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COURT OF APPEALS
DIVISION II

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NO. 36404-2-II

STATE OF WASHINGTON
BY *VMS*

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

STATE OF WASHINGTON,

Respondent,

v.

NOEL CHRISTOPHER SLOAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James Jay Stonier

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE “TO CONVICT” JURY INSTRUCTION ERRONEOUSLY MISSTATED AN ELEMENT OF THE CRIME OF TELEPHONE HARASSMENT AND THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The state concedes that the jury instruction was erroneous because it misstated an element of the crime but argues that the error was harmless primarily relying on State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). Brief of Respondent at 2- 4. To the contrary, the error was not harmless under the test set forth by the United States Supreme Court in Nedar v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), followed by the Washington Supreme Court in Brown and this Court in State v. Jennings, 111 Wn. App. 54, 44 P.3d 1 (2002), review denied, 148 Wn.2d 1001, 60 P.3d 1212 (2003). In Nedar, the Supreme Court applied the test for determining whether a constitutional error is harmless established in Chapman v. California, 384 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Under that test, an error is harmless when it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Nedar, 527 U.S. at 15. When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. Nedar, 527 U.S. at 18. A reviewing court must therefore thoroughly examine the

record but in so doing it does not “become in effect a second jury to determine whether the defendant is guilty.” Nedar, 527 U.S. at 19. Rather, a reviewing court, “in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding” with respect to the omitted or misstated element. Id.

An examination of the record here shows that the only evidence the state presented to prove telephone harassment was the testimonies of Anna Sloan and Kandice Schulte. Anna testified that she was at her apartment with Kandice, a close friend who babysat the Sloan’s children. RP 68. The phone rang and Kandice answered it while she stood right beside her. Anna claimed that she heard Noel Sloan say, “you’re fucking dead.” RP 69-70. Kandice testified that she answered the phone and said “hello” three or four times then heard a male voice say, “you’re fucking dead.” RP 94-95, 100. According to Kandice, she recognized Noel’s voice from messages left on Anna’s answering machine. RP 94-95. Kandice had previously met Noel and spoke with him on the phone to make arrangements for picking up or dropping off the children. RP 92-93.

The erroneous jury instruction provided that to convict Sloan of telephone harassment, the state had to prove beyond a reasonable doubt that Sloan made a telephone call to *Anna Sloan and/or Kandice Schulte*, with the intent to harass, intimidate, torment, or embarrass Anna Sloan,

and communicated a true threat to kill Anna Sloan. CP 60. The jury was therefore erroneously led to assume that it did not matter whether Anna or Kandice answered the phone and heard the threat. Consequently, under the test set forth in Nedar, the error was not harmless because the record substantiates that a proper instruction could lead to a rational contrary finding. According to Anna and Kandice, they were at Anna's apartment but Kandice answered the phone. To satisfy the element requiring Sloan to make a call to Anna, the state had to prove beyond a reasonable doubt that Sloan made a call to Anna personally, not just a call to Anna's residence. The state overlooks this important distinction. See Brief of Respondent at 3-4.

It is therefore evident that the erroneous jury instruction contributed to the jury's verdict. Clearly, if the jury had been properly instructed, it could have rationally found that the state failed to prove beyond a reasonable doubt that Sloan made a threatening call to Anna because according to the state's evidence, it was Kandice, not Anna, who answered the phone and heard the threat.

"It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt." Brown, 147 Wn.2d at 339. The Legislature has codified the state's burden as follows: "Every person charged with the commission of

a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.” RCW 9A.04.100(1).

Reversal is required because the erroneous “to convict” instruction relieved the state of its high burden of proving each and every element of the crime of telephone harassment beyond a reasonable doubt. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997).

B. CONCLUSION

For the reasons stated here, and in appellant’s opening brief, this Court should reverse Mr. Sloan’s conviction.

DATED this 22nd day of August, 2008.


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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Megan Hallin, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

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

DATED this 22st day of August, 2008 in Kent, Washington.


Valerie Marushige
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