

66979-6

66979-6

NO. 66979-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
DANTE HAYNES,
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The concept of "true threats" is a definition employed by Washington courts to ensure that statutes that prohibit threats are constitutional. Definitions of elements are not themselves elements that must be included in the charging document. Was Haynes properly charged when the information did not include the definition of a "true threat," but included all of the statutory elements of harassment?

2. When granting misdemeanor probation, the trial court has broad discretion to impose conditions, provided the conditions bear a relationship to the duty to make reparations to the victim or would tend to prevent the future commission of crimes. Here, the trial court ordered Haynes to comply with the treatment required in his parenting plan. Did the trial court properly impose the treatment requirement when Haynes's current crime and his past criminal history were related to his parenting issues?

3. When a defendant is convicted of an offense that renders him ineligible to possess a firearm, the trial court is required to provide notice of this prohibition, both orally and in writing. Here, in addition to providing oral and written notice, the court warned Haynes that if he was found near a gun and had access to that gun,

he could be charged with a new criminal offense. Did the trial court properly advise Haynes regarding the firearm prohibition?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Dante Haynes was charged by amended information with third-degree assault of J.B. (count I), felony harassment of Seantaila Spears (count II), and fourth-degree assault of Spears (count III). CP 111-12. The State further alleged that counts II and III were crimes of domestic violence and that count II occurred within the sight or sound of a minor child. Id.

Trial occurred in March of 2011. The jury found Haynes guilty of assaulting Spears and acquitted him of assaulting J.B. CP 77, 80. The jury also acquitted Haynes of felony harassment, but found him guilty of the lesser offense of misdemeanor harassment. CP 78-79. The court imposed two concurrent suspended sentences and placed Haynes on probation for two years. CP 90-92.

2. SUBSTANTIVE FACTS.

Seantaila Spears and Dante Haynes dated off and on for about three years, beginning when they were in high school. 4RP¹ 117-18. Their son, D.H., was born in August of 2003. 4RP 118. Spears and Haynes stopped dating when D.H. was about six months old. Id. There was a parenting plan in place, which allowed Haynes afternoon visits, but no overnight visits. Id. However, Spears occasionally allowed D.H. to spend the night with Haynes. Id. Spears had sporadic contact with Haynes; their encounters were limited to coordinating D.H.'s visits. 4RP 120-21. Spears also has a younger son, J.B. (born 4/4/2008), who is not related to Haynes. 4RP 119.

On August 28, 2010, Haynes and his girlfriend, Starshea Harris, drove D.H. to his football game. 4RP 120. Spears planned to meet them at the game, along with J.B. and her best friend,

¹ The verbatim report of proceedings: 1RP (2/23/11); 2RP (2/24/11); 3RP (3/1/11); 4RP (3/2/11); 5RP (3/3/11); 6RP (3/7/11); 7RP (3/8/11); 8RP (3/9/11 and 3/10/11); and 9RP (3/21/11).

Kadijah Smith. Id. While she was driving to the game, Spears realized that she had forgotten D.H.'s cleats. 4RP 121. Although she was able to get the cleats to D.H. before the game started, Haynes yelled at her for forgetting them. 4RP 124.

After the game, D.H. left with Spears, Smith, and J.B. 4RP 127. Smith sat in the front passenger seat, while the kids were in the back seat. 4RP 130. When Spears stopped at a traffic light on the way home, Harris and Haynes stopped in the lane next to her. 4RP 132. Spears and Haynes began to argue. 4RP 135. Spears tossed a cup of cold coffee at Haynes; in return, Haynes threw the contents of a beer can in Spears's window. 4RP 136. While the light was still red, Haynes got out of his car and continued to yell at Spears, who then exited her car. 4RP 139. Haynes threw a metal cup at Spears's car, shattering the back windshield. 4RP 141. J.B. started crying and both children were noticeably scared. 4RP 141, 146. Spears asked Haynes why he would risk hurting her kids. 4RP 143. Haynes said that he did not care, and added, "I want to kill you. I wish you were dead." Id. Based on

Haynes's behavior that day, as well as a prior fight over D.H., Spears was afraid that Haynes would carry out that threat. 4RP 149-52. Haynes punched Spears several times in the face, neck, and back. 4RP 143, 148.

As she was calling 911, Spears stood in front of Harris's car to prevent the couple from leaving. 4RP 156. Harris hit Spears with her car as she and Haynes drove away. Id. D.H. chased after his father, with his fists balled up in a way that one witness described as "protective." 4RP 159; 6RP 29.

