

NO. 43556-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARK ANTHONY DAVIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 11-1-02049-7

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant waive his right to challenge the jury instructions because for the crime of harassment, the requirement that a “threat” be a “true threat” is a definitional requirement, and defendant did not preserve the issue below?
2. Did the information properly include all of the essential elements of harassment, specifically where it included language that the threat “place the person threatened in reasonable fear that the treat would be carried out”?
3. Did the trial court exceed its statutory authority when it imposed a term of community custody?

B. STATEMENT OF THE CASE.

1. Procedure

On May 16, 2011, the Pierce County Prosecuting Attorney’s Office (State) charged Mark Anthony Davis (defendant) with one count of felony harassment with an aggravating circumstance of committing the crime against a law enforcement officer. CP 1–2. Defendant’s jury trial began on January 30, 2012, before the Honorable Vicki L. Hogan. RP 1.

The jury found defendant guilty as charged. CP 42 (Verdict Form A), 44 (Special Verdict Form). On June 8, 2012, the court sentenced defendant to 51 months in custody,¹ with a term of community custody of 12 months. CP 268 (Judgment and sentence, paragraphs 4.5–4.6). Defendant timely filed a notice of appeal on June 11, 2012. CP 279.

2. Facts

On May 13, 2011, Tacoma Police Department Officer Cory Peyton was working the graveyard shift near South 14th and M Street. RP 23. The area is known for its high volumes of drug deals and prostitution. RP 24. While patrolling the area, Officer Peyton saw defendant standing by the street and trying to flag down vehicles as they passed by. RP 24–25. Because the officer thought defendant was trying to initiate a narcotics transaction, Officer Peyton approached defendant, engaged him in a conversation, and arrested defendant after a brief conversation. RP 28.

Once Officer Peyton had placed defendant in the back of his patrol car, defendant expressed his frustration by trying to engage Officer Peyton in a heated exchange filled with vulgarities and racial slurs. RP 31–34. After Officer Peyton refused to respond to the statements, defendant threatened the officer's life:

¹ Defendant had an offender score of 9 with a standard range of 51–60 months. CP 265

- That's why you all you motherfucking peckerwood cops be getting shot and killed all the time, because they be acting like you, you fucking bitch. You just a little bitch who probably got his ass kicked growing up. Now you think you're a bad ass cop, and you can just bully black people around.
- [I'm] from this hood around here, and now you just became a marked mother fucker. Next time I see you, you are going to be just like them other pigs. You're going to get shot.
- Next time I see you, you are a dead mother fucker.
- Why [do] you think all them other cops be getting shot and shit, because they are just like you. Next time I see you, you are going to be just like them.
- You think you are hard, wait till I get out and we will see. Wait till I see you, nigga, you don't know who you fucking with.

RP 31–34. While Officer Peyton admitted that part of his job was to professionally handle angry comments, he felt threatened by defendant's latter statements because Officer Peyton and his family lived in the area, and defendant had threatened to shoot him. RP 34–35, 43.

Defendant did not testify or offer evidence during his case. RP 60–61.

C. ARGUMENT.

1. BY FAILING TO OBJECT, DEFENDANT WAIVED HIS RIGHT TO CHALLENGE THE JURY INSTRUCTIONS BECAUSE FOR THE CRIME OF HARASSMENT, THE REQUIREMENT THAT A “THREAT” BE A “TRUE THREAT” IS A DEFINITIONAL REQUIREMENT, AND DEFENDANT CANNOT SHOW ERROR OF CONSTITUTIONAL MAGNITUDE.

The court reviews alleged instructional errors de novo. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). Jury instructions must properly state the elements of the charged crime, and that the State has the burden to prove those elements beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

The court may refuse to review any claim of error which was not raised to the trial court and such error is not of constitutional magnitude. RAP 2.5(a). The Washington State Supreme Court has reiterated that challenges to definitional jury instructions are not of constitutional magnitude that may be raised for the first time on appeal. *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992) (“As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude.”) (Citing *State v. Lord*, 177 Wn.2d 829, 880, 822 P.2d 177 (1991); *State v. Fowler*, 114 Wn.2d 59, 69–70, 785 P.2d 808 (1990)).

