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62579-9

NO. 62579-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO JAKO,

Appellant.

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

The Honorable Catherine Shaffer

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of due process, the amended information for count 2, charging felony harassment, omitted the essential element that the threat was a “true threat.”

2. In violation of due process, the “to convict” instruction for count 2 omitted the essential element that the threat was a “true threat.”

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Sixth and Fourteenth Amendments and Article I, section 22 of the Washington Constitution, a charging document must contain all of the essential elements of a criminal charge, both statutory and nonstatutory. The omission of a necessary element from the information requires reversal and dismissal of the conviction. That the threat made was a “true threat” is an essential element of the crime of felony harassment, but the State omitted the “true threat” element from the information filed here. Must Mr. Jako’s felony harassment conviction be reversed and dismissed? (Assignment of Error 1)

2. An accused person has the due process right to have the jury instructed on the essential elements of the crime charged in the “to convict” instruction. Because the felony harassment statute

criminalizes pure speech, to avoid constitutional overbreadth problems, the jury must find the threat made was a “true threat.” The trial court here did not instruct the jurors in the “to convict” instruction that they had to find the threat made was a “true threat.” Must this Court reverse Mr. Jako’s conviction for felony harassment and remand for a new trial at which the “true threat” element will be included in the “to convict” instruction? (Assignment of Error 2)

C. STATEMENT OF THE CASE

Shontrell Franks and appellant Antonio Jako were in a three-and-a-half year relationship that resulted in the birth of a daughter. 4RP 22.¹ Even after their breakup, Mr. Jako and Ms. Franks had a fairly amicable relationship. He provided her with financial assistance in securing her apartment and would come over and do odd jobs around the house. 4RP 44.

On March 24, 2008, slightly less than a year after Ms. Franks and Mr. Jako parted, Mr. Jako contacted Ms. Franks and asked to see his daughter. 4RP 24. Ms. Franks felt uneasy about this; their daughter was in delicate health and it had been several months since Mr. Jako had had contact with her. 4RP 24-25. Ms. Franks told Mr. Jako that she was sending their daughter to her

¹ There are seven transcripts of proceedings in this appeal. Two transcripts, from August 12 and 13, 2008, are cited as 4RP and 5RP.

mother's house in Tacoma and that Mr. Jako could not see her.
4RP 25-26.

This upset Mr. Jako, and he started to drink. 4RP 25-27.
That evening, after Ms. Franks got off of work, she went to the
home of her cousin, Aleage Franks. 4RP 26, 57. Mr. Jako started
to call Ms. Franks on her cousin's cell phone, stating, "I'm going to
beat you up, I'm going to mess up your house." 4RP 26. In one
such call, Mr. Jako stated that he "did mess up [her] house." Id.

Ms. Franks and her cousin went to Ms. Franks' home and in
fact there was substantial damage to the home and its contents.
4RP 28-29, 64-65. They called the police and Deputy A. R. Buchan
responded. While Deputy Buchan was there, someone identifying
himself as Mr. Jako called Aleage Franks' cell phone. 5RP 23.
She put the call on speaker and the caller admitted to damaging the
items in Shontrell Franks' home. Id. The caller stated, "You know
now that I can get to her whenever I want to get to her, and the next
time I am going to kill her." 5RP 24.

The King County Prosecuting Attorney charged Mr. Jako by
amended information with two felony counts: residential burglary
with a domestic violence designation, and felony harassment. CP
8-9. For purposes of count 2, the felony harassment count, the

information did not allege that the threat made was a “true threat.” The matter proceeded to a jury trial, and the to-convict instruction for this count also omitted this element. CP 49. The jury convicted Mr. Jako as charged. CP 33. Mr. Jako appeals. CP 73-74.

D. ARGUMENT

THAT THE THREAT MADE WAS A “TRUE THREAT”
IS AN ESSENTIAL ELEMENT OF FELONY
HARASSMENT THAT HAD TO BE INCLUDED IN
THE INFORMATION AND FOUND BY THE JURY.

1. An accused person has the due process right to have the State prove the essential elements of the crime charged. An accused person has the due process right to require the State to prove the essential elements of a charged offense to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 14.

Also required by principles of due process, the essential elements of a crime must be included in the charging document, regardless of whether they are statutory or non-statutory. U.S.

Const. amend. 6;¹ Const. art. I, § 22;² State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). In Goodman, the Court relied on Apprendi to hold that all facts essential to punishment must be pleaded in the information and proved beyond a reasonable doubt. Goodman, 150 Wn.2d at 785-86.

The purpose of the rule is to give the accused notice of the nature of the allegations so that a defense may be properly prepared. Id. at 784; State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). An information omitting essential elements charges no crime at all. State v. Courneya, 132 Wn. App. 347, 351, 131 P.3d 343, rev. denied, 149 P.3d 378 (2006).

Charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before trial or a guilty verdict. Kjorsvik, 117 Wn.2d at 102. The reviewing court looks to determine whether the necessary facts appear in the information in any form, and if not,

¹ In pertinent part, the Sixth Amendment provides: "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation."

