

No. 34635-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

KEITH BRIER,

Appellant.

---

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

---

BRIEF OF APPELLANT

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## A. INTRODUCTION

The right to freedom of speech is of paramount importance. Thus, although states may criminalize “true threats,” this category must be construed narrowly in light of our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>1</sup> Courts have interpreted statutes criminalizing speech narrowly because of these concerns.

Keith Brier endured unfair treatment by police on multiple occasions. He posted about his experiences on the Rants and Raves section of Craigslist, and said that the next time he interacted with law enforcement there would be “at least one dead cop.” He later explained that he was just venting and did not think his statements would be taken as threats given the context. He was convicted of harassment, but this Court should reverse. The State failed to prove the statutory elements, and failed to prove a true threat.

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<sup>1</sup> *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed.2d 664 (1969); U.S. Const. amend. I.

B. ASSIGNMENTS OF ERROR

1. In violation of due process, the State presented insufficient evidence to prove the elements of the crime of harassment.

2. In violation of the First Amendment, the State presented insufficient evidence of a “true threat.”

3. The information was constitutionally deficient.

4. Mr. Brier was unlawfully convicted of a crime not charged.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove felony harassment, the State must prove that the person threatened feared *death*, not just generic harm. Here, the witnesses testified only that they had “concern for the safety of law enforcement officers.” Did the State fail to prove this element of the crime, requiring reversal of the conviction and dismissal of the charge with prejudice? (Assignment of Error 1).

2. To prove harassment, the State must show the defendant knowingly threatened to cause bodily injury to “the person threatened or to any other person” and that he

placed “the person threatened in reasonable fear that the threat [would] be carried out.” RCW 9A.46.020(1). Here, the State presented evidence that Mr. Brier said, “the next time I have an interaction with law enforcement there will be at least one dead cop.” Did the State fail to prove the identity of “the person threatened,” requiring reversal of the conviction and dismissal of the charge with prejudice? (Assignment of Error 1).

3. Because the First Amendment protects speech, an alleged threat may not be criminalized unless it is a “true threat.” Under Washington law, a true threat is a statement made in a context wherein a reasonable person would foresee that the statement would be taken as a serious expression of intent to inflict great bodily harm or death. In contrast, idle talk or political hyperbole is not a true threat. Did the State fail to prove a true threat under Washington law, where Mr. Brier posted his statement to the “Rants and Raves” section of Craigslist, complained about police abuses generally and about an exorbitant traffic fine levied against him personally, and explained to a detective that he made no

threat intentionally but was “just really angry” and “venting?” (Assignment of Error 2).

4. Some courts have read United States Supreme Court caselaw to require proof of a more culpable mental state for true threats than the “reasonable person” standard used in Washington. These courts instead require proof that the defendant intended to induce fear of great bodily harm or death. Did the State fail to meet this standard, where Mr. Brier posted his statement to the “Rants and Raves” section of Craigslist, complained about police abuses generally and about an exorbitant traffic fine levied against him personally, and explained to a detective that he made no threat intentionally but was “just really angry” and “venting?” (Assignment of Error 2).

5. An information is constitutionally deficient if it fails to set forth every element of the crime charged, and the remedy for a violation of this “essential elements” rule is reversal of the conviction and dismissal of the charge without prejudice to the State’s ability to refile. The State charged Keith Brier with felony harassment, but the

information was nonsensical: it omitted a critical clause of the statute, was framed in the present tense, and failed to identify both “the victim” and “the person threatened.” Was the information in this case constitutionally deficient, requiring reversal of the conviction and dismissal of the charge without prejudice to the State’s ability to refile? (Assignment of Error 3).

6. An accused person has a constitutional right to be informed of the charge he is to meet at trial and cannot be tried for a crime not charged. Here, the information did not specify a victim but simply stated “the victim” and “the person.” In denying a pretrial motion to dismiss, the court construed “the victim” to be the Kennewick Police. But at trial, the court convicted Mr. Brier based on a theory that the victim was *any* law enforcement officer – including a member of the Royal Canadian Mounted Police. Was Mr. Brier unlawfully convicted of a crime not charged, requiring reversal and remand for a new trial? (Assignment of Error 4).

D. STATEMENT OF THE CASE

Keith Brier is a 40-year-old man who had no criminal history before this case. CP 75-81; RP (7/20/16) 93-98.

