No. 72728-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

LELAND JORDAN,

Appellant.

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

APPELLANT'S REPLY BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

1. Due to a substantial change in circumstances, a new waiver of counsel was required. Because there was no new waiver, Mr. Jordan was deprived of his right to counsel.

A criminal defendant may waive his right to counsel. Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); City of Bellevue v. Acrey, 103 Wn.2d 203, 209, 691 P.2d 957 (1984). When there is a substantial change in circumstances, the court must obtain a new waiver of counsel. United States v. Fazzini, 871 F.2d 635, 643 (7th Cir. 1989); Schell v. United States, 423 F.2d 101, 103 (7th Cir. 1970); State v. Modica, 136 Wn. App. 434, 445-46, 149 P.3d 446 (2006) aff'd on other grounds, 164 Wn.2d 83, 186 P.3d 1062 (2008). A change in circumstances is substantial when "the defendant can no longer be considered to have knowingly and intelligently waived the right to counsel." United States v. Hantzis, 625 F.3d 575, 581 (9th Cir. 2010). This can occur when there a significant lapse of time between hearings, new charges, a request from the defendant, a change in potential sentences, or other similar circumstances. United States v. Clark, 774 F.3d 1108, 1113 (7th Cir. 2014); State v. Rhoads, 813 N.W.2d 880, 889 (Minn. 2012).

A substantial change in circumstances occurred after Mr. Jordan validly waived his right to counsel in October 2013. First, there was a

significant lapse in the proceedings, about half a year. See Schell, 423 F.2d at 103 (six-month lapse indicated substantial change in circumstances). On the State's motion, the case was continued for two months in December 2013 and (because Mr. Jordan did not appear for a court date on January 17, 2014) proceedings did not resume until June 2014 (when Mr. Jordan appeared again). Second, the State added a new felony charge of bail jumping, which exposed Mr. Jordan to the risk of two consecutive sentences, effectively doubling the potential penalty. RCW 9.94A.589(1)(a); RCW 9A.20.021(1)(c). Finally, after the lapse, Mr. Jordan made ambivalent statements about whether he wanted assistance of counsel, even making a motion to have counsel assigned, though he withdraw it. 1RP 28-30, 39. Thus, contrary to the State's representation, Mr. Jordan indicated that he wanted the assistance of counsel. Br. of Resp't at 19.

Because there was a significant change in circumstances, a new waiver of counsel was required. While the court conducted a cursory inquiry on August 1, 2014, this was inadequate. It was not a full colloquy and it occurred before Mr. Jordan was arraigned on the new bail jumping charge. The State agrees that there was only one formal colloquy conducted in this case, which was on October 16, 2013. Br. of Resp't at 12 n.11. Thus, there was not an unequivocal renewal of Mr. Jordan's

waiver of counsel, requiring reversal. See Rhoads, 813 N.W.2d at 889 (2012) (renewed waiver of counsel on day of trial was not knowing and intelligent); State v. Silva, 108 Wn. App. 536, 541-42, 31 P.3d 729 (2001) (deprivation of right to counsel is necessarily prejudicial).

The State argues that this Court's decision in Modica precludes the foregoing analysis and conclusion. Br. of Resp't at 18. This is an overstatement of Modica. There, this Court simply held that, under the circumstances, the trial court was not required to engage in a second waiver of counsel colloquy. Modica, 136 Wn. App. at 446. As argued, Modica is materially distinguishable because in that case there was no lapse in the proceedings, the amended charge was added shortly after the defendant waived his right to counsel, and the defendant only indicated that he wanted counsel during the trial itself. Id. at 439-40; Br. of App. at 16-17. Here, there was a significant lapse in the proceedings, the additional charge was added long after Mr. Jordan had waived his right to counsel, and Mr. Jordan indicated he wanted assistance of counsel before his trial date in August.

Moreover, Modica does not appear to have considered the argument that an additional charge may constitute a significant change in circumstances because it exposes the defendant to the risk of consecutive sentences. Modica, 136 Wn. App. at 446. "An opinion is not authority for

what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered." Cont'l Mut. Sav. Bank v. Elliott, 166 Wash. 283, 300, 6 P.2d 638 (1932). Hence, "[w]here the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive . . ." ETCO, Inc. v. Dep't of Labor & Indus., 66 Wn. App. 302, 307, 831 P.2d 1133 (1992).

