

No. 43556-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MARK ANTHONY DAVIS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 11-1-02049-7
The Honorable Vicki Hogan, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The charging document and the “to convict” instruction for the crime of harassment were constitutionally deficient because they both failed to include the essential element that the threat was a “true threat.”
2. The trial court exceeded its statutory sentencing authority when it imposed a term of community custody.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Is the fact that a threat must be a “true threat” an essential element of the crime of harassment? (Assignment of Error 1)
2. Where due process requires the essential elements of a criminal charge to be pled in the charging document and included in the “to convict” instruction, is the fact that a threat must be a “true threat” an essential element of the crime of harassment which must be pled in the charging document and included in the “to convict” instruction? (Assignment of Error 1)
3. Did the trial court exceed its statutory sentencing authority when it imposed a term of community custody, where the crime of harassment is not included in the list of offenses for

which a term of community custody is required or allowed?

(Assignment of Error 2)

III. STATEMENT OF THE CASE

At about four in the morning on May 13, 2011, Tacoma Police Officer Corey Peyton was driving his marked police car and patrolling the area of South 14th Street and South M Street, an area known for drug dealing and prostitution. (RP 23-24, 26) Officer Peyton saw Mark Anthony Davis, who he recognized from prior contacts, standing at the corner. (RP 25, 38) He observed Davis attempt to flag down a passing vehicle, and suspected that Davis was attempting to conduct a narcotics transaction. (RP 25, 28)

Officer Peyton initiated contact with Davis and, after further investigation, placed Davis under arrest. (RP 28) Davis was placed in the rear of the patrol vehicle, and Officer Peyton began driving to the Pierce County Jail. (RP 28, 29)

According to Officer Peyton, during the four-minute car ride, Davis began “rambling,” and called Officer Peyton names and made several threatening comments such as:

- [I]f you weren't in uniform I would have just kicked your f***ing ass.

- Take that pig suit off and we'll see who gets their a** kicked. I am from around this area. I don't f**k around, nigga.
- That's why all you motherf***ing peckerwood cops be getting shot and killed all the time, because they be acting like you, you f***ing b**ch.
- I from this hood around here, and now you just became a marked mother f***er. Next time I see you, you are going to be just like them other pigs. You're going to get shot.

(CP 31-34) Officer Peyton testified that he felt concern about the comments because they involved direct threats on his life and because Peyton and his family lived in that area. (RP 34-35, 42)

The State charged Davis by Information with one count of Felony Harassment (RCW 9A.46.020), committed against a law enforcement officer (RCW 9.94A.535). (CP 1) A jury convicted Davis as charged. (CP 42, 44; RP 80-81) The trial court imposed a standard range sentence of 51 months, to be followed by 12 months of community custody. (RP 102; CP 265, 268, 269) This appeal timely follows. (CP 279)

IV. ARGUMENT & AUTHORITIES

A. THE CHARGING DOCUMENT AND THE “TO CONVICT” INSTRUCTION FOR THE CRIME OF HARASSMENT WERE CONSTITUTIONALLY DEFICIENT BECAUSE THEY BOTH FAILED TO INCLUDE THE ESSENTIAL ELEMENT THAT THE THREAT WAS A “TRUE THREAT.”

1. *All Essential Elements of the Crime of Harassment Must Be Pleaded in the Charging Document and Included in the “To Convict” Instruction*

Due process requires that the essential elements of a charged offense be included in the charging document, regardless of whether they are statutory or non-statutory. U.S. Const. amd. VI; Wash. Const. art. I, § 22; State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The purpose of the rule is to give the accused notice of the nature of the allegations so that a defense may be properly prepared. Goodman, 150 Wn.2d at 784; State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991).

Charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before trial or before a guilty verdict. Kjorsvik, 117 Wn.2d 102. The reviewing court determines whether the necessary facts appear in the information in any form, and if not, whether the defendant was actually prejudiced by the lack of notice. Goodman,

150 Wn.2d at 787-88; Kjorsvik, 117 Wn.2d at 105-06.

The first prong looks to the face of the charging document and requires at least some language giving notice of the allegedly missing elements. The second prong may look beyond the face of the information to determine if the accused actually received notice of the charges he or she must have been prepared to defend; it is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges.

State v. Courneya, 132 Wn. App. 347, 351, 131 P.3d 343 (2006) (citations omitted). “If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and reviewing courts reverse without reaching the question of prejudice.” Courneya, 132 Wn. App. at 351.