In 2014, he had an extremely negative experience with a Kennewick police officer. He was driving an old truck that he uses only for “dump runs” when the officer pulled him over for a broken tail light lens. He could not produce registration, and was ordered to pay a fine of \$1,000. He did not have money to pay this fine because he and his family “barely make our bills and sometimes we don’t make them.” CP 36. The officer laughed at him when giving him the ticket. Ex. 5 at ~4:00, ~11:15.<sup>2</sup>

It was not the first time a police officer had treated Mr. Brier unfairly. A few years earlier, an officer had falsely accused him of setting fire to his own car. The allegation resulted in the insurance company refusing to reimburse him. He was “broke” and felt the officer ruined his life. Ex. 5 at ~6:55-9:30.

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<sup>2</sup> Exhibit 5 is the audio recording of the detective’s interview of Mr. Brier. The file name is “14-15994 Interview with Keith Brier 6.5.14 K9.mp3.” It is a little over 15 minutes.

These experiences were in stark contrast to the way he had been treated in Moro, Oregon, where an officer twice stopped him for speeding but issued only warnings. CP 35. He appreciated this officer's approach and made sure to comply with the speed limit thereafter. CP 36.

Mr. Brier's negative experience in Kennewick was consistent with other instances in which he had seen "the police go crazy with power trips and ego trips[.]" CP 36. In addition to witnessing such events "in person," Mr. Brier had watched numerous videos of "police beating, shooting or tazing innocent people[.]" CP 36.

Mr. Brier lamented, "How is it that we the people can be just beat down ... the Obama administration, lack of jobs, ... [price of] food is going up, gas prices are going up, and I have to come up with this money for a ticket that, you know what, he could have cut me a break ...." Ex. 5 at ~9:00-9:45. And the officer who falsely accused him of arson "could have just been honest. He could have just been honest." Ex. 5 at ~10:20.

Mr. Brier shared his frustrations in two posts to the Tri-Cities “Rants and Raves” section of Craigslist, with the title “Good Cop/Bad Cop.” CP 35-36. In the first post, he described and contrasted his experiences in Oregon and Washington. At the end of the post, after noting the officer had imposed an excessive fine he could not afford to pay, he said “when those tickets go to warrant this will be dealt with in a 2<sup>nd</sup> amendment fashion. When the people lose everything they lose it.” CP 36.

In the second post, he discussed his observations of police officers mistreating others by beating and shooting them. He then stated:

Let me be clear! The next time I have a interaction with law enforcement their will be at least one dead cop. If I get the chance to take a few more I will. I know that I will die and I am ok with that, we all die it's just a matter of how. As for that one innocent cop who may get it.... Well I'll give you a break, only a gut shot instead of the head. Sound fair after the break you guys gave me.

CP 36.

A Craigslist “Rants and Raves” reader shared Mr. Brier’s posts with the police. CP 3. A detective interviewed

Mr. Brier, and asked him about his “threat.” Mr. Brier responded, “If it was phrased as a threat, I made no threat intentionally. I was just really angry; I was really angry and just venting.” Ex. 5 at ~2:40-2:46. Mr. Brier explained the circumstances discussed above and said, “being pulled over, and a guy that’s making \$70,000 a year, *laughs* as he hands me a thousand dollars’ worth of tickets. Twenty-five dollars a month is a big deal when you’re barely scratching by. It’s a tank of gas. It’s groceries. So I was angry.” Ex. 5 at ~11:10-11:45.

Mr. Brier repeatedly assured the detective that he was just ranting because he had been mistreated and was struggling financially. He reiterated, “I was very angry. I had no intentions of going out and shooting a police officer.” Ex. 5 at ~5:58-5:59. The detective was somewhat sympathetic, but asked, “Could you see how police could see that as a legitimate threat?” Mr. Brier responded, “On Craigslist? No ....” Ex. 5 at ~6:09-6:10.

The detective nevertheless referred the case to the prosecutor’s office. According to the prosecutor, “there was

some hesitation in filing it because of the lack of a specific victim.” RP (11/21/14) 11. The State ultimately charged Mr. Brier with one count of felony harassment, alleging:

That the said Keith Eric Brier in the County of Benton, State of Washington, on or about the 26<sup>th</sup> day of May, 2014, in violation of RCW 9A.46.020(1)(a)(i) and (2)(b)(ii) without lawful authority, knowingly threatens to cause bodily injury immediately or in the future by threatening to kill the person or any other person and the person by words or conduct places the victim in reasonable fear that the threat will be carried out, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

CP 1.