Even errors concerning technical terms are not sufficient to constitute constitutional magnitude. *Id.*

- a. The requirement that a “threat” be a “true threat” is not an essential element of the crime of harassment, but rather a definitional requirement not of constitutional magnitude

RCW 9A.46.020(1)(a)(i)(b)² defines the crime of harassment as the following:

(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

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

(2)(b) A person who harasses another is guilty of a class C felony if . . . (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.

RCW 9A.46.020 (2010).³

² The full statute is included as Appendix A.

³ The Legislature amended RCW 9A.46.020 in July 2011. *See* 2011 Wash. Sess. Laws, ch. 64, § 1. The amendments, however, did not alter the substantive provisions at issue here. The amended RCW 9A.46.020 is included as Appendix B.

In *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006), and *State v. Kilburn*, 151 Wn.2d 36, 84 P.3d 1215 (2004), the Washington State Supreme Court held that a “threat” must be construed to apply only to true threats in order to avoid interference with the constitutional protection of free speech. *Johnston*, 156 Wn.2d at 360; *Kilburn*, 151 Wn.2d at 43. The Court defined a “true threat” as a statement “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].” *Johnston*, 156 Wn.2d at 361 (internal citations omitted).

Relying on *Johnston* and *Kilburn*, defendant claims that the information and the to-convict instruction were improper because the documents use the term “threat,” instead of “true threat,” to outline defendant’s charges. Brief of Appellant 4, 6–9. This argument misreads both *Johnston* and *Kilburn*.⁴ At issue in those cases was whether the jury was properly instructed about the *definition* of what a true threat is (i.e.,

⁴ Similar to defendant’s reading of *Johnston*, defendant misinterprets the Ninth Circuit’s decision in *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005), the Seventh Circuit’s decision in *United States v. Fuller*, 387 F.3d 643 (7th Cir. 2004), and the Wisconsin Supreme Court’s decision in *In re Robert T.*, 307 Wis.2d 488, 746 N.W.2d 564 (2008). None of those cases supports the proposition that the information and to-convict instructions must expressly state “true threat” as an essential element of the crime of harassment.

whether “threat” was defined as a statement a reasonable person would foresee as a serious expression of intention to inflict bodily harm), as opposed to the use of the term “true threat” as an essential element. Neither case holds that a true threat is an essential element of the crime of harassment.

The courts have repeatedly rejected defendant’s argument. *See, e.g., State v. Allen*, 161 Wn. App. 727, 755, 255 P.3d 784 (2011) (“[W]e hold that this court’s previous cases addressing this issue are dispositive and hold that true threat is merely the definition of the element of threat which may be contained in a separate definitional instruction.”); *State v. Atkins*, 156 Wn. App. 799, 805, 236 P.3d 897 (2010) (accord); *State v. Tellez*, 141 Wn. App. 479, 483–44, 170 P.3d 75 (2007) (accord).

Specifically in *Tellez*, the court stressed that a reading of *Johnston* similar to defendant’s interpretation is inaccurate:

The *Johnston* court did not rule that a true threat is an essential element of the crime of threatening to bomb a building. It did not require that the information charging the defendant with a criminal use of threatening language allege a true threat. Nor did it rule that a “to convict” instructions is inadequate if it does not require the jury to find a true threat beyond a reasonable doubt. *No Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document or “to convict” instruction. We decline to go any further than the Supreme Court because it is not necessary.*

So long as the court defines a true threat for the jury, the defendant's First Amendment rights will be protected.

Tellez, 141 Wn. App. at 483–44 (emphasis added). Thus, both the to-convict instruction and charging document are proper where the jury is given the definition of “true threat.”

Just recently, the Washington Supreme Court put this issue to rest. *State v. Allen*, ___ Wn.2d ___, ___ P.3d ___ (2013) (Slip opinion 86119-6, issued 1/24/13), holding that the “true threat” requirement was not an essential element of the harassment statute that must appear in the information or “to convict” instruction.

Furthermore, the Washington Pattern Jury Instructions do not treat true threat as an essential element. 11 *Washington Practice, Criminal* Pattern Instruction 36.07.02 (2010).⁵ The instruction requires the State to prove that defendant threatened a person by putting that person “in reasonable fear that the threat to kill would be carried out.” WPIC 36.07.02. The instruction's comment recommends further defining “threat” with WPIC 2.24,⁶ which states:

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]; [or]

⁵ The pattern jury instruction is included as Appendix C.

