

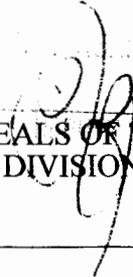
Original

FILED
COURT OF APPEALS

FILED AM 10: 22

No. 33735-5-II

STATE OF WASHINGTON

BY 

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

STATE OF WASHINGTON,

Respondent,

v.

SUNG DO GO,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

Appellant's Brief

The Honorable Linda C.J. Lee, Judge

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

 1. Procedural Facts 2

 2. Testimony at trial 3

D. ARGUMENT 9

 1. APPELLANT’S DUE PROCESS RIGHTS WERE VIOLATED AND REVERSAL OF THE FELONY HARASSMENT CONVICTION IS REQUIRED BECAUSE THE JURY INSTRUCTIONS RELIEVED THE PROSECUTION OF ITS BURDEN OF PROVING AN ESSENTIAL ELEMENT OF THAT CRIME AND COUNSEL WAS INEFFECTIVE 9

 a. The instructions failed to state an element 10

 b. Counsel was ineffective in proposing similar instructions 16

 2. REVERSAL IS ALSO REQUIRED BECAUSE THE ACTS FOR WHICH THE JURY CONVICTED ON BOTH CONVICTIONS MAY HAVE BEEN THE SAME 18

E. CONCLUSION 23

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) 19, 20

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 14, 15

State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003) 10, 17, 19

State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995) 19

State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003) 10

State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996) 9

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995) 16

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 9

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). 17

State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005) 2, 10-13, 17

State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2006) 11

State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984) 22

State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999). 16, 17

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) 16

State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003). 18

WASHINGTON COURT OF APPEALS

State v. Garcia, 65 Wn. App. 681, 829 P.2d 241, review denied, 120 Wn.2d 1003 (1992) 21, 22

FEDERAL AND OTHER CASELAW

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) . . . 9

Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) 14

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2 d 674 (1984) 16, 18

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Article 1, § 9.	1, 19
Article I, § 22	1
Fifth Amendment	1, 19
Fourteenth Amendment	1, 19
RAP 2.5(a)(3)	10
RCW 9.94A.510	2
RCW 9.94A.530	2
RCW 9.94A.602	2
RCW 9A.36.021(1)(c)	2, 20
RCW 9A.46.020	2, 10, 19

A. ASSIGNMENTS OF ERROR

1. The jury instructions on the felony harassment charge were constitutionally insufficient under the state and federal due process clauses because they failed to set forth an essential element of the offense and thereby relieved the prosecution of the full weight of its constitutionally mandated burden of proving each essential element of the crime beyond a reasonable doubt.

2. Appellant was deprived of his rights to effective assistance of counsel, guaranteed by the Fourteenth Amendment and Article I, § 22, of the Washington constitution.

3. The trial court failed to ensure that appellant's convictions for harassment and second-degree assault were based upon separate acts in order to prevent violation of the double jeopardy provisions of the state and federal constitutions, provided in the Fifth Amendment and Article I, § 9.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. For felony harassment, the prosecution is required to prove not only that the threat made was a threat to kill but also that the person who heard the threat was placed in reasonable fear that a threat to kill would be carried out. The "to-convict" and special interrogatory in this case failed to inform the jury that the prosecution had the burden of proving that Mr. Hwang had a reasonable fear that the threat to kill would be carried out. Further, the other instructions focused only on the misdemeanor harassment requirements of fear regarding a threat to cause injury, not a threat to kill.

Is reversal required where the instructions relieved the prosecution of its constitutionally mandated burden of proof, there was disputed evidence on the element in question, and instructions with the same error compelled reversal in State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005)?

2. Was counsel ineffective in proposing instructions which relieved the prosecution of its burden of proof even though the error in those instructions was made clear in Mills well before the trial in this case?

3. The three acts for which the jury may have convicted on the assault charge were the same three acts which might have supported the harassment conviction. Is reversal required to prevent violation of the right to be free from double jeopardy where there was no instruction given requiring the jury to rely upon separate acts for each conviction?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Sung Do Go was charged by amended information filed in Pierce County with two counts of second-degree assault and two counts of felony harassment, each with a deadly weapon enhancement. CP 42-44; RCW 9A.36.021(1)(c), RCW 9A.46.020(2)(b), RCW 9A.46.020(1)(a)(i)(b), RCW 9A.46.020(2)(b), RCW 9.94A.510, RCW 9.94A.530, RCW 9.94A.602.

