

NO. 48126-0

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

STATE OF WASHINGTON, RESPONDENT

v.

ANDREW TOOMBS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge G. Helen Whitener

No. 14-1-02050-5

BRIEF OF RESPONDENT

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

1. Should this court affirm the jury's verdicts finding defendant guilty of two counts of assault in the third degree committed against employees of law enforcement agencies when the evidence showed that the defendant's aggressive posturing and conduct and threatening words put both victims in reasonable fear and apprehension of being harmed and the jury can infer that was defendant's intent from his behavior?
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B. STATEMENT OF THE CASE.

1. Procedure

Appellant, Andrew Toombs (“defendant”), was brought to trial on charges of two counts of intimidation of a public servant, five counts of assault in the third degree, felony harassment, and resisting arrest. CP 7-10. One count of intimidation and assault in the third degree concerned an interaction defendant had with “Chico” Mageo sometime between May 19 and 23, 2014. *Id.* (see Counts I and II). The remainder of the charges pertained to events that occurred on May 27, 2014, involving Mr. Mageo, several Fife police officers, and one other employee of the Fife Police Department. *Id.*

Concerns arose regarding the defendant’s competency to stand trial. On July 28, 2014, the court signed an order for an evaluation. RP 169-173. After being evaluated in the Pierce County Jail, a mental health expert found there was reason to doubt his competency to stand trial. CP 174-179. On August 6, 2014, the court ordered competency restoration treatment for 45 days at Western State Hospital (“WSH”). CP 180-182. Defense counsel filed a motion seeking a show cause hearing and an order of dismissal when defendant had not yet been admitted to WSH by August 27, 2014. CP 183-84. When this matter came before the court, the court did not find WSH to be in contempt and denied the motion to dismiss.

9/3/14 RP 1-4. The court entered another order directing defendant's transport to WSH and noting the denial of the motion to dismiss. CP 186. Defense counsel filed a second motion for a show cause hearing for contempt on September 16, 2014, when defendant was still in the Pierce County Jail. CP 188-189. At the September 24, 2014 hearing, the court heard from an attorney general representing WSH. 9/24/14 RP 1-4. The court did not find WSH to be in contempt; no motion for dismissal was argued. *Id.* The court entered a written order denying contempt. CP 190.

Defendant was admitted to WSH on October 20, 2014; the staff at WSH issued a report indicating defendant was competent on November 28, 2014. CP180-82, 194-201. The court entered an order of competency on December 10, 2014. CP 202-03.

After several continuances, the case proceeded to trial on September 3, 2015, before the Honorable G. Helen Whitener. RP 1-4. After hearing the evidence, the jury acquitted defendant of the assault and intimidation of a public servant that were alleged to have occurred prior to May, 27, 2014. CP 94, 95.RP 833-44. Defendant was convicted of assaulting Chico Mageo, an employee of the Fife Corrections Department who worked in the Electronic Home Detention ("EHD") program, and Steven Van Zanten, an employee of the Fife police department, as well as felony harassment and resisting arrest for events that occurred on May 27, 2014. CP 96, 97, 98, 99, 102; RP 833- 44. Defendant was acquitted of

assaults that he was alleged to have committed against Fife Police Officers that same day. CP 99, 100, 101; RP 833-44.

The matter came on for sentencing on October 7, 2015. RP 859. The State indicated that the conviction for assault in the third degree, intimidation of a public servant and felony harassment in Counts III, IV and V should be treated as the same criminal conduct, making his standard range on each of the felonies 12+ to 14 months. RP 860-61. The court imposed a mid-range sentence on each of the felonies, to run concurrently, 12 months of community custody, a \$100 DNA fee and a \$500 CVPA; the court waived all non-mandatory costs. RP 875-879; CP 103-116. Defendant received a 90 day sentence on the resisting arrest, concurrent with the felony counts. CP 117-118.

Defendant filed a timely notice of appeal from entry of judgment. CP 119.

2. Facts

Filivaa Mageo, known as “Chico,” testified that he is employed by the corrections department, or jail, for the City of Fife in the electronic home detention (“EHD”) program, and has been so employed since January, 2013. RP 215-16. He testified that this corrections department is a law enforcement agency and that his office is also the Fife Police Station interview room, which is located in Washington State. RP 220-23. Mr. Mageo knew defendant because he supervised him on the EHD program; there had been issues with defendant’s participation such as he would fail

to charge his GPS bracelet to keep it functioning and the Breathalyzer equipment issued to defendant kept getting broken. RP 220-225.

