

CO-STEP 2014-010
STATE OF WASHINGTON
BY _____
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No. 39380-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Phillip Atkins,

Appellant.

Lewis County Superior Court Cause No. 08-1-00581-4

The Honorable Judge Nelson Hunt

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 4

ARGUMENT 5

I. **Mr. Atkins’s conviction violated his Sixth Amendment right to notice and his Fourteenth Amendment right to due process.**..... 5

A. The Information was deficient because it failed to allege that Mr. Atkins made a “true threat.” 6

B. The court’s “to convict” instruction omitted an essential element of the offense and relieved the state of its burden to prove a “true threat,” in violation of Mr. Atkins’s Fourteenth Amendment right to due process. 8

II. **Mr. Atkins’s assault conviction violated his Fourteenth Amendment right to due process because the court’s knowledge instruction created a mandatory presumption and relieved the state of its burden to prove the essential elements under the law of the case.**10

III. **The trial judge failed to properly determine Mr. Atkins’s criminal history and offender score.** 19

A. The state failed to allege or prove that Mr. Atkins had any prior offenses, and the sentencing court included in the offender score offenses that had “washed out.” 19

B. The SRA, as amended in 2008, violates the Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing. 21

CONCLUSION 24

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Carella v. California</i> , 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989).....	17
<i>Cole v. Arkansas</i> , 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948).....	6
<i>Estelle v. McGuire</i> , 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)	15
<i>Estelle v. Smith</i> , 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)..	21
<i>Francis v. Franklin</i> , 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).....	17
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	10
<i>Mitchell v. United States</i> , 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).....	21
<i>Morissette v. United States</i> , 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).....	11, 17
<i>Neder v. United States</i> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	8
<i>Sandstrom v. Montana</i> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)	11, 17
<i>United States v. Cina</i> , 699 F.2d 853 (7th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983).....	6
<i>Yates v. Evatt</i> , 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991)15, 16, 17, 18	

WASHINGTON STATE CASES

<i>City of Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000).....	15, 18
<i>In re Cadwallader</i> , 155 Wn.2d 867, 123 P.3d 456 (2005)	19, 20, 21

<i>In re Detention of Post</i> , 145 Wn.App. 728, 187 P.3d 803 (2008)	21
<i>In re Goodwin</i> , 146 Wn.2d 861, 50 P.3d 618 (2002).....	19
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 768 P.2d 470 (1989)	11
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002)	10
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	15
<i>State v. Deal</i> , 128 Wn.2d 693, 911 P.2d 996 (1996)	11, 16
<i>State v. DeRyke</i> , 149 Wn.2d 906, 73 P.3d 1000 (2003).....	8
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999)	21, 22, 23
<i>State v. Franks</i> , 105 Wn.App. 950, 22 P.3d 269 (2001).....	7
<i>State v. Gerdts</i> , 136 Wn. App. 720, 150 P.3d 627 (2007)	14
<i>State v. Goble</i> , 131 Wn.App. 194, 126 P.3d 821 (2005)	13, 14
<i>State v. Gonzales Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008).....	8
<i>State v. Harris</i> , 122 Wn.App. 547, 90 P.3d 1133 (2004).....	10
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	12
<i>State v. Johnson</i> , 119 Wn.2d 143, 829 P.2d 1078 (1992).....	5, 6
<i>State v. Keend</i> , 140 Wn. App. 858, 166 P.3d 1268 (2007)	14
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	7
<i>State v. Mendoza</i> , 165 Wn.2d 913, 205 P.3d 113 (2009)	22
<i>State v. Mertens</i> , 148 Wn.2d 820, 64 P.3d 633 (2003)	11
<i>State v. Mills</i> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	8, 9
<i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997).....	10
<i>State v. Recuenco</i> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	8

