

NO. 42263-8-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

IRVIN LEE GREENE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 10-1-02314-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is “true threat” an essential element of the crime of harassment?
2. Has defendant failed to show that the charging document has omitted an essential element of the crime of harassment?
3. Has defendant failed to show that the “to convict” instructions for harassment omitted an essential element of the crime?

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecutor’s Office (“State”) charged Irvin Lee Greene (“Defendant”) on May 28, 2010, with five counts of domestic violence court order violation. CP 1-4. On February 14, 2011, the information was amended to include one count of stalking, and one count of felony harassment. CP 62-66. On May 11, 2011, the case proceeded to trial before the Honorable Edmund Murphy. 18 RP 35.

The jury found the defendant guilty of stalking and felony harassment. 23 RP 330-331. However, the jury was unable to reach a verdict on the five counts of domestic violence court order violation. 23 RP 332.

The defendant has an offender score of 9.5. CP 169-183; 25 RP 351; CP 169-183. On June 17, 2011, the court sentenced defendant to 60 months for each count, concurrently. CP 169-183; 25 RP 351.

On June 20, 2011, defendant filed a timely notice of appeal. CP 286.

2. Facts

Carol Unkur is 51 years old and has a 17 year old daughter. 18 RP 83. Ms. Unkur lives in Pierce County. 18 RP 84. She works as an operator for the light rail in downtown Tacoma for Sound Transit. 18 RP 84.

Ms. Unkur initially met defendant in early June 2009, when defendant was a passenger on the train and wanted to make a complaint. 18 RP 85. Defendant rode the train a couple more times and he and Ms. Unkur became acquainted. 18 RP 86-87. Around the middle of July 2009, defendant and Ms. Unkur became romantically involved for a couple weeks, until mid August 2009. 18 RP 87-89.

On August 14, 2009, Ms. Unkur broke up with the defendant. 18 RP 91. Ms. Unkur had taken her daughter and her daughter's friend to Seattle so she was not taking defendant's phone calls. 18 RP 89. Defendant began texting her a little in the morning, and then the calls became more frequent as the day went on. 18 RP 89. Defendant "kept calling and calling and calling." 18 RP 89.

Ms. Unkur got home around 8:30 p.m. or 9:00 p.m. 18 RP 89. Ms. Unkur finally told her daughter, “I have to take this call. He’s not going to stop calling until I answer the phone.” 18 RP 89. When Ms. Unkur returned defendant’s phone call the defendant asked “Where are you at?” 18 RP 90. Ms. Unkur responded “I’m at home.” 18 RP 90. The defendant then asked Ms. Unkur “Where at home are you?” Ms. Unkur said, “I’m around the corner of the apartment out on the street.” The defendant then answered “Well, I’m in your backyard.” 18 RP 90.

Ms. Unkur told defendant that she was going to take him home because she wanted to get defendant away from her daughter and her daughter’s friend. 18 RP 90. Ms. Unkur’s daughter refused to let Ms. Unkur go with defendant alone. 18 RP 90. Ms. Unkur, defendant, Ms. Unkur’s daughter, and her daughter’s friend got into Ms. Unkur’s vehicle. 18 RP 91. Ms. Unkur first dropped her daughter off at her friend’s house, and then took defendant home. 18 RP 91. Ms. Unkur told defendant “No, I’m done with this. I’m done. Don’t call me anymore.” 18 RP 91. Defendant said, “Okay. Just give me two weeks. I won’t contact you for two weeks.” 18 RP 91. Ms. Unkur finally agreed because it was the only way to get defendant out of her car. 18 RP 91. Defendant began contacting Ms. Unkur again within six hours. 18 RP 91.

Ms. Unkur knew that defendant had been boxing since his early teens, is a licensed professional boxer by the Washington Boxing Commission, and was training for a fight. 18 RP 110. At some point, the

defendant had also told Ms. Unkur that he had previously put another woman in a headlock. 18 RP 110.

The next morning, Ms. Unkur notified her supervisor of the situation with defendant. 18 RP 93. Instead of working at the Tacoma Dome platform in customer service, Ms. Unkur was assigned to work the Tacoma Dome Station with another operator and a security guard. 18 RP 93. Defendant showed up at the Tacoma Dome Station while Ms. Unkur was working, got off the bus, made a loop around, and re-boarded in the next one or two buses. 18 RP 92-93. Defendant then sent Ms. Unkur a text saying “What is it now? Why are you getting people involved?” 18 RP 94. Pierce Transit issued a no trespass notice to defendant to keep him from riding the buses to look for Ms. Unkur. 18 RP 94.

