

No. 39380-8

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

PHILLIP VAN ATKINS,

Appellant.

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STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II

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Appeal from the Superior Court of Washington for Lewis County

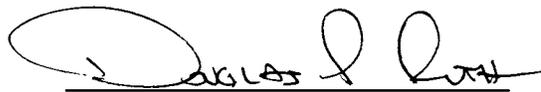
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**Respondent's Brief**

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## STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

## ARGUMENT

### **I. THE DEFINITION OF A TRUE THREAT IS NOT AN ESSENTIAL ELEMENT OF A CRIME AND DOES NOT NEED TO BE INCLUDED IN AN INFORMATION OR A "TO CONVICT" INSTRUCTION.**

In his first argument, the defendant contends that the trial court erred in failing to include a "true threat" "element" in the "to convict" instruction. Moreover, he claims that the charging document was deficient because it did not also include this "true threat" element. Both arguments depend upon the incorrect premise that a "true threat" is an element of the crime of harassment. As this court found in State v. Tellez, 141 Wn.App. 479, 170 P.3d 75 (2007), it is not.

The term "true threat" refers to the type of "threat" that may be punished without infringing upon the First Amendment. The "true threat" definition delineates what is protected speech from what is unprotected speech in a criminal context. The "true

threat" language defines the "threat" element, but the language is not itself an element, and thus, the language neither needs to be included in the "to convict" instruction or a charging document.

**a. The Charging Document and Jury Instructions.**

By amended information the defendant was charged as follows:

...the Prosecuting Attorney for Lewis County accuses the defendant of the crime of Harassment, which is a violation of RCW 9A.46.020(1)(a)(i)&(b), the maximum penalty for which is 5 years in prison and a \$10,000 fine, that 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; against the peace and dignity of the State of Washington. CP 15-17.

The court gave a "to convict" instruction that read as follows:

To convict the defendant of the crime of harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 31, 2008, the defendant knowingly threatened to kill Arthur Steele immediately or in the future.
- (2) That the words or conduct of the defendant placed Arthur Steele in reasonable fear that the threat to kill would be carried out;
- (3) That the defendant acted without lawful authority;  
and

(4) That the threat was made or received in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any of the elements, then it will be your duty to return a verdict of not guilty. CP26.

The court gave the following definitional instruction:

"To be a threat, a statement or act must occur in a context of 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 treat rather than as something said in jest or idle talk." CP 33.

**b. The Elements of the Crime.**

A person commits the crime of felony harassment if he or she, with a prior qualifying conviction of harassment, knowingly threatens to cause bodily injury immediately or in the future to the person threatened, and the words or conduct place the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a). The statute sets out all the elements of the crime.

The statute does not require that the threats constituting harassment be "true threats." This requirement is a creation of judicial interpretation of the constitution. Through defining the

constitutional limits of the harassment statute, the Washington Supreme Court has stated that to avoid unconstitutional infringement on protected speech, the harassment statute must be read as prohibiting only "true threats." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001); State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001). A "true threat," according to the Court, is

"a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Kilburn, 151 Wn.2d at 43.

Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, 151 Wn.2d at 44. The relevant question is whether a reasonable person in the defendant's place would foresee that the listener would interpret the statement, in context, as a serious threat. Kilburn, 151 Wn.2d at 46.

Here, the court gave an instruction properly incorporating the definition of what constitutes a "true threat." Still, the defendant contends that the court's instructions were deficient because they did not inform the jury that proof of a true threat is an element of the crime of felony harassment. There is no support for this contention.

The Supreme Court holdings in *Williams, J.M.*, and *Kilburn* only required that the criminal penalty contained in RCW 9A.46.020(1)(a)(i) be limited to punishing “true threats” and not protected speech. These holdings did not establish this limitation as an element.

A case regarding a similarly worded statute as the felony harassment law is a good illustration of the true scope of the opinions holding that trial courts must provide a “true threat” instruction. In *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006), the Supreme Court held that the reach of RCW 9.61.160(1), criminalizing bomb threats, must be circumscribed by the “true threat” definition. *Johnston*, 156 Wn.2d at 359, 363. Specifically, the Court held that the jury instructions offered in that case “were erroneous because they did not *define* ‘true threat.’” *Johnston*, 156 Wn.2d at 364, 366 (emphasis added). Consistent with *Kilburn*, *J.M.*, and *Williams*, the Court iterated that when trial courts define a “threat” to the jury, they must use language that will limit the scope of the conduct prohibited to authentic, meaningful threats. Because the trial court had not done so when trying Johnston, the Supreme Court remanded the case and directed the trial court to instruct the

jury upon re-trial on the meaning of a "true threat." Johnston, 156 Wn.2d at 366.

It is apparent from this holding, and from the holdings of the other "true threat" cases, that the Supreme Court never intended that trial courts view the "true threat" limitation as an actual separate element. None of the opinions indicate that the "true threat" language must be included in the "to convict" instruction for felony harassment or any other statute that criminalizes threatening language. In fact, this proposition was specifically rejected by this court in one case, *Tellez*, supra.

In *Tellez*, the defendant was convicted of felony telephone harassment based on a threat to kill his girlfriend. For the first time on appeal, the defendant made the same claim that Atkins makes here: that the definition of a "true threat" is an essential element of the crime that must be included in the "to convict" instruction.

Tellez, 141 Wn.App. at 481. As in this case, the jury in *Tellez* was given a separate instruction defining a "true threat."

