

No. 67368-8-I

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

**STATE OF WASHINGTON,
Appellant,**

v.

**RUSSELL J. WARE, JR.
Respondent.**

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Appellant/Cross-Respondent
WSBA #22007**

2012 MAY -2 PM 1:42
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

**B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS
OF ERROR..... 1**

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT..... 1

**1. The definition of “true threat” is not an essential element of
felony harassment and thus doesn’t need to be included in
the information..... 3**

E. CONCLUSION 8

TABLE OF AUTHORITIES

Washington Court of Appeals

<u>State v. Allen</u> , 161 Wn.App. 727, 255 P.3d 784, <i>rev. granted</i> , 172 Wn.2d 1014 (2011).....	passim
<u>State v. Atkins</u> , 156 Wn.App. 799, 236 P.3d 897 (2010)	passim
<u>State v. Tellez</u> , 141 Wn. App. 170, 175 P.3d 75 (2007).....	2, 5, 7

Washington Supreme Court

<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1215 (2004)	5, 6
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	3, 5
<u>State v. McCarty</u> , 140 Wn.2d 420, 998 P.2d 296 (2000).....	4
<u>State v. Powell</u> , 167 Wn.2d 672, 223 P.3d 493 (2009).....	4
<u>State v. Schaler</u> , 169 Wn.2d 274, 236 P.3d 858 (2010).....	5, 6, 7, 8
<u>State v. Ward</u> , 148 Wn.2d 803, 64 P.3d 640 (2003).....	4

Rules and Statutes

RCW 9A.46.020(1).....	1, 6
RCW 9A.46.020(2)(b)(ii)	6

Other Authorities

http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2012Jan#P439_28069	2
---	---

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether defendant's information was defective for failing to include language defining "true threat" in the information charging felony harassment where binding precedent has held that "true threat" is not an element of the offense.

C. STATEMENT OF THE CASE¹

Appellant Russell Ware, Jr. was charged on March 29, 2011 with two counts of Felony Harassment, in violation of RCW 9A.46.020(1)(a)(i) and (2)(b), for his actions on or about March 23rd, 2011. CP 65-66. He was tried by a jury and found guilty as charged on May 25th, 2011. CP 27. At sentencing, the judge imposed a standard range sentence of 17 months based on Ware's offender score of five. CP 17-18; SRP 21, 26.²

D. ARGUMENT

On appeal Ware asserts for the first time that the information is defective for failure to allege that the threat to kill he made was a "true

¹ As Appellant Ware only raises a challenge to the sufficiency of the information and does not challenge any trial rulings or the verdict, the State has not provided a summary of the evidence produced at trial.

² SRP refers to the verbatim report of proceedings for the sentencing hearing held on June 29, 2011.

threat.” Ware acknowledges, however, that the law is not in his favor, that there is controlling caselaw in this Court that holds that language defining “true threat” need not be included in the information.³ He asserts that those cases were wrongly decided. Under current law the definition of “true threat” is not an essential element of the offense of felony harassment that needs to be alleged in the information. The information here sufficiently alleged all the necessary elements of the offense: that Ware made a threat to kill the victim, placing that person in reasonable fear that the threat would be carried out. The State submits that the decision(s) in State v. Allen and State v. Atkins are dispositive of Ware’s appeal at this point, but acknowledges that Allen is currently pending review at the Washington Supreme Court.⁴ Therefore, this Court should affirm Ware’s conviction, or alternatively the Court could stay its decision pending the decision by the Washington Supreme Court in Allen.

³ See, State v. Allen, 161 Wn.App. 727, 255 P.3d 784, *rev. granted*, 172 Wn.2d 1014 (2011); State v. Atkins, 156 Wn.App. 799, 236 P.3d 897 (2010), State v. Tellez, 141 Wn.App. 170, 175 P.3d 75 (2007).

⁴ One of the issues pending review in Allen is: “Whether the existence of a “true threat” is an element of the crime of felony harassment that must be alleged in the information and included in the to-convict jury instruction.”
http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc supreme issues.display&fileID=2012Jan#P439 28069.

1. The definition of “true threat” is not an essential element of felony harassment and thus doesn’t need to be included in the information.

Ware asserts that the information charging felony harassment was defective only because it failed to include language defining the threat as a “true threat.” Ware does not otherwise assert that he was prejudiced by the information. Under State v. Allen and State v. Atkins, this Court has determined that language defining the threat as a “true threat” does not need to be included in the information. As binding precedent, those cases are dispositive of Ware’s appeal. The information here contained all the essential elements, and thus under the applicable liberal construction standard of review, Ware was adequately informed of the offense with which he was charged.

A charging document is constitutionally adequate only if all of the essential elements, statutory and non-statutory, are included in the document so as to place the defendant on notice of the charges and allow the defendant to prepare a defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When the sufficiency of a charging document is challenged for the first time on appeal, courts liberally construe the information in favor of validity. *Id.* at 103. A different standard of review is employed post verdict in order to “encourage defendants to make timely challenges to defective charging documents and to discourage

‘sandbagging,’ *i.e.*, waiting to assert a defect in the charging document because asserting it in a timely manner would only result in an amendment of the information. *Id.* Under the liberal construction rule, the court inquires: (1) do the necessary elements or facts appear in any form, or can the alleged missing element or fact be fairly implied from the language within the information; and (2) can the defendant show that he or she was actually prejudiced by the inartful language. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 105-06. If the information failed to allege the essential elements, the charge is dismissed without prejudice to refile. McCarty, 140 Wn.2d at 428.

