

No. 64678-8-1

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

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STATE OF WASHINGTON,

Respondent,

v.

DARREN JOHN ELKEY,

Appellant.

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COUNTY OF KING  
CLERK OF COURT

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The charging document did not set forth all of the essential elements of the crime, in violation of article 1, section 22 of the Washington State Constitution and constitutional due process.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The charging document in a criminal prosecution must set forth all of the essential elements of the crime. In State v. Lilyblad, 163 Wn.2d 1, 177 P.3d 1276 (2008), the Washington Supreme Court held that the crime of telephone harassment requires proof that the defendant formed the intent to harass the victim at the time the defendant initiated the call to the victim. Was the information charging Darren Elkey with the crime of telephone harassment deficient where it did not set forth this essential element of the crime?

C. STATEMENT OF THE CASE

On June 12, 2009, the State charged Darren Elkey in King County with one count of felony telephone harassment (RCW 9.61.230(1)(c), (2)(a)). CP 1. The information alleged:

That the defendant DARREN JOHN ELKEY in King County, Washington, on or about June 10, 2009, with intent to harass, intimidate, and torment another person, did make a telephone call to Kelley Gabryshak-Reyes, threatening to inflict injury on the person or property of Kelley Gabryshak-Reyes, or to

any member of that person's family or household; and the defendant had previously been convicted of Assault in the 4th Degree, a crime of harassment as defined in RCW 9A.46.060, with the same victim or member of the victim's family or household.

CP 1.

Thus, although the information alleged that Mr. Elkey "did make" a telephone call with the intent to harass, intimidate, and torment Ms. Gabryshak-Reyes, it did not allege that he had the requisite intent at the time he *initiated* the telephone call.

Following a jury trial, Mr. Elkey was convicted of one count of felony telephone harassment as charged. CP 35, 36-45.

D. ARGUMENT

THE INFORMATION DID NOT SET FORTH ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME OF TELEPHONE HARASSMENT, WHERE IT DID NOT ALLEGE THAT MR. ELKEY FORMED THE INTENT TO HARASS, INTIMIDATE AND TORMENT MS. GABRYSHAK-REYES AT THE TIME HE INITIATED THE TELEPHONE CALL

1. A charging document is constitutionally sufficient only if it sets forth all of the essential elements of the crime. It is a fundamental principle of criminal procedure, embodied in the state<sup>1</sup>

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<sup>1</sup> Article 1, section 22 of the Washington Constitution guarantees that "In criminal prosecutions, the accused shall have the right to appear and . . . to demand the nature and cause of the accusation against him (and) to have a copy thereof."

and federal<sup>2</sup> constitutions, that the accused in a criminal case must be formally apprised of the nature and cause of the accusation before the State may prosecute and convict him of a crime. The judicially approved means of ensuring constitutionally adequate notice is to require a charging document set forth all of the essential elements of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). This "essential elements rule" has long been settled law in Washington and is constitutionally mandated. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008) (citing State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995)).

All essential elements of the crime, statutory or otherwise, must be included in the information so as to apprise the accused of the charges and allow him to prepare a defense, and so that he may plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Every material element of the charge, along with all essential supporting facts, must be set forth with clarity. State v.

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<sup>2</sup> The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of accusation." In addition, the Fourteenth Amendment

McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 97.

The constitutional requirement that the information contain every essential element of the crime is not relaxed simply because the challenge is raised for the first time on appeal. But for post-verdict challenges, the charging document will be construed liberally and deemed sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. Regardless of when the challenge is raised, however, an information cannot be upheld if it does not contain all of the essential elements, as "the most liberal possible reading cannot cure it." State v. Hopper, 118 Wn.2d 151, 157, 822 P.2d 775 (1992).

2. The information is constitutionally deficient, because it does not set forth the essential element that Mr. Elkey formed the intent to harass at the time he initiated the telephone call. Mr. Elkey was charged with felony telephone harassment under RCW 9.61.230(1)(c), (2)(a). CP 1. RCW 9.61.230(1)(c) provides:

(1) Every person who, with intent to harass, intimidate, torment or embarrass another person, shall make a telephone call to such other person:

...

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provides "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. 14.