On September 4, 2009, the court implemented a temporary protection order to protect Ms. Unkur from defendant. 18 RP 95. On September 10, 2009, Ms. Unkur had her friend Dan stay at the apartment with her because as she explained it, she was “not allowed to go to the apartment” alone.¹ 18 RP 101. Ms. Unkur went to pick up Dan, her friend, when they saw defendant in the area. 18 RP 97-98; 18 RP 101. Dan made a witness statement. 18 RP 101. Ms. Unkur’s daughter stayed elsewhere with family because she was afraid to stay at the apartment. 18

¹ The implication is that this was part of a plan for her safety made with friends and family.

RP 101. Defendant was arrested later that day for violating the temporary restraining order. 18 RP 97-98.

On September 14, 2009, Ms. Unkur obtained a two year no contact order that expired on September 14, 2011. 18 RP 95-96; Exhibit 16. Ms. Unkur had also moved by mid-September because she was concerned for her safety. 18 RP 92.

On January 6, 2010, defendant pleaded guilty to two counts of violating the protection order. 18 RP 50; 18 RP 59; Exhibit 2. On January 6, 2010, the court issued a second no contact order as part of the sentence that was to expire on January 6, 2012. 18 RP 59; Exhibit 4.

Notwithstanding the multiple no-contact orders, defendant began contacting Ms. Unkur again around March 16, 2010. 18 RP 98. Text messages started with "Call me. I'm not pissed anymore, Irvin." 18 RP 99. Then defendant threatened to put Dan in the hospital if Ms. Unkur did not answer his calls. 18 RP 102. So Ms. Unkur ended up calling defendant, spoke to him for about 30 minutes, and agreed to see him because she wanted to protect Dan. 18 RP 101-102. Ms. Unkur said she had a normal conversation with defendant and they talked about what had happened. 18 RP 102. However, after the conversation, the calls and texts started getting progressively worse again. 18 RP 103. Even so, Ms. Unkur kept in contact with defendant because she felt that it was safer to talk through the phone, then to have defendant looking for her at work. 18

RP 103-104. Ms. Unkur remained concerned for her own, her daughter's, and Dan's safety. 18 RP 105.

Defendant continuously harassed Ms. Unkur by sending her threatening texts and voicemails. A variety of texts bombarded Ms. Unkur's phone like "slut," "What's this kills your white ass slut ass let me send you this show the punk this," (pictures of his penis), "move out of town," "ho bag bitch on black dick, Irvin," "I know where you live now. I know where you live, Irvin." 19 RP 125-144; Exhibit 6-8; Exhibit 9-19; Exhibit 20-192.

In April, 2010, defendant had threatened to hurt a passenger on the train, so Ms. Unkur filed another incident report with the police for violating the temporary protection order. 18 RP 103.

On April 18, 2010, defendant left a voicemail on Ms. Unkur's phone threatening to kill her and chop her head off. *See* 19 RP 204-205; *see also* Brief of Appellant at 4 citing (Exhibit 193b).

On May 15, 2010, defendant had also indicated to Ms. Unkur in a text that he had purchased a gun and that he was "ready for anything them and the cops you owe me and I owe you, Chuckie²." 19 RP 160-161; Exhibit 139.

² Defendant had continuously referred to himself as "Chucky," a reference to a killer doll from a horror movie series. 19 RP 159. *See also*, http://en.wikipedia.org/wiki/Charles_Lee_Ray; <http://www.imdb.com/character/ch0009424/>.

On the morning of May 17, 2010, defendant sent Ms. Unkur 11 text messages and tried contacting Ms. Unkur 22 times within a three hour period. Exhibit 6-8. Defendant had sent Ms. Unkur a threatening text saying “I know who he is now. I’m going to take care of him. Then I’m going to come after you.” 18 RP 106. Defendant was referring to a “Steve.” 18 RP 105-106. “Steve” was a person that Ms. Unkur had made up to deflect some of defendant’s hostility from her and Dan by telling him that there was a third person in the van on September 10, 2009, the night defendant was arrested. 18 RP 105-106.

On May 18, 2010, concerned that defendant was going to hurt someone, Ms. Unkur went to the police station and spoke with Deputy Salmon. 18 RP 106. Deputy Salmon took pictures of Ms. Unkur’s phone to document the text messages and voicemails. Exhibit 6-8; Exhibit 9-19; Exhibit 20-192. Deputy Salmon also recorded Ms. Unkur’s voice mails and video texts. Exhibit 193B.

C. ARGUMENT.

1. FOR THE CRIME OF HARASSMENT, THAT THE THREAT BE A “TRUE THREAT” IS A DEFINITIONAL REQUIREMENT, AND NOT AN ESSENTIAL ELEMENT OF THE CRIME.

