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No. 54163-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kalob Hackett,

Appellant.

Cowlitz County Superior Court Cause No. 19-1-00354-2

The Honorable Judge Patricia M. Fassett

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Hackett's conviction for felony harassment violated his Sixth and Fourteenth Amendment right to notice of the charges against him.
2. The felony harassment conviction violated Mr. Hackett's state constitutional right to notice under Wash. Const. art. I, §22.
3. The Information was deficient and failed to charge a crime because it omitted an essential element of felony harassment.

ISSUE 1: A criminal charging document must set forth all essential elements of an offense. Was the Information deficient because it did not allege that a reasonable officer would fear that Mr. Hackett would carry out his "threat"?

4. Mr. Hackett's conviction for felony harassment was entered in violation of his Fourteenth Amendment right to due process.
5. The court's instructions relieved the State of its burden to prove the essential elements of felony harassment.
6. The court did not instruct jurors to acquit Mr. Hackett if it was apparent that he lacked the present and future ability to carry out any alleged threat.

ISSUE 2: It is reversible error to instruct jurors in a manner that relieves the State of its burden to prove the essential elements of an offense. Did the court's instructions relieve the State of its burden to prove Mr. Hackett's apparent present and future ability to carry out any alleged threat?

7. Mr. Hackett's conviction for felony harassment violated his Fourteenth Amendment right to due process because the evidence was insufficient for conviction.
8. The State failed to prove beyond a reasonable doubt that a reasonable officer would have been frightened that Mr. Hackett would carry out any alleged threat contained in his vague drunken statements.
9. The State failed to prove beyond a reasonable doubt that Mr. Hackett's vague drunken statements amounted to a "true threat" under all the circumstances.
10. The State failed to prove that Mr. Hackett had the apparent present and future ability to carry out any alleged threat.

ISSUE 3: Felony harassment requires proof that the defendant's words and conduct would frighten a reasonable officer into believing that the defendant would carry out a threat to inflict bodily injury. Was the evidence insufficient to prove that Mr. Hackett's words and conduct would frighten a reasonable officer?

ISSUE 4: A conviction for felony harassment requires proof that the defendant made a "true threat." Was the evidence insufficient to prove that Mr. Hackett's vague drunken statements about visiting the trooper's home were anything more than a hyperbolic expression of frustration?

ISSUE 5: A person may not be convicted of felony harassment based on threatening words if it is apparent that the person does not have the present and future ability to carry out the threat. Did the State fail to prove that Mr. Hackett's allegedly threatening words met this standard?

11. The sentencing court improperly imposed discretionary legal financial obligations (LFOs) without inquiring into Mr. Hackett's ability to pay.
12. The court failed to make a finding regarding Mr. Hackett's present or future ability to pay discretionary LFOs.

ISSUE 6: A court may not impose discretionary LFOs absent a finding based on adequate inquiry that the offender has the ability to pay. Did the trial court err by imposing discretionary LFOs without determining Mr. Hackett's ability to pay?

INTRODUCTION AND SUMMARY OF ARGUMENT

The State charged Kalob Hackett with felony harassment based on statements he made to a police officer. However, the Information failed to allege that Mr. Hackett's words and conduct would have frightened a reasonable officer into believing that he would carry out any alleged threat. Because the charging document was constitutionally insufficient, Mr. Hackett's conviction must be reversed.

A person may not be convicted of felony harassment based on threatening words if it is apparent to the officer that the defendant lacked the present and future ability to carry out the verbal threat. Here, the court failed to instruct jurors on this requirement, which requires reversal of the conviction.

Conviction for felony harassment requires proof that the defendant made a "true threat" sufficient to frighten a reasonable officer into believing that the accused person would carry out a threat to cause bodily injury. In addition, a person may not be convicted for threatening words if it is apparent to the officer that the defendant lacked the present and future ability to carry out the threat. In this case, Mr. Hackett was handcuffed and in custody. The officer restrained him in the back of a police car and later at the police station. He was too intoxicated to drive. He told the officer that he would see him around town, come to his house, and give him a

hug. He also told the officer that he would never threaten him, and made a number of insulting statements, including a claim about having sex with the officer's mother.