In accordance with State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006), this court held that although the jury must be instructed as to what constitutes a "true threat," in order to protect a defendant's First Amendment rights, "the true threat concept itself

is not an essential element" of such threatening language crimes. Tellez, 141 Wn.App. at 483-84. Therefore, giving a separate definitional instruction informing the jury of what constitutes a "true threat" is sufficient; the definition need not be in the "to convict" instruction as well. *Id.*

Mr. Atkins rejects this holding. Citing *State v. Williams*, he concludes that proof that a threat constitutes a "true threat" is a non-statutory element of felony harassment. He argues that the definition of a true threat is an essential element because it is essential "to establish the very illegality of the behavior." Appl. Br. at 6 (citing *State v. Johnson*, 119 Wn.2d 143,147, 829 P.2d 1078 (1992)). But the *Williams* Court did not so hold. To confine the crime within First Amendment boundaries, the Court narrowed the scope of the statute. But this is different from reading into the crime an additional element to be proved by the state. After *Williams* and *Kilburn* the components of felony harassment had not changed. These opinions merely circumscribed the scope of the crime by the prohibition of the First Amendment.

In contrast are cases through which the Supreme Court read into the law or found within the law's text non-statutory elements, as the Supreme Court did in *State v. Boyer*, 91 Wn.2d 342, 588 P.2d

1151 (1979). In *Boyer* the Court held that guilty knowledge is an implicit element of the crime of delivery of a controlled substance. *State v. Boyer*, 91 Wn.2d at 344. The Court identified this non-statutory element based upon statutory interpretation, legislative history, and the nature of the crime. See *Boyer*, 91 Wn.2d at 344; see also *State v. Martin*, 73 Wn.2d 616, 625, 440 P.2d 429 (1968), cert. denied, 393 U.S. 1081, 89 S.Ct. 855 (1969) (finding that the crime of hit and run requires the mental element of knowledge because "it is inconceivable that the legislature intended that punishment would be imposed...if the operator of the vehicle was ignorant of the... accident."). The focus of the Supreme Court in *Williams* and *Johnston* was much different. In those cases, the Supreme Court was not concerned with identifying the actus and mens reus components of the crime of felony harassment; they were simply concerned with how application of those components impacted First Amendment protections. They addressed this concern by invoking the practice of limiting a statute's scope through instruction rather than invalidating the statute. *State v. Pauling*, 149 Wn.2d 381, 386, 69 P.3d 331 (2003). Thus, the requirement that trial courts use a "true threat" instruction was imposed as a means to cure the constitutional infirmity of the crime,

not to provide the jury with "a yardstick by which to measure a defendant's guilt or innocence." Appl. Br. at 8 (*quoting State v. Mills*, 154 Wn.2d 1, 7 109 P.3d 415 (2005)). The *Kilburn* court firmly had this distinction in mind when it stated:

"Because of the First Amendment implications, a conviction for felony harassment based upon a threat to kill requires that the State satisfy both the First Amendment demands - by proving a true threat was made - and the statute, by proving all the statutory elements of the crime. *Kilburn* 151 Wn.2d at 54.

Mr. Atkins confuses the *Williams* and *Johnston* courts' manner of addressing the court's first amendment concerns with a judicial search for the characteristics of a crime.<sup>1</sup> His argument is the same one made and rejected in *Tellez*. See also *State v. Schaler*, 145 Wn.App. 628, 186 P.3d 1170 (2008), *review granted*, 165 Wn.2d 1015, 199 P.3d 411 (2009). And he provides no reason for this court to reconsider that holding. This court should deny his

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<sup>1</sup> A similar distinction can be found in *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981), which held that "unwitting possession" is an affirmative defense to the crime of possession of a controlled substance. In *Cleppe*, the Court found that the harshness of the legislature's decision not to require knowledge of possession of a controlled substance to be an element of the crime required a judicial response. The Court, however, did not create a non-statutory element where there was none. *Cleppe*, 96 Wn.2d at 380 (legislative intent that knowledge was not an element was clear from the legislature deleting the words "knowingly" and "intentionally" from the bill). Instead, it recognized the affirmative defense of unwitting possession. The "true threat" instruction is a similar response.

claims that both the charging document and the "to convict" instruction were deficient.<sup>2</sup>

**C. Any Error In Failing To Include A Definition Of A "True Threat" In The Felony Harassment "To Convict" Instruction Is Harmless.**

Turning specifically to the court's jury instructions, if the true threat definition is an element of felony harassment then the failure to include that definition in the "to convict" instruction is harmless. In order for a constitutional error to be harmless, "it must appear beyond a reasonable doubt that the error did not contribute to the ultimate verdict." *State v. Berube*, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003). Omitting an element of the charged offense or misstating the law in a jury instruction is harmless if the record establishes beyond a reasonable doubt that the erroneous instruction did not contribute to the jury's verdict. *Thomas*, 150 Wn.2d at 844 (citing *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827 (1999)). The omission of an element in an instruction is harmless if uncontroverted evidence establishes the omitted

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<sup>2</sup> The newest criminal pattern jury instructions for criminal harassment, issued in July 2008, are consistent with the holdings of *Tellez* and *Schaler*. See 11 Wash. Pattern Jury Instructions: Criminal 36.06--09 (2008). Had the Court in *Johnston* held that the "true threat" language is actually an element of the crime of harassment, then the pattern instructions approved by the Court two years after *Johnston* are incorrect. It is unlikely the Court would approve instructions that conflict with their own decision.

element. *Id.* Mr. Atkins' claim of error regarding the "to convict" instruction meets these standards.