Mr. Brier moved to dismiss the charge pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). CP 26-32; RP (11/21/14) 1-23. He argued that there “was no particular identity of a person or persons referenced ... nor was it known if [Mr. Brier] would ever have interactions with law enforcement anywhere else in the City of Kennewick, County of Benton, or State of Washington for that matter.” CP 27-28; RP (11/21/14) 4-9. He noted that in published cases, defendants convicted of harassment always targeted

specific victims. CP 29-30. Mr. Brier also argued that there was insufficient evidence of a “true threat” to satisfy the First Amendment, because the statement was hyperbole made in the “Rant and Rave” section of Craigslist. CP 31-32; RP (11/21/14) 3.

The court denied the motion to dismiss. First, it determined there was enough evidence for a reasonable juror to find a true threat. RP (11/21/14) 19-21. Second, it determined that “the victim” was the “Kennewick Police.” RP (11/21/14) 21-22.

The parties proceeded to trial, and Mr. Brier waived his right to a jury. RP (1/14/15) 11. The judge considered the recorded interview, as well as testimony from officers. Sergeant Maynard’s trial testimony was consistent with the recording. He said:

I asked Keith if he knew anything about the threat. He stated, “If it was phrased as a threat I made no threat intentionally. Just really angry.” He went on to explain that he was venting.

RP (3/2/15) 29-30.

Sgt. Maynard admitted that there was no specific threat to him or to the Kennewick Police Department. RP (3/2/15) 63-64. He said it “was to the next officer [Mr. Brier] had contact with[,]” and acknowledged “it could have been the Royal Canadian Mounted Police[.]” RP (3/2/15) 63-64.

In closing argument, Mr. Brier emphasized that the State failed to prove its case for multiple reasons. He noted that “no victim” was specified, and that “at best” the threat was conditional. RP (3/2/15) 77. He argued the statement was not a true threat because the evidence showed Mr. Brier was just angry and “venting.” RP (3/2/15) 78. In context, the alleged threats were political arguments because Mr. Brier spoke of “Obama and the police always beatin’ down, you know, the little people so to speak[.]” RP (3/2/15) 80.

He was comparing \$25.00 a month to groceries and to an officer who makes 70,000 a year. He was by definition aware this was posted a rant and rave. He was on a rant that could not be reasonably taken as a serious true threat ....

RP (3/2/15) 80.

The court nevertheless found Mr. Brier guilty. The judge said:

Let's take the question first as to whether or not a group of people -- a threat against a group of people can be a threat under RCW 9A.46.020, and I look at the plain language of it, of the statute, and it is broad enough to encompass a threat against a group.

RP (3/2/15) 84. The court found Mr. Brier “knowingly threatened,” that the threat met the definition of a “true threat,” and that the language used “would place a reasonable person in fear that the threat would be carried out.” RP (3/2/15) 84-86. The Court concluded:

You know, I – sir, I feel badly for you. You know, in your statement my heart went out for you when you described your financial circumstances and your – how you felt that life had really been serving you up with some real tough situations, and were I a king I could probably go ahead and pardon you, but I'm not.

RP (3/2/15) 86.

At sentencing, Mr. Brier apologized for his conduct and noted he had a job and would pay legal financial obligations. RP (7/20/16) 102.

Mr. Brier timely appeals. CP 1168.

## E. ARGUMENT

The conviction should be reversed for several independent reasons. The State failed to prove two separate statutory elements, and either failure on its own would require reversal. The State also failed to prove a “true threat” as required to criminalize speech that is otherwise protected by the First Amendment. The charging document was deficient because it was nonsensical: it omitted a clause of the statute, was phrased in the present tense, and failed to identify a victim. Finally, Mr. Brier was unconstitutionally convicted of a crime not charged. For each of these independent reasons, this Court should reverse.

**1. The conviction should be reversed and the charge dismissed with prejudice because the State failed to prove every element of the crime charged.**

- a. Due Process requires the State to prove every element of the crime charged beyond a reasonable doubt.

[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable

doubt of the existence of every element of the offense.

*State v. Hummel*, 196 Wn. App. 329, 352, 383 P.3d 592 (2016) (quoting *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970)).