Under these circumstances, the evidence was insufficient for conviction. Mr. Hackett did not make a "true threat" that would have frightened a reasonable officer into believing that he would carry out a threat to inflict bodily injury. Furthermore, it was apparent that Mr. Hackett lacked the present and future ability to carry out any alleged threat. The State failed to meet its burden of proving the elements of felony harassment, requiring reversal.

At sentencing, the court did not inquire into Mr. Hackett's finances. Nor did the court make a finding as to his ability to pay discretionary Legal Financial Obligations (LFOs). Despite this, the sentencing court ordered Mr. Hackett to pay discretionary LFOs. If Mr. Hackett's conviction is not reversed, the Court of Appeals must vacate the financial penalties and remand the case for a proper inquiry into Mr. Hackett's financial situation.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In March of 2019, Kalob Hackett had been drinking. RP 68.

Trooper Macomber pulled him over and noticed that he had watery eyes, slurred speech and he smelled strongly of alcohol. RP 66-68. Mr. Hackett eventually admitted drinking, which the field sobriety tests confirmed. RP 68-75. Macomber arrested Mr. Hackett for driving under the influence. RP 76.

Once arrested, Mr. Hackett was a belligerent and vulgar drunk. RP 77, 93, 96. While cuffed in the back of the police car, he called the officer a “pig” and a child molester. He kept up a hostile stream of invective for the entire interaction with the officer. RP 77, 80, 84-87. Mr. Hackett did not ever resist the officer physically, and he complied with commands. RP 55, 61-87, 92.

At one point, Mr. Hackett said that he was sure the trooper lived in the area and that he would find out. RP 86. Trooper Macomber asked if he was being threatened, and Mr. Hackett said, “I would never threaten you.” RP 86. At another point, Mr. Hackett told the officer that someone may pay him a visit. RP 87-88. When asked why, Mr. Hackett said he would give the officer a hug. RP 88.

The state charged Mr. Hackett with harassment, driving while intoxicated, driving while license suspected and violation of ignition

interlock requirement. CP 1-2. The charging document for felony

harassment of a criminal justice participant defined the crime as follows:

knowingly did threaten to cause bodily injury immediately or in the future to Trooper Nicholas Macomber, and the words or conduct did place Trooper Nicholas Macomber in reasonable fear that the threat would be carried out...

CP 1.

At trial, Mr. Hackett only contested the harassment. RP 135. The court's instructions did not include instruction that the words or conduct do not amount to felony harassment "if it is apparent to the [officer] that the person does not have the present and future ability to carry out the threat." RCW 9A.46.020(2)(b). The jury convicted on all four counts.¹ CP 34.

At sentencing, the trial court did not make any oral or written findings about Mr. Hackett's ability to pay legal financial obligations. RP 162-166. Even so, the court issued fines totaling \$2,295.50. CP 42. On the same day that the court issued these fines, the court also in a different order made a finding of indigency. CP 34, 51.

Mr. Hackett timely appealed. CP 48.

¹ This appeal only challenges the harassment conviction.

ARGUMENT

I. THE CHARGING DOCUMENT WAS CONSTITUTIONALLY DEFICIENT.

As charged in this case, felony harassment requires proof that the accused person's threat to a law enforcement created fear that a reasonable officer would experience under all the circumstances. Here, the charging document did not allege this essential element. Because the Information failed to provide notice and did not charge a crime, Mr. Hackett's conviction must be reversed, and the charge dismissed without prejudice.

A. The Information omitted an essential element of felony harassment.

The state and federal constitutions require that charging documents include all essential elements of each charged crime. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. art. I, §22; *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). Essential elements are those facts that must be proved beyond a reasonable doubt to obtain a conviction. *Id.*

The reviewing court must determine if the necessary facts appear or can be found by fair construction in the charging document. *Zillyette*, 178 Wn.2d at 162. If the Information omits an essential element, prejudice is presumed. *Id.* at 162-163.

