

67368-8

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COA NO. 67368-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL WARE, JR.,

Appellant.

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The information failed to notify appellant of every element of the crime of felony harassment. CP 65-66.

Issue Pertaining to Assignment of Error

Is reversal required because the State failed to allege the "true threat" element of the crime of felony harassment in the information?

B. STATEMENT OF THE CASE

The State charged Russell Ware Jr. with two counts of felony harassment based on a threat to kill. CP 65-66. A jury found Ware guilty on both counts. CP 27. The court sentenced Ware to 17 months confinement. CP 16, 18. This appeal follows. CP 2-13.

C. ARGUMENT

1. THE INFORMATION IS DEFECTIVE BECAUSE IT OMMITS AN ESSENTIAL ELEMENT OF THE CRIME OF FELONY HARASSMENT.

Ware's harassment convictions must be reversed because the charging document does not set forth the "true threat" element of the crime. U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. Vangerpen, 125 Wn.2d at 787. Where, as here, the adequacy of an information is challenged for the

first time on appeal, the court undertakes a two-pronged inquiry: "(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?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

"While laws may proscribe 'all sorts of conduct' the same is not true of speech." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004). Speech protected by the First Amendment may not be criminalized. Kilburn, 151 Wn.2d at 42. RCW 9A.46.020, the statute defining the crime of harassment, criminalizes pure speech if read literally. Id. at 41. To avoid unconstitutional infringement on protected speech, the harassment statute and the threat-to-kill provision of RCW 9A.46.020 must therefore be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

"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." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287.

The information accused Ware of committing the crime of felony harassment as follows: "That on or about the 23rd day of March, 2011, the said defendant, Russell Jerry Ware Jr., then and there being in said county and state, knowingly and without lawful authority, did threaten to kill another immediately or in the future, and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out, in violation of RCW 9A.46.020(1)(A)(I) And (2)(B), which violation is a Class C Felony[.]" CP 65-66. The charging language is the same for counts I and II. CP 65-66.

The information fails to allege Ware made a "true threat." It is silent as to the required mens rea that Ware be negligent as to the result of the hearer's fear.

This Court has held the "true threat" allegation need not be included in the charging document because it is merely definitional rather than an essential element. State v. Allen, 161 Wn. App. 727, 753-56 255 P.3d 784 (felony harassment under RCW 9A.46.020), review granted, 172

Wn.2d 1014, 262 P.3d 63 (2011)¹; State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010) (same); State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (telephone harassment under RCW 9.61.230(2)(b)).

Those decisions cannot be reconciled with the Supreme Court's decision in Schaler and established precedent. The Supreme Court in Schaler pointedly declined to determine whether Tellez was correctly decided because the issue of whether a true threat was an element of harassment was not before it. Schaler, 169 Wn.2d at 289 n.6. The Court, however, stated, "It suffices to say that, to convict, the State must prove that a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious." Id. That statement is in complete accord with Kilburn, where the Court held a harassment conviction must be reversed if the State fails to prove a "true threat." Kilburn, 151 Wn.2d at 54.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). "An

¹ The Supreme Court has granted review of this issue in Allen. Oral argument is scheduled for March 1, 2012.

'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

As Schaler and Kilburn make clear, the State cannot convict someone of harassment unless it proves the existence of a true threat. Schaler, 169 Wn.2d at 286-87, 289 n.6; Kilburn, 151 Wn.2d at 54. Schaler establishes a "true threat" is necessary to prove the mens rea of the crime of felony harassment, which consists of negligence as to the result of the hearer's fear. Schaler, 169 Wn.2d at 286-87, 289 n.6.

Following Schaler and Kilburn, a "true threat" must be deemed an essential element of felony harassment. The State's information is deficient because it omits the required mens rea that Ware be negligent as to the result of the hearer's fear.

Courts presume prejudice and reverse conviction where a necessary element is neither found nor fairly implied from the charging document. McCarty, 140 Wn.2d at 425; State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010). This Court must therefore presume prejudice and reverse the harassment convictions because the necessary "true threat" element is neither found nor fairly implied in the information.

D. CONCLUSION

For the reasons stated, Ware respectfully requests that this Court reverse the convictions under counts I and II.

DATED this 17th day of February 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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DIVISION ONE

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 67368-8-1
)	
RUSSELL WARE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF FEBRUARY, 2012 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
SUITE 201
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] RUSSELL WARE
DCO NO. 938665
CEDAR CREEK CORRECTIONS CENTER
P.O. BOX 37
LITTLEROCK, WA 98556

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF FEBRUARY, 2012.

x Patrick Mayovsky

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