First, the failure to include the "true threat" delineation in the "to convict" instruction did not affect the verdict because the instruction still required the jury to find that the defendant delivered a "true threat." The delivered instruction stated as its third element the state's obligation to prove "that the defendant acted without lawful authority..." Supp. CP 26. In Mr. Atkins' appellate brief, he explains the relevancy of this phrase: "acted without lawful authority" "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." Appl. Br. n. 4. Although this statement is in reference to the same phrase in the brief he proposed at trial, the language in the court's instruction has the same significance. The jury was, therefore, called upon by the court's instruction to prove each element of the crime beyond a reasonable doubt.<sup>3</sup>

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<sup>3</sup> The defendant argued that he did not invite error because his proposed "to convict" instruction differed from the state's instruction. Since this is not the case, his claim is invited error and should be disregarded on this basis alone. argues that we should not review this claim because Ulbricht proposed this same instruction and thus invited the error. We agree. See *State v. Studd*, 137 Wn.2d 533, 546-49, 973 P.2d 1049 (1999) (defendant's request for an unconstitutional WPIIC instruction precludes review).

The failure to include a "true threat" definition in the "to convict" instruction is harmless, in any event, because it is clear beyond a reasonable doubt that the jury would have found that Mr. Atkins made a true threat based on the facts of the case. The failure of the state to include the true threat definition in the elemental instruction did not control the verdict. From the record, it would be apparent to any reasonable jury that Mr. Atkins' threats were authentic, purposeful and meaningful. While Mr. Atkins and the victim, Mr. Steele, were friends, it is clear that Mr. Atkins' threats were not friendly jokes. Initially, Mr. Atkins was aggressively horseplaying with Mr. Steele, including hitting him with a stick after Mr. Steele asked him to stop. 4/24/09 RP 52-53. At some point, the horseplay turned more serious. And after Mr. Steele warned Mr. Atkins in front of his camp not to touch his hat again, Mr. Atkins became hostile. He directly and "extremely aggressive[ly]" stated to Mr. Steele that "if you ever turn your fucking back on me again, I'll kill you, you mother fucker, do you hear me, I'll kill you." 4/23/09 RP 36. He repeatedly stated "I'll kill you" to Mr. Steele in a progressively more aggressive manner until he was spitting the words out. Id. he told Mr. Steele he would kill him 12-15 times. 4/24/09 RP 55; 82. Mr. Steele finally told him to

go to his own camp, and Mr. Atkins continued to scream at Mr. Steele as he left, "don't you ever sleep because I'm going to kill you." 4/23/09 RP 37

Later that same evening, Mr. Atkins again repeatedly screamed threats at Mr. Steele from near his camp. He told him he would "fucking kill" him, that he was "a dead man," and "don't go to sleep, mother fucker." 4/23/09 RP 38; 57 4/24/09 RP 57. Mr. Steele, his wife, and his friends were concerned enough by the threats to consider leaving the campsite early, and finally sent Mrs. Steele to Packwood to call 911. While she was away, Mr. Steele and his friend hid in the forest. 4/23/09 RP 41-42.

There can be no misconception regarding Mr. Atkins' statements to Mr. Steele. The record provides substantial evidence that Mr. Atkins' threats were not jokes or idle talk. He made the statements over a long period of time and in a hostile manner, he was in Mr. Steele's face. 4/23/09 RP 81. He was angry and belligerent while he was saying them. He scared Ms. Steele and his friend. 4/23/09 RP 37-38; 83. With this record, any error that is due to the true threat instruction being separate from the to convict instruction was harmless.

#### **D. The State's Information Adequately Charged Mr. Atkins For Felony Harassment.**

Turning to the state's information, Mr. Atkins' argument also fails as applied to the information both because proof of a "true threat" is not an element of felony harassment, and because the information adequately notified him that his threat had to be a "true threat" under the law. The state's information was sufficient to charge the crime.

When the sufficiency of an information is first challenged on appeal, a court construes the information "quite liberally." State v. Hopper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). To determine if it affords the accused adequate notice of the charge against him, courts apply a two-prong test: (1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so (2) can the defendant show he or she was actually prejudiced by the in artful language. State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991).

Applying this test, it is not "necessary to use the exact words of a statute in a charging document; it is sufficient if words conveying the same meaning and import are used." Kjorsvik, 117 Wn.2d at 108 (footnote omitted). The inquiry is whether the elements appear "in any form, or by fair construction can be found

in this information." *Id.* " 'A court should be guided by common sense and practicality in construing the language. Even missing elements may be implied if the language supports such a result.' " *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (quoting *Hopper*, 118 Wn.2d at 156); see also *Kjorsvik*, 117 Wn.2d at 110 (intent to steal element of robbery fairly implied from description of a forceful unlawful taking).