<i>State v. Savage</i> , 94 Wn.2d 569, 618 P.2d 82 (1980).....	11
<i>State v. Seek</i> , 109 Wn. App. 876, 37 P.3d 339 (2002).....	8, 9
<i>State v. Tellez</i> , 141 Wn.App. 479, 170 P.3d 75 (2007).....	6
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	10
<i>State v. Williams</i> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	6, 7

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I.....	6, 9
U.S. Const. Amend. V	2, 3, 21, 23
U.S. Const. Amend. VI.....	1, 5, 6
U.S. Const. Amend. XIV	1, 2, 3, 5, 6, 8, 9, 10, 21, 23
Wash. Const. Article I, Section 22.....	1, 6

WASHINGTON STATE STATUTES

RCW 9.94A.500.....	19, 22
RCW 9.94A.525.....	19, 20
RCW 9.94A.530.....	22, 23
RCW 9A.08.010.....	11, 12, 14
RCW 9A.46.020.....	6

OTHER AUTHORITIES

Laws of 2008, Chapter 231, Section 2.....	22
WPIC 10.02 (2008 Edition).....	13, 14

ASSIGNMENTS OF ERROR

1. Mr. Atkins's harassment conviction violated his Sixth and Fourteenth Amendment right to notice of the charges against him.
2. Mr. Atkins's harassment conviction violated his Article I, Section 22 right to notice of the charges against him.
3. The Information was deficient because it failed to allege an essential element of felony harassment.
4. Mr. Atkins's harassment conviction violated his Fourteenth Amendment right to due process.
5. The trial court erred by giving Instruction No. 4.
6. The trial court erred by giving Instruction No. 5.
7. The trial court erred by giving Instruction No. 9.
8. The trial court's "to convict" instruction omitted an essential element of felony harassment and relieved the state of its burden of proof.
9. The trial court provided an erroneous definition of knowledge.
10. The trial court's instruction defining knowledge contained an improper mandatory presumption.
11. The court's instruction defining knowledge impermissibly relieved the state of its burden to establish each element of Assault in the Third Degree by proof beyond a reasonable doubt.
12. The trial judge failed to properly determine Mr. Atkins's criminal history and offender score.
13. The trial judge erred by adopting Finding 2.2 of the Judgment and Sentence.
14. The trial judge erred by sentencing Mr. Atkins with an offender score of five.

15. The state failed to allege or present evidence that Mr. Atkins had any criminal history.
16. The sentencing court erroneously included in the offender score offenses that had “washed out.”
17. The 2008 amendments to the SRA violate an offender’s Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal Information must set forth all essential elements of an offense. The Information in this case failed to allege that Mr. Atkins made a “true threat.” Must Mr. Atkins’s felony harassment conviction be reversed and the charge dismissed without prejudice?
2. A “to convict” instruction must set forth all essential elements of the charged crime. The court’s “to convict” instruction failed to require proof that Mr. Atkins made a “true threat.” Did the incomplete “to convict” instruction violate Mr. Atkins’s Fourteenth Amendment right to due process?
3. A jury instruction creates a conclusive presumption whenever a reasonable juror might interpret the presumption as mandatory. The trial judge instructed the jury that “Acting knowingly or with knowledge also is established if a person acts intentionally.” Did the court’s instruction defining knowledge create an unconstitutional mandatory presumption?
4. A sentencing judge may consider no more information than is admitted, acknowledged, or established at trial or at sentencing. The state did not allege or prove that Mr. Atkins had any prior convictions. Must the court’s finding (that Mr. Atkins had criminal history) be vacated?

5. Class C felonies are excluded from the offender score if the defendant spent five years in the community without committing additional offenses. The trial court's criminal history finding included a five-year period with no criminal convictions. Should the sentencing court have excluded Mr. Atkins's alleged prior Class C felonies because they had washed out prior to the commission of the current offense?

