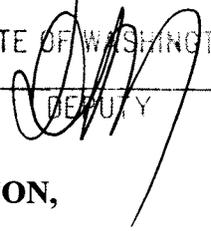


FILED
COURT OF APPEALS
DIVISION II

08 JUN 11 AM 11:23

STATE OF WASHINGTON
BY  DEPUTY

NO. 36849-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRYANT DENNIS NOLAN,

Appellant.

CORRECTED BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

ORIGINAL

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	5
D. ARGUMENT	
I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO ALLOW HIM TO PRESENT RELEVANT, EXCULPATORY EVIDENCE	9
II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNDER UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO GIVE THE DEFENDANT'S PROPOSED LESSER INCLUDED INSTRUCTIONS ON MISDEMEANOR HARASSMENT	14
III. THE STATE VIOLATED THE DEFENDANT'S RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT, WHEN IT ELICITED THE FACT THAT THE DEFENDANT REFUSED TO ANSWER WHEN OFFICER ELDER ASKED IF THE DEFENDANT WAS THREATENING HIM	17

**IV. THE TRIAL COURT DENIED THE DEFENDANT HIS
RIGHT TO DUE PROCESS UNDER WASHINGTON
CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES
CONSTITUTION, FOURTEENTH AMENDMENT, WHEN
IT ENTERED JUDGEMENT AGAINST HIM FOR FELONY
HARASSMENT BECAUSE SUBSTANTIAL EVIDENCE
DOES NOT SUPPORT THIS CONVICTION 23**

E. CONCLUSION 29

F. APPENDIX

1. Washington Constitution, Article 1, § 3 30

2. Washington Constitution, Article 1, § 9 30

3. United States Constitution, Fifth Amendment 30

4. United States Constitution, Fourteenth Amendment 30

5. RCW 9A.46.020 31

TABLE OF AUTHORITIES

Page

Federal Cases

Bruton v. United States,
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) 9

Chambers v. Mississippi,
410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 9

Edwards v. Arizona,
451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) 19

Hoffman v. United States,
341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) 17

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 23

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 24

Michigan v. Mosley,
423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313, (1975) 19

Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 18

State Cases

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 23

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) 18

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 22

State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003) 16, 24, 26

State v. Earls, 116 Wn.2d 364, 805 P.2d 211 (1991) 17, 18

<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996)	19, 20
<i>State v. Edmon</i> , 28 Wn.App. 98, 621 P.2d 1310 (1981)	9, 10
<i>State v. Ellis</i> , 136 Wn.2d 498, 963 P.2d 843 (1998)	9
<i>State v. Foster</i> , 91 Wn.2d 466, 589 P.2d 789 (1979)	18
<i>State v. Fricks</i> , 91 Wn.2d 391, 588 P.2d 1328 (1979)	18
<i>State v. Grisby</i> , 97 Wn.2d 493, 647 P.2d 6 (1982)	19
<i>State v. Holland</i> , 98 Wn.2d 507, 656 P.2d 1056 (1983)	18
<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983)	9
<i>State v. Johnson</i> , 12 Wn.App. 40, 527 P.2d 1324 (1974)	24
<i>State v. LeBlanc</i> , 34 Wn.App. 306, 660 P.2d 1142 (1983)	15
<i>State v. MacMaster</i> , 113 Wn.2d 226, 778 P.2d 1037 (1989)	15
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983)	14
<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972)	24
<i>State v. Parker</i> , 102 Wn.2d 161, 683 P.2d 189 (1984)	15
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995)	22
<i>State v. Richmond</i> , 65 Wn.App. 541, 828 P.2d 1180 (1992)	19
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963)	9
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973)	24
<i>State v. Wheeler</i> , 108 Wn.2d 230, 737 P.2d 1005 (1987)	19
<i>State v. Wilson</i> , 38 Wn.2d 593, 231 P.2d 288 (1951)	11
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978)	15

Constitutional Provisions

Washington Constitution, Article 1, § 3 9, 10, 14, 15, 23, 28

Washington Constitution, Article 1, § 9 17, 21

United States Constitution, Fifth Amendment 17

United States Constitution, Fourteenth Amendment 10, 23

Statutes and Court Rules

ER 401 10, 11

ER 402 10, 12

RCW 9A.46.020 11, 15

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to allow him to present relevant, exculpatory evidence. RP 132.

2. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, when it refused to give the defendant's proposed lesser included instructions on misdemeanor harassment. RP 154-158; CP 34-37.

3. The state violated the defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, when it elicited the fact that the defendant refused to answer when Officer Elder asked if the defendant was threatening him. RP 94.

4. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against him for an offense unsupported by substantial evidence. RP 1-143.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to allow the defendant to present relevant, exculpatory evidence?

2. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, if it refuses to give a proposed lesser included instruction that is both legally and factually available?

3. Does the state violate a defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, when it intentionally elicits the fact that a defendant refused to answer a question a police officer asked him after the defendant's arrest?

4. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment against that defendant for an offense unsupported by substantial evidence?

STATEMENT OF THE CASE

Factual History

On July 30, 2007, Lewis County Deputy Sheriff Michael Brady along with Chehalis Police Officers Michael Renshaw and Jeffrey Elder responded to a report of an assault at 766 S.W. Moonlight Lane in the city of Chehalis. RP 29-32, 53, 83-87. Once at that address, they spoke with a woman who claimed that the defendant Bryant Dennis Nolan had hit her head into a pole. RP 87. They also spoke with a man, who indicated that the defendant had challenged to fight him. *Id.* This man was the owner of the adjacent house and told the officer that the defendant was inside sleeping on the couch. RP 32, 54-56, 88. Upon receiving this information, the officers banged on the front door of the house without receiving a response. *Id.* The homeowner's son then went into the house via a back door, unlocked the front door, and allowed the officers entry. *Id.*

Upon entering, the officers saw the defendant sleeping on the couch with a blanket over him. RP 32, 55-56, 88-89. One of the officers was sure that the room was dark, illuminated only by a television. RP 41. Another officer was just as sure that the lights were on in the room. RP 62. In any event, after seeing the defendant, the officers pulled the blanket off him, while Officer Elder told him that he was under arrest and that he should roll over on his stomach and put his hand behind his back so they could handcuff

him. RP 33-34, 55-59, 89-90 The defendant responded by asking what was happening and by stating that he had been sleeping and had not done anything. *Id.* Officer Elder repeated his commands, and when the defendant did not comply, the officer shot the defendant in his bare chest with a taser. *Id.* This particular taser unit shot two metal probes with sharp, barbed tips that penetrated the defendant's skin and stuck. RP 45.

Upon being shot with the taser, the defendant pulled his arms up to his chest and rolled off the couch, thereby crossing the wires that trailed after the barbed tips. RP 91-93. When the wires touched each other the taser did not function properly. *Id.* Seeing this, Officer Elder shoved his Taser on the defendant's back and gave him a minimum 5 second burst of 50,000 volts of electricity. RP 92-93. After this shock, the defendant began weeping and complied with the officers' orders. RP 93 Once the defendant was handcuffed, and placed in the patrol car, he became belligerent and started yelling obscenities at the officers, as well as asking why they had shot him with the taser. RP 35-37. Although the defendant calmed down during the journey to the jail, Officer Elder reported that at one point the defendant leaned forward and said, "I'm going to kill you." RP 94. Officer Elder then asked, "Are you threatening me?" *Id.* The defendant did not respond. *Id.* Once at the jail, the defendant again became verbally abusive with both Officer Elder and the jail personnel. RP 94-95.

Procedural History

By information filed July 30, 2007, the Lewis County Prosecutor charged the defendant with two counts of indecent liberties, one count of resisting arrest, one count of fourth degree assault, and one count of felony harassment. CP 1-4. Prior to trial, the court dismissed all but the resisting arrest and felony harassment charges. RP 1. The case later came on for trial before a jury with the state calling Deputy Bailey, Officer Renshaw, and Officer Elder, who testified to the facts as set out previously. RP 29-52, 53-82, 83-133, 134. The defense did not put on any witnesses. RP 134-138.

