

NO. 36404-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

NOEL C. SLOAN,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
JAN 14 AM 9:18
STATE OF WASHINGTON
DEPUTY

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

The Honorable James Jay Stonier

BRIEF OF APPELLANT

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82-11-1
PMD

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A. ASSIGNMENTS OF ERROR

1. The amended information charging appellant with telephone harassment is insufficient because it fails to plainly and concisely set forth the essential elements of the crime.

2. The “to convict” jury instruction on the crime of telephone harassment is improper because it incorrectly states an essential element of the crime.

3. Appellant was denied his constitutional right to effective assistance of counsel because counsel failed to object to the insufficient information and improper jury instruction.

Issues Pertaining to Assignments of Error

1. Is the amended information charging appellant with telephone harassment insufficient because it fails to plainly and concisely set forth the essential elements of the crime in violation of appellant’s constitutional right to be fully informed of the charges against him?

2. Is the “to convict” jury instruction on the crime of telephone harassment improper because it incorrectly states an essential element of the crime?

3. Was appellant denied his constitutional right to effective assistance of counsel because counsel failed to object to the constitutionally defective information and improper jury instruction?

B. STATEMENT OF THE CASE

1. Procedural Facts

On July 25, 2006, the state charged appellant, Noel Christopher Sloan, with one of count of rape of a child in the first degree, one count of threatening telephone calls, and one count of violation of a protection order. CP 3-4. The state amended the information on May 30, 2007, eliminating the charge of rape of a child in the first degree. CP 22-23. Following a trial on the same day, before the Honorable James Jay Stonier, a jury found Sloan guilty of telephone harassment and violation of a protection order. CP 69-70. On June 7, 2007, the court sentenced Sloan to 30 days confinement and 24 months community supervision. CP 77-78. Sloan filed this timely appeal. CP 86.

2. Substantive Facts

On the day of trial, the state filed an amended information, which the court accepted, and defense counsel made no objection to the count charging Sloan with telephone harassment. RP¹ 44-48.

Anna Marie Sloan testified that she and her husband, Noel Sloan, have been separated for three years and have filed for divorce. They have a three-year-old daughter and she also has two other daughters, ages ten

¹ There is one volume of verbatim report of proceedings for proceedings on 7/21/06, 7/26/06, 8/23/06, 9/6/06, 11/15/06, 1/17/07, 2/22/07, 3/8/07, 4/26/07, 5/24/07, 5/29/07, 5/30/07, 5/31/07, 6/7/07, 6/14/07 - RP 1-191.

and seven. RP 64-65. There was a lot of animosity between her and Noel over visitation and custody and she had a protection order against him. RP 67-68.

On June 24, 2006, Anna was at her apartment with Kandice, a close friend who babysat her children. The phone rang and Kandice answered the phone while Anna stood right beside her and heard Noel say, "you're fucking dead," and then he hung up. RP 69-70. Anna recognized Noel's voice and also saw that the caller ID displayed "private name, private number," which appeared whenever he called. RP 70-71. After the phone call Anna packed a few items and left for her sister's house. The following day she went to the police station and reported the incident. RP 72, 82.

Kandice Schulte testified that she was Anna's friend and she babysat her children. She met Noel and spoke to him on the phone "when we're exchanging the girls and figuring out when I was going to pick them up from him." RP 92-93. Kandice was at Anna's apartment on June 24, 2006, when the phone started ringing. Anna believed it was Noel because the caller ID displayed, "private name, private caller." RP 93-94. Kandice answered the phone while Anna stood within a couple of feet of her. She said "hello, about three, four times." RP 100. Then she heard a male voice say, "you're fucking dead." RP 94. Kandice recognized

Noel's voice from messages left on Anna's answering machine. RP 94-95. After the call, Anna went to her sister's house. The next day Kandice met Anna at the police station and gave a written statement. RP 96, 102.

Officer Brian Streissguth, of the Longview Police Department, testified that he was on duty on June 25, 2006, when Anna Sloan reported "a violation of an order" and "some threats." RP 105-06. Streissguth took a verbal and written statement from Sloan and also took a written statement from Kandice Schulte. Sloan and Schulte sat together in the lobby and wrote their statements. RP 109. Streissguth filed a police report and unsuccessfully attempted to contact Noel Sloan at his residence. RP 106, 112.

