

68338-1

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NO. 68338-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AARON DODGE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE PROCHNAU

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	2
3. THE CHARGING DOCUMENT AND RELEVANT JURY INSTRUCTIONS	3
C. <u>ARGUMENT</u>	5
1. THE TERM "TRUE THREAT" IS A TERM OF ART THAT DESCRIBES THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF FELONY HARASSMENT OR WITNESS INTIMIDATION	5
a. Felony Harassment.....	6
b. Witness Intimidation.....	10
2. EVEN IF THE DEFINITION OF "TRUE THREAT" IS SOMEHOW CONSTRUED AS AN ESSENTIAL ELEMENT OF A THREATS CHARGE, THE CHARGING DOCUMENTS WERE SUFFICIENT TO AVOID PREJUDICING DODGE	12
3. DODGE'S OFFENDER SCORE ERRONEOUSLY INCLUDED AN EXTRA POINT FOR BEING ON COMMUNITY CUSTODY	15
D. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Virginia v. Black, 538 U.S. 343,
123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) 8

Washington State:

State v. Allen, 161 Wn. App. 727,
255 P.3d 78, review granted,
172 Wn.2d 1014 (2011)..... 7, 9, 10

State v. Crawford, 164 Wn. App. 617,
267 P.3d 365 (2011)..... 16

State v. J.M., 144 Wn.2d 472,
28 P.3d 720 (2001)..... 6

State v. Johnston, 156 Wn.2d 355,
127 P.3d 707 (2006)..... 7

State v. Kilburn, 151 Wn.2d 36,
84 P.3d 1215 (2004)..... 6

State v. King, 135 Wn. App. 662,
135 P.3d 1224 (2006), review denied,
161 Wn.2d 1017 (2007)..... 11, 12

State v. Kjorsvik, 117 Wn.2d 93,
812 P.2d 86 (1991)..... 5, 13, 14, 15

State v. Phillips, 98 Wn. App. 936,
991 P.2d 1195 (2000)..... 13

State v. Schaler, 169 Wn.2d 274,
236 P.3d 858 (2010)..... 9, 10, 13, 15

State v. Tellez, 141 Wn. App. 479,
170 P.3d 75 (2007)..... 7

State v. Williams, 144 Wn.2d 197,
26 P.3d 890 (2001)..... 6

Constitutional Provisions

Federal:

U.S. Const. amend. I..... 5, 8, 10

Statutes

Washington State:

RCW 9.94A.030 16
RCW 9.94A.625 16
RCW 9A.36.011 8
RCW 9A.46.020 6

Other Authorities

WPIC 2.04..... 8
WPIC 35.04..... 8

A. ISSUES PRESENTED

1. A charging document must contain all essential elements of a crime. Courts have consistently ruled that “true threat” is a definitional term in threat cases and is not an essential element. The charging document accusing Dodge of Felony Harassment and Witness Intimidation did not define “true threat,” although threat was defined in the jury instructions. Has Dodge failed to show any defect in the charging document?

2. Where a charging document is challenged for the first time on appeal, courts liberally construe the document in favor of validity. Here, the information for all counts alleged that the threat was knowingly made, and for the charge of Witness Intimidation, alleged that the threat was directed at a witness because of the witness' role in an official proceeding. Even if the definition of “true threat” is an element of crimes involving threats, was the charging document here sufficient to provide notice and avoid prejudicing Dodge?

3. A defendant must be released to the community in order to be on community custody for purposes of sentencing. The current offenses were committed while Dodge was in prison. Dodge nevertheless received a point against his offender score at

sentencing for being on community custody. Should this case be remanded for resentencing on a corrected offender score?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Aaron Dodge was charged with two counts of Felony Harassment, domestic violence; and one count of Witness Intimidation, domestic violence. CP 98-100. Following a jury trial, he was found guilty as charged on all counts. CP 104-08.

2. SUBSTANTIVE FACTS.

When he was 18 years old, Dodge attempted to rape his 15-year-old half-sister, Sarah Dodge. 6RP 79-82.¹ He grabbed her from behind, threw her on a bed, and tried to hold her down as he undid his pants. 6RP 79-82. She kicked herself free and ran outside until her mother returned home from shopping; together, they reported the crime to the police. 6RP 82. Dodge pled guilty to indecent liberties and went to prison. 6RP 107.