During trial, the state elicited the following additional testimony from Officer Elder concerning the exchange between him and the defendant.

Q. After aid had checked him out, what did you do?

A. Then I drove – started driving to the Lewis County Jail. He was still screaming and stuff until we got to about 16th Street, and then he became quiet. I thought, “Okay, he’s finally done. He’s finally calming down.” And that’s when he leaned forward – he was directly behind me when I was driving. Leaned forward up to the cage and said, “I’m going to kill you.”

Q. And did he continue to keep his face close to your head after he said that?

A. I asked him, “Are you threatening me?” And then he sat back and didn’t say a word again until we got to the jail, and as soon as we got to the door of the jail, he started in again. You know, “You fucking pig,” and –

RP 94.

The state also elicited the following from Officer Elder concerning the officer's belief as to whether or not the defendant would fulfill his threat to kill:

Q. And did you take that threat seriously?

A. Yes. I did.

. . . .

Q. Did you think he was going to carry it out at that very moment?

A. Well, he couldn't do it at that moment because he was handcuffed in the back of the car, and I'd already searched him.

Q. When did you think he might do that?

A. One day shopping WalMart or anything else, come up behind you and – it happens in our line of work.

Q. Have you had any training or instruction regarding getting threats while you're on duty?

A. Yeah. We go to – called "Street Survival" by Caliber Press, and they cover stuff like that, officers that are murdered with their families, and cars blown up by suspects when they've made threats. They teach us, you know, when you get a threat like that, you need to take it seriously and use precautions.

RP 94-96.

During each of these officers' testimony, the state elicited the fact that the officers had been called out to a report of a claimed assault. RP 29-32, 53, 87. When the defense tried to elicit the fact that the assault charges had been dropped, the state objected. RP 132. The court then sustained the

objection and ordered the jury to disregard it. *Id.* However, during closing argument, the state not only argued that the officers had been called out to an assault claim, but that the defendant had actually committed the assault, and that this fact supported a conclusion that it was reasonable for Officer Elder to believe that the defendant would follow through on his threat. RP 162-163. Specifically, the state argued as follows:

Now I submit to you that all five of these [elements of felony harassment] are met. The only one that counsel can even argue isn't met – the only one you even have to think about is the third one, that the words or conduct of the defendant placed Officer Jeff Elder in reasonable fear that the threat would be carried out. So was it reasonable for him to think that this threat might be carried out? And it was. Let's talk about why.

He's just come to investigate an assault. **He learned from the witnesses that the defendant had rammed the head of a 19-year-old female into a beam** and that he threatened and tried to get other people to fight with him, too. So he had that in his mind. He knew that kind of assaultive behavior, he's violent at times, this guy's for real when he says he's going to hurt you.

RP 162-163 (emphasis added).

Prior to this argument, the court instructed the jury with the defense taking exception to the court's refusal to give the defendant's proposed lesser included instruction on misdemeanor harassment. RP 154-158; CP 34-38. Although the court found the proposed lesser included instruction legally available, it found that it was not factually available under the evidence as presented. RP 154-158. Following argument and deliberation, the jury

returned verdicts of guilty on both counts. CP 56-57. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 63-71, 73.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO ALLOW HIM TO PRESENT RELEVANT, EXCULPATORY EVIDENCE.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because

the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments, to present relevant evidence supporting his defense.

Under ER 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 402, "all relevant evidence is admissible" with certain limitations. By contrast, under this same rule "[e]vidence which is not relevant is not admissible." Thus, before testimony or an exhibit can be received into evidence, it must be shown to be relevant and material to the

case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951).

In the case at bar, the state charged the defendant with felony harassment under RCW 9A.46.020(2)(b)(ii). This statute states:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

. . . and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . . .

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: . . . or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

RCW 9A.46.020.

Under this statute, the objective reasonableness of the belief of the complaining witness in the probability of the defendant carrying out his or her threat is an element of the crime. Thus, any fact that makes it slightly more or less likely that the professed belief that the defendant would carry out the threat would be relevant on the issue of reasonableness, since under ER 401 “relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action

more probable or less probable than it would be without the evidence,” and under ER 402, “all relevant evidence is admissible” with certain limitations.