Due process also requires that the State prove every essential element of a charged offense. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amd. XIV. Thus, jury instructions must “properly inform the jury of the applicable law.” State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). It is reversible error to instruct the jury in a manner that relieves the State of its burden of proving every essential element of a criminal offense beyond a reasonable doubt.

State v. Pirtle, 127 Wn. 2d 628, 656, 904 P.2d 245 (1995).

A challenge to a jury instruction on the grounds that it relieved the State of its burden of proof may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). The court reviews alleged errors of law in jury instructions de novo. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

2. It is an Essential Element of the Crime of Harassment That the Threat be a "True Threat"

A person is guilty of harassment if "the person knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person . . . and [t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1). Harassment is generally a misdemeanor, but is elevated to a felony if the threat involves a threat to kill. RCW 9A.46.020(2)(b)(ii).¹

In State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004), the Supreme Court considered a First Amendment challenge to RCW 9A.46.020, the felony harassment statute. The Court noted that

¹ The full text of the harassment statute, RCW 9A.46.020, is attached in Appendix A.

because the statute “criminalizes pure speech,” it “must be interpreted with the commandments of the First Amendment clearly in mind.” 151 Wn.2d at 41 (quoting State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001) and Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)).

The Kilburn Court held that in order to “avoid unconstitutional infringement of protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only ‘true threats.’” 151 Wn.2d at 43. The Court further explained:

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 take the life of another person.

151 Wn.2d at 43. The communication “must be a serious threat, and not just idle talk, joking or puffery.” 151 Wn.2d at 46. Whether a true threat was made “is determined under an objective standard that focuses on the speaker.” 151 Wn.2d at 44.

The Court considered the issue again in State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006). In that case, the Court reiterated that a statute proscribing threats must be limited to “true threats” to avoid constitutional overbreadth prohibitions, and further

found that failure to instruct the jury on the definition of a “true threat” was fatal to the conviction. 156 Wn.2d at 363-65.

In State v. Tellez, Division 1 considered whether, in the context of a prosecution for telephone harassment, the requirement that the threat was a “true threat” had to be included in the information or the “to convict” instruction. 141 Wn. App. 479, 482-85, 170 P.3d 75 (2007). Johnston notwithstanding, the Tellez court concluded that the “true threat” requirement was a mere definitional component of the harassment statute, and not an essential element. The court reasoned that Johnston did not expressly rule that “a true threat is an essential element of any threatening-language crime.” 141 Wn. App. at 483.

The decision in Tellez was incorrect and should not be followed by this Court.² In Johnston, the Court held that “the jury must be instructed that a *conviction* under [the statute proscribing threats to bomb or injure property] requires a true threat *and* must be instructed on the meaning of a true threat.” 156 Wn.2d at 366 (emphasis added). The language of the Court’s holding intimates

² Division 1 recently affirmed its Tellez decision in State v. Allen, 161 Wn. App. 727, 755-56, 255 P.3d 784 (2011). However, our State Supreme Court has granted review of Division 1’s opinion in Allen. See State v. Allen, 172 Wn.2d 1014, 262 P.3d 63 (2011).

that the Court considered the “true threat” requirement to be an element of any harassment charge.

The conclusion that the Johnston Court considered the “true threat” requirement to be an element is consistent, as well, with how the Washington courts treat mere definitional terms. See e.g., State v. Lorenz, 152 Wn.2d 22, 33-35, 93 P.3d 133 (2004) (observing that the failure to instruct on definitional terms is not an error that requires a conviction to be reversed). By requiring an instruction on the “true threat” requirement, the Johnston Court implicitly distinguished “true threats” from purely definitional terms and signaled its view that whether a threat was a “true threat” is an essential element of a harassment charge.

Furthermore, both the Federal courts and at least one other state Supreme Court have expressly held that whether a threat is a “true threat” is an element of a harassment crime. For example, in State v. Robert T., 7146 N.W.2d 564 (Wis. 2008), the Wisconsin Supreme Court construed its own “bomb scares” statute. That statute provided:

Whoever intentionally conveys or causes to be conveyed any threat or false information, knowing such to be false, concerning an attempt or alleged attempt being made or to be made to destroy any property by the means of explosives is guilty of a

Class I felony.

Wis. Stat. § 947.015 (2003-04).

Discussing its own cases interpreting the “true threat” requirement, the court concluded: “we are satisfied that upon reading into the elements of the crime a requirement that it must be a ‘true threat’ renders Wis. Stat. § 947.015 constitutional.” Robert T., 7146 N.W.2d at 568. The court further observed: “Indeed, this is exactly what the supreme court of the state of Washington did with a similar statute prohibiting threats.” 7146 N.W.2d at 568 (citing Johnston).