In this case, the charging document failed to allege the essential elements required for conviction. CP 1. Prejudice is presumed, and the conviction must be reversed. *Id.*

To obtain a conviction for felony harassment, the State must prove that the accused person threatened a law enforcement officer² with bodily harm and placed the officer in fear that the threat would be carried out. RCW 9A.46.020(1), (2)(b). The State must also prove that the officer's fear was one "that a reasonable [officer] would have under all the circumstances." RCW 9A.46.020(2)(b). This requirement distinguishes harassment of an officer from harassment of others; it is one component of the evidence required to elevate the charge to a felony. RCW 9A.46.020(2)(a).

The Information in this case did not include this essential element. CP 1. It did not allege that the officer's fear was one that a reasonable officer would experience. CP 1. Instead, it alleged only that the officer was placed "in reasonable fear." CP 1. This is the language applicable to harassment charged as a gross misdemeanor.

Even a fair construction of the charging language does not include the elements required for conviction. *Zillyette*, 178 Wn.2d at 162.

² The statute uses the phrase "criminal justice participant," which is defined to include employees of law enforcement agencies. RCW 9A.46.020(4).

Accordingly, the Information failed to charge a crime and did not provide the notice required by the constitution. *Id.* Mr. Hackett's harassment conviction must be reversed, and the charge dismissed without prejudice. *Id.*, at 163.

B. The Court of Appeals should review this manifest error *de novo*.

A challenge to the sufficiency of a charging document may be raised for the first time on review. *Id.*, at 161; *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991); RAP 2.5(a)(3). Such challenges are reviewed *de novo*. *State v. Pittman*, 185 Wn.App. 614, 619, 341 P.3d 1024 (2015).

II. THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ELEMENTS OF FELONY HARASSMENT.

Threatening words do not amount to harassment if it is apparent that the accused person does not have the present and future ability to carry out the threat. The court did not instruct jurors on this element. Because the instructions were constitutionally insufficient, Mr. Hackett's felony harassment conviction must be reversed.

A. The court did not instruct jurors that a person must be acquitted of felony harassment of an officer if it is apparent that the accused lacks the present and future ability to carry out the threat.

Due process requires courts to instruct jurors on every element of an offense. U.S. Const. Amend. XIV; *State v. Byrd*, 125 Wn.2d 707, 714,

887 P.2d 396 (1995). It is reversible error to instruct jurors in a manner that relieves the State of its burden to prove the essential elements of the charged crime. *Id.* Any fact³ that increases the penalty for an offense is an element of that offense which must be proved to the jury beyond a reasonable doubt. U.S. Const. Amend. VI and XIV; *State v. Allen*, 192 Wn.2d 526, 534, 431 P.3d 117 (2018); *State v. Joseph*, 3 Wn.App.2d 365, 416 P.3d 738 (2018), *review denied*, 191 Wn.2d 1022, 428 P.3d 1176 (2018).

Jury instructions must make the relevant legal standard “manifestly apparent to the average juror.” *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (internal quotation marks and citations omitted). To determine whether an instruction is misleading, courts look at “the way a reasonable juror *could have* interpreted the instruction.” *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997) (emphasis added) (citing *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)).

Threatening words directed at a law enforcement officer do not amount to felony harassment “if it is apparent to the [officer] that the person does not have the present and future ability to carry out the threat.” RCW 9A.46.020(2)(b). The State must prove this element to elevate a

³ Other than the fact of a prior conviction. *Allen*, 192 Wn.2d at 534.

charge from simple harassment to felony harassment. RCW 9A.46.020(2)(b).

The court's instructions did not include this element. CP 4-27. A reasonable juror "could have"⁴ interpreted the instructions to permit conviction based on threatening words alone, even if it were apparent that Mr. Hackett lacked "the present and future ability to carry out the threat." RCW 9A.46.020(2)(b).

