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FILED

AUG 04 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 259196

FILED
AUG 19 2008

CLERK OF SUPREME COURT
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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GLEN ARTHUR SCHALER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Glen Arthur Schaler (Mr. Schaler) asks this Court to accept review of the Court of Appeals' decision designated in Part B of this Petition.

B. COURT OF APPEALS DECISION

Mr. Schaler seeks review of the Court of Appeals' decision filed on July 3, 2008. The published decision affirmed Mr. Schaler's convictions for

Harassment. A copy of the published decision is in the Appendix at pages A-1 through A-19. This Petition for Review timely follows.

C. ISSUES PRESENTED FOR REVIEW

1. Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. Instructions must also properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case.

Here, a jury instruction misapplied the law and ultimately relieved the State of its burden to prove an essential element of the crime charged. The erroneous instruction presumably misled the jury and tainted its verdict. Was the erroneous jury instruction harmless beyond a reasonable doubt?

2. Due process requires the State to prove every element of the charged crime beyond a reasonable doubt. To obtain a conviction for Harassment pursuant RCW¹ 9A.46.020, the State had to satisfy both the statutory elements of the crime and First Amendment demands.

Here, to satisfy First Amendment demands, the State had to prove a reasonable person in the defendant's position could foresee that a statement

¹ RCW refers to Revised Code of Washington.

would be interpreted as a serious expression of intention to inflict bodily harm or death. The evidence presented proved the defendant was not in a reasonable state of mind. On the other hand, the evidence failed to prove whether a person in the defendant's condition could have foreseen that a mental health professional would have construed the description of a nightmare as a *true threat*. Was the evidence presented sufficient to support the jury's verdict?

D. STATEMENT OF THE CASE

a. Substantive History

Mr. Schaler awoke from a nightmare. Terrified and confused, he telephoned a crisis intervention hotline for help. "I wasn't in control. I was hallucinating, hearing voices, believing things were going that weren't happening." 2/21/07 RP at 26.

According to the crisis counselor, "[Mr. Schaler] was crying.

He was you know pretty hysterical, saying that he thought he had killed his neighbor. He said that he'd been having dreams that he had killed his neighbor and he thought that it's been occupying a lot of his daytime too, his thoughts. And that he had a dream that he went into and I think he told me the neighbor's name. I didn't get that at the time, and he slit her throat. He said that he woke up and he was covered with blood and he was very, very scared."

2/6/07 RP at 241-242. "He was tearful. He was very sad when he called.

Very hysterical." 2/6/07 RP at 269.

Within minutes, the counselor notified police. "It caused quite a ruckus in the front desk, and so, there were a few people in, in the office with me, and I had asked Jordan to dispatch police, because it seemed like a pretty legitimate call at the time." 2/06/07 RP at 243. "I think I told [Mr. Schaler] that we were sending somebody out there." 2/06/07 RP at 243.

"I can't remember if he called me, or I called him back, but at that time, I called him back, and I said, "They're there to check on your neighbor." 2/06/07 RP at 244. "And I think at that point, he made the threat that he was going to kill himself." 2/06/07 RP at 244.

The counselor asked Mr. Schaler to come in for further evaluation. "I just needed to see him face to face to see what was really going on." 2/06/07 RP at 246. "He presented on the phone maybe a little bit paranoid, a little bit, not thinking clearly, and my goal was to get him in to an evaluation setting and see if I could make sense out of what was going on in his life." 2/06/07 RP at 254-55.

Mr. Schaler seemed reluctant to go in for an evaluation. "I asked him several times, and he said he couldn't." 2/06/07 RP at 244. Concerned, the counselor faxed a pick up order to police.² She informed the officer Mr. Schaler thought "he was covered in blood and believed he had killed his neighbor." 2/06/07 RP at 207.

When the officer reached his residence, she encountered Mr. Schaler, still quite terrified and confused. "When I got into the house, Mr. Schaler was

² "A pick up order is for us to go to a location or locate an individual who's named on the order and bring them either to the hospital or to Mid Valley for an evaluation." 2/06/07 RP at 226.

wearing a brown short-sleeved pocket tee-shirt and a pair of jeans. He was sweaty and panting. He appeared like he was having difficulty getting a complete breath.” 2/06/07 RP at 212. “I’d ask him if he believed that he’d killed his neighbors. His response was I dreamed I slit her throat.” 2/06/07 RP at 207. “I couldn’t see any blood on him.” 2/06/07 RP at 208. “The shirt was soiled but there were no signs of blood.” 2/06/07 RP at 214. “He told me he felt funny. He said he couldn’t feel his hands or feet.” 2/06/07 RP at 212. He indicated that he had not taken his medication that morning.” 2/06/07 RP at 212.

The officer testified that she “was able to get Mr. Schaler to take his medication. I waited till I had clearance to give him his medication.” 2/06/07 RP at 212. After he had taken the medication, Mr. Schaler seemed more calm and compliant. 2/06/07 RP at 215.

The officer then left the house to assess the area. “I still hadn’t negated that we had a criminal investigation or that there hadn’t been someone who was seriously injured, so I went as quickly as I could to the Busbin residence.” 2/06/07 RP at 208-09. “I went to the front door, it was locked. I peered in through the screens. I couldn’t see any signs of violence.” 2/06/07 RP at 209. Assisting officers “canvassed the area more thoroughly and were able to determine that Mr. Busbin was out of town on a jobsite and that Ms. Busbin had been seen leaving earlier in the morning to go to work.” 2/06/07 RP at 215.

The officer returned to Mr. Schaler's house and transported him to the hospital for evaluation. 2/06/07 RP at 229-30. During the evaluation, Mr. Schaler tearfully and desperately recounted the nightmare to the crisis counselor. 2/06/07 RP at 266. At some point, the officer was summonsed back to the hospital. Mr. Schaler's commitment had changed. "It had gone from a voluntary commitment status to an involuntary commitment status."

2/06/07 RP at 220. Mr. Schaler was experiencing a mental breakdown.

2/06/07 RP at 261. So, "I determined to detain him under the ITA law for danger to self and danger to others." 2/06/07 RP at 255.

