

67829-9

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No. 67829-9-I

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

STATE OF WASHINGTON, Respondent,

v.

ERIC FREEMAN, Appellant.

BRIEF OF RESPONDENT

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the definition of "true threat" is an element of felony harassment that must be included in the information charging Freeman with three counts of felony harassment.
2. Whether there is sufficient evidence in the record to support Freeman's conviction for three counts of felony harassment.
3. Whether the trial court erred imposing legal financial obligations against Freeman at sentencing.

B. FACTS

1. Substantive Facts

On April 15, 2011 Eric Freeman came to the Whatcom County Homeless Service Center in Bellingham and found the business office door locked. RP 12¹. The office was open earlier, from 8a.m.-12p.m. but the front door was locked at noon so employees could conduct one on one appointments with clients or catch up on work. RP 12. A "closed" sign was placed on the business door. When Freeman came to the homeless service center after noon, he began knocking and pulling at the locked door. RP 13. Francisco Javier Flores, Sarah Emerson and Gary Dolin were working in the office at that time. RP 11.

¹ The verbatim reports of proceedings are referred to as "RP" herein refer to the trial volume pertaining to dates "9/21/11, 9/29/11 and 10/3/11."

Flores got up and went to Emerson's desk, where she was meeting with a client, to see if she was expecting another client for an appointment. RP 13. Emerson said no, but nonetheless went to the locked door to see what Freeman wanted. RP 15. When Emerson unlocked and opened the door, Freeman began talking quickly, stating he was a veteran and that he needed housing. RP 15. Emerson attempted to direct Freeman to the other side of the building where the community resource center was located so he could meet with someone who could try to help find immediate available shelter because she was already with a client and the homeless service center processing took time. RP 34. Emerson explained to the court that Freeman's housing application had come in the day before but would take up to a year due to a lengthy waiting list with a hundred other clients. RP 33. Freeman would not go to the community resource center. He instead acted upset and frustrated and began raising his voice with Emerson. RP 37. Gary Dolin, hearing the commotion came up to assist. Emerson asked if Dolin could meet with Freeman to explain how the agency and process worked. RP 46. Dolin agreed and then tried to talk to Freeman at the door given Freeman's agitation. RP 55.

The more Dolin tried to talk to Freeman and diffuse the situation, the more Freeman escalated, becoming increasingly hostile, posturing with

his body in a manner that made Dolin fear for his safety, and began yelling at Dolin and not listening. RP 55-56, 65. Freeman then repeatedly told Dolin to call the police and the F.B.I. because he was going to leave, get a gun and come back and shoot everyone. RP 57, 67. Given the level of agitation and posturing by Freeman, Dolin felt threatened and thought he, Emerson and Flores were in danger, so he locked the door and told Emerson of the threat to shoot them and to call the police. RP 57, 39. Flores also heard Freeman's threat to come back with a gun and take care of them and was immediately scared because he understood Freeman's threat as a threat to "come back and kill us." RP 18. Similarly, Emerson and Dolin thought Freeman would act on his threat. RP 42, 57, 65, 67. Emerson recalled hearing Freeman state "the runaround would stop today." RP 42.

Freeman was charged with three counts of felony harassment pursuant to RCW 9A.46.020(1)(a)(i)(2)(b). Following a bench trial, Freeman was convicted as charged.² Freeman timely appeals. CP 4-13.

² Appellate Counsel has requested trial counsel file findings of fact and conclusions of law as soon as feasible. (Trial DPA was on bereavement leave at the time when a second request was sent out for findings to be entered- The State anticipates findings to be forthcoming now that DPA has returned). Counsel for the State does not object if Freeman requests to assign supplemental error after Findings are entered.

C. ARGUMENT

1. The charging document sufficiently placed Freeman on notice of the essential elements of felony harassment.

Freeman asserts for the first time on appeal that “true threat” is an essential element of the crime of felony harassment that must be included in the charging document.

A charging document is sufficient if it sets forth all essential elements of the offense. State v. Kjorsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). When a charging document is challenged for the first time on appeal, courts liberally construe the information in favor of validity. Kjorsvik, 117 Wn.2d at 105. In contrast, when an information is challenged before the verdict, “the charging language must be strictly construed.” State v. Taylor, 140 Wn.2d 229, 237, 996 P.2d 571 (2000). The two distinct standards of review are intended in part to “encourage defendants to make timely challenges to defective charging documents to discourage ‘sandbagging’” *Id.* at 237. Under the liberal construction rule, the question is whether the essential element may be fairly implied from the language within the information. *Id.* If so, whether the defendant has shown he or she was actually prejudiced by the insufficient language that caused the lack of notice. Kjorsvik, 117 Wn.2d at 105-06. Sufficiency of

the charging document is reviewed de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007).

