

No. 48126-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Andrew Toombs,**

Appellant.

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Pierce County Superior Court Cause No. 14-1-02050-5

The Honorable Judge G. Helen Whitener

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Toombs's assault convictions in counts four and seven violated due process because the evidence was insufficient to prove each offense.
2. The state failed to prove that Mr. Toombs assaulted Mageo.
3. The state failed to prove that Mr. Toombs assaulted Van Zanten.
4. The state failed to prove that Van Zanten was performing official duties at the time of the assault.

**ISSUE 1:** Conviction of third-degree assault requires proof of an assault. Was the evidence insufficient to prove third degree assault against Mageo and Van Zanten, where Mr. Toombs did no more than assume a fighting stance and yell at them from several feet away?

**ISSUE 2:** The prosecution was required to prove that Mr. Toombs assaulted a law enforcement officer who was performing official duties at the time of the assault. Did the state fail to prove that Van Zanten was performing official duties, given that he'd left work and was walking toward his car at the time of the alleged assault?

5. Mr. Toombs's conviction for intimidating a public servant violated due process because the evidence was insufficient.
6. The state failed to prove that Mr. Toombs attempted to influence Van Zanten's "decision or other official action as a public servant."

**ISSUE 3:** To obtain a conviction for intimidating a public servant, the prosecution was required to prove that Mr. Toombs attempted to influence Van Zanten's "decision or other official action as a public servant." Was the evidence insufficient to prove that Mr. Toombs attempted to influence Van Zanten's "decision or other official action as a public servant?"

7. Mr. Toombs's felony harassment conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.

8. The harassment conviction violated Mr. Toombs's state constitutional right to notice under Wash. Const. art. I, §§ 3 and 22.
9. The Information was deficient because it failed to allege that Mr. Toombs threatened a particular criminal justice participant who reasonably feared that he might carry out the threat.

**ISSUE 4:** A criminal Information must set forth all of the essential elements of an offense. Where the state charges felony harassment based on threats directed at one or more criminal justice participant(s), must the Information identify those criminal justice participants who were threatened and who reasonably feared that the defendant would carry out the threat?

10. Mr. Toombs was denied his state constitutional right to a unanimous verdict on the harassment charge.
11. The trial court erred by failing to give a unanimity instruction as to the harassment charge.

**ISSUE 5:** In a "multiple acts" case, the prosecution must elect a particular act upon which to proceed, or the court must provide a unanimity instruction. In the absence of a unanimity instruction, did the state's failure to elect a particular criminal justice participant as the victim of the harassment charge violate Mr. Toombs's right to a unanimous verdict?

12. The felony harassment conviction violated Mr. Toombs's constitutional right to due process and to free speech.
13. The trial court erred by failing to instruct jurors that conviction for harassment required proof of Mr. Toombs's subjective intent to cause fear of bodily injury.

**ISSUE 6:** Both due process and the First Amendment prohibit conviction for threats unless the speaker intended to cause fear. Did the trial court's instructions improperly allow conviction without proof that Mr. Toombs subjectively intended to cause fear of bodily injury?

14. The government violated Mr. Toombs's Fourteenth Amendment right to due process by holding him in jail for 2 ½ months after the court ordered him admitted to the hospital for competency restoration.
15. The trial court erred by refusing to dismiss the charges for violation of Mr. Toombs's Fourteenth Amendment right to due process.

**ISSUE 7:** Due process prohibits incarceration longer than seven days for an incompetent person awaiting competency restoration. Did the government violate Mr. Toombs's Fourteenth Amendment right to due process by holding him in jail more than ten times the "maximum justifiable period of incarceration" for a person in his circumstances?

16. The conviction for resisting arrest was obtained in violation of Mr. Toombs constitutional right to free speech.
17. Under the courts instructions, jurors may have convicted Mr. Toombs of resisting an arrest based on an unconstitutional provision of the Fife municipal code.
18. The Fife municipal ordinance criminalizing disorderly conduct is unconstitutionally overbroad because it criminalizes a substantial amount of free speech.

**ISSUE 8:** A charge of resisting arrest requires proof of a lawful arrest. Did the court's instructions allow jurors to convict Mr. Toombs for resisting an arrest based on an unconstitutionally overbroad provision of the Fife municipal code?

19. The trial court erred by failing to memorialize its finding that counts three and four comprised the same criminal conduct.