RCW 9A.46.020(1)(a)(i)(b) defines the crime of harassment:

A person commits the crime of harassment if when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person and when he or she by words or conduct places the person

threatened in reasonable fear that the threat will be carried out and the threat to cause bodily harm consists of a threat to kill the threatened person or another person.

In both *Johnston* and *Kilburn*, the Court held that a threat must be construed to limit its application to “true threats” in order to avoid interference with the constitutional protection of free speech. *See State v. Johnston*, 156 Wn.2d 355, 360, 127 P.3d 707 (2006) and *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

Relying on *Kilburn* and *Johnston*, defendant claims that the information and the “to convict” jury instructions were improper because they did not include “true threat.” Brief of Appellant 4. However, this argument has been repeatedly rejected.

Under the First Amendment, the State may punish only intentional threats. *Black v. Virginia*, 538 U.S. at 631. In addition, the State must show that a “true threat” was made in order to keep the statute from being overly broad and violating the Constitution. *Kilburn*, 151 Wn.2d at 43.

The Washington courts have consistently held that “true threat” is not an essential element of the crime of felony harassment based on threat to kill, and consequently, does not need to be included in the charging information, or the “to convict” instruction, and that it is sufficient to simply define “threat” as the definition of true threat. *See State v. Meneses* 169 Wn.2d 586, 597, 238 P.3d 495 (2010); *Kilburn* 151 Wn.2d 36, 54, 84 P.3d 1215 (2004); *State v. Allen*, 161 Wn. App. 727, 755-756,

255 P.3d 784 (2011), *review granted*; ***State v. Atkins***, 156 Wn. App 799, 803, 236 P.3d 897 (2010); ***State v. Tellez***, 141 Wn. App. 479, 170 P.3d 75 (2007).

A true threat is defined as 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... A true threat is not one said in jest, idle talk, political argument, or puffery.” ***Kilburn***, 151 Wn.2d at 46.

Defendant misinterprets both ***Johnston***, and ***Kilburn*** by arguing that “true threat” was an essential element. ***Johnston***, 156 Wn.2d 355; ***Kilburn***, 151 Wn.2d 36. The Court did not hold in either case that “true threat” was an essential element of harassment. The Court’s held in those cases that threats must be limited to “true threats” and that jury instructions should define a “true threat.” ***Johnston***, 156 Wn.2d at 363-364.

Contrary to defendant’s claim, the Ninth Circuit also did not hold that a statute must specifically state “true threat” as an essential element of harassment in order to be constitutional. *See* Brief of Appellant at 10. Rather, the court held that in order to criminalize a “threat” it must be a defined as “true threat.” ***U.S. v. Cassel***, 408 F.3d 622 (9th Cir. 2005). The court was addressing 18 U.S.C. § 1860, a statute that criminalized

“[w]hoever, by intimidation... hinders, prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of federal land at public sale.” *Id.* at 626. The court cited to the U.S. Supreme Court’s definition of “true threat” and “intimidation” in *Black v. Virginia*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), stating that “intimidation” is a type of “true threat.” *Id.* at 631. The importance of the definition is that only *intentional* threats are criminally punishable under the First Amendment. *Black v. Virginia*, 538 U.S. at 631. The requirement is that the intimidation itself must be intentional, and the speaker must intend that his language threatens the victim. *Id.* at 631.

Washington courts have repeatedly held that the term “true threat” is not an essential element of the crime of harassment. The term “true threat” is not listed in the statute, and has not been referred to by courts as an essential element of the crime of harassment that needs to be in the “to convict” instructions, or the information. Accordingly, the defendant’s claims are without merit.

2. THE INFORMATION CHARGING THE CRIME OF HARASSMENT PROPERLY LISTED THE ESSENTIAL ELEMENTS.

The defendant alleges that the information did not give proper notice to defendant because it failed to state that the threat was a true threat. Brief of appellant 13. The defendant bases this claim on the

“essential elements” rule which requires that a charging document must include all of the essential elements of the crime. *See State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991).

The State recognizes that this court may be constrained by precedent as to some of the arguments made in this section. However if the court is so constrained, the arguments are also made in order to preserve the argument in the event of further review.

- a. There Has Long Been A Rule, Derived From The Common Law, That The Information Must Include The Essential Elements Of Crime Charged.

Starting in the fourteenth century, the original accusatory pleadings were simple documents that alleged, e.g. that ““A stole an ox, B burgled a house, C slew a man.”” LaFave, Israel, King, Kerr, *CRIMINAL PROCEDURE* (2011), § 19.1(a) (quoting T. Plucknett, *A CONCISE HISTORY OF THE COMMON LAW* 429 (5th ed. 1956)). However, as the Anglo-American legal system developed over time, both the mechanisms of the legal system, as well as the changes that occurred at various times left their effect on a body of law that has come down to us and is now known as the essential elements rule.