Noel Sloan testified that he thought that he and Anna were divorced and was shocked to learn that the court withdrew the decree. RP 123. There were many accusations throughout the course of the divorce, "it's been a nightmare . . . I would love for it to stop." RP 126. Noel was aware of the protection order because he went to the courthouse and signed for it. RP 125. He did not call to threaten Anna on June 24, 2006 and could not remember meeting or seeing Kandice Schulte. RP 124-25.

At the conclusion of trial testimony, the court reviewed the jury instructions and defense counsel made no objections, exceptions, or requests for additional instructions. RP 128-29.

C. ARGUMENT

1. THE INFORMATION CHARGING SLOAN WITH TELEPHONE HARASSMENT IS CONSTITUTIONALLY DEFECTIVE BECAUSE IT FAILS TO PLAINLY AND CONCISELY SET FORTH THE ESSENTIAL ELEMENTS OF THE CRIME.

The amended information charging Sloan with telephone harassment is insufficient because it fails to plainly and concisely set forth the essential elements of the crime. Reversal is required because the amended information is constitutionally defective.

Our State Constitution, art. 1, sect. 22 (amend. 10), provides in part that “In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him” Similarly, our United States Constitution, amend. 6, provides in part that “In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation”

A criminal defendant has a constitutional right to be fully informed of the charges against him and can raise a challenge to the constitutional sufficiency of the charging document at any time. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). If an information cannot be construed to give notice or to contain in some manner the essential elements of the

crime, the most liberal reading cannot cure it. State v. Moavenzadeh, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998).

When the sufficiency of an information is first challenged on appeal, the court applies a two-prong test: (1) do the necessary facts appear in any form, or by fair construction can they be found, and if so, (2) can the defendant show he was nonetheless actually prejudiced by the inartful language which caused a lack of notice. Kjorsvik, 117 Wn.2d at 105-06.

The charging document must allege facts supporting every element of the offense in addition to adequately identifying the crime charged. State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). If the court can neither find nor imply the necessary elements, the court must presume prejudice. State v. McCatry, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Charging instruments which fail to set forth the essential elements of a crime in such a way that the defendant is notified of both the illegal conduct and the crime with which he is charged are constitutionally defective and require dismissal. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992).

By amended information, the state charged Sloan with telephone harassment:

COUNT I

THREATENING TELEPHONE CALLS (THREATS TO KILL)

The defendant, in the County of Cowlitz, State of Washington, on or about June 24, 2006, with the intent to harass, intimidate, torment, or embarrass any other person, did make a telephone call to Anna Sloan and/or Kandice Schulte threatening to kill that person or any other person; contrary to RCW 9.61.230(3)(b)² and against the peace and dignity of the State of Washington.

CP 22.³

Sloan was charged under the following statute:

RCW 9.61.230 Telephone harassment

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

....

(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, except as provided in subsection (2) of this section.

(2) The person is guilty of a class C felony punishable according to chapter 9A.20 RCW if either of the following applies:

² The state erroneously cited former RCW 9.61.230(3)(b). The correct citation is RCW 9.61.230(2)(b). However, such error is not considered prejudicial. Hopper, 118 Wn.2d at 159-60.

³ The amended information is attached as Appendix A.

....

- (b) That person harasses another person under subsection (1)(c) of this section by threatening to kill the person threatened or any other person.

(Emphasis added).

The amended information filed on the day of trial is constitutionally defective because it fails to set forth the essential elements of telephone harassment in such a way that Sloan is fully notified of both the illegal conduct and the crime with which he is charged. Count I, entitled "Threatening Telephone Calls (Threats to Kill), alleges that Sloan intentionally called "Anna Sloan and/or Kandice Schulte threatening to kill that person or any other person." According to the amended information, Sloan called Anna or Kandice or both and threatened to kill Anna or Kandice or another person. At trial, however, the state unequivocally argued that Sloan intentionally called Anna and threatened to kill her. CP 133-34. Both Anna and Kandice testified that they were at Anna's apartment when Kandice answered the phone. They claimed that it was Sloan who made a threat and hung up. RP 69-70, 93-94.

Under the two-prong test adopted in Kjorsvik, the amended information fails to meet the first prong because it lacks the necessary facts. Consequently, an analysis under the second prong is not required. Furthermore, the amended information violates CrR 2.1(a)(1), which

requires that an information “be a plain, concise and definite written statement of the essential facts constituting the offense charged.”