In the petition for involuntary commitment, the counselor quoted Mr. Schaler as having said, "I think I killed my neighbor. I had a dream I went to her house and slit her throat. I had blood all over the house and on my hands. I hope I didn't really kill her. I want to kill her with my bare hands. I dream about it. But in the dream she hits me and scratches my face." 2/06/07 RP at 267-68.

The counselor contacted the neighbors. She told them Mr. Schaler had threatened to kill them. "I think that I contacted them, I think it's a duty to protect, and I have to contact anybody that's made threats, viable threats immediately." 2/06/07 RP at 251. Some time later, a prosecuting attorney asked the officer to contact the neighbors and obtain statements. 2/06/07 RP at 233-34.

b. Procedural History

The State ultimately charged Mr. Schaler with two counts Harassment under RCW 9A.46.020 (1) (a) (i). CP at 224-25; 115-16; and 47-48. During pre-trial deliberations, Mr. Schaler moved the court to suppress evidence which was obtained in violation of the law and dismiss the action. CP at 200-203. Specifically, Mr. Schaler argued communication between the counselor and he was privileged. The court denied Mr. Schaler's motion. It found the counselor was proper in disclosing statements to the neighbors. It further found Mr. Schaler threatened to slit the throats of both Ms. Busbin and Ms. Nockels. CP at 110-114. Mr. Schaler moved the court to reconsider its ruling, but the court denied the motion for reconsideration. CP at 99-109.

A jury trial commenced. At the end of the State's case, Mr. Schaler moved the court to dismiss the action because the State failed to prove the elements of the crime charged. 2/07/07 RP at 48. The trial court denied the motion and the jury found Mr. Schaler guilty of both counts. 2/07/07 RP at 61; CP at 24 and 25.

Mr. Schaler appealed the conviction. CP at 07. On appeal, Mr. Schaler argued the trial court committed reversible error when it failed to instruct the jury on the definition of a *true threat*. The reason being, RCW 9A.46.020 prohibits only *true threats*. Therefore, the jury should have been instructed on what constituted a *true threat* rather than just a *threat*. He also argued the evidence presented at trial was insufficient to prove a reasonable

person in Mr. Schaler's position would interpret his statements as a serious threat to cause bodily injury or death.

The Court of Appeals found the trial court erred when it failed to instruct the jury on the definition of a *true threat*. Appendix A-13- A-14. It reasoned "the definition of *threat* was insufficient to protect Mr. Schaler's First Amendment rights." Appendix A-14. The Court of Appeals concluded however, the trial court's error was harmless beyond a reasonable doubt. Appendix A-15.

In addition, the Court of Appeals found the evidence presented at trial supported the jury's verdict. It reasoned a reasonable person in Mr. Schaler's position would interpret his statements as a serious threat to cause bodily injury or death. Appendix A-18- A-19. This Petition for Review timely follows.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP³ 13.4 (b). Petitioner believes this Court should accept review because the decision of the Court of Appeals is in conflict with other decisions of this Court and the United States Supreme Court. Furthermore, the Court of Appeals' decision involves issues of substantial public interest that should be determined by the Supreme Court. RAP 13.4 (b) (4).

³ RAP refers to Rule of Appellate Procedure.

I. AN INSTRUCTIONAL ERROR THAT RELIEVES THE STATE OF ITS BURDEN TO PROVE AN ESSENTIAL ELEMENT OF A CRIME CHARGED IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

a. Jury Instruction No. 10 relieved the State of its burden to prove an essential element beyond a reasonable doubt. Instructional errors which tend to shift the burden of proof to a criminal defendant are of a constitutional magnitude because they may implicate a defendant's rights of due process.

See Sandstrom v. Montana, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979); In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

Due process of law requires the State to prove each element of a crime beyond a reasonable doubt. State v. Byrd, 125 Wn.2d 713-14, 887 P.2d 396 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 22. Implicit in this principle is the requirement that jury instructions list all of the elements of the crime, since failure to list all elements would permit the jury to convict without proof of the omitted element. See State v. Linehan, 147 Wn.2d 653-54, 56 P.3d 542 (2002).

Here, Mr. Schaler challenged Jury Instruction No. 10. It read, a "threat means to communicate, directly or indirectly, the intent to cause bodily injury immediately or in the future to the person threatened or to any other person." CP at 26-45. Because RCW 9A.46.020 prohibits only *true threats*, Mr. Schaler argued the trial court should have instructed the jury on what constituted a *true threat* rather than just a *threat*. The Court of Appeals agreed and found the trial court did in fact err when it failed to instruct the jury on the definition of a *true threat*.

b. The trial court's failure to properly instruct the jury was prejudicial. Neither the United States Supreme Court nor this Court will forsake a defendant's fundamental right to a fair trial when constitutional error is prejudicial. Rose v. Clark, 478 U.S. 570, 92 L. Ed. 2d 470, 106 S. Ct. 3101 (1986); State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

In general, when trial error abridges a right guaranteed to the defendant by the United States Constitution, the jury verdict will be affirmed only if that error was "harmless beyond a reasonable doubt". Chapman v. California, 386 U.S. 24, 17 L. Ed. 2d 705, 87 S. Ct. 824, 24 A.L.R.3d 1065 (1967). "A harmless error is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the outcome of the case.*" State v. Wanrow, 88 Wn.2d 237, 559 P.2d 548 (1977)(*quoting State v. Golladay*, 78 Wn.2d 139, 470 P.2d 191 (1970)).

Here, the Court of Appeals found the trial court's failure to properly instruct the jury was harmless beyond a reasonable doubt. Appendix A-15. However, "it cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." State v. Johnson, 100 Wn.2d 623, 674 P.2d 145 (1983), *overruled on other grounds* in State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985).

In fact, this Court has consistently held a trial court's failure to instruct a jury on an essential element of a crime cannot be deemed harmless. For example, in State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995), the Court of Appeals reversed the defendant's conviction for attempted first degree rape. The State challenged the Court of Appeals' decision. It argued the Court of Appeals incorrectly concluded the trial court committed reversible error when it failed to instruct the jury that fourth degree assault was a lesser included offense of attempted first degree rape, and that intent was an element of attempt. This Court not only found that the trial court erred when it failed to instruct the jury that intent was an element of attempted rape, but this Court also found that the trial court's error was not harmless. Aumick, 126 Wn.2d at 430.

