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

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COURT OF APPEALS
DIVISION ONE
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STATE OF WASHINGTON,

Respondent,

v.

J.C. JOHNSON,

Appellant.

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

The Honorable Michael Heavey, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Ineffective assistance of counsel deprived appellant of his right to a fair trial in relation to the second degree assault conviction under count II.

2. The information is defective because it omits an element of the harassment offense for count IV.

3. The information is defective because it failed to give adequate notice of the deadly weapon enhancement for count IV.

4. Insufficient evidence supports the deadly weapon enhancement for count IV.

Issues Pertaining to Supplemental Assignments of Error

1. Is reversal of the second degree assault conviction under count II required because defense counsel was ineffective in proposing a jury instruction that defined recklessness in a manner that relieved the State of proving an element of the crime beyond a reasonable doubt?

2. Is reversal of the harassment conviction required because the State failed to allege the "true threat" element of the crime of harassment in the information?

3. The State charged appellant with being armed with "duct tape" as the basis for the deadly weapon enhancement under the count IV felony harassment charge. The jury, however, returned a special

interrogatory identifying "knife" as the deadly weapon. Must the deadly weapon enhancement for count IV be vacated due to lack of notice in the charging document and insufficient evidence?

B. STATEMENT OF THE CASE

The statement of the case set forth in the opening brief at pages 2-13 is incorporated herein by reference.

C. ARGUMENT

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

The trial court's instructions misstated the law by giving the jury an incorrect definition of "recklessness," thereby relieving the State of its burden of proving an essential element of the crime of assault. Reversal of the assault conviction for count II is required because counsel was ineffective in proposing the flawed instruction.

a. The Jury Instruction Defining Recklessness Misstated The Law And Relieved The State Of Its Burden Of Proof.

Under RCW 9A.36.021(1)(a), a person commits second degree assault if he "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." The conduct at issue for second degree assault under count II is Johnson's act of pushing Jena, which caused her to hit her

head against the bed stand and pass out. 7RP 68, 86; 8RP 41-42; 12RP

31-33. The "to convict" instruction for count II provides:

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 Jena Johnson;

(2) That the defendant thereby recklessly inflicted substantial bodily harm on Jena Johnson; and

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

CP 49 (Instruction 18).

RCW 9A.08.010(1)(c), in addressing general levels of culpability, 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 his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation."

Instruction 11 defined "recklessness" as follows:

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.

CP 42 (emphasis added).

The italicized portion of Instruction 11 misstates the law. It does not adequately convey the mental state required to convict Johnson for second degree assault under RCW 9A.36.021(1)(a). To accurately hold the State to its burden of proof, the instruction should have substituted the term "great bodily harm" for the term "a wrongful act."

In State v. Harris, the defendant was charged with first degree assault of a child, which required the State to prove "the person . . . [i]ntentionally assaults the child and . . . [r]ecklessly inflicts great bodily harm." State v. Harris, __ Wn. App. __, __ P.3d __, 2011 WL 4944038 at *3 (slip op. filed Oct. 18, 2011) (quoting RCW 9A.36.120(1)(b)(i)). The first paragraph of the instruction defining recklessness was identical to the one used in Johnson's case. Harris, 2011 WL 4944038 at *3.

To convict for first degree assault of a child, the jury needed to find Harris recklessly disregarded the substantial risk that "great bodily harm" would occur as a result of his actions under RCW 9A.36.120(1)(b)(i), not that "a wrongful act" would occur. Id. at *4. The instruction defining recklessness relieved the State of its burden to prove Harris acted with disregard that a substantial risk of great bodily harm would result when he shook the child. Id. at *5. A jury instruction defining the recklessness requirement must account for the specific risk

contemplated under that statute, i.e., "great bodily harm" rather than some undefined "wrongful act." Id. (citing State v. Gamble, 154 Wn.2d 457, 468, 114 P.3d 646 (2005)) ("the risk contemplated per the assault statute is of 'substantial bodily harm'").

