

NO. 39485-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES P. ATKINSON,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

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

The Honorable John F. Nichols, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court commented on the evidence in its limiting instruction.

2. The court instructed the jury on an uncharged alternative means of harassment.

Issues pertaining to assignments of error

1. Appellant was charged with harassment by a threat to kill. The trial court instructed the jury that evidence of appellant's prior bad acts could be considered for the purpose of the alleged victim's state of mind "while the threats were being made." Where the issue of whether threats were made was highly contested and critical to the State's case, did the implication that the court had found that issue to be established constitute an impermissible comment on the evidence?

2. Although appellant was charged with harassment by threat to kill, the court also instructed the jury on the uncharged alternative means of threatening maliciously to do an act intended to substantially harm the victim's physical health or safety. Where the record does not affirmatively establish that appellant was convicted of the charged means, is reversal of the harassment conviction required?

B. STATEMENT OF THE CASE

1. Procedural History

The Clark County Prosecuting Attorney charged appellant James Atkinson by amended information with first degree burglary, second degree assault, felony harassment, and second degree malicious mischief. CP 15-16; RCW 9A.52.020(1)(a)(b); RCW 9A.36.021(1)(c); RCW 9A.46.020(1)(a)(i) and (2)(b)(ii); RCW 9A.48.080(1)(a). The case proceeded to jury trial before the Honorable John F. Nichols. The jury found Atkinson not guilty on the assault charge but entered guilty verdicts on the remaining counts and found Atkinson was armed with a deadly weapon during the burglary. CP 109-15. The court imposed low-end standard range sentences plus a 24-month weapon enhancement, for a total confinement of 55 months. CP 121-22. Atkinson filed this timely appeal. CP 168.

2. Substantive Facts

James Atkinson and Shyler Sigsbee were married in December 2008. 2RP¹ 268. Although they had known each other for years, their relationship changed after they were married, and they often argued about

¹ The Verbatim Report of Proceedings is contained in seven volumes, designated as follows: RP (3/12/09)—omnibus hearing; RP (5/7/09)—motion hearing; RP(5/11/09)—jury voir dire; 1RP—5/11/09; 2RP—5/12/09; 3RP—5/13/09; RP (6/12/09)—sentencing hearing.

finances. 2RP 267-68. Following an argument on the afternoon of January 2, 2009, Atkinson told Sigsbee he was filing for an annulment. 1RP 150; 2RP 272. Atkinson then left their apartment and went to work. 2RP 274.

After Atkinson left, Sigsbee, her friend Kaitlyn Roberts, and her daughter went to the apartment of Fail Zelknovic. 1RP 151. They watched some television, had some drinks, and then went to bed. 1RP 151.

Atkinson went to a bar after work to have a few drinks, and he continued drinking at his father's house after he left the bar. 2RP 276-78. Atkinson was unhappy about what had happened with Sigsbee, and he wanted to talk to her, so he drove to their apartment. 2RP 278-79. Although Sigsbee was not there, Atkinson found her cell phone and called the last number she had dialed. 2RP 279-82. He reached Zelknovic, a man he had met before but did not know well. 2RP 281-82. Atkinson asked Zelknovic if his wife was there and asked to talk to her. 1RP 74; 2RP 283. When Zelknovic refused to put Sigsbee on the phone, Atkinson called Roberts. 2RP 285. Roberts hung up on him as well. 2RP 205, 285. After several unsuccessful attempts to talk to his wife, Atkinson drove to Zelknovic's apartment. 2RP 285-86.

Atkinson knocked gently on Zelknovic's apartment door and asked to speak to Sigsbee. 1RP 76; 2RP 290. Sigsbee told Zelknovic not to let Atkinson in, however. 1RP 76-77. Atkinson then began knocking louder. 1RP 77; 2RP 292. He became frustrated and upset, and he kicked the door twice. 1RP 77, 86; 2RP 293. With the second kick, the striker plate broke off the door. 1RP 78; 2RP 332. The door opened slightly and was immediately closed again. 1RP 78; 2RP 294. Atkinson then stabbed the door with a knife, which protruded through the door two to three inches before Atkinson removed it. 1RP 190; 2RP 295. Atkinson took the knife and striker plate and walked to a grassy area where he threw both items. 2RP 215, 299-300. He then called his father to tell him he had "screwed up." 2RP 325.