The court's failure to instruct on this element requires reversal of Mr. Hackett's felony harassment conviction. *Byrd*, 125 Wn.2d at 714. The charge must be remanded for a new trial with proper instructions. *Id.*

B. The Court of Appeals must review the instructions *de novo* to determine if they made the relevant standard manifestly clear to the average juror.

Mr. Hackett's constitutional claim regarding the court's deficient instructions may be addressed for the first time on appeal because it amounts to a manifest error affecting his constitutional rights. The issue must be reviewed *de novo*.

To raise a manifest constitutional error, an appellant need only make "a plausible showing that the error... had practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d

⁴ *Miller*, 131 Wn.2d at 90.

46 (2014); RAP 2.5(a)(3). The showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

Here, given what the trial court knew, it “could have corrected” the error by properly instructing the jury in accordance with the statute. *Id.* Mr. Hackett’s constitutional arguments can be raised for the first time on appeal. *Id.*

Constitutional issues are reviewed *de novo*. *State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373 (2017). The overall sufficiency of the instructions given is an issue of law, reviewed *de novo*. *State v. Walker*, 182 Wn.2d 463, 481, 341 P.3d 976, 986 (2015), *cert. denied*, 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015).

III. THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION OF FELONY HARASSMENT.

Mr. Hackett was intoxicated and handcuffed when he made his alleged threat. A reasonable officer would not have been frightened that

Mr. Hackett would carry out his “threat.” Furthermore, under the circumstances, a reasonable person would not view Mr. Hackett’s vague drunken utterances as a “true threat.” Finally, the State failed to meet the requirements of RCW 9A.46.020(2)(b) relating to Mr. Hackett’s present and future ability to carry out his allegedly threatening words.

Because the evidence was insufficient, Mr. Hackett’s conviction for felony harassment must be reversed and the charge dismissed with prejudice.

Due process requires the State to prove beyond a reasonable doubt all facts necessary for conviction. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). A conviction based on insufficient evidence must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). Here, the State did not prove the essential elements of felony harassment.

- A. The State failed to prove that Mr. Hackett’s drunken utterances would frighten a reasonable officer into believing that his vague “threats” would be carried out.

By statute, threats to law enforcement do not amount to felony harassment unless the person’s words or conduct frightens the officer into believing that the threat will be carried out, and the officer’s fear is one

“that a reasonable [officer] would have under all the circumstances.”

RCW 9A.46.020. Here, the State failed to prove this element beyond a reasonable doubt.

Mr. Hackett was vulgar and hyperbolic, but he cooperated with every request made by the officer. He did not struggle or engage in any assaultive behavior. He asked if the trooper planned to “to take me out of the car and beat me?” RP 86. He was intoxicated, handcuffed, and restrained in a police car (and later at the police station) when he made his allegedly threatening statements.

Mr. Hackett mimicked Trooper Macomber, talking loudly as the officer read the implied consent warning. RP 79. This was followed by an additional barrage of insulting language:

He made statements about f*cking my mother. He called me a child molester and a f*ggot. And he asked how my wife was.^[5] Then he said, throughout the night, that someone would be—or that he would see me around town and that someone would be paying me a visit.
RP 80.

The trooper took this to mean “[t]hat he was going to find out where I live and he’d pay me a visit, or somebody was [sic].” RP 80. He never testified that he thought Mr. Hackett intended to inflict bodily injury. RP 61-97. When asked if he were making the threat, Mr. Hackett

⁵ Mr. Hackett also suggested that the trooper had a husband instead of a wife. RP 86.

replied “I would never threaten you.” RP 86. Instead, he said that when he saw the trooper, he’d give him a hug. RP 87-88, 94.