⁶ WPIC 2.24 and its comments are attached as Appendix D.

[to do any [other] act that is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships.]

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] [jest, idle talk, or political argument].

WPIC 2.24. While neither instruction uses the express term of “true threat” to define the elements of the crime, the comment to WPIC 2.24 shows that the drafters were cognizant of the Court’s holding in *Johnston*:

True threat. The constitution requires the prosecution to prove a true threat for many offenses, including: felony harassment involving a threat to kill . . . (see *State v. Johnston*)

The pattern instruction does not use the term “true threat.” Instructing jurors using this term could unnecessarily confuse the issues by causing jurors to speculate about “false” threats. *Accordingly, the committee incorporated the constitutional concepts into the instruction’s final paragraph without directly referring to the legal term of art.*

WPIC 2.24, Comment (emphasis added). According to the drafting committee, defendant’s constitutional rights are protected where the jury is given the above definitional instruction.

The Washington State Supreme Court has recognized that WPIC 2.24 comports with the Court's holding in *Johnston*:

Although the instructions in [Schaler's] case erroneously failed to limit the statute's scope to "true threats," the problem is unlikely to arise in future cases. After our opinion in *Johnston* limited the bomb threat statute's scope to "true threats," the Washington Pattern Jury Instructions Committee amended the pattern instruction defining "threat" so that it matches the definition of "true threat." Cases employing the new instruction defining "threat" will therefore incorporate the constitutional mens rea as to the result.

State v. Schaler, 169 Wn.2d 274, 288 n.5, 236 P.3d 858 (2010).

The case law is clear that whether the instructions properly convey a "threat" as a "true threat" is a definitional requirement, not an essential element of the crime of harassment. Defendant's constitutional rights are protected where the instructions elsewhere define a "true threat." *See, e.g., Allen*, 161 Wn. App. at 755. Here, the jury instructions comported with the applicable pattern jury instructions in defining "true threat." CP 29, 32 (Jury Instruction No.'s 8, 11).⁷ The instructions properly stated the law and the State's burden of proof. The jury was thus properly instructed, and defendant's constitutional rights were not implicated.

⁷ The instructions are included as Appendices E and F, respectively.

- b. Defendant waived any challenge to the alleged instructional error because he failed to preserve the issue below.

As argued in subsection (a), whether a “threat” is a “true threat” is a definitional requirement that is not of constitutional magnitude. To preserve this issue for appeal, defendant was thus required to object below,⁸ which he failed to do. RP 51–62. The court should thus dismiss defendant’s argument because he cannot raise this issue for the first time on appeal.

2. THE INFORMATION PROPERLY INCLUDED ALL OF THE ESSENTIAL ELEMENTS OF HARASSMENT.

When reviewing a claim that the information omits an essential element for the first time on appeal, the reviewing court construes the information liberally in favor of validity. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). The court first asks whether the necessary facts appear or can be found by fair construction in the information. *Id.* at 105–06. If so, the court determines whether the defendant was nonetheless prejudiced by the language used in the information. *Id.*

As argued in section 1, the true threat requirement is a definitional requirement and does not need to be included in the charging document.

⁸ See *Stearns*, 119 Wn.2d at 250; see also RAP 2.5(a).

Tellez, 141 Wn. App. at 483 (“No Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document”); *Allen*, 161 Wn. App. at 751; *Atkins*, 156 Wn. App. at 805.

Here, the information properly stated the necessary facts of defendant’s conduct, along with the proper elements of the charge:

That MARK ANTHONY DAVIS, in the State of Washington, on or about the 13th day of May, 2011, without lawful authority, did unlawfully, knowingly threaten Officer Cory Peyton of the Tacoma Police Department to cause bodily injury, immediately or in the future, to that person or to any other person, and by words or conduct place the person threatened in reasonable fear that the threat would be carried out, and that further, the threat was a threat to kill the person threatened or any other person, thereby invoking the provisions of RCW 9A.46.020(2)(b)

CP 1 (Information);⁹ *see also* RCW 9A.46.020. Even if the true threat requirement was an essential element of harassment, the information in this case was sufficient because it defined “threat” as a “true threat,” as “words or conduct [that] place the person threatened in reasonable fear that the threat would be carried out.” CP 1. This statement necessarily limits the threat to only true threats, and thus defendant cannot demonstrate how he was prejudiced by the charging document.

