No. 43878-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FRED HENRY CARPENTER IV,

Appellant.

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

The Honorable Wm. Thomas McPhee, Judge
Cause No. 12-2-00773-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the language charging two counts of felony harassment was constitutionally deficient because it did not allege that the threat was a true threat.

2. Whether knowledge that the law enforcement officer was performing official duties is an essential element of the crime of obstructing a law enforcement officer that must be included in the charging document.

B. STATEMENT OF THE CASE.

The State accepts Carpenter's statement of the substantive and procedural facts.

C. ARGUMENT.

1. That the threat is a "true threat" is not an essential element of felony harassment and need not be included in the charging language.

Carpenter challenges for the first time on appeal the charging language for the two counts of felony harassment. The charges, Counts 3 and 4, alleged different victims but the language was otherwise identical:

> In that the defendant, FRED HENRY CARPENTER, IV, in the State of Washington, on or about June 9, 2012, without lawful authority, knowingly threatened to kill [the victim], a family or household member, pursuant to RCW 10.99.020, and the defendant's words or conduct placed [the victim] in reasonable fear that the threat would be carried out. It is further alleged that the current offense involved Domestic Violence as defined in RCW 10.99.020 and the offense occurred within sight or sound of the victim's

> or the offender's minor children under the age of eighteen years.

CP 20.

The jury was instructed on the elements of each count.

> To convict the defendant of the crime of felony harassment as charged in Count [3, 4], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about June 9, 2012, the defendant knowingly threatened to kill [the victim] immediately or in the future;
>
> (2) That the words or conduct of the defendant placed [the victim] in reasonable fear that the threat to kill would be carried out;
>
> (3) That the defendant acted without lawful authority; and
>
> (4) That the threat was made or received in the State of Washington.

CP 39, 43, Instructions No. 29 and 35.

A defendant may challenge the constitutional sufficiency of a charging document for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The time at which a defendant challenges the charging document controls the standard of review for determining the charging document's validity. State v. Borrero, 147 Wn.2d 353, 360, 58 P.3d 245 (2002). When the charging document is challenged after the verdict, the language is construed liberally in favor of validity. Id. at 360.

A charging document must include all essential elements of a crime, statutory or nonstatutory, "to afford notice to an accused of the nature and cause of the accusation against him." Kjorsvik, 117 Wn.2d at 97. An "essential element is one whose specification is necessary to establish the very illegality of the behavior." State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

The court uses a two-pronged analysis to determine the constitutional sufficiency of a charging document challenged for the first time on appeal: 1) do the essential elements 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 actually prejudiced by the language of the charging document. Kjorsvik, 117 Wn.2d at 105-06.

The State does not disagree that, to avoid a First Amendment violation, the threat prohibited by the harassment statute must be a "true threat." State v. Kilburn, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004). A "true threat" has been 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 person.'" Id. at 43 (quoting

State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001)). The State need not prove that the person making the threat actually intended to carry it out, only that he would reasonably foresee that the persons hearing it would take it seriously. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

Carpenter argues that it is an essential element of the crime of harassment that the threat be a "true threat" and that it must therefore be included in the charging language. He acknowledges that in State v. Allen, 161 Wn. App. 727, 225 P.3d 784 (2011), the court held that a "true threat" is a definition, not an essential element and need not be included in the information. Appellant's Opening Brief at 7-8. He argues, however, that the Supreme Court left open that question in Schaler. At the time Carpenter filed his opening brief, Allen was pending review in the Supreme Court. That court has since issued an opinion, State v. Allen, No. 86119-6 (Jan. 24, 2013).

In Allen, neither the charging language nor the to-convict jury instruction included the true threat requirement. The jury was given a separate instruction explaining true threat, identical to the instruction in Carpenter's case. Allen, No. 86119-6, slip op. at 20-21; Instruction No. 28, CP 39. The court began its analysis by

saying, "We have never held the true threat requirement to be an essential element of a harassment statute." Id. at 21. It noted that the Court of Appeals has consistently held that the true threat requirement is not an essential element of harassment. Id. at 23. Under the circumstances of Allen, which, in relevant part, are identical to Carpenter's case, the court found it was not error to fail to include the true threat requirement in either the information or the to-convict instruction. Id. at 24. The court in Schaler noted that the Washington Pattern Jury Instructions had been modified following the decision in State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006), and approved the modification. Schaler, 169 wn.2d at 287, n. 5; WPIC 2.24. That is the instruction that was given in Carpenter's trial. Instruction No. 28, CP 39.