Ultimately, the essential elements rule led to paroxysms of technicality in pleading criminal accusations such that American courts have gone through several phases of reform as a result. *See CRIMINAL*

PROCEDURE (2011), § 19.1.

One stage of the reform was the implementation of “short form” pleading, which reform was typically unsuccessfully challenged on the basis of the state constitutional counterparts to the Sixth Amendment. *See* CRIMINAL PROCEDURE (2011), § 19.1(c). Presumably it was this round of litigation that as a by product originally drew a connection between the Sixth Amendment and the essential elements rule.

Another round of reform was the Supreme Court’s holding that the Sixth Amendment right to grand jury indictment did not apply to the States, leading to charging by information. *See, e.g., State v. Siers*, --- Wn.2d ---, 274 P.3d 358, 362 (2012).

Finally, the adoption of the federal rules of criminal procedure resulted in a third round of reform. *See* CRIMINAL PROCEDURE (2011), § 19.1(d). One purpose of the federal rules was to [promote judicial economy] through a doctrine of waiver, that restricted the defense tactic of “sandbagging” in which no objection would be made to a defect before trial where it could be cured, so that it could be raised for the first time on appeal and a new trial obtained. *See* CRIMINAL PROCEDURE (2011), § 19.1(d).

Differing authorities have sought to justify the essential elements requirement as serving different functions. Some have predicated it upon

preventing double jeopardy violations, others on providing notice of the charge to the defendant, while still others have based justified it based on facilitating judicial review. CRIMINAL PROCEDURE (2011), § 19.2(b), (c), (d). However, basing the essential elements requirement on the Sixth Amendment's notice requirement is doubtful. CRIMINAL PROCEDURE (2011), § 19.2(c), § 19.3(a). Under the common law, the purpose of the rule was also held to provide a jurisdictional grounding for the conviction, however, under modern pleading practices that bases is no longer recognized as pertinent. *See* CRIMINAL PROCEDURE (2011), § 19.2(e). Recently, the courts have justified the essential elements rule as protecting the defendant's right to prosecution by indictment (in jurisdictions where indictment is required), e.g. such that amendments to the indictment must be made by resubmission to the grand jury. *See* CRIMINAL PROCEDURE (2011), § 19.2(f). 41 AMJUR Indictment § 1.

Rather than focus on technical pleading requirements, under modern pleading philosophy the courts have looked to the functions that an accusatory pleading should perform in order to test whether the pleading is sufficient. *See* CRIMINAL PROCEDURE (2011), § 19.2(a). However, an emphasis on the functional approach to accusatory pleadings is not a modern novelty and goes back to many of the Supreme Court's earliest considerations of pleading issues. *See* CRIMINAL PROCEDURE

(2011), § 19.2(a) n. 2 (citing *The Hoppett*, 11 U.S. (7 Cranch) 389, L.Ed.2d 380 (1813); *United States v. Mills*, 32 U.S. (7 Peters) 138, 8 L. Ed. 636 (1833); *United States v. Cruickshank*, 92 U.S. (2 Otto) 542, 23 L. Ed. 588 (1876)).

By 1974 the United States Supreme Court adopted a test that the accusatory pleading must: 1) include the elements of the offense; 2) provide adequate notice of the charge; and 3) provide protection against double jeopardy. See CRIMINAL PROCEDURE (2011), § 19.2(a) citing *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)).

During much of the common law period, on subsequent review trial records consisted primarily of the charging instrument, without a trial transcript. See CRIMINAL PROCEDURE (2011), § 19.2(b). As a result, most courts will cite the double jeopardy function in discussion pleading requirements, but give it no separate content or meaning such that it is subsumed into the notice function. See CRIMINAL PROCEDURE (2011), § 19.2(b). Thus, some commentators and courts have gone so far as to question whether the double jeopardy function of pleadings has any modern relevancy. See CRIMINAL PROCEDURE (2011), § 19.2(b).

Many courts have tied the essential elements rule to the notice function of the Sixth Amendment. See CRIMINAL PROCEDURE (2011), §

19.2(c). But see, *See* CRIMINAL PROCEDURE (2011), § 19.3(a) n. 4.

However, many other courts have viewed the essential elements requirement as resting on other functions, e.g. judicial review, jurisdictional grounding, and more recently, a defendant's right to prosecution by indictment in which the prosecution is limited to those crimes and elements found by a grand jury. *See* CRIMINAL PROCEDURE (2011), § 19.2(c)-(f). This was particularly so at a time when grand jury proceedings were not transcribed, so that the indictment would provide the only evidence of what was before the grand jury and what it decided. *See* CRIMINAL PROCEDURE (2011), § 19.2(f).