Similarly, in State v. Lilyblad, the trial court failed to instruct the jury correctly on the intent requirement for telephone harassment. The Court of Appeals reversed the defendant's conviction and the State petitioned for review. This Court found the crime of telephone harassment requires proof that the defendant formed the intent to harass the victim at the time the defendant initiates the call to the victim. This Court recognized that failure to instruct the jury on an element of a crime constitutes error of constitutional magnitude that can not be deemed harmless and affirmed the Court of Appeals' decision. State v. Lilyblad, 163 Wn.2d 13, 177 P.3d 686 (2008).

Here, based on witness testimony, the Court of Appeals found the jury would have concluded *true threats* were made. Appendix A-14. This is

highly inconceivable. The reason being, the jury was only instructed to consider whether the nightmare constituted a *threat*. The jury had no basis for concluding otherwise, because it was not presented with instruction on the omitted element of *true threat*. And “a jury is presumed to follow the instruction of the court.” *State v. Grisby*, 97 Wn.2d 499, 647 P.2d 6 (1982). “Absent any showing to the contrary, this Court must presume the jury followed the trial court’s instruction.” *State v. Cerny*, 78 Wn.2d 850, 480 P.2d 199 (1971), vacated, 408 U.S. 939 (1972).

The Court of Appeals also concluded the defense’s theory of the case was that the threats were not knowingly made. “There was simply no contention that the threats were not serious or true.” Appendix A-15.

To satisfy due process, the State had to prove statutory elements of the crime and also First Amendment demands. It was the State’s burden to properly instruct the jury on all elements of the crime so that the jury would not assume the *true threat* element did not have to be proven. Furthermore, it was the State’s burden to instruct the jury so as to permit the defense to argue the theory that the threats were not serious or true. *State v. LeFaber*, 128 Wn.2d 903, 913 P.2d 369 (1996).

The State failed to meet these burdens. “The omission of an element of the crime produces a *fatal error* by relieving the State of its burden of proving every essential element beyond a reasonable doubt.” *See also State v. Byrd*, 125 Wn.2d 713-14, 887 P.2d 396 (1995); *State v. Brown*, 147 Wn.2d 339, 58 P.3d 889 (2002). For that reason, reversal is the only appropriate

remedy. State v. Bennet 161 Wn.2d 307, 165 P.3d 1241 (2007) (citing Sullivan v. Louisiana, 508 U.S. 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE VERDICT.

a. Evidence presented did not prove beyond a reasonable doubt a

nightmare constituted a true threat to kill. In order to preserve the vital right to free speech, it is imperative that a court carefully assess statements at issue to determine whether they fall within or without the protection of the First Amendment. State v. Kilburn, 151 Wn.2d 42, 84 P.3d 1215 (2004). An appellate court 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. It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings. The First Amendment demands more. State v. Kilburn, 151 Wn.2d at 49.

Whether language constitutes a *true threat* is an issue of fact for the trier of fact in the first instance. United States v. Fulmer, 108 F.3d 1492 (1st Cir. 1997); Melugin v. Hames, 38 F.3d 1485 (9th Cir. 1994). However, a rule of independent appellate review applies in First Amendment speech cases. An appellate court “must make an independent examination of the whole record, . . . so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression.” Kilburn, 151 Wn.2d at 50 (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 508 104 S.Ct.

1949, 80 L.Ed.2d 502 (1984)(internal quotation marks omitted). The rule of independent appellate review does not extend to factual determinations such as findings on credibility, however. *Id.*; see *United States v. Hanna*, 293 F.3d 1088 (9th Cir. 2002). So, to avoid unconstitutional infringement of protected speech, RCW 9A.46.020 (1) (a) (i) must be read as clearly prohibiting only *true threats*. *State v. Williams*, 144 Wn.2d 208, 26 P.3d 890 (2000); *State v. J.M.*, 144 Wn.2d 478, 28 P.3d 720 (2001).

b. *A nightmare does not constitute a true threat*. “A *true threat* is 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.” *Williams*, 144 Wn.2d at 208-09 (quoting *State v. Knowles*, 91 Wn. App. 373, 957 P.2d 797 (1998) (quoting *United States v. Khorrami*, 895 F.2d 1192 (7th Cir. 1990)); accord *J.M.*, 144 Wn.2d at 477-78. A *true threat* is a serious threat, not one said in jest, idle talk, or political argument. *United States v. Howell*, 719 F.2d 1260 (5th Cir. 1984); *J.M.*, 144 Wn.2d at 478; *State v. Hansen*, 122 Wn.2d 717 n.2, 862 P.2d 117 (1993). The *true threat* test is determined under an objective standard that focuses on the speaker. *State v. Kilburn*, 151 Wn.2d at 44.

Recently, the Ninth Circuit applied the *true threat* test in *Bauer v. Simpson*, 261 F.3d 775 (9th Circuit 2001). In that case, a college disciplined a professor who had published the following arguably threatening writings in a campus newspaper: a fantasy description of a funeral for a college trustee and

the asphyxiation of the college president; illustrations showing the president beheading his enemies; an illustration of a two-ton granite 'shit list' dropping on the president's head. Shannon McMinimee, Lavine v. Blaine School District: Fear Silences Student Speech in Ninth Circuit, 77 Wash. L. Rev. 545 (2002).

The college argued that these writings constituted *true threats*. Bauer v. Simpson at 782-783. In addition, the college asked the court to consider other related events involving the professor. Id. at 784 (noting that no allegation had been made that the professor had ever been physically abusive or violent, on or off campus).⁴ For example, the college claimed the professor had experienced verbal run-ins with other employees, told his supervisor that he and the president were 'going down', told a co-worker 'your day has come' after the co-worker mocked a friend, and referred to minority co-workers as 'the dark side.' See Id. The college also submitted a report from a psychiatrist who believed the professor was sufficiently disturbed to require counseling and was an increasingly ominous risk because of his unambiguously stated fantasies of revenge and destruction.⁵ See Id. at 788.

The Court held despite a turbulent campus community and other related events involving the professor, there was simply no way a reasonable reader would have construed the writings and illustrations to be *true threats*.

