

**FILED**

SEP 24 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

29268-1-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DUNCAN MCNEIL, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Andrew J. Metts  
Deputy Prosecuting Attorney  
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erroneously gave Instruction No. 13, which incorrectly and incompletely defined “threat,” for purposes of First of the First Amendment.
2. Insufficient evidence was presented to establish beyond a reasonable doubt Mr. McNeil communicated a “true threat,” as required by the First Amendment.
3. Insufficient evidence was presented to establish beyond a reasonable doubt that the alleged victim of Count I was “placed in reasonable fear the threat would be carried out,” an essential element of the crime of harassment.
4. The trial court erroneously failed to give a unanimity instruction on Counts I and III when the State failed to elect which of two distinct instances of alleged threats it was relying upon for a conviction

II.

ISSUES PRESENTED

- A. Can the defendant base a brief on cases that did not exist at the time of the crimes?

- B. Can the defendant fault the State for not providing evidence of the “true threat” when the statute in effect at the time of the crimes did not mention “true threat” in conjunction with misdemeanor harassment?
- C. Is a unanimity instruction required in this case wherein (other than the crime occurring in Washington) the location where the threats were made is not an essential element?

### III.

#### STATEMENT OF THE CASE

For the purposes of this appeal only, the state accepts the defendant’s version of the Statement of the Case.

### IV.

#### ARGUMENT

- 1. THE DEFENDANT CANNOT CREATE AN APPELLATE BRIEF BASED ON CASES THAT DID NOT EXIST AT THE TIME OF THE CRIMES.

In 2002, the statute relevant to this case read as follows:

#### 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 person who harasses another is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW, except that the person is guilty of a class C felony if either of the following applies: (a) 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 no-contact or no-harassment order; or (b) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

Former RCW 9A.46.020.

RCW 9.94A.345 provides that the law to be used in this appeal is that existing at the time of the crimes. The defendant has not challenged the essential elements as constituted in the 2002 statute.

2. THE STATE WAS NOT REQUIRED BY THE STATUTE IN EFFECT IN 2002 TO PROVE A "TRUE THREAT" IN ORDER TO CONVICT A DEFENDANT OF THE MISDEMEANOR CHARGE OF HARASSMENT.

It is of utmost importance to recognize that the crimes in this case were committed in May of 2002. Under RCW 9.94A.345, it is the law at the time of

the crime that controls. The defendant did not mention this statute or its application in his brief. The defendant's extensive use of cites to caselaw from various dates *after* the commission of the crimes in this case indicates that the defendant did not contemplate the effect that RCW 9.94A.345 would have on his selection of citations.

For example, the defendant freely uses the case of *State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010) to support a number of concepts including "true threat." *Schaler* did not exist at the time this case was tried. It is possible that other cases existing at the time the crimes in this case were committed might support several of the defendant's arguments. It is not the State's job to rewrite the defendant's appeal so that it meets the constraints of RCW 9.94A.345.

The defendant uses a free-form approach to authorities noting that in 2008, the WPIC for "threat" was amended. Since this case was tried several years prior to this amendment, this argument is not relevant to this case. The defendant waxes eloquent on the relationship between the First Amendment and "true threats." Once again, the defendant's arguments are pointless as they are based on the holdings in *Schaler*, decided some number of years *after* this case. Brf. of App. 13. It seems a bit unfair to fault the trial court for failing to follow law that did not exist.

Not dissuaded by inapplicability of case law decided years *after* this case was tried, the defendant cites again to *Schaler* claiming that “This issue (raising argument for first time on appeal) is also controlled by *Schaler*...” Brf. of App. 14. As previously noted, *Schaler* is not applicable authority for the issues to be decided in this case.

The defendant claims that “when a criminal statute proscribes threats, the State bears the burden of proving beyond a reasonable doubt that the threats were “true threats....” Brf. of App. 16. An examination of the 2002 version of the harassment statute shows that the terms “true threat” are not present in the gross misdemeanor section of the statute. The court in *State v. J.M.*, 101 Wn. App. 716, 6 P.3d 607 (2000) only applies the term “true threat” to *felonies* charged under the statute.