Under these circumstances, a reasonable officer would not be afraid that Mr. Hackett would follow through with any alleged threat to cause bodily injury.⁶ Mr. Hackett’s intoxicated state, his other expressions of frustration, and the vagueness of his statements would not, “under all the circumstances,” frighten a reasonable officer into fearing that Mr. Hackett would carry out a threat to inflict bodily injury. RCW 9A.46.020(2)(b).

The evidence was insufficient to prove all facts necessary for conviction. *W.R.*, 181 Wn.2d at 762. Mr. Hackett’s harassment conviction must be reversed, and the charge dismissed with prejudice. *Id.*

B. The State failed to prove that Mr. Hackett made a “true threat.”

The First Amendment requires proof of a “true threat” before a person can be convicted of harassment. U.S. Const. Amend. I; *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). The State may not criminalize “communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole.” *Id.*

⁶ Jurors were apparently uncertain if Mr. Hackett’s statements qualified as a threat to cause bodily injury. *See* Jury Note filed 11/13/19, Supp. CP.

A true threat is “a statement made in a context or under such circumstances wherein a reasonable person would foresee the statement would be interpreted as a serious expression of intention to inflict bodily.”

Id. (internal quotation marks and citation omitted); CP 15.**Error!**

Bookmark not defined. The standard is an objective one. *State v.*

Kilburn, 151 Wn.2d 36, 53, 84 P.3d 1215 (2004), *as amended* (Feb. 17, 2004).

Because of “the First Amendment values at issue, [this is] a difficult standard to satisfy.” *Id.* Appellate courts independently review the record to determine if an accused person’s statement amounted to a “true threat.” *Id.*, at 52. Failure to prove a “true threat” requires reversal and dismissal with prejudice. *State v. Kohonen*, 192 Wn.App. 567, 575-83, 370 P.3d 16 (2016).

In *Kilburn*, a student told one of his peers “I’m going to bring a gun to school tomorrow and shoot everyone and start with you.” *Kilburn*, 151 Wn.2d at 39. He then said “maybe not you first.” *Id.* He also admitted saying “[t]here’s nothing an AK 47 wouldn’t solve.” *Id.* At trial, he maintained that he was joking. *Id.*, at 52.

The Supreme Court determined that these statements were not “true threats.” *Id.*, at 54. It undertook an independent review of “the crucial facts in the record” and examined the defendant’s statements “in

light of the entire context.” *Id.*, at 46, 52. After reviewing the crucial facts in context, the court found it “difficult to conclude that [the defendant] would reasonably foresee his comments being taken seriously.” *Id.*, at 53.

In *Kohonen*, the defendant tweeted “I still want to punch you in the throat,” accompanied by the hashtag #[victim’s name]mustdie.” *Kohonen*, 192 Wn.App. at 571. She later tweeted the word “murder.” *Id.* The Court of Appeals reversed her cyberstalking conviction,⁷ concluding that the threats did not amount to “true threats.” *Id.*, at 573. Important to the court’s determination was “the larger context in which the words were uttered.” *Id.*, at 567. The court concluded that the tweets were “hyperbolic expressions of frustration.”⁸ *Id.*

As in *Kohonen*, Mr. Hackett’s vague statements were “hyperbolic expressions of frustration.” *Id.* They came in the context of insulting language, the suggestion that he’d had sex with the trooper’s mother, the assurance that he’d never threaten the trooper, and the “threat” that he’d hug the trooper if he saw him around town. RP 80.

⁷ RCW 9.61.260.

⁸ See also *State v. Locke*, 175 Wn.App. 779, 307 P.3d 771 (2013). In *Locke*, the court found that one of the defendant’s emails to Governor Gregoire did not contain “true threats.” *Id.*, at 791-792. The language of the email included “Gregoiremustdie” and the defendant’s hope that the governor would “witness a family member ‘raped and murdered by a sexual predator.’” *Id.*, at 791. (The *Locke* court did find that two additional emails included menacing and specific language that amounted to true threats when considered in context. *Id.*, at 792-793.)