Jury trial was held before the Honorable Judge Linda C.J. Lee on July 27-28, August 1-3, 2005. RP 1, 49, 149, 266, 344. The jury acquitted Mr. Go of one of the counts of second-degree assault and one of the counts of felony harassment, but found him guilty of the other two counts and of

being armed with a deadly weapon for each. CP 159-64.

On August 19, 2005, Judge Lee ordered Mr. Go to serve standard-range sentences and terms for the enhancements which totaled 21 months in custody. 189-201.

Mr. Go appealed, and this pleading follows. CP 206-219.

2. Testimony at trial

Sung Do Go had worked as a cook in Eui Jae Hwang's teriyaki restaurant off an on for several years when, on May 3, 2005, they got into an altercation. RP 94-125. According to Mr. Hwang, Mr. Go was not following all of Mr. Hwang's orders and, although Mr. Go was a good worker and a good cook, Mr. Hwang had decided to give Mr. Go notice that he had to "quit the job." RP 102-105. Mr. Hwang said Mr. Go was making trouble by "lying too much," including saying that Mr. Hwang's wife was a "bad lady." RP 137.

Mr. Hwang and Mr. Go went outside to talk and Mr. Hwang told Mr. Go he had one month to find another job. RP 106. Mr. Hwang said Mr. Go was not upset and seemed fine but then, about 15 minutes later, when Mr. Hwang was back inside the restaurant, Mr. Go came to the door, lit a cigarette, threw his lighter on the table and told Mr. Hwang that Mr. Go was going to leave in two weeks, not a month. RP 108-109. Mr. Hwang testified that he said that was fine, but that Mr. Go seemed really upset, said he had no money, and was cussing him out, something Mr. Hwang said Mr. Go could not do because Mr. Hwang was older and in the Korean culture which they shared it was very improper. RP 109, 165.

On cross-examination, Mr. Hwang admitted that, in fact, Mr.

Hwang had started the “cussing” when Mr. Go had said he was going to leave in two weeks. RP 165. Mr. Hwang said he did not think the curse word he used was “that severe,” because it was something commonly said in Korean which was “not quite” the same as calling someone a bastard or son of a bitch. RP 165, 198. Mr. Hwang said he had cursed Mr. Go because Mr. Go had “talked in half tongues” to him when saying when he was going to leave in two weeks. RP 200. “Talking in half tongues” is something which Korean people believe amounts to essentially showing “no respect.” RP 200.

After a moment, Mr. Hwang called Mr. Go crazy, and Mr. Go called Mr. Hwang a really bad word. RP 110. Sun Joung Shin, who had worked at the restaurant for a little over a month, had come into the room by then and she tried to intervene, telling Mr. Go he could not talk to Mr. Hwang like that because Mr. Hwang was the boss. RP 98, 110-11, 210. According to Mr. Hwang, Mr. Go tried to punch Ms. Shin, then turned to Mr. Hwang and stuck his head towards Mr. Hwang, saying “hit me,” and “[i]f you hit me, I’m going to go to hospital.” RP 111. This made Mr. Hwang concerned that Mr. Go was going to file a civil suit against Mr. Hwang for his actions. RP 175-76.

Mr. Hwang then shoved Mr. Go away, saying he did not want to argue and that Mr. Go should just leave. RP 112. On cross-examination, Mr. Hwang admitted that the shove was so hard that Mr. Go’s “body jumped backward.” RP 174. Mr. Hwang was very angry and, when Mr. Go did not want to leave, Mr. Hwang pushed him some more. RP 112-13, 174, 193.

According to Mr. Hwang, Mr. Go then ran to where a knife was stored over the sink in the kitchen. RP 113-14. Mr. Hwang followed and grabbed Mr. Go's hands just a moment after Mr. Go grabbed the knife. RP 114, 178. According to Mr. Hwang, Mr. Go had the knife pointed at him and was saying "I'm going to kill you" when Mr. Hwang grabbed both of Mr. Go's hands by the wrist and used his superior strength to hit Mr. Go's arm to the sink so the knife was dropped. RP 114-17, 178. Mr. Hwang also testified, however, that Mr. Go had said "I'm going to kill you" before grabbing the knife, not after. RP 195. Mr. Hwang said he grabbed Mr. Go's wrists because Mr. Hwang "didn't want to get killed." RP 191.

