

No. 42263-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

IRVIN LEE GREENE,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-02314-5
The Honorable Edmund Murphy, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The charging document and the “to convict” instruction for the crime of harassment were constitutionally deficient because they both failed to include the essential element that the threat was a “true threat.”

II. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Is the fact that a threat is a “true threat” an essential element of the crime of harassment? (Assignment of Error 1)
2. Where due process requires the essential elements of a criminal charge to be pled in the information and included in the “to convict” instruction, is the fact that a threat must be a “true threat” an essential element of the crime of harassment which must be pled in the charging document and included in the “to convict” instruction? (Assignment of Error 1)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Irvin Lee Greene by Amended Information with five counts of violation of a domestic violence court order (RCW 26.50.110), one count of stalking (RCW 9A.46.110), and one count of felony harassment (RCW 9A.46.020). (CP 62-66)

The jury was not able to reach a unanimous verdict on the

court order violation counts, but found Greene guilty of stalking and harassment. (5/18/11 RP 325, 327-28, 330-31; CP 155-53)¹ The trial court entered an order dismissing the court order violation counts without prejudice. (CP 166-68) The trial court sentenced Greene within his standard range to 60 months of confinement. (CP 174, 176-77; 6/17/11 RP 347, 351) This appeal timely follows. (CP 286)

B. SUBSTANTIVE FACTS

Carol Unkrur works as a driver and customer service representative onboard Sound Transit's Tacoma light rail trains. (5/11/11 RP 84) She met Irvin Greene in May of 2009, when he approached her to complain about an issue he had with a Sound Transit security guard. (5/11/11 RP 85) Unkrur and Greene soon began a romantic and sexual relationship. (5/11/11 RP 87, 88) By mid-August of 2009, Unkrur felt that Greene had become aggressive and verbally abusive so she ended the relationship. (5/11/11 RP 89-91)

But Greene continued to contact Unkrur repeatedly by calling and texting her cellular phone, and by showing up uninvited

¹ Citations to the reports of proceedings will be to the date of the proceeding followed by the transcript page number.

at her workplace and home. (5/11/11 RP 91-93, 95) On September 14, 2009, Unkrur obtained a protection order forbidding Greene from contacting her. (Exh. P1; 5/11/11 RP 95) But Greene continued to contact Unkrur, so she called the police and reported the violation. (11/5/11 RP 96, 97) On January 6, 2010, Greene pleaded guilty to violating the terms of the protection order. (5/11/11 RP 49, 50; Exh. P2) A new protection order was entered that same day, which forbid any contact until January 6, 2012. (5/11/11 RP 59, 98; Exh. P4)

About two months later, Unkrur received a text message from Greene asking that she call him. (5/11/11 RP 98-99) Unkrur returned the call and decided to meet Greene so they could talk. (5/11/11 RP 101) After their meeting, Greene began calling and texting frequently, sometimes multiple times a day. (5/11/11 RP 102)

The content and tone of Greene's messages became progressively angrier, and eventually included threats to hurt Unkrur or her friends. (5/11/11 RP 103, 177-78, 179; Exh. P21-192, P193) Unkrur occasionally returned Green's calls or text messages because she believed that would keep him from hurting anyone. (5/11/11 RP 103-04)

On April 18, 2010, Greene left Unkrur a voice mail message threatening to kill her and cut off her head. (5/12/11 RP 181-83; Exh. P193B)² And on the morning of May 17, 2010, Greene sent Unkrur 11 text messages, and tried to contact her 22 times within a three hour period. (5/11/11 RP 106)

Unkrur was concerned for her safety and the safety of her friends, so on May 19, 2010, she finally went to the police and reported the contacts. (5/11/11 RP 65, 105-06; 5/12/11 RP 182-83)

IV. ARGUMENT & AUTHORITIES

A. ALL ESSENTIAL ELEMENTS OF THE CRIME OF HARASSMENT MUST BE PLEADED IN THE CHARGING DOCUMENT AND INCLUDED IN THE "TO CONVICT" INSTRUCTION