**ISSUE 9:** Under CrR 7.8(a), clerical errors may be corrected at any time. If the Court of Appeals does not reverse Mr. Toombs's convictions, must it nonetheless remand the case to allow the trial court to memorialize its same-criminal-conduct finding in the Judgment and Sentence?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Andrew Toombs joined the Army in 2000. He was deployed to Iraq in 2004. Forensic Mental Health Evaluation filed 8/4/14 (“FMHE”), p. 2, Supp. CP. Within a year or so of his return, he and his wife divorced. FMHE, p. 2, Supp. CP.

Mr. Toombs continued to serve in the national guard and the reserves through 2008. FMHE, p. 2, Supp. CP. At some point, he moved in with his parents, and supported himself on a Veteran’s disability pension related to mental health problems. FMHE, p. 2, Supp. CP.

He received outpatient psychiatric treatment at a Veterans’ Administration hospital, and was admitted for inpatient treatment on three occasions, in 2009, 2010, and 2012. FMHE, p. 2, Supp. CP. He has been diagnosed with post-traumatic stress disorder, anxiety, depression, bipolar disorder, and an unspecified mood disorder.<sup>1</sup> FMHE, p. 3, Supp. CP; RP (10/7/15) 872.

In August of 2011, he had an encounter with police that resulted in a two-day hospitalization for his injuries and charges for third-degree

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<sup>1</sup> Mr. Toombs also suffered from kidney stones, lower back problems, and a fractured heel. RP (10/7/15) 872; FMHE, p. 3, Supp. CP.

assault.<sup>2</sup> CP 106; FMHE, p. 2, 3, 5, Supp. CP. He remains preoccupied with the incident, and may suffer PTSD from it, in addition to the PTSD relating to his military service. FMHE, p. 5, Supp. CP

In May of 2014, Mr. Toombs was on electronic home monitoring with the City of Fife, apparently as a condition of release for a pending DUI charge. FMHE, p. 3, Supp. CP; RP (9/9/15) 214-216, 244-247. He had multiple and repeated problems with the equipment, and he came to the city building to get help from program manager Filivaa Mageo. RP (9/9/15) 221, 225, 248. The EHM office was in the same space as the police station. RP (9/15/15) 320.

By mid-May, Mr. Toombs had become very frustrated. He believed that Mageo repeatedly gave him equipment that didn't work and that Mageo unfairly blamed him for the malfunctions. RP (9/9/15) 227-229. During one meeting, Mageo gave Mr. Toombs a new breath sensor, and wanted to review how it worked with Mr. Toombs and his mother. RP (9/9/15) 229. Mageo first took a break for Mr. Toombs to calm down, and then finished his explanation. Mr. Toombs's mother said that Mr. Toombs had a medical appointment that he needed to get to. RP (9/9/15)

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<sup>2</sup> The FMHE indicates that the encounter occurred in 2012. FMHE, p. 2, 3, Supp. CP. According to court records, the incident occurred in 2011, but Mr. Toombs was convicted of two counts of third-degree assault in 2012. CP 106.

231, 233. Mr. Toombs and his mother left and went to the appointment.

RP (9/9/15) 233.

The next week, on May 27, 2014, Mageo texted a message to Mr. Toombs to come in and review the equipment again. RP (9/9/15) 251.

Mageo set an appointment for 4 pm, but Mr. Toombs and his mother arrived late. RP (9/9/15) 235, 237. When Mr. Toombs went to the door, it was locked and the building was closed to the public for the evening. RP (9/9/15) 236.

He saw Steven Van Zanten coming out of the building, and told him to get Mageo. RP (9/15/15) 320-32, 334-335. Van Zanten worked at the front desk at the police station, and was not an officer. He had finished his days' work and was going to his car. RP (9/9/15) 115-116; RP (9/14/15) 314-319. Mr. Toombs spit out his gum, said part of the pledge of allegiance, placed one foot in front of the other, and told Van Zanten he needs to go get Mageo. RP (9/14/15) 321.

Van Zanten went to get Mageo. RP (9/15/15) 334-335.

Mageo came out, with at least three officers behind him. RP (9/9/15) 253. There were up to six additional officers already in the parking lot with Mr. Toombs when Mageo got out there. RP (9/9/15) 253, 373, 411, 476; RP (9/16/15) 545, 607-608.

Mr. Toombs was angry, and surrounded by the police. He stood with one foot in front of the other and shouted, at times clenching his hands at his hips or waist. RP (9/9/15) 254; RP (9/15/15) 322, 375, 378, 419. He yelled at Mageo about the equipment, and about demands made on him by the EHM program. He also made reference to mixed martial arts, and either said that he could “take” the officers or that he wasn’t afraid. RP (9/9/15) 237-239, 254, 477. Officers told Mr. Toombs to unclench his fists but he did not. RP (9/9/15) 239; RP (9/15/15) 383. Mr. Toombs swore. RP (9/15/15) 328, 338.