While Atkinson was at the door, Sigsbee called 911. She reported that her husband was trying to break down a friend's door and that he stabbed a knife through the door. 1RP 106-07, 158-66. A Clark County Sheriff's Deputy who was dispatched to the disturbance contacted Atkinson as he was talking to his father on his cell phone. 2RP 230, 233, 300. Atkinson was obviously intoxicated: he smelled of alcohol, his speech was slurred, and he repeated his statements several times. 2RP 236, 255. He told the deputy he had come to the apartment to find his

wife, and he admitted kicking and stabbing the door. 2RP 236, 239, 245-46.

At trial, Sigsbee testified that Atkinson threatened to kill her when he was banging on the door, although she did not mention this alleged threat in the 911 call. 1RP 154, 158-66. Moreover, neither Zelknovic nor Roberts, both of whom were closer to the door than Sigsbee, heard any threats while Atkinson was at the door. 1RP 82, 190; 2RP 209, 213, 224. Zelknovic testified that he received a strange text message before Atkinson arrived at the apartment which may have been some kind of threat, but he did not take the threat seriously because Atkinson had been drinking, and Zelknovic believed Atkinson was joking. 1RP 75, 93. Sigsbee and Roberts testified that Zelknovic showed them a text message from Atkinson saying that they had signed their death warrants. 1RP 152; 2RP 206. Roberts told Zelknovic to ignore the message, saying it was not a big deal. 2RP 219. Atkinson explained that he had sent a text message containing the words “death warrants,” but he thought he had sent it to Sigsbee’s phone, which he had with him. 2RP 286.

Sigsbee testified that she was afraid Atkinson would kill her in part because of the argument they had had the previous afternoon. 1RP 119, 152. She claimed Atkinson had picked her up and thrown her into some boxes and hit the side of her face. 1RP 115, 148. Atkinson denied

physical contact with his wife during the altercation, but the court admitted Sigsbee's allegations to show her state of mind at the time of the incident at Zelknovic's apartment. 1RP 45, 128-29.

The court instructed the jury regarding this evidence as follows:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior bad acts of the defendant, and may be considered by you only for the purpose of Shyler Sigbee's [sic] state of mind while the threats were being made. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 75 (Instruction No. 5).

C. ARGUMENT

1. THE COURT'S PREJUDICIAL COMMENT ON THE EVIDENCE IN THE LIMITING INSTRUCTION REQUIRES REVERSAL OF ATKINSON'S HARASSMENT CONVICTION.

The Washington Constitution explicitly prohibits judicial comments on the evidence: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. Art. IV, § 16. The purpose of this constitutional prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshier, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). The prohibition is strictly applied. City of Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491

P.2d 1305 (1971). Moreover, a judicial comment on the evidence is a manifest constitutional error which may be challenged for the first time on appeal. State v. Levy, 156 Wn.2d 709, 720, 132 P.3d 1076 (2006).

This constitutional provision prohibits judges from instructing the jury that matters of fact have been established as a matter of law. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). An instruction improperly comments on the evidence if it resolves an issue of fact that should have been left to the jury. State v. Eaker, 113 Wn. App. 111, 118, 53 P.3d 37 (2002), review denied, 149 Wn.2d 1003 (2003). The prohibition on judicial comments is violated not only when the judge's opinion is expressly conveyed, but also when it is merely implied. Levy, 156 Wn.2d at 721. "[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as a judicial comment." Levy, 156 Wn.2d at 721. The fundamental question in deciding whether a judge has impermissibly commented on the evidence is whether the alleged comment "conveys the idea that the fact has been accepted by the court as true." Levy, 156 Wn.2d at 726.