With the knife now in the sink right next to Mr. Go, Mr. Hwang turned away and walked towards the door. RP 117. He said he was not really "thinking anything" when he walked away, and was not concerned that Mr. Go would get the knife again. RP 179-80, 196. According to Mr. Hwang, however, Mr. Go did just that and followed Mr. Hwang, then held the knife up to Mr. Hwang's neck without cutting him. RP 117-18. Mr. Hwang testified that Ms. Shin was yelling at Mr. Go and Mr. Go told her to "shut up," pointing the knife at her before pointing it towards Mr. Hwang's stomach and making little growling sounds. RP 118, 217.

Despite the knife pointed at him, Mr. Hwang said he reached around Mr. Go, said "I want to call the police," grabbed the cellular phone, and punched buttons on the phone. RP 120. Mr. Hwang was not "exactly sure" where the knife was pointing when Mr. Hwang reached around Mr. Go, and Mr. Hwang admitted Mr. Go did not try to stop him in any way.

RP 183-84. Mr. Hwang only pretended to call the police however, explaining at trial that he did not call out of concern for Mr. Go. RP 121.

Mr. Go then went outside. RP 121-22. Mr. Hwang did not recall how the knife which had been pointed at him somehow got put down or away or what happened to it at that point. RP 181.

Mr. Hwang then called his wife on the phone to tell her what happened and ask her to come down to work. RP 121-22. During the 20-25 minutes it took Mr. Hwang's wife to get to the restaurant, Ms. Shin went outside to talk to Mr. Go, who was still there, waiting for the police to come. RP 185-87, 222. She asked if Mr. Go was okay and he said he was fine and asked her to go back into the restaurant. RP 229. When Mr. Hwang's wife arrived, she spoke with him and Ms. Shin in the kitchen, then went outside to speak to Mr. Go, along with Ms. Shin. RP 186, 224. Right after she started talking to Mr. Go, Mr. Hwang's wife ordered Ms. Shin back into the restaurant. RP 224.

Mrs. Hwang said that Mr. Go first said he had not pointed the knife but at some point apologized and said that he did it. RP 238-39.

When asked if he ever thought Mr. Go was going to kill him, Mr. Hwang first said he did not think Mr. Go would hold a knife against him but that he did think Mr. Go was going to kill him, both at the sink and then later over at the door." RP 201. He then said that, at the sink, he thought he "might be get killed." RP 201. He could not explain why, if he really believed there was such danger, he walked away, leaving the knife he had just forced from Mr. Go's hands into the sink there, and another knife right on the shelf above. RP 201-202. He said he walked away

because Mr. Go had dropped the knife and he did not think Mr. Go would grab it again. RP 202.

Ms. Shin testified that the men were having an argument and that Mr. Go had grabbed the knife first. RP 210-17. She described Mr. Hwang baiting Mr. Go, yelling at him to try to stab him if he wanted. RP 217. She said Mr. Go had gestured at her with the knife when he told her to be quiet, and she had stepped back, because she was afraid of being stabbed. RP 219. Mr. Hwang kept saying “kill me, kill me” and “go ahead. Stab me.” RP 220-21. Ms. Go said something like, “[w]ell, I’m going to really kill you then.” RP 224. Ms. Shin described it as “like competition between two males.” RP 224. She thought Mr. Go was generally a peaceful man. RP 225.

Mr. Hwang did not call police until after his wife arrived and talked to Mr. Go. RP 125, 204. He testified that he changed his mind and called police because “Mr. Go lied” to his wife, telling his wife that it was Mr. Hwang who had grabbed the knife first. RP 204-205.

Mr. Hwang did not recall telling police that Mr. Go had tried to hit him, nor did he initially recall that he had told police there was no weapon. RP 128-129, 158. He did not call the police emergency phone number, 9-1-1, instead calling the local police business department and speaking to officers he knew fairly well from them coming in to his restaurant. RP 129-30.

Sung Do Go testified that the incident started when Mr. Hwang got angry that Mr. Go did not have money to give Mr. Hwang to pay for his apartment and other things “up front” and told Mr. Hwang he would just

have to handle it himself. RP 287. It appeared that Mr. Hwang was financially responsible for the apartment and the car somehow, and Mr. Go told Mr. Hwang to just rent the apartment to someone else and that Mr. Go would be selling the car. RP 303-13. Mr. Go said Mr. Hwang really got angry when Mr. Go told Mr. Hwang he could just use the money Mr. Hwang owed Mr. Go to pay the bills. RP 313.