The evidence was insufficient to prove a true threat. A reasonable person could not foresee that the vague drunken statements made while in custody would be interpreted as anything more than idle talk or “hyperbolic expressions of frustration.” *Id.* Because of this, the harassment conviction must be reversed, and the charge dismissed with prejudice. *Kohonen*, 192 Wn.App. at 583.

C. The State failed to prove that Mr. Hackett had the present and future ability to carry out the threat.

Threatening words “do not constitute harassment if it is apparent to the [officer] that the person does not have the present and future ability to carry out the threat.” RCW 9A.46.020(2)(b). The conjunctive “and” in the phrase “present *and* future ability” indicates the legislature’s intent to require acquittal where it is apparent that the accused lacks the ability to carry out any alleged threat, both in the present and in the future. Because it was apparent that Mr. Hackett lacked the present ability to carry out any alleged threat, the State’s evidence was insufficient for conviction.

In interpreting a statute, the court’s “fundamental objective is to ascertain and carry out the legislature’s intent.” *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 624-625, 278 P.3d 173 (2012). The court’s inquiry “always begins with the plain language of the statute.” *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789 (2004).

If a statute’s meaning is plain on its face, the plain meaning must be given effect as an expression of legislative intent.⁹ *Broughton*, 174 Wn.2d at 627. Courts must “assume the legislature meant what it says.” *In re Det. of Sease*, 190 Wn.App. 29, 47, 357 P.3d 1088 (2015) review granted 184 Wn.2d 1019, 361 P.3d 746, review dismissed as improvidently granted 366 P.3d 438 (2016).

Statutory phrases separated by the word “and” must “generally... be construed in the conjunctive.” *HJS Dev., Inc. v. Pierce Cty. ex rel. Dep’t of Planning & Land Servs.*, 148 Wn.2d 451, 474 n. 95, 61 P.3d 1141 (2003). The word “and” cannot be interpreted as anything other than a conjunction “unless there is a clear legislative intent to the contrary.” *Riofta v. State*, 134 Wn.App. 669, 682, 142 P.3d 193 (2006), *aff’d*, 166 Wn.2d 358, 209 P.3d 467 (2009). In other words, “the plain language of a statute can only be disregarded, and this exceptional rule [substituting “or” for “and”] can only be resorted to where the act itself furnishes cogent proof of the legislative error.” *State v. Tiffany*, 44 Wash. 602, 604, 87 P. 932 (1906).

⁹ The court may not add language to a clearly worded statute, even if it believes the legislature intended more. *In re Det. of Martin*, 163 Wn.2d 501, 508-509, 182 P.3d 951 (2008). The judiciary may only correct inconsistencies that render a statute “entirely meaningless” or “*completely* ineffectual.” *Id.*, at 512-513 (internal quotation marks and citation omitted) (emphasis in original).

Here, the statute uses the phrase “present *and* future ability”¹⁰ rather than “present *or* future ability.” There is no “clear legislative intent” to interpret the word “and” in the disjunctive. *Id.* Nor can it be said that the legislature’s use of the word “and” renders the statute “entirely meaningless” or “*completely* ineffectual.” *Martin*, 163 Wn.2d at 512-513.

Under the statute, Mr. Hackett could not be convicted of felony harassment if it was apparent that he lacked “the present *and* future ability to carry out the threat” at the time he made his statement to Trooper Macomber. RCW 9A.46.020(2)(b) (emphasis added). Because he clearly lacked the present ability to carry out his alleged threat, the evidence was insufficient for conviction.

Mr. Hackett was in custody. He had been handcuffed and was too intoxicated to drive. Any alleged threats were made while he was either locked in the police car or detained at the police station. It should have been apparent that Mr. Hackett lacked the present ability to see Trooper Macomber around town, to visit him at his home, to give him a hug, or to inflict bodily injury. RP 80.

Because it was apparent that Mr. Hackett lacked the “present... ability to carry out the threat” at the time he spoke with Trooper Macomber, he could not be guilty of felony harassment. RCW

¹⁰ RCW 9A.46.020(2)(b) (emphasis added).