The State argues that the Schell case has "nothing to do with Mr. Jordan's case." Br. of Resp't at 20. Schell illustrates, however, that a lapse in the proceedings may constitute a substantial change in circumstances. Schell, 423 F.2d at 103. That the circumstances of Mr. Jordan's case is not exactly like Schell does not change the fact that a significant lapse in the proceedings occurred here.

The Minnesota Supreme Court's opinion in Rhoads supports the determination that there was a substantial change in circumstances due to the additional charge. To follow Rhoads on this point does not contravene Modica because Modica did not address this precise argument.

It is true that Mr. Jordan was arraigned on the second charge, unlike the defendant in Rhoades. Br. of Resp't at 23. But the court did not tell Mr. Jordan that the second charge exposed him to the risk of double the punishment. The State argues that Mr. Jordan understood this

information because the plea form recounts it. Br. of Resp't at 24. That form states, on the bottom of page 6 (out of 14 pages), that "The sentences imposed on counts 1 & 2 . . . will run concurrently unless there is a finding of substantial and compelling reasons to do otherwise." CP 84. But this information was not conveyed to Mr. Jordan until after his arraignment. Thus, the additional charge still indicates that there was a substantial change in circumstances requiring a new waiver.

Because there was a substantial change in circumstances, a new waiver was required. The cursory inquiry by the court on August 1, 2014 did not establish that Mr. Jordan voluntarily, knowingly, and intelligently waived his right to counsel. Accordingly, this Court should reverse.

2. There was not a valid factual basis to accept Mr. Jordan's Alford plea to felony harassment.

Before a trial court accepts an Alford plea, there must be a factual basis for the plea and the plea must be made knowingly, voluntarily, and intelligently. In re Pers. Restraint of Cross, 178 Wn.2d 519, 526, 309 P.3d 1186 (2013). Here, there was an insufficient factual basis to support Mr. Jordan's plea to felony harassment. Br. of App. at 20-25. This argument is properly raised for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001); In re Pers. Restraint of Clements, 125 Wn. App.

634, 645, 106 P.3d 244 (2005). The State does not argue otherwise. Br. of Resp't at 24-32.

Felony harassment requires proof that "the person threatened was placed in reasonable fear that the threat to kill would be carried out." State v. Mills, 154 Wn.2d 1, 10-11, 109 P.3d 415 (2005) (emphasis added); accord State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003). Here, there was an inadequate basis to conclude that Dr. Shah was the target of the threat, i.e., that she was the person threatened. State v. Morales, 174 Wn. App. 370, 380, 298 P.3d 791 (2013). The report does not indicate that Mr. Jordan and Dr. Shah interacted or even that Mr. Jordan was aware of Dr. Shah. CP 95. The report indicates only that Dr. Shah "witnessed," in other words heard, Mr. Jordan's threat, not that she was the target of it. CP 95. Being a witness to a threat does not make one the target of that threat.

The State argues that Dr. Shah's witnessing of "Mr. Jordan's threatening behavior" is sufficient to conclude that Dr. Shah was the target. Br. of Resp't at 30-31. This is purely speculative. The report supports only a factual basis to conclude that the nurses which Mr. Jordan interacted with were the targets. CP 95.

Additionally, Dr. Shah did not state that she reasonably feared that Mr. Jordan's threat to kill **would** be carried out. CP 95. Rather, she only

stated that she "feared that Mr. Jordan **could** actually carry out his plan." CP 95. Thus, there was also an inadequate factual basis to conclude that Dr. Shah reasonably feared that the threat **would** be carried out.

The State argues that this is mere semantics. See Br. of at 27, 31. But the statute requires proof of reasonable fear that the threat to kill would be carried out, not reasonable fear that the threat to kill could be carried out. One is sufficient, the other is not. Fearing that Mr. Jordan was capable of carrying out the threat is not the same as fearing that he would carry out the threat. The State's argument criminalizes behavior which is not a crime.

In arguing that there was an adequate factual basis, the State cites to State v. Alvarez, 74 Wn. App. 250, 872 P.2d 1123 (1994), aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995) and State v. E.J.Y., 113 Wn. App. 940, 55 P.3d 673 (2002). Br. of Resp't at 27-30. These cases are inapposite because they do not involve Alford pleas. They were appeals in juvenile bench trials. Moreover, unlike this case, the facts in those cases are plainly adequate to establish that the victims were actual targets of death threats and that they reasonably feared the threats would be carried out.