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). The beyond a reasonable doubt standard is designed to impress “upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused.” *Jackson*, 443 U.S. at 315. It “symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.” *Id.*

A conviction based on insufficient evidence violates a defendant’s fundamental right to due process. U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt.”  
*Jackson*, 443 U.S. at 318; *State v. Vasquez*, 178 Wn. 2d 1, 6,  
309 P.3d 318 (2013).

Where a determination of sufficiency of the evidence  
requires statutory construction, review is de novo. *State v.*  
*Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

The State charged Mr. Brier with felony harassment.  
The statute at issue 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.

As explained below, the State failed to prove multiple elements of the crime. Each failure provides an independent basis for reversal.

- b. The State failed to prove that an officer feared that a threat to kill would be carried out.

One element for which the State presented insufficient evidence was the “fear” element set forth in subsection (1)(b) of the statute. In cases where the State charges misdemeanor harassment, the State need only prove that the person threatened was placed in reasonable fear of bodily harm. But where, as here, the State charges felony harassment, the State must prove the person threatened was placed in reasonable fear of *death*. *State v. C.G.*, 150 Wn.2d 604, 607-08, 80 P.3d 594 (2003); RCW 9A.46.020. This the State failed to prove.

No police officer testified that he or she feared a threat to *kill* would be carried out. Instead, all three witnesses testified that they were “concerned” about the “safety” of law enforcement officers. RP (3/2/15) 14 (Detective Salter says “I did” when asked, “Based on your observation of the posting,

did you have concerns about the safety of law enforcement officers?"); RP (3/2/15) 18 (Sergeant Kirk Isakson answers "yes" when asked, "And did you have concerns about officer safety based on that post?"); RP (3/2/115) 21 (Sergeant Maynard testifies he had "concern for the safety of a law enforcement officer"). This testimony is insufficient to prove the element at issue.

The Supreme Court's decision in *C.G.* is dispositive. There, the defendant yelled obscenities and told the alleged victim, "I'll kill you Mr. Haney, I'll kill you." *C.G.*, 150 Wn.2d at 606-07. At trial, the alleged victim "testified that C.G.'s threat caused him concern." *Id.* at 607. "He testified that based on what he knew about C.G., she might try to harm him or someone else in the future." *Id.* Even drawing all reasonable inferences in favor of the State, the Supreme Court held this evidence was insufficient to prove the specific fear required under the felony harassment provision. *C.G.*, 150 Wn.2d at 610 ("C.G.'s conviction for felony harassment must be reversed because there is no evidence that Mr.

Haney was placed in reasonable fear that she would kill him.”).

The same is true here. As in *C.G.*, the witnesses expressed “concern” about general harm (“safety”). But the felony harassment statute requires more. *C.G.*, 150 Wn.2d at 606-07, 610. Accordingly, the conviction should be reversed, and the charge dismissed with prejudice. *Hummel*, 196 Wn. App. at 359 (remedy for insufficiency of the evidence, where lesser-included offense was not presented to fact-finder, is dismissal of the charge with prejudice).

This Court need not reach the alternative arguments in the remainder of the brief.

c. The State failed to prove a particular victim, as required by the statute.

As trial counsel noted, the State did not prove there was a threat directed at any particular person. CP 27-32; RP (11/21/4) 4, 7; RP (3/2/15) 77. The judge concluded no such proof was necessary and that “a threat against a group of people can be a threat under RCW 9A.46.020.” RP (3/2/15) 84. The plain language of the statute indicates otherwise.

As set forth above, the plain language of the statute provides that the State must prove the existence of “the person threatened[.]” RCW 9A.46.020(1)(a)(i); RCW 9A.46.020(1)(b); RCW 9A.46.020(2)(b)(ii). The word “person” is singular, indicating an individual.

When the legislature means for a provision to apply to either an individual or a group, it uses the phrase “person or persons.” *See, e.g.*, RCW 9A.28.040(2) (“It shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired ... has not been prosecuted ...”); RCW 9A.83.030(5) (when a person has a claim of ownership in property government seizes for crime of money laundering, “the person or persons shall be afforded a reasonable opportunity to be heard”); RCW 9A.88.150(5) (same for prostitution). The legislature could have, but chose not to, use this same phrase in the harassment statute. This choice must be given effect. *See State v. Slattum*, 173 Wn. App. 640, 656, 295 P.3d 788 (2013) (use of particular language in one statute demonstrated legislature “knew how to say it” when it

intended to do so, and did not intend same meaning when using different language in another statute).