In mid to late-May, 2014, Mr. Mageo came into contact with defendant, and his mother, in his office, because defendant's Breathalyzer equipment was broken again. RP 228. Defendant was extremely upset and adamant that it was not his fault the equipment was broken; Mr. Mageo tried to talk to defendant about how he was using the equipment but defendant would not listen and kept talking over Mr. Mageo. RP 228-30. Mr. Mageo told him that he needed to listen and told him he was stepping out of the room for a few minutes. RP 230. Mr. Mageo returned in a few minutes and asked if defendant was calm enough to go over a few procedures. RP 231. Defendant began yelling and screaming at Mr. Mageo about the worthlessness of the equipment; Mr. Mageo again indicated that he was going to leave the room until defendant was ready to listen. RP 231-32. Mr. Mageo opened the door to leave, but defendant got up, grabbed the door then shoved it back into Mr. Mageo while stating "No, you're not." RP 232. The door hit Mr. Mageo on the side of his face causing him pain that lasted for a while. RP 232. Mr. Mageo looked at defendant; he described the defendant as angry and "beet red" in the face. RP 233. Defendant's mother quickly came between the two men and said: "Please. He needs to go see his doctor. He has a doctor's appointment." RP 233. Five police officers approached from the other side of the door and asked if Mr. Mageo wanted to press charges. *Id.* Mr. Mageo indicated

that he would rather have defendant go see his doctor. *Id.* Defendant's mother calmed defendant down enough so that Mr. Mageo could finish with his instructions and the defendant left with his mother. RP 233-34.

Mr. Mageo directed defendant to come to his office at 4:00 pm on May 27, 2014, because there was another issue with defendant's Breathalyzer equipment. RP 234-37. Steven Van Zanten is employed by the Fife Police Department to handle the front counter and other administrative duties; he is not a police officer, but does wear a uniform. RP 314-316, 321. He was working on May 27, 2014, until 5:00 pm when he left the building to walk to his car parked in the lot. RP 319. As Mr. Van Zanten approached his car, he was approached by defendant; Mr. Van Zanten recognized defendant as he had seen him many times when defendant came in for his appointments in the EHD program. RP 319-20. Defendant told Mr. Van Zanten that he needed to see "Chico," referring to Mr. Mageo. RP 320.

The building had closed to the public at 4:30 pm. RP 321. Mr. Van Zanten told defendant that he should go to the front of the building where there is a buzzer which connects to dispatch and to ask them to contact Chico. RP 321. In response, defendant took the chewing gum out of his mouth, threw it down, took a "bladed stance," balled up his fists, and told Mr. Van Zanten: "I pledge allegiance to the flag of the United States of America. You are going to get Chico for me. We're going for a walk." RP 322-23. Mr. Van Zanten described a "bladed stance" as

having one foot slightly forward of the other so as to steady the body. RP 324. Defendant seemed very agitated and his voice was stern. RP 325. Mr. Van Zanten was afraid that he was about to be physically harmed and did not want to go anywhere with defendant. RP 325. Because of defendant's actions and statements, Mr. Van Zanten felt he would be hurt if he did not get Chico, so he changed his plans and instead of leaving, went back inside to find Mr. Mageo. RP 325-26, 341. On his way into the building, Mr. Van Zanten passed Officer Stringfellow and let him know that he was afraid that he was about to be assaulted by defendant. RP 326, 370. Mr. Van Zanten proceeded inside to get word to Mr. Mageo about defendant's presence. RP 326. Officer Stringfellow noted that defendant seemed to be yelling at the woman who was with him and was very agitated. He contacted some other nearby officers to apprise them of the situation. RP 371-73.

