

70602-1

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COA NO. 70602-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID JOHNSON,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Eric Z. Lucas, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE CONVICTIONS MUST BE REVERSED BECAUSE THE INFORMATION CHARGING HARASSMENT OMITTS THE ELEMENT REGARDING APPARENT ABILITY TO CARRY OUT THE THREAT.

Johnson's claim that the information fails to allege every element of the offense is reviewable for the first time on appeal under RAP 2.5(a)(3). State v. Kjorsvik, 117 Wn.2d 93, 102-03, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989). Under RCW 9A.46.020(1)(b)(iii), "[t]hreatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat." In the opening brief, Johnson argued the charging document fails to set forth this element of the harassment offense.

In response, the State asserts the charging language includes this element in stating "a reasonable criminal justice participant would have been in fear under all the circumstances that the threat would be carried out." Brief of Respondent at 6.

One problem with the State's argument is that it fails to account for the full temporal aspect of the offense at issue here. The phrase "would be carried out" expresses futurity. At best, "a reasonable criminal justice participant would have been in fear under all the circumstances that the

threat would be carried out" speaks to the requirement that it be apparent to the participant that Johnson had the *future* ability to carry out the threat. That language, however, does not encompass the requirement that it be apparent to the participant that Johnson had the *present* ability to carry out the threat.

Another problem is that the State's argument violates basic principles of statutory construction. Under the State's theory, the requirement that "a reasonable criminal justice participant would have been in fear under all the circumstances that the threat would be carried out" means the same thing as "[t]hreatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat."

The State's argument renders the latter statutory language superfluous. That could not be what the legislature intended because, in ascertaining legislative intent, meaning must be given to every portion of a statute, so that no provision is rendered meaningless or superfluous. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

Whether the ability to carry out the threat is "apparent" is a matter of a person's perception. Its meaning is different from whether a person feels fear that the threat will be carried out. "In determining the elements of a statutorily defined crime, principles of statutory construction require

us to give effect to all statutory language if possible." State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Johnson's argument honors that directive. The language that "[t]hreatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat" must be given effect as a separate requirement for conviction. But that requirement cannot be found in the charging document. Reversal of the convictions is appropriate.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Johnson requests reversal of the convictions.

DATED this 15th day of May 2014

Respectfully Submitted,

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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 15TH DAY OF MAY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF MAY, 2014.

x *Patrick Mayovsky*