(c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household; . . . .

is guilty of a gross misdemeanor. RCW 9.61.230(1)(c). The crime is elevated to a class C felony if the person "has previously been convicted of any crime of harassment, as defined in RCW 9A.46.060, with the same victim or member of the victim's family or household or any person specifically named in a no-contact or no-harassment order in this or any other state." RCW 9.61.230(2)(a).

In State v. Lilyblad, 163 Wn.2d 1, 13, 177 P.3d 686 (2008), the Washington Supreme Court determined that the crime of telephone harassment includes as an element the intent to harass or intimidate at the time the phone call is initiated.

An essential element of a crime is one that must be proven to "establish the very illegality of the behavior." State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 669 F.2d 853, 859 (7<sup>th</sup> Cir.), cert. denied, 464 U.S. 991 (1983)). An element need not be listed in the statute defining the crime to be considered essential. Johnson, 119 Wn.2d at 147.

Thus, that the defendant had the intent to harass at the initiation of the telephone call is an "essential element" of the crime of telephone harassment that must be set forth in the charging

document. Lilyblad, 163 Wn.2d at 13; Johnson, 119 Wn.2d at 147; Kjorsvik, 117 Wn.2d at 101-02.

The charging document in this case did not contain the essential non-statutory element that Mr. Elkey had the intent to harass at the initiation of the telephone call. The information alleged that Mr. Elkey, "with intent to harass, intimidate, and torment another person, did make a telephone call to Kelley Gabryshak-Reyes, threatening to inflict injury on the person or property of Kelley Gabryshak-Reyes, or to any member of that person's family or household." CP 1. Although the information alleged Mr. Elkey "did make" a telephone call with the intent to harass, intimidate, and torment, it did not specify that Mr. Elkey had that intent at the *initiation* of the telephone call.

When an information is challenged for the first time on appeal, the question is, "do the necessary facts appear in any form, or by fair construction can they be found, in the charging document"? Kjorsvik, 117 Wn.2d at 105. "Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." Id. at 109. For example, in Kjorsvik, the court determined that the word "unlawfully" contained in an information charging the crime of

robbery was sufficient to notify the defendant of the intent to steal element of the crime. Id.

An information challenged for the first time on appeal "must be read as a whole, in a commonsense manner, from the perspective of a person of common understanding rather than a legal expert." McCarty, 140 Wn.2d at 433. When read in a commonsense manner, from the perspective of a person of common understanding, the allegation that Mr. Elkey "with intent to harass, intimidate, and torment another person, did make a telephone call to Kelley Gabryshak-Reyes, threatening to inflict injury," does not reasonably imply that the intent to harass or intimidate existed at the *initiation* of the telephone call.

Prior to the Supreme Court's decision in Lilyblad, this Court interpreted "make a telephone call" to mean that the intent to harass or intimidate could be formed "at any point" during the telephone conversation. City of Redmond v. Burkhart, 99 Wn. App. 21, 27, 991 P.2d 717 (2000), abrogated by Lilyblad, 163 Wn.2d at 13. Relying on the dictionary definition of "make," this Court concluded "'make' may be a continuing process rather than merely the initiation of a process." Id. at 26 (citing Webster's Encyclopedic Unabridged Dictionary 866 (1989)). Applying "common sense," this

Court concluded that interpreting the statute as governing only those calls dialed while the caller has the intent to intimidate "draws an illogical distinction between threats made by a caller who initiates the call with the intent to intimidate and those made by a caller who formulates the intent to intimidate mid-conversation." Id. at 25. This Court's commonsense interpretation in Burkhart of the statutory language is consistent with the interpretation that a person of common understanding would apply to the charging language in this case.

In Lilyblad, the Supreme Court ultimately resolved the conflict that existed between Divisions I and II concerning the interpretation of the phrase "make a telephone call."<sup>3</sup> Applying rules of statutory construction, Lilyblad concluded that the phrase "make a telephone call" means the call must be initiated with the intent to harass. 163 Wn.2d 1. That is the only interpretation that applies consistently to all three subsections of the statute, and the only interpretation that is consistent with the overall purpose of the statute, which is to protect against the invasion of privacy that occurs at the moment a harassing call is initiated. Id. at 11-13.