6. Under the Fifth and Fourteenth Amendments, an offender has a constitutional right to remain silent pending sentencing, and the state is constitutionally required to prove criminal history by a preponderance of the evidence. The 2008 amendments to the SRA permit the court to use a prosecutor's bare assertions as prima facie evidence of criminal history, and allow the court to draw adverse inferences from the offender's silence pending sentencing. Do the 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Philip Atkins with Harassment (felony) and Assault in the Third Degree. CP 15. The Information alleged:

...Harassment, which is a violation of RCW 9A.46.020 (1)(a)(i)&(b)... in that the defendant on or about August 31, 2008 in Lewis County, Washington, then and there without lawful authority, did knowingly and feloniously threaten to kill another, immediately or in the future, and the defendant's words or conduct placed another in reasonable fear that the threat would be carried out...
CP 15.

At the close of the evidence, the court gave a definition of harassment, as well as an elements instruction, that failed to include that it was a "true threat". Court's Instructions to Jury, No. 4, 5, Supp. CP. In a later instruction, the court defined a threat as "a statement or act [that] must occur in a context of [sic] under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk." Court's Instructions to Jury, No. 12, Supp. CP.

The court also gave the following definition of knowledge:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.
Court's Instructions to Jury, No. 9, Supp. CP.

The jury convicted Mr. Atkins of both counts. CP 5. At sentencing, the state proposed an order that included 4 alleged prior convictions without comment. RP (6/2/09) 1-5; CP 5-7. The defense attorney did not mention criminal history either, but did make a recommendation within what the state alleged was the proper sentencing range. RP (6/2/09) 3. The court, also without comment, signed the Judgment and Sentence that included the four alleged priors, sentencing Mr. Atkins within that range. RP (6/2/09) 4-6; CP 5-14. Mr. Atkins timely appealed. CP 3-4.

ARGUMENT

I. MR. ATKINS'S CONVICTION VIOLATED HIS SIXTH AMENDMENT RIGHT TO NOTICE AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

An essential element is "one whose specification is necessary to establish the very illegality of the behavior." *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). (citing *United States v. Cina*, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d

679 (1983). Felony harassment occurs when a person knowingly threatens to kill another and, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020. There is an additional, nonstatutory element: to avoid First Amendment violations, the state must prove the threat constitutes a “true threat” rather than idle chat.¹ *State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001).

A. The Information was deficient because it failed to allege that Mr. Atkins made a “true threat.”

The Sixth Amendment to the Federal Constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI. This right is also guaranteed to people charged in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948). A similar right is secured by the Washington State Constitution. Wash. Const. Article I, Section 22. All essential elements—both statutory and nonstatutory—must be included in the charging document. *Johnson*, at 147.

¹ Division I has decided that the requirement of a “true threat” is not an element of the offense, and need not be alleged in a charging document. *State v. Tellez*, 141 Wn.App. 479, 483-484, 170 P.3d 75 (2007). This is incorrect: a threat that is not a “true threat” is not illegal. Thus the existence of a “true threat” is essential “to establish the very illegality of the behavior.” *Johnson*, at 147. The Supreme Court has not adopted Division I’s position.

A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Kjorsvik*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Kjorsvik*, at 105-106. If the Information is deficient, no prejudice need be shown, and the case must be dismissed without prejudice.² *State v. Franks*, 105 Wn.App. 950, 22 P.3d 269 (2001).

Here, the state alleged that Mr. Atkins, acting “without lawful authority, did knowingly and feloniously threaten to kill another, immediately or in the future, and [by] words or conduct placed another in reasonable fear that the threat would be carried out...” CP 15. The Information did not allege that Mr. Atkins’s threat constituted a “true threat.” Accordingly, the allegations in the Information were not (by themselves) sufficient to charge a crime. *Williams, supra*. Because the Information was deficient, Mr. Atkins’s conviction must be reversed and the case dismissed without prejudice. *Kjorsvik, supra*.

² By contrast, if the missing element can be found by fair construction of the charging document, the appellant must show prejudice caused by any inartful phrasing. *Kjorsvik, supra*.

