

No. 41747-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER DENNIS,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Dennis's right to counsel under the Sixth Amendment and article I, section 22 by denying his motion to substitute counsel.

2. The State presented insufficient evidence to prove felony harassment as charged in count three.

3. The trial court violated Mr. Dennis's Fourteenth Amendment right to due process by omitting the true threat element from the "to convict" instructions for the harassment counts.

4. The information, amended information, and second amended information were deficient under the Sixth Amendment and article I, section 22 because they failed to allege an element of the crime of harassment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused's constitutional right to counsel is violated when he is forced to proceed with an attorney with whom he has an irreconcilable conflict. In reviewing the denial of a motion to substitute counsel, this court considers the extent of the conflict, the adequacy of the trial court's inquiry, and the timeliness of the motion. Here, Mr. Dennis moved to substitute counsel more than six weeks before trial, explaining he and his attorney had an

“irreparable relationship,” but the trial court asked him only one question before denying the motion. Did the trial court violate Mr. Dennis’s constitutional right to counsel by denying his timely substitution motion without an adequate inquiry?

2. In order to convict a defendant of felony harassment, the State must prove the defendant threatened to kill the complaining witness and that the complaining witness knew of the threat. In this case, the State charged Mr. Dennis with two counts of felony harassment based on his alleged threat to kill both Karin Riley and Charmaine Riley. But Karin Riley testified that when Mr. Dennis told her he was going to “kill all of us” Charmaine Riley was not present, and Charmaine Riley did not testify that she heard or learned of the threat. Must the conviction for felony harassment as to Charmaine Riley be reversed?

3. A “to convict” instruction violates due process if it does not include every element of the crime. The State charged Mr. Dennis with two counts of felony harassment, which requires proof of a true threat, but the “to convict” instructions on the harassment counts did not include the true threat requirement. Did the “to convict” instructions on the harassment counts violate Mr. Dennis’s right to due process?

4. An information is constitutionally deficient if it fails to set forth every element of the crime charged. The State charged Mr. Dennis with two counts of felony harassment, which requires proof of a true threat, but did not allege that Mr. Dennis issued a true threat. Was the information in this case constitutionally deficient as to the harassment counts?

C. STATEMENT OF THE CASE

In 2010, appellant Sylvester Dennis worked at RT London and lived with his girlfriend, Karin Riley, and her daughter Charmaine. Trial RP 347-48.¹ On the night of July 2, Karin Riley picked Mr. Dennis up from work and they went to Hawks Prairie Casino to have dinner. Trial RP 348-49. Shortly after they arrived, Ms. Riley changed her mind and went home, leaving Mr. Dennis at the casino without transportation. Trial RP 349-50.

After Ms. Riley went home, she sent numerous text messages to Mr. Dennis urging him not to gamble. Trial RP 275, 351. Mr. Dennis eventually called Ms. Riley to ask her to pick him up, but she refused, saying she had had a glass of wine and should not drive. Trial RP 276-77, 352.

¹ Many of the cover pages of the verbatim reports of proceedings in this case are inaccurate and therefore counsel will cite to the VRP's from the trial as "Trial RP" followed by the page number. VRP's from pretrial hearings will be cited by date.

Mr. Dennis managed to convince "a friend of a friend" to give him a ride home. Trial RP 352-53. After he arrived, he and Ms. Riley argued and decided to end their relationship. Trial RP 279-80, 355. Mr. Dennis began packing his belongings, and the two continued to argue. Trial RP 281, 355. After Mr. Dennis went to the garage to look for his duffle bag, he came back carrying a can of gasoline. According to Charmaine Riley, Mr. Dennis started pouring the gasoline "all over." Trial RP 207. He then "flicked" a lighter and said he was going to burn the house down. Trial RP 207-08. Charmaine called 911, and ran outside for help. Trial RP 285. According to Karin Riley, while Charmaine was outside, Mr. Dennis told Karin he was "just going to kill all of us." Trial RP 285.

Police officers arrived and arrested Mr. Dennis. Trial RP 66. The State charged him with one count of attempted murder, one count of attempted arson, and two counts of felony harassment. CP 18-19. Defense counsel requested multiple continuances over Mr. Dennis's objections, and the trial court denied Mr. Dennis's motion to discharge counsel. 9/9/10 RP 3-8; 9/30/10 RP 3-4; 10/20/10 RP 4-6. At trial, witnesses testified to the events described above. The jury acquitted Mr. Dennis of attempted

murder but convicted him of attempted arson and two counts of felony harassment. CP 42-50.

