

NO. 66756-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY WALKER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. WHETHER THE THREAT WAS A 'TRUE THREAT' WAS AN ESSENTIAL ELEMENT THAT HAD TO BE PLED IN THE INFORMATION AND INCLUDED IN THE 'TO-CONVICT' INSTRUCTION.

Because the essential element that the threat forming the basis of the felony harassment charge must have been a "true threat" was not pled in the information or included in the to-convict instruction, the conviction should be reversed. Op. Br. at 8-21. Contrary to the State's characterization, Mr. Walker does not contend that the entire definition of true threat must be included in the charging document and to-convict instruction. See Resp. Br. at 6. Instead, those documents must simply indicate that the allegedly threatening statements were "true threats." For example, for the information to have complied with the constitutional requirement, the State need only have charged:

Anthony Brian Walker . . . did threaten to cause bodily injury immediately or in the future to Seattle Police Officer Leenstra, by threatening to kill Seattle Police Officer Leenstra, [*the threat was a true threat,*] and the words or conduct did place said person in reasonable fear that the threat would be carried out.

CP 1-2 (information (bracketed language added)). The addition of such language is neither onerous nor complicated.

Further relying on its mischaracterization of Mr. Walker's argument, however, the State argues that the language describing what constitutes a true threat is definitional only. Resp. Br. at 29-30, 32. While that might true of the full paragraph of definitional language included in the State's response brief, the element of "true threat" is not definitional and those words should be included in the charging document and to-convict instruction.

The first degree assault example provided at footnote 2 of the Response Brief actually supports Mr. Walker's position. Resp. Br. at 12 n.2. As the State points out, an information and to-convict instruction on assault in the first degree must contain the element "great bodily harm." The definition of that element, however, need not be included in the information or to-convict, but can be defined separately for the jury. Likewise, the "true threat" *element* of felony harassment must be included in the charging document and to-convict instruction. The *definition of that element*, however, can be provided in a separate jury instruction.

The State's argument falters as well because it relies upon State v. Johnston, but the question presented here was not decided in that case. Resp. Br at 11. The Johnston Court held that a conviction under the harassment statute requires a true threat and

that the jury must be instructed on the meaning of a true threat.

State v. Johnston, 156 Wn.2d 355, 366, 127 P.3d 707 (2006).

Though the Court emphasized the centrality of the true threat requirement, the opinion does not hold whether “true threat” is an essential element that must be included in the charging document and to-convict instruction. The Supreme Court’s acceptance of review of the issue in State v. Allen further demonstrates that it was not decided in Johnston. Allen, No. 86119-6 (oral argument scheduled for Mar. 1, 2012).

Notably, the State does not contest that automatic reversal is the appropriate remedy for failure to include an essential element either in the charging document or the to-convict instruction.

Compare Op. Br. at 14-21 with Resp. Br. at 6-12. Accordingly, the State concedes the issue. State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (issue conceded where no argument set forth in response).

2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED MR. WALKER A FAIR TRIAL.

Mr. Walker’s opening brief sets forth prosecutorial misconduct in the form of accusing Mr. Walker for the first time in closing argument (i.e., without cross-examination or even door-

opening testimony) of tailoring his testimony and lying on the stand. The State's response brief suffers from several errors.

First, the State attempts to rely on State v. Martin, 171 Wn.2d 521, 252 P.3d 872 (2011), to argue repeated allegations of tailoring and lying is proper during closing argument. Resp. Br. at 16-17. However, as noted in Mr. Walker's opening brief, Martin only addresses the propriety of a prosecutor *cross-examining* a testifying defendant about his or her ability to tailor testimony. Moreover, the majority specifically found that where the defendant had opened the door in his direct examination by explicitly stating a response was based on "prior testimony," cross-examination on tailoring was appropriate. 171 Wn.2d at 536. That case did not consider the issue presented here: whether the State can accuse the defendant of tailoring testimony and being a liar for the first time in closing argument without the defendant opening the door and without having ever provided the defendant the opportunity to respond to the accusations. The Martin Court's reliance on Justice Ginsberg's dissent in Portuondo v. Agard suggests the Court would not have treated the alleged error the same had the prosecutor's accusations come solely in closing argument. Martin, 171 Wn.2d at 535 (adopting dissent in Portuondo v. Agard, 529 U.S. 61, 120 S.