B. The court's "to convict" instruction omitted an essential element of the offense and relieved the state of its burden to prove a "true threat," in violation of Mr. Atkins's Fourteenth Amendment right to due process.

A "to convict" instruction must contain all elements essential to the conviction, and the reviewing court may not rely on other instructions to supply the missing element. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). This is so because "the jury treats the instruction as a 'yardstick' by which to measure a defendant's guilt or innocence." *Mills*, at 7.

The adequacy of a "to convict" instruction is reviewed *de novo*. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). If a deficient "to convict" instruction relieves the state of its burden to establish every element, the appellant is entitled to automatic reversal, regardless of whether the error is prejudicial or harmless. *State v. Seek*, 109 Wn. App. 876, 883, 37 P.3d 339 (2002); *see also State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).³

³ The only exception to this rule is where the element is uncontested. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002), *citing Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). If the element is conceded, the reviewing court must still apply the stringent constitutional harmless error test. *Brown*, at 339-340. Under that test, error is presumed to be prejudicial; to overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Gonzales Flores*, 164 Wn.2d 1, ___, 186 P.3d 1038 (2008); *Brown*, at 341.

In this case, the court's "to convict" instruction did not require proof that Mr. Atkins made a "true threat." Instruction No. 5, Court's Instructions to the Jury, Supp. CP. Nor did the preliminary instruction defining harassment include a "true threat." Instruction No. 4, Court's Instructions to the Jury, Supp. CP. Instead, the "true threat" requirement was outlined in the instruction defining "threat." Instruction No. 12, Court's Instructions to the Jury, Supp. CP. But the court may not rely on other instructions to supply a missing element. *Mills*, at 7.

The court's failure to include proof of a "true threat" as an essential element in the "to convict" instruction relieved the state of its burden to prove each element beyond a reasonable doubt. This violated Mr. Atkins's right to due process under the Fourteenth Amendment. Accordingly, automatic reversal is required.⁴ *Seek, supra*. Mr. Atkins's conviction must be vacated and the case remanded to the trial court for a new trial with proper instructions. *Seek, supra*.

⁴ The error cannot be ignored as "invited error," even though defense counsel proposed a similar "to convict" instruction. First, defense counsel's instruction differed from the one given in that it required proof that Mr. Atkins "acted without lawful authority." Defendant's Proposed Instructions, Supp. CP. This language arguably requires proof of a "true threat," since any threat that is not a "true threat" is protected by the First Amendment and thus is not "without lawful authority." Second, the error is not "invited error" because defense counsel apparently withdrew his proposed instruction in light of the court's decision to give Instruction No. 5 instead of the proposed instruction.

II. MR. ATKINS'S ASSAULT CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S KNOWLEDGE INSTRUCTION CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS UNDER THE LAW OF THE CASE.

Under the Fourteenth Amendment's Due Process Clause, criminal defendants are presumed innocent, and the government must prove guilt beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997).

A jury instruction that misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Jury instructions must be "manifestly clear," since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury.

State v. Savage, 94 Wn.2d 569, 573, 618 P.2d 82 (1980), citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58, 63, 768 P.2d 470 (1989). An instruction creates a conclusive presumption whenever “a reasonable juror might interpret the presumption as mandatory.” *State v. Deal*, 128 Wn.2d 693, 701, 911 P.2d 996 (1996).

The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820, 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

RCW 9A.08.010 (“General requirements of culpability”) defines the mental states used in the criminal code. Under certain circumstances, proof of one mental state can substitute for proof of a lesser mental state. Thus “[w]hen acting knowingly suffices to establish an element, such

element also is established if a person acts intentionally.” RCW

9A.08.010(2).

Here, the court’s instructions required the state to prove

That the defendant knew at the time of the assault that Deputy Mauerman was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties...

Instruction No. 7, Court’s Instructions to the Jury, Supp. CP.

Although not a statutory element of Assault in the Third Degree, this knowledge became an essential element of the offense under the “law of the case” doctrine. *See State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998).