In the present case, the defendant was charged that "without lawful authority" he did "knowingly and feloniously" threaten to kill another and his words placed "another in reasonable fear that the threat would be carried out..." CP 15-17. The defendant clearly had sufficient notice that he was charged with making threats that were "true threats" i.e. not ones said in jest, idle talk, or political argument. Employing a liberal reading of the charging language, a fair construction of the information satisfies the concept of "true threats." The charging language both alleged that Mr. Atkins knowingly and intentionally threatened to kill another and that the receiver of the threats understood those threats to be actual threats of harm. See *State v. Nieblas-Duarte*, 55 Wn.App. 376, 381, 777 P.2d 583 (1989) ("feloniously" means with intent to commit a crime). Since "a reasonably foreseeable response from the listener

and an actual reasonable response should be the same," the charging document gave Mr. Atkins sufficient notice of the charges against him to prepare an adequate defense. *Kilburn*, 151 Wn.2d at 43 (quoting *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir.2002)); see also, *U.S. v. Howell*, 719 F.2d 1258, 1261 (1983), *cert denied*, 467 U.S. 1228 (charging document that left out "true" to describe threat was sufficient to apprise defendant of the charge against him and to avoid exposing him to the risk of double jeopardy.)

Finally, Mr. Atkins fails to satisfy the second prong of the *Kjorsvik* test, demonstration of prejudice. He does not establish how his defense suffered from the language of the information. The state suggests it did not. Whatever distinction there may be between the charging language and the definition of a true threat it is sufficiently minor not to have thwarted Mr. Atkins' defense. Mr. Atkins did not offer a defense that his statements were not authentic threats, and, as already established, the record contains abundant evidence that Mr. Atkins' threats were true ones. The defendant's conviction for felony harassment should be affirmed.

**II. IT WAS HARMLESS ERROR FOR THE TRIAL COURT TO DELIVER AN INSTRUCTION EQUATING INTENTIONAL ACTION WITH KNOWLEDGABLE ACTION.**

Atkins next asserts that the lower court erred in instructing the jury that "acting knowingly or with knowledge ... is established if a person acts intentionally. Relying on State v. Goble, 131 Wn.App. 194, 126 P.3d 821 (2005), Atkins claims that the last sentence of Instruction No. 9 is a misstatement of the law and creates a mandatory presumption.<sup>4</sup> His argument is without merit.

In Goble, this Court, in a 2 to 1 decision, found that the instruction Atkins challenges was confusing to the jury. The case also regarded a third degree assault charge, but in Goble the defendant testified that he had not realized the person he assaulted was a police officer. Goble, 131 Wn.App. at 201. Several witnesses supported his account. In addition, a few days after the incident, Goble apologized to the deputy explaining that he had not recognized who the officer was at the time. Goble, 131 Wn.App. at 197-98. During deliberations, the jury sent out a note indicating that they did not understand the "knowledge" instruction.

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<sup>4</sup> The Washington Supreme Court accepted review of two similar, "conclusive presumption" issues regarding the knowledge instruction (former WPIC 10.02). In both cases - State v. Sibert, 135 Wn.App. 1025 (2006), *review granted*, 163 Wn.2d 1059 (2008) and State v. Schaler - the defendant makes almost identical arguments as are presented in Atkins' appeal. The Supreme Court has heard oral arguments in both cases.

Based on this record, this court determined first, that the challenged instruction relieved the State of the burden of proving that Goble knew the deputy's status as a law-enforcement officer. Goble, 131 Wn.App. at 203. Because there was credible evidence that Goble acted intentionally in assaulting the person approaching his grandson, but did not have knowledge that person was an on-duty police officer, the instruction allowed the jury to find that in acting intentionally he had knowledge the person he assaulted was an officer. Id. The jury's question indicated that it was confused by the instruction and underscored the possibility that the instruction might be the cause.

Second, this court found that the trial court's use of the "knowledge" instruction was not harmless error. Id. To come to this conclusion, the court examined the conflicting testimony addressing whether Goble was awareness of who he was attacking. This court concluded that the evidence of Goble's knowledge was not sufficiently strong to hold that the instruction was harmless.

While the State believes the *Goble* decision was fact-specific, it acknowledges that it governs resolution of the assignment of error presented by Mr. Atkins. The knowledge

instruction provided in *Goble* is the same one provided at Mr. Atkins' trial, and in both cases the state's "to convict" instruction contained the unnecessary element that the defendant knew the assault victim was a law enforcement officer.

The *Goble* holding does not, however, control the outcome of the harmless error analysis in this case. The *Goble* opinion does not state that the language at issue is per se a misstatement of the law, or that it per se violates due process by relieving the state of its burden of proof. Moreover, the facts that justified the court's harmful error decision in *Goble* are not present in the instant case. Here, there was only minimal evidence that Mr. Atkins was unaware of his victim's status as an officer at the time of the assault. Indeed, Mr. Atkins' defense was essentially that no assault occurred, that the injuries were accidental. His witnesses indicated that it was the officers' aggression that caused the contact and the injuries. But they were aware that these officers were present in their official capacity. So, his defense was not that he lacked knowledge. His arguments did not even implicate the question of whether he had knowledge of the officer's status. And, the jury did not indicate any confusion applying the knowledge instruction. In these respects, the record in the present case differs markedly from

that in *Goble* and justifies further analysis of the harm caused by the state again using this instruction in a felony assault case.

As previously noted, a jury instruction that omits an element of a charged offense or misstates the law does not necessarily require reversal if the state shows that the error was harmless. Neder, 527 U.S. at 9; Thomas, 150 Wn.2d at 844. A court may excuse an instructional error if the record establishes beyond a reasonable doubt that the erroneous instruction did not contribute to the jury's verdict. Id. Reversal is necessarily warranted only when such an error “render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Id. Here, the evidence of the defendant's knowledge strongly weighs in favor of excusing the state's error.