In this case, the state elicited the fact that the officer had been called out to a claimed assault because that fact was relevant to the reasonableness of an officer’s belief on the issue whether or not the alleged perpetrator of such a crime would or would not fulfill a threat to kill. However, also relevant to this determination would be the fact that there had been no assault and that the initial charges of assault had been dismissed. Thus, in this case, the trial court erred when it refused to allow the defense to elicit the fact that the assault charges had been dismissed. This occurred at the end of the defendant’s cross-examination of Officer Elder in the following exchange:

Q. You were aware that subsequent to this incident the assault charges were dismissed, correct.

MR. HAYES: Objection

THE COURT: Sustained. Disregard the question and the answer.

RP 132.

The error in excluding this evidence was exacerbated when the state argued in closing that the defendant had actually committed the assault and that this fact supported the state’s claim that the officer reasonably believed that the defendant would fulfill his threat. The state said the following on this point:

Now I submit to you that all five of these [elements of felony harassment] are met. The only one that counsel can even argue isn't met – the only one you even have to think about is the third one, that the words or conduct of the defendant placed Officer Jeff Elder in reasonable fear that the threat would be carried out. So was it reasonable for him to think that this threat might be carried out? And it was. Let's talk about why.

He's just come to investigate an assault. **He learned from the witnesses that the defendant had rammed the head of a 19-year-old female into a beam and that he threatened and tried to get other people to fight with him, too. So he had that in his mind.** He knew that kind of assaultive behavior, he's violent at times, this guy's for real when he says he's going to hurt you.

RP 162-163 (emphasis added).

One of the primary issues for the jury to determine in this case was the reasonableness of the officer's claimed belief that the defendant would fulfill the threat.¹ The evidence on this issue was equivocal at best. At no point did the officers claim that the defendant attempted to harm them in any manner whatsoever. Although they did claim that he was verbally abusive, they did not claim he physically threatened them in any manner. Neither was there any evidence that the defendant had ever tried to harm a police officer on any other occasion. Thus, the claim that the defendant had actually committed the assault that the witnesses claimed was critical to the state's argument that

¹Of course, this was not the only issue at trial. Contrary to the state's claim during closing argument, the defense did not stipulate or tacitly agree that the defendant had even made the threat. Thus, this element was also very much at issue in the trial.

the officer's belief was reasonable. However, this also made it critical for the defense to be able to elicit the fact that far from there being a conviction for the alleged assault, in fact the charges had been dismissed. Thus, under these facts, the court's erroneous ruling prohibiting the defense from eliciting the fact of the dismissal of the assault charge prevented the defendant from presenting some of its best evidence on the issue of reasonableness. Had the jury actually been able to hear this fact, and had the defense been able to effectively argue it in closing, the jury would more likely than not have returned a verdict of acquittal on the felony harassment charge. As a result, the court's error in excluding this evidence denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. The defendant is entitled to a new trial.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNDER UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO GIVE THE DEFENDANT'S PROPOSED LESSER INCLUDED INSTRUCTIONS ON MISDEMEANOR HARASSMENT.

It is a fundamental principle of due process under both our State and Federal Constitutions that a defendant in a criminal proceeding must be permitted to argue any defense allowed under the law and supported by the facts. *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983). Thus, the

failure to instruct on a defense allowed under the law and supported by the facts constitutes a violation of due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989); *State v. LeBlanc*, 34 Wn.App. 306, 660 P.2d 1142 (1983).

A defendant is entitled to have the jury instructed on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged; and (2) the evidence in the case affirmatively supports an inference that the defendant committed the lesser crime. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). In addition, “[r]egardless of the plausibility of th[e] circumstance, [a] defendant ha[s] an absolute right to have the jury consider the lesser included offense on which there is evidence to support an inference it was committed.” *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984) (citing, *inter alia*, *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981)).

