

No. 29529-0-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

MICHAEL EUGENE HAZELMYER,  
Defendant/Appellant.

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APPEAL FROM THE STEVENS COUNTY SUPERIOR COURT  
Honorable Allen C. Nielson

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BRIEF OF APPELLANT

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SUSAN MARIE GASCH, WSBA No. 16485

Gasch Law Office  
P. O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149

FAX - None  
Attorney for Appellant

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FAX - None  
Attorney for Appellant

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**A. ASSIGNMENT OF ERROR**

The information fails to allege all elements of the offense of harassment—threats to kill.

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

Whether a conviction for harassment—threats to kill based upon an information that fails to allege the name of the person who was threatened must be reversed and dismissed?

**C. STATEMENT OF THE CASE**

The defendant, Michael Eugene Hazelmyer, was charged with harassment--threats to kill and second degree criminal trespass. CP 1--2.

The harassment charge, Count I of the information, states in relevant part:

... [T]he Prosecuting Attorney accuses you of the crime of HARASSMENT -- THREATS TO KILL, ... which is a violation of RCW 9A.46.020(1)(a)(ii) and (2)[sic](b) ... in that you, on or about a period of time between November 29, 2009 and November 30, 2009, in the State of Washington did then and there knowingly and without lawful authority, threaten to kill another immediately or in the future, and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out.

CP 1--2.

Following a bench trial, the court found Mr. Hazelmyer not guilty of the charge of trespass and guilty of the charge of harassment—threats to kill. CP 63–65. This appeal followed. CP 83–102.

**D. ARGUMENT**

**A conviction for harassment—threats to kill based upon an information that fails to allege the name of the person who was threatened must be reversed and dismissed.**

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C Torcia, WHARTON ON CRIMINAL PROCEDURE 238, p. 69 (13 3d. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charge in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. art. 1, § 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information "will be more liberally construed in favor of validity. . . ." Kjorsvik, 117 Wn.2d at 102.

The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient "to use words conveying the same meaning and import as the statutory language." State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, "state the acts constituting the offense in ordinary and concise language ... ." State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). The question "is whether the words would reasonably appraise an accused of the elements of the crime charged." Kjorsvik, 117 Wn.2d at 109.

The primary purpose [of a charging document] is to give notice to an accused so a defense can be prepared. There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

City of Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992)

(bracketed material added) (internal citations omitted).

RCW 9A.46.020(1) provides that 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; ...and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. ...

An information lacks an essential element where the crime of harassment---threats to kill is only committed by threats made to a particular person thereby placing that person in reasonable fear that the threats will be carried out, and there is no reference to the identity of the victim. *See City of Seattle v. Termain*, 124 Wn. App. 798, 804-05, 103 P.3d 209 (2004) (discussing *State v. Clowes*, 104 Wn. App. 935, 18 P.3d 596 (2001)).

Here, Mr. Hazelmyer was charged in the information as to Count I as follows:

... [T]he Prosecuting Attorney accuses you of the crime of HARASSMENT -- THREATS TO KILL, ... which is a violation of RCW 9A.46.020(1)(a)(ii) and (2)[sic](b) ... in that you, on or about a period of time between November 29, 2009 and November 30, 2009, in the State of Washington did then and there knowingly and without lawful authority, threaten to kill another immediately or in the future, and by words or

conduct placed the person threatened in reasonable fear that the threat would be carried out.

CP 1–2.

This information is insufficient because it does not allege the name of the person who was allegedly threatened.<sup>1</sup> Since the charging document fails the essential elements test, the prejudice test is not reached. City of Seattle v. Termain, 124 Wn. App. at 803; City of Auburn v. Brooke, 119 Wn.2d t 636, 836 P.2d 212. Because the information is defective, the conviction obtained on the charge of harassment—threats to kill must be reversed and the charge dismissed. City of Seattle v. Termain, 124 Wn. App. at 801, 806; State v. Kitchen, 61 Wn. App. 915, 918, 812 P.2d 888 (1991).

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<sup>1</sup> The Clowes court held that a court will not fill voids in a defective count with facts located elsewhere. Clowes, 104 Wn. App. at 942, 18 P.3d 596 (citing State v. Gill, 103 Wn. App. 435, 442, 13 P.3d 646 (2000)). Even if this were not true, Count II herein refers to alleged trespass “upon the premises of another located at 3983 Highway 231, Springdale, Washington.” CP 2. There was no evidence that any of the witnesses in this case lived at “3983 Highway 231”. Shawn Mattix and his mother Joy Siemers lived at 2983 Highway 231, Springdale, Washington; his neighbor Steven Wolff lived at 3989

**E. CONCLUSION**

For the reasons stated, the appellant asks this Court to reverse and dismiss the conviction.

Respectfully submitted on April 28, 2011.

  
Susan Marie Gasch, WSBA #16485  
Attorney for Appellant

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Highway 231, and Mr. Hazelmyer and his wife lived at 3983-A, Highway 231. CP 70, 108-09, 129.