Around 5:00 pm, Mr. Mageo heard someone in the parking lot was looking for him and looked out to see defendant walking toward his car. RP 236-37. Defendant's car was being driven by his mother and defendant was in the passenger seat. RP 328, 533, 546. Mr. Mageo went out to the parking lot to contact the defendant; defendant was already in his car and moving out of the parking space; Mr. Mageo walked toward the car. RP 237. Mr. Mageo, and Mr. Van Zanten, who had come back outside and was about 50-60 yards away, each testified that defendant got out of his car; defendant was angry and started clenching his fist while

yelling at Mr. Mageo and other officers. RP 238, 328, 340. Mr. Van Zanten described defendant as very agitated and that he was calling Mr. Mageo a “motherf**ker” and shouting other profanities. RP 328. Mr. Van Zanten said that defendant was using his hands a lot more when he was talking to Mr. Mageo and that his hands were balled into fists and partially raised. RP 329. Officer Malave described defendant’s fists as being even with defendant’s navel. RP 478. To Officer Stringfellow it looked like defendant, who was again in a bladed stance, was about to punch Mr. Mageo. RP 377-79. Defendant’s mother tried to get him back into the car but was unsuccessful. RP 379, 552-53.

Mr. Mageo testified he could only understand about half of what defendant was yelling; Mr. Mageo told defendant he was “late”. *Id.* This set defendant off yelling, again with clenched fists. RP 238.

By this time police officers had come up behind Mr. Mageo; defendant looked past Mr. Mageo and yelled “You don’t scare me.” *Id.* Defendant then got into a stance with clenched fists; this frightened Mr. Mageo, who was a few feet away from the defendant, thinking that he or someone else might get hurt. RP 240, 304-05. Officer Mulrine testified that after Mr. Mageo told defendant he was late, the defendant closed the gap between he and Mr. Mageo to a few feet and began making threats to fight saying “I’ll kick your ass.” RP 551-52. Officer Mulrine said that defendant was speaking so rapidly it was hard to understand everything he

was saying but his tone was threatening. RP 552. Officer McNaughton moved in and asked defendant to calm down and unclench his fists; when two officers tried to arrest defendant, he did not comply and resisted. RP 241, 330, 338, 380-81, 555-57. At that point Mr. Mageo went back inside. RP 256.

Officer Stringfellow also testified that the other officers tried to calm the defendant down but he would not. RP 381. Two officers tried to arrest defendant but it became a physical struggle and more officers joined in to subdue defendant; when Officer Stringfellow saw defendant apparently bite Officer McNaughton and heard Officer McNaughton scream he employed his tazer on defendant. RP 381-91, 394-99, 491-94 . Officer Mulrine heard Officer McNaughton yell “Stop biting me!” RP 556-57. The tazer did not immediately have an effect and defendant continued to kick, bite and otherwise fight with the officers during that time. RP 394-400, 557- 65. Eventually, defendant was subdued and taken into custody. RP 399, 566.

In the defense case, defendant called the chief of police for Fife Police Department to testify that Officer McNaughton was terminated from employment. The chief had received a complaint from the Pierce County Prosecutor’s office regarding discrepancies between McNaughton’s report and evidence received from the defendant in a different case. RP 739-40. The Chief asked for an investigation, which was ultimately done by the Lakewood Police Department. RP 741. After

reviewing the results of that investigation, he forwarded a recommendation for termination due to untruthfulness. RP 741. McNaughton was terminated. RP 741. Defendant did not testify.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE ADDUCED TO SUPPORT THE JURY'S VERDICTS OF ASSAULT IN THE THIRD DEGREE AND INTIMIDATION OF A PUBLIC SERVANT.

The State bears the burden of proving beyond a reasonable doubt all elements of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983). Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences which can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Thereoff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). When there is evidence produced of all elements of the crime, the trier of fact's decision must be upheld.

For the court to find there was insufficient evidence on appeal it must determine that, after viewing the evidence in the light most favorable

to the State, that no rational jury could have found the defendant guilty beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201; *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

- a. The evidence shows that defendant's actions put both victims, who were performing official duties of a law enforcement agency, in fear and apprehension of being physically harmed. And the jury could infer from defendant's words and actions that defendant was intending to create fear and apprehension.