Because the information adequately described the necessary facts and conduct of defendant's charges, this court should dismiss defendant's claim and affirm his conviction.

3. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY WHEN IT IMPOSED A TERM OF COMMUNITY CUSTODY FOR A FELONY HARASSMENT CONVICTION.

This court reviews de novo whether the trial court had statutory authority to impose community custody. *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010). A trial court may impose only statutorily authorized sentences. *State v. Paulson*, 131 Wn. App. 570, 588, 128 P.3d 133 (2006). "If the trial court exceeds its sentencing authority, its actions are void." *Id.* This court remedies sentencing errors by remanding the issue to the sentencing court with instructions only to strike the unauthorized condition. *See State v. Jones*, 118 Wn. App. 199, 212, 76 P.3d 258 (2003).

RCW 9.94A.701¹⁰ outlines the crimes for which a trial court may impose a term of community custody. "Harassment" does not fall under any of the crimes provided in the statute. *See* RCW 9.94A.701. Thus, the trial court exceeded its statutory authority when it imposed a 12-month

⁹ The information is attached as Appendix G.

term of community custody as part of defendant's sentence. The State respectfully requests this court to remand the issue to the sentencing court with instructions to strike only the term of community custody.

D. CONCLUSION.

Defendant waived his right to challenge the jury instructions and charging information in this case because the requirement that a "threat" be defined as a "true threat" is a definitional requirement, and defendant did not preserve the issue below. Both the charging document and the jury instructions properly defined "threat" such that defendant's constitutional rights were protected. The State respectfully requests that the court affirm defendant's conviction.

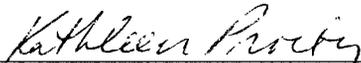
Additionally, because the trial court exceeded its statutory authority when it imposed a term of community custody, this court should

¹⁰ The statute is included as Appendix H.

remand the issue to the sentencing court with instructions to strike the unauthorized term of community custody.

DATED: JANUARY 24, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Kiel Willmore
Rule 9

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/24/13 J. Johnson
Date Signature

APPENDIX “A”

RCW 9A.46.020 (2010)

West's RCWA 9A.46.020

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

Chapter 9A.46. Harassment (Refs & Annos)

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 either of the following applies: (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 no-contact or no-harassment order; or (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.

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

CREDIT(S)

[2003 c 53 § 69, eff. July 1, 2004; 1999 c 27 § 2; 1997 c 105 § 1; 1992 c 186 § 2; 1985 c 288 § 2.]

HISTORICAL AND STATUTORY NOTES

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Intent—1999 c 27: "It is the intent of chapter 27, Laws of 1999 to clarify that electronic communications are included in the types of conduct and actions that can constitute the crimes of harassment and stalking. It is not the

APPENDIX “B”

RCW 9A.46.020 (2011)



West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

Chapter 9A.46. Harassment (Refs & Annos)

→ → **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 no-contact 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.

CREDIT(S)

[2011 c 64 § 1, eff. July 22, 2011; 2003 c 53 § 69, eff. July 1, 2004; 1999 c 27 § 2; 1997 c 105 § 1; 1992 c 186 § 2; 1985 c 288 § 2.]

Current with all 2012 Legislation and Initiative Measures 502, 1185, 1240

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END OF DOCUMENT

APPENDIX “C”

WPIC 36.07.020

Washington Practice Series TM
Database Updated November 2011

Washington Pattern Jury Instructions--Criminal
2008 Edition Prepared by the Washington Supreme Court Committee On Jury Instructions, Hon. Sharon S. Armstrong, Co-Chair, Hon. William L. Downing, Co-Chair

Part
VI. Crimes Against Personal Security
WPIC CHAPTER
36. Harassment and Domestic Violence

WPIC 36.07.02 Harassment—Felony—Threat to Kill—Elements

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

- (1) That on or about (date), the defendant knowingly threatened to kill (name of person) immediately or in the future;
- (2) That the words or conduct of the defendant placed (name of person) 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 has 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 the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

NOTE ON USE

Use this instruction if the defendant is charged with felony harassment based on a threat to kill. If instead the felony charge is based on a previous conviction, then use WPIC 36.07.03 instead of this instruction.