Based upon the Allen opinion from the Supreme Court, it is a fair conclusion that the true threat requirement is not an essential element of harassment and need not be included in either the charging document or the to-convict jury instruction. As long as the jury is instructed as to the definition of a true threat, the defendant's First Amendment rights have been protected.

The information in Carpenter's case was not defective and there is no grounds for reversal of the harassment convictions.

2. The language charging Carpenter with obstructing a law enforcement officer does, by fair construction, include the element that he had knowledge that the officers were discharging their official duties.

Carpenter contends that the language of Count 6, charging him with obstructing a law enforcement officer, is constitutionally deficient because it does not include the nonstatutory element that he knew the officers were discharging their official duties. He does not claim that he was unaware that they were doing so, he does not claim that the jury instructions were inadequate, and he does not claim that there was insufficient evidence to prove that he knew they were performing an official function. Appellant's Opening Brief at 9-10. He raises this challenge for the first time on appeal.

The charging language reads as follows:

> In that the defendant, FRED HENRY CARPENTER, IV, State of Washington (sic), on or about June 9, 2012, did willfully hinder, delay, or obstruct any law enforcement officer in the discharge of his or her official powers or duties.

CP 20. The to-convict instruction , No. 44, says, in pertinent part:

> To convict the defendant of the crime of obstructing a law enforcement officer, in Count 6, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about June 9, 2012, the defendant willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of the law enforcement officer's official powers or duties;

(2) That the defendant kew that the law enforcement officer was discharging official duties at the time; and

(3) That any of these acts occurred in the State of Washington.

CP 47. The jury was also instructed in the definition of "willfully" in Instruction No. 43:

> Wilfully means to purposefully act with knowledge that this action will hinder, delay, or obstruct a law enforcement officer in the discharge of the officer's official duties.

CP 47.

Applying the test set forth in Kjorsvik, the charging language is sufficient if the necessary elements appear in any form or can, by fair construction, be found in the charging document, and if so, the defendant was not prejudiced by the "inartful language." Kjorsvik, 117 Wn.2d at 101-02. Here, the document explicitly included all of the essential statutory elements of the crime:

> Obstructing a law enforcement officer.
> (1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

RCW 9A.76.020. The essential elements are:

> (1) that the action or inaction in fact hinders, delays, or obstructs; (2) that the hindrance, delay, or obstruction be of a public servant in the midst of discharging his official powers or duties; (3)

> knowledge by the defendant that the public servant is discharging his duties, and (4) that the action or inaction be done knowingly by the obstructor, *i.e.*, with intent to hinder.

State v. CLR, 40 Wn. App. 839, 841-42, 700 P.2d 1195 (1985).

The charging document alleged that Carpenter willfully hindered, delayed, or obstructed any law enforcement officer in the discharge of his or her official powers or duties. Willfulness includes knowledge. RCW 9A.08.010(4); Instruction No. 43, CP 47. Nothing in the language or punctuation of the charging language would cause a reasonable person to separate "in the discharge of his or her official powers or duties" from the word "willfully." By fair construction, the element that Carpenter knew the officers were engaged in their official duties is included in the charging language.

Carpenter cites to Lassiter v. City of Bremerton, 556 F.3d 1049 (9th Cir. 2009), for the principle that knowledge is an essential element of the crime of obstructing. But Lassiter was discussing the sufficiency of probable cause, not the charging language. The State does not dispute that the State had to prove Carpenter knew the officers were performing official duties. The jury was properly instructed and the evidence was sufficient to prove it.

Carpenter has not claimed any prejudice, nor is any apparent from the record of the trial. There is no evidence to even suggest that he did not know the officers were doing their job, and indeed, it would be difficult to assert that he did not. Nor is there any suggestion that he was unable to prepare his defense because of the language of the charging document.

The charging language for obstructing was not constitutionally deficient.

D. CONCLUSION.

Carpenter has failed to show any constitutional infirmities in the information charging him with felony harassment or obstructing a law enforcement officer. The State respectfully asks this court to affirm all of his convictions.

Respectfully submitted this 14th day of March, 2013.

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Attorney for Respondent

THURSTON COUNTY PROSECUTOR

March 14, 2013 - 2:23 PM

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