Instruction 11 here is flawed for the same reason. It needed to account for the specific risk contemplated by the second degree assault statute, i.e., "substantial bodily harm" as opposed to a generic "wrongful act." The instruction relieved the State of its burden of proving Johnson acted with a disregard that a substantial risk of substantial bodily harm would result when he pushed Jena.

b. Defense Counsel Was Ineffective In Proposing The Flawed Recklessness Instruction.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

The State proposed Instruction 11. Supp CP __ (sub no. 61, State's Instructions to Jury, 12/16/10). Defense counsel did as well. CP 101. The invited error doctrine does not preclude review where, as here, defense counsel was ineffective in proposing the defective instruction. State v. Kyllo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." Kyllo, 166 Wn.2d at 862.

Counsel performed deficiently in proposing an instruction that lessened the State's burden of proof. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Harris had not been decided at the time of Johnson's trial. But a competent attorney would have been aware Instruction 11 was flawed at the time of Johnson's trial.

The State will argue counsel's performance cannot be deficient because he proposed a standard WPIC. That argument fails. Counsel did not follow the WPIC because he failed to tailor the pattern instruction to the particular charge and facts of the case as envisioned by the WPIC.

WPIC 10.03 provides:

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

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.03 (3d Ed).

Pattern instructions are not to be applied in a mechanical manner. The WPIC committee specifically cautions lawyers that pattern instructions "provide a neutral starting point for the preparation of instructions that are *individually tailored for a particular case*. We emphasize that they are a starting point, not an ending point. Trial judges and *attorneys must always consider appropriate modifications to fit the individual case*." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 0.10 (3d ed.) (emphasis added).

This case-sensitive approach includes "substituting more specific language for the necessarily general language of a pattern instruction." Id. Bracketed language in a pattern instruction, such as the "wrongful act" language in WPIC 10.03, signifies "the enclosed language may or may not be appropriate for a particular case." Id. Brackets "are inserted to alert the judge and attorneys that a choice in language needs to be made." Id. WPIC 10.03, the recklessness pattern jury instruction, accordingly provides "wrongful act" in brackets immediately followed by a direction

to "fill in more particular description of act, if applicable." Harris, 2011 WL 4944038 at *4 (citing 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.03, at 209 (3d ed. 2008)).

Reasonably competent counsel would know, at the time of Johnson's trial, that there was a need to fill in the bracketed language of WPIC 10.03 with a more particular description of the act at issue for second degree assault. Indeed, the statutory definition of the crime of second degree assault under RCW 9A.36.021(1)(a) requires that a person "recklessly inflicts substantial bodily harm," not recklessly inflicts a generic "wrongful act."

Counsel has a duty to know the relevant law. Kyllo, 166 Wn.2d at 861. Aside from the statutory definition of the crime, several cases should have alerted counsel that the "wrongful act" required for a finding of recklessness in a second degree assault case is recklessness that substantial bodily harm would occur, not simply whether a generic, undefined "wrongful act" would occur.

The Supreme Court in Gamble addressed whether first degree manslaughter is a lesser included offense of second degree felony murder with second degree assault under RCW 9A.36.021(1)(a) as the predicate felony. Gamble, 154 Wn.2d at 459-60. In examining mens rea and what "wrongful act" was at issue for the felony murder charge predicated on

second degree assault, the Court concluded "the State was required to prove only that Gamble acted intentionally and 'disregard[ed] a substantial risk that [substantial bodily harm] may occur." Id. at 467-68 (citing RCW 9A.08.010(1)(c)). "Significantly, the risk contemplated per the assault statute is of "substantial bodily harm." Id. at 468.

Consistent with Gamble, the court in State v. R.H.S. recognized the subjective component of recklessness for second degree assault under RCW 9A.36.021(1)(a) is actual knowledge of the likelihood of substantial bodily harm. State v. R.H.S., 94 Wn. App. 844, 847-48, 974 P.2d 1253 (1999). In State v. Keend, the court addressed the crime of second degree assault under RCW 9A.36.021(1)(a) and concluded "the mens rea of intentionally relates to the act (assault), while the mens rea of recklessly relates to the result (substantial bodily harm)." State v. Keend, 140 Wn. App. 858, 866, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041, 187 P.3d 270 (2008).

A reasonably competent attorney is sufficiently aware of relevant case law to propose a proper instruction applicable to the facts of a given case. Thomas, 109 Wn.2d at 227. The cases cited above would have alerted a competent attorney familiar with relevant law of the need to tailor the WPIC with the "substantial bodily harm" language as opposed to proposing the bracketed generic language of "wrongful act." Compare

Kyllo, 166 Wn.2d at 866 (counsel deficient in proposing WPIC because there were several cases that should have indicated to counsel that the pattern instruction was flawed) with State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) ("counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC 16.02").

Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. The presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The failure to appropriately tailor a WPIC instruction or be aware of relevant case law cannot be characterized as a legitimate tactic designed to aid Johnson. Nor can the proposal of an instruction that relieved the State of its burden of proof.

Under the ineffective assistance standard, a defendant demonstrates prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. "*A reasonable probability is a probability sufficient to undermine confidence in the outcome.*" Id. (quoting Strickland, 466 U.S. at 694). Johnson "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

By relieving the State of its burden of proof on the recklessness element of the crime, the flawed instruction undermines confidence in the outcome. The defense to count II was that Johnson committed the lesser offense of third degree assault under RCW 9A.36.031(1)(f). CP 51-54; 12RP 53-54. Johnson committed third degree assault if he, under circumstances not amounting to assault in the second degree, "[w]ith criminal negligence, cause[d] bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering[.]" RCW 9A.36.031(1)(f). Johnson was entitled to the lesser offense instruction because substantial evidence supported the conclusion that a rational jury could find he committed only the lesser offense.¹ See State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (jury instruction on inferior degree offense should be administered if substantial evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater).

Under the facts of this case, the line between recklessness and negligence is a fine one. Jena said she hit her head on the bed stand and passed out when Johnson threw her to the ground. 7RP 68, 86; 8RP 41-42. Johnson acknowledged pushing Jena down during an argument, although he did not intend to cause injury. 10RP 133; 11RP 32, 34, 39, 56. Under

¹ The State had no objection to any instruction. 12RP 9.

these facts, which are open to differing interpretations regarding culpability as to result, a rational jury could find Johnson acted with negligence rather than recklessness.

There is no question that a "wrongful act" occurred here in some general sense. Any result from throwing or pushing a person to the ground could be considered wrong. And therein lay the critical problem. Instruction 11 allowed the jury an easy way to find guilt based on Johnson knowing and disregarding a substantial risk that a "wrongful act" may occur as opposed to holding the State to its more difficult burden of proving Johnson knew and disregarded a substantial risk that "substantial bodily harm" may occur. Reversal of count II is required because there is a reasonable probability the flawed instruction affected the verdict.

2. THE INFORMATION WAS DEFECTIVE BECAUSE IT OMITTED AN ELEMENT OF THE CRIME OF HARASSMENT.

Johnson's harassment conviction must be reversed because the charging document does not set forth the "true threat" element of the crime. U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

The felony harassment conviction was vacated on double jeopardy grounds in relation to the second degree assault conviction under count III. CP 184; 14RP 5-6. However, it is appropriate to challenge the harassment

conviction as part of this direct appeal because the State may attempt to reinstate it in the event the greater count III conviction is reversed on appeal.² See State v. Turner, 169 Wn.2d 448, 461 n.7, 466, 238 P.3d 461 (2010) (under certain conditions a lesser conviction previously vacated on double jeopardy grounds may be reinstated if the defendant's conviction for a more serious offense based on the same act is subsequently overturned on appeal).

The final amended information fails to allege Johnson made a "true threat." CP 17-18. Instead, the information merely accuses Johnson of committing the crime of felony harassment, 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, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Jena Johnson, by threatening to kill Jena Johnson, and the words or conduct did place said person in reasonable fear that the threat would be carried out; Contrary to RCW 9.A.46.020(1), (2), and against the peace and dignity of the State of Washington.

CP 17-18.

² For this same reason, Johnson further challenges the felony harassment conviction under an ER 404(b) analysis and the deadly weapon enhancement for that count, which converts the harassment conviction into a "most serious offense" under the Persistent Offender Accountability Act. See sections C. 3 and 4, infra.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. Vangerpen, 125 Wn.2d at 787. The information must apprise the accused of the statutory elements, as well as the common law elements, of the crime charged. State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991).

