

68851-1

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NO. 68851-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDGAR PACHECO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PATRICK OISHI

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JERRY L. TAYLOR JR.
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000



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A. ISSUES

1. A charging document must contain all essential elements of a crime. Courts have consistently ruled that “true threat” is a definitional term in threat cases and is not an essential element. The charging document accusing Pacheco of Felony Harassment did not define “true threat,” although threat was defined in the jury instructions. Has Pacheco failed to show any defect in the charging document?

2. Where a charging document is challenged for the first time on appeal, courts liberally construe the document in favor of validity. Here, the information for the crime of Felony Harassment alleged that the threat was knowingly made. Even if the definition of “true threat” is an element of crimes involving threats, was the charging document here sufficient to provide notice and avoid prejudicing Pacheco?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY.

Defendant Edgar Pacheco was charged with one count of Felony Harassment. Clerk’s Papers (CP) 1. Following a jury trial, he was found guilty as charged. CP 12.

2. SUBSTANTIVE FACTS.¹

In 2009, Joseph Dennis and his wife moved into their house, located at 12131 Southeast 188th street, in Renton, Washington. 2RP 22. Pacheco was already living in a house next door with his father. 2RP 23. Mr. Dennis has an easement that runs through the Pacheco property, that allows Mr. and Mrs. Dennis access to their home from 188th street. 2RP 29. In June of 2010, Mr. and Mrs. Dennis held a baby shower in anticipation of the couple's first child. 2RP 25. There were about 20 people that attended the baby shower. 2RP 25-26. All vehicles belonging to the guests were parked entirely on the Dennis' property. 2RP 26. Dennis did not attend the baby shower. 2RP 25.

When Dennis came home at the conclusion of the baby shower, he was met by an angry Pacheco, who told Dennis that he would need to check with him prior to having another party. 2RP 26. Pacheco complained that edge of the asphalt was cracking because of people traveling up and down the road and threatened to sue Dennis. Id. Dennis attempted to ignore Pacheco's comments, but Pacheco got into his face, making him feel

¹ This brief refers to the verbatim report of proceedings (RP) as follows: 1RP 4/23/12; 2RP 4/24/12; 3RP 4/25/12; 4RP 4/26/12; and 5RP 5/25/12.

uncomfortable. 2RP 27. Prior to the baby shower, there were no incidents between Pacheco and Dennis. 2RP 33.

After the baby shower incident, Pacheco confronted Dennis a couple of times complaining about cars speeding up and down the driveway during the middle of the day, when Dennis and his wife would be at work. 2RP 31. Pacheco was angry over the situation, and by the second confrontation, he was convinced it was Dennis' friends speeding down the driveway. 2RP 31-32, 39. However, when asked, Pacheco could not give Dennis a description of the speeding cars. 2RP 32. Based on Pacheco's confrontations, Dennis felt that Pacheco did not like him, had some anger towards him, and did not want him around. 2RP 39.

On March 8, 2011, around 8 o'clock in the evening, Dennis was at home with his wife and daughter. 2RP 34, 39. Dennis went to take the garbage out. 2RP 34. Dennis grabbed his trash cans and started walking towards the end of his property, towards the beginning of the easement. 2RP 46. Dennis saw Pacheco outside working on one of his cars. 2RP 46. Dennis kept his head down because of prior confrontations with Pacheco, and because he thought Pacheco may say something to him. 2RP 46. Pacheco shined his flashlight on Dennis and held it there for a long time.

2RP 46. While remaining on his property, facing the car he was working on, Pacheco said, "You better watch out, I'm locked and loaded now." 2RP 46, 48. Dennis then said, "Edgar, what's your problem? You know, it's me, my wife and kid, why do you have to bring a gun into this situation." 2RP 46-47. Dennis kept his head down and continued walking. 2RP 47.

Based on Pacheco's comments, Dennis believed that Pacheco was talking about having a loaded gun that was ready to shoot. 2RP 48. Dennis was scared because he was not sure if Pacheco had a gun on him at that moment, and began to question whether he should take the garbage out at that point. 2RP 48.

As Dennis passed Pacheco with his trash can, Pacheco began to follow him down the easement, cursing at him, and mumbling weird stuff. 2RP 49. When Dennis placed his trash can at the curb and turned around, Pacheco came right up to him and standing face to face with Dennis, Pacheco said, "Get the fuck off my property, I'm going to kill you, motherfucker. 2RP 49-50. At this point, Pacheco was so close that his nose was brushing against Dennis' goatee. 2RP 50. Dennis was very scared, and Pacheco's pit bull, was barking and jumping up and down nipping in the air at Dennis. 2RP 50.