⁴ This paragraph was taken from Shannon M. McMinimee, Lavine v. Blaine School District: Fear Silences Student Speech in Ninth Circuit, 77 Wash. L. Rev. 548 (2002).

⁵ This paragraph was taken from Shannon M. McMinimee, Lavine v. Blaine School District: Fear Silences Student Speech in Ninth Circuit, 77 Wash. L. Rev. 549 (2002).

Consequently, mere illustrations and fantasies are not direct and unambiguous enough to amount to “true threats”. *Id.* at 775.⁶

The facts here are somewhat analogous to those in *Bauer v. Simpson*. Like the professor’s relationship with his colleagues, Mr. Schaler’s relationship with his neighbors was quite turbulent. They often engaged in acrimonious discussions about property lines and fruit trees. “There was a problem with the Busbins long before these other folks moved in with them building the fence across the alley, telling me I can’t use it.” 2/21/07 RP at 37. “They believed I had enough access to my property.” 2/21/07 RP at 28.

The relationship became more strained when Mr. Schaler removed an obstructive fruit tree. “I have had permission for several years to cut the trees down, anything in the alleyway that would scratch my vehicle, or not allow me to go through the alley.” 2/21/07 RP at 28. “I remember cutting down the apple tree, but I also remember spending a year in contact with the county and calling Schultz, the county commissioner.” “Ms. Busbin says I cut her tree out of her yard. After they had been informed by the officer it was an open alley by the Planning Commission, they come up here and lie to get restraining orders.” 2/21/07 RP at 31.

Unlike the professor, however, Mr. Schaler’s nightmare neither stemmed from malice nor vengeance. “[] something was trying to force me to do something that was against my values... I got help. I can’t help from hearing things; I can’t help with the hallucinations. They asked me what I

⁶ This paragraph was taken from Shannon M. McMinimee, *Lavine v. Blaine School District: Fear Silences Student Speech in Ninth Circuit*, 77 Wash. L. Rev. 549 (2002).

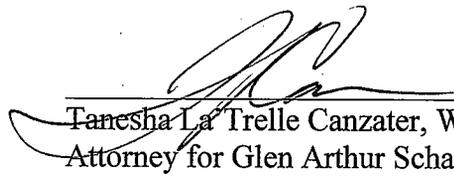
thought happened. I told them straight out, I've been under a lot of stress from my neighbors because they keep whining about me. I mean I have done nothing to them." 2/21/07 RP at 36. "I was having thoughts that were telling me to do things. Like I said, that were against my values and all I was trying to do was communicating those thoughts to the people that were trying to get me help." 2/21/07 RP at 37.

Based on a finding that the relationship between Mr. Schaler and his neighbors was tumultuous, the Court of Appeals, here, concluded a reasonable person in Mr. Schaler's position would have interpreted his statements as a serious threat to cause bodily injury or death. Appendix A-18- A-19. When Mr. Schaler contacted the mental health professional to describe his nightmare, however, he was not in a reasonable state of mind. A person, in Mr. Schaler's condition, could not have foreseen that a mental health professional would have interpreted a nightmare as a *true threat* to kill. It was a delusion or hallucination. Such experiences are too ambiguous to rise to the level of a *true threat*. The only appropriate remedy is to reverse Mr. Schaler's conviction.

E. CONCLUSION

For the reasons set forth above, Mr. Schaler respectfully asks this Court to accept review and to reverse the Court of Appeals' decision affirming his convictions.

Respectfully submitted this 4th day of August, 2008.


Tanesha La'Trelle Canzater, WSBA# 34341
Attorney for Glen Arthur Schaler

FILED

AUG 04 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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DECLARATION OF SERVICE

August 4, 2008

Court of Appeals Case No. 259196
Superior Court Case No. 06-1-00016-0

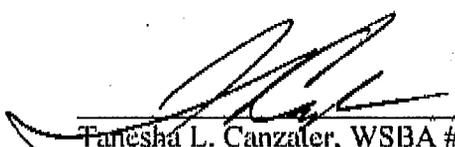
Case Name: *State of Washington v. Glen Arthur Schaler*

81864-9

I declare under penalty and perjury of the laws of the State of Washington that on **Monday, August 04, 2008**, I filed a PETITION FOR REVIEW at Division Three Court of Appeals via facsimile¹ and copies of the same to the following interested parties, by depositing in the United States of America mails an addressed postage paid envelope to the following:

COURT OF APPEALS, DIVISION THREE²
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¹ An original copy was also filed via post mail.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,) No. 25919-6-III
)
 Respondent,)
)
 v.) Division Three
)
 GLEN ARTHUR SCHALER,)
)
 Appellant.) PUBLISHED OPINION

Korsmo, J. — Glen Arthur Schaler, crying and hysterical, called Okanogan Behavioral Health Care and reported he had been having dreams he killed his neighbor and was covered in blood. After law enforcement responded to Mr. Schaler's residence and determined no crime had occurred, Mr. Schaler was transported to the hospital for a mental health evaluation. Tonya Heller-Wilson spent four hours evaluating Mr. Schaler at the hospital, during which time he repeatedly stated he wanted to kill his neighbors. When Ms. Heller-Wilson asked Mr. Schaler if he was serious, he specifically stated he wanted to harm his neighbors. Ms. Heller-Wilson informed the neighbors, Kathy

Nockels and Denise Busbin, of the threats. Both neighbors had previously obtained protection orders against Mr. Schaler. Mr. Schaler was charged with two counts of felony harassment – threats to kill. The case proceeded to a jury trial, where the jury was instructed on the definition of “threat,” and “knowingly threaten,” but not on the definition of a “true threat.” Mr. Schaler was found guilty as charged. We hold the failure to instruct the jury on the definition of “true threat” was error, although under the specific facts presented here, the error was harmless. Further, the evidence presented to the jury was sufficient to establish Mr. Schaler’s statements were “true threats.” Accordingly, we affirm the convictions.