Ct. 1119, 146 L. Ed. 2d 47 (2000)). The Martin Court agreed with Justice Ginsburg that the timing of the prosecutor's comments is critical because during summation the jury is unable to evaluate the defendant's response to the accusation and measure his credibility. Portuondo, 529 U.S. at 78 (Ginsberg, J., dissenting).

Division Three of this Court recently confirmed Martin's limited application. State v. Wallin, No. 28671-1-III, Slip. Op. at 4-9, ___ Wn. App. ___, ___ P.3d ___ (Feb. 2, 2012). In Wallin, the Court noted the Martin decision was based on (1) the defendant having specifically opened the door to the precise issue of tailoring on direct examination, (2) the prosecutor's elicitation of testimony regarding tailoring on cross-examination of the defendant, and (3) the principles expounded in Justice Ginsberg's Potuondo dissent, namely that cross-examination and summation constitute unique circumstances because in the latter the jury has no opportunity to ascertain defendant's response to the State's accusations. Id. On these principles, Division Three reversed Mr. Wallin's conviction based on prosecutorial misconduct. Id. at 17.

In Wallin, the misconduct arose in cross-examination. Unlike in Martin, the Court found Mr. Wallin had not opened the door. Id. at 10. Thus, the prosecutor's accusations were improper and

warranted reversal, even though they arose in cross-examination.

Id. at 16-17.

The prosecutor's accusations here came only in summation. Consequently, the jury was unable to evaluate Mr. Walker's response or measure his credibility. Moreover, like in Wallin, the prosecutor's generic accusations prejudiced Mr. Walker's right to appear at trial and testify in his defense. Slip. Op. at 4-5 (discussing art. I, § 22 right to appear and testify and review of same in Martin, 171 Wn.2d 536-38).

The State next incorrectly argues that Mr. Walker's rights were not compromised because the prosecutor's accusations focused on the defendant tailoring his testimony to comport with his own direct examination and not other witnesses. Resp. Br. at 18. The prosecutor's general accusation of "tailoring" for the first time in closing argument renders it difficult to parse precisely at what the allegations were aimed. See 1/6/11RP 65 (prosecutor arguing, without nexus to any testimony, "The only person with a motive to tailor their testimony is the defendant."). For that very reason, Martin and Justice Ginsburg's dissent in Portuondo distinguish between cross-examination (where the defendant has an opportunity to respond) and summation. Further, the State's

argument neglects to recognize that such remarks also infringe on Mr. Walker's constitutional right to testify in his own behalf. E.g., Const. art. I, § 22; Wallin, Slip. Op. at 4-5, 9, 12, 16 (relying on constitutional right to testify). Additionally, as set forth in State v. Wright, 76 Wn. App. 811, 825-26, 888 P.2d 1214 (1995) and State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209 (1991), such prosecutorial comments are also misconduct because they ask the jury to focus on who is lying and who is telling the truth rather than the ultimate issue of guilt beyond a reasonable doubt.

The State's brief also ignores that Mr. Walker may raise the issue for the first time on appeal because it is a manifest constitutional error. Compare Op. Br. at 25 n.5 with Resp. Br. at 17-18. Further, to the extent the constitutional bar is not reached, the prosecutor's comments were flagrant and ill-intentioned because this State's case law clearly forbids a prosecutor from focusing the jury's attention on determining which witnesses are telling the truth and which are lying. Op. Br. at 27-28. The State incorrectly asserts without any citation that "the defendant's failure to object bars review." Resp. Br. at 20. The State's contention should be disregarded.