Use the bracketed word “felony” only if the jury is also being instructed on the gross misdemeanor form of harassment. See discussion in the Comment.

With this instruction, use WPIC 2.24, Threat—Definition, and WPIC 10.02, Knowledge—Knowingly—Definition. If an instruction defining the phrase “without lawful authority” would be helpful to jurors, then see the Note on Use and Comment for WPIC 36.27, Stalking—Without Lawful Author-

ity—Definition.

COMMENT

RCW 9A.46.020(1), (2).

Title of crime. For ease of reference, the committee has referred to this crime as “felony harassment.” The word “felony” should not be included unless the jury is also being instructed on the gross misdemeanor form of the crime, WPIC 36.07. Juries are routinely instructed that they should not consider potential punishment during their deliberations. See e.g., WPIC 1.02, Conclusion of Trial—Introductory Instruction. Referring to the crime as a “felony” to some extent is inconsistent with this mandate. Other suggestions include referring to the crime as “aggravated” or “serious.”

Structure of instruction. Consistent with the approach taken in this volume, the committee recommends that the enhancing factors of RCW 9A.46.020(2) be included as elements and not simply be provided to the jury by way of special verdict forms. For a detailed discussion of this issue, see the Comment to WPIC 36.51, Violation of a Court Order—Gross Misdemeanor—Elements.

If the defendant is charged with felony harassment based on both on making threats to kill and on the basis of prior convictions, then use WPIC 36.07.02 and address the prior qualifying convictions by way of special interrogatory. The committee believes this will likely be a fairly rare situation and that structuring an instruction with two alternative elements will be unduly confusing. Use of a special interrogatory for prior convictions has been specifically upheld. See *State v. Oster*, 147 Wn.2d 141, 52 P.3d 26 (2002) (enhancement for violation of a domestic violence order based on prior convictions).

Threat to kill as enhancing factor. In *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003), the Supreme Court reversed a juvenile conviction for felony harassment where there was no evidence that the person threatened reasonably believed that the threat to kill would be carried out. The court disapproved of *State v. Savaria*, 82 Wn.App. 832, 919 P.2d 1263 (1996), cited in the 1998 pocket part, in so far as the *Savaria* court concluded that the person threatened need not have actually believed that the threat to kill would be carried out. In *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005), the Supreme Court concluded that the version of the enhancement instruction contained in the 1998 supplement was defective as it did not require that the jury conclude that the victim reasonably believed the threat to kill would be carried out. This deficiency has been remedied for the 2008 edition, as the victim's reasonable belief that the threat would be carried out is included as an element of the offense.

Further discussion. Additional issues underlying this instruction are discussed in the Comment to WPIC 36.07, Harassment—Gross Misdemeanor—Elements. [*Current as of July 2008.*] Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

11 WAPRAC WPIC 36.07.02

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APPENDIX “D”

WPIC 2.24 & Comment

Washington Practice Series TM
Database Updated November 2011

Washington Pattern Jury Instructions--Criminal
2008 Edition Prepared by the Washington Supreme Court Committee On Jury Instructions, Hon. Sharon S. Armstrong, Co-Chair, Hon. William L. Downing, Co-Chair

Part
I. General Instructions
WPIC CHAPTER
2. Definitions

WPIC 2.24 Threat—Definition

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]; [or]

[to cause physical damage to the property of a person other than the actor]; [or]

[to subject the person threatened or any other person to physical confinement or restraint]; [or]

[to accuse any person of a crime or cause criminal charges to be instituted against any person]; [or]

[to expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule]; [or]

[to reveal any information sought to be concealed by the person threatened]; [or]

[to testify or provide information, or withhold testimony or information, with respect to another's legal claim or defense]; [or]

[to take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding]; [or]

[to bring about or continue a strike, boycott, or other similar collective action to obtain property that is not demanded or received for the benefit of the group which the actor purports to represent]; [or]

[to do any *[other]* act that is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships.]

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]**[jest, idle talk, or political argument]*.

NOTE ON USE

Use bracketed material as applicable. For directions on using bracketed phrases, see the Introduction to WPIC 4.20. Select from among the bracketed phrases so as to use only those that apply to the particular case. With regard to the bracketed clause relating to political argument, see the Comment below.