Defendant alleges that there is insufficient evidence to convict him of assault in the third degree in Counts IV and VII. The “to convict” instructions for these two counts are identical except for the fact that Alleged victim for Count IV is Steven Van Zanten (Instruction No. 11) while the alleged victim for Count VII is Filivas “Chico” Mageo (Instruction No. 14). CP 57-92. The “to convict” instructions set forth the following elements that must be proved beyond a reasonable doubt:

- (1) That on or about [the] 27th day of May, 2014, the defendant assaulted [name of alleged victim];
- (2) That at the time of the assault [name of alleged victim] was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties; and
- (3) That any of these acts occurred in the State of Washington.

CP 57-92 (Instructions 11 and 14). Defendant argues that the State failed to prove that either Mr. Mageo or Mr. Van Zanten was assaulted or that

Mr. Van Zanten was performing official duties at the time of the assault.

The arguments are without merit.

The court instructed the jury on the three common law definitions of assault:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 57-92 (Instruction 22). Washington's reliance upon these common law definitions have a long history and the array of conduct that will satisfy these definitions is quite varied:

An assault is an attempt, with unlawful force, to inflict bodily injuries on another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is in its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in

threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person-A right to live in society without being put in fear of personal harm.

Howell v. Winters, 58 Wash. 436, 438, 108 P. 1077, 1078 (1910), citing Cooley on Torts (3d Ed.) 278.

The evidence in this case shows that defendant came up to both Mr. Mageo and Mr. Van Zanten and took a very aggressive stance; defendant had his arms raised level with his navel and his hands clenched into fists, his feet spread for stability. RP 240, 304-05, 322-25, 377-79, 478. This is a posture of someone who is about to engage in a physical fight. Both victims testified that these actions caused him to think he was about to be physically hurt by the defendant. RP 240, 304-05, 324-26, 370. Defendant was in close enough physical proximity to inflict injury. RP 304-05, 551-52. The law does not require that defendant actually throw a punch for there to be an assault, this creation of apprehension and fear is enough.

The jury could also infer from defendant's actions that he was intending to create apprehension and fear. When Mr. Van Zanten did not immediately take action to get defendant into the presence of Mr. Mageo, the defendant's whole demeanor changed. He took the aggressive stance and commanded Mr. Van Zanten to take him to "Chico." RP 322-23.

When Mr. Mageo told defendant that he was “late” for his meeting, defendant became enraged and moved quickly toward Mr. Mageo saying “I’ll kick your ass.” RP 304-05, 551-52. These are intentional actions designed to create fear. Sufficient evidence was adduced to show that an assault occurred on both Mr. Mageo and Mr. Van Zanten.

Defendant also contends that the State failed to prove that Mr. Van Zanten was “performing official duties” at the time of the assault because he was walking to his car to leave work at the time that defendant assaulted him. The evidence adduced showed that Mr. Van Zanten was employed to man the front desk at the Fife Police Department and that he knew defendant from all the times that defendant had come in for appointments while in the EHD program. RP 314-16, 319-21. Defendant stopped Mr. Van Zanten while he was still on the work premises and still in uniform; moreover, defendant asked Mr. Van Zanten to take action that was consistent with his work duties. RP 319, 321. Defendant asked Mr. Van Zanten to take an official action in putting him in contact with Mr. Mageo. In other words, defendant acted just as if Mr. Van Zanten were standing behind the front desk of the police department during work hours and he had arrived timely for his appointment. The *only* reason that defendant contacted Mr. Van Zanten in the parking lot was because of his employment by the Fife Police Department. There was sufficient evidence for the jury to find that Mr. Van Zanten was performing official duties at the time of the assault.

This court should uphold the jury's verdicts finding defendant guilty of assaulting Mr. Mageo and Mr. Van Zanten.

- b. The state adduced evidence to show that defendant was attempting to influence Mr. Van Zanten's decision or official actions as a public servant.

Defendant also challenges his conviction for intimidating a public servant in Count III for insufficient evidence. The "to convict" instruction for Count III set forth the following elements that must be proved beyond a reasonable doubt:

- 1) That on or about the 27th day of May, 2014, the defendant attempted to influence a public servant's, to wit: Steven Van Zanten's, decision or other official action as a public servant;
- 2) That such attempt was accomplished by use of a threat;
- 3) That the acts occurred in the State of Washington.

CP 57-92 (Instruction 10).

Defendant argues that the State failed to show that defendant was attempting to influence Mr. Van Zanten's decision or other official action as a public servant. This argument is without merit.