The court's that have relied on a Sixth Amendment notice basis for the essential elements rule are more likely to treat an objection to a deficiency in the pleading as forfeited or waived if not raised prior to trial, and further as subject to a harmless error analysis. *See* CRIMINAL PROCEDURE (2011), § 19.2(c). Jurisdictional grounding has now been rejected by the Supreme Court as a constitutional basis for the essential elements rule. *See Cotton*, 353 U.S. at 629-631. Further, the right to prosecution by indictment by a grand jury does not apply to the States. *See State v. Siers*, --- Wn.2d ---, 274 P.3d 358, 362 (2012).

The honest assessment of this history is that the essential elements rule is not a rule of constitutional law, but rather one of common law that

developed to meet the needs of the legal system in an era of uncodified common law crimes, in which the record on further review was extremely limited by today's standards.

The point then is that the essential elements rule in fact does not derive from the constitution, in the sense that it is not mandated. Rather, properly, the essential element rule is a common law rule that developed to serve a number of different common law purposes. Many of those purposes also further the constitutional protections afforded by the Fifth and Sixth Amendments. However, the rule itself is not of constitutional magnitude and is indeed not constitutionally mandated. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 537-529, 120 S. Ct. 2348 (2000) (O'Connor dissenting). *But see, Apprendi*, 530 U.S. at 500 n. 1 (Scalia concurring).

Here the nature of the legal system, as well of many of the procedural practices relating to criminal prosecution have substantially changed, many of the specific needs served by the essential elements rule no longer exist. As such, where the purposes of rigid application of the rule are no longer served as a result of changes in the legal system and criminal prosecution, it makes no sense to continue to apply the rule in an unnecessarily harsh manner.

Under a modern system of law, where all charges are statutorily

based, conviction records and criminal histories are easily obtainable, proceedings are transcribed, filings are thoroughly recorded and preserved and a defendant is always entitled to ask for a bill of particulars, continued application of the essential elements rule is of extremely limited relevance. The interests of justice warrant that the rule should be greatly limited as to its rigidity, scope, and effect. *See* CRIMINAL PROCEDURE (2011), § 19.1(e)

b. The Essential Elements Rule In Washington

Because the essential elements rule derives from common law and pre-dates the admission of Washington to the United States, the historical origin of the rule in Washington is from the common law. Subsequently, and only rather late, Washington courts have attempted to engraft the essential elements rule onto a constitutional provision.

However, the constitutional underpinning of the essential elements rule has been as questionable in Washington as it has been in other jurisdictions.

The first case that refers to the essential elements rule as constitutional appears to be *State v. Newson*, 8 Wn. App. 534, 535-36, 507 P.2d 893 (1973). In *Newson*, the defendant claimed that even though he knew what he was charged with and had no doubts about the nature of the charge, the information was constitutionally defective because it did not include essential elements of the crime of rape. *Newson*, 8 Wn. App. at 535-36. In support of his claim, the defendant relied upon *State v. Carey*.

Newson, 8 Wn. App. at 536 (citing *State v. Carey*, 4 Wash. 424, 432, 30 P. 729 (1982)). The court in *Carey* considered a common law rule of criminal procedure that the indictment must contain a statement of the acts constituting the offense, and also quoted from the United States Supreme Court. *Carey*, 4 Wash. at 432-433 (citing Bish. Crim. Proc. § 611 and quoting *United States v. Simmonds*, 96 U.S. 360, 24 L. Ed. 819 (1878)).

At the beginning of its analysis, the court *Newson* cited to the Sixth Amendment, as well as art. 1, § 22 of the Washington Constitution and also cited *State v. Unosawa*, 29 Wn.2d 578, 188 P.2d 104 (1948). The court did not make clear whether the essential elements rule was based on the constitutional provisions cited. Ultimately, the court in *Newson* concluded the information was sufficient and denied the defendant's claim.

The first Washington Supreme Court case to declare the essential elements rule is of constitutional magnitude is *State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989). Ultimately the Supreme Court in *Leach* held that the omission of elements of the crime violated "...Leach's due process right to be properly informed of the charge against him as required by the state and federal constitutions. *Leach*, 113 Wn.2d at 690. In doing so, the court in *Leach* merely cited to Const. art. 1, §§3, 22 (amend. 10); U.S. Const. amends. 5, 6, 14. However, other than this conclusory assertion the court in *Leach* undertook no further analysis of the essential elements rule, its history or how it derived from the constitutional

provisions cited.