In Alvarez, there were two distinct threats. In the first case, the victim (the defendant's neighbor) testified that she understood the defendant's statement to her to mean that "'I will kill you.'" Alvarez, 74

Wn. App. at 253. In the second case, the victim (the defendant's teacher) was the target of a tirade by the defendant, which included threats of blowing up and burning down the teacher's house. Id. at 254. The issue in these cases were not whether the victims were actually the targets of threats or whether the victims actually feared that the defendant would carry out his threat. Rather, the issue was whether the evidence was sufficient to prove that the victim's fears were reasonable. Id. at 260. Additionally, the evidence in Alvarez is plainly extensive, unlike the facts presented in the report which served as the basis for the plea.

Similarly, in E.J.Y., the defendant made threats to school employee about getting his gun and shooting up the school, specifically telling the employees that they "'better watch out.'" E.J.Y., 113 Wn. App. at 944. Again, the defendant did not argue that either of the employees were not the targets of the threats or that the employees did not fear that the defendant would carry out his threats. Rather, he argued that neither employee's fears were reasonable. Id. at 952-53. The State emphasizes language used by one of the victims, who testified that she feared the defendant "'was making a threat that he could come back in and cause violence whether he was going to come back and shoot up the place. . . .'" Id. at 953. But this was not the only evidence in the case. Moreover, the defendant in E.J.Y. did not argue what Mr. Jordan is arguing, i.e., that

"could" does not mean "would." Hence, it is not controlling. See ETCO, 66 Wn. App. at 307 (prior opinion is not dispositive if court did not consider argument that defendant is making).

This Court should reject the State's arguments. There was not a factual basis to conclude that Dr. Shah was the **target** of any threat or, even if she were, that she reasonably feared the threat **would** be carried out. Hence, Mr. Jordan's plea was not knowing, voluntary, and intelligent. State v. Berry, 129 Wn. App. 59, 68, 117 P.3d 1162 (2005).

3. Washington's felony harassment statute is unconstitutional.

Recognizing Washington precedent to the contrary, Mr. Jordan has raised a succinct constitutional challenge the felony harassment statute. Br. of App. at 25-26. He argues that before he can be convicted of felony harassment, the First Amendment requires proof that the speaker subjectively intended to communicate a threat. Br. of App. at 25-26. The basis for this rule is precedent from the United States Supreme Court and the federal Court of Appeals. Virginia v. Black, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); United States v. Heineman, 767 F.3d 970, 979 (10th Cir. 2014); United States v. Bagdasarian, 652 F.3d 1113, 1117 n.14 (9th Cir. 2011); United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2005).

Black was a case involving state-law convictions for cross burning with intent to intimidate. See Black, 538 U.S. at 348-51. In resolving the case, a majority defined true threats:

> True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat *to a person or group of persons* with the intent of placing the victim in fear of bodily harm or death.

Id. at 359-60 (emphasis added) (brackets, citations, and internal quotation marks omitted).

Hence, Black establishes that proof of subjective intent to communicate a threat is required under the First Amendment before conviction. As explained by the Heineman court:

> We read *Black* as establishing that a defendant can be constitutionally convicted of making a true threat only if the defendant *intended* the recipient of the threat to feel threatened. The majority of the Court said that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359, 123 S. Ct. 1536. When the Court says that the speaker must "mean[ ] to communicate a serious expression of an intent," it is requiring more than a purpose to communicate just the

> threatening words. *Id.* It is requiring that the speaker want the recipient to believe that the speaker intends to act violently. The point is made again later in the same paragraph when the Court applies the definition to intimidation threats: "Intimidation *in the constitutionally proscribable sense of the word* is a type of true threat, where a speaker directs a threat to a person or group of persons with the *intent of placing the victim in fear of bodily harm or death.*" *Id.* at 360, 123 S. Ct. 1536 (emphasis added).

Heineman, 767 F.3d at 978 (10th Cir. 2014).

Nevertheless, our State Supreme Court has held that the First Amendment does not impose this requirement. State v. Schaler, 169 Wn.2d 274, 287, 236 P.3d 858 (2010); State v. Kilburn, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004). Black and federal circuit decisions notwithstanding, a panel of this Court has followed our State Supreme Court on the issue. State v. Ballew, 167 Wn. App. 359, 369, 272 P.3d 925 (2012).

The State argues that Mr. Jordan's argument is inadequately briefed and should not be considered, citing State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004). There, the Court declined to consider an issue for the first time on appeal, reasoning that the defendant had "not specified with any particularity which of his constitutional rights has been violated and makes no argument on the issue, nor does he cite any authority." Thomas, 150 Wn.2d at 869. Here, Mr. Jordan has specified with particularity that the harassment statute violates the First Amendment,

made an argument on the issue, and cited pertinent authority. The argument is thus properly before this Court.