FACTS

On August 10, 2005, at approximately 11:00 a.m., Mr. Schaler called Okanogan Behavioral Health Care, and stated he thought he just killed his neighbor and he needed to speak to someone. The phone call was transferred to Ms. Heller-Wilson, the Director of Crisis Services. Mr. Schaler, crying and hysterical, told Ms. Heller-Wilson he had been having dreams he killed his neighbor by slitting her throat. He stated he woke up covered in blood, and he was “very, very scared.” After a few minutes of conversation with Mr. Schaler, Ms. Heller-Wilson asked a co-worker to call 911. When the police arrived at his residence, Mr. Schaler hung up the phone; however, Ms. Heller-Wilson was

able to resume telephone contact with him shortly thereafter.

Deputy Connie Humphrey of the Okanogan County Sheriff's Office responded to the 911 call. Upon arrival at Mr. Schaler's residence, she pounded on the front door and heard a male voice tell her to go away. Deputy Humphrey again attempted to get Mr. Schaler to come to the door; eventually he opened the door and handed her the phone. Deputy Humphrey took the phone and spoke to Ms. Heller-Wilson. She asked Deputy Humphrey to transport Mr. Schaler to Mid-Valley Hospital in Omak for evaluation if the situation did not develop into a criminal investigation. Ms. Heller-Wilson also informed Deputy Humphrey she had faxed a pick up order¹ for Mr. Schaler. After speaking to Ms. Heller-Wilson, Deputy Humphrey went to the residence of Mr. Schaler's neighbors, Larry and Denise Busbin. Deputy Humphrey was unable to contact anyone at the residence, but she did not observe any signs of violence. Subsequently, additional law enforcement officers arrived as backup. They determined Larry Busbin was out of town and Ms. Busbin had been seen leaving for work earlier that morning.

Mr. Schaler agreed to let Deputy Humphrey transport him to Mid-Valley Hospital. Upon arrival at the hospital, Deputy Humphrey left Mr. Schaler with Ms. Heller-Wilson,

¹ A pick up order is a document sent from Okanogan Behavioral Health Care to law enforcement, requesting law enforcement transport the individual named in the order either to the hospital or to the Okanogan Behavioral Health Facility for an evaluation. Deputy Humphrey testified a pick up order is a civil, rather than a criminal, process and that it relates to someone who is a threat to themselves or others.

who had come to the hospital to meet them.

Ms. Heller-Wilson spent approximately four hours evaluating Mr. Schaler at the hospital. During this time, Mr. Schaler told Ms. Heller-Wilson he wanted to kill his neighbors, eventually identified as Kathy Nockels and Larry and Denise Busbin, "with his bare hands, by strangulation." He told her he had been thinking about it for months. Ms. Heller-Wilson described Mr. Schaler's demeanor when he made these statements as angry. She asked Mr. Schaler whether he was serious:

I can't recall specifically how I asked him. I, I know that you don't, it's part of my job to try to keep people out of the hospital. And when people tell me that they feel like they want somebody to die, or they want to die, I always go into the explanation that you know, there are times that I wish I were dead, but I don't have a plan to kill myself. I mean, you know, there are just times, and there's times that I wish my, my boss didn't exist, but I don't have a plan to kill him. And I kind of went that way, and I said, "You know, sure, you might wish that they weren't there. Maybe you're [sic] life would be a little bit easier." But he said specifically, he wanted to harm them.

At no time did Mr. Schaler tell Ms. Heller-Wilson his statements were not serious.

Furthermore, Ms. Heller-Wilson asked him, more than once, whether he really meant what he had said. According to Ms. Heller-Wilson:

I was seeing, I was in and out of the room. Danny Lockwood was sitting with [Mr. Schaler] directly the whole time, and he has to get medical clearance, and they're drawing blood, and doing all this stuff. And so, I'm kind of in and out, you know, giving him some time to chill, to make sure that maybe you know, you know, get some of this energy out of him. And so, yeah, back and forth, trying to say, "You know, how are you feeling?"

You doing better now? You doing better now?" And he, he said it several times.

Subsequently, Ms. Heller-Wilson informed both Ms. Nockels and Ms. Busbin of the threats made by Mr. Schaler.

Mr. Schaler was charged with two counts of felony harassment – threats to kill, in violation of RCW 9A.46.020(1)(a)(i) and (2)(b). Ms. Nockels was named as the alleged victim in count one, and Ms. Busbin was named as the alleged victim in count two. Mr. Schaler filed a motion to suppress the statements he made to Ms. Heller-Wilson in her capacity as a mental health professional, and a motion to dismiss the charges pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). The court denied both motions.

The case proceeded to a jury trial. On cross-examination, Ms. Heller-Wilson stated it was Mr. Schaler who made the initial phone call, in part conveying a dream, and his purpose in calling was to ask for help. Also on cross-examination, Ms. Heller-Wilson indicated Mr. Schaler confided in her he wanted to kill Ms. Nockels and Ms. Busbin, and that he thought about it.

The jury also heard testimony regarding the relationship between Mr. Schaler and Ms. Nockels and Ms. Busbin, prior to August 10, 2005. Ms. Nockels testified on the morning of June 1, 2005, she observed Mr. Schaler cutting, with a chainsaw, several fruit trees that stood between her home and Ms. Busbin's home. Ms. Nockels testified she

telephoned Ms. Busbin and 911 to report this incident. Ms. Busbin testified she was at work when she received Ms. Nockels' phone call, and she left work and came home. She further testified when she arrived home, she observed Mr. Schaler cutting a tree with a chainsaw. She testified she responded by calling 911. Both Ms. Nockels and Ms. Busbin testified they obtained protection orders against Mr. Schaler, on the same day as this incident.

Deputy Michael Blake of the Okanogan County Sheriff's Office testified he came into contact with Mr. Schaler on July 23, 2005, while responding to a harassment complaint. He testified Mr. Schaler made "some specific statements regarding the association with him and his neighbors." Mr. Schaler also told Deputy Blake, "[i]t was obvious that somebody [is] going to die," but clarified "he felt he was the one that was going to die." Deputy Blake also testified he spoke to Ms. Nockels and Ms. Busbin on that same date.

At the close of the State's case, defense counsel moved to dismiss, arguing the evidence was insufficient to establish Mr. Schaler knowingly threatened another person with bodily harm. Specifically, defense counsel argued the evidence did not establish Mr. Schaler subjectively intended to communicate a threat. The court denied the motion. Subsequently, the defense rested.