¹ This brief will refer to the Verbatim Report of Proceedings as follows: 1RP (12/21/11); 2RP (12/22/11); 3RP (12/28/11); 4RP (1/3/12); 5RP (1/4/12); 6RP (1/5/12); 7RP (1/11/12-1/12/12); 8RP (2/10/12).

While serving his time, Dodge visited with a psychiatrist working for the Public Health Department, Dr. Lovell. 7RP 43. During an evaluation, Dodge told the doctor that he wanted to murder his adoptive mother, Suzanne Dodge, and his half-sister, Sarah Dodge, adding that if he was within 100 miles of Spokane, where they lived, he would kill them. 7RP 45. Dodge told the doctor that he was going to kill his sister because it was her fault that he was in custody. 7RP 12.

Concerned for Suzanne's and Sarah's safety, Dr. Lovell reported the threat to Officer Stark, a Corrections Investigator, where Dodge was being held. 7RP 35. Similarly concerned with the threats, Officer Stark called both Suzanne and Sarah and reported the threats to each of them, and they became frightened for their own safety. 7RP 17.

3. THE CHARGING DOCUMENT AND RELEVANT JURY INSTRUCTIONS.

In the alternative means charged in Count I of the amended information, the State accused Dodge of threatening to kill his adoptive mother:

Without lawful authority, knowingly did threaten to cause bodily injury immediately or in the future to Suzanne Dodge, by threatening to kill her, and the words or conduct did place her in reasonable fear that the threat would be carried out.

CP 98. Count II is identical except the named victim is Dodge's half-sister, Sarah Dodge. CP 99. In Count III, the information accused Dodge of Witness Intimidation for threatening to kill his sister because of her role as the complainant in his indecent liberties conviction: "...did knowingly direct a threat to Sarah Dodge, a former witness because of the witness' role in an official proceeding." CP 100.

The "to convict" instructions submitted to the jury mirrored the charging language. CP 133-34, 143. Jurors received instruction No. 13, which said that a person acts "knowingly" when he "is aware of that fact, circumstance or result." CP 136. instruction No. 14 defined a "true threat" for the jury:

Threat means to communicate, directly or indirectly, the intent:

To cause bodily injury in the future to the person threatened;

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to

carry out the threat rather than as something said in jest or idle talk.

CP 137.

C. ARGUMENT

1. THE TERM "TRUE THREAT" IS A TERM OF ART THAT DESCRIBES THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF FELONY HARASSMENT OR WITNESS INTIMIDATION.

Dodge contends that it was error not to include the definition of "true threat" in the charging language in this case. He argues that the definition of "true threat" is an element of every criminal statute involving a verbal threat. This is inconsistent with existing case law, which establishes that "true threat" is not an essential element of a crime involving threats, but is instead a term of art used to describe the permissible scope of threat statutes for First Amendment purposes.

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). The purpose of the rule is to ensure that defendants are sufficiently apprised of the charges against them so that they may prepare a defense. Id. at 101.

a. Felony Harassment.

As charged and convicted here, a person commits the crime of Felony Harassment if he knowingly threatens to kill, immediately or in the future, the person threatened, and the words or conduct place the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020. The statute sets out all the elements of the crime.

In defining the constitutional limits of the harassment statute, this 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. Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Id. at 44. The relevant question is whether a reasonable person in the defendant's position would foresee that,

taken in context, a listener would interpret the statement as a serious threat. Id. at 46.

Courts have consistently rejected the argument that the language defining a "true threat" must be charged in the information. State v. Allen, 161 Wn. App. 727, 255 P.3d 78, review granted, 172 Wn.2d 1014 (2011) (felony harassment)²; State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006) (bomb threats); State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007) (telephone harassment).

The State does not dispute that it was required to prove that Dodge's threats were "true threats." As instructed here, the jury was required to find beyond a reasonable doubt that Dodge "knowingly threatened to kill" his mother and his adoptive sister, 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 20, 21. Dodge has cited no case holding that the language defining a "true threat" is a separate

² The Washington Supreme Court heard oral argument in Allen on March, 1, 2012. A decision is pending.

element that must be included in the charging document for Felony Harassment, or for any other crime that contains a threat element.³

Dodge cites to Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), in support of his argument. The Court was asked to rule on the constitutionality of a statute proscribing content-based conduct; specifically, whether Virginia's cross-burning statute violated the First Amendment. The Court held that a state could proscribe cross-burning done with the intent to intimidate, but that the statute violated the First Amendment because it contained a presumption that any cross-burning was done with the intent to intimidate, even if the cross was burned for political or ideological reasons. 583 U.S. at 363-64. Black did not determine, or even discuss, what must be included in the charging documents. In any event, the Washington harassment statute does not proscribe content-based conduct.