Due process requires that the essential elements of a charged offense be included in the charging document, regardless of whether they are statutory or non-statutory. U.S. Const. amd. VI; Wash. Const. art. I, § 22; State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The purpose of the rule is to give the accused notice of the nature of the allegations so that a defense may be properly prepared. Goodman, 150 Wn.2d at 784; State v. Kiorsvik,

² The State alleged that this specific message was the factual basis for the harassment charge. (CP 66; 5/16/11 RP 247, 275)

117 Wn.2d 93, 101-02, 812 P.2d 86 (1991).

Charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before trial or before a guilty verdict. Kjorsvik, 117 Wn.2d 102. The reviewing court determines whether the necessary facts appear in the information in any form, and if not, whether the defendant was actually prejudiced by the lack of notice. Goodman, 150 Wn.2d at 787-88; Kjorsvik, 117 Wn.2d at 105-06.

The first prong looks to the face of the charging document and requires at least some language giving notice of the allegedly missing elements. The second prong may look beyond the face of the information to determine if the accused actually received notice of the charges he or she must have been prepared to defend; it is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges.

State v. Courneya, 132 Wn. App. 347, 351, 131 P.3d 343 (2006) (citations omitted). “If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and reviewing courts reverse without reaching the question of prejudice.” Courneya, 132 Wn. App. at 351.

Due process also requires that the State prove every essential element of a charged offense. 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, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amd. XIV. Thus, jury instructions must “properly inform the jury of the applicable law.” State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). It is reversible error to instruct the jury in a manner that relieves the State of its burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle, 127 Wn. 2d 628, 656, 904 P.2d 245 (1995).

A challenge to a jury instruction on the grounds that it relieved the State of its burden of proof may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). The court reviews alleged errors of law in jury instructions de novo. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

B. THAT A THREAT IS A “TRUE THREAT” IS AN ESSENTIAL ELEMENT OF THE CRIME OF HARASSMENT

A person is guilty of harassment if “the person knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person . . . and [t]he person by words or conduct places the person threatened in reasonable

fear that the threat will be carried out.” RCW 9A.46.020(1). Harassment is generally a misdemeanor, but is elevated to a felony if the threat involves a threat to kill. RCW 9A.46.020(2)(b)(ii).³

In State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004), the Supreme Court considered a First Amendment challenge to RCW 9A.46.020, the felony harassment statute. The Court noted that because the statute “criminalizes pure speech,” it “must be interpreted with the commandments of the First Amendment clearly in mind.” 151 Wn.2d at 41 (quoting State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001) and Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)).

The Kilburn Court held that in order to “avoid unconstitutional infringement of protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only ‘true threats.’” 151 Wn.2d at 43.

The Court further explained:

A true threat 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 person.

151 Wn.2d at 43. The communication “must be a serious threat,

³ The full text of the harassment statute, RCW 9A.46.020, is attached in the Appendix.

and not just idle talk, joking or puffery.” 151 Wn.2d at 46. Whether a true threat was made “is determined under an objective standard that focuses on the speaker.” 151 Wn.2d at 44.

The Court considered the issue again in State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006). In that case, the Court reiterated that a statute proscribing threats must be limited to “true threats” to avoid constitutional overbreadth prohibitions, and further found that failure to instruct the jury on the definition of a “true threat” was fatal to the conviction. 156 Wn.2d at 363-65.

In State v. Tellez, Division 1 considered whether, in the context of a prosecution for telephone harassment, the requirement that the threat was a “true threat” had to be included in the information or the “to convict” instruction. 141 Wn. App. 479, 482-85, 170 P.3d 75 (2007). Johnston notwithstanding, the Tellez court concluded that the “true threat” requirement was a mere definitional component of the harassment statute, and not an essential element. The court reasoned that Johnston did not expressly rule that “a true threat is an essential element of any threatening-language crime.” 141 Wn. App. at 483.