Jury instruction 10 defined “threat,” stating “[t]hreat means to communicate, directly or indirectly, the intent to cause bodily injury immediately or in the future to the person threatened or to any other person.” Instruction 12 instructed the jury, “[a] person threatens ‘knowingly’ when the person subjectively intends to communicate a threat.” Defense counsel did not object to this instruction. The court did not give, nor did the parties request, a jury instruction defining a “true threat.” The jury found Mr. Schaler guilty as charged. He appealed.

ANALYSIS

The first issue here is whether the jury was properly instructed. On appeal, instructional errors are reviewed de novo. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). A jury instruction must correctly state the applicable law. *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). “Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

In general, an objection to a jury instruction may not be raised by a criminal defendant for the first time on appeal, unless it involves a “manifest error affecting a constitutional right.” *State v. O’Donnell*, 142 Wn. App. 314, 321-322, 174 P.3d 1205

(2007) (quoting RAP 2.5(a)(3)). Applicability of this exception is determined by applying the following two-part test:

First, the court determines whether the alleged error is truly constitutional. Second, the court determines whether the alleged error is “manifest,” i.e., whether the error had “practical and identifiable consequences in the trial of the case.”

State v. Kirkpatrick, 160 Wn.2d 873, 880, 161 P.3d 990 (2007) (citation omitted).

Furthermore, “[o]nce the claim is found to be constitutional, the court examines the effect of the error on the defendant’s trial under a harmless error standard.” *O’Donnell*, 142 Wn. App. at 322 (citing *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). In order for a constitutional error to be harmless, “it must appear beyond a reasonable doubt that the error did not contribute to the ultimate verdict.” *State v. Berube*, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003).

A person is guilty of felony harassment – threats to kill, when:

(1)

(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 . . . [and]

(2)

(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.

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RCW 9A.46.020.

RCW 9A.46.020 “criminalizes pure speech.” *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004). Accordingly, this statute must comply with the requirements of the First Amendment. *Id.* There are a number of categories of speech that are without the protection of the First Amendment. *See id.* at 42-43 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984)). One of these categories is “true threats.” *Id.* at 43. Therefore, “[t]o avoid unconstitutional infringement of protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only ‘true threats.’” *Id.* (citing *Williams*, 144 Wn.2d at 208; *State v. J.M.*, 144 Wn.2d 472, 478, 28 P.3d 720 (2001)). Accordingly, “[a] conviction for felony harassment based upon a threat to kill requires that the State satisfy both the First Amendment demands—by proving a true threat was made—and the statute, by proving all the statutory elements of the crime.” *Id.* at 54. “True threat” is defined 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. *Id.* at 43 (internal quotation marks omitted) (quoting *Williams*, 144 Wn.2d at 208-209). In addition, “whether a true threat has been made is determined under an objective standard that focuses on the

speaker.” *Id.* at 44.

There is no published authority concerning whether the jury must be instructed on the definition of “true threat” in a harassment prosecution under RCW 9A.46.020. The issue has been addressed, however, under two other criminal statutes. *See State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006) (addressing the issue under RCW 9.61.160, threats to bomb or injure property); *State v. Tellez*, 141 Wn. App. 479, 170 P.3d 75 (2007) (addressing the issue under RCW 9.61.230(2)(b), felony telephone harassment).

In *Johnston*, the defendant was arrested at Sea-Tac International Airport on two outstanding misdemeanor warrants. *Johnston*, 156 Wn.2d at 357-358. The arresting officer came into contact with the defendant after Alaska Airlines pilots notified the police the defendant, a passenger on their flight, appeared to be intoxicated. *Id.* During the booking process, the defendant told the arresting officer “he would come back to the airport and . . . this place up” and that “he was going to blow this place up.” *Id.* at 358. The arresting officer testified the defendant stated “he knew about the airport, and he knew what it would take . . . all he needed was a Ryder truck and some nitro diesel fuel.” *Id.* The arresting officer further testified the defendant “was ‘visibly upset’ about the arrest.” *Id.*

The defendant was charged with violating RCW 9.61.160, threats to bomb or injure property. *Id.* At trial, the defendant proposed a jury instruction defining “true threat,” but the court declined to give the instruction, and instead instructed the jury “[t]hreat means to communicate, directly or indirectly, the intent to wrongfully cause physical damage to the property of a person other than the actor.” *Id.* During its deliberations, the jury inquired, “Are we suppose[d] to judge if defendant is guilty of only ‘saying the words’ or deciding if the defendant ‘actually has intent to carry out the threat?’” *Id.* at 359. In response, over objection from the defense, the trial court answered “Intent to carry out the threat is not an element of the crime.” *Id.* The jury returned a verdict of guilty. *Id.*

On appeal, our Supreme Court first considered the constitutionality of RCW 9.61.160. *Id.* at 359-364. Finding “[t]he statute regulates pure speech,” the court “construe[d it] to avoid an overbreadth problem by limiting it to true threats.” *Id.* at 360, 364. Second, the court considered whether the jury was instructed properly. *Id.* The court stated “RCW 9.61.160 must be limited to true threats . . . and the jury must be instructed accordingly.” *Id.* Therefore, the court held “the jury instructions given at trial were insufficient to ensure a constitutional verdict.” *Id.* at 366. The court further held this instructional error was not harmless beyond a reasonable doubt.² *Id.* at 364. The

² The State conceded the error could not be deemed harmless beyond a reasonable

court reasoned “[t]he evidence presented at trial appears close on the question whether [the defendant’s] statements constituted a true threat.” *Id.* In addition, the court reasoned that because the trial court informed the jury “intent to carry out the threat was not an element of the crime, the jury could infer the alternative was correct, i.e., that it could convict merely on the basis that [the defendant] said the words.” *Id.* at 365 (footnote omitted). The court remanded the case for a new trial under proper instructions. *Id.* at 366.

In *Tellez*, the defendant was charged, in relevant part, with felony telephone harassment. *Tellez*, 141 Wn. App. at 481. At trial, the jury was given an instruction stating: “[a] true threat is a statement made in a context or under such circumstances where a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to carry out the threat.” *Id.* at 482. However, the requirement that the threat be a “true threat” was not included in the information nor the “to convict” jury instruction. *Id.* at 481-482. The jury found the defendant guilty. *Id.* at 482.