Use WPIC 2.03, Bodily Injury—Physical Injury—Definition, as applicable, with this instruction.

Portions of this instruction may be used with, or as an alternative to, WPIC 115.52, Intimidating a Witness—Threat—Definition, in combination with WPIC 115.51, Intimidating a Witness—Threat to Former Witness—Elements. See the Comments to those instructions.

COMMENT

RCW 9A.04.110.

Threat. Several statutes supplement RCW 9A.04.110 with an additional definition of threat: “to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time.” See RCW 9A.76.180(3)(a) (intimidating a public servant); RCW 9A.72.160 (intimidating a judge); RCW 9A.72.130 (intimidating a juror); and RCW 9A.72.110 (intimidating a witness).

A speaker need not actually intend to carry out a threat in order for the communication to constitute a threat, as long as the speaker objectively knows that the communication constitutes a threat. *State v. Kilburn*, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004); see also *State v. Side*, 105 Wn.App. 787, 790, 21 P.3d 321 (2001). A statement may constitute a threat even if it does not actually reach the victim. *State v. Hansen*, 122 Wn.2d 712, 717-18, 862 P.2d 117 (1993); *State v. Side*, 105 Wn.App. 787 at 790, 21 P.3d 321.

Use of the second bracketed phrase is proper in a prosecution under RCW 9.61.160, threatening to bomb or injure property. *State v. Edwards*, 84 Wn.App. 5, 924 P.2d 397 (1996). A conditional threat to injure property in the future is within this definition. 84 Wn.App. at 11-12. See the Comment to WPIC 86.02, Threatening to Bomb or Injure Property—Elements.

Use of the first bracketed phrase, which is the language of RCW 9A.04.110(27)(a), is error in a robbery case because that statutory definition refers to threat to do injury in the future. *State v. Gallaher*, 24 Wn.App. 819, 604 P.2d 185 (1979).

True threat. The constitution requires the prosecution to prove a true threat for many offenses, including: felony harassment involving a threat to kill (see cases cited earlier in this section); threats to bomb or injure property (see *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006)); threats involved in intimidating a judge (*State v. Hansen*, 122 Wn.2d 712, 862 P.2d 117 (1993)); threats to bomb a government building (*State v. Smith*, 93 Wn.App. 45, 966 P.2d 411 (1998)); and threats involved in intimidating a public servant (*State v. Stephenson*, 89 Wn.App. 794, 966 P.2d 411 (1997)); see also *State v. King*, 135 Wn.App. 662, 145 P.3d 1224 (2006) (holding that an instruction defining “true threat” is not needed for the crime of intimidating a former witness, RCW 9A.72.110; the crime's elements are such that they limit the statute's application to true threats and exclude constitutionally protected speech). The true threat requirement is imposed so that criminal statutes prohibiting threats do not target constitutionally protected speech. See *State v. Williams*, 144 Wn.2d 197, 207, 26 P.3d 890 (2001).

The pattern instruction does not use the term “true threat.” Instructing jurors using this term could unnecessarily confuse the issues by causing jurors to speculate about “false” threats. Accordingly, the committee incorporated the constitutional concepts into the instruction's final paragraph without directly referring to the legal term of art.

A true threat is defined as

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. A true threat is a serious threat, not one said in jest, idle talk, or political argument. Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.

State v. Kilburn, 151 Wn.2d at 43–44 (citations omitted). See also State v. J.M., 144 Wn.2d 472, 481–82, 28 P.3d 720 (2001).

A true threat can be found even when there is no actual intent to carry out the threat. State v. Kilburn, 151 Wn.2d at 44–48.

The instruction directs jurors to consider foreseeability from the standpoint of a reasonable person in the position of the speaker. This language incorporates the requirement that true threats be evaluated using an “objective standard that focuses on the speaker.” See, e.g., State v. Kilburn, 151 Wn.2d at 44.

True threat—Political advocacy. The case law establishes that true threats are to be distinguished from constitutionally protected speech, including not only statements made in jest and idle talk, but also political arguments. See State v. Kilburn, 151 Wn.2d at 43; State v. J.M., 144 Wn.2d at 477–78.