Reversal is required because the amended information is insufficient, in violation of Sloan’s constitutional right to be fully informed of the charges against him. Leach, 113 Wn.2d at 689, Hopper, 118 Wn.2d at 155.

2. THE “TO CONVICT” JURY INSTRUCTION ON THE CRIME OF TELEPHONE HARASSMENT IS IMPROPER BECAUSE IT INCORRECTLY STATES AN ESSENTIAL ELEMENT OF THE CRIME.

Reversal is required because the “to convict” jury instruction on the crime of telephone harassment incorrectly stated an essential element of the crime.

The use of an improper jury instruction in a criminal case is presumed to be prejudicial. State v. Hagen, 55 Wn. App. 494, 499, 781 P.2d 892 (1989) (citing State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984), overruled on other grounds, 113 Wn.2d 631, 781 P.2d 483 (1989)). Due process requires the state to prove each essential element of the crime charged beyond a reasonable doubt. State v. Hanson, 59 Wn. App. 651, 660, 800 P.2d 1124 (1990). Omission of an element of the crime produces a “fatal error” by relieving the state of its burden of proving every essential element beyond a reasonable doubt. State v. Eastmond, 129

Wn.2d 497, 503, 919 P.2d 577 (1996). The failure to properly instruct on an element of an offense constitutes reversible error. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

A “to convict” instruction must contain all of the elements of the crime because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). A jury has a right to regard the “to convict” instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand. Smith, 131 Wn.2d at 263. Because a flawed “to convict” instruction is a manifest error of constitutional magnitude, the courts may consider the error for the first time on appeal under RAP 2.5(a). Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). Appellate courts review de novo any claimed errors in jury instructions. State v. Yates, 161 Wn.2d 714, 749, 168 P.3d 359 (2007).

The trial court provided the following “to convict” instruction to the jury in relevant part:

INSTRUCTION NO. 7

To convict the defendant of the crime of telephone harassment as charged in Count I of the Information, each of the following elements of the crime must be proved

beyond a reasonable doubt.

- (1) That on or about June 24, 2006, the defendant made a telephone call to Anna Sloan and/or Kandice Schulte;
- (2) That the defendant made that telephone call with the intent to harass, intimidate, torment, or embarrass Anna Sloan;
- (3) That during the call, the defendant communicated a “true threat” to kill Anna Sloan; and
- (4) That the acts occurred in the State of Washington.

CP 60 (Emphasis added).⁴

The “to convict” instruction incorrectly states the law because for conviction under the telephone harassment statute, RCW 9.61.230(2)(b),⁵ Sloan must make the call to Anna with the intent to harass Anna by threatening to kill Anna. The statute specifically provides that “Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person.” RCW 9.61.230(1)(Emphasis added).

Both Anna Sloan and Kandice Schulte testified that Kandice answered the phone and the call was from Noel Sloan who made a threat

⁴ The jury instruction is attached as Appendix B.

⁵ See supra at 7.

and hung up. RP 69-70, 93-94. According to Kandice, she had met and spoken to Noel several times because she babysat the children. RP 92-93. The erroneous instruction allowed the jury to incorrectly assume that it could find Sloan guilty of telephone harassment regardless of whether he made the call to Anna or Kandice. “It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.” State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), overruled on other grounds, 105 Wn.2d 1, 711 P.2d 1000 (1985).

To convict Sloan of telephone harassment, the state had the burden of proving that Sloan made the call to Anna. Reversal is required because the “to convict” instruction incorrectly stated an essential element of the crime, relieving the state of its burden of proving every element of the crime beyond a reasonable doubt. Smith, 131 Wn.2d at 263.

3. SLOAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL FAILED TO OBJECT TO THE INSUFFICIENT INFORMATION AND IMPROPER JURY INSTRUCTION.

Reversal is required because defense counsel’s failure to object to the insufficient information and improper jury instruction violated Sloan’s constitutional right to effective assistance of counsel.

Both the Sixth Amendment to the United States Constitution and article 1, section 22 (amend. 10) of the Washington Constitution guarantee effective assistance of counsel in criminal proceedings. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); U.S. Const. amend. 6; Wash. Const. art. 1, sec 22. Ineffective assistance of counsel is an issue of constitutional magnitude. State v. Soonalole, 99 Wn.App. 207, 215, 992 P.2d 541, rev. denied, 141 Wn.2d 1028, 11 P.3d 827 (2000).

