

NO. 64678-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,

v.

DARREN JOHN ELKEY,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE REGINA CAHAN

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COURT OF APPEALS
STATE OF WASHINGTON #1
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BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Both the federal and Washington constitutions require that a person accused of a crime be informed of the nature and cause of the accusation. U.S. Const. amend VI; Wash. Const. art. I, § 22; State v. Sloan, 149 Wn. App. 736, 740, 205 P.2d 172 (2009).

Although a defendant may challenge the sufficiency of the charging document for the first time on appeal, the failure to challenge its sufficiency prior to or during trial is a factor for the reviewing court's consideration on appeal. Where the essential facts and elements are found, by fair construction and when the information is read as a whole and in a common sense manner, does the defendant fail to show that the charging document was constitutionally defective?

B. STATEMENT OF THE CASE

On June 12, 2009, the State charged the Appellant with one count of felony telephone harassment - Domestic Violence, contrary to RCW 9.61.230(1)(c) and (2)(a). CP 1-2. The Information alleged, in pertinent part:

That the defendant, DARREN JOHN ELKEY in King County, Washington, on or about June 10, 2009, with

intent to harass, intimidate, and torment another person, did make a telephone call to Kelley Gabryshak-Reyes, threatening to inflict injury on the person or property of Kelley Gabryshak-Reyes, or to any member of that person's family or household; and the defendant had previously been convicted of Assault in the 4th Degree, a crime of harassment as defined in RCW 9A.46.060, with the same victim or member of the victim's family or household.

CP 1.

At no time prior to or during trial did the Appellant note or file a motion for a "bill of particulars," or otherwise object to the sufficiency of the Information. On December 2, 2009, the jury returned a verdict of guilty to the offense of Telephone Harassment as charged. CP 35. Judgment was entered on December 18, 2009; this appeal follows. CP 36-45.

C. ARGUMENT

THE INFORMATION CHARGING MR. ELKEY WITH "TELEPHONE HARASSMENT" SET FORTH ALL ESSENTIAL ELEMENTS OF THE CHARGE WHEN READ IN A COMMON-SENSE MANNER, AND IS THUS CONSTITUTIONALLY SUFFICIENT.

- a. The Charging Document Is Constitutionally Sufficient Only If It Sets Forth All Essential Elements Of The Offense Charged.

Both the federal and Washington Constitution accord a person accused of a crime the right to be informed of the nature of

the cause of the accusation. U.S. Const. amend VI; Wash. Const. art. I, § 22; State v. Sloan, 149 Wn. App. 736, 740, 205 P.2d 172 (2009). In light of these constitutional standards, CrR 2.1(a)(1) provides that: "the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." CrR 2.1(a)(1).

The critical purpose for these provisions is to provide adequate notice. The "essential elements rule" requires that a charging document allege facts supporting every element of the offense and identify the crime charged. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2007), *citing* State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 592 (1989). In enforcing this state constitutional provision reviewing courts have sought to avoid "technical rules," but rather have tailored review to protect against "the precise evil article 1, section 22 was designed to prevent - charging documents which prejudice a defendant's ability to mount an adequate defense by failing to provide sufficient notice." State v. Schaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993); State v. Leach, 113 Wn.2d at 695-96.

- b. The Information Charging Mr. Elkey With "Telephone Harassment" Properly Advised Him Of All Essential Elements Of The Offense, And Thus Is Constitutionally Sufficient.

The Appellant contends that his conviction for one count of Felony Telephone Harassment must be reversed and dismissed without prejudice because the Information failed to specify that, at the time he placed the telephone call, he had formed the intent to harass the victim. Brief of App. at 11. This argument should be rejected because a common sense and fair reading of the Information makes clear the State's allegation that the intent to harass was formed at the time the call was placed.

The Telephone Harassment statute, RCW 9.61.230, states, in pertinent part that:

"(1) [e]very person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person

...

(c) [t]hreatening to inflict injury on the person or property of the person called or any member of his or her family or household...is guilty of a gross misdemeanor, except as provided in subsection (2) of this section."¹

RCW 9.61.230.

¹ Subsection (2)(a) provides that the offense is classified as a Class C felony if the offender has previously been convicted of "any crime of harassment, as defined in RCW 9A.46.060."

The Information charging Mr. Elkey with this offense alleged that:

That the defendant, DARREN JOHN ELKEY in King County, Washington, on or about June 10, 2009, *with intent* to harass, intimidate, and torment another person, *did make a telephone call* to Kelley Gabryshak-Reyes, threatening to inflict injury on the person or property of Kelley Gabryshak-Reyes, or to any member of that person's family or household; and the defendant had previously been convicted of Assault in the 4th Degree, a crime of harassment as defined in RCW 9A.46.060, with the same victim or member of the victim's family or household.

CP 1 (emphasis added).