Mr. Toombs never lunged at anyone, or attempted to throw any punches or kicks. RP (9/15/15) 339, 465; RP (9/16/15) 504, 509, 581, 617; RP (9/17/15) 644-645. Although multiple surveillance cameras cover the area, none of them recorded the incident. RP (9/15/15) 342; RP (9/16/15) 499, 501-502, 539.

Officer McNaughton went in to take hold of Mr. Toombs. He tried a “cross-face” maneuver which didn’t work. RP (9/15/15) 384-387. He yelled that he’d been bitten (a charge for which the jury later acquitted Mr. Toombs).<sup>3</sup> RP (9/16/15) 558. Officers kicked and tased Mr. Toombs multiple times. Eventually, all of the officers were able to get Mr. Toombs

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<sup>3</sup> In fact, not long after this incident, McNaughton was fired from his job as a police officer for lying. RP (9/16/15) 615; RP (9/17/15) 738-741.

into custody. RP (9/15/15) 331, 389, 396-399, 431; RP (9/16/15) 493.

Police booked Mr. Toombs into jail on charges of disorderly conduct and assault of an officer. RP (9/15/15) 281, 433.

After the melee in the parking lot, Mageo told officers that Mr. Toombs had assaulted him with a door the week before. He had not reported it earlier, nor even made a note of it in his own records. RP (9/9/15) 249-251, 259; RP (9/15/15) 284, 302-303.

By the time trial took place, Mr. Toombs faced nine counts. CP 7-10. These included two counts of intimidating a public servant (for alleged threats to Mageo and Van Zanten), four counts of assault three (for alleged assaults against Mageo with the door and a week later in the parking lot, against Van Zanten, against Officer McNaughton, and against an officer named Mulrine), felony harassment (for an alleged threat against an unspecified criminal justice participant), and resisting arrest. CP 7-10. The arrest took place on May 27, 2014. CP 8-10.

Because of doubts about Mr. Toombs's competency, the trial court ordered a mental health evaluation. Order for Examination filed 7/28/14, Supp. CP. An evaluation was completed on August 3, 2014. FMHE, Supp. CP. The evaluator found that Mr. Toombs lacked the capacity to assist in his defense. FMHE, pp. 5-6, Supp. CP.

On August 6, 2014, the trial court ordered Mr. Toombs committed to Western State Hospital for restoration of competency. Order of Commitment filed 8/6/14, Supp. CP. Mr. Toombs was not transported to Western State Hospital until he'd obtained three separate show cause orders over the next several months. Show Cause Orders filed 8/27/14, 9/16/14, and 10/15/14, Supp. CP. He sought dismissal and a contempt finding based on Western State's failure to timely offer admission for restoration of competency. *See* defendant's Motions for Order to Show Cause and Memoranda of Authorities filed 8/27/14, 9/16/14 and 10/15/14, Supp. CP.

The court held hearings on September 3<sup>rd</sup> and 24<sup>th</sup>, but refused to enter a contempt finding or dismiss the charges. RP (9/3/14) 2-4; RP 9/24/14) 2-5; Order re: Transport filed 9/3/14; Order Denying Contempt filed 9/24/14, Supp. CP. Mr. Toombs was not admitted to Western State Hospital until October 20, 2014. Forensic Mental Health Report ("FMHR") filed 12/4/14, p. 1, Supp. CP.

Ultimately, Mr. Toombs was restored to competency. Order Regarding Competency filed 12/10/14, Supp. CP. The case proceeded to trial.

After hearing the evidence, the jury acquitted Mr. Toombs of the assault and intimidating charges stemming from Mr. Toombs's contact

with Mageo the week before his arrest. CP 94-95. They also declined to convict Mr. Toombs of the counts of assault 3 related to Officers McNaughton and Mulrine. Jurors did convict Mr. Toombs of both charges related to Van Zanten: intimidating a public servant and assault 3. CP 96-97. The jury also voted to convict for resisting arrest, the assault 3 against Mageo on the day of the arrest, and felony harassment against an unspecified criminal justice participant. CP 98, 99, 102.

At sentencing, the parties agreed that counts three and four comprised the same criminal conduct. RP 859-861, 864-865. Despite this, the trial judge neglected to check the box or complete the finding indicating that “[c]urrent offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are...” CP 106. The trial judge did sentence Mr. Toombs with an offender score of 4, as agreed by the parties. CP 106. The court imposed a sentence of 14 months, and Mr. Toombs timely appealed. CP 109, 119.