³ Dodge's position is similar to that of a person charged with (for example) first-degree assault, which requires the intent to inflict "great bodily harm." See RCW 9A.36.011(1). The charging document and the "to convict" instruction must contain the statutory element of "great bodily harm," which will be defined for the jury as "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." See WPIIC 2.04, 35.04.

Dodge argues that Allen and its line of supporting cases are irreconcilable with State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010). Schaler dealt with faulty jury instructions. They required the jury, in order to convict, to find that Schaler knowingly threatened to cause bodily injury, but defined knowingly as “when the person subjectively intends to communicate a threat.” Id. at 285. The submitted definition of “threat” failed to mention anything about the “fear that typically results from a threat.” Id. at 285-86. The jury there, then, was left with no mens rea requirement attached to the result of the threat, resulting in the faulty instructions. But the Schaler court was clear – had the “knowingly threaten” language in the jury instruction not been so defined, the mens rea requirement would have been satisfied. Id. at 286.

Here, the jury instructions created no such issue and the charging language accurately contained the “knowingly did threaten” language, sufficient to satisfy the “know or foresee” mens rea element as to the real result: intending the hearer’s fear. CP 98; see Allen, 161 Wn. App. at 755. The charging language in this case contained all of the essential elements of Felony Harassment.

Further, as Allen notes, Schaler did not overrule the basic concept that a true threat is definitional:

[W]e hold that this court's previous cases addressing this issue are dispositive and hold that true threat is merely the definition of the element of threat which may be contained in a separate definitional instruction. In fact, "[n]o Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document or 'to convict' instruction." This court has consistently repeated that "[s]o long as the court defines a 'true threat' for the jury, the defendant's First Amendment rights will be protected."

Allen, 161 Wn. App. at 755-56 (2011) (internal citations omitted).

None of the cases cited by Dodge supports his argument that the definition of "true threat" must be charged in the information.

Dodge was properly charged and the jury was properly instructed on all the elements of the crime of Felony Harassment. The jury found beyond a reasonable doubt that his threats to kill Suzanne and Sarah Dodge were "true threats."

b. Witness Intimidation.

Count III of the charging language alleged that Dodge committed Witness Intimidation when he "did knowingly direct a threat to Sarah Dodge, a former witness because of the witness'

role in an official proceeding.” CP 100. Dodge repeats his argument against this count, applying the same analysis to the crime of Witness Intimidation. He argues that the definition of a true threat is an essential element of Witness Intimidation that was lacking from the charging information, thereby warranting reversal. But again, Dodge cannot produce a case that supports his position, and is bound by many that counter it.

The analysis set out in the cases already cited is even more favorable for the crime of Witness Intimidation. The court ruled in State v. King that language which intimidates witnesses because of their role in legal proceedings does not violate constitutional protections for speech because the prohibited speech under the Witness Intimidation statute is threatening speech. 135 Wn. App. 662, 669, 135 P.3d 1224 (2006), review denied, 161 Wn.2d 1017 (2007). Felony Harassment and Witness Intimidation are two separate crimes: Felony Harassment “covers a virtually limitless range of utterances and contexts, any of which might be protected,” id. at 669, but the Witness Intimidation statute is limited exclusively to threats against witnesses. King held that these types of threats are inherently threatening because “a former adverse witness

always knows a reason why the defendant might wish him harm.”

Id. at 671.

Dodge concedes that King is in direct contradiction to his argument, but posits that King's reasoning is “infirm” because a “person can utter a threat against a former witness that rises no further than the level of jest, idle talk or hyperbole.” Brief of Appellant at 8. In so arguing, Dodge neglects the impact that a threat against a witness *because* of their role as witness has on the listener. It is precisely that context which makes any threat inherently intimidating. King, 135 Wn. App. at 669. Where a defendant makes a threat against another precisely because that individual has summoned the courage to be a witness, he should not be permitted thereafter to hide behind the first amendment, claiming that the threat was mere jest.

2. EVEN IF THE DEFINITION OF “TRUE THREAT” IS SOMEHOW CONSTRUED AS AN ESSENTIAL ELEMENT OF A THREATS CHARGE, THE CHARGING DOCUMENTS WERE SUFFICIENT TO AVOID PREJUDICING DODGE.