On appeal to Division One of this court, the defendant argued, for the first time on appeal, the “true threat” language should have been included in the information and the

doubt. *Johnston*, 156 Wn.2d at 364. Furthermore, the parties agreed the failure to instruct on the definition of “true threat” was error. *Id.*

“to convict” instruction. *Id.* at 482. The defendant relied on *State v. Johnston*, discussed above, arguing “*Johnston* holds that a true threat is an essential element that must be proven to the jury in any case involving a statute criminalizing the use of threatening language.” *Id.* at 483. The court identified threats as pure speech, and therefore, statutes criminalizing threats “must be interpreted with the commands of the First Amendment clearly in mind.” *Id.* at 482 (internal quotations omitted) (quoting *Williams*, 144 Wn.2d at 207). The court then rejected the defendant’s argument, stating “[t]he *Johnston* court merely held that the trial court erred by refusing to give a limiting instruction explaining that the bomb threat statute criminalizes only true threats.” *Id.* at 483. The court further explained, “[t]he *Johnston* court did not rule that a true threat is an essential element of the crime of threatening to bomb a building.” *Id.* Declining to extend *Johnston*, the court stated “[s]o long as the court defines a true threat for the jury, the defendant’s First Amendment rights will be protected.” *Id.* at 484. The court held “the essential element in the crime of telephone harassment is a threat which must be defined for the jury as a true threat.” *Id.* Further, “[b]ecause the true threat concept itself is not an essential element . . . it need not be included in the charging document or [the] ‘to convict’ instruction.” *Id.* Accordingly, the court affirmed the defendant’s conviction. *Id.*

Here, like in *State v. Johnston*, the statute at issue criminalizes “pure speech,” and

accordingly, has been limited to prohibit only “true threats.” *See Kilburn*, 151 Wn.2d at 41, 43 (stating RCW 9A.46.020 “criminalizes pure speech,” and limiting the statute to “true threats”). Therefore, like in *State v. Johnston*, the jury instructions given at trial, by not providing a definition of “true threat,” were deficient. Furthermore, although *State v. Tellez* held “true threat” was not an essential element of the crime of felony telephone harassment, another crime targeting “pure speech,” the court affirmed that a “true threat” must be defined for the jury in order to protect a defendant’s First Amendment rights. *See Tellez*, 141 Wn. App. at 483-484. We conclude that a jury in a criminal harassment prosecution likewise must be instructed on the concept of “true threat.” Therefore, the definition of “threat” in jury instruction 10 was not sufficient to protect Mr. Schaler’s First Amendment rights. The court erred in failing to instruct the jury on the definition of “true threat.”

Concluding the trial court erred in failing to instruct the jury on the definition of a “true threat,” this court must now decide whether this error was harmless beyond a reasonable doubt. *See Johnston*, 156 Wn.2d at 364-365. Unlike in *State v. Johnston*, the evidence at trial here was not close on the issue of whether Mr. Schaler’s statements were “true threats.” *Id.* at 364. Ms. Heller-Wilson testified Mr. Schaler told her he wanted to kill Ms. Nockels, Ms. Busbin, and Mr. Busbin, “with his bare hands, by strangulation,”

and that he had been thinking about it for months. Mr. Schaler specifically told Ms. Heller-Wilson he wanted to harm his neighbors, repeated his statements several times over a four-hour period, and did not indicate his statements were not serious.

Additionally, the jury heard about the June 1, 2005 incident involving Mr. Schaler cutting the fruit trees between Ms. Nockels' and Ms. Busbin's properties, that Ms. Nockels and Ms. Busbin had obtained protection orders against Mr. Schaler, and that law enforcement had responded to a harassment complaint on July 23, 2005. Based on this testimony, the jury would have concluded, as it did, that "true threats" were made, that "a reasonable person would foresee that the statement[s] would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life" of another.

Kilburn, 151 Wn.2d at 43 (internal quotation marks omitted) (quoting *Williams*, 144 Wn.2d at 208-209). It appears, beyond a reasonable doubt, that the failure to instruct the jury on the definition of "true threat" did not contribute to the ultimate verdict.

Accordingly, this error was harmless.

Not only was the evidence overwhelming on this point, the "true" nature of the threats simply was not at issue at trial. The defense theory of the case was that the threats were not "knowingly" made (i.e., with the intent that they be conveyed to the victims). There simply was no contention that the threats were not serious or "true."

For both reasons, we conclude that the error in failing to give a “true threat” instruction was harmless beyond a reasonable doubt. Accordingly, the constitutional error identified in this appeal was not “manifest” per RAP 2.5(a)(3).

The remaining issue here is whether the evidence was sufficient to support the verdict. In particular, Mr. Schaler argues that the evidence did not establish that his statements were “true threats.”³

Because Mr. Schaler’s sufficiency of the evidence argument concerns whether he made “true threats,” and therefore, whether his speech was unprotected, implicating the First Amendment, “[i]t is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court’s findings.” *Kilburn*, 151 Wn.2d at 49. Instead, the applicable standard of review is “the rule of independent review,” under which this court “must independently review the crucial facts in the

³ Mr. Schaler also challenges a finding of fact entered following his pretrial motion to dismiss pursuant to *State v. Knapstad*. However, “after proceeding to trial, a defendant cannot appeal the denial of a *Knapstad* motion, which is a pretrial challenge to the sufficiency of the evidence.” *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004) (citing *State v. Richards*, 109 Wn. App. 648, 653, 36 P.3d 1119 (2001)). To the contrary, when a case proceeds to trial, the proper argument on appeal is insufficiency of the evidence, based on the evidence adduced at trial. *Id.* (citing *Richards*, 109 Wn. App. at 653).