The crime of harassment is defined as: A person is guilty of harassment if, without lawful authority, the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened, or to any other person, and by words or conduct places the person threatened in reasonable fear that the threat will be carried out. Where the threat to cause bodily injury is a threat to kill, this crime is elevated to felony harassment. RCW 9A.04.020(2)(b). Consistent with the statute, the information charging Freeman with three counts of felony harassment stated Freeman “knowingly and without lawful authority, did threaten to kill another immediately or in the future, and by words or conduct placed the person threatened, ... in reasonable fear the threat would be carried out.” CP 31-32, RCW 9A.46.020.

The definition of “true threat” is not an element of felony harassment that needs to be included in the charging document. In State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010) contrary to Freeman’s argument, the state Supreme Court declined to decide whether the definition of true threat is an element of the crime of harassment, stating “We note that there is a Court of Appeals opinion on point, State v. Tellez, but we express no opinion on the matter.” Schaler, 169 Wn2d 274, n.6,

but see Br. of App. at 10.. True Threat instead further defines the statutory term ‘threat’ ensuring that the threat found is in fact speech that is unprotected by the first amendment. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004), State v. J.M., 144 Wn.2d 478, 28 P.3d 720 (2001). A “true threat” is defined as a statement made in 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.” State v. Kilburn, 151 Wn.2d at 43. Whether a true threat has been made is determined under an objective standard that focuses on the speaker to determine whether a reasonable person in the defendant’s position would understand that the threat, taken in context by the listener, would interpret the statement as a serious threat. State v. Kilburn, at 44, 46.

In State v. Atkins, 156 Wn.App. 799, 236 P.3d 897(2010) and State v. Allen, 161 Wn. App. 727, 255 P.3d 784 (2011), *review granted*, Supreme Court No.86119-6 (2012)³, this Court rejected Freeman’s argument. This Court held that “true threat” was not an essential element of the harassment statute and therefore not required to be detailed in the

³ The Washington Supreme Court has accepted review on the issue of whether the definition of ‘true threat’ must be included in the charging document and included in the ‘to convict’ instruction in a harassment prosecution in State v. Allen.

charging document. The Court in Atkins and Allen relied on the analysis set forth in State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007), where this Court, in the context of examining the telephone harassment statute determined “true threat” merely defines and limits the scope of the essential “threat” element contained within the statute.

The charging document filed against Freeman, liberally construed, sufficiently placed Freeman on notice of the nature of the charges against him and the essential elements the state was required to prove to support the conviction. Freeman’s argument should be rejected or alternatively, this matter should be stayed pending the decision in State v. Allen.

2. Examining the evidence in the light most favorable to the state, evidence that Freeman threatened to get a gun, come back and shoot everyone where employees Dolin, Emerson and Flores reasonably believed Freeman would act on his threat was sufficient to support Freeman’s convictions for three counts of felony harassment.

Freeman contends the evidence presented below is insufficient to support his conviction for three counts of felony harassment. Br. of App. at 13. Specifically, Freeman contends his repeated threats to get a gun and come back and shoot everyone was not a threat to kill as proscribed by the statute and that there is insufficient evidence in the record to demonstrate

that two employees, Dolin and Emerson perceived Freemans as a threat to kill them.

Under a sufficiency of the evidence analysis, the test is “whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). In applying this test, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 339. Such a challenge admits the truth of the State’s evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. State v. Cross, 156 Wn. App. 568, 581, 234 P.3d 288 (2010). The appellate court defers to the trier of fact on issues of credibility of witnesses and persuasiveness of evidence. State v. Thomas, 150 Wn.2d 821, 83 P.2d 970 (2004).

In order to prove felony harassment the State must show that the defendant knowingly threatened to kill the person threatened and that person reasonably feared that the threat would be carried out. State v. C.G., 150 Wn.2d 604, 608-09, 80 P.3d 594 (2003); RCW 9A.46.020. Threats include “conditional threats” and future threats, and are not just limited to threats to cause immediate harm. RCW 9A.46.020(1)(a)(i), (2);

Cross, 156 Wn. App. at 582; *see also*, State v. Edwards, 84 Wn. App. 5, 11-12, 924 P.2d 397 (1996), *rev. den.* 131 Wn.2d 1016 (1997) (interpreting the plain meaning of threats under RCW 9.61.060 regarding threats to property). In order to comply with the First Amendment, the statute must be interpreted as proscribing only “true threats.” State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). A “true threat” is a statement made in 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 take the life of another person.” *Id.* The threat to kill need not be literal: “the nature of a threat depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken.” C.G. 150 Wn.2d at 611.