Mr. Hwang screamed for Mr. Go to leave and Mr. Go said he would and went to collect his belongings. RP 303-304. Mr. Hwang then got on the phone and talked to someone in English, telling Mr. Go he was calling the police and ultimately throwing the phone at Mr. Go. RP 305. Mr. Hwang then grabbed Mr. Go by the neck and dragged him around a little, telling him he had to stay because the police were coming. RP 306.

Mr. Go, who is shorter and smaller than Mr. Hwang, kind of walked as Mr. Hwang was dragging him. RP 307. Mr. Hwang kept cursing Mr. Go and threatened him. RP 307. Mr. Go told Mr. Hwang to stop and “please don’t do this,” but when Mr. Hwang did not stop, Mr. Go told Mr. Hwang to go ahead and hit him if that was what he wanted to do. RP 307. Mr. Hwang said, “you son of a bitch. Do you really want to die?” RP 307. Mr. Hwang also said he would kill Mr. Go and went to the sink and grabbed a knife. RP 308. Mr. Go responded, “go ahead.” RP 308. When Mr. Hwang backed off, saying Mr. Go was not “worth killing,” Mr. Go kind of hit him, saying, “I don’t think you can kill me,” and Mr. Hwang dropped the knife into the sink. RP 308.

Mr. Go then went over to the sink, picked up the knife, and said not to try to scare him with the knife, because it would not work. RP 308.

A moment later Mr. Go put the knife back into the sink. RP 308.

Mr. Go explained that threatening people with a knife was something Mr. Hwang had done at least a couple of times before but that Mr. Hwang had never actually stabbed anyone as far as Mr. Go knew. RP 309. For this reason, he was not really scared when Mr. Hwang threatened him with the knife. RP 309.

After he replaced the knife, Mr. Go went outside, smoked a cigarette, went to a store and bought a lighter, came back and had another cigarette, and waited for police to arrive. RP 310.

Mr. Go stated unequivocally that he never pointed a knife at Ms. Shin or raised a knife to Mr. Hwang, and did not threaten either of them. RP 320-21.

D. ARGUMENT

1. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED AND REVERSAL OF THE FELONY HARASSMENT CONVICTION IS REQUIRED BECAUSE THE JURY INSTRUCTIONS RELIEVED THE PROSECUTION OF ITS BURDEN OF PROVING AN ESSENTIAL ELEMENT OF THAT CRIME AND COUNSEL WAS INEFFECTIVE

The state and federal due process clauses require the prosecution to prove every essential element of a charged crime, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Jury instructions must correctly reflect this burden in order to be constitutionally sufficient. See State v. Eastmond, 129 Wn.2d 497, 502-504, 919 P.2d 577 (1996).

In this case, this Court should reverse, because the jury instructions

improperly relieved the prosecution of its burden of proving that Mr. Hwang was in actual fear that Mr. Go would carry out the threat to kill, an essential element of felony harassment.

As a threshold matter, this issue is properly before the Court. The failure to properly instruct the jury on every element of a charged crime is an error of constitutional magnitude, which may be raised for the first time on appeal. See Mills, 154 Wn.2d at 6; RAP 2.5(a)(3). Indeed, in Mills, the Washington Supreme Court held that this very same issue was of such magnitude and so properly raised. 154 Wn.2d at 6-7. This issue is therefore properly before the Court.

a. The instructions failed to state an element

In addressing this issue, the Court applies de novo review. See State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Applying such review, this Court should reverse. To prove the crime of misdemeanor harassment, the prosecution has to show that a defendant, “without lawful authority,” knowingly threatens to cause bodily injury immediately or in the future to either the person threatened or someone else, and that the defendant, “by words or conduct,” placed the person threatened “in reasonable fear that the threat will be carried out.” RCW 9A.46.020.

To prove felony harassment, however, the threat must be to “kill.” State v. C.G., 150 Wn.2d 604, 612, 80 P.3d 594 (2003). Further, the person threatened must be placed in reasonable fear that the threat *to kill* will be carried out, rather than just having a fear that some harm will occur. Id.

Thus, to prove Mr. Go guilty of felony harassment as charged, the prosecution was required to prove not only that Mr. Go threatened to kill Mr. Hwang, but also that Mr. Hwang reasonably believed that the threat to kill would be carried out. Mills, 154 Wn.2d at 708. And to be constitutionally sufficient, the jury instructions had to properly inform the jury of the prosecution's burden regarding the threat.

