

70602-1

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NO. 70602-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID M. JOHNSON,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

MARA J. ROZZANO
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. Did the charging document sufficiently set forth all the essential elements of the crime of harassment?
2. Was the defendant actually prejudiced by any alleged unartful language in the charging document?

II. STATEMENT OF THE CASE

On December 20, 2012, the defendant was charged by amended information with two counts of Harassment, one count of third degree assault and one count of DUI. On May 3, 2013, the court severed counts 1 & 2 from counts 3 & 4. The defendant proceeded to jury trial on counts 1 and 2 on May 13, 2013. On May 16, 2013, the jury convicted the defendant of counts 1 and 2 as charged. The defendant appeals his conviction as to counts 1 and 2, challenging the sufficiency of the charging language. CP 1-15; 149-150; 200-201; 205-206.

The charging language for counts 1 & 2 was as follows:

COUNT I: HARASSMENT, committed as follows: That the defendant, on or about the 11th day of August, 2011, without lawful authority, knowingly threatened to cause bodily injury to another and maliciously to do any other act which was intended to substantially harm another with respect to his or her physical health and safety and the person threatened was a criminal justice participant, to-wit: [names of alleged victims] who were performing their official duties at the time the threat was made, and the defendant's words or conduct did place such criminal justice participants in fear that the threat would be carried out, and a

reasonable criminal justice participant would have been in fear under all the circumstances that the threat would be carried out; proscribed by RCW 9A.46.020(1) and (2)(b), a felony.

CP 205.

A. FACTS SUPPORTING THE CONVICTION.

At trial, the jury heard from all five criminal justice participant victims. Each of the five witnesses described the threats made by the defendant as being very specific and causing them great concern for their future safety. They told the jury the defendant claimed to have been a sniper, to having a sniper rifle and that the defendant told them, "that sharp piercing pain in our chest was going to be him, shooting us." The defendant indicated he was or had been a firefighter, which to Sgt. Shove of the Marysville Police Department meant the defendant may have access to more information about each of the criminal justice participants, their schedules, etc. The defendant told all five victims it didn't matter how long it would take him, he was going to track them all down and kill them and their families. Each witness described the defendant's demeanor as angry and irate. He was very serious and very detailed in his threats. The defendant continued these threats repeating them throughout the over two hours the police officers and corrections personnel were with him. A large fixed blade knife

was found on the defendant's person. RP – Vol II 11, 12, 13, 14, 17, Vol III 16, 18-21, 51, 53, 56, 89, 94, 95, 98-99, 102.

During the initial stop, the officers had been contacted by a Snohomish County Sheriff's deputy who indicated the defendant had been stopped by them in the past and had been combative and was known to carry guns. RP – Vol II 14, 56, 92, Vol III 25, 56, 90.

All five criminal justice personnel indicated they took the threats very seriously. The defendant's reference to a sniper rifle; to having been a sniper; the threats to do whatever it took to track them down; and, the threats to their families. Marysville Corrections Officer Burtis testified the defendant specifically called him by name when he threatened him saying he would track down Officer Burtis' family and kill them. Similarly, Marysville Police Officer Bartl felt the threats were very serious and directed at him when, while he was advising the defendant of his implied consent warnings, the defendant told him "Shut the fuck up boy. I will blow your head off." RP Vol II 18-19, 20-21, 54, Vol III 21, 25, 28, 67, 72, 97, 98-99, 101, 103.

Marysville Corrections Officer Madan indicated he was very concerned due to the defendant's reference to being a sniper and his cache of weapons. Officer Madan pointed out that he had no

way of knowing if someone is ex-military. He was aware that military guys have a lot of training. Officer Madan was the officer who found the eight inch fixed blade knife the defendant had hidden in his boot. This knife had been missed on the first pat-down. Vol II 53-54, 69-70.

Marysville Police Officer Paxton indicated she altered her life-style for two to three months following the incident, educating her family, driving different routes. She described the threats as very disconcerting. Vol II 18, Vol III 57, 97.

Sgt. Shove indicated he had learned through his years as a law enforcement officer that people are capable of many things. Sgt. Shove indicated while at a grocery store with his child, he had been confronted by a suspect he had dealt with a few days prior. The suspect tried to fight him. That suspect murdered Sgt. Shove's co-worker's mother about a month later. Vol III 10.

Officer Bartl explained it to the jury as, "His specific threats of a sniper rifle and the popping sound and going through my heart, and taking my family, I can't prepare for that. That would be a sniper. And to me, that's somebody hidden somewhere where I have no control over..." Officer Bartl indicated due to the nature of the threats, on the heels of the four officers being shot in Lakewood

and the Seattle officer being shot, he did not consider these threats basic threats, these were very specific threats; the defendant had indicated even if it took him the rest of his life, he would find them and he would kill them. Vol II 10, 19; Vol III 98-99, 101, 127-128.

III. ARGUMENT

A. THE INFORMATION SUFFICIENTLY INFORMED THE DEFENDANT OF THE ELEMENTS OF THE CRIME FOR THE DEFENDANT TO ADEQUATELY PREPARE A DEFENSE.