## ARGUMENT

**I. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. TOOMBS OF THIRD-DEGREE ASSAULT (COUNTS FOUR AND SEVEN) AND INTIMIDATING A PUBLIC SERVANT (COUNT THREE).**

Due process requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). In challenging the sufficiency of the evidence,<sup>4</sup> the appellant admits the truth of the state's evidence and all reasonable inferences that can be drawn from it. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

A. The state failed to prove that Mr. Toombs assaulted Mageo or Van Zanten, or that Van Zanten was performing official duties.

The prosecution did not prove that Mr. Toombs assaulted either Mageo or Van Zanten on May 27. At worst, the state's evidence showed that Mr. Toombs assumed a fighting stance and yelled at them from several feet away. RP (9/9/15) 234-259; RP (9/14/15) 318-341. He did not hit or attempt to hit either of them. RP (9/15/15) 339, 465; RP (9/16/15) 504, 509, 581, 617; RP (9/17/15) 644-645. Nor did he step toward them after adopting a fighting stance. RP (9/15/15) 339, 465; RP (9/16/15) 504, 509, 581, 617; RP (9/17/15) 644-645. Thus, he did not

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<sup>4</sup> A challenge to the sufficiency of the evidence may always be raised for the first time on review. *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012); RAP 2.5(a)(2) and (3).

engage in “an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact create[d]... a reasonable apprehension and imminent fear of bodily injury.” CP 81; *cf. State v. Godsey*, 131 Wn. App. 278, 288, 127 P.3d 11 (2006) (assault complete when defendant adopted a fighting stance and then charged deputy).

As witnesses put it, Mr. Toombs displayed “a preattack indicator,” or adopted a “pre-assaultive stance.” RP (9/14/15) 323, 382.<sup>5</sup> He did not actually assault either Mageo or Van Zanten. Van Zanten testified that he was afraid he “*was going to be* assaulted.” RP (9/14/15) 325 (emphasis added). Mageo testified that he was scared “that somebody *would get hurt*” because he didn’t know “how far [Mr. Toombs] *would have went* [sic].” RP (9/9/15) 259 (emphasis added).

Furthermore, the prosecution failed to prove that Van Zanten was “performing his official duties at the time of the assault.” CP 67, 70. Van Zanten had finished work and left the building. RP (9/14/15) 314-320. He was walking toward his car at the time of the alleged assault. RP (9/9/15) 116. Under these circumstances, the state failed to prove the “performing official duties” element of RCW 9A.36.031.

The evidence was insufficient to convict Mr. Toombs on counts four and seven. The convictions must be reversed and the charges

dismissed with prejudice. *State v. Mau*, 178 Wn.2d 308, 317, 308 P.3d 629 (2013).

B. The state failed to prove that Mr. Toombs attempted to influence Van Zanten’s “decision or other official action as a public servant.”

To convict Mr. Toombs of intimidating a public servant, the prosecution was required to prove that he attempted to influence a public servant’s “decision or other official action as a public servant.” CP 69; *see also* RCW 9A.76.180(1). Here, the state failed to prove any attempt to influence official action.

When he encountered Mr. Toombs, Van Zanten was on his way to his car after work. RP (9/9/15) 116; RP (9/14/15) 314-320. He was not engaged in any decision-making or other official action as a public servant. Nor did Mr. Toombs attempt to influence any such decision or other official action.

Instead, Mr. Toombs merely asked Van Zanten to fetch Mageo for him. RP (9/14/15) 320. This did not involve decision-making or official action as a public servant. *Cf. State v. Hendrickson*, 177 Wn. App. 67, 76, 311 P.3d 41 (2013) (sitting judge’s election campaign is not a “decision or other official action”); *see also State v. Montano*, 169 Wn.2d 872, 880,

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<sup>5</sup> Objections to these characterizations were sustained. RP (9/14/15) 323, 382.

239 P.3d 360 (2010); *State v. Moncada*, 172 Wn. App. 364, 368, 289 P.3d 752 (2012).

The evidence was insufficient to convict Mr. Toombs of intimidating a public servant. His conviction must be reversed and the charge dismissed with prejudice. *Mau*, 178 Wn.2d at 317.

**II. THE FELONY HARASSMENT CONVICTION WAS ENTERED IN VIOLATION OF MR. TOOMBS’S CONSTITUTIONAL RIGHTS TO ADEQUATE NOTICE, TO A UNANIMOUS VERDICT, AND TO FREE SPEECH.**

A. The Information did not identify the criminal justice participant placed in reasonable fear by Mr. Toombs’s alleged threats.