In general, it is required that the "to convict" instruction "must contain all elements essential to the conviction." Mills, 154 Wn.2d at 7. There is a limited exception, however, applicable when certain facts elevate an offense from a misdemeanor to a felony. State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2006). Under that exception, the elevating facts may be separately set forth in a special verdict form rather than in the "to convict." Id. If a special verdict form of some kind is used, it must be made clear to the jury that it must make the finding on that element beyond a reasonable doubt. 147 Wn.2d at 145.

Applying Oster, in Mills, the Court specifically held that it was proper to use a special verdict form to instruct the jury of the prosecution's burden of proof regarding the nature of the threat required to elevate harassment to a felony. Mills, 154 Wn.2d at 10. Thus, the use of the separate "interrogatory" form in this case is arguably proper, so long as that form is sufficient to establish the correct burden for the required elements.

The form fails that test. Titled "Special Interrogatory Form A, the form provided:

We the jury, answer the special interrogatory as follows:

Was the threat referenced in Count II a threat to kill the person threatened (Eui Hwang)?

ANSWER: _____ (Yes or No).

PRESIDING JUROR

CP 165.¹

Nothing in that instruction told the jury that it had to find that Mr. Hwang reasonably believed that the threat to kill him was going to be carried out. Nor did the “to convict” remedy the error. That instruction, Instruction 19, provided, in relevant part:

To convict the defendant of the crime of Harassment as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of May, 2005, the defendant knowingly threatened to cause *bodily injury* immediately or in the future to Eui Hwang; and
- (2) That the words or conduct of the defendant placed Eui Hwang in reasonable fear that *the threat* would be carried out;
- (3) That the defendant acted without lawful authority; and
- (4) That the acts occurred in the State of Washington.

CP 127 (emphasis added).

Thus, the to-convict did not inform the jury of the prosecution’s burden of proof for felony harassment. Instead of telling the jury it had to find that Mr. Go had threatened to kill Mr. Hwang and that Mr. Hwang was placed in reasonable fear that the threat *to kill* would be carried out, the instruction focused instead on the threat to cause bodily injury and Mr. Hwang’s fear regarding *that* threat. As the Mills Court noted with a very

¹The form did not itself indicate that the jury had to make the finding for the special interrogatory beyond a reasonable doubt, although Instruction 24 told the jury that, “[i]n order to answer the special interrogatory form ‘yes,’ you must unanimously be satisfied beyond a reasonable doubt that ‘yes’ is the correct answer.” CP 133.

similar instruction containing the same defect, “*the threat* as used in [the instruction] logically refers to the threats listed” in that instruction, and not the “threat to kill” set out in the separate instruction. 154 Wn.2d at 15 (emphasis in original).

To further confuse the issues in this case, “threat” was defined in the jury instructions, Instruction 22, as communicating, “directly or indirectly, the intent to cause *bodily injury* in the future to the person threatened or to any other person.” CP 130 (emphasis added). And Instruction 18 told the jury that “[a] person commits the crime of Harassment when he or she, without lawful authority, knowingly threatens to cause *bodily injury* immediately or in the future to another person, and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out. CP 126 (emphasis added).

Thus, not only was the jury not properly instructed on the prosecution’s proper burden for this essential element of the crime, it was actually misled. Indeed, in closing argument, when describing what it had the burden of proving, the prosecution initially argued it had to prove that Mr. Go “knowingly threatened *bodily injury* immediately or in the future to Mr. Hwang, that his words or conduct placed him in reasonable fear that that would happen, *that injury*, and that the defendant acted without lawful authority,” without mentioning the “threat to kill” or a reasonable fear of that threat being carried out. RP 372-73 (emphasis added). And later, the prosecution told the jury that it had met its burden of proving a knowing threat of “bodily injury” to Mr. Hwang because a threat to kill amounted to

such a threat. RP 381.

Further, in arguing on the special interrogatory, the prosecution noted it only had to prove that there was a “threat to kill.” RP 382. The prosecutor did not mention the requirement that it also had to prove, as an essential element of the crime, that Mr. Hwang reasonably believed that the threat to kill would be carried out. See RP 382.