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<sup>3</sup> Division II maintained that the intent to harass must be formed at the time the defendant initiated the call. State v. Lilyblad, 134 Wn. App. 462, 140 P.3d 614 (2006), aff'd, 163 Wn.2d 1 (2008).

The rules of statutory construction relied upon in Lilyblad are not available to a person of common understanding. The differing interpretations in the divisions of the Court of Appeals demonstrates the difficulty that a person of common understanding would have interpreting the phrase "make a telephone call." A person of common understanding, reading the language in the information in this case, would not know that the State had the burden to prove Mr. Elkey had the intent to harass at the time he initiated the telephone call.

In Lilyblad, the court concluded that in a prosecution for telephone harassment, the jury must be instructed that the State bears the burden to prove the defendant formed the intent to harass at the time he initiated the telephone call. 163 Wn.2d at 13. The jury instructions in this case are consistent with that holding. Instruction number 6 informed the jury:

A person commits the crime of telephone harassment when, with intent to harass or intimidate or torment another, *he initiates a telephone call* threatening to inflict injury on the person or property of the person called or on any member of her family or household and the person had previously been convicted of any crime of harassment with the same victim.

CP 29 (emphasis added). Instruction number 7, the "to convict" instruction stated:

To convict the defendant of the crime of telephone harassment, as charged, each of the following five elements must be proved beyond a reasonable doubt:

- (1) That on or about June 10, 2009, the defendant made a telephone call to another person;
- (2) *That at the time the defendant initiated the phone call the defendant intended to harass, intimidate, or torment that other person;*
- (3) That the defendant threatened to inflict injury on the person called; and
- (4) That the defendant was previously convicted of the crime of Assault in the Fourth Degree against the person called; and
- (5) That the phone call was made or received in the State of Washington.

CP 30 (emphasis added).

These instructions are consistent with the pattern jury instructions provided by the Washington Pattern Instruction Committee. See 11 Washington Practice: Pattern Jury Instructions: Criminal §§ 36.71, 36.72 (3rd ed. 2008). Citing Lilyblad, the committee recognizes that "[t]he defendant's requisite intent is evaluated at the time that the defendant initiates the call, rather than when the conversation is under way." Id. § 36.72 (citing Lilyblad, 163 Wn.2d 1).

Like charging documents, jury instructions must contain all essential elements of the crime. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845

(1953) (due process requires that the "to convict" instruction include all essential elements of the crime). Jury instructions are sufficient if they "correctly state applicable law, are not misleading, and permit counsel to argue their theory of the case." State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997). Since both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged and tried, there is no meaningful distinction between charging documents and jury instructions in terms of whether they adequately set forth all of the necessary elements. McCarty, 140 Wn.2d at 426 n.1.

In sum, the charging language in this case did not adequately set forth the essential element that Mr. Elkey had the intent to harass at the time he initiated the telephone call.

3. The telephone harassment conviction must be reversed.

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless of whether the accused received actual notice of the charge. Quismundo, 164 Wn.2d at 504; Vangerpen, 125 Wn.2d at 790; State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). If the reviewing court concludes the necessary elements are not found or

fairly implied in the charging document, the court must presume prejudice. McCarty, 140 Wn.2d at 425. If so, the remedy is reversal and dismissal of the charge without prejudice to the State's ability to re-file the charge. Vangerpen, 125 Wn.2d at 792-93.

Because the charging document in this case does not set forth all essential elements of the crime, prejudice is presumed. The conviction must be reversed and dismissed, without prejudice to the State's ability to re-file the charge.

E. CONCLUSION

The information did not contain all essential elements of the crime of telephone harassment, requiring reversal of the conviction.

Respectfully submitted this 18th day of June 2010.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64678-8-I
v.	)	
	)	
DARREN ELKEY,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18<sup>TH</sup> DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> DARREN ELKEY 950230 AIRWAY HEIGHTS CC PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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STATE OF WASHINGTON  
2010 JUN 18 PM 4:39

**SIGNED** IN SEATTLE, WASHINGTON THIS 18<sup>TH</sup> DAY OF JUNE, 2010.

X \_\_\_\_\_  
*[Signature]*

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