A criminal defendant has a constitutional right to be fully informed of the charge he faces. This right stems from the Fifth, Sixth, and Fourteenth Amendments to the federal constitution, as well as art. I, §§ 3, 22 of the Washington constitution. The right to a constitutionally-sufficient Information is one that must be “zealously guarded.” *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

All of the essential elements of a crime must be alleged in the charging document. *State v. Zillyette*, 178 Wn.2d 153, 161-163, 307 P.3d 712 (2013). An Information that omits an essential element fails to charge a crime. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012).

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Pittman*, 185 Wn. App. 614, 619, 341 P.3d 1024 (2015). Such a challenge may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). When the challenge comes after a verdict, the reviewing court construes the document liberally. *Zillyette*, 178 Wn.2d at 161. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.* at 162. If the Information is deficient, the court must presume prejudice and reverse. *Id.* at 163.

To obtain a conviction for felony harassment, the state must allege that a particular person was placed in reasonable fear by the defendant's threats. *See State v. Morales*, 174 Wn. App. 370, 381-384, 298 P.3d 791 (2013).

Here, the state failed to name a particular criminal justice participant placed in reasonable fear by Mr. Toombs's alleged threats. CP 9. Nor can the identity of the particular victim be inferred from the other counts charged. *Cf. State v. Nonog*, 169 Wn.2d 220, 229-231, 237 P.3d 250 (2010).

The Information was deficient. *Zillyette*, 178 Wn.2d at 161-163. The conviction in count five must be reversed, and the charge dismissed without prejudice. *Id.*

- B. The prosecutor failed to elect a single act or a particular criminal justice participant who was placed in reasonable fear by Mr. Toombs's alleged threats.

An accused person has a state constitutional right to a unanimous jury verdict.<sup>6</sup> Wash. Const. art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

Where the prosecution introduces evidence of multiple acts to support a single charge, the state must “clearly” identify the basis for the charge. *State v. Carson*, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015) (citations omitted). If the prosecutor does not clearly elect a single act, the court must provide a unanimity instruction as to that charge. *Coleman*, 159 Wn.2d at 511. This requirement “protect[s] a criminal defendant’s right to a unanimous verdict based on an act proved beyond a reasonable doubt.” *Id.*

The absence of an election by the prosecutor and the trial court’s failure to provide a unanimity instruction are manifest errors affecting the constitutional right to a unanimous verdict. *State v. Moultrie*, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3). Such errors can be

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<sup>6</sup> The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

raised for the first time on appeal. *Moultrie*, 143 Wn. App. at 392; *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997).<sup>7</sup>

Here, the court did not give a unanimity instruction regarding the felony harassment charge. CP 57-90. Because this case involved multiple acts, reversal is required unless the prosecutor made a clear election.

*Coleman*, 159 Wn.2d at 511.

The prosecutor failed to make a clear election. First, the state did not choose between the initial incident (directed at Van Zanten) and the later incident (when other officers approached Mr. Toombs). RP (9/17/15) 777-779.

Second, the prosecutor did not clearly elect a specific victim who was placed in reasonable fear that Mr. Toombs would carry out his alleged threat. RP (9/17/15) 777-779; *cf. Morales*, 174 Wn. App. at 381-384. Instead, the prosecutor referred variously to “a person or persons,” to Mageo specifically, to “[a]ll of the persons who testified,” to “just about all the persons who testified,” to “these people,” to “these officers,” to Van Zanten, and to “these individuals.” RP (9/17/15) 777-779.

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<sup>7</sup> There appears to be a split between Divisions I and II as to whether or not failure to provide a unanimity instruction automatically qualifies as manifest error affecting a constitutional right. *See, e.g., State v. Locke*, 175 Wn. App. 779, 802, 307 P.3d 771 (2013) (requiring appellant to demonstrate practical and identifiable consequences of error); *State v. Knutz*, 161 Wn. App. 395, 406, 253 P.3d 437 (2011) (same). The difference appears to have little practical effect, however, as Division II will analyze the merits of the claimed error to determine whether or not it qualifies for review.

The prosecutor's failure to make a clear election violated Mr. Toombs's right to a unanimous verdict. Some jurors may have voted to convict by deciding that Mageo was placed in reasonable fear during the second incident. Others may have decided that Mageo's fear was not reasonable, but that the earlier threats placed Van Zanten in reasonable fear during the first incident.

Still others may have believed that McNaughton was the person closest to Mr. Toombs, and thus was the only criminal justice participant in position to have a reasonable fear. Other jurors may have decided that a subset of the officers who testified were placed in reasonable fear. In the alternative, one or more jurors may have voted to convict believing that all the officers were placed in reasonable fear, whether they testified or not.

