

No. 41747-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER DENNIS,

Appellant.

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

The Honorable Thomas McPhee, Judge
Cause No. 10-1-01014-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court, by denying Dennis's motion to substitute counsel, violated the right to counsel under the Sixth Amendment and article 1, section 22 of the Washington constitution.

2. Whether the conviction for felony harassment against Charmaine Riley was supported by sufficient evidence.

3. Whether the charging document and the to-convict jury instruction must include the "true threat" requirement of felony harassment.

B. STATEMENT OF THE CASE.

1. Substantive facts.

In mid-2010, Karin Riley and her significant other, Sylvester Dennis, lived together in Olympia. On July 2, 2010, Riley picked Dennis up at work about 2:30 p.m. and they went to the Hawks Prairie Casino. Riley stayed only a short time and left, but Dennis remained at the casino. Riley returned to their home in the Black Lake area of Olympia. [RP 294-95]¹ During the afternoon and evening, Riley sent a number of text messages to Dennis telling him to stop spending money at the casino, but he did not respond to them. [RP 275-76, 296-97, 350-51] There were a couple of completed phone calls, one late in the evening. [RP 276, 351]

¹ Unless otherwise noted, all references are to the Verbatim Report or Proceedings of the trial, November 3, 2010, through November 8, 2010.

Dennis made the second call asking Riley to pick him up at the casino and give him a ride home. [RP 277, 352] Riley refused because she had consumed a glass of wine and did not want to drive. [RP277] Dennis had consumed an unknown quantity of beer while at the casino, but had no vehicle. He eventually got a ride home from a "friend of a friend." [RP 351-53] Riley testified that after she refused to pick him up, Dennis made numerous calls to her, a couple of which she answered, and during those calls he yelled, swore, and called her names. [RP 277]

Riley's college-age daughter, Charmaine Riley (Charmaine), arrived home about 7:30 p.m. on July 2. Riley was upset and Charmaine knew she was texting to Dennis. [RP 193-94] At approximately 11:00 p.m. Charmaine drove Riley to a store to buy cigarettes, and they returned home within 20 to 30 minutes. [RP 194-95, 278] Upon their return home Charmaine noticed that the side gate into the yard was open. [RP 279] The women went into the house, where they found Dennis in the master bedroom which he shared with Riley. [RP 196, 279] Dennis was packing his belongings, and when Riley went to the door of the bedroom he attempted to pull her inside by grabbing her wrists. Charmaine stepped between them and he released Riley. [RP 197, 279]

A short time later, Dennis emerged from the bedroom asking about a green bag. Charmaine stayed with Riley, and they went to the garage looking for the green bag. During this time, while Charmaine was standing between the two, Dennis reached across Charmaine and shoved Riley. [RP 198, 205, 281] Riley located a green bag in the garage, but it was not the one Dennis was looking for, and although Riley offered it to him, Dennis refused to take it. [RP 281, 357]

During this entire time Dennis and Riley had been arguing. Riley was carrying a glass of wine when she reentered the house from the garage. Dennis slapped it out of her hand and it shattered. Riley cleaned it up. [RP 206, 282, 303] Dennis left by the front door of the house, returning within seconds carrying a can of gas. [RP 206-07, 282] He began pouring gas throughout the house in a line from the back to the front, blocking all the exits. [RP 207] He poured gas on Riley and a few rugs on the floor. [RP 283, 306] Dennis then went back out the front door and poured gas on a Honda car belonging to Riley. [RP 207, 283, 308] Returning to the house, Dennis set the gas can down by the front door, took a Bic lighter from his pocket, and began flicking it. Charmaine attempted

unsuccessfully to get the lighter away from Dennis; she believed she had scratched him in the scuffle. [RP 208, 248-49]

Dennis kept Riley from using her phone and told both women that if they called the police there would be even more trouble. [RP 211] Charmaine was able to call 911, without Dennis seeing her, but she was afraid to speak to the dispatcher, so she set the phone down, line open, on the table. She thought they were going to die and wanted someone to know what happened. After a short time she took the phone outside, gave the dispatcher the address, and went back inside. [RP 209-11] Dennis continued to flick the lighter. Charmaine went back outside, taking the gas can, but Dennis followed her and took it away from her. He said something to the effect of "I wouldn't be holding that if I were you." Charmaine understood that to mean the house was going to explode. Both of them returned to the house, Charmaine pleading with Dennis not to blow up the house. [RP 211]

At this time the sound of a siren caught the attention of all three people. Dennis was angry and demanded to know who had called the police. Both women denied it, which made him even angrier. [RP 212] Charmaine ran out of the house as the police cars arrived, yelling "Hurry, hurry, he's going to blow the house up!"