The State argues that to follow the federal courts would be disregarding this Court's precedent. See Br. of App. at 32, 35. But panels of this Court are free to disagree with conclusions made by other panels. See State v. Morgan, 163 Wn. App. 341, 344, 261 P.3d 167 (2011) (disagreeing with conclusion made by panel of the same division). As for decisions from our State Supreme Court, this Court is ultimately bound by the United State Supreme Court on federal constitutional issues. Cooper v. Aaron, 358 U.S. 1, 18-19, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). Properly construing Black, this Court should hold that the felony harassment statute is unconstitutional.

4. The charging document alleging bail jumping failed to allege the essential element that Mr. Jordan knew of the precise date that he was required to appear on.

All the essential elements of the crime must be included in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). To prove bail jumping, the State must prove that the defendant knew he was required to appear on the specific date for which he did not appear. State v. Cardwell, 155 Wn. App. 41, 47, 226 P.3d 243 (2010) ("In order to meet the knowledge requirement of the statute, the State is required to prove that a defendant has been given notice of the required

court dates."), remanded on other grounds, 172 Wn.2d 1003, 257 P.3d 1114 (2011); State v. Ball, 97 Wn. App. 534, 535-36, 987 P.2d 632 (1999) (State must prove that the defendant knew he was required to appear at the scheduled hearing).

Here, the information did not tell Mr. Jordan that it had to prove this element. Rather it only told him that the State had to prove that he had been released by court order with knowledge of the requirement of "a" subsequent personal appearance:

> That the defendant Leland Alfred Jordan in King County, Washington, on or about January 17, 2014, being charged with Felony Harassment, a Class C felony, and having been released by court order with knowledge of the requirement of a subsequent personal appearance before King County Superior Court, a court of the state of Washington, did fail to appear as required;
>
> Contrary to RCW 9A.76.170(1), (3)(c), and against the peace and dignity of the State of Washington.

CP 93.

While this information stated that the crime occurred on or about January 17, 2014, it does not state Mr. Jordan was released with knowledge of the requirement to appear on this date. This is an essential element. Cardwell, 155 Wn. App. at 47; Ball, 97 Wn. App. at 535-36. The State assumes that the "as required" language provides this information. Br. of Resp't at 40. It does not.

A hypothetical is illustrative. For example, suppose a defendant is told (correctly) that he must appear on January 12, 2016. He is not, however, told that he must also appear on January 11, 2016, the day before. If the State charges the defendant with bail jumping for not appearing on January 11, 2016, it must allege that he had knowledge of the requirement to appear on this date, not merely that he was informed of a requirement to appear some time in the future (such as January 12, 2016). But under the State's theory, it is enough to tell the defendant that he had "knowledge of the requirement of a subsequent personal appearance." This Court rejected this very theory. Cardwell, 155 Wn. App. at 47 ("At trial, the State maintained that as long as Cardwell knew that he would have to appear at some time in the future, it did not have to prove that he knew about the December 14, 2005 court hearing date. We disagree.").

Under the Kjorsvik test, if an element is missing, prejudice is presumed and reversal is required. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000). Here, an essential element is missing. The State had to prove that Mr. Jordan was notified of the requirement to appear on January 17, 2014. The information does not convey this requirement. Hence, contrary to the State's argument, no showing of prejudice is required. Br. of Resp't at 42-43. Reversal is proper.

As argued, this issue is properly before this Court. Br. of App. at 26, citing State v. Saylors, 70 Wn.2d 7, 9, 422 P.2d 477 (1966). The State does not disagree.

B. CONCLUSION

Mr. Jordan was deprived of his right to counsel, his plea to felony harassment lacked a factual basis, the crime of felony harassment is unconstitutional, and the charging document was fatally defective. As argued, the remedy for any of these violations is the invalidation of Mr. Jordan's entire plea, reversal, and remand. Br. of App. 31, citing In re Pers. Restraint of Bradley, 165 Wn.2d 934, 941-42, 205 P.3d 123 (2009). The State does not argue that this remedy is improper. This Court should reverse and remand with instruction that Mr. Jordan be permitted to withdraw his plea.

DATED this 30th day of December, 2015.

Respectfully submitted,

/s/ Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72728-1-I
v.	)	
	)	
LELAND JORDAN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] IAN ITH, DPA [paoappellateunitmail@kingcounty.gov] [ian.ith@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] LELAND JORDAN 231085 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF DECEMBER, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710