Dennis was able to get around Pacheco, and he headed directly to his house. 2RP 51. Dennis feared for his life, and did not know if he was going to make it back to his house alive. 2RP 52. Pacheco followed Dennis back up the easement very closely, yelling at Dennis. 2RP 51. As Dennis approached his property, he heard Pacheco say something about having a license to carry it too. 2RP 51. Based on that comment, Dennis believed Pacheco had a gun and was ready to use it on him or his family. 2RP 51.

Dennis went into his house and told his wife to call the police. 2RP 51. Dennis and his wife turned off all the lights in the house, and also turned on all the outside lights, so Pacheco could not see into their house, but they could see Pacheco if he came onto their property. 2RP 53. Dennis and his wife also closed the blinds and drapes of the windows facing Pacheco's house. 2RP 54. After the police arrived, Dennis refused to come outside his home until Pacheco was in-custody. 2RP 54. Once police informed Dennis that Pacheco had been arrested, he felt safer. 2RP 54-55.

3. CHARGING DOCUMENT AND RELEVANT JURY INSTRUCTIONS.

In the information, the State accused Pacheco of threatening to kill Joseph Dennis:

Knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Joseph Dennis, by threatening to kill Joseph Dennis, and the words or conduct did place said person in reasonable fear that the threat would be carried out.

CP 1. The "to convict" instruction submitted to the jury mirrored the charging language. CP 25. Jurors received instruction No. 6, which said that a person acts "knowingly" with respect to a fact, circumstance or result, when he "is aware of that fact, circumstance, or result." CP 22. Jury instruction No. 7 defined "true threat" for the jury:

Threat means to communicate, directly or indirectly, the intent: To cause bodily injury in the future to the person threatened; To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 23.

C. ARGUMENT

- 1. THE TERM "TRUE THREAT" IS A TERM OF ART THAT DESCRIBES THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF THE CRIME OF FELONY HARASSMENT.**

Pacheco contends that it was error not to include the definition of "true threat" in the charging language in this case. He argues that the definition of "true threat" is an element of every criminal statute involving a verbal threat. This is inconsistent with existing case law, which establishes that "true threat" is not an essential element of a crime involving threats, but is instead a term of art used to describe the permissible scope of threat statutes for First Amendment purposes.

A charging document is sufficient if it sets forth all essential elements of the offense. State v. Kjørsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). The purpose of the rule is to ensure that defendants are sufficiently apprised of the charges against them so that they may prepare a defense. Id. at 101. Id.

As charged and convicted here, a person commits the crime of Felony Harassment if he knowingly threatens to kill, immediately or in the future, the person threatened, and the words or conduct place the person threatened in reasonable fear that the threat will

be carried out. RCW 9A.46.020. The statute sets out all the elements of the crime.

In defining the constitutional limits of the harassment statute, this Court has stated that to avoid unconstitutional infringement on protected speech, the harassment statute must be read as prohibiting only "true threats." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001); State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001). 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." Kilburn, 151 Wn.2d at 43. Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Id., at 44. The relevant question is whether a reasonable person in the defendant's position would foresee that, taken in context, a listener would interpret the statement as a serious threat. Id. at 46.

Courts have consistently rejected the argument that the language defining a "true threat" must be charged in the information. State v. Allen, 161 Wn. App. 727, 255 P.3d 78 (2011)

review granted, 172 Wn.2d 1014 (2011) (Felony Harassment)²; State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006) (bomb threats); State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007) (telephone harassment).

The State does not dispute that it was required to prove that Pacheco's threats were "true threats." As instructed here, the jury was required to find beyond a reasonable doubt that Pacheco "knowingly threatened to kill" Joseph Dennis, and that the threat occurred "in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat." CP 20, 21. Pacheco has cited no case holding that the language defining a "true threat" is a separate element that must be included in the charging document for Felony Harassment, or for any other crime that contains a threat element.³

² The Washington Supreme Court heard oral argument in Allen on March, 1, 2012. A decision is pending.

³ Pacheco's position is similar to that of a person charged with (for example) first-degree assault, which requires the intent to inflict "great bodily harm." See RCW 9A.36.011(1). The charging document and the "to convict" instruction must contain the statutory element of "great bodily harm," which will be defined for the jury as "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." See WPIC 2.04, 35.04.

