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OCT 05 2012

King County Prosecutor
Appellate Unit

NO. 68851-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDGAR PACHECO

Appellant.

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

The Honorable Patrick Oishi, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The information is defective because it fails to include the "true threat" element of the felony harassment charge.¹

Issue Pertaining to Assignment of Error

Is reversal of the appellant's felony harassment conviction required where the State failed to allege the "true threat" element in the information?

B. STATEMENT OF THE CASE²

The State charged Edgar Pacheco with felony harassment based on the allegation that he threatened to kill his neighbor Joseph Dennis. CP 1-5. Following a trial, a jury found Pacheco guilty as charged. CP 12. The court sentenced him within the standard range. CP 29-34.

Pacheco timely appeals. CP 38.

¹ This issue is pending in the Washington Supreme Court in State v. Allen, 161 Wn. App. 727, 755-56, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011).

² This brief refers to the verbatim report of proceedings as follows: 1RP – 4/23/12; 2RP – 4/24/12; 3RP – 4/25/12; 4RP – 4/26/12; and 5RP – 5/25/12.

C. ARGUMENT

THE INFORMATION WAS DEFECTIVE BECAUSE IT OMITTED THE "TRUE THREAT" ELEMENT OF THE CRIME OF FELONY HARASSMENT

Pacheco's felony harassment conviction must be reversed, and dismissed without prejudice, because the charging document does not set forth the "true threat" element of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 795, 888 P.2d 1177 (1995).

A charging document is constitutionally defective under the Sixth Amendment and article 1, section 22 of the Washington constitution 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, this Court undertakes the following 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 element is neither found nor fairly implied in the charging document, this 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) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 579, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)). 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." Id. 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 Pacheco of committing felony harassment as follows: "That the defendant . . . on or about March 8,

2011, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future . . . by threatening to kill . . . and the words or conduct did place said person in reasonable fear that the threat would be carried out[.]" CP 1.

The information fails to allege Pacheco made a "true threat." This Court has held the "true threat" allegation need not be included in the charging document because it is definitional rather than an essential element. State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (telephone harassment under RCW 9.61.230(2)(b)); see also State v. Allen, 161 Wn. App. 727, 755, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011); State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010) (felony harassment under RCW 9A.46.020).

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 did reaffirm, however, that the State must prove "a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious." Id. That statement accords 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 '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)), review denied, 163 Wn.2d 1007 (2008). 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. Schaler, 169 Wn.2d at 286-87, 289 n.6.

Following Schaler and Kilburn, a "true threat" must be deemed an element of felony harassment. The State's information is deficient because it lacks this element. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802,

888 P.2d 1185 (1995). Because the necessary element of "true threat" is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse. McCarty, 140 Wn.2d at 425.

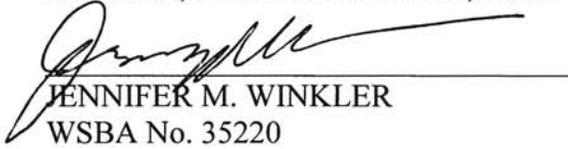
D. CONCLUSION

The State failed to charge all essential elements of the crime of felony harassment. The remedy is reversal and dismissal of the charge without prejudice.

DATED this ^{5TH} day of October, 2012.

Respectfully submitted,

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v.)	COA NO. 68851-1-I
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EDGAR PACHECO,)	
)	
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 5TH DAY OF OCTOBER 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] EDGAR PACHECO
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SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF OCTOBER 2012.

x *Patrick Mayovsky*

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COURT OF APPEALS
STATE OF WASHINGTON