Dodge contends that the information lacked an essential element of the charges and that therefore reversal is warranted, but does not allege any prejudice. Where a defendant waits to

challenge the sufficiency of a charging document until a direct appeal, the charging language is construed in favor of its validity.

Even if Dodge's argument is given any sway, there was never any objection to the information on notice grounds. If the Court were to entertain this analysis, it must first determine whether (1) the necessary facts appear in any form, or by fair construction are found, in the charging document; and if so, (2) whether the inartful or vague language actually prejudiced the defendant. State v. Phillips, 98 Wn. App. 936, 940, 991 P.2d 1195 (2000) (citing Kjorsvik, 117 Wn.2d at 105-06). Under this standard of review, the information would need "at least some language" giving notice of the allegedly missing elements. Id. If that language is present, then the Court inquires as to whether the "inartful" or "vague" wording actually prejudiced the defendant. Kjorsvik, 117 Wn.2d at 106.

Applying Kjorsvik's liberal standard to the charging language in all three counts, the information adequately provided Dodge with notice that the threats must be true threats. Counts I and II, Felony Harassment, allege that Dodge "knowingly did threaten" and that his words or conduct "did place [the victim] in reasonable fear that the threat would be carried out." CP 98, 99. As Schaler makes

clear, the ordinary meaning of “knowing” in this context could be understood to mean that the speaker must be aware that his words frightened the hearer:

If “knowingly threaten” had been left to its ordinary meaning, it could be understood to require that the speaker be aware that his words or actions frightened the hearer – after all, how can one knowingly threaten without knowing that what one says is threatening to another?

169 Wn.2d at 286. Because the information here contained the “knowingly threatened” language, the necessary facts to allege a true threat do indeed appear, at least in some form, in the charging document, under the Kjorsvik standard.

In Count III, Witness Intimidation, the State alleges that Dodge “knowingly directed a threat to Sarah Dodge, a former witness because of the witness’ role in an official proceeding.” CP 100. Here, under the same standard, the term “threat,” combined with the requirement that Dodge directed that threat to a former witness “*because of the witness’ role in an official proceeding,*” should suffice under the liberal construction standard to give notice that the “threat” had to be a “true threat” rather than a

mere “joke[], idle talk, or hyperbole.” CP 100; Schaler, 169 Wn.2d at 283.

Because in both charges there is some language giving notice of the supposedly missing element, even if this Court considers the definition of a “true threat” to be an essential element of either crime, Dodge must show that the failure to further elaborate on the term “threat” resulted in actual prejudice. See Kjorsvik, 117 Wn.2d at 106. Dodge does not allege any prejudice from the allegedly deficient information, nor did his trial counsel. This is not surprising, given the adequacy of the submitted jury instruction defining the term “threat” in all three counts. CP 137. The charging documents themselves provided adequate notice to Dodge, and the absence of the definition of “true threat” in the information created no prejudice.

3. DODGE’S OFFENDER SCORE ERRONEOUSLY INCLUDED AN EXTRA POINT FOR BEING ON COMMUNITY CUSTODY.

Dodge correctly argues that he could not have been on community custody when these crimes were committed because he

was in prison. The extra point added to Dodge's offender score for community custody at the time of his offense was in error.

RCW 9.94A.030(3) (2008 version) requires that community custody be served "in the community." RCW 9.94A.625(3) (2008 version) states that any period of community custody "shall be tolled during any period of time the offender is in confinement for any reason." State v. Crawford held that time spent in prison is not community custody. 164 Wn. App. 617, 619, 267 P.3d 365 (2011).

An additional point was added to Dodge's offender score at sentencing because the parties believed he was on community custody at the time the crimes were committed. CP 150. Because Dodge was in prison at the time of the current crimes, his community custody was tolled; his offender score, therefore, should not reflect an extra point for being on community custody. The State concedes this point and agrees that Dodge should be resentenced in accord with his correct offender score.

D. CONCLUSION

For the foregoing reasons, the defendant's convictions should be affirmed, but he should be resentenced with a properly calculated offender score.

DATED this 5 day of October, 2012.

Respectfully submitted,

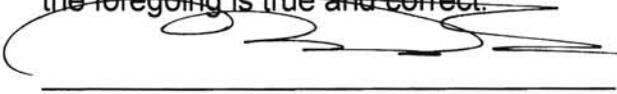
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to 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. AARON DODGE, Cause No. 68338-1-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
Done in Seattle, Washington

Date 10-05-12