In sum, the State's failure to prove there was a threat directed at a particular person provides an independent basis for reversal and dismissal. *See Engel*, 166 Wn.2d at 581 (construing statutory element and reversing and dismissing for insufficient evidence to support that element).

**2. In the alternative, the conviction should be reversed and the charge dismissed with prejudice because the State failed to prove a true threat as required under the First Amendment.**

The harassment statute criminalizes pure speech, and therefore "must be interpreted with the commands of the First Amendment clearly in mind." *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004); *see* U.S. Const. amend. I (government may not abridge freedom of speech); *Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925) (First Amendment applies to the states through the Fourteenth Amendment). Because the right to free speech is "vital," only a few narrow categories of communication may be proscribed. *Kilburn*, 151 Wn.2d at 42. Although a "threat"

is one of those categories, the only type of threat which may be criminalized without running afoul of the First Amendment is a “true threat.” *Id.* at 43.

As explained below, under either the “reasonable person” definition of “true threat” or the subjective intent definition of “true threat,” the State failed to meet its burden to prove that Mr. Brier’s rants on Craigslist fell outside the protection of the First Amendment.

- a. The State failed to prove a true threat under the reasonable person standard.

The Washington Supreme Court has defined a true threat as “a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.” *Kilburn*, 151 Wn.2d at 43 (internal quotations omitted). This is an objective standard that focuses on the viewpoint of a reasonable speaker under all of the circumstances. *Id.* at 44. A statement is not a true threat if it is meant as a joke, idle talk, or political argument. *Id.*

Given “the First Amendment values at issue,” the true threat standard is “a difficult standard to satisfy.” *Id.* at 53. Not only is the State’s burden weighty, but the reviewing court also must “be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech.” *Id.* at 49.

In this case, the State failed to meet its weighty burden to show that Mr. Brier’s Craigslist posts were true threats rather than protected speech. A reasonable person in Mr. Brier’s circumstances would not have foreseen his statements would be interpreted as a serious expression of intention to inflict harm.

As noted, context is critical. *See Kilburn*, 151 Wn.2d at 43; *accord Virginia v. Black*, 538 U.S. 343, 367, 123 S. Ct. 1536, 155 L. Ed.2d 535 (2003) (noting importance of “contextual factors” in First Amendment true threat analysis). The context in which Mr. Brier made his statements was the “Rants and Raves” section of Craigslist. CP 35-36. He complained about police abuses generally and

about an exorbitant traffic fine levied against him personally. Ex. 5. He later explained to a detective that he made no threat intentionally but was “just really angry” and “venting.” *Id.*; RP (3/2/15) 29-30; Ex. 5. He did not think they would be taken as a true threat because they were rants on Craigslist. Ex. 5. Mr. Brier’s statements were political hyperbole, not a true threat.

The seminal true threat case is instructive. *See Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed.2d 664 (1969). In *Watts*, the United States Supreme Court reversed the conviction of a man who objected to the draft and said, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” *Watts*, 394 U.S. at 706. The Court noted that the statute at issue criminalized pure speech, and emphasized that such statutes “must be interpreted with the commands of the First Amendment clearly in mind.” *Id.* at 707. The statute required “the Government to prove a true ‘threat,’” *id.* at 708, and “[w]hat is a threat must be distinguished from what is constitutionally protected speech.” *Id.* at 707.

The Court held that the petitioner’s “political hyperbole” could not be criminalized in light of our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 708. The language used to attack government officials “is often vituperative, abusive, and inexact.” *Id.* Breathing room must be provided for such language in order to comport with the First Amendment. *See id.*

Like the statement in *Watts*, Mr. Brier’s Craigslist post was vituperative, abusive political hyperbole protected by the First Amendment. It is not a true threat, and may not be criminalized. For this reason, too, this Court should reverse the conviction and remand for dismissal of the charge with prejudice. *State v. E.J.J.*, 183 Wn.2d 497, 508, 354 P.3d 815 (2015) (remedy for conviction that violates First Amendment is reversal and dismissal).

b. The State failed to prove a true threat under the subjective intent standard.