The trial court’s instruction defining knowledge included the following language: “Acting knowingly or with knowledge also is established if a person acts intentionally.” Instruction No. 9, Court’s Instructions to the Jury, Supp. CP. The instruction did not place any limitation on the intentional acts that could establish the knowledge required under RCW 9A.08.010. Thus the jury could have interpreted Instruction No. 9 to mean that any intentional act—including the assault itself—conclusively established Mr. Atkins’s knowledge that Deputy Mauerman was a law enforcement officer performing official duties—even if he were, in fact, ignorant of Deputy Mauerman’s status.

Identical language in an instruction defining “knowledge” has previously been found to require reversal under the same circumstances. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.⁵ The trial court’s “knowledge” instruction informed the jury that “[a]cting knowingly or with knowledge also is established if a person acts intentionally.” *Goble*, at 202. This language was found to be ambiguous, in that the jury could believe an intentional assault established Mr. Goble’s knowledge, regardless of whether or not he actually knew the victim’s status as a police officer:

We agree that the instruction is confusing and ... allowed the jury to presume Goble knew Riordan’s status at the time of the incident if it found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew Riordan’s status if it found the assault was intentional. *Goble*, at 203.

WPIC 10.02 (the pattern instruction upon which Instruction No. 7 is based) has been revised in order “to more closely follow the statutory language.” Comment, WPIC 10.02 (2008 Edition). Under the new

⁵ In *Goble*, as here, knowledge that the victim was a law enforcement officer performing official duties was included in the “to convict” instruction and thus became an element under the law of the case. *Goble*, at 201.

instruction, “When acting knowingly [*as to a particular fact*] is required to establish an element of a crime, the element is also established if a person acts intentionally [*as to that fact*].” WPIC 10.02 (2008 Edition).

The change is explained as follows:

Clearly, the principle of inferring knowledge from intent is valid only if both mental states are being evaluated with respect to the same fact. Stated somewhat differently, knowledge about Fact A (the victim’s status) cannot be inferred from an intent about Fact B (committing an assault). For this reason, the instruction now includes bracketed phrases that make this point more directly. The bracketed phrases may be used depending on the evidence and arguments of a particular case.
Comment, WPIC 10.02 (2008 Edition).

As this comment demonstrates, the prior version did not adequately follow RCW 9A.08.010.⁶

The flawed language first criticized in *Goble* requires reversal in this case. A reasonable juror might interpret the language as creating a mandatory presumption, permitting conviction upon proof of any intentional act, even in the absence of knowledge. Since juries lack the tools of statutory construction, the trial court’s failure to give an

⁶ The rule set forth in *Goble* has been limited to crimes (such as the Assault Two charged in this case) that include more than one *mens rea* as an element in the “to convict” instruction. *State v. Gerdtz*, 136 Wn. App. 720, 150 P.3d 627 (2007). Furthermore, the problem created by the ambiguous language can be corrected by instructions that are “clear, accurate, and separately listed [sic].” *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007). However, the *Keend* court did not have the benefit of the 2008 amendments to the WPIC. Had the court considered *Keend* after the amendment, it may have reached a different result.

instruction that was manifestly clear requires reversal under the stringent test for constitutional error.

Constitutional error is presumed prejudicial. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Instructions with conclusive presumptions require a more thorough harmless-error analysis than other unconstitutional instructions. The reviewing court must conclude that the error was “unimportant in relation to everything else the jury considered on the issue in question...” *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled (in part) on other grounds by Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). In other words,

a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict...[I]t must then weigh the probative force of that evidence as against the

probative force of the presumption standing alone... [I]t will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue... is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.
Yates, at 403-405 (footnotes and citations omitted).

A court must examine the proof actually considered, and ask: [W]hether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict *resting on that evidence* would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said... that the presumption did not contribute to the verdict rendered.
Yates, at 403-405 (emphasis added).