Indeed, if one follows back to their source the series of cases starting with *Leach* that claim the essential elements rule is constitutional, each cites to a preceding case without undertaking a constitutional analysis going back to *In re Richard* in 1969. See *State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989); *State v. Holt*, 104 Wn.2d 315, 319, 704 P.2d 1189 (1985); *State v. Bonds*, 98 Wn.2d 1, 653 P.2d 1024 (1982); *In re Richard*, 75 Wn.2d 208, 211, 449 P.2d 809 (1969) (citing *Seattle v. Jordan*, 134 Wash. 30, 235 P. 6 (1925)). The opinion in *Richard* merely says that "...a criminal charge may be so vague as to fail to state any offense whatsoever," and says to "see" *Jordan. Richard*, 75 Wn.2d at 211. Thus, the court in *Richard* does not expressly reference the "essential elements" rule. Nor do the courts in *Bonds* or *Holt*. See *Bonds*, 98 Wn.2d at 16; *Holt*, 104 Wn.2d at 319.

Moreover, *Jordan* in no way stands for the proposition that an information that lacks an essential element is constitutionally deficient.

The opinion in *Jordan* does not assert that a constitutional right is violated by the failure of the information to state an essential element of the crime. Instead, it cites to statutory authority for that requirement. See *Jordan*, 134 Wash. at 33 (citing Section 9281, Pierce's Cod; section 2065, Rem. Comp. Stat., and holding that the complaint was not sufficient under that rule). Indeed, the court in *Jordan* does not even mention constitutional law. See *Jordan*, 134 Wash. 30.

“...an information which charges a [misdemeanor] statutory offense in the language of the statute, or, in words of similar import, is sufficient.”

Jordan, 134 Wash. at 33 (emphasis added) (quoting *State v. Williams*, 73 Wash. 678, 132 P. 415 (1913)). *See also*, *Jordan*, 134 Wash. at 33 (citing *State v. Craddock*, 44 Kan. 489, 24 Pac. 949 (1890)).

Most recently, Washington Courts have engrafted the essential elements rule onto the constitutional right of defendants to be informed of the nature and cause of the accusation against them. This right derives from the Sixth Amendment to the United States Constitution, and Article I, section 22 of the Washington Constitution. *State v. Siers*, --- Wn.2d ---, 274 P.3d 358, 361 (2012) (citing *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992)). The Washington Supreme Court has repeatedly held that the by their use in Art. I, sec. 22 of language substantially similar to the Sixth Amendment, they did not intend to provide any greater protection to defendants under the Washington provision. *State v. Siers*, -- Wn.2d ---, 274 P.3d 358, 361 (2012) (citing *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992)).

The court appears to have abandoned the idea that the essential elements rule is rooted in due process. *See Siers*, 274 P.3d at 362 (only applying the more limited due process notice requirement to notice of aggravating circumstances that need not be given in the information).

c. The Information Here Did Not Fail To Omit An Essential Element Where It Included Language That The Threat “Place The Person Threatened In Reasonable Fear That The Threat Would Be Carried Out”

When reviewing a claim that the information omits an essential element, Washington Courts have held that an information challenged for the first time on appeal is liberally construed in favor of validity. *Kjorsvik*, 117 Wn.2d.at 105. The court applies a two-prong standard of review by first asking whether the necessary facts appear, or can be found by fair construction in the information. *Kjorsvik*, 117 Wn.2d. at 105-106. If so, the court will determine whether the defendant was nonetheless prejudiced by the unartful language used in the information. *Kjorsvik*, 117 Wn.2d at 105-106.

As indicated in section 1 above, the Court of Appeals has previously held that the “true threat” requirement does not need to be included in the charging document. *State v. Allen*, 161 Wn. App 727, 751, 255 P.3d 784 (2011). Furthermore, the necessary facts of defendant’s conduct appear in the information, along with the proper elements of the charge. *See* RCW 9A.46.020(1)(a)(i)(b). The defendant has failed to show how he has been prejudiced by the wording in the information where “true threat” is not an essential element of the crime of harassment. *See State v. Allen*, 161 Wn. App. 727, 255 P.3d 784 (2011); *State v. Atkins*, 156 Wn. App. 799, 236 P.3d 897 (2010).

Here, the information states the following:

That IRVIN LEE GREENE, in the State of Washington, on or about the 18th day of April, 2010, without lawful authority, did unlawfully knowingly threaten Carol Unkur to cause bodily injury immediately or in the future, to that person or to any other person, and by words or conduct place the person threatened in reasonable fear that the threat would be carried out, and that further, the threat was a threat to kill the person threatened or any other person, thereby invoking the provision of RCW 9A.46.020(2)(b) and increasing the classification of the crime to a felony, contrary to RCW 9A.46.020(1)(a)(i)(b) and 9A.46.020(2)(b), a domestic violence incident as defined in RCW 9.94A.535(2)(c), the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010, and against the peace and dignity of the State of Washington.