The record is clear that Mr. Atkins was aware of the victim's status as a sheriff's deputy prior to the assault. The deputies arrived in a standard patrol car with an insignia on the side and a light bar on top of the vehicle. 4/23/09 RP 114, 160. Both officers were dressed in recognizable uniforms with badges and insignias on them. 4/23/09 RP 115; 160. Five witnesses testified that when the deputies were outside Mr. Atkins' trailer the officers loudly announced that they were from the Lewis County Sheriff's

Department. 4/23/09 RP 45, 89,119,165; 4/24/09 RP 63. Deputy Mauermann used a "very loud, commanding voice." 4/23/09 RP 166. Mr. Atkins' father recalled hearing the officers state, "come out now with your hands up or you're going to get tased." These statements were repeated several times – 12 to 15 times – over a five minute period and it is clear that Mr. Atkins heard the announcements. He was not asleep. In response to each call, Mr. Atkins yelled "at the top of his lungs," "fuck you." 4/23/09 RP 45, 89. Inside the trailer, his father stated, "Philip, Sheriff's Office, sounds like Sheriff's Office," or something similar. 4/23/09 RP 166.

Later, once Mr. Atkins came to the trailer's door and the deputies and Mr. Atkins were facing each other, the officer's announcements were reinforced by a deputy informing Mr. Atkins that he was under arrest. 4/23/09 RP 128. Mr. Atkins' father recalled that the officers again stated that Mr. Atkins would be tased if he didn't comply. 4/24/09 RP 112. Mr. Atkins acknowledged this statement with the reply, "what for...," indicating he understood that the person was a law enforcement officer. 4/23/09 RP 128. In contrast, at no place in the record is there any evidence supporting that Mr. Atkins was confused about the identity of the officers. He did not inquire who they were or question their

authority. There was no testimony that he later acted surprised when he discovered they were law enforcement officers. After he was tased, he merely made threats and told the deputies to fuck themselves. 4/23/09 RP 132-134.

The defendant was equally visually aware that the target of his blow was a deputy. Although it was night, the deputies had illuminated the defendant's trailer with their patrol car spot light. 4/23/09 RP 119. After the trailer door was opened, Atkins was facing the officers, discussing with them his need to put on his boots before exiting the trailer. 4/23/09 RP 126. He was standing in the trailer door looking directly at them, only a few feet away. 4/24/09 RP 3, 81; 4/23/09 RP 127-128;. The deputies were on at the edge of the door and speaking directly to him. 4/24/09 RP 81. This conversation lasted between 1 ½ to 3 minutes. 4/23/09 RP 126-127. The officers' uniforms were certainly visible to Mr. Atkins during this time. One was in the traditional uniform of county deputies, the other, the victim of Mr. Atkins assault, was in a green jump suit with a star and his name sewn into it. 4/23/09 RP 160. The deputies were each holding a taser. 4/23//09 RP 171. Mr. Atkins had sufficient time and opportunity to appreciate the circumstance and recognize the identities of the officers. He clearly

saw them well enough to land a blow on one and knock the flashlight out of the hand of the other. 4/23/09 RP 128-29. Even Mr. Holten, a defense witness, stated that he recognized the officers' uniforms "not very long" after he first saw the deputies at the trailer. 4/29/09 RP at 79-80. And Mr. Atkins' father knew that officers were at the door of the trailer. 4/23/09 RP 143.

When viewed in the light of this evidence, the knowledge instruction certainly had no bearing upon Mr. Atkins' conviction and the error was harmless beyond a reasonable doubt. The record here is distinguishable from the record in *Goble* where the defendant stated he didn't recognize the man he assaulted as an officer. In that case, an independent witness described the person who ran out of the crowd as wearing green from head to toe, but she did not recognize him as a law enforcement officer at the time. *Id.* This witness and another stated that *Goble* reacted to a man running out of a crowd toward his grandson. *Goble*, 131 Wn.App. at 198. The defendant's action was possibly a reflex motion. The witnesses' account corresponded with the officer's testimony that as he passed the defendant, *Goble* reached out and grabbed him by the throat. *Id.*

Mr. Atkins' crime occurred over a longer period of time and the officer was more visible to Mr. Atkins than the officer Goble assaulted. Mr. Atkins did not reflexively react to someone who he thought was threatening someone he knew. He, instead, had several minutes to identify the officers and to appraise the situation. Unlike in *Goble*, the confrontation was characterized by law enforcement procedure and was orderly, up until Mr. Atkins assaulted the deputy. It was not a charged, unruly atmosphere that existed at the time of the Goble assault. And although the record contains some conflicting testimony, at the time that Mr. Atkins swung his boot, all witnesses were aware that the object of his blow was a sheriff's deputy. Thus, the evidence is supportive, beyond a reasonable doubt, of Mr. Atkins knowledge of the deputy's status as a law enforcement officer.