9A.46.020(2)(b). His harassment conviction must be reversed, and the charge dismissed with prejudice. *Smalis*, 476 U.S. at 144.

D. The proper remedy is reversal and dismissal with prejudice.

Because the evidence is insufficient for conviction, the felony harassment charge must be dismissed with prejudice. *Id.* Even if Mr. Hackett made a true threat and placed the trooper in reasonable fear that the threat would be carried out, this court may not remand for conviction of simple harassment. *See* RCW 9A.46.020(1), (2)(a).

Reversal for insufficient evidence is equivalent to an acquittal. *State v. Hummel*, 196 Wn.App. 329, 359, 383 P.3d 592 (2016). Remand for resentencing on a lesser included offense is only permissible when the jury has explicitly been instructed on the lesser offense. *Id.*

Here, the prosecutor did not seek instruction on any lesser offense. Accordingly, the charges must be dismissed with prejudice. *Id.*; *In re Heidari*, 174 Wn.2d 288, 292, 274 P.3d 366 (2012).

IV. THE TRIAL COURT SHOULD NOT HAVE IMPOSED DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS WITHOUT DETERMINING MR. HACKETT'S ABILITY TO PAY.

An indigent person may not be made to pay discretionary legal financial obligations (LFOs). *State v. Ramirez*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018); *see* RCW 10.01.160(3). The sentencing court must

“conduct an individualized inquiry on the record concerning a defendant’s current and future ability to pay before imposing discretionary LFOs.” *Id.*

In this case, the sentencing court did not make any inquiry into Mr. Hackett’s ability to pay discretionary LFOs. RP 166. Nor did the court make any findings regarding his ability to pay discretionary LFOs. CP 36.

In fact, the court found Mr. Hackett indigent for the purpose of this appeal. CP 50-51. Despite this, the court ordered the imposition of LFOs totaling \$2,295.50. CP 42. This amount included discretionary LFOs. CP 42.

Because the trial court failed to inquire into Mr. Hackett’s financial circumstances or to make any finding as to his ability to pay discretionary LFOs, the financial penalties outlined in the Judgment and Sentence must be vacated. CP 42. The case must be remanded to the trial court for proper inquiry into Mr. Hackett’s finances. *Id.*

CONCLUSION

The evidence was insufficient for conviction of felony harassment. The State did not prove that Mr. Hackett made a “true threat” that would have frightened a reasonable officer into believing that he planned to inflict bodily injury. Furthermore, it was apparent that Mr. Hackett lacked the present and future ability to carry out any alleged threats.

In addition, the Information was constitutionally deficient. It did not charge felony harassment because it omitted an essential element of that crime. It did not provide Mr. Hackett the notice to which he is constitutionally entitled. Mr. Hackett's harassment conviction must be reversed, and the charge dismissed without prejudice.

The court's instructions were also deficient. They failed to make the relevant legal standards manifestly clear to the average juror. A reasonable juror could have interpreted the instructions to permit conviction even if it were apparent that Mr. Hackett lacked the present and future ability to carry out any alleged threats. The conviction for felony harassment must be reversed and the charge remanded for a new trial with proper instructions.

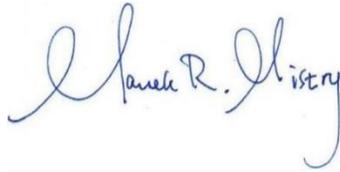
Finally, the court failed to inquire into Mr. Hackett's financial circumstances and did not make any finding as to his ability to pay discretionary LFOs. Whether or not Mr. Hackett's felony harassment conviction is reversed, the financial penalties must be vacated, and the case remanded for a hearing on Mr. Hackett's ability to pay.

Respectfully submitted on June 26, 2020,

BACKLUND AND MISTRY

Handwritten signature of Jodi R. Backlund in blue ink.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Kalob Hackett
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on June 26, 2020.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

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