Unlike Washington courts, several other courts have held that the First Amendment requires proof of a higher mental state than the reasonable person standard in order to criminal speech as a true threat. Based on their reading of *Virginia v. Black*, those courts hold the government must prove the defendant subjectively intended to induce fear of serious harm or death. *See, e.g., United States v. Heineman*, 767 F.3d 970, 976 (10th Cir. 2014); *Brewington v. State*, 7 N.E.3d 946, 964-65 (Ind. 2014); *O'Brien v. Borowski*, 961 N.E.2d 547, 556 (Mass. 2012); *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9<sup>th</sup> Cir. 2011). The Washington Supreme Court has not read *Black* to require this standard<sup>3</sup>, but Mr. Brier raises the issue to preserve it in the event the U.S. Supreme Court resolves the conflict against the reasonable person standard.

The State failed to prove Mr. Brier issued a true threat under the subjective intent standard. He did not mean to threaten anybody but was instead venting about police

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<sup>3</sup> *See State v. Trey M.*, 186 Wn. 2d 884, 893, 383 P.3d 474 (2016).

abuses in the “Rants and Raves” section of Craigslist. CP 35-36; Ex. 5; RP (3/2/15) 29-30. Indeed, he told the detective, ““If it was phrased as a threat, I made no threat intentionally. I was just really angry; I was really angry and just venting.” Ex. 5 at ~2:40-2:46. Accordingly, this Court should reverse the conviction and remand for dismissal of the charge with prejudice. *E.J.J.*, 183 Wn. 2d at 508.

**3. In the alternative, the conviction should be reversed and the charge dismissed without prejudice because the information is constitutionally deficient.**

- a. An information is constitutionally deficient if it fails to set forth every element of the crime charged.

Article I, section 22 of our state constitution<sup>4</sup> and the Sixth Amendment to the federal constitution<sup>5</sup> require the State to provide an accused person with notice of the offense charged. *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). An offense is not properly charged unless the information sets forth every essential element of the crime,

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<sup>4</sup> “In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him ....”

<sup>5</sup> “In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation ....”

both statutory and nonstatutory. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The charging document must contain: (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. *Auburn v. Brooke*, 119 Wn.2d 623, 630, 836 P.2d 212 (1992). “This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.” *Pelkey*, 109 Wn.2d at 488 (quoting *State v. Ackles*, 8 Wash. 462, 464-65, 36 P. 597 (1894)).

A challenge to the sufficiency of the charging document is of constitutional magnitude and may be raised for the first time on appeal. *State v. Leach*, 113 Wn.2d 679, 691, 782 P.2d 552 (1989); RAP 2.5(a)(3). Where the issue is raised for the first time on appeal, the standard of review set forth in *Kjorsvik* applies. This Court asks: (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. If the answer to the first question is “no,” reversal is required without reaching the second question. *State v. Zillyette*, 173 Wn.2d 784, 786, 270 P.3d 589 (2012); *State v. McCarty*, 140 Wn.2d 420, 425-28, 998 P.2d 296 (2000).

- b. The information here is deficient because it omits a critical clause of the statute, is framed in the present tense, and does not identify either “the victim” or “the person threatened.”

Here, the answer to the first question is “no,” i.e., a necessary element of the crime is neither explicitly stated nor fairly implied. And even if all of the elements were “fairly implied,” the inartful language prejudiced Mr. Brier. Thus, this Court should reverse.

Again, the statute at issue 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 (emphasis added); *see State v. Mills*, 154 Wn.2d 1, 12, 109 P.3d 415 (2005).

The information omitted the highlighted clause above.

CP 1. It also omitted the names of the person threatened and the person placed in fear, instead using the generic phrases “the person” and “the victim.” CP 1; *See* WPIC 36.07.02 (names of person threatened and person placed in reasonable fear are elements). Finally, it was nonsensical in at least two respects:

- It used the present tense instead of the past tense, alleging Mr. Brier “threatens to cause bodily injury” and “places the victim in reasonable fear[.]” CP 1.
- It used the phrase “the person” to describe both Mr. Brier and the alleged victim. CP 1 (Alleging that Mr. Brier “knowingly threatens to cause bodily injury immediately or in the future by

threatening to kill **the person** or any other person and **the person** by words or conduct places the victim in reasonable fear that the threat will be carried out”) (emphases added).

In total, the information was “gobbledygook.” See *Seattle v. Termain*, 124 Wn. App. 798, 806, 103 P.3d 209 (2004) (describing information with similar flaws as “gobbledygook” and ordering charges dismissed).