CP 62-66 (Count VII).

Even if the court were to hold that “true threat” is an essential element of [harassment] the information is sufficient because it includes language that “...and by words or conduct place the person threatened in reasonable fear that the threat would be carried out.” This language necessarily limits the threat to a “true threat” because only a true threat could place a person in reasonable fear that the threat would be carried out. If the threat was not true, but only a joke, etc., the fear could not be reasonable.

- d. Even If The Court Were To Hold That A “True Threat” Is An Essential Element, The Proper Remedy Should Not Be Dismissal Of The Charge Where That Remedy Is Not Constitutionally Mandated.

As indicated above, the Washington Supreme Court has held that charging the document must include all of the essential elements for the crime so that the defendant may have notice of the nature of the charge. *Stave v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991).

It has been held well settled that a charging document satisfies constitutional requirements only if it states all the essential elements of the crime charged, both statutory and nonstatutory. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). *See also State v. Robinson*, 58 Wn. App. 599, 606-07, 794 P.2d 1293 (1990) (holding that where citation failed to include case law element of intent in charge of assault in the fourth degree, the conviction must be reversed and the case dismissed).

Where a charging document is challenged for the first time on review, it will be construed liberally and will be found sufficient if the necessary elements appear in any form, or by fair construction may be found, on the face of the document. *McCarty*, 140 Wn.2d at 425 (citing *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991)). However, if the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot

cure it. *McCarty*, 140 Wn.2d at 425; *State v. Moavenzadeh*, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998).

The remedy for a conviction based on a defective information is dismissal without prejudice to the State to refile the charge. *State v. Vangerpen*, 125 Wn.2d 782, 793, 888 P.2d 1177 (1995). For support of the State's ability to refile the charge, the court in *Vangerpen* quoted the United State's Supreme Court:

“The principle that [the Double Jeopardy Clause] does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence.”

Vangerpen, 125 Wn.2d at 794 (quoting *Burks v. United States*, 437 U.S. 1, 14, 98 S. Ct. 2141, 2149, 57 L. Ed. 2d 1 (1978) (quoting *United States v. Tateo*, 377 U.S. 463, 465, 84 S. Ct. 1587, 1589, 12 L. Ed. 2d 448 (1964)).

The court in *Vangerpen* noted that “[d]ismissal without prejudice has been the consistent remedy imposed for reversible error based on an improper charging document.” *Vangerpen*, 125 Wn.2d at 793 n. 21. However, while that may be the remedy consistently imposed, the remedy of dismissal is not mandated by the constitution. See *United States v. Cotton*, 535 U.S. 625, 633, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) (affirming the conviction where the omission of an element from the indictment was not raised in the trial court and overwhelming evidence

established the element). Indeed, that dismissal is not mandated is also consistent with the federal rules of criminal procedure under which a claim is waived if not raised before trial. *See* CRIMINAL PROCEDURE (2011), § 19.1(d) (citing Federal Rules of Criminal Procedure 7(c), and 12(b)).

The real threat then to the “fairness, integrity and public reputation of judicial proceedings” would be if respondents despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial.”

Cotton, 535 U.S. at 634.

3. THE JURY INSTRUCTIONS FOR HARASSMENT INCLUDED THE ESSENTIAL ELEMENTS OF THE CRIME.

Defendant claimed that jury instruction 28 (to convict) was erroneous and required reversal because it did not include “true threat” as an element of the crime. Brief of Appellant 13.

“The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). *See also* United States Const., Fifth Amend. and Fourteenth Amend. § 1; *State v. Hager*, 171 Wn.2d 151, 159 n. 8, 248 P.3d 512 (2011).

A “to convict” instruction must contain all of the essential elements; the jury should not be required to search the other instructions to see if another element should be added to those listed. *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). A “to convict” instruction which purports to be a complete statement of the law and yet omits an element creates a constitutional error requiring reversal. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

However, if the instruction included all the elements and does not misstate the state’s burden, a trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law. *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A trial court has broad discretion in determining the number and wording of jury instructions. *State v. Dana*, 73 Wn.2d 533, 536, 439 P.2d 403 (1968).

A challenge to a jury instruction may not be raised for the first time on appeal unless the instructional error is of constitutional magnitude. RAP 2.5(a)(3); *State v. Dent*, 123 Wn.2d 467, 478, 869 P.2d 392 (1994). The defendant must identify a constitutional error and show how the error affected the defendant’s rights at trial. *State v. Kirkman*, 159 Wn.2d 918, 926-927, 155 P.3d 125 (2007). It is the showing of actual prejudice that

makes the error “manifest,” allowing appellate review. *Kirkman*, 159 Wn.2d at 927. Jury instructions must clearly set forth the elements of the crime charged. *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

Only those exceptions to instructions that are sufficiently particular to call the court’s attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963). “No error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made.” *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988); *State v. Kroll*, 87 Wn.2d 829, 843, 558 P.2d 173 (1976).