In Levy, the defendant was convicted of first degree burglary, three counts of first degree robbery, and unlawful possession of a firearm. Levy, 156 Wn.2d at 715-16. On appeal he challenged several jury

instructions, arguing they contained impermissible judicial comments on the evidence. Levy, 156 Wn.2d at 716. For example, in instructing on the burglary charge, the court informed the jury it had to find the defendant “entered or remained unlawfully in a building, to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA[.]” Id. In addition, in several instructions the court informed the jury it had to find the defendant was armed with or in the possession of “a deadly weapon, to-wit: a .38 revolver or a crowbar[.]” Levy, 156 Wn.2d at 716-17.

The Supreme Court held that the references to the specific apartment as a building and to the crowbar as a deadly weapon constituted impermissible comments on the evidence. Levy, 156 Wn.2d at 721. These instructions improperly suggested to the jury that questions of fact were established as a matter of law, relieving the State of its burden of proving those elements. Levy, 156 Wn.2d at 721-22.

The court similarly held an instruction contained an impermissible judicial comment in Becker. There, the trial court imposed enhanced sentences based on a jury finding that the defendants had delivered cocaine within 1000 feet of school grounds. The jury’s finding was made in response to a special interrogatory asking whether the defendants were “within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program School at the time of the commission of

the crime?” Becker, 132 Wn.2d at 64. Whether the Youth Employment Program constituted a school was highly contested at trial and critical to the case, however. The Supreme Court reversed the sentence enhancements, concluding that by identifying the program as a school in the special verdict form, the trial court “literally instructed the jury that YEP was a school.” Becker, 132 Wn.2d at 65.

Here, as in Becker and Levy, the court’s limiting instruction contained an impermissible comment on the evidence. To convict Atkinson of harassment, the State had to prove he knowingly threatened Sigsbee, placing Sigsbee in reasonable fear that the threat would be carried out. CP 91; RCW 9A.46.020(1)(a). Evidence of an earlier altercation was admitted to support the reasonable fear element. Whether there was a threat was highly contested at trial, however. Although Sigsbee claimed that Atkinson threatened to kill her while he was at Zelknovic’s door, none of the other witnesses backed up that claim, and Atkinson testified he only asked Sigsbee to come outside and talk. 1RP 154; 2RP 290, 293. Atkinson also denied knowingly sending a threatening text message, and the other witnesses described the message as a joke and “not a big deal.” 1RP 75; 2RP 219, 286.

Nonetheless, the court instructed the jury that it could consider evidence of Atkinson’s “prior bad acts ... only for the purpose of Shyler

Sigbee's [sic] state of mind *while the threats were being made.*" CP 75 (emphasis added). This instruction conveys the idea that the court had already determined that threats were in fact made. Just as the instruction in Becker suggested that the jury need not consider whether the education program was a school, the instruction here suggested the jury need not consider the critical element of whether Atkinson threatened Sigbee. Because of this potential effect, the court's instruction constitutes an impermissible judicial comment. See Levy, 156 Wn.2d at 721.

"[A] judicial comment in a jury instruction is presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." Levy, 156 Wn.2d at 725. The State's burden is heavy: it must show that, without the erroneous comment, "no one could realistically conclude the element was not met." State v. Baxter, 134 Wn. App. 587, 593, 141 P.3d 92 (2006). Stated differently, "the burden is not carried, and the error therefore prejudicial, where the jury conceivably could have determined the element was not met had the court not made the comment." Baxter, 134 Wn. App. at 593.

In Levy, the court found the instructional errors harmless, because the judicial comments were insignificant to the disputed issues at trial. The jury could not have found that the apartment was anything other than

a building, and the jury found the defendant did not possess the crowbar. Thus, there was no prejudice. Levy, 156 Wn.2d at 726.

Here, on the other hand, the court's comment went to the heart of the dispute on the harassment charge. Whether there was a threat was a threshold issue that had to be established for there to be any crime at all. The court's instruction had the effect of suggesting to the jury this dispute had been decided as a matter of law, and the State cannot show that the jury would have necessarily reached that conclusion without the court's comment. The court's error is therefore prejudicial, and reversal is required. See Becker, 132 Wn.2d at 65.

2. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY IT COULD CONVICT ATKINSON OF HARASSMENT ON AN UNCHARGED ALTERNATIVE MEANS.