1. The Charging Information Reasonably Put The Defendant On Notice As To All The Elements Of The Crime Of Harassment Of A Criminal Justice Participant.

RAP 2.5(a) generally does not allow parties to raise claims for the first time on appeal. RAP 2.5(a)(3), however, allows appellants to raise claims for the first time on appeal if such claims constitute manifest error affecting a constitutional right. State v. Locke, 175 Wn. App. 779, 796-97, 307 P.3d 771, 779-80 (2013); State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). An alleged error is manifest if it results in actual prejudice; that is, if it had “practical and identifiable consequences” at trial. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

When a defendant challenges a charging document for the first time on appeal, the court has adopted a liberal construction rule, construing the document in favor of its validity. State v.

Kjorsvik, 117 Wn.2d 93, 103, 812 P.2d 86 (1991); State v. Locke, 175 Wn. App. at 800, 307 P.3d 771 (2013). “When a defendant challenges the information for the first time on appeal, we determine if the elements appear in any form, or by fair construction can they be found, in the charging document. We read the information as a whole, according to common sense and including facts that are implied, to see if it reasonably apprises an accused of the elements of the crime charged. If it does, the defendant may prevail only if he can show that the unartful charging language actually prejudiced him.” State v. Nonog, 169 Wn.2d 220, 227, 237 P.3d 250, 254 (2010).

The defendant was charged with two counts of harassment of a criminal justice participant under RCW 9A.46.020(1) and (2)(b)(iii). The defendant now claims a necessary element was left out of the charging document; specifically, that “Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.” Although the charging language is not verbatim, it does include this element by saying, “... a reasonable criminal justice participant would have been in fear under all the circumstances that the threat would be carried out.”

This language puts the defendant on notice that the reasonable criminal justice participant's fear includes a fear that the threat will be carried out, or, in other words, that it was not apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat..

Appellant points to the "to convict" jury instruction to imply this element was left out of the charging language because it was included verbatim there. (Appellant's brief at 7-8). However, this ignores that the information serves a different purpose from jury instructions. "[B]ecause the purpose of jury instructions is to instruct the jury on the applicable law, they 'must necessarily contain more complete and precise statements of the law than are required in an information' or charging document." State v. Benitez, 175 Wn. App. 116, 124-25, 302 P.3d 877, 882 (2013).

The purpose of the information is to give the defendant sufficient notice to adequately prepare a defense. State v. Tandecki, 153 Wn.2d 842, 847, 109 P.3d 398 (2005). The information filed in this case did give the defendant sufficient notice to adequately prepare a defense. It is clear from his trial counsel's cross examination of the witnesses that the defendant was prepared to attack the reasonableness of the officers' fear and

question whether it was apparent to the criminal justice participants that the defendant did not have the present and future ability to carry out the threat.

The defendant's trial counsel pointed out during cross examination of each witness that the defendant was heavily intoxicated and had the each witness agree that people will say and do things when intoxicated that they would not otherwise say or do. The defendant's trial counsel also pointed out that the defendant had claimed to have a gun they had missed when the officers patted him down for weapons but after a strip search it was confirmed the gun did not exist. Most telling, as to the defendant's notice of the elements, is that defendant's trial counsel made a point of bring out through cross examination that the defendant had called approximately the next day to apologize to the officers for his behavior and had left messages for them on their voicemail. This evidence would have been an irrelevant attempt to seek sympathy from the jury and therefore inadmissible had it not gone to the reasonable belief of the threat being carried out in the future. RP Vol II 26-32, 51, 52, 55, 57, 78, 84, 86, Vol III 22, 29-31, 32-35, 59, 62-63, 68-69, 73-74, 106-117, 123-125.

2. Even If The Language Of The Charging Document Was Vague Or Unartful, The Defendant Was Not Prejudiced.

Even if the language of the charging document sufficiently informed the defendant of the elements of the crime, if the language is vague, an inquiry may be required into whether there was actual prejudice to the defendant. State v. Kjorsvik, 117 Wn.2d at 106, 812 P.2d 86, 92 (1991). The defendant has made no claim of actual prejudice.

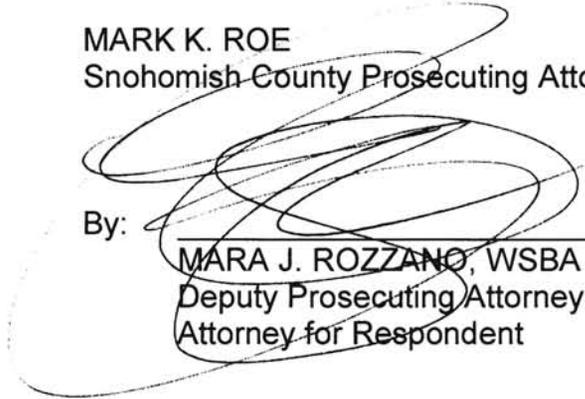
IV. CONCLUSION

For the reasons stated above, the convictions should be affirmed.

Respectfully submitted on April 14, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By:


MARA J. ROZZANO, WSBA #22248
Deputy Prosecuting Attorney
Attorney for Respondent