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March 5, 2012
Court of Appeals
Division III
State of Washington

30235-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JESUS V. MORALES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The charging document omitted an essential element of the offense charged in Count 1.

2. The court erred in giving jury instruction No. 7:

To convict the defendant of the crime of Harassment of Another in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 14, 2011, the defendant knowingly threatened to kill Yanett Farias immediately or in the future;

(2) That the words or conduct of the defendant placed Trinidad Diaz and/or Yanett Farias 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 of Washington.

If you find from the evidence that each of these elements has been proved

beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 39)

3. The court erred in entering the judgment convicting Mr. Morales on two counts of harassment encompassing a single course of conduct.

B. ISSUES

1. The victim's reasonable belief that a threat will be carried out is an element of the offense of felony harassment. Count 1 charged felony harassment based on a threat to kill Ms. Farias. The State undertook to allege and prove *either* that Ms. Farias was the victim and the threat to harm her was communicated indirectly through a statement to Mr. Diaz, *or* that Mr. Diaz was the victim and the threat to harm another, his sister-in-law Ms. Farias, was communicated directly to him.
2. If the information charged the accused with harassment of Mr. Diaz by threatening to kill his sister-in-law, did the failure of the charging document to identify Mr. Diaz as the victim violate the Sixth Amendment right to a statement of the essential elements of the offense?
3. If the information charged the accused with harassment of Ms. Farias, did an instruction that the jury could find the offense was committed based on Mr. Diaz's reasonable belief that the threat would be carried out permit the jury to convict on an uncharged offense?

4. The offense of felony harassment is committed by threatening to harm a victim, but only if the victim reasonably believes the threat will be carried out. The accused tells a third party that he intends to kill the victim, the third party tells the victim of the threat, and less than twelve hours later the accused tells the victim that he intends to kill her. Does the conviction of the accused on two charges of harassing the victim violate Double Jeopardy?

C. STATEMENT OF THE CASE

Trinidad Diaz is Yanett Farias's brother-in-law. (RP 247-48) On February 14, Jesus Morales told Mr. Diaz that he, Mr. Morales, was going to kill Ms. Farias the next day when she dropped her children off at daycare. (RP 248) Mr. Diaz told the police he thought Mr. Morales might follow through on this threat. (RP 250)

Mr. Diaz told his wife to call Ms. Farias and tell her what happened. (RP 250) After she received a phone call from her sister and brother-in-law, Ms. Farias became frightened and called the police. (RP 304)

Early the next morning Ms. Farias and her children arrived at Ariceli Castel's home. (RP 266) Ms. Castel provides daycare for Ms. Farias's three children. (RP 260) Mr. Morales drove up next to the passenger window of Ms. Farias's car and told her he was going to kill her. (RP 307) She believed he would do so. (RP 310)

The State charged Mr. Morales with two counts of felony harassment, RCW 9A.46.020:

On or about February 14, 2011 [count one, or February 15, 2012, count 2] in the State of Washington, without lawful authority, you knowingly threatened to cause bodily injury immediately or in the future to Yanett Farias and the threat to cause bodily injury consisted of a threat to kill Yanett Farias or another person, and did by words or conduct place the person threatened in reasonable fear that the threat would be carried out.

(CP 2-3)

During his opening statement, the deputy prosecutor identified Yanett Farias as the victim in both charges. (RP 236-37) The State requested the following jury instruction respecting the February 14 threat:

To convict the defendant of the crime of Harassment of Another in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about February 14, 2011, the defendant knowingly threatened to kill Yanett Farias immediately or in the future;
- (2) That the words or conduct of the defendant placed *Trinidad Diaz and/or* Yanett Farias 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 of Washington.

If you find from the evidence that each of these elements has been proved

beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable

doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 39)

The words "*Trinidad Diaz and/or*" were handwritten on the jury instructions. (CP 39) Defense counsel did not object to the giving of this instruction.

The jury found Mr. Morales guilty on both counts. (CP 48-49) At sentencing, defense counsel argued that the two threats constituted a single course of conduct, that the unit of prosecution should be the number of victims rather than the number of threatening statements, and that accordingly the offender score should be 2. (CP 463-64) The court rejected this contention, treated the two counts as separate convictions in calculating the offender score, and imposed a standard-range 10-month sentence. (CP 62)

D. ARGUMENT

1. IN ADDITION TO THE PERPETRATOR AND THE VICTIM, THE OFFENSE OF HARRASSMENT MAY ALSO INVOLVE A COMMUNICANT AND/OR A SURROGATE VICTIM.