Thus, a reviewing court evaluating harmlessness cannot rely on evidence drawn from the entire record “because the terms of some presumptions so narrow the jury’s focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed.” *Yates*, at 405-406.⁷

Here, the conclusive presumption required the jury to find Mr. Atkins acted with knowledge. Instruction No. 9, Court’s Instructions to the Jury, Supp. CP. The instruction provided no guidance as to what intentional acts could be considered a predicate for the presumed fact (that

⁷ In *Deal*, *supra*, the court applied the standard test for constitutional harmless error, without reference to *Yates v. Evatt*. *Deal*, at 703. Presumably, this was because the defendant in *Deal* testified and acknowledged the facts that were the subject of the conclusive presumption. *Deal*, at 703.

Mr. Atkins acted with knowledge). No limits were placed on what the jury could consider as predicate facts; under the instruction, jurors could presume knowledge from proof of *any* intentional act, including the assault itself.

The absence of any limitation makes the conclusive presumption here worse than any of the instructions considered in the Supreme Court cases outlined above. *See, e.g., Sandstrom*, at 512 (“the law presumes that a person intends the ordinary consequences of his voluntary acts”); *Morissette, supra* (intent to steal presumed from the isolated act of taking); *Francis v. Franklin*, 471 U.S. 307, 309, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (“[the] acts of a person of sound mind and discretion are presumed to be the product of the person’s will, but the presumption may be rebutted,” and “[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted”); *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (“a person ‘shall be presumed to have embezzled’ a vehicle if it is not returned within 5 days of the expiration of the rental agreement,” and “‘intent to commit theft by fraud is presumed’ from failure to return rented property within 20 days of demand”); *Yates*, at 401 (“‘malice is implied or presumed’ from the

‘willful, deliberate, and intentional doing of an unlawful act’ and from the ‘use of a deadly weapon.’”).

The lack of any limitation makes it impossible to determine what portions of the record the jury considered in deciding that Mr. Atkins acted with knowledge. Jurors could have focused on evidence of *any* intentional act, and disregarded all other evidence bearing on Mr. Atkins’s mental state. Because it is impossible to make the determination required by *Yates, supra*, it cannot be said that the error was harmless beyond a reasonable doubt.

Furthermore, even considering the entire record (contrary to the requirement under *Yates, supra*), reversal is required. A reasonable juror could have acquitted Mr. Atkins of the charged crime by deciding that he was ignorant of Deputy Mauerman’s status as a law enforcement officer performing official duties. Thus the error was not trivial, formal, or merely academic, and it cannot be said that the error was harmless beyond a reasonable doubt. *Lorang*, at 32. Because of this, Mr. Atkins’s assault conviction must be reversed and the case remanded for a new trial.

III. THE TRIAL JUDGE FAILED TO PROPERLY DETERMINE MR. ATKINS'S CRIMINAL HISTORY AND OFFENDER SCORE.

- A. The state failed to allege or prove that Mr. Atkins had any prior offenses, and the sentencing court included in the offender score offenses that had “washed out.”

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record...” RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). Prior offenses that are Class C felonies “wash out” of the offender score after the offender has spent five years in the community “without committing any crime that subsequently results in a conviction.” RCW 9.94A.525(2)(c).

An offender “cannot agree to a sentence in excess of that which is statutorily authorized.” *In re Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). In particular, an offender “cannot waive a challenge to a miscalculated offender score.” *In re Goodwin*, 146 Wn.2d 861, 873-874, 50 P.3d 618 (2002).

In this case, the prosecuting attorney did not allege that Mr. Atkins had any prior convictions, either in writing or orally on the record. RP (6/2/09) 1-5. Nor did the prosecuting attorney present any evidence of prior convictions. Despite this, the sentencing court entered a finding that Mr. Atkins had four prior felony offenses. Finding No. 2.2, CP 6-7. This finding is not supported by the record, and must be stricken.