The Ninth Circuit has also held that a “true threat” requirement is an essential element of a harassment offense. See United States v. Cassel, 408 F.3d 622 (9th Cir. 2005) (construing 18 U.S.C. § 1860, which proscribes interfering with a federal land sale). The Cassel Court conducted a lengthy analysis of the Supreme Court’s decision in Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), and concluded, based on this assessment, that “intent to threaten is a constitutionally necessary element of a statute punishing threats.” Cassel, 408 F.3d at 630-34. Applying this rule, in an appeal following a conviction for making interstate threats to injure in violation of 18 U.S.C. § 875(c),

the Court noted that “specific intent to threaten is an essential element of a § 875(c) conviction[.]” United States v. Sutcliffe, 505 F.3d 944, 962 (9th Cir. 2007).

The Seventh Circuit reached a similar conclusion in United States v. Fuller, 387 F.3d 643 (7th Cir. 2004). While noting a circuit split on the question of whether a “true threat” must include a subjective component, the Court held: “the only two essential elements for [a prosecution under 18 U.S.C. § 871] are the existence of a true threat to the President and that the threat was made knowingly and willfully.” 387 U.S. at 647; accord. United States v. Lockhart, 382 F.3d 447, 450 (4th Cir. 2004) (“The statute governing threats against the President . . . has been interpreted to include two major elements: (1) the proof of a ‘true threat’ and (2) that the threat is made ‘knowingly and willfully’”).

Because the Washington Supreme Court has not explicitly stated that the “true threat” requirement is an essential element, the Tellez court concluded that a “true threat” is a mere definitional term that need not be included in the charging document or the “to convict” instruction. 141 Wn. App. at 482-84. But the federal and state decision cited above establish that Division 1’s conclusion is incorrect. Accordingly, the Tellez analysis and holding should be

rejected, and this Court should hold that the existence of a “true threat” is an essential element of the crime of harassment.³

3. *The Charging Document and “To Convict” Instruction for the Crime of Harassment were Deficient in this Case*

In this case, the information charging Davis with harassment alleged the following:

That MARK ANTHONY DAVIS, in the State of Washington, on or about the 13th day of May, 2011, without lawful authority, did unlawfully, knowingly threaten Officer Cory Peyton of the Tacoma Police Department to cause bodily injury, immediately or in the future, to that person or to any other person, and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out, and that further, the treat was a threat to kill the person threatened or any other person[.]

(CP 1)

The “to convict” instruction required the jury to find the following elements in order to convict Davis of the crime of felony harassment:

- (1) That on or about May 13, 2011, the defendant knowingly threatened to kill Cory Peyton immediately or in the future.
- (2) That the words or conduct of the defendant placed Cory Peyton 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

³ See e.g. *State v. Schmitt*, 124 Wn. App. 662, 669 fn. 11, 102 P.3d 856 (2004) (“We need not follow the decisions of other divisions of this court.”).

of Washington.

(CP 32; Instruction No. 11) In a separate instruction, the court defined the term threat:

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; or to do any other act that is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships.

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.

(CP 29; Instruction No. 8)

The information did not give proper notice to Davis and the "to convict" instruction did not properly inform the jury that a "true threat" is a constitutionally required essential element of the crime of harassment.

The omission of this essential element in the information is not cured by its inclusion as a definition in the jury instructions. For example, in Courneya, the court found the State's omission of the implied element of knowledge from an information charging hit-and-run was fatal to the ensuing conviction, even though two jury

instructions explained that knowledge was an essential element of the charged crime. 132 Wn. App. at 353-54; see also Vangerpen, 125 Wn.2d at 788 (holding that proper jury instructions cannot cure a defective information). The Courneya court reversed the conviction with instructions to dismiss the information. 132 Wn.2d at 354.

Furthermore, the instructional error is harmful because if a constitutionally required element is treated as a “definition,” then the State’s burden of proof is diluted, and this Court cannot be confident that the jury’s verdict does not punish protected speech. And in this case specifically, the Court cannot be confident that the jury found that Davis’ statements were anything more than hyperbole or puffery.

B. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY WHEN IT IMPOSED A TERM OF COMMUNITY CUSTODY BECAUSE THE CRIME OF HARASSMENT IS NOT INCLUDED IN THE LIST OF OFFENSES FOR WHICH A TERM OF COMMUNITY CUSTODY IS REQUIRED OR ALLOWED.