Mr. Morales was charged under RCW 9A.46.020, which provides

in relevant part:

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

(2)(b) A person who harasses another is guilty of a class C felony if (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; . . .

RCW 9A.46.020.

The legislature's use of the phrase "the person threatened or any other person" has repeatedly perplexed the courts. *See State v. J.M.*, 144 Wn.2d 472, 488, 28 P.3d 720 (2001) discussing *State v. G.S.*, 104 Wn. App. 643, 17 P.3d 1221 (2001).

In *G.S.*, the court decided that the threat to injure either the person threatened or another person constituted a single means of committing the offense. In so deciding, "the court in *G.S.* appear[ed] to have equated the person threatened with the person to whom the communication of the threat is made. *J.M.*, 144 Wn. 2d at 488. Our Supreme Court rejected this

approach and held “Under RCW 9A.46.020(1)(a)(i), the person threatened is generally the victim of the threat, i.e., the person against whom the threat to inflict bodily injury is made. The person to whom the threat is communicated may or may not be the victim of the threat.” *Id.*

The court also recognized that, under the language of the statute, the person threatened might not be the person whose harm is contemplated by the threat: “The statute also contemplates that a person may be threatened by harm to another. An example that comes readily to mind is a communication of intent to harm the child of the person threatened.” *Id.*

In short, the statute contemplates four different possible participants in the commission of an act of harassment: the perpetrator; the communicant to whom the perpetrator communicates the threat to harm; the victim, who is the person threatened, and the surrogate victim, who is sometimes the person whose physical harm is threatened. Thus, the communicant, the victim and the surrogate victim may be one and the same person, or two or three different people.

In *J.M.*, the court sought to identify which of these parties would be “the person threatened” for purposes of applying the provision of RCW 9A.46.020(1)(b): “The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” The court concluded that the victim rather than the communicant was the

person threatened. *Id.* at 482; *see also State v. Kiehl*, 128 Wn. App. 88, 93, 113 P.3d 528 (2005).

2. THE INFORMATION WAS INSUFFICIENT TO INFORM MR. MORALES THAT HE WAS CHARGED WITH HARRASSING MR. DIAZ.

A defendant has a constitutional right to be informed of the nature and cause of the charges against him. Wash. Const. Article I, § 22; United States Constitution, Sixth Amendment. Under the “essential elements” rule, a charging document must allege facts supporting every element of the offense, in addition to adequately identifying the crime charged. *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). “The primary goal of the ‘essential elements’ rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.” *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). Merely reciting the statutory elements of the charged crime may not be sufficient. *Id.* at 688.

The charging document in this case charged Mr. Morales with two counts of harassing Ms. Farias by threatening to kill her. In count two, allegedly committed on February 15, she was clearly identified as the communicant and the victim and there was no suggestion of the existence of a surrogate victim. The identically worded Count One can only be

reasonably construed as alleging the same facts, with the exception of the date of commission of the offense.

Mr. Morales did not challenge the sufficiency of the information in the trial court. “Charging documents which are not challenged until after the Verdict will be more liberally construed in favor of validity than those challenged before or during trial.” *Kjorsvik*, 117 Wn.2d at 102. When, as here, the sufficiency of the information is first challenged on appeal, the reviewing court must determine (1) whether “the necessary facts appear in any form, or by fair construction can they be found, in the charging document” and, if so, (2) whether the defendant can show that he was nonetheless actually prejudiced “by the inartful language which caused a lack of notice.” *Kjorsvik*, 117 Wn.2d at 105-106.

As the facts were known to Ms. Farias, and as the evidence showed at trial, Ms. Farias was threatened directly in Count Two, but the threat was indirect in Count One, and involved a communicant: Mr. Diaz. While Mr. Diaz was not mentioned in the charging document, his role could arguably be inferred from the charging document since the statute, which was referenced in the information, specifically authorizes charging harassment by means of a threat that is communicated indirectly to the alleged victim.

But the jury was instructed that it could find Mr. Morales guilty on Count One based on finding that Mr. Diaz reasonably feared the threat would be carried out. This instruction could only be an accurate statement of the law if Mr. Diaz was the victim of a threat to kill another person, if Ms. Farias was the surrogate victim of the threat, and if Mr. Diaz reasonably believed the threat would be carried out. The identity of Mr. Diaz as the victim of the threat charged in count one is a necessary fact that does not appear in the charging document. The charging document simply cannot be construed as stating the facts necessary to give notice that Mr. Diaz was the victim in count 1.

Mr. Morales's conviction of the crime charged in count one must be reversed. *See State v. Kirwin*, No 28972-9, 2012 WL 593208 (Div III. Feb. 23, 2012).