Furthermore, even if the finding were correct, two of the prior felonies should not have been included in the offender score. The second-degree theft and the forgery charge both washed out under RCW 9.94A.525(2)(c), since Mr. Atkins had no convictions during the five years after his sentence was imposed for the forgery in 1993.

Mr. Atkins's sentence must be vacated, and the case remanded for a new sentencing hearing. At the new sentencing hearing, the state should not be permitted to present evidence establishing any criminal history, since it failed to even allege that Mr. Atkins had criminal history. *See Cadwallader*, at 878 (“[W]here the prosecution... does not even allege a necessary prior conviction...the defendant has no obligation to object and the State should not be allowed the remedy of an evidentiary hearing to correct its failure.”)⁸

⁸ Even if the prosecution had alleged the four offenses listed in Finding No. 2.2, it failed to allege any post-1993 convictions that would prevent the washout of the forgery and

In the absence of any criminal history, Mr. Atkins must be resentenced with an offender score of one.

B. The SRA, as amended in 2008, violates the Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *In re Detention of Post*, 145 Wn.App. 728, 758, 187 P.3d 803 (2008) (citing *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences from an offender's silence pending sentencing. *Mitchell*, at 328-329. Thus, for example, it is improper to imply lack of remorse from an accused person's presentencing silence. *Post*, at 758.

The state does not meet its burden to establish an offender's criminal history through "bare assertions, unsupported by evidence." *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). An offender's "failure to object to such assertions [does not] relieve the State of its

theft charges. As in *Cadwallader, supra*, it would thus be barred from presenting proof of any such subsequent convictions on remand.

evidentiary obligations.” *Ford* at 482. This rule is constitutionally based, and thus cannot be altered by statute; as the Supreme Court pointed out, requiring the offender to object when the state presents no evidence “would result in an unconstitutional shifting of the burden of proof to the defendant.” *Ford*, at 482.

In 2008, the legislature amended RCW 9.94A.500 and RCW 9.94A.530. *See* Laws of 2008, Chapter 231, Section 2. Under RCW 9.94A.500(1), “[a] criminal history summary relating to the defendant from the prosecuting authority... shall be prima facie evidence of the existence and validity of the convictions listed therein.” RCW 9.94A.500(1). Furthermore, the sentencing court may rely on information that is “acknowledged in a trial or at the time of sentencing,” and “[a]cknowledgment includes... not objecting to criminal history presented at the time of sentencing.” RCW 9.94A.530(2).⁹

These provisions result in the “unconstitutional shifting of the burden of proof to the defendant.” *Ford*, at 482. By requiring an offender to object to a prosecutor’s allegations, RCW 9.94A.500(1) and RCW

⁹ Under the prior version of the statute, a Statement of Prosecuting Attorney was insufficient to establish an offender’s criminal history. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009).

9.94A.530(2) violate the Fifth and Fourteenth Amendments to the U.S. Constitution. *Ford, supra.*

Mr. Atkins should have been sentenced with an offender score of one, because the prosecutor failed to prove the existence of any criminal history. Instead of sentencing him with an offender score of one, the trial judge adopted the prosecutor's oral assertion regarding the standard range and sentenced Mr. Sherman with an offender score of five. CP 7. By accepting the prosecutor's statement, the court relied on "bare assertions" of criminal history in violation of *Ford, supra.* Because the prosecutor failed to prove Mr. Atkins's criminal history, the judgment and sentence must be vacated and the case remanded to the trial court for resentencing. *Ford, supra.*

CONCLUSION

For the foregoing reasons, Mr. Atkins's convictions must be vacated. The harassment charge must be dismissed without prejudice, and the assault charge must be remanded to the superior court for a new trial. In the alternative, if the convictions are not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on September 25, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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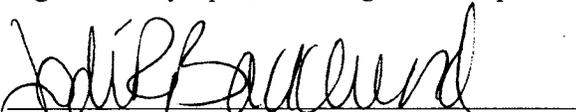
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 25, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 25, 2009.



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