"While laws may proscribe 'all sorts of conduct' the same is not true of speech." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004). Speech protected by the First Amendment may not be criminalized. Kilburn, 151 Wn.2d at 42. RCW 9A.46.020, the statute defining the crime of harassment, criminalizes pure speech if read literally. Id. at 41. To avoid unconstitutional infringement on protected speech, the harassment statute and the threat-to-kill provision of RCW 9A.46.020 must therefore be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

"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 to take the life of another person." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have

some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287.

The information fails to allege Johnson made a "true threat." CP 17-18. It is silent as to the required mens rea that the defendant be negligent as to the result of the hearer's fear.

This Court has held the "true threat" allegation need not be included in the charging document because it is merely definitional rather than an essential element. State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007); State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010); State v. Allen, 161 Wn. App. 727, 753-56, 255 P.3d 784, review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011).³

Those decisions cannot be reconciled with the Supreme Court's decision in Schaler and established precedent. The Supreme Court in Schaler pointedly declined to determine whether Tellez was correctly decided because the issue of whether a true threat was an element of harassment was not before it. Schaler, 169 Wn.2d at 289 n.6. The Court, however, stated, "It suffices to say that, to convict, the State must prove that a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious." Id. That statement is in complete accord with Kilburn, where the Court held a harassment

³ The Supreme Court has granted review of this issue in Allen.

conviction must be reversed if the State fails to prove a "true threat."
Kilburn, 151 Wn.2d at 54.

"An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). As Schaler and Kilburn make clear, the State cannot convict someone of harassment unless it proves the existence of a true threat. Schaler, 169 Wn.2d at 286-87, 289 n.6; Kilburn, 151 Wn.2d at 54. Schaler establishes a "true threat" is necessary to prove the mens rea of the crime of felony harassment. Schaler, 169 Wn.2d at 286-87, 289 n.6.

Following Schaler and Kilburn, a "true threat" must be deemed an element of felony harassment. The State's information in this case is deficient because it lacks this element.

Courts presume prejudice and reverse conviction where a necessary element is neither found nor fairly implied from the charging document. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010). This Court must therefore presume prejudice and reverse the harassment conviction because the necessary "true threat" element is neither found nor fairly implied in the information.

3. THE DEADLY WEAPON VERDICT FOR FELONY HARASSMENT MUST BE VACATED DUE TO INSUFFICIENT EVIDENCE AND LACK OF NOTICE.

The deadly weapon enhancement verdict for felony harassment must be vacated because the jury found the use of a deadly weapon that was not charged by the State.⁴ Furthermore, the special verdict must be vacated and the deadly weapon allegation dismissed with prejudice due to insufficient evidence to support it.

The State sought a deadly weapon enhancement by charging Johnson with using a deadly weapon during the commission of felony harassment. CP 18. The information specified "duct tape" as the deadly weapon. CP 18. Consistent with the charging document, the prosecutor argued to the jury that the duct tape was the deadly weapon at issue for the felony harassment charge. 12RP 39-40. The jury, however, specified a knife as the deadly weapon for that charge in answer to a special interrogatory. CP 147-48.

An accused person must be informed of the charge he is to meet at trial, and cannot be tried for an offense not charged. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); U.S. Const. amend. VI; Wash.

⁴ Felony harassment with a deadly weapon special verdict qualifies as a "most serious offense" under the Persistent Offender Accountability Act. RCW 9.94A.030(32)(t).

Const. art. I, § 22. To this end, CrR 2.1(b) requires the information to contain a plain, concise and definite statement of the essential facts constituting the offense charged. State v. Rhinehart, 92 Wn.2d 923, 928, 602 P.2d 1188 (1979). Deadly weapon enhancement allegations must be included in the information. State v. Theroff, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980).

Again, the State charged Johnson with a using a deadly weapon in connection with count IV, but in doing so specified duct tape as the deadly weapon at issue. CP 18. But the jury found Johnson guilty of using a knife in count IV — a deadly weapon for which he had no notice. CP 147-48. Johnson's constitutional due process right to notice of the crime charged was therefore violated. See State v. Valladares, 99 Wn.2d 663, 671, 664 P.2d 508 (1983) (when a defendant is specifically charged with conspiring with a named codefendant, he cannot be convicted of conspiring with another person or with some unnamed co-conspirator: "an accused must be informed of the charge against him and he cannot be tried for an offense not charged.").