The trial court sentenced Davis to 51 months of confinement and 12 months of community custody. (CP 268, 269; RP 103) However, community custody terms may be imposed only under certain specific circumstances, none of which apply in this case.

When offenders are sentenced to prison for certain listed

offenses, the court must also impose a term of community custody. RCW 9.94A.710(1)-(3).⁴ The mandatory terms are: 36 months for sex offenses (other than those subject to indeterminate sentences) and serious violent offenses; 18 months for other violent offenses; and 12 months for crimes against persons, drug offenses, and unlawful possession of firearms by members of criminal street gangs. RCW 9.94A.710(1)-(3). The crime of felony harassment is not included in any of these categories. See RCW 9.94A.710(1)-(3); RCW 9.94A.030(45) (defining serious violent offenses); RCW 9.94A.030(54) (defining violent offenses); RCW 9.94A.411(2) (defining crimes against persons).

The other circumstances where a trial court must impose a term of community custody, such as: when an offender receives a sentence of one year or less; when a sentence is imposed under one of the various sentencing alternatives; or when a sex offender receives an indeterminate sentence, also do not apply in this case or to Davis' offense. See RCW 9.94A.710(4)-(8).

A court has no authority to impose community custody under any other circumstances. 13B WASH. PRAC., CRIMINAL LAW § 3607

⁴ The full text of the community custody statute, RCW 9.94A.710, is attached in Appendix B.

(2011-12) (citing In re Sentences of Jones, 129 Wn. App. 626, 120 P.3d 84 (2005). And a trial court may impose a sentence only as authorized by statute. See In re Pers. Res. of Tobin, 165 Wn.2d 172, 175, 196 P.3d 670 (2008). Thus, the imposition of a term of community custody in this case was improper because the trial court exceeded its statutory sentencing authority. The community custody portion of Davis' Judgment and Sentence must be stricken.

V. CONCLUSION

Because the information and "to convict" instruction for harassment omitted the essential "true threat" element, Davis' conviction should be reversed and the harassment charge dismissed. Alternatively, Davis' case should be remanded for resentencing because the trial court did not have authority to impose a term of community custody.

DATED: September 24, 2012



STEPHANIE C. CUNNINGHAM. WSB #26436
Attorney for Mark A. Davis

CERTIFICATE OF MAILING

I certify that on 09/24/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Mark A. Davis, DOC# 964450, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, WA 99001-2049.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX A
RCW 9A.46.020

RCW 9A.46.020. Definition—Penalties

(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: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a nocontact or no-harassment order; (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; (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.

(3) Any criminal justice participant who is a target for threats or harassment prohibited under subsection (2)(b)(iii) or (iv) of this section, and any family members residing with him or her, shall be eligible for the address confidentiality program created under RCW 40.24.030.

(4) For purposes of this section, a criminal justice participant includes any (a) federal, state, or local law enforcement agency employee; (b) federal, state, or local prosecuting attorney or deputy prosecuting attorney; (c) staff member of any adult corrections institution or local adult detention facility; (d) staff member of any juvenile corrections institution or local juvenile detention facility; (e) community corrections officer, probation, or parole officer; (f) member of the indeterminate sentence review board; (g) advocate from a crime victim/witness program; or (h) defense attorney.

(5) The penalties provided in this section for harassment do not preclude the victim from seeking any other remedy otherwise available under law.

APPENDIX B
RCW 9.94A.701

RCW 9.94A.701. Community custody--Offenders sentenced to the custody of the department

(1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:

- (a) A sex offense not sentenced under RCW 9.94A.507; or
- (b) A serious violent offense.

(2) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

(3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:

- (a) Any crime against persons under RCW 9.94A.411(2);
- (b) An offense involving the unlawful possession of a firearm under RCW 9.41.040, where the offender is a criminal street gang member or associate;
- (c) A felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000; or
- (d) A felony violation of RCW 9A.44.132(1) (failure to register) that is the offender's first violation for a felony failure to register.

(4) If an offender is sentenced under the drug offender sentencing alternative, the court shall impose community custody as provided in RCW 9.94A.660.

(5) If an offender is sentenced under the special sex offender sentencing alternative, the court shall impose community custody as provided in RCW 9.94A.670.

(6) If an offender is sentenced to a work ethic camp, the court shall impose community custody as provided in RCW 9.94A.690.

(7) If an offender is sentenced under the parenting sentencing alternative, the court shall impose a term of community custody as provided in RCW 9.94A.655.

(8) If a sex offender is sentenced as a nonpersistent offender pursuant to RCW 9.94A.507, the court shall impose community custody as provided in that section.

(9) The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

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