After Haynes left, Spears noticed that J.B. had a small scrape, with crusted blood, behind his left ear. 4RP 144. She had not noticed the scrape before Haynes threw the cup at the windshield. Id.

C. ARGUMENT

1. THE DEFINITION OF "TRUE THREAT" IS NOT AN ELEMENT OF HARASSMENT AND NEED NOT BE INCLUDED IN THE CHARGING DOCUMENT.

Haynes contends that "true threat" is an essential element of harassment and that the information in his case was defective because it did not allege that Haynes made a "true threat."

Haynes's argument should be rejected because the definition of a "true threat" is not an element of the crime of harassment; consequently, it need not be alleged in the charging document.²

A charging document is sufficient if it sets forth all elements of the offense. State v. Kjorsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). When the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-prong inquiry: (1) do the necessary facts appear in any form; and, if so, (2) can the defendant nevertheless show that he was prejudiced by any lack of notice? Id. at 105-06.

A person commits the crime of felony harassment if he knowingly threatens to kill a person immediately or in the future, and the words or conduct place the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020. Here, the State alleged by information that Haynes "knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Seantaila Spears, by threatening to kill Seantaila Spears, and the words or conduct did place said

² Haynes does not challenge the "to convict" instruction or the definition of "true threat" given to the jury, nor does he claim that there was not sufficient evidence for the jury to have found that he made a "true threat."

person in reasonable fear that the threat would be carried out." CP 112; RCW 9A.46.020. The information included all of the statutory elements.

In defining the constitutional limits of the harassment statute, the Washington Supreme Court has stated that to avoid unconstitutional infringement on protected speech, the harassment statute must be read as prohibiting only "true threats." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001); State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001). 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." Kilburn, 151 Wn.2d at 43.

Haynes argues that this language is not merely definitional, but is an element of every criminal statute involving a verbal threat. This argument should be rejected because the term "true threat" is a term of art used to describe the permissible scope of threat statutes for First Amendment purposes. The language need not be included in the charging document. Indeed, this Court has

repeatedly rejected the argument that "true threat" is an essential element that must be included in the information. See e.g., State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006); State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007); State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010); State v. Allen, 161 Wn. App. 727, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011).³

In Tellez, this Court held that the concept of "true threat" serves to define and limit the constitutional scope of the threat element in the felony telephone harassment statute, and is not an element of the crime. 141 Wn. App. at 483-84. This Court held that the "true threat" requirement need not be included in the charging document. Id. Likewise, this Court recently held that while the "true threat" concept limits the constitutional scope of the harassment statute, it is not an element of the crime of felony harassment. Allen, 161 Wn. App. at 755.

There is no question that the State was required to prove that Haynes's threat was a "true threat." The jury was properly instructed that in order to find Haynes guilty, they must find beyond a reasonable doubt that he knowingly threatened to cause bodily

³ Oral argument in Allen is scheduled for March 1, 2012.

injury to Spears and that the threat occurred "in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat." CP 53, 59. Haynes has cited no case holding that the language defining a "true threat" is a separate element that also must be included in the charging document.

As it did in Allen, this Court should decline Haynes's invitation to revisit Tellez in light of State v. Schaler.⁴ Schaler was charged with felony harassment. Schaler, 169 Wn.2d at 281. The trial court did not instruct the jury as to the definition of a "true threat." Id. at 284. The Supreme Court held that failing to define "true threat" was error. Id. at 287. However, the Court noted that the error was unlikely to arise in future cases because the proper definition had been incorporated into WPIC 2.24, the instruction that defines "threat." Id. at 288 n.5. Acknowledging this Court's opinion in Tellez, the Supreme Court expressly declined to address whether "true threat" was an essential element of felony harassment. Schaler, 169 Wn.2d at 288 n.6. Accordingly, this

⁴ 169 Wn.2d 274, 236 P.3d 858 (2010).

Court's decision in Tellez is dispositive. See Allen, 161 Wn. App. at 755 (holding that Schaler did not require reversal of Tellez).

Because the definition of "true threat" is not an essential element of harassment that must be charged in the information, Haynes was properly charged and his challenge to the information should be rejected.