This error cannot be deemed harmless. An instruction which relieves the prosecution of its burden of proving every essential element of the crime charged may only be found “harmless” if, based on the record, “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). To meet that exacting standard, it must be shown that the missing element “is supported by uncontroverted evidence,” and the reviewing court must conclude “beyond a reasonable doubt that the jury verdict would have been the same absent the error.” Brown, 147 Wn.2d at 341, quoting, Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

Here, the evidence does not meet that standard. The question of whether Mr. Hwang was in fact reasonably afraid that Mr. Go would carry out the threat to kill was disputed. Although Mr. Hwang did say, at one point at trial, that he was afraid Mr. Go would kill him, his acts belied that claim, and whether such a fear would, in fact, be reasonable. It was undisputed that Mr. Hwang was bigger, stronger and taller than Mr. Go. RP 114-17, 178, 307. When Mr. Go first grabbed the knife, according to Mr. Hwang, Mr. Hwang was right there, and got the knife out of Mr. Go’s

hand within moments. RP 178. Mr. Hwang then *turned his back on Mr. Go*, leaving the knife within Mr. Go's reach, as well as another one stored over the sink. RP 178-80. And when Mr. Go then held a knife to Mr. Hwang's throat, or when he was pointing the knife directly at Mr. Hwang's stomach, Mr. Hwang was not so afraid that Mr. Go was going to kill him that he froze in place. RP 117-20, 217. Instead, he moved and *reached around the man holding the knife on him to pick up a phone*. RP 120. Once he had the phone, he was not so afraid he was going to be imminently stabbed to death that he actually used it to call police. RP 121. Instead, he just *pretended* to call police, because he did not want to get Mr. Go in trouble. RP 120-21. A reasonable jury could easily conclude that these are hardly the acts of a man who actually reasonably feared Mr. Go's threat to kill was about to be carried out.

Notably, the jury did not find Mr. Hwang's testimony of what happened entirely credible, or it would have also convicted Mr. Go for at least the assault on Ms. Shin, for pointing the knife at her as Mr. Hwang insisted Mr. Go had done.

Thus, the failure to set forth the required element that the jury had to find Mr. Hwang had a reasonable belief that the threat to kill would be carried out was not harmless under Brown. There is no possible way, given this record, that the prosecution can show beyond a reasonable doubt that this very serious constitutional error had no effect on the verdict in this case. Reversal of the harassment conviction is required.

b. Counsel was ineffective in proposing similar instructions

In its response, the prosecution may argue that the error in giving instructions 18 and 19 and the special interrogatory was somehow “invited,” based upon counsel’s acts. Mr. Go’s appointed counsel herself proposed jury instructions which mirror Instructions 18 and 19, and the erroneous special interrogatory. CP 45-85. Further, she did not even propose an instruction on the burden of proof for the interrogatory. See CP 45-85.

Any argument that counsel’s acts should deprive Mr. Go of the relief to which he is entitled should be rejected, because counsel’s proposal of the constitutionally deficient instructions clearly amounted to ineffective assistance of counsel.

In general, the “invited error” doctrine prohibits a party from requesting an instruction and then assigning error to the giving of that instruction on appeal. See State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). Where, however, counsel’s proposal of the instruction was ineffective assistance, “invited error” does not preclude review. Studd, 137 Wn.2d at 551; State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995).

To prove counsel ineffective, Mr. Go must show that her representation of him was deficient and that the deficiency prejudiced the defense. See State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). Mr. Go can easily meet that standard for counsel’s

proposal of the improper, constitutionally insufficient instructions.

First, counsel's proposal of the instructions was clearly ineffective. Counsel is ineffective, despite a strong presumption of effectiveness, where counsel's acts fell "below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The circumstances here establish counsel's ineffectiveness. She proposed these instructions after Mills was decided, even though that case clearly established that the instructions were erroneous. See Mills, 154 Wn.2d at 1 (case decided April 7, 2005); RP 1, 49, 149, 266, 344 (trial in this case on July 27-28, August 1-3, 2005).

Further, C.G. was decided nearly *two years* prior to the trial in this case, and that case clearly established that the "reasonable fear" the victim is required to have for a felony harassment charge is that the threat to kill will be carried out, not a threat of bodily injury. See C.G., 150 Wn.2d at 604 (decided December 11, 2003); compare, Studd, 137 Wn.2d at 551 (where counsel proposed a deficient instruction before the Supreme Court had ever decided the instruction was erroneous, counsel could "hardly be faulted" for requesting the "then-unquestioned" instruction).

Nor can there be any tactical reason to propose instructions which relieve the prosecution of the full weight of its constitutionally mandated burden of proof.

There can be no question that the defense was prejudiced by counsel's unprofessional act of proposing improper, constitutionally deficient instructions. To prove such prejudice, Mr. Go need only show

that there is a “reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). A “reasonable probability” is a probability sufficient to undermine confidence in the outcome; it is not necessary for a defendant to show counsel’s performance “more likely than not altered the outcome of the case.” Strickland, 466 U.S. at 694.