In the case at bar, the state charged the defendant with felony harassment under RCW 9A.46.020. Under this statute, the state has the burden of proving that the defendant unlawfully threatened to harm a person and by words or deeds placed a person in reasonable fear that the threat would be fulfilled. This crime is a misdemeanor if the threat is to harm; it is a felony if the threat is to kill. Since a threat to kill would always constitute

a threat to harm, every felony violation of the statute would also constitute a misdemeanor violation of the statute. Thus, for the purpose of analyzing the right to a lesser included offense instruction, misdemeanor harassment meets the elements requirement for being a lesser included offense to felony harassment when the felony is charged as a threat to kill.

In fact, in this case, the court did not conclude that misdemeanor harassment was not legally a lesser included offense to felony harassment. Rather, the court found that the lesser included offense was not factually available because Officer Elder testified that the defendant had threatened to kill him, and there was no evidence to support a claim that the defendant had only threatened to harm. In so holding, the court failed to view the evidence as a whole and failed to see the elements of the offense as a whole. When seen as a whole, it was well within the jury's province to (1) find that the defendant had made the threat to kill, and (2) find the officer's belief in that threat to be unreasonable, but (3) find that it was reasonable for the officer to believe that the defendant would harm him in some manner other than killing him. Under this possibility, the jury could well have found the defendant not guilty of felony harassment but guilty of misdemeanor harassment because the threat to kill *ipso facto* included a threat to harm. This alternative was specifically envisioned by the Washington Supreme Court in *State v. C.G.*, *infra*, where it held as follows:

Finally, we observe that the State will still be able to charge one who threatens to kill with threatening to inflict bodily injury, in the nature of a lesser included offense, thus enabling a misdemeanor charge even if the person threatened was not placed in reasonable fear that the threat to kill would be carried out, but was placed in fear of bodily injury.

State v. C.G., 150 Wn.2d at 611.

Thus, in the case at bar, the trial court erred when it refused to give the defendant's proposed instructions on the lesser included offense of misdemeanor harassment. Consequently, the defendant is entitled to a new trial.

III. THE STATE VIOLATED THE DEFENDANT'S RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT, WHEN IT ELICITED THE FACT THAT THE DEFENDANT REFUSED TO ANSWER WHEN OFFICER ELDER ASKED IF THE DEFENDANT WAS THREATENING HIM.

The United States Constitution, Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Similarly, Washington Constitution, Article 1, § 9, states that "[n]o person shall be compelled in any criminal case to give evidence against himself." The protection of Washington Constitution, Article 1, § 9, is coextensive with the protection of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the

defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It also precludes the state from eliciting comments from witnesses or making closing arguments relating to a defendant's silence to infer guilt from such silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979).

In order to effectuate this right, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that before a defendant's "custodial statements" may be admitted as substantive evidence, the state bears the burden of proving that prior to questioning the police inform the defendant that: " (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him." *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly informed the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*, *supra*. If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The "triggering factor" requiring the police to inform a defendant of

his or her rights under *Miranda* is “custodial interrogation.” Just what the words “custodial” and “interrogation” mean has been the subject of significant litigation. *State v. Richmond*, 65 Wn.App. 541, 544, 828 P.2d 1180 (1992). However, generally speaking, an interrogation is “any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Richmond*, 65 Wn.App. at 544 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

Once an accused asserts his or her right to remain silent and right to counsel, all interrogation must cease until an attorney is present “unless the accused himself initiates further communication, exchanges, or conversations with the police.” *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987). At this point, the right to silence and counsel must be “scrupulously honored.” *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313, (1975); *State v. Grisby*, 97 Wn.2d 493, 504, 647 P.2d 6 (1982).

For example, in *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996), the defendant was prosecuted for multiple counts of vehicular homicide. At trial, the state, in its case in chief, elicited testimony from its investigating officer that shortly after the accident, he found the defendant in the bathroom of a gas station at the intersection, and that the defendant

“totally ignored” him when he asked what happened. The police officer also testified that when he continued to ask questions, the defendant looked down, “once again ignoring me, ignoring my questions.” Following conviction, the defendant appealed, arguing that this testimony violated his right to remain silent. The Washington Supreme Court agreed and reversed, stating as follows:

Accordingly, Easter’s right to silence was violated by testimony he did not answer and looked away without speaking when Officer Fitzgerald first questioned him. It was also violated by testimony and argument he was evasive, or was communicative only when asking about papers or his friend. Moreover, since the officer defined the term “smart drunk” as meaning evasive behavior and silence when interrogated, the testimony Easter was a smart drunk also violated Easter’s right to silence.