The absence of a unanimity instruction and the state's failure to elect violated Mr. Toombs's state constitutional right to a unanimous verdict. *Coleman*, 159 Wn.2d at 511. The violation requires reversal of Mr. Toombs's conviction of felony harassment. *Id.* The charge must be remanded for a new trial. *Id.*

C. The court’s instructions violated Mr. Toombs’s right to free speech and to due process, because they allowed conviction for harassment without proof that Mr. Toombs intended to cause fear of bodily injury.<sup>8</sup>

1. Washington’s negligence standard for true threats predates the U.S. Supreme Court decisions in *Virginia v. Black* and *Elonis v. United States*.

Because the right to free speech is “vital,” only a few narrow categories of communication may be proscribed. *State v. Kilburn*, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004) *as amended* (Feb. 17, 2004); U.S. Const. amend. I. Although a “threat” is one of those categories, the only type of threat which may be criminalized without running afoul of the First Amendment is a “true threat.” *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).

In the wake of *Watts*, the Washington Supreme Court adopted an objective test for evaluating whether a statement is a true threat or constitutionally protected speech. *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001). Under the objective test, “[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 to take

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<sup>8</sup> The Supreme Court is considering this issue on review. *State v. Trey M.*, No. 92593-3. Oral argument is currently scheduled for May 5, 2016.

the life of [another individual].” *Williams*, 144 Wn.2d at 207-08 (internal quotations omitted).

Two years after *Williams*, the U.S. Supreme Court decided *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). *Black* called into question the constitutionality of the objective (negligence) standard for assessing true threats.

Following *Black*, several courts replaced the objective negligence standard with a subjective intent standard, holding that the First Amendment requires prosecutors to prove the speaker *intended to intimidate* the victim – in other words, that the speaker intended to place the victim in fear of bodily harm or death. See *United States v. Heineman*, 767 F.3d 970, 976 (10th Cir. 2014); *Brewington v. State*, 7 N.E.3d 946, 964-65 (Ind. 2014); *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011); see also *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (not reaching issue because jury was instructed it had to find intent, but opining that negligence standard is unconstitutional under *Black*).

The U.S. Supreme Court’s even more recent decision in *Elonis* also provides persuasive authority for the proposition that a negligence standard is insufficient. See *Elonis v. United States*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015). The court did not reach the First Amendment question in *Elonis*, but rejected a negligence standard for

threats on statutory construction grounds. *See id.* at 2012. The court's holding relied heavily on due process considerations which are equally applicable in Washington. *See id.* at 2009-11.

*Black* and *Elonis* suggest that a person may not be convicted of issuing a "true threat" unless the state proves the speaker subjectively intended to place the victim in fear of bodily harm.

2. A *mens rea* of negligence is insufficient under the First Amendment and *Black*.

*Black* involved consolidated cases in which three defendants were convicted of cross-burning with the intent to intimidate. *Black*, 538 U.S. at 347-48. The Virginia statute provided that "burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." *Id.* at 348.

The *Black* court indicated that "[t]rue threats" encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359 (emphasis added). The court held that Virginia could ban "cross burning with intent to intimidate," because "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat

to a person or group of persons *with the intent of placing the victim in fear of bodily harm or death.*” *Id.* at 360 (emphasis added).

But the *Black* court struck down the provision creating a presumption that any cross-burning was done with intent to intimidate. *Id.* at 364 (plurality).<sup>9</sup> The plurality explained, “The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.” *Id.* at 367.<sup>10</sup>

The convictions in *Black* were reversed even though (1) all of the defendants intentionally burned crosses; (2) the burning crosses caused people to fear harm; and (3) this fear was reasonable in light of the context and history of cross-burning. *See id.* at 348-50. The Supreme Court concluded that statements causing fear of violence are protected unless made with a *purpose* of causing that fear. *Id.* at 360. This court should impose a similar requirement in Washington to comport with the First Amendment and *Black*.

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<sup>9</sup> Three justices would have invalidated the statute in its entirety under the First Amendment. *Id.*, at 380-81.

<sup>10</sup> Although he would have applied a different remedy, Justice Scalia endorsed the plurality’s view that “‘a burning cross is not always intended to intimidate,’ and nonintimidating cross burning cannot be prohibited.” *Id.* at 372 (Scalia, J., concurring in part).

3. Other courts have abandoned the negligence standard in light of *Black*.

Other courts have had the opportunity to reassess the true-threat standard in light of *Black*, and have renounced the objective (negligence) standard in favor of a subjective (intent) requirement.