D. ARGUMENT

1. BY DENYING HIS MOTION TO SUBSTITUTE COUNSEL, THE TRIAL COURT VIOLATED MR. DENNIS'S RIGHTS UNDER THE SIXTH AMENDMENT AND ARTICLE I, SECTION 22.

a. A court violates a defendant's constitutional right to counsel if it forces him to proceed with an attorney with whom he has an irreconcilable conflict. A trial court has the discretion to grant or deny a motion for substitution of counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (2001).

However, this discretion is constrained by the accused's constitutional rights. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002).

Both the federal and state constitutions guarantee the right to counsel in criminal proceedings. U.S. Const. amend. VI; Const. art. I, § 22. The right to counsel is violated where a defendant is forced to proceed with an attorney with whom he has an irreconcilable conflict, even if the attorney is competent. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970); Nguyen, 262 F.3d at 1003-04. An irreconcilable conflict exists where there is a "serious

breakdown in communications.” Nguyen, 262 F.3d at 1003 (citing United States v. Musa, 220 F.3d 1096, 1102 (9th Cir. 2000), cert. denied, 531 U.S. 999 (2000)).

“A defendant’s right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer.” Riggins v. Nevada, 504 U.S. 127, 144, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1993).

A defendant is denied his Sixth Amendment right to counsel when he is “forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.”

Nguyen, 262 F.3d at 1003 (citing Craven, 424 F.2d at 1169).

Where “the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [the defendant’s] Sixth Amendment right to effective assistance of counsel.” United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998).

In determining whether a motion for substitution of counsel was improperly denied, a reviewing court considers: (1) the extent of the conflict between the accused and his attorney, (2) the adequacy of the trial court’s inquiry into the conflict, and (3) the

timeliness of the motion. Stenson, 142 Wn.2d at 724 (citing Moore, 159 F.3d at 1158-59).

b. Mr. Dennis timely notified the trial court that he and his attorney had an irreconcilable conflict, but the trial court engaged in an inadequate inquiry and improperly denied the motion to substitute. An evaluation of the three factors in this case shows that the denial of the motion to substitute counsel was improper. First, the extent of the conflict between Mr. Dennis and his attorney was substantial and irreconcilable. Mr. Dennis was extremely unhappy that his attorney apparently prioritized another case over his, and as a result repeatedly requested continuances in Mr. Dennis's case. On both August 18 and September 9, defense counsel requested continuances over Mr. Dennis's objections.² 8/18/10 RP 5-6; 9/9/10 RP 3-4.

On September 16, Mr. Dennis filed a motion to dismiss counsel in which he again explained he did not agree to continuances. CP 8. He said, "Throughout this ordeal I have stated that I want to proceed as scheduled for various reasons." CP 9; Cf. Moore, 159 F.3d at 1159 (defendant and attorney "disagree[d] about what to do in the case"). He also stated his

² Counsel requested another continuance over Mr. Dennis's objection on October 20. 10/20/10 RP 4-6.

attorney had not provided him with copies of discovery or allowed him to view it. CP 8. He said, "we have a conflict of interest." CP 8. "Sylvester Lee Dennis and [his attorney] have an irreparable [sic] relationship." CP 9. The breakdown in the attorney-client relationship between Mr. Dennis and his lawyer constituted an irreconcilable conflict that should have been addressed by granting the motion for substitution of counsel. See Moore, 159 F.3d at 1160.

Second, the inquiry into the conflict was inadequate. "For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'" Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160). "[I]n most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2002). An inquiry is adequate if it "ease[s] the defendant's dissatisfaction, distrust, and concern and provide[s] a sufficient basis for reaching an informed decision." Daniels v. Woodford, 428 F.3d 1181, 1198 (9th Cir. 2005) (citing Adelzo-Gonzalez, 268 F.3d at 777).

The court held a hearing on Mr. Dennis's motion on September 30, 2010. The extent of the inquiry was as follows:

THE COURT: Okay, Mr. Dennis, I've read what you've had to say. You have a personality conflict, if you will, and you would like another attorney that you think you can get along with.