Accordingly, this Court should reverse.

- c. The remedy is reversal of the conviction and remand for dismissal of the charge without prejudice to the State’s ability to refile.

Washington courts “have repeatedly and recently held that the remedy for an insufficient charging document is reversal and dismissal of charges without prejudice to the State’s ability to refile charges.” *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Mr. Brier accordingly asks this Court to reverse the conviction and remand for dismissal of the charge without prejudice.

**4. The conviction should be reversed and the case remanded for a new trial because Mr. Brier was unconstitutionally convicted of a crime not charged.**

Just as the accused is entitled to notice of the crime charged, he is also entitled not to be tried for a crime *not* charged. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Pelkey*, 109 Wn.2d at 487; *State v. Jain*, 151 Wn. App. 117, 121, 210 P.3d 1061 (2009) (“An accused person has a constitutional right to be informed of the charge he is to meet at trial and cannot be tried for a crime not charged.”).

Here, as noted, the original charging document was deficient in several respects, one of which was that the identity of the “person threatened” was vague and overbroad. Mr. Brier filed a pretrial motion to dismiss on this basis. CP 26-32; RP (11/21/14) 1-23. He argued that there “was no particular identity of a person or persons referenced ... nor was it known if [Mr. Brier] would ever have interactions with law enforcement anywhere else in the City of Kennewick, County of Benton, or State of Washington for that matter.” CP 27-28; RP (11/21/14) 4-9. He noted that in published

cases, defendants convicted of harassment always targeted specific victims. CP 29-30.

In denying the motion to dismiss, the court determined that “the victim” was the “Kennewick Police.” RP (11/21/14) 21-22. Thus, the ruling on the motion to dismiss essentially served as a bill of particulars. *Cf. State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141 (2005) (“A charging document that states each statutory element of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars”). But at trial, Mr. Brier was convicted based on testimony that the victim could have been any officer anywhere – even a member of the Royal Canadian Mounted Police. RP (3/2/15) 63-64. This was error.

This Court’s decision in *Vidales Morales* is instructive. *See State v. Vidales Morales*, 174 Wn. App. 370, 298 P.3d 791 (2013). There, the defendant was charged with two counts of felony harassment. One count involved a statement the defendant made to Trinidad Diaz, in which he said he was going to kill Yanett Farias the next morning. As to that count, the charging document read:

On or about February 14, 2011, 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.

*Vidales Morales*, 174 Wn. App. at 376.

Although the charging document alleged the “person threatened” was “Yanett Farias,” the jury was instructed that it could find guilt if “the words or conduct of the defendant placed Trinidad Diaz &/or Yanett Farias in reasonable fear that the threat to kill would be carried out[.]” *Id.* The jury found the defendant guilty, but this Court reversed. *Id.* at 376, 384.

This Court noted that because a defendant has a constitutional right to be informed of the nature of the cause against him, it is error to instruct the jury on “uncharged offenses or uncharged alternative theories.” *Vidales Morales*, 174 Wn. App. at 382. The Court determined that in light of the evidence presented, it was possible the jury found the defendant guilty of the uncharged alternative theory – that

the “person threatened” was Mr. Diaz. Thus, reversal was required. *Id.* at 384.

Similarly here, the charging document, as construed by the judge in denying the motion to dismiss, alleged that Mr. Brier threatened the Kennewick Police. RP (11/21/14) 21-22. But the court later convicted him based on the alternative theory that the “person threatened” was any police officer anywhere, including the Royal Canadian Mounted Police. RP (3/2/15) 63-64. Mr. Brier was thus unconstitutionally convicted of a crime not charged. The remedy is reversal and remand for a new trial. *Vidales Morales*, 174 Wn. App. at 384.

F. CONCLUSION

For each of the independent reasons set forth above, the conviction should be reversed.

Respectfully submitted this 24th day of July, 2017.

/s Lila J. Silverstein  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 34635-8-III
	)	
KEITH BRIER,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24<sup>TH</sup> DAY OF JULY, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <p>[X] KEITH BRIER<br/>1620 S DAYTON PL<br/>KENNEWICK, WA 99337</p>  | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>HAND DELIVERY<br/>_____</p>                    |

**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF JULY, 2017.

X \_\_\_\_\_ 

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