This analysis, however, does not resolve Mr. Atkins' challenge. Mr. Atkins disputes not only that the record supports that the instructional error was harmless, but challenges the analysis employed to arrive at such a conclusion. He claims that the *Neder* harmless error analysis is insufficient to determine the harmfulness that results from employing a mandatory presumption. He argues that the Supreme Court's holding in *Yates v. Evatt*, 500

U.S. 391, 111 S.Ct. 1884 (1991) *overruled on another ground*,  
Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991) requires that  
this court make additional inquiries prior to applying the Neder  
harmless error test. However, conducting these examinations is  
ultimately futile, he contends, since it is impossible to determine  
harmlessness beyond a reasonable doubt when a trial court  
employs the instruction challenged here. Employing this argument,  
Mr. Atkins functionally claims that use of the former 10.02 WPIC is  
not only a per se error, but is one that is inherently harmful beyond  
a reasonable doubt. This argument is flawed in its application and  
its conclusion.

The *Yates* opinion addressed an issue identified by the  
Supreme Court in *Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct.  
969, 976 - 977 (1983) several years before issuing the *Yates*  
holding:

"An erroneous presumption on a disputed element of the  
crime renders irrelevant the evidence on the issue  
because the jury may have relied upon the presumption  
rather than upon that evidence. If the jury may have  
failed to consider evidence of intent, a reviewing court  
cannot hold that the error did not contribute to the  
verdict. The fact that the reviewing court may view the  
evidence of intent as overwhelming is then simply  
irrelevant." Connecticut, 460 U.S. 85-86.

To address this difficulty in judging harmless error, the *Yates* court adopted a specific standard for weighing the impact of a mandatory presumption. A reviewing court must find that use of the mandatory presumption "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates*, 500 U.S. at 403. In other words, the court must make a "judgment about the significance of the presumption to reasonable jurors, when measured against the other evidence considered by those jurors independently of the presumption." *Yates*, 500 U.S. at 404.

To apply this standard, a court must first "ask what evidence the jury actually considered in reaching its verdict." *Yates*, 500 U.S. at 404. This question is answered by analyzing the instructions given and applying "that customary presumption that jurors follow instructions and, specifically, that they consider relevant evidence on a point in issue when they are told that they may do so." *Id.*

Second, the reviewing court must "weigh the probative force of that evidence as against the probative force of the presumption standing alone." *Yates*, 500 U.S. at 404. It is not sufficient to simply establish that

"the jury considered evidence from which it could have come to the verdict without reliance on the presumption.

Rather, the issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption." *Id.*

The reviewing court must approach this inquiry by "asking whether 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."

Yates, 500 U.S. at 405.

Stated succinctly, the inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081 (1993). "A reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt beyond a reasonable doubt."

Sullivan, 508 U.S. at 281 (*citing Yates*, 500 U.S. at 402-406).

Mr. Atkins applies the *Yates* analysis to the instruction delivered at his trial since he characterizes them as creating a mandatory or conclusive presumption. But, in fact, the instruction, which is found in RCW 9A.08.101(2), does not do so. Contrary to Mr. Atkins' assertion, the instruction does not mandate that the jury

presume knowledge given a set of predicate facts. Rather, the instruction is merely a definition or description of what qualifies as knowledge. RCW 9A.08.101(2) instructs the jury that a finding by them that the defendant acted intentionally includes a finding that the defendant, by definition, acted also with knowledge. This is simply a statement that a finding of intent includes the lesser mental element of knowledge. This is true as a matter of definition, logical probability, and of human thought. Any time a person acts with intent, he or she has knowledge of his or her actions.

Viewed in this way, the instruction does not relieve the State from proving beyond a reasonable doubt that a defendant acted knowingly. By law and according to the actual definitions of the words a finding of intent is necessarily a finding of knowledge. State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980) (intentional acts are, as a matter of law, knowing acts); State v. Woolworth, 30 Wn.App. 901, 905, 639 P.2d 216, 218 (1981) (jury finding that the defendant purposefully had sexual contact with the victim established that the contact was knowingly sexual). Thus, the instruction does not take from the jury its fact-finding function of establishing each element of the crime beyond a reasonable doubt

and the *Yates* analysis is unnecessary to protect the jury's autonomy.

Regardless, the trial court's use of the instruction was harmless even when analyzed according to the *Yates* formula. The same result is reached when this stricter analysis is applied to the present facts: the outcome of the trial was not undermined by the error. The additional inquiry demanded by the *Yates* opinion does not change the conclusion that there exists "a reasonable probability" that the outcome of the trial would not have been different had the trial court struck the challenged instruction. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

The first step in the *Yates* analysis is "to ascertain from the trial court's instructions whether the jurors, as reasonable persons, would have considered the entire trial record before looking to that record to assess the significance of the erroneous presumption." *Yates*, 500 U.S. at 406. In *Yates*, the Court reviewed jury instructions in a murder trial that created a mandatory presumption for malice. The instructions charged the jury that "malice is implied or presumed... from the intentional doing of an unlawful act without any just cause or excuse." *Yates*, 500 U.S. at 397. Alternatively, the trial court instructed the jurors that "...malice is implied or

presumed from the use of a deadly weapon." *Id.* In response, the Supreme Court analyzed whether the jury considered evidence independent of the predicate facts -- the unexcused and intentional doing of an unlawful act and the use of a deadly weapon. The court concluded that the jury did look to all the facts in the record. *Yates*, 500 U.S. at 408-09. It based this conclusion on both the fact that evidence in the record rebutting malice "left the jury free to look beyond the unlawful act presumption and to consider all the evidence on malice" and that the "jury was instructed to consider all the evidence, not just the presumption itself." *Id.*

The same considerations apply here. As in *Yates*, the record reveals some evidence rebutting Mr. Atkins' knowledge of his victim's position. One witness to the altercation testified that he did not initially recognize the officers due to the brightness of their flashlights. 4/24/09 RP at 83. Another witness also stated he initially did not recognize that the men outside the trailer were officers and disputed that the officers had identified themselves. 4/24/09 RP 109-10. And as in *Yates*, the jury too was instructed by the trial court to consider all the admitted evidence. Supp. CP 20.