MR. DENNIS: Correct.

THE COURT: Anything else you want to say about that?

MR. DENNIS: No, sir.

9/30/10 RP 3-4. The court proceeded to deny the motion. 9/30/10 RP 4.

This inquiry is constitutionally insufficient. See Nguyen, 262 F.3d at 1005 (reversing where trial court "asked [the defendant] and his attorney only a few cursory questions, did not question them privately, and did not interview any witnesses"); Moore, 159 F.3d at 1160 (reversing because while "[t]he court did give both parties a chance to speak and made limited inquiries to clarify what was said, ... the court made no inquiries to help it understand the extent of the breakdown"). The inadequate inquiry in this case cuts in favor of reversal.

Third, Mr. Dennis's motion was clearly timely. He filed it on September 16, 2010. CP 8. Trial did not start until November 3, 2010. This factor, too, cuts in Mr. Dennis's favor. See Moore, 159 F.3d at 1159, 1161 (motions held timely when made one month before trial and again two weeks before trial); Nguyen, 262 F.3d at 1003 (motion timely when made the day trial set to begin).

In sum, the trial court violated Mr. Dennis's constitutional right to counsel by denying his motion to substitute counsel and forcing him to work with an attorney with whom he had a serious breakdown in communication.

c. Reversal is required. The erroneous denial of a motion to substitute counsel is presumptively prejudicial and requires reversal. Nguyen, 262 F.3d at 1005; Moore, 159 F.3d at 1161. Because the trial court erroneously denied Mr. Dennis's timely motion to substitute counsel without conducting an adequate inquiry, the convictions should be reversed and his case remanded for a new trial. Nguyen, 262 F.3d at 1005.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. DENNIS OF FELONY HARASSMENT AS CHARGED IN COUNT THREE.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"The reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." State v. DeVries, 149

Wn.2d 842, 849, 72 P.3d 748 (2003) (internal citations omitted). “[I]t is critical that our criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned.” Id.

b. The State presented no evidence that Mr. Dennis committed felony harassment against Charmaine Riley. The State charged Mr. Dennis with two counts of felony harassment. In count four, the State alleged Mr. Dennis threatened to kill Karin Riley, and in count three, the State alleged Mr. Dennis threatened to kill Charmaine Riley. CP 19. Karin Riley testified that Mr. Dennis threatened to kill her, and the jury was entitled to believe her. Trial RP 285. But as the State acknowledged in closing argument, Charmaine Riley never testified that Mr. Dennis threatened to kill her. Trial RP 190-98, 205-15, 236-64, 440. The conviction on count three must be reversed.

The statute at issue provides that a person is guilty of felony harassment if he knowingly threatens to kill the person threatened or any other person and by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(2)(b)(ii); CP 19. The threat must be a “true threat,” which 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 take the life of another individual.” State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001).

There was no proof that Mr. Dennis knowingly threatened to kill Charmaine Riley. Karin Riley testified that after Charmaine Riley ran outside, Mr. Dennis told Karin he was “just going to kill all of us.” Trial RP 285. Although Mr. Dennis allegedly told Karin Riley he wanted to kill all of them, no evidence was presented that Charmaine Riley either heard this threat directly or learned of it later. Thus, this statement cannot support the conviction as to Charmaine Riley. State v. J.M., 144 Wn.2d 472, 482, 28 P.3d 720 (2001) (“the person threatened must find out about the threat”).³

The State in closing argument acknowledged that Charmaine Riley did not hear a threat to kill. Trial RP 440. It was reduced to arguing that Mr. Dennis’s threat to burn down the house supported not only the attempted arson charge but also the felony harassment charge as to Charmaine Riley:

³ Additionally, relying on the same statement to convict for both counts three and four would violate the prohibition on double jeopardy. Cf. State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007) (single solicitation to murder multiple individuals supports only one conviction for solicitation).

We're going to blow up the house. I'm going to light my lighter. You're in the house. Ladies and gentlemen, that's a threat.

Trial RP 440. But a threat to burn down a house is not a threat to kill, which is required to prove felony harassment as charged.

RCW 9A.46.020(2)(b)(ii); CP 19.

