the right of [the defendant] to have the jury base its decision on an accurate statement of the law applied to the facts in the case." *Miller*, 131 Wn.2d at 90–91; *accord Smith*, 131 Wn.2d at 263–65; *State v. Pope*, 100 Wn. App.

624, 630, 999 P.2d 51 (omission of element in "to convict" instruction is never harmless), *review denied*, 141 Wn.2d 1018 (2000).

As discussed above, the information on count 2 omitted the objective reasonable person element as it related to the victim's fear. The "to convict" instruction for that charge suffers the same deficiency. The pertinent portion of the instruction required the State to prove:

> 1. That on or between Dec. 26, 2013 and Jan. 22, 2014, the defendant intentionally and repeatedly harassed, or repeatedly followed, Lisa Jacobs;
>
> 2. That Lisa Jacobs reasonably feared that the defendant intended to injure her; …

CP 89 (emphasis added).

The instruction failed to inform the jury that the victim's fear of injury had to be compared to that of an objectively reasonable person. The instruction dispensed with an essential element of the offense and eased the State's burden of proof in violation of Delgado's due process rights. Reversal is automatic.

3. The evidence was insufficient for any rational trier of fact to find the essential elements of the crime of felony stalking.

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." *State v. Hutchins*, 73 Wn. App. 211, 215, 868 P.2d 196 (1994) (citing *State v. Grover*, 55 Wn. App. 923, 930, 780 P.2d 901 (1989), *rev. denied*, 114 Wn.2d 1008, 790 P.2d 167 (1990)). "Circumstantial evidence is no less reliable than direct evidence; specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

RCW 9A.46.110 provides in pertinent part:

> (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:
>
> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
>
> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
>
> (c) The stalker either:
>
> (i) Intends to frighten, intimidate, or harass the person; or
>
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.
>
> …
>
> (5)(b) A person who stalks another is guilty of a class B felony if any of the following applies: … (ii) the stalking violates any protective order protecting the person being stalked…

Herein, the evidence is insufficient to establish the second element—that the person being harassed or followed was placed in fear that the stalker intended to injure the person, another person, or property of the person or of another person; and/or that the feeling of fear was one that a reasonable person in the same situation would experience under all the circumstances.

While Ms. Jacobs said she was "irritated" and "intimidated" by the Sweet Annie song excerpt and "irritated" by the preacher recording, she indicated they caused her no fear of injury. RP 307–09, 395–96. While she said the third message asking her not to contact Delgado's ex-girlfriend or his brother was offensive and distressed her enough to call a girlfriend, Ms. Jacobs stated she did not interpret this or any of the messages as a threat of injury. RP 253, 307–08, 395–97.

Even if Ms. Jacobs was in fear due to the messages, that fear was not one that a reasonable person in the same situation would experience under all the circumstances. The prior week she'd received and erased a number of messages left by Delgado, which she knew to be in violation of a court order. RP 233, 307, 389. At the encouragement of a girlfriend, Ms. Jacobs reported the present violations to law enforcement in order to stop them. RP 307–08, 396. She did not seek counseling. She did not tell

police she felt frightened or harassed by Delgado at the time or as a result of the phone messages. And shortly after providing the recordings to police, Ms. Jacobs moved back into her trailer with Delgado. RP 311–12. Thus even if Ms. Jacobs was in fear at the time of receiving the messages, her actions demonstrate that fear was not one that a reasonable person in the same situation would experience under all the circumstances.

There is insufficient evidence for the jury to find the essential second element—that the person being harassed or followed was placed in fear that the stalker intended to injure the person, another person, or property of the person or of another person; and/or that the feeling of fear was one that a reasonable person in the same situation would experience under all the circumstances. Therefore, the evidence is insufficient to sustain the conviction.

4. Appeal costs should not be imposed.

The trial court found Delgado to be indigent and unable to pay for the expenses of appellate review and entitled to appointment of appellate counsel at public expense. *See* 2/23/15 RP 13; *see also* footnote 1 herein. If Delgado does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the "court of appeals … may require an adult … to pay appellate costs." "[T]he word

'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny any request for costs by the State.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case" analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.* Accordingly, Delgado's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. CP 115–16.

Without a basis to determine that Delgado has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

The language in the information for count 2 is deficient. So is the "to convict" instruction. The stalking conviction must be reversed on this basis or alternatively dismissed for insufficient evidence.

Respectfully submitted on April 12, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 12, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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