In addition, there are considerations particular to the facts of this case that also support a finding that the first *Yates* criterion is

met by these facts. First, the trial court delivered the disputed instruction along with other instructions that ensured that the jury properly considered the knowledge element of third degree assault. In particular, the trial court instructed the jury on the standard WPIC meaning of knowledge. This instruction directed them to employ the more traditional definition of knowledge in determining whether Mr. Atkins committed the crime. See Supp. CP 30. The first two paragraphs of this instruction provide a recognizable and comprehensible test for whether a person has "knowledge." See State v. Scott, 110 Wn.2d 682, 691-92, 757 P.2d 492 (1988). This instruction was also provided separately from the "with intent" instruction. Thus, the jury had available to them a distinct and clear test for determining whether Mr. Atkins was aware or had information implying he was aware that the person he faced was an officer. See Supp. CP 30, Instruc. No. 9.

Looking at the other side of the coin, the disputed instruction created a much less attractive tool for the jury to employ to determine knowledge. For the jury to use the presumption to conclude that Mr. Atkins had knowledge of the official capacity of the victim it would have had to relate Mr. Atkins' intentional use of his boot against Deputy Mauermann to Mr. Atkins' knowledge of the

deputy's official status. Or, according to the defendant's argument, relate his intentional harassment of Mr. Steele to his later knowledge of the deputy's status. Or, relate some other equally disconnected intentional act to Mr. Atkins' knowledge. It is unlikely that twelve reasonable jurors would have viewed the evidence in this way.

In another case on appeal, Mr. Atkins' appellate counsel has described the presumption as "nonsensical" when applied to crimes "where proof of a higher mental state is meaningless." Appl. Br., *State of Washington v. Richard Sibert*, No. 33373-2-II at 4. This conclusion applies to the current case as well. Because there is no logical connection between one's intent to attack a person and the person's knowledge about the target of that assault, it is hard to perceive how a jury would have applied the disputed instruction to the case facts. A jury would have trouble articulating how the presumption operates, let alone actually applying it to the facts of Mr. Atkins' assault to make a conclusion about his state of knowledge. To conclude, as the defendant does, that there is a reasonable probability that a jury would forego assessing the facts of the case according to the ordinary definition of knowledge and instead apply a presumption that provides a nonsensical outcome

implies that juries act irrationally. This is contrary to the presumption that juries act sensibly and according to the law in deliberating. See Strickland v. Washington, 466 U.S. 668, 695, 104 S.Ct. 2052 (1984) (A court should both presume a jury ruled according to law and "exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like.").

While it is possible that the jury at Atkins' trial analyzed the evidence according to the challenged instruction and establish the defendant's knowledge by proof his assaultive intent, the lack of any logical connection between the two heavily weighs against this possibility. The nonsensical nature of the instruction in this case diminishes its importance in affecting the jury's deliberation.

Where, as here, the jury was instructed to view the whole record, it was instructed in an ascertainable criteria for judging whether the defendant had knowledge, the record contains evidence meeting that criteria, and application of the presumption produces a nonsensical result, the inference that the jury considered all the evidence in the record is truly stronger here than it was in *Yates*. See Yates, 500 U.S. at 408-09. As a result, this court should follow the outcome of *Yates* and look to the full record when performing the harmless error analysis.

The second step under *Yates* is to consider whether "the evidence considered by the jury 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." *Yates*, 500 U.S. 405. "A reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt beyond a reasonable doubt." *Sullivan*, 508 U.S. at 281 (citing *Yates*, 500 U.S., at 402-406).

As demonstrated above, the record before this court meets this standard. The record as a whole, independent of the challenged instruction, shows that the jury's finding of guilt beyond a reasonable doubt would surely not have been different absent the disputed instruction. See *Yates*, 500 U.S., at 413-414. It was reasonable for a juror to consider all the record and find that Mr. Atkins had knowledge of Deputy Mauermann's status. There was ample evidence in the case on which the jury could have independently, and without abandoning all logic, reached that conclusion. Consequently, there is virtually no likelihood that the jury applied the challenged instruction to establish the mental state. Mr. Atkins' conviction should be affirmed.

### III. THE TRIAL COURT ACCURATELY CALCULATED MR. ATKINS' SENTENCE BASED ON HIS STIPULATION TO THE STATE'S OFFENDER SCORE.

Next, Mr. Atkins' challenges his sentence. He claims that the sentence exceeds the proper range because the state failed to provide any evidence establishing the offender score. He argues that this court should remand the case back to the lower court so it can properly ascertain his offender score and resentence him accordingly. This remedy is unnecessary. By implicitly agreeing to the state's sentence, Mr. Atkins acknowledged his offender score and waived his right to now appeal that amount.

A sentencing court's calculation of an offender score is reviewed de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). It is the State's burden to prove the existence of prior convictions by a preponderance of the evidence. State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007) (internal citations omitted). The best evidence to establish a prior conviction of the defendant is a certified copy of the prior judgment and sentence. Id.