Pacheco argues that Allen and its line of supporting cases are irreconcilable with State v. Schaler, 169 Wn. 2d 274, 236 P.3d 858 (2010). Schaler dealt with faulty jury instructions. They required the jury, in order to convict, to find that Schaler knowingly threatened to cause bodily injury, but defined knowingly as “when the person subjectively intends to communicate a threat.” Id. at 285. The submitted definition of “threat” failed to mention anything about the “fear that typically results from a threat.” Id. at 285 -86. The jury there, then, was left with no mens rea requirement attached to the result of the threat, resulting in the faulty instructions. But the Schaler court was clear – had the “knowingly threaten” language in the jury instruction not been so defined, the mens rea requirement would have been satisfied. Id. at 286.

Here, the jury instructions created no such issue and the charging language accurately contained the “knowingly did threaten” language, sufficient to satisfy the “know or foresee” mens rea element as to the real result: intending the hearer's fear. CP 1; See Allen, 161 Wn. App. at 755. The charging language in this case contained all of the essential elements of Felony Harassment.

Further, as Allen notes, Schaler did not overrule the basic concept that a true threat is definitional:

[W]e hold that this court's previous cases addressing this issue are dispositive and hold that true threat is merely the definition of the element of threat which may be contained in a separate definitional instruction. In fact, “[n]o Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document or ‘to convict’ instruction.” This court has consistently repeated that “[s]o long as the court defines a ‘true threat’ for the jury, the defendant’s First Amendment rights will be protected.”

Allen 161 Wn.App. at 755-56, (2011); internal citations omitted.

None of the cases cited by Pacheco supports his argument that the definition of "true threat" must be charged in the information. Pacheco was properly charged and the jury was properly instructed on all the elements of the crime of Felony Harassment. The jury found beyond a reasonable doubt that his threat to kill Joseph Dennis was a "true threat."

2. EVEN IF THE DEFINITION OF "TRUE THREAT" IS SOMEHOW CONSTRUED AS AN ESSENTIAL ELEMENT OF FELONY HARASSMENT, THE CHARGING DOCUMENT WAS SUFFICIENT TO AVOID PREJUDICING PACHECO.

Pacheco contends that the information lacked an essential element of the charge and that therefore reversal is warranted, but does not allege any prejudice. Where a defendant waits to

challenge the sufficiency of a charging document until a direct appeal, the charging language is construed in favor of its validity.

Even if Pacheco's argument is given any sway, there was never any objection to the information on notice grounds. If the Court were to entertain this analysis, it must first determine whether (1) the necessary facts appear in any form, or by fair construction are found, in the charging document; and if so, (2) whether the in-artful or vague language actually prejudiced the defendant. State v. Phillips, 98 Wn. App. 936, 940, 991 P.2d 1195 (2000) (citing Kjorsvik, 117 Wn.2d at 105-06).

Under this standard of review, the information would need "at least some language" giving notice of the allegedly missing elements. Id. If that language is present, then the Court inquires as to whether the "in-artful" or "vague" wording actually prejudiced the defendant. Kjorsvik, 117 Wn.2d at 106.

Applying liberal standard to the charging language set for in Kjorsvik, the information adequately provided Pacheco with notice that the threat must be a true threat. The sole count of Felony Harassment, alleged that Pacheco "knowingly did threaten" and that his words or conduct "did place [the victim] in reasonable fear that the threat would be carried out." CP 1. As Schaler makes

clear, the ordinary meaning of “knowing” in this context could be understood to mean that the speaker must be aware that his words frightened the hearer:

If “knowingly threaten” had been left to its ordinary meaning, it could be understood to require that the speaker be aware that his words or actions frightened the hearer – after all, how can one knowingly threaten without knowing that what one says is threatening to another?

169 Wn.2d at 286. Because the information here contained the “knowingly threatened” language, the necessary facts to allege a true threat do indeed appear, at least in some form, in the charging document, under the Kjorsvik standard.

Since there is some language giving notice of the supposedly missing element, even if this Court considers the definition of a “true threat” to be an essential element of the crime charged, Pacheco must show that the failure to further elaborate on the term “threat” resulted in actual prejudice. See Kjorsvik, 117 Wn.2d at 106. Pacheco does not allege any actual prejudice from the allegedly deficient information, nor did his trial counsel. This is not surprising, given the adequacy of the submitted jury instruction defining the term “threat.” CP 7. The charging document provided

adequate notice to Pacheco, and the absence of the definition of "true threat" in the information created no prejudice.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Pacheco's conviction.

DATED this 4th day of December, 2012.

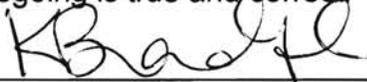
Respectfully submitted,
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Jerry L. Taylor
JERRY L. TAYLOR JR., WSBA #40739
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer M. Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. EDGAR PACHECO, Cause No. 68851-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Kerri Bradford
Done in Seattle, Washington



Date 12/4/12

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