[RP 60, 212] When Charmaine ran out of the house yelling for help, Dennis told Riley that he didn't care, he had no reason to live, and he was just going to kill all of them. However, instead he put down the gas can and, taking the lighter with him, ran out the back door. [RP 212, 285] The gas can was on the back porch when the police arrived. [RP 213] Charmaine estimated the entire incident lasted one to one and a half hours. [RP 214]

Sgt. Ray Brady and Deputy Mitchell King of the Thurston County Sheriff's Office were the first officers to arrive, just after midnight on July 3. [RP 54, 59, 145] As they approached the house, they met Charmaine running out. She told them Dennis had run out the back door, and King was in a position where he could see him running into the back yard. Riley told them Dennis had jumped the fence. [RP 61, 146] Brady ran around the house and could hear noises in the brush and the rattling of a fence. Brady followed over that fence and one more, stopping in the next yard over. The area was heavily wooded and he heard no other noises. Then he noticed Dennis lying on his back along the other side of a chain link fence, partially hidden in the foliage. Brady aimed his Taser at Dennis, told him not to move, and waited for King. [RP 61-

63] While they were waiting, Dennis told Brady to shoot him, he was as good as dead. [RP 64]

King ran along the adjacent property in an attempt to cut Dennis off. He found Dennis lying on the grass where Brady had him at Taser-point, and, climbing over the fence, took control of Dennis. Dennis was calm and smelled strongly of gasoline. [RP 64, 146-47] The deputies walked Dennis back to the house by way of the street, circling around the block. [RP 147] Dennis was asked what happened and he said he had had an argument with his girlfriend, but knew nothing about gas. [RP 65] However, while they were walking back and the deputies commented to each other about the smell of gas, Dennis said that he had been filling a car and spilled some on himself. [RP 148] Dennis was searched and a Bic lighter was found in his front pants pocket. He was read his constitutional rights and placed into a patrol car. [RP 67]

The gas fumes in the house were so strong the officers could smell it when they first arrived and met Charmaine outside the residence. [RP 61, 146] The fire department was called to ventilate the house. [RP 85-87] Lt. Michael Grosvenor testified that gas fumes are flammable. [RP 88]

On September 22, 2010, Riley notified Brady that she had saved two phone messages that she received from Dennis before the incident on July 3, but which she had not listened to until after Dennis was taken into custody. [RP 122] Both messages were from Dennis, both played to the jury, both angry, profanity-laced rants. [RP 291-92]

Sylvester Dennis testified in his own behalf. He denied that he was angry with Riley, [RP 369-71] denied trying to pull her into the bedroom, [RP 356] and denied assaulting her. [RP 358] He said he did not deliberately pour gas on the floor but was holding the open gas can in his hand while “talking with his hands” and accidentally sloshed some gas around. [RP 362] He planned to camp out in the back yard and was going to use the gas to start a fire. He denied threatening to blow up the house or kill either woman. He said he never left the backyard of Riley’s residence and was not lying along a fence when police arrived but was sitting on some brush. [RP 363-66] He denied making any statements to the police. [RP 367].

2. Procedural facts.

Dennis was charged by information on July 8, 2010, with attempted second degree murder, attempted first degree arson,

and one count of felony harassment, all domestic violence. [CP 5-6] A second amended information filed on November 2, 2010, added a second count of attempted first degree arson (Dennis was actually tried on only one count of attempted first degree arson, CP 35) and a second count of felony harassment, both domestic violence. [CP 18-19] Dennis was arraigned on the second amended information on the first day of trial, November 3, 2010. [RP 5]

On September 9, 2010, the trial date was continued from a date not reflected in this record until October 20, 2010, [CP 7] based on defense counsel's trial schedule. [09/09/10 RP 3-4, 8-9] Dennis objected, not because his case would be prejudiced, but because his mother in Illinois was ill and needed his help, and he didn't want to miss his daughter's birthday. [09/09/10 RP 7-8]. On September 16, 2010, Dennis filed a pro se motion to dismiss his counsel, alleging his constitutional right to a speedy trial had been violated, he had not been allowed to see all of the discovery, and he had a conflict of interest with counsel. [CP 8] He complained that his best interests were not important to counsel and they had an "irreparable" relationship. [CP 9] He cited to no reason for this irreparability. A hearing was held on September 30, 2010.

