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STATE OF WASHINGTON
BY: [Signature]

No. 39380-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Phillip Atkins,

Appellant.

Lewis County Superior Court Cause No. 08-1-00581-4

The Honorable Judge Nelson Hunt

Appellant's Reply Brief

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ARGUMENT

I. A “TRUE THREAT” IS A NONSTATUTORY ELEMENT OF FELONY HARRASSMENT.

The essential elements of an offense are those elements that are necessary to establish the illegality of a behavior. *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). All essential elements, whether statutory or not, must be included in the Information and the “to convict” instruction. *State v. Courneya*, 132 Wn.App. 347, 351, 131 P.3d 343 (2006); *State v. Cuble*, 109 Wn.App. 362, 369, 35 P.3d 404 (2001).

Threats to kill are not unlawful, even when accompanied by words or conduct placing another in reasonable fear that the threat will be carried out, unless the threats are “true” threats. *State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001). Thus a “true threat” is necessary to establish the very illegality of threatening words or conduct. *Johnson, supra*. The true threat requirement is a nonstatutory element of felony harassment, and is necessary to avoid First Amendment violations. *Williams, supra*; RCW 9A.46.020.

Because a threat is not unlawful unless it is a true threat, the true threat requirement is an essential element of felony harassment. The state must allege and prove a true threat in order to establish the very illegality of the behavior. *Johnson, at 147*. The true threat requirement must also

be included in the “to convict” instruction. *Cuble, supra*. Respondent concedes that neither the Information nor the “to convict” instruction in this case included the true threat requirement. Brief of Respondent, pp. 1-10.

Because the Information and “to convict” instruction were deficient, Mr. Atkins’s conviction must be reversed. The case must be dismissed without prejudice. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

II. THE COURT’S KNOWLEDGE INSTRUCTION CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN TO PROVE AN ESSENTIAL ELEMENT.

The trial court’s “knowledge” instruction (Instruction No. 7) impermissibly conflated disparate mental elements and relieved the state of its burden of proof. *State v. Hayward*, ___ Wn.App. ___, 217 P.3d 354 (2009). This case is controlled by *Hayward*. Mr. Atkins’s conviction must be reversed, and the case remanded for a new trial. *Id., supra*.

III. THE TRIAL JUDGE FAILED TO PROPERLY DETERMINE MR. ATKINS'S CRIMINAL HISTORY AND OFFENDER SCORE.

- A. The state failed to allege or prove that Mr. Atkins had any prior offenses, and the sentencing court included in the offender score offenses that had “washed out.”

Nothing in the record supports the criminal history or offender score contained in Mr. Atkins's Judgment and Sentence. Without citation to authority, Respondent argues that Mr. Atkins “acknowledged the state's calculation of his offender score” by signing the Judgment and Sentence. Brief of Respondent, p. 37. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007). Counsel's argument is erroneous for three reasons.

First, the state bears the burden of proof. *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). This is a constitutional requirement; the state cannot simply rely on inclusion of “facts” within the judgment and sentence without submitting evidence in support of those facts. *Id., supra*.

Second, the defendant is not obligated to object to any assertions made by the state. *Id., supra*. Failure to object to the prosecutor's bare assertions does not constitute acknowledgement; the same must be true for unproven “facts” included in the judgment and sentence. *Id., supra*.

Third, it is inappropriate for counsel to continue to argue after a judge has pronounced sentence. Respondent's position—that counsel should object *after* a judge has imposed sentence—is an invitation to such improper behavior. Once a decision has been made, a party may seek relief through a motion, an appeal, or a collateral attack. Otherwise, counsel would have an incentive to whine, bicker, or attempt to bully the court after an adverse decision.

Mr. Atkins's silence after sentence was pronounced should not constitute an acknowledgment of his criminal history or offender score. *Id.* Accordingly, his sentence must be vacated and the case remanded to the trial court for a new sentencing hearing.

B. The SRA, as amended in 2008, violates the Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.

Mr. Atkins rests on the argument set forth in his Opening Brief.

CONCLUSION

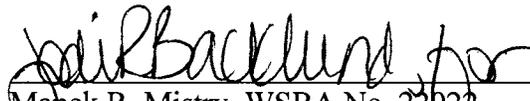
Mr. Atkins's convictions must be reversed. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on December 30, 2009.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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and to:

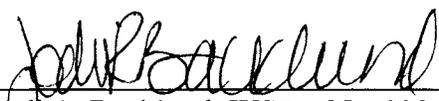
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 4, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 4, 2009.



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