State v. Easter, 130 Wn.2d at 241.

In the case at bar, the state also elicited evidence concerning the defendant’s exercise of his right to silence following the exchange in which the officer claimed the defendant had threatened him. This testimony was as follows:

Q. After aid had checked him out, what did you do?

A. Then I drove – started driving to the Lewis County Jail. He was still screaming and stuff until we got to about 16th Street, and then he became quiet. I thought, “Okay, he’s finally done. He’s finally calming down.” And that’s when he leaned forward – he was directly behind me when I was driving. Leaned forward up to the cage and said, “I’m going to kill you.”

Q. And did he continue to keep his face close to your head after

he said that?

A. **I asked him, “Are you threatening me?” And then he sat back and didn’t say a word again until we got to the jail**, and as soon as we got to the door of the jail, he started in again. You know, “You fucking pig,” and –

RP 94 (emphasis added).

In this case, there should be no argument that at the time Officer Elder asked the defendant if he was threatening him, the defendant was under arrest and in custody. The officer had not only unequivocally told him that he was under arrest, but they had tasered him, handcuffed him, and put him in the back of a patrol car. Thus, for the purposes of the Fifth Amendment and Washington Constitution, Article 1, § 9, the defendant was “in custody.” In addition, there should be no argument that Officer Elder’s question “Are you threatening me?” was interrogation. After all, it was an unequivocal question designed to elicit a confession that the defendant had committed the crime for which he was on trial. Thus, the defendant’s unequivocal refusal to answer this question constituted an invocation of his right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, and the state violated these rights when it elicited the question and his refusal to answer it.

As an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error

was harmless. *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). “An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). As the following explains, in this case the state cannot meet this heavy burden.

In the case at bar, the evidence shows that the defendant became abusive to the officers at the time they got him into the patrol vehicle and once again when Officer Elder got him to the jail. In spite of the fact that the defendant apparently made any number of angry, abusive and profane statements directed at all three officers and jail personnel, not one of these witnesses claims they ever heard the defendant utter a threat. Only Officer Elder made this claim. This incongruent threat to one officer when the defendant was not emotionally “out of control,” instead of a threat to one or all of the officers when the defendant was emotionally “out of control,” calls in to question the issue whether or not the defendant ever really did utter the threat to Officer Elder.

In fact, the Officer’s claimed question “Are you threatening me?” begs the question whether or not the defendant did utter a threat. It also calls into question the objective and subjective reasonableness of the state’s claim

that the officer believed the defendant would make good on the threat. Under these facts, the purpose in eliciting the fact that the defendant refused to answer the officer's question was to argue to the jury *soto voce* both that the defendant had made the threat and that he intended it to be believed. Under these facts, the elicitation of the fact that the defendant exercised his right to silence was prejudicial and far from harmless beyond a reasonable doubt. As a result, the defendant is entitled to a new trial.

IV. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT. WHEN IT ENTERED JUDGEMENT AGAINST HIM FOR FELONY HARASSMENT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CONVICTION.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla

of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003), the state charged a juvenile with felony harassment. In this case the

defendant, a student at Blaine High School, became angry and disruptive in class after she was accused of taking a pencil. Eventually, the teacher called Mr. Haney, the vice-principal who was responsible for disciplinary matters at the school. He asked C.G. to leave the classroom with him, and after some resistance the defendant went with him, although she continued to yell obscenities. The vice-principal then called another teacher for help, and at that point the defendant said “I’ll kill you Mr. Haney, I’ll kill you.”