Defense counsel was unavailable that day, and another attorney from the Office of Appointed Counsel stood in for him. Substitute counsel advised there was no reason under the Rules of Professional Conduct that appointed counsel could not represent Dennis. [09/30/10 RP 3] Dennis agreed with the judge that he and his attorney had a personality conflict but had nothing to add, even though given the opportunity to address the court. [09/30/10 RP 4] The court found a personality conflict to be an insufficient reason to substitute counsel and denied Dennis's motion. [09/30/10 RP 4] At that time trial was set for October 25, 2010, and an ER 404(b) motion hearing on October 18. [09/30/10 RP 4]

On October 19, defense counsel filed a motion to continue, explaining in detail the extent of his trial schedule. [CP 10-12] A hearing was held the following day. The court balanced Dennis's speedy trial right against the right to effective counsel and granted a one-week continuance. Dennis did not address the court himself. [10/20/10 RP 6]

C. ARGUMENT.

1. The trial court did not deny Dennis his constitutional right to counsel under the Sixth Amendment or article 1, section 22 of the Washington constitution.

Dennis argues that the circumstances in this case deprived him of the effective assistance of counsel. The record does not support his claim.

An appellate court reviews a trial court's denial of new court appointed counsel for abuse of discretion. State v. Varga, 151 Wn. 2d 179, 200, 86 P.3d 139 (2004).

[A] defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. . . . To justify appointment of new counsel, a defendant "must show good cause to warrant substitution of counsel, such as conflict of interest, an irreconcilable conflict, or a complete breakdown of communication between the attorney and the defendant." . . . Generally a defendant's loss of confidence or trust in his counsel is not sufficient reason to appoint new counsel. (Cites omitted)

Id. at 200. See also State v. Schaller, 143 Wn. App. 258, 267, 177 P.3d 1139 (2007).

The Sixth Amendment does not guarantee a meaningful relationship between an accused and his counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001) In the opinion on Stenson's direct appeal, State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), the Supreme Court had set forth the following factors to be considered in deciding whether to grant a motion to substitute counsel: (1) the reasons given for the

dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings. Subsequent to that opinion, a Ninth Circuit Court of Appeals decision applied the following test to determine "whether a trial court erred in failing to substitute counsel to the determination of whether an irreconcilable conflict exists between a defendant and his counsel: (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." In re PRP of Stenson, 142 Wn.2d at 723-4.

The purpose of providing counsel to criminal defendants is to ensure that they receive a fair trial, and therefore the proper focus is on the adversarial process, not the lawyer-client relationship. Even if a defendant demonstrates error in the trial court's denial of a substitution of counsel, he must also show prejudice, that is, that the error actually had an adverse effect on his defense. In re PRP of Stenson, 142 Wn.2d at 725, 743.

"A complete breakdown of communication which may lead to an unjust verdict is considered good and sufficient reason for withdrawal." State v. Hegge, 53 Wn. App. 345, 350, 766 P.2d 1127 (1989). The court in Hegge considered that such a breakdown had occurred where "this matter has consumed [the attorney] and his

staff for approximately 18 months, . . . he has been called as a witness by Mr. Hegge and has been forced to testify in court to Mr. Hegge's detriment, and may be called at trial. . . " Id.

Irreconcilable conflict requires more than an uncooperative defendant or a clash of personalities. "Counsel and defendant must be at such odds as to prevent presentation of an adequate defense." Schaller, 143 Wn. App. at 268.

In examining the extent of the conflict, this court considers the extent and nature of the breakdown in the relationship and its effect on the representation actually presented. If the representation is inadequate, prejudice is presumed. If the representation is adequate, prejudice must be shown. Because the purpose of providing assistance of counsel is to ensure that defendants receive a fair trial, the appropriate inquiry necessarily must focus on the adversarial process, not only the defendant's relationship with his lawyer as such. "[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." (Cites omitted.)