The sufficiency of the information may be challenged at any time, including for the first time on appeal. State v. Brown, ___ Wn.2d ___, 234 P.3d 212 (2010). In State v. Kjorsvik, 117 Wn.2d 93, 105-08, 812 P.2d 86 (1991), the Washington Supreme Court adopted a liberal construction rule when reviewing challenges to charging documents when the challenge was mounted for the first time on appeal. State v. Nonog, ___ Wn.2d ___, ___ P.3d ___ (July 22, 2010 slip opinion at 6). The standard adopted in Kjorsvik requires "at least some language in the information giving notice of the allegedly missing elements *and* if the language is vague, an inquiry

may be required into whether there was actual prejudice to the defendant." Kjorsvik, 117 Wn.2d at 106.

The Kjorsvik standard incorporates both statutory and "nonstatutory," or judicially created, elements. Kjorsvik, 117 Wn.2d at 108-09. The test is whether "all the words used would reasonably apprise an accused of the elements of the crime charged...[w]ords in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." Id. at 109. The liberal construction balances the defendant's right to notice against the risk of what Professor Wayne R. LaFave termed "sandbagging" --that is, that a defendant might keep quiet about defects in the information only to challenge them after the State has rested and can no longer amend it." Nonog, at p. 6.

Here, Mr. Elkey challenges the sufficiency of the charging document for the first time on appeal. As such, the Kjorsvik standard of liberal construction applies. Any common sense reading of the Information makes clear that the intent to harass must be formed by the time the call is placed. The order in which

the allegation of "intent" appears in the Information is of particular significance here. The allegation of "intent" is expressly stated before the allegation of "did make a telephone call." CP 1.

The crux of the "fair construction" standard is that the charging document is read as a whole rather than in isolation of its parts. Certainly an argument could be made that the document misadvised a defendant of the charge if the converse were true: that the allegation of "intent to harass" were placed elsewhere in the document, for instance if it were placed after the allegation that a telephone call was made. As stated *supra*, the right to be protected is the accused's right to be adequately informed of the allegations made; not to employ hypertechnical and strained construction of a charging document. Schaffer, 120 Wn.2d at 620. Here, there can be no question that the Information accused Mr. Elkey of forming the intent to harass at the time he placed the call.

The Appellant claims that the Washington Supreme Court's holding in State v. Lilyblad, 163 Wn.2d 1, 177 P.3d 686 (2008), requires additional language in the Information specifying that the "intent to harass" was formed at the time the call was made. Brief of App. at 4. However, the court in Kjorsvik specifically held that

the failure to include the "exact words of a case law element" is "not fatal to an information or complaint," so long as the "words used would reasonably apprise an accused" of the essential elements of the charge. Kjorsvik, 117 Wn.2d at 109.

It should be noted that the court in Lilyblad held RCW 9.61.230 is "unambiguous." Lilyblad, 163 Wn.2d at 12. In its review of the statute's purpose, the court specifically references the "temporal scope of the act" of "making a call includes the point of connection" makes clear what conduct is proscribed. Id. at 10. The charging language fully advised Mr. Elkey of what was unlawful, and that the intent to harass attached at the point of the call's inception.

It should also be noted that Division Two of the Court of Appeals held charging language identical in structure to the pertinent portions of the Information here is constitutionally sufficient. State v. Sloan, 149 Wn. App. 736, 741, 205 P.3d 172 (2009). While the appellant in Sloan did not specify what language was missing or misleading in the charging document, the Sloan court similarly applied the Kjorsvik standard in finding the charging document sufficient. Id.

The charging language in the Information fully-advised Mr. Elkey of the essential element of “intent to harass” at the inception of a phone call. The Kjorsvik standard applies to this post-judgment challenge to the sufficiency of the charging document. The Lilyblad decision necessitating that the intent to harass form by the time the call is made is found by a common sense reading of the Information; the fact that “intent” is formed at this time is found in both a literal and implied reading of the charging language, how it is worded and in the order it is found.

D. CONCLUSION

Mr. Elkey was fully and fairly advised of all essential elements of RCW 9.61.230. The charging document, when read in its entirety and through the prism of common sense, adequately advised him that he intended to harass his victim, and then “did make” a phone call. CP 1. The order in which these facts were placed in the Information is relevant here, and fully apprised Mr. Elkey of the conduct the statute prohibited. The Respondent

respectfully asks that this Court find the charging document constitutionally sufficient and affirm his conviction for Felony Telephone Harassment.

DATED this 14th day of September, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'P. Lewicki', written over a horizontal line.

By: _____
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to MAUREEN M. CYR, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the "Brief of Respondent," in STATE V. DARREN JOHN ELKEY, Cause No. 64678-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



PETER DAVID LEWICKI
WSBA # 39273
Done in Seattle, Washington

9/15/10

Date 9/15/2010