Viewing all inferences in the light most favorable to the state, Freeman’s repeated threats to get a gun, come back and shoot everyone was reasonably interpreted as a threat to kill particularly under the facts of this case. Freeman was agitated, frustrated and angry when he made the threats. Nothing Dolin or Emerson said to him was diffusing his anger instead Freeman only escalated and continued to become angrier before uttering his repeated threats to shoot them. Moreover, both Emerson and Dolin described Freeman as yelling, acting forcefully and posturing

aggressively just prior to making his repeated threats to call police and the F.B.I. because he was going to go get a gun, come back and shoot everyone. Under these circumstances, Freeman should have reasonably foreseen that his threats would be interpreted as a serious expression of his intent to come back and kill Dolin, Emerson and Flores.

Flores testified he interpreted Freeman's threat to be a threat to "come back and kill us." RP 18. Equating obtaining a gun and coming back and shooting someone with a threat to kill under these circumstances is reasonable. Moreover, such interpretation is supported by State v. C.G., wherein the court explained that in determining the nature of the threat, the threat to kill need not be literal. State v. C.G., 150 Wn.2d at 611. Shooting someone is equated with using lethal force and often reasonably results in a person's death. Therefore Freeman's threats sufficiently demonstrate the requisite statutory threat to kill. Any person in Dolin, Emerson or Flores position would reasonably take Freeman's threats to get a gun and come back and shoot them as a serious expression of a threat to kill them. State v. Kilburn, 151 Wn.2d at 43.

Freeman further asserts there is insufficient evidence in the record to demonstrate Dolin or Emerson reasonably feared Freeman would kill them by his repeated threats to come back and shoot them. Br. of App. at

17⁴. Emerson could hear Freeman's behavior escalating after she left Dolin to deal with him, even overhearing Freeman state to Dolin that "the runaround is going to stop today." RP 42. Soon thereafter Dolin came back and told Emerson they needed to call the police because Freeman threatened "to come back with a gun and shoot us". RP 39. Emerson testified, given that Freeman had been escalating the entire time he was at the homeless service center, making big gestures and acting forcefully, she reasonably feared Freeman would act on this threat to come back and shoot her. Under those circumstances Emerson reasonably feared, without explicitly stating so, she would be killed if Freeman acted on his threats.

Similarly, Dolin testified Freeman repeatedly told him he was going to leave, get a gun and come back and shoot everyone. RP 57. Freeman then told Dolin to go ahead and call the police and the F.B.I. Dolin testified he thought Emerson, Flores and himself were in Danger because Freeman was extremely agitated and posturing physically in a threatening manner when he threatened to go get a gun to shoot them. Dolan testified he took protective measures after Freeman left because "the man had just threatened to shoot me." RP 63. Moreover, Dolin

⁴ Freeman concedes there is sufficient evidence in the record that demonstrates Flores reasonably feared Freeman would kill him based on Freeman's threat to get a gun and kill everyone. See, Br. of App. at 17, see also RP 18.

explained that prior to threatening to shoot him, Freeman was already physically posturing in a manner that made him concerned for his welfare. RP 65. Looking at Dolin's testimony in the light most favorable to the state, the totality of Dolin's testimony demonstrates Dolin reasonably feared Freeman would come back and shoot him, and that Dolin perceived being shot to a threat to kill him.

In State v. C.G., the court reversed the juvenile's adjudication for felony harassment determining there was insufficient evidence to demonstrate the victim, a high school principle, was placed in reasonable fear that C.G. would *kill* him. 150 Wn.2d at 607 (emphasis added). While C.G. specifically threatened to kill the victim, yelling "I'll kill you Mr. Haney, I'll kill you," the victim testified only that her threat caused him concern based on what he knew of C.G., that she might try to harm him or someone else in the future. The Court found this evidence insufficient to support a conclusion that the victim feared C.G. would kill him and therefore insufficient to support the charge.

In contrast here, Emerson, Dolin and Flores all testified they heard or knew Freeman had threatened to go get a gun and come back and shoot them and that they believed Freeman would act on his threat. Given that the nature of the threat was a threat to kill, Emerson and Dolin's testimony that they believed Freeman would act on his threat, sufficiently

demonstrates Emerson and Dolin were placed in fear that Freeman would kill them. Consistently, Flores explicitly stated he interpreted Freeman's threats to shoot them as a threat to kill him and that he believed Freeman would act on that threat. Given that the circumstances demonstrate Freeman was escalating in hostility and agitation at the time of the threat, Emerson, Dolin and Flores' fear that Freeman would act on his threat was reasonable. Moreover, the circumstance surrounding the threat sufficiently demonstrates the threats made were true threats that any rational person would foresee would be a serious expression of an intention to take the life of another person. There is sufficient evidence in the record to support Freeman's conviction.

3. Freeman failed to object to the imposition of legal financial obligations at sentencing on the basis of inability to pay and therefore has waived his ability to complain for the first time on appeal that the trial court erred imposing these costs.