Id. at 270. In Schaller, the court found that his refusal to meet with his attorneys after the State rested its case insufficient to constitute an irreconcilable conflict. "It is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a

breakdown in communications where he simply refuses to cooperate with his attorneys.” Id., at 271.

Dennis maintains that the trial court did not undertake an adequate inquiry into the dispute between him and his attorney. Appellant’s Opening Brief at 8. “But a trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully. . . . Formal inquiry is not always essential where the defendant otherwise states his reasons for dissatisfaction on the record.” Id., at 271. Here the court gave both Dennis and his attorney an opportunity to explain the specifics of their problem, but Dennis did not offer anything but conclusory statements that his attorney did not have his best interests at heart.

Dennis cites to Riggins v. Nevada, 504 U.S. 127, 144, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1993) for this language:

A defendant’s right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer.”

Appellant’s Opening Brief at 6. However, Riggins was a case which held that the forced administration of anti-psychotic medication during trial violates a defendant’s 6th and 14th Amendment rights to counsel. In that case, the court found that the medication interfered with the defendant’s ability to defend himself

in a capital murder case because he could not effectively communicate with his attorney. That is a far stretch from Dennis's situation, where he was annoyed that his case did not take top priority over older and equally serious cases.

The State does not dispute that Dennis made a timely request for new counsel. However, he did not have reasons that would support a change of appointed counsel. The evidence at trial shows that Dennis was not a man inclined to be cooperative. His opinion was that the relationship was "irreparable," but the record indicates that was largely his own doing. The court was well within its discretion to deny his motion.

In addition, Dennis has not even argued that he was prejudiced by the personality conflict with his attorney. Nothing in the record suggests that there was any problem with communication during the trial. Counsel was able to persuade the jury to acquit Dennis of attempted second degree murder. The record reflects that counsel conducted a vigorous and professional defense. It was not until he was sentenced that Dennis refused to speak to the court, sign the judgment and sentence, and refused the assistance of his attorney in filing a notice of appeal. [01/04/11 RP 27-33] It is apparent that his personality conflict with his

attorney did not adversely affect the outcome of the trial. The case against him was overwhelming and under the circumstances he got a very good result.

2. The record contains more than sufficient evidence that Dennis threatened to kill Charmaine Riley.

Dennis maintains that because Charmaine Riley was not present in the house when he said to Karin Riley that he was going to kill them all, there was no basis for a felony harassment charge with Charmaine as the victim. Appellant's Opening Brief at 13.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, supra, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Felony harassment is defined in RCW 9A.46.020, which reads in pertinent part:

1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if any of the following apply:

.....

(ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

The State disagrees that the statement Dennis made to Karin Riley was the only threat to kill that he made. Charmaine

testified that while they were all in the house Dennis poured gasoline, starting at the back and working toward the front of the house, blocking the exits. He said he was going to blow up the house. [RP 207] She called 911 “[b]ecause I honestly didn’t think we were going to make it out alive . . .” [RP 209] When Charmaine took the gas can and tried to remove it, Dennis followed her, telling her he wouldn’t do that if he were her. Charmaine pled with him not to blow up the house. [RP 211] “I thought I was going to die.” [RP 214]

Nothing in RCW 9A.46.020(2)(b)(ii) requires that the threat to kill be in the specific words, “I am going to kill you.” Dennis’s words and actions made it quite clear his intent was to blow up the house with all of them in it. Pouring gas on a direct line from the front to the back of the house, blocking the exits, flicking his lighter, and saying that he was going to blow up the house could only mean that anybody in the house was going to die and he wasn’t going to let the women leave.

Washington courts have held that conduct can communicate meaning. For example, in State v. Immelt, 173 Wn.2d 1, ___ P.3d ___ (2011), the court found that honking a horn is speech, and speech protected by the First Amendment at that. Id. at 9. In State

v. Smith, 118 Wn. App. 480, 93 P.3d 877 (2003), Smith, from his own backyard, yelled at and threatened two men attempting to tow a vehicle from a parking lot on the other side of the fence separating it from Smith's backyard. He displayed a firearm, a metal pipe, and a hammer, all in a threatening manner. The court there said that "he intended that his behavior traverse the fence to communicate threats." Id. at 485, n. 8.