The Tenth Circuit engaged in a particularly thorough analysis in *Heineman*, 767 F.3d 970. The Indiana Supreme Court has also read *Black* to require a subjective standard. *Brewington*, 7 N.E.3d at 963. The Ninth Circuit has similarly held that, following *Black*, proof of subjective intent to threaten is required under the First Amendment. *Bagdasarian*, 652 F.3d at 1116-18. The Seventh Circuit has also construed *Black* to require proof of subjective intent to cause fear. *Parr*, 545 F.3d at 500.

Washington's harassment statute already requires proof that the alleged victim reasonably fears that the threat will be carried out. What is lacking and must be added under the First Amendment is a requirement that the state prove subjective intent to cause such fear.

4. A *mens rea* of negligence is insufficient in light of due process principles as explained in *Elonis*.

Although *Black* is binding authority on the First Amendment question and compels a subjective-intent standard, it is also worth noting that due process concerns support such a standard. The U.S. Supreme Court construed a federal threat statute in light of due process principles

and rejected the negligence standard in *Elonis*, 135 S.Ct. at 2011. The Sixth Circuit further explained the due-process problems with the negligence standard in *United States v. Houston*, 792 F.3d 663, 667-68 (6th Cir. 2015).

The due process principles relied on in *Elonis* are equally applicable in Washington. *See, e.g., State v. Anderson*, 141 Wn. 2d 357, 366-67, 5 P.3d 1247 (2000). Furthermore, the First Amendment provides special protection against the criminalization of speech. *See Black*, 538 U.S. at 358. In light of these twin constitutional concerns, this court should hold that a person may not be convicted of issuing a “true threat” unless the state proves the speaker subjectively intended to place the victim in fear of bodily harm.<sup>11</sup>

5. The trial court improperly instructed on the negligence standard rather than the subjective intent standard required under *Black* and *Elonis*.

The trial court instructed jurors that Mr. Toombs could be convicted of harassment if “a reasonable person, in [his position], 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 79. The court did not instruct jurors on the state’s

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<sup>11</sup> As noted previously, the Supreme Court is currently considering this issue.

obligation to prove Mr. Toombs's subjective intent to cause fear of bodily injury.<sup>12</sup>

Because of this, his conviction for felony harassment must be reversed, and the case remanded for a new trial with proper instructions.

**III. THE UNREASONABLE DELAY PRIOR TO COMPETENCY RESTORATION VIOLATED MR. TOOMBS'S RIGHT TO DUE PROCESS.**

An accused person determined to be incompetent has liberty interests in freedom from incarceration and in restorative treatment.

*Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003).

Where the sole treating authority unreasonably delays admission of incapacitated defendants for restoration of competency, the delay violates an accused person's right to substantive due process. *Mink*, 322 F.3d at 1120.

Where an incompetent defendant is held in jail for "weeks or months," Washington state's Department of Social and Health Services (DSHS) violates due process because "the nature and duration of [the] incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals." *Mink*, 322 F.3d at

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<sup>12</sup> By contrast, the court's instructions on Intimidating a Public Servant required proof of an (intentional) attempt, by use of a threat, to influence a public servant's decision or other official action.

1122; *see also Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972).

In Washington, due process requires that detainees be admitted to the hospital for competency restoration within seven days: this is “the maximum justifiable period of incarceration absent an individualized finding of good cause.” *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, 101 F. Supp. 3d 1010, 1022 (W.D. Wash. 2015). This seven-day limit is

required by the Constitution because of the gravity of the harms suffered... during prolonged incarceration—harms which directly conflict with [detainees'] rights to freedom from incarceration and to the competency services which form the basis of their detention, and also directly conflict with the State's interests in swiftly bringing those accused of crimes to trial and in restoring incompetent criminal defendants to competency so as to try them.

*Id.*

In this case, the trial court committed Mr. Toombs to DSHS for competency restoration on August 6, 2014. Order of Commitment filed 8/6/14, Supp. CP. The court was obligated to sign three separate show cause orders while Mr. Toombs waited in the county jail.<sup>13</sup> Mr. Toombs was not admitted until October 20, 2014, approximately 2 ½ months

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<sup>13</sup> These were dated August 27, September 16, and October 15, 2014. Show Cause Orders filed 8/27/14, 9/16/14, and 10/15/14, Supp. CP.

following entry of the order committing him for competency restoration.

FMHR, p. 1, Supp. CP.

In other words, as a result of his mental illness, Mr. Toombs spent more time in the county jail awaiting admission to the hospital than his entire speedy trial period. *See* CrR 3.3(b)(1)(i) (setting 60 days as the time for trial of a defendant detained in jail).<sup>14</sup>

This violated Mr. Toombs's Fourteenth Amendment right to due process. Mr. Toombs was in legal limbo longer than permitted under the speedy trial rules, and ten times longer than the "maximum justifiable period" identified by the *Trueblood* court. The government should not have abused Mr. Toombs in this manner. The trial court should have granted his motions to dismiss.