The court instructed the jury that “to convict” the defendant of harassment, as charged in count VII, each of the following elements of the crime must be proven beyond a reasonable doubt:

- (1) That on or about April 18, 2010, the defendant knowingly threatened to kill Carol Unkrur immediately or in the future;
- (2) That the words or conduct of the defendant placed Carol Unkrur 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.

CP 121 (Instruction No. 28). *See* RCW 9A.46.020(1)(a)(i)(b); *See* 11 WASHINGTON PRACTICE, Criminal Pattern Instruction No. 36.07.02 (2011).

The “to convict” instruction follows the statutory language and uses the term “threatened.”

In a separate instruction, the court defined threat as:

Threat means to communicate, directly, or indirectly, the intent to cause physical damage to the property of a person other than the actor.

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 of 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 120 (Instruction No. 26); *see State v. Allen*, 161 Wn. App. 727, 749, 255 P.3d 784 (2011).

The definition of “threat” that was given to the jury included the definition of “true threat” that courts have deemed as sufficient. *See State v. Allen*, 161 Wn. App. 727, 255 P.3d 784 (2011); *Tellez*, 141 Wn. App. 479, 170 P.3d 75. Because “true threat” is not an element of the crime, Courts have held that the “true threat” requirement does not need to be included in the “to convict” instruction. *State v. Allen*, 161 Wn. App. at 751. A separate instruction defining “true threat” protects the defendant’s First Amendment rights. *Allen*, 161 Wn. App. at 752.

In addition, the Supreme Court of Washington has held that challenges to definitional instructions to the jury cannot be raised on the first time on appeal. For example, in *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988), Scott's, co-defendant, Brown, was charged and convicted as an accomplice to burglary. *Scott*, 110 Wn.2d at 683. Brown made no objection at trial to the judge's failure to define "knowledge" in the jury instructions and challenged the issue for the first time on appeal. *Scott*, 110 Wn.2d at 683. Brown argued that this was a constitutional error that could be challenged for the first time on appeal under RAP 2.5(a)(3). *Scott*, 110 Wn.2d at 684. The Court held that Brown's challenge was not an issue of constitutional magnitude. *Scott*, 110 Wn.2d at 687. Brown sought to avoid the consequences of his failure to comply with the procedural requirements by claiming his challenge was a constitutional one. *Scott*, 110 Wn.2d at 686. But, failure to give a definitional instruction is not the same as failure to instruct on an essential element. *Scott*, 110 Wn.2d at 690.

In this case, defendant also seeks to avoid the consequences of his failure to comply with the procedural requirements by attempting to word his challenge as a constitutional one, when it is, at most, a challenge to a definitional instruction. The defendant did not object to the wording of the jury instructions in regard to instruction 28, the crime of harassment, during trial. 20 RP 235-236. The defendant did not preserve the error during trial such that he can challenge the definitional instruction on

appeal. In addition, the definition of “threat” correctly contained the definition as “true threat.”

Therefore, the defendant’s challenge to the definitional instruction is not properly preserved for appeal.

Additionally, as similarly argued in section 2.c above, as to the second element, the instruction here required the jury to find beyond a reasonable doubt, “That the words or conduct of the defendant placed Carol Unkur in reasonable fear that the threat to kill would be carried out.” CP 121 (Instruction No. 28). This language satisfied the “true threat” requirement even if it did not explicitly use the “true threat” language. This is because Unkur’s fear could not be reasonable if the threat was not a true threat.

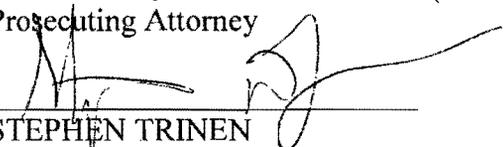
The “to convict” instructions listed every essential element where “true threat” is not an essential element of the crime. This is particularly so where the definition of “threat” was consistent with the meaning of “true threat.” The instructions given properly required the State to prove each essential element of harassment beyond a reasonable doubt. This is especially so where the “to convict” instruction also required the jury to find that Greene’s threat had to put Unkur in reasonable fear, which could only be accomplished by a true threat.

D. CONCLUSION.

For the reasons argued above, the State respectfully requests that the Court affirm his convictions.

DATED: May 21, 2012

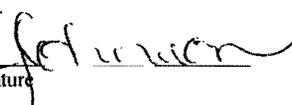
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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/21/12 
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