Taking the evidence and the reasonable inferences from it in the light most favorable to the State—and even in a less favorable light—Dennis threatened Charmaine's life in a clear manner that she understood without difficulty. There is no question that she was in reasonable fear for her life. The evidence was sufficient.

3. That the threat is a "true threat" is not an essential element of harassment that must be included in the charging document. The jury instructions properly instructed the jury about "true threats."

a. Charging document.

The adequacy of charging documents is reviewed de novo. State v. Allen, 161 Wn. App. 727, 751, 255 P.3d 784 (2011). Dennis argues correctly, and cites to appropriate authority, that all essential elements of a crime must be included in the charging document, whether they are statutory or non-statutory. An essential

element is one that must be proven in order to establish that the behavior is illegal. State v. Tellez, 141 Wn. App. 479, 482-83, 170 P.3d 75 (2007). He is also correct that the standard of review for a challenge to the charging document raised for the first time on appeal is different than if it had been challenged in the trial court.

In such cases we construe the charging document more liberally in favor of validity than does a trial court when the charging documents are challenged initially or during trial. . . . We adopted a two-pronged inquiry in such cases: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" This method of liberal construction permits us to fairly infer the apparent missing element from the charging document's language. . .

State v. Goodman, 150 Wn.2d 774, 787-88, 83 P.3d 410 (2004), (cites omitted).

The language in the information charging the two counts of harassment in this case is identical except for the name of the victim.

In that the defendant, SYLVESTER LEE DENNIS, in the State of Washington, on or about July 3, 2010, without lawful authority, knowingly threatened to kill [victim], a family or household member, pursuant to RCW 10.99.020, and the defendant's words or conduct placed [victim] in reasonable fear that the threat would be carried out.

[CP 19]

b. Jury instructions.

Dennis did not object to the instructions at trial, [RP 377], and therefore he can raise it for the first time on appeal only if it constitutes a manifest error affecting a constitutional right. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). A challenged jury instruction is reviewed de novo. The instructions are read as a whole and the challenged portion is considered in the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions are adequate if they allow the parties to argue their theories of the case, they are not misleading, and when read as a whole, they properly inform the jury of the applicable law. State v. Schneider, 36 Wn. App. 237, 242, 673 P.2d 200 (1983).

The pertinent instructions given in Dennis's trial are as follows. The to-convict instruction was the same for both counts with the exception of the number of the count and the name of the victim.

Instruction No. 19 and 20 [CP 37, 38]:

To convict the defendant of the crime of harassment as charged in Count [3 and 4], each of

the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 3, 2010, the defendant knowingly threatened to kill [victim] immediately or in the future;

(2) That the words or conduct of the defendant placed [victim] in reasonable fear that the threat to kill would be carried out;

(3) That the defendant acted without lawful authority; and

(4) That the threat was made or received in the State of Washington.

If you find from the evidence that each of these elements has been proven 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 one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 18 [CP 36]

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

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.

Instruction No. 13 [CP 33]

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result, when he or she is aware of that fact, circumstance, or result. It is not necessary that the

person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

c. Discussion.

The State does not disagree that the State must prove that the threat made by the defendant was a “true threat,” because other types of threats are protected speech under the First Amendment. Tellez, 141 Wn. App. at 482.

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.”

Id.

In Tellez, the defendant relied on State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006), to make the very same argument that Dennis does here—that the requirement that the threat be a “true threat” is an essential element that must be included in the

charging document and the to-convict instruction. Tellez, 141 Wn.

App. at 483-84. The court said:

. . . Tellez overstates the holding in *Johnston*. The *Johnston* court merely held that the trial court erred by refusing to give a limiting instruction explaining that the bomb threat statute criminalizes only true threats. . . The *Johnston* court did not rule that a true threat is an essential element of the crime of threatening to bomb a building. It did not require that the information charging the defendant with criminal use of threatening language allege a true threat. . . No 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.

Id. at 483.