Where a defendant, after trial, challenges the sentencing court's determination of his offender score based on insufficient evidence of the prior convictions, there are three ways for the court

to analyze the situation. *Id.* "First, if the State alleges the existence of prior convictions at sentencing and the defense fails to 'specifically object' before the imposition of the sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence. *Id.*, citing State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002); see also RCW 9.94A.530(2); RCW 9.94A.525(21). Second, if the defense does specifically object at sentencing, but the State does not produce any evidence of the defendant's prior conviction, then the State is held to the initial record and may not present any new evidence at resentencing. Bergstrom, 162 Wn.2d at 93 (internal citations omitted), but c.f. RCW 9.94A.530(2) and RCW 9.94A.525(21). Finally, if the State alleges the existence of prior convictions at sentencing and the defense does not specifically object and agrees with the State's depiction of defendant's criminal history, then the defendant waives his right to challenge the criminal history after his sentence has been imposed. *Id.* at 94.

In the instant case, the state defendant did not object to the State's depiction of his criminal history or to the calculation of his offender score. 6/2/09 RP 1-4. In fact, the defense attorney asked for a sentence duration within the range stated by the state, 17 to

22 months, which was based upon the state's calculation of Mr. Atkins' offender score. 6/2/09 RP 3. Clearly, if he had been disputing the crimes, he would have sought a sentence outside this range. He did initially seek a year and a day, but characterized this as an exceptional sentence downward. 6/2/09 RP at 2.

Mr. Atkins argues that the state "failed to even allege that Mr. Atkins had criminal history." Appl. Br. at 20. This is not true. The state clearly maintained to the trial court that Mr. Atkins had "a very extensive misdemeanor history including assault and resisting." 6/2/09 RP at 1.

More significantly, Mr. Atkins acknowledged the state's calculation of his offender score. The state listed in the judgment and sentence four previous crimes stretching back to 1990. CP 6-7. Mr. Atkins and his attorney reviewed this criminal history, did not take exception to it, and put their signatures to it. 6/2/09 RP 5-6; CP 13. Later, the trial court acknowledged that both parties were in agreement about the circumstances of the sentence. The court stated, "Everything else appears to have been, at least, not argued if not agreed..." 6/2/09 RP at 4.

This court should find that Mr. Atkins waived the right to challenge his criminal history by stipulating to the state's offender

score and uphold the court's sentence. Assuming, arguendo, that this court finds that defendant did not agree with the State's depiction of his criminal history, it is clear from the record that defendant did not object to the existence of his prior convictions, as alleged by the state, prior to his sentencing. As a result, this court should remand this case for resentencing, but allow the State to present new evidence at that time as the defendant failed to notify the trial court of any apparent defects with his offender score calculation. *Bergstrom*, 162 Wn.2d at 93; RCW 9.94A.530(2).

#### **IV. THE TRIAL COURT DID NOT APPLY THE SRA 2008 AMENDMENTS TO THE DEFENDANT'S SENTENCE.**

Mr. Atkins argues that the 2008 amendments to the Sentencing Reform Act unconstitutionally shift the burden of proof to defendants. He alleges that the law presumes that the state's calculation of an offender score is correct regardless of any proof is offered in support.

Whether this argument is correct, this court does not need to address this claim since the trial court's sentence did not implicate the 2008 amendments to the SRA. The trial court did not de facto adopt the state's offender score simply because Mr. Atkins failed to object to the state's representation of his criminal history. Rather,

the trial court adopted the offered score because the state and the defendant agreed on the criminal history. This agreement is exhibited by Mr. Atkins' execution of the judgment and sentence. Regardless of the standard of proof for establishing prior criminal history, a defendant's affirmative acknowledgement of that history obviates the need for the state to produce any evidence proving it. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113, 116 (2009). Thus, the trial court's actions were constitutional in this instance and vacation of the sentence is not called for here.

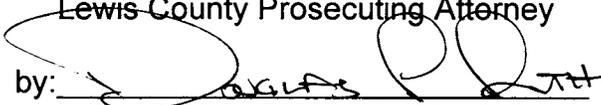
CONCLUSION

For the foregoing reasons, this court should affirm Mr. Atkins's conviction.

RESPECTFULLY submitted this 8<sup>th</sup> day of December, 2009.

MICHAEL GOLDEN  
Lewis County Prosecuting Attorney

by:

  
DOUGLAS P. RUTH, WSBA 25498  
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
Respondent, )  
vs. )  
PHILLIP VAN ATKINS, )  
Appellant. )  
\_\_\_\_\_ )

NO. 39380-8 II

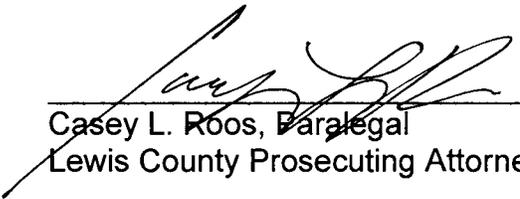
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

Ms. Casey Roos, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On December 8, 2009, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Jodi R. Backlund, Esq.  
Manek R. Mistry, Esq.  
203 Fourth Ave E Suite 404  
Olympia WA 98501

DATED this 8<sup>th</sup> day of December, 2009, at Chehalis, Washington.

  
\_\_\_\_\_  
Casey L. Roos, Paralegal  
Lewis County Prosecuting Attorney Office