The prosecutor also read the "threat" element out of the statute altogether, telling the jury:

And defense counsel says that the defendant ... has to threaten their lives. But that's not what the law says. Because the law says, "by words or conduct places the person threatened in reasonable fear that the threat will be carried out."

Trial RP 440. Contrary to the prosecutor's argument, to prove felony harassment as charged, the State was most certainly required to prove that Mr. Dennis threatened Charmaine Riley's life – in addition to proving that Charmaine was reasonably afraid.

RCW 9A.46.020(2)(b)(ii). Because the State failed to prove Mr. Dennis threatened to kill Charmaine Riley, the conviction on count three must be reversed.

c. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Dennis committed the offense for which he was convicted, the judgment may not stand. State v.

Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is dismissal of the conviction on count three based upon the State's failure to prove Mr. Dennis committed felony harassment against Charmaine Riley.

3. THE INFORMATION AND TO-CONVICT INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF THE CRIME OF FELONY HARASSMENT.

a. A to-convict instruction violates due process if it omits an element of the crime charged. The "to convict" instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error, because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. State v. Aumick, 126 Wn.2d

422, 429, 894 P.2d 1325 (1995); see Winship, 397 U.S. at 364.

Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. Smith, 131 Wn.2d at 262-63. "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." Smith, 131 Wn.2d at 263.

Because the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude, it may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Omission of an element from the to-convict instruction "obviously affect[s] a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict." State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). This Court reviews a challenged jury instruction de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

b. An information is constitutionally deficient if it fails to set forth every element of the crime charged. Article I, section 22 of our state constitution⁴ and the Sixth Amendment to the federal constitution⁵ require the State to provide an accused person with notice of the offense(s) charged. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). An offense is not properly charged unless the information sets forth every essential element of the crime, both statutory and nonstatutory. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The charging document must contain: (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. Auburn v. Brooke, 119 Wn.2d 623, 630, 836 P.2d 212 (1992). "This doctrine is elementary and of universal application, and is founded on the plainest principle of justice." Pelkey, 109 Wn.2d at 488 (quoting State v. Ackles, 8 Wash. 462, 464-65, 36 P. 597 (1894)).

A challenge to the sufficiency of the charging document is of constitutional magnitude and may be raised for the first time on appeal. State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552

⁴ "In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him"

⁵ "In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation"

(1989)). Where, as here, the issue is raised for the first time on appeal, the standard of review set forth in Kjorsvik applies. This Court asks: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice? Kjorsvik, 117 Wn.2d at 105-06. If the answer to the first question is "no," reversal is required without reaching the second question. State v. McCarty, 140 Wn.2d 420, 425-28, 998 P.2d 296 (2000).

c. The information and the to-convict instructions for the harassment counts violated Mr. Dennis's constitutional rights because they omitted the true threat element. As explained above, the State charged Mr. Dennis with two counts of felony harassment in violation of RCW 9A.46.020(2)(b)(ii). CP 19. The statute provides that a person is guilty of felony harassment if he knowingly threatens to kill the person threatened or any other person and by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020. The First Amendment limits the reach of the statute to "true threats," which are statements "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 take the life of another individual.” Williams, 144 Wn.2d at 207-08. The State may not prohibit or sanction statements that are not true threats. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

Notwithstanding the above, neither the information nor the “to convict” instructions included the true threat requirement. The second amended information alleged the following in Count Three:

That the defendant, Sylvester Lee Dennis, in the State of Washington, on or about July 3, 2010, without lawful authority, knowingly threatened to kill Charmaine D. Riley, a family or household member, pursuant to RCW 10:99.020, and the defendant’s words or conduct placed Charmaine D. Riley in reasonable fear that the threat would be carried out.

CP 19. Count Four had exactly the same wording except it applied to Karin Riley rather than Charmaine Riley. CP 19. Neither count alleged a true threat.

The “to convict” instruction for Count Three provided:

To convict the defendant of the crime of harassment as charged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 3, 2010, the defendant knowingly threatened to kill Charmaine D. Riley immediately or in the future;

- (2) That the words or conduct of the defendant placed Charmaine D. Riley 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.

CP 37. The “to convict” instruction for Count Four was identical except that the alleged victim was Karin Riley. CP 38. Neither “to convict” instruction included the true threat element. Rather, the true threat requirement was relegated to a mere definitional instruction. CP 36.