Dennis maintains that this court should decline to follow the holding of Tellez based upon the Supreme Court’s analysis in State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010). Schaler was charged with two counts of felony harassment. He asked for and received a jury instruction which required the jury to find that he subjectively intended to communicate a threat to the victims, two women who were his neighbors (“A person threatens ‘knowingly’ when the person subjectively intends to communicate a threat.”). Id. at 285. Neither party submitted an instruction defining “true threat” and Schaler did not take exception to the State’s proposed

definition of “threat.” Id. at 281-82. That instruction defined “threat” as “to communicate, directly or indirectly, the intent to cause bodily injury immediately or in the future to the person threatened or to any other person.” Id. at 285.

Reading the definitions into the statute, the jury was advised that a person is guilty of threats-to-kill harassment if (1) without lawful authority, he subjectively intends to communicate, directly or indirectly, the intent to kill the person threatened or any other person and (2) by words or conduct, he places the person threatened in reasonable fear that the threat will be carried out.

Id. at 285.

The Schaler court found that the instructions given did not specify a mens rea as to the result of the threats, because the definition of “knowingly threaten” was given as “intend[ing] to communicate a threat.” Id. at 286. The definition of threat did not mention fear. Id.

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?”

.....
“Under these instructions, the statutory requirement of knowing or even intentional threatening refers only to the conduct and circumstances proscribed, but not the proscribed result.”

Id., emphasis added. The mens rea which applies to the result, the hearer's fear, is simple negligence. Id. Because the instructions in Schaler's case did not include a mens rea, the court found he could have been convicted without the jury finding a "true threat," and because this was a manifest error, it could be raised for the first time on appeal. Id. at 287-88. The court further held that the error was not harmless because of the equivocal nature of the statements made by Schaler. "Reversal is required because the jury was not asked to decide whether a reasonable person in Schaler's position would foresee that his statements or acts would be interpreted as a serious expression of intent to carry out the threat, and the evidence was ambiguous on the point." Id. at 290.

The holding in Schaler was fact-specific. The instructions in Dennis's case were very different from the instructions given in Schaler, and the threat itself was much different. Here the jury was instructed on both mens rea (knowledge) and "true threat," and therefore they were properly instructed as to the mens rea as to the results. Further, the threats made by Dennis were not, by any stretch of the imagination, equivocal.

The Court of Appeals has applied Schaler in Allen. Allen also contended that a “true threat” was an essential element that must be included in the charging language and the to-convict instruction. Allen, 161 Wn. App. at 750. The charging language in that case was essentially identical to that in Dennis’s case, and the “true threat” instruction was the same as given to Dennis’s jury. Id. at 750-51; WPIC 2.24;² CP 36.

The court in Allen noted that Schaler had not answered the question as to whether the mens rea of felony harassment was an essential element that must be included in both the information and the to-convict instruction, nor did it address the issues raised in Tellez. Therefore, the court held to its prior cases and held that a “true threat” is merely a definition of the threat element. The jury must be instructed as to “true threat,” but it need not be in the to-convict instruction. Allen, 161 Wn. App. at 755. A “true threat” is not an element that must be included in the charging document. Tellez, 141 Wn. App. at 484.

Dennis cites to State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009), for his argument that the mens rea of an offense must

² The Schaler court specifically approved this instruction: “Cases employing the new instruction defining “threat” will therefore incorporate the constitutional mens rea as to the result.”

be included in the information and to-convict instruction. Appellant's Opening Brief at 22. Fisher actually addressed only the to-convict instruction in that case. It said:

A proper "to convict" instruction need not contain all pertinent law such as "*definitions of terms*, duties of the jury to disregard statements that are not evidence, and so forth.

Id. at 754-55 (emphasis in original). Because the instruction about "true threat" defines the element of "threat," it need not be in the to-convict instruction. It is properly included as "a mere definitional instruction." Appellant's Opening Brief at 20.

The charging document included a mens rea of knowledge. Under these authorities, and the lesser standard applied when charging language is challenged for the first time on appeal, even if the "true threat" were an essential element, by fair construction it can be found in this information. [CP 19] Further, Dennis has not shown any prejudice by the "inartful language," and his claim is without merit.

D. CONCLUSION.

The trial court properly denied Dennis's request for new counsel, there was sufficient evidence to support the conviction for harassment of Charmaine Riley, and both the charging document

and the jury instructions were correct. The State respectfully asks this court to affirm all of Dennis's convictions.

Respectfully submitted this 25th day of January, 2012.



Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

January 25, 2012 - 9:57 AM

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