The deadly weapon enhancement must be vacated for another reason. There is insufficient evidence to show Johnson was armed with a knife during the commission of the felony harassment.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is insufficient to support a conviction unless, viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

Johnson told Jena on May 5 that he was going to duct tape her hands, feet and mouth and nose if she did not tell him the truth about who she was sleeping with. 7RP 69, 90-91. She asked, "are you telling me you are going to kill me?" 7RP 69. He said, "you just better tell me the truth" and "I need to let you know that I'm serious." 7RP 69, 91.

To prove Johnson was armed with a deadly weapon, the State needed to prove beyond a reasonable doubt that "there was a connection between the weapon and the crime." CP 81 (Instruction 43). A knife played no role in this incident, which is why the State did not allege Johnson used a knife in the charging document as the basis for the deadly weapon enhancement for felony harassment. The State did not prove, nor did it ever intend to prove, a connection between a knife and the crime of harassment for purposes of the special verdict.

The deadly weapon enhancement must be vacated and the enhancement charge dismissed with prejudice due to insufficient evidence. State v. Pierce, 155 Wn. App. 701, 714-15, 230 P.3d 237 (2010) (setting forth remedy); see Rhinehart, 92 Wn.2d at 928 (insufficient evidence to prove possession of stolen property where "information put petitioner on notice that he must answer the charge as to a stolen Ford Bronco, not one part thereof. This was the charge his defense prepared to meet.").

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

The opening brief challenges admission of prior bad acts under ER 404(b). Brief of Appellant at 13-31. The argument on prejudice set forth in the opening brief at pages 27-31 is incorporated here and applied to the crime of felony harassment for which Johnson was convicted.

The defense to count IV was that Johnson committed the lesser offense of misdemeanor harassment as opposed to felony harassment. CP 61-64; 12RP 57-60. The court instructed the jury on the crime of misdemeanor harassment as a lesser to felony harassment in count IV. CP 61-64. This means the court found Johnson was entitled to those lesser instructions because substantial evidence supported the conclusion that a rational jury could find he committed only the lesser offense.⁵ See

⁵ The State did not object to any instruction. 12RP 9.

Fernandez-Medina, 141 Wn.2d at 455-56 (jury instruction on inferior degree offense should be administered if substantial evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater).

The improperly admitted misconduct evidence may have swayed the jury to convict for felony harassment as charged rather than find Johnson guilty of the inferior degree offense of misdemeanor harassment. Reasonable jurors could differ on whether the State proved beyond a reasonable doubt that Johnson's words and conduct constituted a felony threat to kill as opposed to a misdemeanor threat to only cause bodily injury. 7RP 69-70, 90-91. Johnson never told Jena that he was going to duct tape her hands, feet and mouth until she died. When Jena asked if he was going to kill her, Johnson did not say he would. 7RP 69, 71. Rather, he responded "you just better tell me the truth" and "I need to let you know that I'm serious." 7RP 69, 91.

A juror could infer a threat to kill from this evidence, but given the ambiguity of the circumstances and indirect nature of the threat, could also infer lack of proof beyond a reasonable doubt that there was a threat to kill. The jury would be more inclined to convict Johnson as charged with the greater crime in light of extensive evidence showing Johnson's previous bad acts.

Moreover, there is a reasonable probability that the jury's knowledge of prior bad acts affected the jury's determination that Johnson's threat was a "true threat." The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely hyperbole or puffery. Schaler, 169 Wn.2d at 283; Kilburn, 151 Wn.2d at 43, 46. Under the circumstances, a rational juror could reach the conclusion that Johnson's words were hyperbole or puffery used to obtain information from a cheating spouse. Evidence of prior bad acts, which the jury should not have been allowed to consider, severely undermines that conclusion.

D. CONCLUSION

For the reasons stated above and in the opening brief, Johnson requests reversal of all convictions and dismissal of the deadly weapon enhancement in count IV.

DATED this 11/14 day of November, 2011

Respectfully Submitted,

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

STATE OF WASHINGTON, DSHS,

Respondent,

v.

J.C. JOHNSON,

Appellant.

COA NO. 66624-0-1

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COURT OF APPEALS, DIV I
STATE OF WASHINGTON

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF NOVEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] J.C. JOHNSON
DOC NO. 732446
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF NOVEMBER, 2011.

x Patrick Mayovsky