2. THE TRIAL COURT PROPERLY REQUIRED HAYNES TO CONTINUE WITH TREATMENT ORDERED BY FAMILY COURT.

Haynes argues that the trial court erred when it ordered him to comply with the treatment previously imposed by King County Family Court as a component of his parenting plan. Haynes's argument should be rejected because the trial court did not abuse its discretion when it imposed the treatment condition.

Sentencing conditions are reviewed for abuse of discretion. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or reasons.

State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

Under RCW 9.95.210, the superior court has the authority to grant probation. The court's decision to grant a suspended

sentence and impose probation for a misdemeanor conviction is "not a matter of right, but a matter of grace, privilege, or clemency" that may be "granted to the deserving, and withheld from the undeserving." State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999), review denied, 140 Wn.2d 1006 (2000) (quoting State v. Farmer, 39 Wn.2d 675, 679, 237 P.2d 734 (1951)). The purpose of probation is, in part, the rehabilitation of the offender. State v. Barklind, 12 Wn. App. 818, 823, 532 P.2d 633 (1975), affirmed, 87 Wn.2d 814, 557 P.2d 314 (1976). Conditions of probation need not be connected to the underlying crime, provided that they "bear a reasonable relation to the defendant's duty to make restitution or tend to prevent the future commission of crimes." Williams, 97 Wn. App. at 263 (citing State v. Summers, 60 Wn.2d 702, 707, 375 P.2d 143 (1962)). Substance abuse treatment or mental health treatment are reasonable conditions of probation. State v. LaRoque, 16 Wn. App. 808, 810-11, 560 P.2d 1149 (1977); State v. Osborn, 87 Wn.2d 161, 166, 550 P.2d 513 (1976).

Haynes's custody of D.H. was subject to the terms of a parenting plan under King County Superior Court Cause Number 09-3-03171-5. 9RP 16. As a part of the parenting plan, Haynes was ordered to complete an evaluation and participate in treatment

recommended by Family Court Services. Id. The trial court ordered Haynes to comply with the evaluation and treatment as a condition of his probation.

Although he did not object at sentencing, Haynes now argues that the trial court lacked any reason to believe that this condition "would tend to prevent the commission of future crimes or was related to reparation" because the court did not know what type of treatment was ordered. App. Br. at 15-16.

The trial court did not err when it incorporated the treatment as a condition of probation. According to trial counsel, Haynes's only legal trouble stemmed from interactions with Spears. 9RP 4-5; CP 85-86. Haynes's relationship with Spears is limited to communications about D.H. 4RP 120-21. Because Haynes's past convictions all involved Spears, and because his interactions with Spears are limited to discussions about D.H., Haynes's encounters with the criminal justice system appear to be intertwined with his role as D.H.'s father. Indeed, the events in this case were precipitated by tensions related to parenting D.H. Given the connection between Haynes's parenting and his criminal activity, the trial court reasonably concluded that any treatment designed to help Haynes be a better parent would reduce the possibility that he

would commit future crimes. Therefore, the trial court properly relied upon the Family Court judge's determination that Haynes could benefit from treatment.

3. THE TRIAL COURT PROPERLY ADVISED HAYNES REGARDING THE PROHIBITION AGAINST POSSESSING FIREARMS.

Haynes argues that the trial court misadvised him regarding the consequences of having access to a firearm. This argument should be rejected because the trial court's advisement was not a misstatement of the law.

A person is guilty of unlawful possession of a firearm if he possesses a firearm after being convicted of domestic-violence assault in the fourth degree. RCW 9.41.040(2)(a)(i). Following conviction for such an offense, the trial court must notify a defendant, orally and in writing, that he may not possess a firearm until his right has been restored. RCW 9.41.047(1)(a).

Here, the trial court's written notice correctly stated the law and summarized the statutory language of RCW 9.41.047(1)(a). CP 104. Likewise, the trial court orally advised Haynes about his loss of the right to possess a firearm:

Because this was a domestic violence crime, the Assault 4 involving her, you will lose your right to use or possess a firearm. I want to make sure you understand that....It is important that you not be around guns. You might hang out with people who have guns....You might be in a car with a friend who happens to have a gun. *If you have access to that gun, you are in violation.*

9RP 16-17 (emphasis added).

Possession of a firearm can be actual or constructive.