The decision in Tellez was incorrect and should not be

followed by this Court.⁴ In Johnston, the Court held that “the jury must be instructed that a *conviction* under [the statute proscribing threats to bomb or injure property] requires a true threat *and* must be instructed on the meaning of a true threat.” 156 Wn.2d at 366 (emphasis added). The language of the Court’s holding intimates that the Court considered the “true threat” requirement to be an element of any harassment charge.

The conclusion that the Johnston Court considered the “true threat” requirement to be an element is consistent, as well, with how the Washington courts treat mere definitional terms. See e.g., State v. Lorenz, 152 Wn.2d 22, 33-35, 93 P.3d 133 (2004) (observing that the failure to instruct on definitional terms is not an error that requires a conviction to be reversed). By requiring an instruction on the “true threat” requirement, the Johnston Court implicitly distinguished “true threats” from purely definitional terms and signaled its view that whether a threat was a “true threat” is an essential element of a harassment charge.

Furthermore, both the Federal courts and at least one other

⁴ Division 1 recently affirmed its Tellez decision in State v. Allen, 161 Wn. App. 727, 755-56, 255 P.3d 784 (2011). However, our State Supreme Court has granted review of Division 1’s opinion in Allen. See State v. Allen, 172 Wn.2d 1014, 262 P.3d 63 (2011).

state Supreme Court have expressly held that whether a threat is a “true threat” is an element of a harassment crime. For example, in State v. Robert T., 7146 N.W.2d 564 (Wis. 2008), the Wisconsin Supreme Court construed its own “bomb scares” statute. That statute provided:

Whoever intentionally conveys or causes to be conveyed any threat or false information, knowing such to be false, concerning an attempt or alleged attempt being made or to be made to destroy any property by the means of explosives is guilty of a Class I felony.

Wis. Stat. § 947.015 (2003-04).

Discussing its own cases interpreting the “true threat” requirement, the court concluded: “we are satisfied that upon reading into the elements of the crime a requirement that it must be a ‘true threat’ renders Wis. Stat. § 947.015 constitutional.” Robert T., 7146 N.W.2d at 568. The court further observed: “Indeed, this is exactly what the supreme court of the state of Washington did with a similar statute prohibiting threats.” 7146 N.W.2d at 568 (citing Johnston).

The Ninth Circuit has also held that a “true threat” requirement is an essential element of a harassment offense. See United States v. Cassel, 408 F.3d 622 (9th Cir. 2005) (construing

18 U.S.C. § 1860, which proscribes interfering with a federal land sale). The Cassel Court conducted a lengthy analysis of the Supreme Court's decision in Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), and concluded, based on this assessment, that "intent to threaten is a constitutionally necessary element of a statute punishing threats." Cassel, 408 F.3d at 630-34. Applying this rule, in an appeal following a conviction for making interstate threats to injure in violation of 18 U.S.C. § 875(c), the Court noted that "specific intent to threaten is an essential element of a § 875(c) conviction[.]" United States v. Sutcliffe, 505 F.3d 944, 962 (9th Cir. 2007).

The Seventh Circuit reached a similar conclusion in United States v. Fuller, 387 F.3d 643 (7th Cir. 2004). While noting a circuit split on the question of whether a "true threat" must include a subjective component, the Court held: "the only two essential elements for [a prosecution under 18 U.S.C. § 871] are the existence of a true threat to the President and that the threat was made knowingly and willfully." 387 U.S. at 647; accord. United States v. Lockhart, 382 F.3d 447, 450 (4th Cir. 2004) ("The statute governing threats against the President . . . has been interpreted to include two major elements: (1) the proof of a 'true threat' and (2)

that the threat is made 'knowingly and willfully").