Freeman alleges that the trial court erred in finding that he has the ability either in the present or future to pay discretionary legal financial obligations, premised largely upon the court's alleged failure to consider his ability to pay at the time of sentencing. Freeman bears the burden of demonstrating he can raise this issue for the first time on appeal by showing that the sentencing court exceeded its statutory authority in

assessing the amounts or demonstrate that the error he alleges is a manifest one of constitutional magnitude.

In order to assert a constitutional claim for the first time on appeal, an appellant must demonstrate that the alleged error is a manifest error of constitutional magnitude. RAP 2.5(a). “Manifest” means that a showing of actual prejudice is made. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *see also*, State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) (error is manifest if it had “practical and identifiable consequences” in the case). If the error was manifest, the court must also determine if the error was harmless. Lynn, 67 Wn. App. at 345. The burden is on the defendant to identify the constitutional error and how it actually prejudiced his defense. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

The imposition of legal financial obligations standing alone, however, is not enough to raise constitutional concerns. *See*, State v. Curry, 118 Wn.2d 911, 915 n.3, 829 P.2d 166 (1992). There is no constitutional requirement that a court make a specific finding regarding a defendant’s ability to pay. *See*, State v. Curry, 118 Wn.2d at 916 (under the constitution court need not make any specific finding but need only consider defendant’s ability to pay as long as there is a mechanism for a defendant who ultimately is unable to pay to have the judgment modified).

Freeman cannot demonstrate this is an issue of constitutional magnitude that warrants review for the first time on appeal.

To the extent that he relies on a statutory basis, RCW 10.01.160, to assert there is insufficient evidence in the record to show the court considered Freeman's ability to pay LFO's, Freeman waived this issue by failing to raise it at sentencing. Moreover, a standard range sentence cannot be appealed. RCW 9.94A.585; State v. Osman, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). Limited review is available only "if the sentencing court failed to comply with procedural requirements of the Sentencing Reform Act ("SRA") or constitutional requirements." Osman, 157 Wn.2d. at 481-82. In order to appeal based on the court's failure to follow a procedural requirement, the appellant must show that "the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so." State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). There is no requirement that a court make a specific finding regarding a defendant's ability to pay. State v. Curry, 118 Wn.2d at 916.

Additionally, there is nothing in the record to show that Freeman will not have the ability to pay his legal financial obligations *in the future*, given the length of the time Freeman has to satisfy his judgment. Pursuant to RCW 10.01.160 (3), a court may order the defendant to pay costs

incurred by the state in its prosecution if the defendant “is or will be able to pay them.” The fact that Freeman was indigent for trial purposes, for pursuing an appeal or obtaining housing, does not automatically mean he otherwise doesn’t have the ability to pay *any* costs. As noted in Curry:

[Defendants] argue additionally that the orders of indigency entered for purposes of appeal are sufficient to show that they cannot, in fact, pay the financial obligations imposed. We disagree. The costs involved here are on a different scale that the costs involved in obtaining counsel and mounting an appeal.

Curry, 118 Wn.2d at 915 n.2, in part. A defendant’s indigent status at the time of sentencing does not preclude the imposition of court costs, and a defendant’s inability to pay is best addressed at the time the State attempts to enforce collection. State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008), *rev. den.*, 165 Wn.2d 1044 (2009); *see also*, State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (the time to address the defendant’s ability to pay is at the time the State seeks to enforce collection as court’s determination at sentencing is speculative).

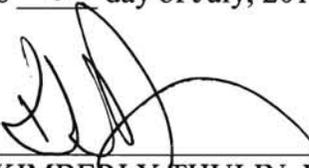
Freeman therefore waived any error regarding failure to consider underlying facts in deciding how much to impose in fees and court costs by failing to bring those matters to the court’s attention at the time of sentencing. Moreover, there is nothing in the record that demonstrates the trial court abused its discretion in imposing fees where nothing presented

at sentencing establishes Freeman will not have the ability to pay these costs in the future or when enforcement of payment schedule is sought. The court has jurisdiction over Freeman's judgment and sentence for collection of the legal financial obligations until the judgment is satisfied. RCW 9.94A.760(4). A defendant's inability to pay is best addressed at the point at which the State seeks to enforce collection, and RCW 10.01.160(4) provides a means for a defendant to request remission of payment of the costs. Therefore the trial court's general finding regarding Freeman's current or future ability to pay was not error.

D. CONCLUSION

Based on the foregoing, the State respectfully requests this court affirm Freeman's judgment and sentence for three counts of felony harassment.

Respectfully submitted this 16th day of July, 2012.



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CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, a true and correct copy of the document to which this certificate is attached, to appellant's counsel, Marla Zink, addressed as follows:

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Date