The State later charged C.G with felony harassment out of the incident. At the adjudicatory hearing in the matter, the vice-principal testified that C.G’s threat “caused him concern.” He further testified that based on what he knew about C.G, she might well try to harm him or someone else in the future. The trial court found C.G guilty, and she appealed, arguing that the record did not contain substantial evidence to prove that the vice-principal reasonably believed she would fulfill her threat to kill. The court of appeals affirmed, and the defendant then obtained review before the state supreme court.

In responding to the defendant’s arguments, the state claimed that in order to sustain a conviction for a felony, the state need only prove that (1) the defendant made the threat to kill, and (2) that a person reasonably believed that the defendant would “harm,” as opposed to “kill” a person. This argument was based upon the fact that the requirement of a “reasonable

belief’ was included in subsection (1)(b) of the statute, not subsection (2)(b) where the statute defined felony harassment as a threat to kill. However, the court rejected this argument, finding as follows:

Whatever the threat, whether listed in subsection (1)(a) or a threat to kill as stated in subsection (2)(b), the State must prove that the victim was placed in reasonable fear that the same threat, i.e., “the” threat, would be carried out.

State v. C.G., 150 Wn.2d at 609.

The court then went on to address the issue whether substantial evidence supported a finding that the victim reasonably believed that the defendant would kill him. Based upon the vice-principal’s testimony, the court found the evidence insufficient. The court held:

We thus conclude that under the plain language of RCW 9A.46.020, supported by the related statute, RCW 9A.46.010, the State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out. Under the plain reading of the statute, C.G.’s conviction for felony harassment must be reversed because there is no evidence that Mr. Haney was placed in reasonable fear that she would kill him.

State v. C.G., 150 Wn.2d at 611.

The vice-principal’s testimony in *C.G.* concerning the defendant’s threats was strikingly similar to Officer Elder’s testimony in the case at bar. In *C.G.*, the vice-principal testified that the defendant’s threat “caused him concern,” and that based on what he knew about C.G., she might well try to harm him or someone else in the future. In the case at bar, Officer Elder

testified as follows:

Q. And did you take that threat seriously?

A. Yes. I did.

. . .

Q. Did you think he was going to carry it out at that very moment?

A. Well, he couldn't do it at that moment because he was handcuffed in the back of the car, and I'd already searched him.

Q. When did you think he might do that?

A. One day shopping at WalMart or anywhere else, come up behind you and – it happens in our line of work.

Q. Have you had any training or instruction regarding getting threats while you're on duty?

A. Yeah. We go to – called "Street Survival" by Caliber Press, and they cover stuff like that, officers that are murdered with their families, and cars blown up by suspects when they've make threats. They teach us, you know, when you get a threat like that, you need to take it seriously and use precautions.

RP 95-96.

The officer's testimony in this case was not that he believed the defendant would fulfill the threat. Rather, it is couched in the same terms of "might at some point in the future" as was the testimony of the vice-principal in *C.G*. Thus, in the same manner that the evidence in *C.G* was insufficient to support a charge of felony harassment, so the evidence in the case at bar is insufficient to support a charge of felony harassment. As a result, the trial

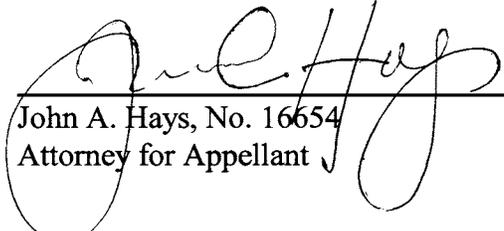
court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 an United States Constitution, Fourteenth Amendment when it entered judgement against him for this offense.

CONCLUSION

The defendant's conviction for felony harassment should be vacated and dismissed because it is not supported by substantial evidence. In the alternative, the defendant is entitled to a new trial because he was denied a fair trial when (1) the court refused to allow the defense to elicit relevant, admissible exculpatory evidence, (2) the trial court erroneously denied the defendant's request for a lesser included offense instruction, and (3) when the state elicited evidence that the defendant invoked his right to silence.

DATED this 25th day of April, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9A.46.020

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

(3) The penalties provided in this section for harassment do not preclude the victim from seeking any other remedy otherwise available under law.