Although this Court has held that a “true threat” is not an essential element of harassment that must be pled in the information and included in the “to convict” instruction, this Court should revisit that decision in light of intervening jurisprudence. State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007).⁶ In State v. Schaler, the Supreme Court reversed the defendant’s conviction because the trial court did not instruct the jury that it could only convict if it found the defendant issued a true threat. State v. Schaler, 169 Wn.2d 274, 278, 236 P.3d 858 (2010). The full

⁶ This Court recently declined to overrule Tellez in Allen, but the Supreme Court has granted review in Allen. State v. Allen, 161 Wn. App. 727, 255 P.3d 784 (2011), review granted, No. 861196 (9/26/11). This Court should therefore take the opportunity to reevaluate the issue and weigh in on the matter.

definition of “true threat” was neither in the to-convict instruction nor in a standalone instruction. The Court noted that while the jury was instructed on the necessary mens rea as to the speaker’s conduct, it was not instructed on the necessary mens rea as to the result. Id. at 286. “True threat” includes the latter – that a reasonable speaker would foresee that the statement would be interpreted as a serious expression of intention to inflict harm. Id.

The Court went on to explain that “the omission of the constitutionally required mens rea from the jury instructions ... is analogous to [a situation] in which the jury instructions omit an element of the crime.” Id. at 288. And although it declined to reach the issue Mr. Dennis raises here, it noted, “[i]t suffices to say that, to convict, the State must prove that a reasonable person in the defendant’s position would foresee that a listener would interpret the threat as serious.” Id. at 289 n.6 (emphasis added).

The above reasoning supports Mr. Dennis’s argument that a “true threat,” i.e. the mens rea as to the result, is an element that must be included in the information and to-convict instruction. “[A] crime defined by a particular result must include the intent to accomplish that criminal result as an element.” State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). For example, “[t]he

crime of murder is defined by the result of death, RCW 9A.32.030, and the rule is well established that the crime of attempted murder requires the specific intent to cause the death of another person.” Id. Thus, for attempted murder, the mens rea as to the result must be pleaded in the information and included in the to-convict instruction. See id. The same is true for murder. See, e.g., WPIC 27.02 (to-convict instruction for second-degree intentional murder). As the Supreme Court explained in another case, the elements that must be included in the to-convict instruction are “the actus reus, mens rea, and causation.” State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (emphasis added). Because the definition of “true threat” is the mens rea for felony harassment, it must be included in the information and to-convict instruction.

d. The remedy is reversal of the harassment convictions and dismissal of the charges without prejudice to the State’s ability to re-file. Washington courts “have repeatedly and recently held that the remedy for an insufficient charging document is reversal and dismissal of charges without prejudice to the State’s ability to refile charges.” State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). This Court should reverse Mr. Dennis’s

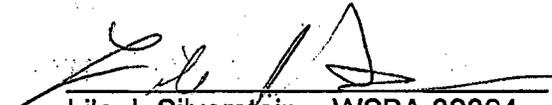
convictions on Counts three and four, and remand for dismissal of the charges without prejudice. Id.⁷

E. CONCLUSION

For the reasons set forth above this Court should reverse the conviction on count three for insufficient evidence and remand for dismissal of the charge with prejudice. This Court should reverse the remaining convictions and remand for a new trial.

DATED this 17th day of October, 2011.

Respectfully submitted,


Lila J. Silverstein – WSBA 38394
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Attorney for Appellant

⁷ If the “true threat” element were missing only from the “to convict” instructions but not from the information, this Court would ask whether the State could prove beyond a reasonable doubt that the error was harmless. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The State would be unable to do so here. As explained above, the State presented insufficient evidence of harassment to support the conviction on count three regardless of instructional error. And as to count four, Karin Riley admitted on cross-examination that she had not told the detective that Mr. Dennis threatened to kill her and did not include this alleged threat in her written victim statement. Under these circumstances, the omission of the element cannot be said to be harmless for either count, and reversal is required. See Smith, 131 Wn.2d at 266.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 41747-2-II
)	
SYLVESTER DENNIS,)	
)	
Appellant.)	

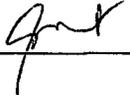
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