The context of political advocacy raises special considerations with regard to constitutionally protected speech. See, e.g., *Watts v. U.S.*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (holding that the statement “if they ever make me carry a rifle the first man I want in my sights is L.B.J.” in a political speech did not amount to a threat against the life of the President). For cases involving political speech, some additional instructions may be necessary to address these issues. For cases that do not involve political speech, practitioners may avoid these issues by omitting the bracketed reference to political arguments. [*Current as of July 2008.*] Westlaw. © 2011 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

11 WAPRAC WPIC 2.24

END OF DOCUMENT

APPENDIX “E”

Court's Instructions to the Jury, No. 8

INSTRUCTION NO. 8

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; or to do any other act that is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships

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.

APPENDIX “F”

Court’s Instructions to the Jury, No. 11

INSTRUCTION NO 11

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

- (1) That on or about May 13, 2011, the defendant knowingly threatened to kill Cory Peyton immediately or in the future;
- (2) That the words or conduct of the defendant placed Cory Peyton 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 has 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 the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX “G”

Information

May 16 2011 2:59 PM

KEVIN STOCK
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 11-1-02049-7

vs.

MARK ANTHONY DAVIS,

INFORMATION

Defendant.

DOB: 10/6/1966
PCN#: 540425477

SEX : MALE
SID#: 14646197

RACE: BLACK
DOL#: WA DAVISMA342PF

COUNT I

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MARK ANTHONY DAVIS of the crime of FELONY HARASSMENT, committed as follows:

That MARK ANTHONY DAVIS, in the State of Washington, on or about the 13th day of May, 2011, without lawful authority, did unlawfully, knowingly threaten Officer Cory Peyton of the Tacoma Police Department to cause bodily injury, immediately or in the future, to that person or to any other person, and by words or conduct place the person threatened in reasonable fear that the threat would be carried out, and that further, the threat was a threat to kill the person threatened or any other person, thereby invoking the provisions of RCW 9A.46.020(2)(b) and increasing the classification of the crime to a felony, contrary to RCW 9A.46.020(1)(a)(i)(b) and 9A.46.020(2)(b), and the crime was aggravated by the following circumstance: pursuant to RCW 9.94A.535(3)(v), the offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense, and against the peace and dignity of the State of Washington.

DATED this 16th day of May, 2011.

TACOMA POLICE DEPARTMENT
WA02703

MARK LINDQUIST
Pierce County Prosecuting Attorney

hkb

By: /s/ HUGH K. BIRGENHEIER
HUGH K. BIRGENHEIER
Deputy Prosecuting Attorney
WSB#: 14720

APPENDIX “H”

RCW 9.94A.701

C

West's Revised Code of Washington Annotated Currentness

Title 9. Crimes and Punishments (Refs & Annos)

▣ Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos)

▣ Supervision of Offenders in the Community

→ → **9.94A.701. Community custody--Offenders sentenced to the custody of the department**

(1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:

(a) A sex offense not sentenced under RCW 9.94A.507; or

(b) A serious violent offense.

(2) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

(3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:

(a) Any crime against persons under RCW 9.94A.411(2);

(b) An offense involving the unlawful possession of a firearm under RCW 9.41.040, where the offender is a criminal street gang member or associate;

(c) A felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000; or

(d) A felony violation of RCW 9A.44.132(1) (failure to register) that is the offender's first violation for a felony failure to register.

(4) If an offender is sentenced under the drug offender sentencing alternative, the court shall impose community custody as provided in RCW 9.94A.660.

(5) If an offender is sentenced under the special sex offender sentencing alternative, the court shall impose community custody as provided in RCW 9.94A.670.

(6) If an offender is sentenced to a work ethic camp, the court shall impose community custody as provided in RCW 9.94A.690.

(7) If an offender is sentenced under the parenting sentencing alternative, the court shall impose a term of community custody as provided in RCW 9.94A.655.

(8) If a sex offender is sentenced as a nonpersistent offender pursuant to RCW 9.94A.507, the court shall impose community custody as provided in that section.

(9) The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

CREDIT(S)

[2010 c 267 § 11, eff. June 10, 2010; 2010 c 224 § 5, eff. June 10, 2010; 2009 c 375 § 5, eff. July 26, 2009; 2009 c 28 § 10, eff. Aug. 1, 2009; 2008 c 231 § 7, eff. Aug. 1, 2009.]

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PIERCE COUNTY PROSECUTOR

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