Here, there is more than a sufficient probability to undermine confidence in the outcome of this case, based on counsel’s ineffectiveness. The instructions here enabled the jury to convict Mr. Go of felony harassment without finding the necessary element that Mr. Hwang had a reasonable fear that the threat to kill would actually be carried out. And the evidence was such that the jury could easily have found that Mr. Hwang did *not* have the required intent. Given Mr. Hwang’s greater strength and size, his walking away from Mr. Go just after Mr. Go supposedly had threatened him with a knife and *leaving* a knife within Mr. Go’s reach, his reaching around Mr. Go while Mr. Go was holding a knife on him, his only pretending to call for help, and his other acts inconsistent with a real fear that Mr. Go was actually going to kill him, a reasonable jury could easily have found Mr. Hwang did not have the required fear of a threat to kill, rather than a simple threat to cause injury. With her ineffectiveness, counsel seriously prejudiced her client’s defense on this count, and reversal is required.

2. REVERSAL IS ALSO REQUIRED BECAUSE THE ACTS FOR WHICH THE JURY CONVICTED ON BOTH CONVICTIONS MAY HAVE BEEN THE SAME

Reversal is also required because of the prohibitions against double

jeopardy. Under both the state and federal clauses, multiple convictions for the same conduct may amount to “double jeopardy,” under certain circumstances. See State v. Calle, 125 Wn.2d 769, 772, 775-76, 888 P.2d 155 (1995); Fifth Amendment; Fourteenth Amendment; Wa. Const. Art. I, § 9. Recently, the Washington Supreme Court clarified that, in order to determine if double jeopardy has been violated by convictions and sentences for two crimes, the crimes are not looked at in the abstract based on the generic elements of the crimes, but rather based upon the relevant facts. In re Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004). If both crimes are based on the same conduct and the evidence required to support the conviction for one of the crimes was sufficient to convict on the other, double jeopardy will be violated. Orange, 152 Wn.2d at 820.

In this case, the double jeopardy issue arises because it is impossible to tell if the jury convicted Mr. Go of both the assault and the harassment based on the exact same acts. To prove felony harassment, the prosecution had to prove that Mr. Go, without lawful authority, made a knowing threat to kill Mr. Hwang, and that Mr. Hwang had a reasonable belief that the threat to kill would be carried out. RCW 9A.46.020; C.G., 150 Wn.2d at 612. Taken in the light most favorable to the state, the evidence at trial was that Mr. Go threatened to kill Mr. Hwang just before or just after grabbing the knife by the sink, and then a few moments later, after grabbing the knife again, when he held the knife to Mr. Hwang’s neck and then pointed it back at Mr. Hwang, at his stomach. RP 113-17, 191-95, 217, 201. The testimony was that Mr. Hwang thought Mr. Go was going to carry out that threat, both at the sink and then later with the neck,

and then the stomach incident at the door. RP 201. Thus, there were three acts and three points where Mr Hwang had the required fear for felony harassment - at the sink, with the knife to the throat, or with the knife pointing to the stomach.

All three of those acts, however, were the same as the acts which could have supported the conviction for second-degree assault. To prove the second-degree assault as charged, the prosecution had to prove that Mr. Go assaulted Mr. Hwang with a deadly weapon. RCW 9A.36.021(1)(c). The prosecution argued that Mr. Go had committed the assault either by grabbing the knife and pointing it at Mr. Hwang at the sink, or later, by holding the knife to Mr. Hwang's throat or pointing it at Mr. Hwang's stomach. RP 378-80, 411. Indeed, those are the only times when Mr. Go had the knife. They were also the only times when there was any evidence that Mr. Hwang had the required fear which could have supported the felony harassment charge.

Thus, under Orange, because both of the crimes involved the exact same acts, and proof of one of the crimes amounted to proof of the other under the facts, double jeopardy was violated unless it can be shown that Mr. Go was not convicted of both crimes for the same act.

Here, there is not evidence to prove that such a violation did not occur. It is possible, at least in theory, that Mr. Go was not convicted of felony harassment for the exact same conduct for which he was convicted of assault. The jury could have convicted Mr. Go of the harassment based on one of the three acts - the incident at the sink, for example- and for the assault based on another - such as the knife to the throat. But because

there were no instructions requiring the jury to indicate for which act it was convicting Mr. Go on either count, there is no way to ensure that his state and federal constitutional rights to be free from double jeopardy were not violated by the convictions.