Because the Washington Supreme Court has not explicitly stated that the "true threat" requirement is an essential element, the Tellez court concluded that a "true threat" is a mere definitional term that need not be included in the charging document or the "to convict" instruction. 141 Wn. App. at 482-84. But the federal and state decision cited above establish that Division 1's conclusion is incorrect. Accordingly, the Tellez analysis and holding should be rejected, and this Court should hold that the existence of a "true threat" is an essential element of the crime of harassment.⁵

C. THE CHARGING DOCUMENT AND "TO CONVICT" INSTRUCTION FOR HARASSMENT WERE DEFICIENT IN THIS CASE

In this case, the information charging Greene with harassment alleged the following:

That IRVIN LEE GREENE, in the State of Washington, on or about the 18th day of April, 2010, without lawful authority, did unlawfully, knowingly threaten Carol Unkrur to cause bodily injury, immediately or in the future, to that person or to any other person, and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out.

(CP 66)

⁵ See e.g. State v. Schmitt, 124 Wn. App. 662, 669 fn. 11, 102 P.3d 856 (2004) ("We need not follow the decisions of other divisions of this court.").

The “to convict” instruction required the jury to find the following elements to convict Greene of the crime of felony harassment:

- (1) That on or about April 18, 2010, the defendant knowingly threatened to kill Carol Unkrur immediately or in the future.
- (2) That the words or conduct of the defendant placed Carol Unkrur 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.

(CP 142; Instruction No. 28) In a separate instruction, the court defined the term threat:

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

(CP 140; Instruction No. 26)

The information did not give proper notice to Greene and the “to convict” instruction did not properly inform the jury that a “true threat” is a constitutionally required essential element of the crime of harassment.

The omission of this essential element in the information is not cured by its inclusion as a definition in the jury instructions. For example, in Courneya, the court found the State's omission of the implied element of knowledge from an information charging hit-and-run was fatal to the ensuing conviction, even though two jury instructions explained that knowledge was an essential element of the charged crime. 132 Wn. App. at 353-54; see also Vangerpen, 125 Wn.2d at 788 (holding that proper jury instructions cannot cure a defective information). The Courneya court reversed the conviction with instructions to dismiss the information. 132 Wn.2d at 354.

Furthermore, the instructional error is harmful because if a constitutionally required element is treated as a "definition," then the State's burden of proof is diluted, and this Court cannot be confident that the jury's verdict does not punish protected speech. And in this case specifically, the Court cannot be confident that the jury found that Greene's April 18th voicemail threat was anything more than hyperbole or puffery.

V. CONCLUSION

Because the information and "to convict" instruction for harassment omitted an essential element, Greene's conviction

should be reversed and the harassment charge dismissed.

DATED: December 30, 2011



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Irvin L. Greene

CERTIFICATE OF MAILING

I certify that on 12/30/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Irvin L. Greene, DOC# 919102, Coyote Ridge Corrections Center, P.O. Box 769 , Connell, WA 99326-0769Ave. S.. Rm. 946, Tacoma, WA 98402.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX
RCW 9A.46.020

RCW 9A.46.020. Definition—Penalties

(1) A person is guilty of harassment if:

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

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

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

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

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

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

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

(b) A person who harasses another is guilty of a class C felony if any of the following apply: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a nocontact or no-harassment order; (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person; (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.

(3) Any criminal justice participant who is a target for threats or harassment prohibited under subsection (2)(b)(iii) or (iv) of this section, and any family members residing with him or her, shall be eligible for the address confidentiality program created under RCW 40.24.030.

(4) For purposes of this section, a criminal justice participant includes any (a) federal, state, or local law enforcement agency employee; (b) federal, state, or local prosecuting attorney or deputy prosecuting attorney; (c) staff member of any adult corrections institution or local adult

detention facility; (d) staff member of any juvenile corrections institution or local juvenile detention facility; (e) community corrections officer, probation, or parole officer; (f) member of the indeterminate sentence review board; (g) advocate from a crime victim/witness program; or (h) defense attorney.

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

CUNNINGHAM LAW OFFICE

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