Finally, the State misrepresents the standard on appeal. See Resp. Br. at 13-14. As set forth in Mr. Walker's opening brief, because the prosecutorial misconduct alleged here affected Mr. Walker's constitutional rights, the State bears the burden of showing beyond a reasonable doubt that the jury would have reached the same result absent the error. Op. Br. at 29 (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)). The standard relied on by the State, while satisfied here, only applies to misconduct not affecting a constitutional right. Op. Br. at 28-29. For misconduct not affecting a constitutional right, Mr. Walker bears the burden of showing substantial likelihood the misconduct affected the verdict. Id.

As set forth in the opening brief, Mr. Walker prevails under either standard. Op. Br. at 29-30.

3. THE STATE'S LACK OF EVIDENCE OF COMPARABILITY OF OUT-OF-STATE CONVICTIONS IS PROPERLY BEFORE THE COURT AND REQUIRES REVERSAL OF THE SENTENCE.

The State notes an appeal cannot be had where a defendant affirmatively acknowledges the comparability of out-of-state convictions. Resp. Br. at 23-24. However, contrary to the State's

assertion in response, Mr. Walker did not affirmatively acknowledge the out-of-state convictions were comparable.

The prosecutor stated at sentencing,

I did confer with defense counsel on that issue to make sure that we were in agreement on the offender score. Initially, I had believed that the defendant's offender score was a seven. However, on review of the law, pre 1986, I would point out, because his convictions from Hawaii from 1982 and his conviction from California from 1981, because those sentences on those four different counts were imposed concurrently, they only count as one point rather than two points as I had initial [sic] thought Hawaii would count as one and the California would count as one. So his offender score is, as I understand it and as I understand defense to agree, is a six.

2/18/11RP 4. The prosecutor does not state any agreement as to comparability—and the prosecutor did not argue comparability.

Thus, even if defense counsel had agreed with the prosecutor that the out-of-state convictions would count as only one point *if they were comparable*, there is no showing that the defense “affirmatively acknowledged” the comparability of the out-of-state offenses. Resp. Br. at 23-24 (citing State v. Mendoza, 165 Wn.2d 913, 927-28, 205 P.3d 113 (2009)). Silence does not constitute affirmative acknowledgement.

This Court recently affirmed the State's inability to rely on a silent record in a decision that agrees with Division Two's analysis

in State v. Hunley, 161 Wn. App. 919, 928-29, 253 P.3d 448, review granted 172 Wn.2d 1014, 262 P.3d 63 (2011) (oral argument scheduled Mar. 13, 2012). State v. Hayes, No. 65622-8-I, ___ Wn. App. ___, 265 P.3d 982 (Dec. 19, 2011). In Hayes, this Court reaffirmed that the State cannot rely on a defendant's silence at sentencing where it presented no proof that an out-of-state conviction was legally or factually comparable to a Washington felony. Id. at 990. Because no comparability evidence was presented, this Court remanded the case for resentencing. Id. at 991.

Because Mr. Walker did not affirmatively agree to the comparability of the out-of-state convictions, he may challenge their inclusion on appeal. Moreover, because the State presented no evidence of comparability and the court conducted no analysis, the sentence should be reversed and remanded to the trial court. See, e.g., Hayes, 256 P.3d at 990-91.

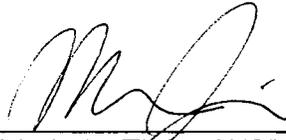
B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Walker's conviction should be reversed on alternative bases. First, the essential true threat element was not included in the charging document or to-convict instruction. Second, the prosecutor

committed misconduct in closing argument and infringed upon Mr. Walker's constitutional rights. Absent reversal of the conviction, the sentence must be reversed and remanded for an evidentiary hearing because the State failed to prove the comparability of four out-of-state convictions.

DATED this 3rd day of February, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Zink', is written over a horizontal line.

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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. 66756-4-I |
| v. |) | |
| |) | |
| ANTHONY WALKER, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF FEBRUARY, 2012, I CAUSED THE ORIGINAL **REPLY 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:

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