Under Article I, Section 22 of the Washington Constitution, a criminal defendant must be informed of all crimes he must face at trial and cannot be tried for an uncharged offense. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). The means of committing an offense is an element of which the defendant must be informed in the information. State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). Thus, when an information charges only one of several alternative means of committing the crime, "it is error to instruct the jury that they may consider other ways

or means by which the crime could have been committed.” State v. Laramie, 141 Wn. App. 332, 342, 169 P.3d 859 (2007) (quoting Bray, 52 Wn. App. at 34). When the court instructs the jury on an uncharged alternative means, reversal is required unless it affirmatively appears from the record that the error was harmless. Laramie, 141 Wn. App. at 342-43; State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003); Bray, 52 Wn.App. at 34-35.

Here, the court instructed the jury on an uncharged means of committing harassment. Although defense counsel did not object to the court’s instruction, an instruction on an uncharged alternative means is a manifest error affecting a constitutional right, and it may therefore be challenged for the first time on appeal. See Chino, 117 Wn. App. at 538; RAP 2.5(a)(3).

Harassment is an alternative means crime. See State v. Gill, 103 Wn. App. 435, 442 n.2, 13 P.3d 646 (2000). The harassment statute provides four alternative means for committing the offense:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
 - (ii) To cause physical damage to the property of a person other than the actor; or

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

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

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

RCW 9A.46.020(1). Harassment is a felony if it is committed under subsection (1)(a)(i) by a threat to kill. RCW 9A.46.020(2)(b)(ii).

The State charged Atkinson with violating only RCW 9A.46.020(1)(a) (i) and 2(b)(ii). Nonetheless, the court instructed the jury it could convict Atkinson if it found he violated either subsection (1)(a)(i) or (1)(a)(iv) of the statute:

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

(1) That on or about January 3rd, 2009, the defendant knowingly threatened:

(a) to cause bodily injury immediately or in the future to Shyler Sigsbee, or

(b) maliciously to do any act which was intended to substantially harm Shyler Sigsbee with respect to her physical health or safety;

(2) That the words or conduct of the defendant placed Shyler Sigsbee in reasonable fear that the threat 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 elements (2), (3), and (4), any of the alternative elements (1)(a), or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a), or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty.

CP 91 (Instruction No. 21). Because the instruction allowed the jury to consider an uncharged alternative means of committing harassment, it violates Atkinson's rights under Article I, Section 22 of the Washington Constitution.

The court's error is presumed prejudicial unless it affirmatively appears that the error was harmless. Chino, 117 Wn. App. at 540. It is impossible to tell from the record whether the jury convicted Atkinson under the charged or uncharged means. The State did not confine its argument to the charged means, instead arguing that Atkinson threatened to substantially harm Sigsbee with respect to her physical health or safety.

2RP 366. And, although the jury returned a special verdict finding the threat was a threat to kill, the special verdict does not affirmatively establish that Atkinson was convicted of the charged means.

In the special verdict, the jury found that Atkinson's "threat to cause bodily harm" consisted of a threat to kill. CP 113. Under the court's instructions, the jury could convict Atkinson of harassment if it found he threatened either to cause bodily injury to Sigsbee or maliciously to do any act intended to substantially harm Sigsbee's physical health or safety. CP 91. Either of these means could be a "threat to cause bodily harm" as indicated in the special verdict form. The jury was instructed to answer the special interrogatory only if it found Atkinson guilty of harassment, but it was not told to use the form only if it unanimously agreed Atkinson threatened to cause bodily injury. CP 113. In fact, the jury was told it need not be unanimous as to which means was committed. CP 91.

Because the record does not affirmatively establish that Atkinson was convicted of the charged means, the court's error is presumed prejudicial, and reversal is required. See Chino, 117 Wn. App. at 540.

D. CONCLUSION

The court impermissibly commented on the evidence and instructed the jury on an uncharged alternative means of harassment. Atkinson's conviction on that offense must therefore be reversed.

DATED this 1st day of December, 2009.

Respectfully submitted,



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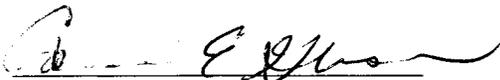
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I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
December 1, 2009

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