To establish ineffective assistance of counsel, a defendant must show first that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness and prejudice occurs when, except for counsel's errors, there is a reasonable probability that the outcome would have been different. In re Det. of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Here, defense counsel failed to object to the insufficient amended information and improper "to convict" jury instruction on the crime of telephone harassment. Counsel's performance was deficient because it is readily apparent that the amended information is constitutionally defective

and that the jury instruction incorrectly stated an essential element of the crime. Sloan was prejudiced because counsel's deficient performance relieved the state of its burden to prove beyond a reasonable doubt that with the intent to harass Anna Sloan, he made a call to Anna and threatened to kill Anna.

Reversal is required because but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different in light of the evidence that Kandice Schulte answered the phone at Anna Sloan's apartment and the threat was made to her after she said hello three or four times. RP 94, 100.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Sloan's convictions.

DATED this 11th day of January, 2008.

Respectfully submitted,


VALERIE MARUSHIGE
WSBA # 25851
Attorney for Appellant

APPENDIX A

FILED
SUPERIOR COURT

2007 MAY 30 P 4: 08

COWLITZ COUNTY
RONI A. BOOTH, CLERK

By *[Signature]*

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,

Plaintiff,

- vs. -

NOEL C. SLOAN,

Defendant.

)
) No. 06-1-00919-1
)
) AMENDED INFORMATION
) CHARGING:
)
) COUNT I - THREATENING
) TELEPHONE CALLS (THREATS
) TO KILL); COUNT II - VIOLATION
) OF PROTECTION ORDER - FIRST
) OR SECOND OFFENSE

COMES NOW, SUSAN I. BAUR, Prosecuting Attorney of Cowlitz County, State of Washington, and by this Information accuses the above-named defendant of violating the criminal laws of the State of Washington as follows:

COUNT I

THREATENING TELEPHONE CALLS (THREATS TO KILL)

The defendant, in the County of Cowlitz, State of Washington, on or about June 24, 2006, with the intent to harass, intimidate, torment, or embarrass any other person, did make a telephone call to Anna Sloan and/or Kandice Schulte threatening to kill that person or any other person; contrary to RCW 9.61.230(3)(b) and against the peace and dignity of the State of Washington.

(26)

COUNT II

VIOLATION OF PROTECTION ORDER - FIRST OR SECOND OFFENSE

The defendant, in the County of Cowlitz, State of Washington, on or about June 24, 2006, with knowledge that the Superior Court of Cowlitz County had previously issued a protection order pursuant to Chapter 26.50 RCW in Sloan v. Sloan, Cause No.04-2-01160-5, did violate the order while the order was in effect by knowingly violating the restraint provisions therein, to-wit: by having any contact whatsoever in person, by phone, or through others either directly or indirectly with Anna M. Sloan, petitioner; contrary to RCW 26.50.110(1) and against the peace and dignity of the State of Washington.

DATED: Tuesday, May 29, 2007.

Susan J. Baur #29933
SUSAN J. BAUR, WSBA #15221
Cowlitz County Prosecuting Attorney

DEFENDANT INFORMATION						
NAME: NOEL C. SLOAN				DOB: 05/29/1970		
ADDRESS:				CITY:		
STATE:		ZIP CODE:		PHONE #(s):		
DRIV. LIC. NO.	DL ST	SEX: M	RACE:	HGT: 604	WGT: 220	EYES: brn
HAIR: brn	OTHER IDENTIFYING INFORMATION:					

STATE'S WITNESSES:

WITNESS LIST FORTHCOMING

APPENDIX B

INSTRUCTION NO. 7

To convict the defendant of the crime of telephone harassment as charged in Count I of the Information, each of the following elements of the crime must be proved beyond a reasonable doubt.

- (1) That on or about June 24, 2006, the defendant made a telephone call to Anna Sloan and/or Kandice Schulte;
- (2) That the defendant made that telephone call with the intent to harass, intimidate, torment or embarrass Anna Sloan;
- (3) That during the call, the defendant communicated a "true threat" to kill Anna Sloan;
and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Susan Baur, Cowlitz County Prosecuting Attorney, 312 SW 1st Avenue, Kelso, Washington 98626 and Noel Sloan, P. O. Box 623, Cascade Locks, Oregon, 97014.

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

DATED this 11th day of January, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

FILED
COURT OF APPEALS
DIVISION II
08 JAN 14 AM 9:18
STATE OF WASHINGTON
DEPUTY