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Court of Appeals
Division II
State of Washington
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No. 51814-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARSHALL JAY LEWIS

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The State has failed to show beyond a reasonable doubt that the error in failing to instruct on "true threat" was a harmless error.

The State concedes as it should that the trial court erred in failing to instruct the jury on "true threat." Brief of Respondent at 13-14. The State's sole argument is the error was harmless. The State's argument consists of "there was a lot of evidence," but fails to show why this evidence is different from the volume of evidence in *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006), or *State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010).

The State is required to prove that the error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In *Schaler*, there was evidence that Mr. Schaler said he wanted to kill his neighbors, described planning to do so, and said he dreamt about the event. But he never explicitly said that he would do so and his behavior was at times erratic, and he was often contradictory. The Supreme Court noted that Mr. Schaler's utterances did not unequivocally lead to a finding of a true threat because they were also consistent with an impression that he was mentally unstable and lashing out somewhat incoherently at those

around him, thus the State failed to prove beyond a reasonable doubt the error was harmless. *Schaler*, 169 Wn.2d at 289-90.

Similarly, in *Johnston*, there was evidence defendant and another were extremely intoxicated and had been observed drinking alcoholic drinks on an airplane that they had illegally brought on board. 156 Wn.2d at 357-58. The men were met at the airport gate and Mr. Johnston was arrested for outstanding warrants. *Id.* Upset over his arrest, Mr. Johnston made several threats to "blow this place up," claiming "all he needed was a Ryder truck and some nitro diesel fuel." *Id.* the Supreme Court suggested that a drunken defendant's outbursts might not have been true threats. *Johnston*, 156 Wn.2d at 364-65.

In both of these cases, there was a substantial amount of evidence, but the Supreme Court found the State failed to prove the error was harmless, instead finding the evidence essentially equivocal on whether they constituted "true threats." The State here fails to distinguish either *Schaler* or *Johnston.*

Further, the State's reliance on *State v. Allen*, is not helpful. In *Allen*, the defendant argued that "true threat" was an element of felony harassment. 176 Wn.2d 611, 626-27, 294 679 (2013). This Court determined "true threat" was not an essential element, thus the trial

court did not err in inclusing "true threat" in the Information or in the to-convict instruction. *Id.* at 629-30. The Court refused to address the First Amendment argument because it was raised for the first time on appeal and did not constitute a manifest error. *Id.* at 630.

Here, Mr. Lewis did not argue "true threat" was an element as in *Allen*, rather that the failure to instruct on "true threat" infringed his First Amendment rights, the issue not raeched in *Allen*.

Mr. Lewis admitted being extremely intoxicated when he made his text and phone threats. As in *Schaler*, the jury could have concluded Mr. Lewis's threats "were a cry for help from a mentally troubled man, directed towards mental health professionals who could hlp him. 169 Wn.2d at 289-90. The State has failed to prove beyond a reasonable doubt the error in failing to instruct on "true threat" was harmless. This Court should reverse Mr. Lewis's cybertstalking and telephone harassment convictions.

2. The prosecutor had a duty to disclose the fire investigator's report.

The State begins its argument by claiming that since it did not have possession of the report, they had no duty to disclose the report. Brief of Respondent at 16-18. The State is in error as they take a far too restrictive veiew of its obligation.

The prosecutor's duty of disclosure is limited to information within the knowledge, possession or control of the prosecutor and staff. CrR 4.7(a)(4). The duty to preserve evidence applies not only to the prosecutor, but also to agents acting under the prosecutor's authority, including the police. *State v. Vaster,* 99 Wn.2d 44, 53, 659 P.2d 528 (1983); *City of Seattle v. Fettig,* 10 Wn.App. 773, 775, 519 P.2d 1002 (1974). The prosecutor has a duty to learn of any favorable evidence known to others acting on the Government's behalf, including the police. *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). *See also State v. Salgado-Mendoza*, 189 Wn.2d 420, 430, 403 P.3d 45 (2017) ("discovery rules require the prosecutor to obtain disclosure of discoverable information in the possession of others.").

Here, Captain Barnes was working as a fire investigator for the Clallam County Fire Department and working closely with law enforcement:

> Q And during the course of these investigations, how often do you collaborate with law enforcement?
>
> A Not -- on scene we collaborate. If we see something we believe is criminal, we call the jurisdiction, local law enforcement or the county level to take the criminal investigation, so as far as collaboration, we collaborate

> on the scene. There hasn't been a lot of collaboration after the fact.