State v. Garcia, 65 Wn. App. 681, 829 P.2d 241, review denied, 120 Wn.2d 1003 (1992), is instructive. In Garcia, the defendant was charged with delivery of a controlled substance and possession with intent to deliver a controlled substance. Garcia, 65 Wn. App. at 685. The defendant had been seen removing a white tissue from his pants and giving a white bindle to another man, and, after his arrest the same day, was found with more white powder in his pockets. 65 Wn. App. at 683-84. The jury instructions did not require the jury to find that the possession with intent to deliver occurred separately from the actual delivery of the drugs. 65 Wn. App. at 690-91.

In reversing, the Court noted that the “intent to deliver” which occurred just prior to the actual delivery would necessarily have “merged” with the actual delivery charge, in order to avoid violation of the prohibitions against double jeopardy. 65 Wn. App. at 691. Because there was evidence of “two instances” from which the jury could have found intent to deliver, and one of them violated the prohibition against double jeopardy, the Court held that the trial court “should have instructed the jury in such a manner as to distinguish the merged charge from the validly charged criminal act.” 65 Wn. App. at 690-91. The Court concluded that “[t]he failure to give an instruction whereby the jury could distinguish between a validly charged criminal act and one for which conviction is

constitutionally impermissible requires that we reverse the conviction and remand for a new trial.” Id., citing, State v. Russell, 101 Wn.2d 349, 354, 678 P.2d 332 (1984).

Similarly, here, the failure to give an instruction requiring the jury to rely on separate acts for the assault and harassment convictions requires reversal. This is so even though counsel did not propose such an instruction. In Garcia, counsel similarly did not propose an instruction requiring the jury to rely on separate acts in order to prevent a violation of double jeopardy. 65 Wn. App. at 691, n. 4. Nevertheless, the Court addressed the issue and reversed, because “a conviction without a clarifying instruction may have violated the prohibition against double jeopardy” and the issue was thus one which could be raised for the first time on appeal under RAP 2.5. Id.

Notably, here, counsel specifically raised the issue of double jeopardy for the two convictions, albeit without proposing any instruction on this issue. See RP 272.

Remand for retrial on both the assault and the harassment is required. In Garcia, the Court ordered retrial only the possession with intent to deliver conviction, ordering only resentencing with a lower offender score on the actual delivery charge. 65 Wn. App. at 691. That made sense, because in Garcia there was only one act which could have supported the delivery conviction. Under those facts, that the act upon which the jury relied for that conviction was clear and it was only the act supporting the possession with intent conviction which was unclear. Here, in contrast, there were three acts upon which the jury could have convicted

for each count. Remand for retrial on only one count would not remedy the problem because the act which formed the basis for the other conviction would still be unknown and the same problem of conviction for two crimes based on the same exact acts would arise. Retrial on both the assault and the harassment is required in order to ensure that Mr. Go's state and federal constitutional rights to be free from double jeopardy were not violated. This Court should so hold and should reverse.

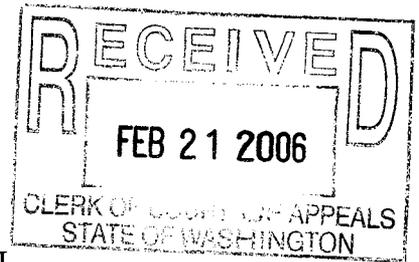
E. CONCLUSION

The jury instructions on the harassment charge were constitutionally insufficient and relieved the prosecution of its burden of proving an essential element of that crime. Further, counsel was ineffective in proposing similar instructions. These errors were not harmless and were instead highly prejudicial to Mr. Go, given the facts in the case. In addition, because it is impossible to ensure that Mr. Go's state and federal rights to be free from double jeopardy were not violated, reversal, remand and retrial for both the assault and harassment convictions is required.

DATED this 17th day of February 2006.

Respectfully submitted,


KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353



CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Pierce County Prosecuting Attorney's Office, 946 County City Building, 930 Tacoma Avenue S., Tacoma, Washington, 98402;

to Mr. Sung Do Go, DOC # 886013, Airway Heights Corrections Center, P.O. Box 1809, Airway Heights, WA. 99001.

DATED this 17th day of February, 2006.

A handwritten signature in black ink, appearing to read "Kathryn Russell Selk".

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353