Although Mr. Schaler also appears to argue the court improperly denied his pretrial and midtrial motions to dismiss, the standard of review is the same. *See, e.g., State v. Athan*, 160 Wn.2d 354, 378 n.5, 158 P.3d 27 (2007) (stating that insufficiency of the evidence, denial of a pretrial *Knapstad* motion, and denial of a midtrial motion to dismiss are reviewed under the same standard).

record, i.e., those which bear on the constitutional question.” *Id.* at 52. This is “not complete de novo review.” *Id.* at 51. The standard requires “a full review of only those facts in a record that relate to the First Amendment question whether certain expression was unprotected.” *Id.* at 50. Credibility findings must be given deference. *Id.*

In *State v. Johnston*, the defendant also argued the evidence was insufficient to establish he made a “true threat.” *Johnston*, 156 Wn.2d at 365. Considering this argument, the court stated “[w]hether language constitutes a true threat is an issue of fact for the trier of fact in the first instance.” *Id.* (citing *United States v. Fulmer*, 108 F.3d 1486, 1492 (1st Cir. 1997); *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir.), *cert. denied*, 498 U.S. 986 (1990); *Melugin v. Hames*, 38 F.3d 1478, 1485 (9th Cir. 1994)). The court identified “a rule of independent appellate review applies in First Amendment speech cases.” *Id.* The court then found independent appellate review was inappropriate under the circumstances, declining to consider the issue. *Id.* at 366. The court reasoned, “[i]f . . . the trial proceedings are tainted by error, an appellate court may be unable to conduct an independent review of the record—for example, where inadmissible evidence that was admitted may have influenced the jury.” *Id.* (citing *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002)). Applying this rule to the case before it, the court found “[i]n [the defendant’s] case, the jury was influenced by the

erroneous jury instructions that governed the trial.” *Id.*

The current case is distinguishable from *State v. Kilburn*, where the court concluded the evidence was insufficient to establish a “true threat.” *See Kilburn*, 151

Wn.2d at 52-53. In *Kilburn*, the defendant stated to a classmate, K.J., “I’m going to bring a gun to school tomorrow and shoot everyone and start with you . . . maybe not you first.” *Id.* at 39. The defendant was charged with one count of felony harassment, under RCW 9A.46.020, based on this statement. *Id.* at 39-40. The court reiterated K.J.’s testimony:

K.J. testified that at the end of the last class the students were chatting, giggling, and laughing as they often did at the end of the school day. [The defendant] and K.J. started talking about books they were reading; [the defendant] had a book that had military men and guns on it. [The defendant] then turned to K.J. and, half smiling, said he was going to bring a gun the next day and shoot everyone, beginning with her. Then he began giggling, and said maybe not her first. K.J. testified that [the defendant] started to “laugh or giggle” as if he were not serious, and that “he was acting kind of like he was joking.” K.J. testified that she said “okay,” and that she said “right” in an exaggerated tone.

Id. at 52.

K.J. further testified she and the defendant knew each other for two years, never fought or had a disagreement, and the defendant “always treated her nicely.” *Id.* Additionally, she testified the defendant joked in the past, both she and other classmates laughed at these jokes, and the defendant also joked with a friend who sat behind him.

Id. at 52-53. The court concluded:

[T]he evidence is insufficient for a reasonable person in [the defendant's] place to foresee that K.J. would interpret his statement as a serious threat to cause bodily injury or death, given his past relationship with K.J., his having joked with her and his other friend in the class before, the discussion that had been taking place about the books they were reading, and his laughing or giggling when he made his comments.

Id. at 53.

Here, in contrast, the relationship between Mr. Schaler and his victims prior to the threats at issue was tumultuous. First, there was the June 1, 2005 incident involving the fruit trees between Ms. Nockels' and Ms. Busbin's properties. Second, both Ms. Nockels and Ms. Busbin obtained protection orders against Mr. Schaler. Third, law enforcement had responded to a harassment complaint on July 23, 2005, involving the parties. Given all, the evidence was sufficient to establish "true threats." A reasonable person in Mr. Schaler's position would interpret his statements as a serious threat to cause bodily injury or death. The evidence supported the jury's verdicts.

Accordingly, the convictions are affirmed.

Korsmo, J.

I CONCUR:

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Brown, J.

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Sweeney, J. (dissenting)—The central issue in this case is not whether Glen Schaler said what he said, but whether his statements were intended as true threats. Here is what his lawyer argued: “This was not a criminal act on the part of Mr. Schaler, because he never intended that his action was the communication of a threat. His action was a cry, cry for help. And that’s exactly what he was doing.” Report of Proceedings (Feb. 7, 2007) at 110. The Supreme Court concluded in *State v. Johnston* (on what I believe are less compelling facts than the facts here) that the failure to instruct on true threats was not harmless and remanded for a new trial. *State v. Johnston*, 156 Wn.2d 355, 366, 127 P.3d 707 (2006). Of course, the court erred by failing to instruct on “true threat.” And this error was not harmless by any principled standards. To conclude otherwise is effectively to conclude that Mr. Schaler is guilty as a matter of law. We should not do that.

I would conclude that the threats here were true threats were I the fact finder in this case. I am persuaded. But I am not the finder of fact. I am instead a concluder of law. And, so, for me to find true threats (beyond a reasonable doubt, no less) usurps the role properly reserved to a jury. And it deprives Mr. Schaler of his constitutional right to have a jury make those findings. *Johnston*, 156 Wn.2d at 365. We should not do that. The error would be harmless if Mr. Schaler denied making these threats. He, however,

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admits he made the statements. His defense is that he did not mean them, i.e., they were not true threats. But the jury here, like the jury in *Johnston*, was not able to evaluate whether they were or not because there was no definitional instruction that told it how to do so.

Courts of appeals, as institutions, are capable of evaluating whether evidence is sufficient (burden of production). *Welch Foods, Inc. v. Benton County*, 136 Wn. App. 314, 322, 148 P.3d 1092 (2006). We are not, however, well situated to decide how persuasive that evidence was to this particular jury or to any jury. *See id.* (fact finders determine whether the burden of persuasion has been met). Again, we should not try to. Judges are sometimes surprised by the results juries reach. I do not know what this jury might have done if properly instructed. It may well have concluded that Mr. Schaler's statements were not true threats and that, accordingly, they were protected speech. *See Johnston*, 156 Wn.2d at 362 (true threats are unprotected speech). I, therefore, respectfully dissent.

Sweeney, J.