. . .

> Q And once those law enforcement officers arrived what was your role at the scene?
>
> A My role switched. This became a scene where we believed it was -- we contacted law enforcement to show up, because we believed there was a criminal, we had a criminal scene at that time.
>
> Q And so what happened with your role at that point?
>
> A My role switched into a fire investigator role.
>
> Q And what did you do generally in that fire investigation role, at that point?
>
> A At that point, our efforts are to determine the origin and the cause of the fire.

RP 544, 559-60.

Once Captain Barnes began his role as fire investigator and working closely with law enforcement, he was working under the prosecutor's authority and the State had an obligation to disclose the report. *Kyles v. Whitely*, 514 U.S. at 437; *Vaster*, 99 Wn.2d at 53.

3. The State failed to authenticate the purported Verizon phone records.

When considering whether the State provided sufficient evidence to authenticate the purported Verizon cellphone records, it is important to remember that Mr. Ninete, the Verizon employee called

to testify about the records, was not the individual who provided the records. RP 659. The records were provided by an unknown Verizon employee pursuant to a search warrant. *Id.*

The cellphone records are generic. They are no different than any other Excel spreadsheet, containing no identifying information indicating they are from Verizon. While admittedly the State's burden is low, there was not sufficient proof provided for a reasonable juror to find authenticity or identification of these ubiquitous records as Verizon records. *State v. Danielson*, 37 Wn.App. 469, 471, 681 P.2d 260 (1984).

4. The $1000 in discretionary Legal Financial Obligations should be stricken.

In response to Mr. Lewis's argument that he is indigent, therefore, under RCW 10.01.160 it was categorically impermissible to impose discretionary costs, the State claims he has the ability the ability to pay. Brief of Respondent at 37-39. The discretionary LFOs should be stricken because the trial court's individualized inquiry into Mr. Lewis's ability to pay was deficient and the State has not established Mr. Lewis is not indigent.

Initially, the State concedes as it must that Mr. Lewis was deemed to be indigent at trial and indigent for the purposes of appeal. *Id.*

But the trial court failed to engage in any inquiry into Mr. Lewis's ability to pay. Prior to imposing discretionary LFOs, the trial court must engage in an individualized inquiry into the defendant's ability to pay:

> Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

This Court reviews the trial court's inquiry *de novo. State v. Ramirez*, 191 Wn.2d 732, 741, 426 P.3d 714 (2018). The failure of the trial court to conduct an individualized inquiry is an abuse of discretion *per se*:

> If the trial court fails to conduct an individualized inquiry into the defendant's financial circumstances, as RCW 10.01.160(3) requires, and nonetheless imposes discretionary LFOs on the defendant, the trial court has per se abused its discretionary power. Stated differently,

> the court's exercise of discretion is unreasonable when it is premised on a legal error.

Id.

Here the trial court made no inquiry into Mr. Lewis's ability to pay:

> One thing I do have to ask you, I usually go into a *Blazina* analysis and talk about what you'd be able to pay in regard to financial obligations, but your counsel indicated that you have an extensive occupational history, that you're able to work as a chef and that you work 60 hours a week, so to me that means that you would be able to pay legal financial obligations. It's indicated in your own response to the prosecutor's recommendations for sentence. So, clearly I can find that you have the ability to pay legal financial obligations.

RP 992. The court failed "[a]s part of this inquiry, . . . to consider 'important factors,' such as incarceration and the defendant's other debts, when determining" Mr. Lewis's ability to pay. *Ramirez*, 191 Wn.2d at 742.

In light of the court's failure to conduct the on the record individualized inquiry into Mr. Lewis's ability to pay the discretionary LFOs, this Court must either strike the $1000 in discretionary LFOs or reverse and remand for resentencing with instructions to the trial court to strike the LFOs. *Ramirez*, 191 Wn.2d at 750.

B. CONCLUSION

For the reasons stated, Mr. Lewis asks this Court to reverse his convictions. Alternatively, he asks this Court to strike the discretionary LFOs or remand for resentencing so the trial court can strike the LFOs.

DATED this 5th day of April 2019.

Respectfully submitted,

s/Thomas M. Kummerow

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	)	
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	)	
Appellant.	)	

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