3. OR, IF THE INFORMATION CHARGED MR. MORALES WITH HARASSMENT OF MS. FARIAS, THEN IT WAS CONSTITUTIONAL ERROR TO INSTRUCT THE JURY ON AN UNCHARGED CRIME.

“[W]hen an information alleges only one crime, it is constitutional error to instruct the jury on a different, uncharged crime. When the jury is instructed on an uncharged crime, a new trial is appropriate when it is

possible that the defendant was mistakenly convicted of an uncharged crime.” *State v. Kirwin*, 2012 WL 593208 at 11-12.

An essential element of the crime of harassment is that the person threatened be placed in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(b). Here, since the jury was instructed that it could convict Mr. Morales if it found Mr. Diaz was placed in such reasonable fear, Mr. Morales may have been convicted of the uncharged crime of harassing Mr. Diaz.

A new trial is mandatory when a person is convicted of an uncharged crime, even in the face of substantial evidence of guilt of the crime charged, if there is a possibility the conviction is the result of the erroneous instruction. *State v. Kirwin*, 2012 WL 593208 at 5.

The State presented evidence from which the jury could infer that Ms. Farias knew of the threat Mr. Morales’s had made to Mr. Diaz, and feared that the threat would be carried out. Shortly after hearing the threat, Mr. Diaz told his wife to call Ms. Farias, and beginning about that same time Ms. Farias became fearful and called the police. (RP 250, 304) But Mr. Diaz’s wife did not testify, so there is no direct evidence she told Ms. Farias of the threat. And although Ms. Farias received a telephone call and then became frightened, she did not testify that she became frightened because the caller told her of the threat. Thus, although the jury

could have inferred that Mr. Diaz's wife told Ms. Farias of the threat and this caused Ms. Farias to fear that the threat would be carried out, the jury need not have drawn those inferences.

Assuming Ms. Farias learned of the threat, it is undisputed that she nevertheless drove her children to their caregiver's home the following morning. The State argued that she did so because she had to continue working and using daycare, but the jury could infer from Ms. Farias's actions that she did not, in fact, fear that Mr. Morales would carry out the threat to kill her.

On the other hand, Mr. Diaz specifically testified that he thought the threat would be carried out. (RP 250, 258)

While the evidence that Mr. Morales threatened Ms. Farias on February 14 is substantial, the jury's decision to convict on that count, if properly instructed, was not inevitable. It is possible Mr. Morales was conviction based on Mr. Diaz's testimony that he believed the threat would be carried out. Accordingly, the conviction on Count 1 should be reversed.

4. MR. MORALES'S TWO CONVICTIONS FOR A SINGLE COURSE OF CONDUCT VIOLATE CONSTITUTIONAL DOUBLE JEOPARDY PROTECTIONS.

A course of conduct threatening one individual is the unit of prosecution for harassment.

Under the double jeopardy provisions of the United States and Washington constitutions, a defendant may not be convicted more than once under the same criminal statute if only one unit of the crime has been committed. U.S. Const. Amend. V; Const. Art. I, § 9; *State v. Leyda*, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); *citing State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). The state constitutional provision, Wash. Const. art. I, § 9, affords the same protection as its federal counterpart. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).

The unit of prosecution is designed to protect the accused from overzealous prosecution. *State v. Turner*, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The unit of prosecution may be an act or a course of conduct. *Tvedt*, 153 Wn.2d at 710, *citing United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225-26, 73 S. Ct. 227, 97 L. Ed. 260 (1952); *State v. Root*, 141 Wn.2d 701, 710, 9 P.3d 214 (2000); *Adel*, 136 Wn.2d at

634. If the legislature fails to define the unit of prosecution or its intent is unclear, under the rule of lenity, any ambiguity must be resolved against turning a single violation into multiple offenses. *Bell v. United States*, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955); *Universal C.I.T. Credit Corp.*, 344 U.S. at 221-22; *Tvedt*, 153 Wn.2d at 711; *Adel*, 136 Wn.2d at 634-35.

An appellate court engages in *de novo* review of the statutory unit of prosecution, a question of law. *State v. Ose*, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). This is a three-part process:

In a unit of prosecution case, the first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one “unit of prosecution” is present.

State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007)

Appellate courts interpret and construe statutes to give effect to all the language used, with no portion rendered meaningless or superfluous. *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 948, 162 P.3d 413 (2007); *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)); see *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995). Words in a statute are given their plain and ordinary

meaning, unless a contrary intent is evidenced in the statute. *State v. Lilyblad*, 163 Wn.2d 1, 7, 177 P.3d 686 (2008).