As noted above, the evidence showed Mr. Van Zanten was employed to man the front desk at the Fife Police Department and he

knew defendant from all the times that defendant had come in for appointments while in the EHD program. RP 316, 319-20. Mr. Van Zanten was employed to handle people who came to the front counter and acted as a gatekeeper. RP 316. Access into the police station from the lobby was restricted. RP 230. When defendant confronted Mr. Van Zanten in the parking lot, he was not only trying to get into the police station, he was trying to get into a building at a time that it was closed to the public. RP 235-36. He confronted Mr. Van Zanten, a public employee who worked in that building to gain access to a person he believed was still inside that building but whom he couldn't access because he was after business hours. When Mr. Van Zanten did not provide access, then defendant employed threatening behavior to influence Mr. Van Zanten to take him to Mr. Mageo. Mr. Van Zanten testified that because of defendant's actions and statements, he felt he would be hurt if he did not get Mr. Mageo, so he changed his plans and instead of leaving, went back inside to find Mr. Mageo. RP 325-26, 341. This is sufficient to prove that defendant was attempting to influence Mr. Van Zanten's actions as a public servant. This conviction should be affirmed.

2. THE INFORMATION CHARGING DEFENDANT WITH HARASSMENT WAS NOT CONSTITUTIONALLY DEFICIENT BUT THE INSTRUCTIONS DID FAIL TO ASSURE JURY UNANIMITY ON THIS COUNT AND MUST BE VACATED; THE COURT NEED NOT DECIDE THE OTHER ISSUE RAISED AS TO THE CONSTITUTIONALITY OF THE INSTRUCTIONS AS THAT ISSUE IS CURRENTLY PENDING AT THE SUPREME COURT.

Defendant challenges his conviction for harassment by alleging: 1) the information was constitutionally deficient; 2) the instructions failed to assure jury unanimity as to this count; and 3) the instructions were constitutionally inadequate to protect him from a conviction that was based on the exercise of his first amendment rights. Appellant's Brief at p. 14-25. The State contests the first claim, but concedes error on the issue of jury unanimity. This concession, coupled with the fact that the third issue is pending before the Washington Supreme Court, makes consideration of the third claim unnecessary.

- a. As the identity of the victim of harassment is not an essential element of the crime, defendant has failed to identify any deficiency in the charging document.

All essential elements of an alleged crime, including statutory and court-imposed elements, must be included in the charging document in order to afford the accused notice of the nature of the allegations so that a defense can be prepared. *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). If a charging document fails to allege each element, the

remedy is dismissal without prejudice. *State v. Vangerpen*, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995). If the charging document does contain the necessary facts in any form, the court will still consider whether the defendant was “nonetheless actually prejudiced by the inartful language which caused a lack of notice.” *Kjorsvik*, 117 Wn.2d at 105–06.

The standard of review for evaluating the sufficiency of a charging document is determined by the timing of the motion challenging the sufficiency. *State v. Borrero*, 147 Wn.2d 353, 360, 58 P.3d 245 (2002); *State v. Taylor*, 140 Wn.2d 229, 237, 996 P.2d 571 (2000). When a charging document is challenged for the first time after the verdict, it is to be “liberally construed in favor of validity.” *Kjorsvik*, 117 Wn.2d at 102. In contrast, however, when an information is challenged before the pretrial “the charging language must be strictly construed.” *Taylor*, 140 Wn.2d at 237.

For the first time on appeal, defendant raises the issue that the information charging him with felony harassment was deficient. Defendant contends that the information was deficient because it does not name a specific criminal justice participant who was the focus of defendant’s threats.

The pertinent charging language for the count of felony harassment (Count V) was as follows:

That ANDREW PATRICK TOOMBS, in the State of Washington, on or about the 27th day of May, 2014, did unlawfully, feloniously, And without lawful authority,

knowingly threaten to cause bodily injury, immediately or in the future, to a person, and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out, and that further, the threat was made to a criminal justice participant while that person was performing his or her official duties ..., and the fear from the threat was a fear that a reasonable criminal justice participant would have under all the circumstances, 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), (2)(b)(iii), and against the peace and dignity of the State of Washington.

CP 7-10.