Actual possession occurs when the firearm is in the actual physical custody of the defendant. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); WPIC 133.52. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the firearm or the premises where the firearm is found. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Mere proximity is insufficient to establish dominion and control. State v. Bradford, 60 Wn. App. 857, 862, 808 P.2d 174, review denied, 117 Wn.2d 1003 (1991). However, proximity coupled with other circumstances linking a defendant to an item is sufficient to establish constructive possession. See State v. Mathews, 4 Wn. App. 653, 658, 484 P.2d 942 (1971) (regarding constructive possession of a controlled substance).

Here, the court provided Haynes with a written order notifying him of his ineligibility to possess a firearm, and told him that he could potentially be charged with a felony if he were found inside a car where a firearm was found, as long as he was able to access that firearm. The trial court was trying to convey to Haynes that, to avoid even the *possibility* of being arrested and charged with a felony, regardless of whether a conviction would follow, Haynes should not allow himself to be in the vicinity of a firearm.

Relying on State v. Lee, 158 Wn. App. 513, 243 P.3d 929 (2010), Haynes argues that the trial court incorrectly stated the law of constructive possession. In Lee, the trial court informed the defendant that he could not be "anywhere near a firearm" and could not "be in the same house or the same car with a firearm." Id. at 515. Holding that the trial court's overly broad advisement misstated the law, this Court struck the trial court's oral advisement, but declined Lee's request to remand for resentencing.⁵ Id. at 517.

Lee is distinguishable. Whereas in Lee the trial court overstated the doctrine of constructive possession when it warned

⁵ In Lee, this Court found that the oral advisement was not appealable as a matter of right under RAP 2.2(a)(1), but that discretionary review was warranted under RAP 2.3(b)(2). 158 Wn. App. at 516. Given this Court's opinion in Lee, the State acknowledges that if the trial court erred, discretionary review is appropriate under RAP 2.3(b)(2).

Lee not to be in a house where there was a gun, here the court's remarks were sound advice that accurately informed Haynes of the potential consequences of being in a situation where he has ready access to a gun. See State v. Jeffrey, 77 Wn. App. 222, 889 P.2d 956 (1995) (constructive possession when defendant knew a firearm was under the couch in his home); State v. Reid, 40 Wn. App. 319, 698 P.2d 588 (1985) (possession proved when defendant admitted having a firearm in front seat of automobile, but said he moved it to the back so it would not be seen by the police); State v. Howell, 119 Wn. App. 644, 649-50, 79 P.3d 451 (2003) (no requirement that the firearm be immediately accessible at the time of possession, distinguishing firearm possession offenses from firearm enhancements). A defendant could be found to have constructive possession of a firearm if he had access to a gun in a friend's car. Consequently, the trial court did not misadvise Haynes of the consequences of his conviction.

Finally, even if the trial court misadvised Haynes, as in Lee, the remedy is for this Court to strike the oral advisement. Id. at 517.

4. THE STATE CONCEDES THAT THE TRIAL COURT ERRED WHEN IT IMPOSED A NO CONTACT ORDER THAT EXCEEDED THE LENGTH OF PROBATION.

Haynes argues that the trial court erred when it imposed a four-year no contact order because it exceeded the term of probation. The State concedes that the no contact order could not exceed the length of Haynes's probation.

The trial court imposed two concurrent suspended sentences and placed Haynes on probation for two years. CP 90-92. The court also signed a no contact order, prohibiting Haynes from having contact with Spears and J.B. CP 107-10. Although the original no contact order expired after five years, the trial court subsequently amended the order to expire after four years. CP 105, 107-10.

In granting probation, the superior court may suspend the execution of the sentence subject to certain conditions, including a no contact order. RCW 9.95.210. Just as with other probation conditions, a no contact order issued as a condition of a suspended sentence cannot exceed the length of probation.

Here, the no contact order was issued as a condition of Haynes's suspended sentence under RCW 9.95.210. Because the

trial court imposed two years of probation,⁶ the maximum term of the no contact order must also be two years. Therefore, this Court should remand Haynes's case for the sole purpose of amending the no contact order.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Haynes's conviction for misdemeanor harassment. The State also asks this Court to affirm Haynes's sentence, with the exception of the no contact order, which must be amended to reflect the proper expiration date.

DATED this 4 day of January, 2012.

Respectfully submitted,

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⁶ Under State v. Parent, ___ Wn. App. ___, ___ P.3d ___, WL 4912853 (July 25, 2011), the trial court could impose no more than two years of probation.

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 Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DANTE MARQUIS HAYNES, Cause No. 66979-6-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.


Name _____ Date 1-4-12
Done in Seattle, Washington