The harassment statute does not specifically define either an “act” or a “course of conduct” as the applicable unit of prosecution. RCW 9A.46.020 requires an act, the making of a threat; an intended harm to the person threatened; and the threatened person’s reasonable fear. The threat may be indirect, so that the resulting fear need not be contemporaneous with the threatening act.

A single threat, if communicated to and believed by the person threatened, may constitute harassment. *State v. Alvarez*, 74 Wn. App. 250, 872 P. 2d 1123 (1994). But *Alvarez* did not hold that each threat constitutes a separate unit of prosecution, only that the person threatened need not await communication of a second threat before becoming the victim of the crime of harassment.

Mr. Alvarez had been found guilty of harassment based on his killing, then waiving a pigeon and finally chopping its head off, accompanied by a threatening statement to a neighbor. 74 Wn. App. at 253. In a separate case, he had been found guilty of a single count of harassment based on threats, overheard by a teacher to burn down a teacher’s house, dynamite his car, or put Drano in his food. Threats were communicated directly to a teacher’s assistant and some, but not all, of the

threats were apparently overheard by the teacher. *Id.* at 254. The court noted the difficulty in distinguishing between a single act and a course of conduct in the harassment context since in each of these cases the defendant had made more than one threat. *Id.* at 260.

Moreover, the *Alvarez* decision rests in part on language in RCW 9A.46.030 which provides that the offense may be deemed to have been committed “at the place where the *threat or threats were made.*” *Id.* at 259. Thus, in *Alvarez*, the identity of the person threatened was deemed to be the unit of prosecution rather than the number of threatening statements, the kinds of harm threatened, or the identity of the person to whom the threats were communicated.

The statute focuses on a particular person who is threatened and that person’s reasonable belief that the threat will be carried out, thereby contemplating the harassment of *a single individual*. *See State v. J.M.*, 144 Wn.2d at 482; *State v. Kiehl*, 128 Wn. App. at 93; *see also State v. Root*, 141 Wn.2d at 710-11 (holding the legislature’s use of the words “a minor” in the sexual exploitation of a minor statute, RCW 9.68A.040, meant that the defendant “may be charged per child involved”). In addition to focusing on a specific individual, the language of the harassment statute focuses on that individual’s belief in the likelihood that the particular injury threatened will in fact be carried out.

Under the plain language of the statute, the act of communicating the threat, without more, does not constitute the offense; rather, threatening to harm an individual, whether once or repeatedly, resulting in that individual's fear that the threat will be carried out, constitutes an offense. The victim's reasonable belief that threat to harm would be carried out is the injury the statute is designed to protect against, whether it lasts for a day or a week, whether or not it is reinforced by repetition. Thus the unit of prosecution must be a course of conduct that results in the threatened individual's person's reasonable fear of injury or other harm.

If the statute is ambiguous, then the course of conduct must be the unit of prosecution

The initial statutory analysis may not resolve the issue if the statute is ambiguous. *State v. Hall*, 168 Wn.2d 726, 730, 230 P. 3d 1048 (2011).

A statute is ambiguous if a reasonable person can interpret it in more than one way. *State v. Watson*, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002); *State v. Keller*, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001); *In re Charles*, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). The State may contend that the unit of prosecution in each occasion on which a threat is made, or each person to whom the threat is communicated. But even if such a position is reasonable, it merely demonstrates that the statute is ambiguous.

When a choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Tvedt, 153 Wn.2d at 711, quoting *Universal C.I.T. Credit Corp.*, 344 U.S. at 221-22.

Because the language of RCW 9A.46.120(1) is susceptible to more than one reasonable interpretation, it is ambiguous. *Watson*, 146 Wn.2d at 954-55. The ambiguity must be construed in Mr. Morales's favor, as punishing a course of conduct rather than each individual "instance" within that course of conduct. See *Adel*, 136 Wn.2d at 634-35.

The facts of the case show a single course of conduct, consisting of several threatening statements directed at Ms. Farias. Mr. Morales's threatening statements, made within a single twenty-four hour period, had a single purpose and effect: to frighten Ms. Farias. His convictions on two separate counts of harassment, based on a single course of conduct, violated double jeopardy provisions.

E. CONCLUSION

The harassment conviction based on statements made to Mr. Diaz threatening harm to Ms. Farias should be reversed as it was either for an

uncharged crime or the result of an erroneous jury instruction. Because both convictions were for the same offense, consisting of a single course of conduct, the convictions should be reversed, and the matter remanded for entry of judgment and sentence on one count of harassment.

Dated this 5th day of March, 2012.

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30235-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
JESUS V. MORALES,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on March 5, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on March 5, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on March 5, 2012.



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