An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003). “Essential elements consist of the statutory elements of the charged crimes and a description of the defendant’s conduct that supports every statutory element of the offense.” State v. Powell, 167 Wn.2d 672, 682, 223 P.3d 493 (2009), *overruled on other grounds*, State v. Siers, 2012 WL 1355763.

It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as ‘those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.’

Kjorsvik, 117 Wn.2d at 100.

In order to meet the dictates of the First Amendment, statutes criminalizing threats are interpreted as proscribing only “true threats,” *i.e.*, “statement[s] 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 or to take the life of another person.” State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010); *see also*, State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). The “true threat” requirement, however, is not an element of the crime of felony harassment, but is a definitional instruction that must be given along with the to-convict instruction in order to protect a defendant’s First Amendment rights. State v. Atkins, 156 Wn. App. 799, 805, 236 P.3d 897 (2010), *accord*, State v. Allen, 161 Wn. App. 727, 752-56, 255 P.3d 784 (2011), *review granted*, 172 Wn. 2d 1014 (2011); *see also*, State v. Tellez, 141 Wn.App. 170, 175 P.3d 75 (2007) (“true threat” definition requirement is not essential element of telephone harassment). The “true threat” definition, required for conviction, need not be included in the information. Atkins, 156 Wn.App. at 805.

The felony harassment statute under the alternative relevant to this case states:

(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. ...

RCW 9A.46.020(1). Moreover, under subsection (2):

(b) A person who harasses another is guilty of a class C felony if any of the following apply:

...

(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(2)(b)(ii); *see also*, Kilburn, 151 Wn.2d at 41.

In this case, both counts of the information stated:

That on or about the 23rd day of March, 2011, the said defendant, ... 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...

CP 65-66. Here the information tracked the statutory language of felony harassment and contained all the statutory elements for felony harassment.

Ware asserts that the information omits the mens rea element required under the “true threat” definition, *i.e.* that defendant was negligent with respect to the result on the hearer. Referencing a footnote in State v. Schaler, he asserts that the decisions in Allen and Atkins cannot be reconciled with the Schaler opinion. In that footnote the Schaler court

noted that it was not deciding if the State v. Tellez opinion holding that “true threat” is not an element of the offense was correctly decided because the issue was not before it. However, Schaler also did *not* hold that “true threat” *is* an essential element of the offense, again because the issue was not before it. In fact, in another footnote the Court stated that use of the definitional instruction for “threat”, WPIC 2.24, which had been modified to mirror the language required for “true threats,” would essentially cure the problem of instructions that fail to limit the statute’s scope to “true threats.” Schaler, 169 Wn.2d at 287, n.5. It further noted: “Cases employing the new instruction *defining* ‘threat’ will therefore incorporate the constitutional mens rea as to the result.” *Id.* (emphasis added).

The Court in Allen addressed the same argument Ware makes in his brief. It concluded that the statutory mens rea of “knowingly” satisfied the mens rea required regarding the result. Allen, 161 Wn. App. at 755. It distinguished Schaler on the basis that the Schaler court clearly stated it was not addressing the issue decided in Tellez, *i.e.* whether “true threat” was an essential element of the offense. Allen held that its prior cases in Atkins and Tellez were dispositive of this issue. *Id.*

In fact, “[n]o Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language

defining what constitutes a true threat in a charging document or 'to convict' instruction." ... This court has consistently repeated that "[s]o long as the court defines a 'true threat' for the jury, the defendant's First Amendment rights will be protected." ...

Allen, 161 Wn. App. at 755-56 (page number and citations omitted).

Schaler did not hold, nor even imply, that the language defining "true threat" was an essential element of the offense of felony harassment that needed to be included in the information. Allen and Atkins clearly hold to the contrary. Those cases, as binding precedent, are dispositive of Ware's only issue on appeal.

E. CONCLUSION

Based on the foregoing, the State respectfully requests that Ware's convictions for felony harassment be affirmed, or alternatively that this Court stay this matter until the Washington Supreme Court issues its opinion in State v. Allen.

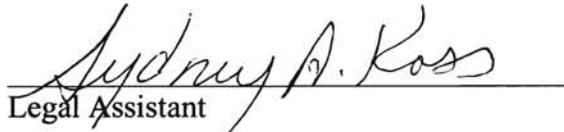
Respectfully submitted this 1st day of May, 2012.

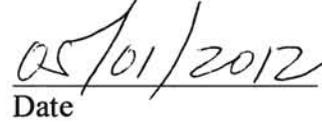

HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Respondent/ Cross-Appellant's attorney, CASEY GRANNIS, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLS
1908 E. Madison Street
Seattle, WA 98122-2842


Legal Assistant


Date