² Article I, section 22 of the Washington Constitution states in relevant part: "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him."

whether the defendant was actually prejudiced by the lack of notice.

Goodman, 150 Wn.2d at 787-88; Kjorsvik, 117 Wn.2d at 105-06.

The first prong looks to the face of the charging document and requires at least some language giving notice of the allegedly missing elements. The second prong may look beyond the face of the information to determine if the accused actually received notice of the charges he or she must have been prepared to defend; it is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges.

Courneya, 132 Wn. App. at 351 (citations omitted).

“If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and reviewing courts reverse without reaching the question of prejudice.” Id. In Courneya, the Court found the State’s omission of the implied element of knowledge from an information charging hit and run was fatal to the ensuing conviction, even though two jury instructions explained knowledge was an essential element of the crime charged. 132 Wn. App. at 353-54. Rejecting the State’s invitation to disregard the strict interpretation of the rule, the Court relied on Vangerpen, in which the Supreme Court held proper jury instructions cannot cure a defective information. Courneya, 132 Wn. App. at 354 (citing Vangerpen, 125 Wn.2d at 788).

Accordingly the Court reversed the conviction with instructions to dismiss the information. Courneya, 132 Wn.2d at 354.

2. That the threat made was a “true threat” was an essential element of felony harassment and telephone harassment that had to be included in the information. In Washington, whether a threat was a “true threat” is an essential element of felony harassment that must be included in the charging document and the jury instructions.

In State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004), the Washington Supreme Court considered a First Amendment challenge to RCW 9A.46.020,³ the felony harassment statute. The Court noted that because the statute “criminalizes pure speech,” it “must be interpreted with the commands of the First Amendment clearly in mind.” Id. at 41 (quoting State v Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001) and Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)). The Court held that in order to “avoid unconstitutional infringement of

³ In pertinent part, RCW 9A.46.020 provides:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person[.]

Under subsection (b) of the statute, a person is guilty of a class C felony if “the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.”

protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only ‘true threats.’” Kilburn, 151 Wn.2d at 43.

A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or take the life of another person.

Id. The communication “must be a serious threat, and not just idle talk, joking or puffery.” Id. at 46 (citing State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001)). Whether a true threat was made “is determined under an objective standard that focuses on the speaker.” Id. at 44.

The Court considered the issue again in State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006). In that case the Court reiterated that a statute proscribing threats must be limited to “true threats” to avoid constitutional overbreadth prohibitions, and further found the failure to instruct the jury on the definition of a “true threat” was fatal to the conviction. Id. at 363-65.

In State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007), the Court considered whether, in the context of a prosecution for telephone harassment, the requirement that the threat was a “true threat” had to be included in the information or in the “to convict”

instruction. 141 Wn. App. at 482-85. The Court concluded that the “true threat” requirement was a mere definitional component of the harassment statute, and not an essential element, reasoning that the court in Johnston did not expressly rule that “a true threat is an essential element of any threatening-language crime.” Id. at 483.

The Court’s decision in Tellez was incorrect. In fact, the Court in Johnston expressly held “the jury must be instructed that a conviction under RCW 9.61.160 requires a true threat and must be instructed on the meaning of a true threat.” Johnston, 156 Wn.2d at 366 (emphasis added). I.e., the Court did not limit its holding to requiring the jury only be instructed on the meaning of a true threat, but unequivocally decreed that “the jury must be instructed that a conviction under RCW 9.61.160 requires a true threat.” Id. (emphasis added). The unequivocal language of the Court’s holding makes it plain that the Court considered the “true threat” requirement to be an element of any harassment charge.

The conclusion that the Court considered the “true threat” requirement to be an element is consistent, as well, with the Court’s treatment of mere definitional terms. See e.g. State v. Lorenz, 152 Wn.2d 22, 33-35, 93 P.3d 133 (2004) (observing that the failure to instruct on definitional terms is not an error that requires a

conviction be reversed) (citations omitted). By requiring an instruction on the “true threat” requirement, the Court implicitly distinguished “true threats” from definitional terms and signaled its view that whether a threat was a “true threat” is an essential element of a harassment charge.

No Washington court has adopted the holding in Tellez. In State v. Sloan, 149 Wn. App. 736, 205 P.3d 172 (2009), the “true threat” requirement was included in the “to convict” instruction, thus the court’s fleeting reference to Tellez is dicta. See 149 Wn. App. at 743, 745-46. In State v. Schaler, 145 Wn. App. 628, 186 P.3d 1170 (2008), the court acknowledged Tellez, but ultimately followed Johnston in concluding the failure to instruct on a “true threat” was manifest error. 145 Wn. App. at 640-41. This Court should conclude that Tellez was wrongly decided and, consistent with the plain language of Johnston’s holding, hold that a “true threat” is an essential element of a threatening-language crime.