The defendant's arguments take a peculiar turn by arguing from the jury's “not guilty” verdicts involving threats to kill. The defendant expands on the verdicts, without obvious rationale. The defendant uses the “not guilty” verdicts to postulate a theory that the jury was not persuaded beyond a reasonable doubt that the defendant's statements were serious threats. The defendant then jumps to the conclusion that the special verdicts show that the jury thought that the threats of the defendant were not “serious.” Brf. of App. 17. Aside from being illogical, the defendant does not explain how “not guilty” verdicts from one set of counts could be used to infer facts in other counts. The jury verdicts mentioned by the

defendant stand for nothing more than that the State was unable to convince the jury that the defendant intended to kill. Since the State did not need to prove an intent to kill for the gross misdemeanor charges of harassment, this entire attempt to infer facts other than the jury was not convinced the defendant intended to kill the victims should be rejected.

3. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CRIME OF HARASSMENT INVOLVING MR. SULLIVAN.

Again, it is important to note exactly what the defendant is contesting. The defendant claims *only* that there was insufficient evidence to support the charge involving Mr. Sullivan. Brf. of App. 19.

The defendant appears to be arguing from the position that the defendant had to threaten Mr. Sullivan personally before there would be sufficient evidence to support the crime. This is incorrect. The harassment statute reads (in part):

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

RCW 9A.46.020.(emphasis added.)

By the plain language of the statute, it does not matter whether the defendant threatened Mr. Sullivan, as opposed to others. By the defendant's own arguments, the defendant directed threats at Mr. Hall and Mr. Ashby while the

individuals were inside Mr. Sullivan's office. *See* Inst. No. 13. "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*." Inst. No. 13. The defendant attempts to make arguments involving whether the threats were made inside a building or outside. So long as the jurisdictional requirement of the crimes occurring in Washington State is met, there is no reference to location neither in the statute nor in the instructions. The location of the making of the threats is irrelevant.

In the body of the instructions, there is no mention of "true threat." Inst. No. 13 is a definitional instruction. *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992). As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude. The language of Inst. No. 13 is entirely consistent with the law as it stood in 2002. The crimes were committed in 2002.

As an aside, the defendant argues that if this case were to be reversed and the defendant retried, this would amount to a "double jeopardy" violation. This argument is utterly without merit. *State v. Jasper* 174 Wn.2d 96, 120, 271 P.3d 876 (2012). (double jeopardy not invoked when case reversed for retrial.)

The defendant argues that the State cannot prove that the alleged instructional error was “harmless.” That is certainly true as the State is not proposing that any of the jury instruction in question were in error or harmless.

4. THE IDEA OF “UNANIMOUS VERDICTS” DOES NOT APPLY TO A CASE SUCH AS THIS ONE WHICH HAS MULTIPLE COUNTS BUT NOT MULTIPLE ACTS CHARGED ON AN INDIVIDUAL COUNT.

In his last set of arguments, the defendant constructs a series of complaints involving the question of “unanimous verdicts.” The theory of the defendant’s arguments is based on the idea that the State did not prove that the threats occurred inside or outside a building. None of the “To convict” instructions require the State to prove that the threats took place inside the building or outside the building.

The “To convict” instructions” are in harmony with the statute as it existed at the time of the crimes and the statute does not require proof of the location in which the threats were made. The requirements were only that the events occurred in the State of Washington, occurred on the specified dates and involved the relevant individual for the particular count.

There is no “unanimity instruction” required for this case. There are multiple counts but not multiple acts. The defendant’s arguments are without merit.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 24<sup>th</sup> day of September, 2012.

STEVEN J. TUCKER  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578  
Deputy Prosecuting Attorney  
Attorney for Respondent

FILED

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DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 29268-1-III
v.	)	
	)	CERTIFICATE OF MAILING
DUNCAN MCNEIL,	)	
	)	
Appellant,	)	

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I certify under penalty of perjury under the laws of the State of Washington, that on September 24, 2012, I mailed a copy of the Respondent's Brief in this matter, addressed to:

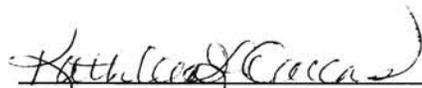
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9/24/2012  
(Date)

Spokane, WA  
(Place)

  
(Signature)