**IV. THE COURT'S INSTRUCTIONS IMPROPERLY ALLOWED CONVICTION FOR RESISTING AN ARREST BASED ON AN UNCONSTITUTIONAL PROVISION OF THE FIFE MUNICIPAL CODE.**

Conviction for resisting arrest requires proof of a lawful arrest. RCW 9A.76.040. An arrest is not lawful if conducted pursuant to an unconstitutional statute. *See, e.g., State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982) (declining to adopt a good faith exception to the exclusionary rule where arrest is based on an unconstitutional statute).

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<sup>14</sup> Because this amounts to an excluded period, Mr. Toombs is not entitled to dismissal under CrR 3.3(h). *See* CrR 3.3(c)(1).

Here, the court's instructions improperly allowed jurors to convict Mr. Toombs even if officers arrested him pursuant to an unconstitutional ordinance. Specifically, the court's instructions permitted jurors to convict Mr. Toombs of resisting arrest, *inter alia*, if officers had probable cause to arrest under Fife's disorderly conduct ordinance. CP 87-89. Under one provision of that ordinance, a person is guilty when he "in a public place, makes noise by shouting, screaming, throwing objects or striking objects, which disturbs or tends to disturb the public peace." CP 89. This provision is unconstitutionally overbroad. It cannot provide the basis for a lawful arrest.

Free speech challenges are different from most constitutional challenges to statutes; under the First Amendment, the state bears the burden of justifying a restriction on speech. *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011). Furthermore, a defendant may challenge a statute as overbroad even where the constitution clearly does not protect his own conduct. *Id.*, at 7. A law criminalizing expression violates the first amendment if it prohibits a substantial amount of constitutionally protected speech. *Id.*, at 10-11.

This case is controlled by *Immelt*, which involved an ordinance restricting horn-honking. *Id.*, at 6-13. The Supreme Court invalidated the

ordinance because it swept “too broadly in banning protected forms of expressive conduct.” *Id.*, at 13.

The Fife disorderly conduct ordinance implicates free speech. As in *Immelt*, “[a] moment’s reflection brings to mind numerous occasions” in which a person who disturbs the public peace by shouting, screaming, or striking objects “will be engaging in speech intended to communicate a message that will be understood in context.” *Immelt*, 173 Wn.2d at 9. Examples include protesters shouting their message, Seahawks fans screaming with joy or frustration, and street musicians banging their drums.

Like the ordinance at issue in *Immelt*, the Fife ordinance is substantially overbroad. *Id.*, at 12. It prohibits a vast amount of constitutionally protected speech. CP 89. Indeed, it criminalizes even more pure speech than the horn-honking ordinance, since it covers shouting and screaming. CP 89.

The Fife ordinance is unconstitutional, and cannot provide the basis for a lawful arrest. *Id.* Because the court improperly instructed jurors that police could lawfully arrest Mr. Toombs for protected speech activity, the conviction for resisting arrest must be reversed. The case must be remanded for a new trial. Upon retrial, the court should not

instruct jurors on the unconstitutional provision of Fife's disorderly conduct statute.

**V. THE CASE MUST BE REMANDED TO THE TRIAL COURT TO CORRECT A CLERICAL ERROR.**

At sentencing, the parties agreed that counts three and four comprised the same criminal conduct. RP 859-861, 864-865. However, the court did not make a finding reflecting this, despite agreeing that Mr. Toombs offender score was four. CP 106. Even if this court does not reverse any of Mr. Toombs's convictions, the case must be remanded to the trial court to correct this clerical error.<sup>15</sup>

**CONCLUSION**

For the foregoing reasons, Mr. Toombs's convictions must be reversed and the case dismissed with prejudice because of the pretrial delay in admission to Western State Hospital.

In the alternative, count seven must be dismissed for insufficient evidence, and the remaining charges remanded for a new trial.

If the convictions are not reversed, the case must nonetheless be remanded for correction of a clerical error in the Judgment and Sentence.

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<sup>15</sup> Although this will not impact the current case, the clerical error might well affect future offender score and standard range calculations, should Mr. Toombs again be charged with a felony.

Respectfully submitted on March 1, 2016,

**BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Andrew Toombs  
andrew.toombs@gmail.com

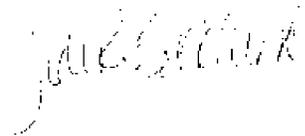
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney  
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 1, 2016.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

March 01, 2016 - 2:52 PM

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