3. The omission of the essential element that the threat was a “true threat” requires reversal and dismissal. As the foregoing discussion establishes, that a threat was a “true threat” is an essential element of a harassment charge. Accordingly, the State had to “satisfy both the First Amendment demands—by proving a

true threat was made—and the statute, by proving all the statutory elements of the crime.” Kilburn, 151 Wn.2d at 54. The information here did not allege the essential non-statutory element of the crime of felony harassment that the threat was a “true threat.” CP 8-9.

Because the information is challenged for the first time on appeal, the liberal standard of review applies. Kjorsvik, 117 Wn.2d at 105-06. Under this standard, Mr. Jako is entitled to reversal of his conviction. Critically, the face of the charging document does not contain any language giving notice of the missing element. Courneya, 132 Wn. App. at 351. Because the necessary element is “neither found nor fairly implied in the charging document, prejudice is presumed” and this Court should “reverse without reaching the question of prejudice.” Id.

Even if this Court were to consider whether Mr. Jako was prejudiced by the omission, however, it is plain he was, as the court did not subsequently include the “true threat” element in the “to convict” instructions. Not only was Mr. Jako deprived of his constitutionally-required opportunity to fair notice of the State’s accusation, the State was also relieved of its burden of proving this element of the crime. Mr. Jako is entitled to reversal and dismissal of the convictions.

4. The “true threat” element had to be included in the “to convict” instruction. As held in Johnston, supra, the jury had to be instructed on the “true threat” element of felony harassment. The court’s definition of harassment did contain the language that

To constitute a threat, the communication must occur in a context or under circumstances where a reasonable person making that communication would foresee that it would be interpreted as a serious expression of intent to carry out that threat.

CP 50.

The “true threat” requirement, however, was not included in the “to convict” instruction, and hence the instructions were not adequate to inform the jury of what they had to find in order to find Mr. Jako of the charged offense. CP 36.

The “to convict” instruction must contain all of the elements of the crime charged because it serves as a “yardstick” by which the jury measures guilt or innocence. State v. Mills, 154 Wn.2d 1, 7-8, 109 P.3d 415 (2005); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). “The jury has the right under Emanuel to regard the “to convict” instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand.” State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

The Court has recognized a limited exception to this rule where the missing element is included in a special verdict form. Mills, 154 Wn.2d at 8; State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002). This exception is narrowly drawn, however, and is restricted to the circumstance where the jury is expressly instructed it must unanimously agree beyond a reasonable doubt before it may answer the special verdict. Mills, 154 Wn.2d at 10.

This predicate is not present here. This Court should conclude that, consistent with Kilburn, Johnston, Mills, and Oster, the jury had to be instructed in the “to convict” instruction or in a special verdict form that it had to find the threat was a “true threat.”

5. The error from the deficient instructions requires reversal of Mr. Jako’s felony harassment conviction. The Washington Supreme Court has held that the omission of an essential element from the “to convict” instruction is a structural error that requires reversal of the conviction. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.2d 1000 (2003) (agreeing that some errors in jury instructions, such as when the court fails to instruct the jury on all the elements of the crime, are structural and require automatic reversal of the conviction) (citing State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) and Emmanuel, 42 Wn.2d at 819); see also State v.

Eastmond, 129 Wn.2d 497, 503, 919 P.2d 577 (1996) (holding the omission of an element of the crime from the “to convict” instruction produces a “fatal error” by relieving the State of its burden of proving every essential element beyond a reasonable doubt. The omission of the “true threat” requirement from the “to convict” instruction requires reversal.

Even under a constitutional harmless error standard of review, the standard employed by the court in Schaler, 145 Wn. App. at 641, the error requires reversal. The constitutional harmless error test derives from Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), in which the Court held that constitutional error is harmless only if “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Id. at 24 (emphasis added).

Applying the constitutional harmless error standard, this Court cannot be confident the jurors would have convicted Mr. Jako of felony harassment if they had properly been instructed to find in the “to convict” instruction that the threat made was a “true threat.” As Ms. Franks testified, Mr. Jako was drunk when he made the telephone calls to her cousin’s cell phone and when he used the language that was the subject of the harassment count. 4RP 24.

Had the jury been properly instructed, it may well have found that Jako's alleged threats were mere "idle talk" or "puffery."

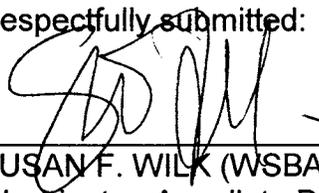
In sum, the State cannot prove beyond a reasonable doubt that the error did not prejudice Mr. Jako. Mr. Jako is therefore entitled to a new trial on the felony harassment count at which the jury will be instructed in the "to convict" instruction to find the threat made was a "true threat."

E. CONCLUSION

Because the information omitted an essential element of the charge, Mr. Jako requests this Court reverse and dismiss his conviction for felony harassment. He alternately requests reversal and remand for a new trial at which the "to convict" instruction will list this element.

DATED this 2nd day of September, 2009.

Respectfully submitted:



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62579-9-I
v.)	
)	
ANTONIO JAKO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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