RCW 9A.46.020(1)(a)(i) provides that a person is guilty of harassment if:” [w]ithout lawful authority, the person knowingly threatens...[t]o cause bodily injury immediately or in the future to the person threatened or to any other person. RCW 9A.46.020(2)(b)(iii) provides that harassment is a Class C felony when “the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made[.]”

Defendant’s charging document tracks the language of the statute and, thus, contains all the required statutory elements. *See Kjorsvik*, 117 Wn.2d at 108, 812 P.2d 86 (precise language of statute is not necessary; test is whether elements appear “in any form”).

Generally, criminal statutes which protect a particular class of persons do not require that the particular victim be named. *City of Seattle v. Termain*, 124 Wn. App. 798, 805, 103 P.3d 209, 213 (2004). For

example, a Washington Court has held that the victim's name is not an element of assault. *State v. Plano*, 67 Wn. App. 674, 679-80, 838 P.2d 1145 (1992). In *Plano*, the court found neither statutory nor common law authority for the proposition that the name of the victim of an assault is an essential element and observed that other jurisdictions have held that the name of the victim is not an essential element of assault. *Plano*, 67 Wn. App. at 679-80 (citing *People v. Waldron*, 162 A.D.2d 485, 556 N.Y.S.2d 404 (1990), and *State v. Phillips*, 75 Ohio App.3d 785, 600 N.E.2d 825 (1991) (generally, victim's name is not an essential element of a charged offense)); accord *People v. Griggs*, 216 Cal. App. 3d 734, 742-43, 265 Cal.Rptr. 53 (1989). This holding is not limited to the crime of assault. See *State v. Johnston*, 100 Wn. App. 126, 134, 996 P.2d 629, review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000) (victim's name not an essential element of murder); *State v. Larson*, 178 Wash. 227, 34 P.2d 455 (1934) (name of prostitute not an essential element of crime of accepting money earned by a common prostitute); *Coffield v. State*, 794 A.2d 588, 593 (Del. Supr. 2002) (the name of the alleged human victim is not an essential element of first degree robbery); *State v. Owens*, 51 Ohio App.2d 132, 149, 5 O.O.3d 290, 300, 366 N.E.2d 1367, 1377 (1975) (“An

amendment to an indictment which changes the names of the victim changes neither the name nor the identity of the crime charged.”).

In contrast, the statute proscribing violations of no contact orders is violated only when there is contact with a particular person or location identified in the no-contact order. *City of Seattle v. Termain*, 124 Wn. App. at 805. In such cases as these there must be “reference to the identity of the victim or to the underlying domestic violence order or facts of the crime” so as to inform as to what conduct was being charged. *Id.*

Because the statute under which defendant was charged does not require a specific victim, the victim's identity is not an essential element that must be included in the information. Any confusion concerning the victim could have been clarified by requesting a bill of particulars. As our Supreme Court explained in *State v. Noltie*,

Washington courts have repeatedly distinguished informations which are constitutionally deficient and those which are merely vague. If an information states each statutory element of a crime but is vague as to some other matter significant to the defense, a bill of particulars can correct the defect. In that event, a defendant is not entitled to challenge the information on appeal if he or she has failed to timely request a bill of particulars.

Noltie, 116 Wn.2d 831, 843–844, 809 P.2d 190 (1991) (footnotes omitted).

Defendant has failed to show that the element he claims was omitted was, in fact, an essential element that had to be included in the

information. The information stated all essential statutory elements and was, therefore, sufficient. Once a court finds that the information contained all of the essential elements, it would normally proceed to the second prong of the *Kjorsvik* test to ask whether vague or inartful language prejudiced the defendant. 117 Wn.2d at 106. In this case, defendant has not alleged that he was actually prejudiced, only that the information is facially insufficient. As defendant's information included all essential elements, this court need not address the second prong. *See Termain*, 124 Wn. App. at 803.

- b. The court's instructions did not assure jury unanimity on the harassment charge and the prosecutor did not make an election during closing argument to cure the lack of instruction; the State cannot show that this error was harmless and the conviction should be vacated.

Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Jury unanimity issues can arise when the State charges a defendant with committing a crime by more than one alternative means. *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976), or when the State presents evidence

of several acts that could form the basis of one count charged. *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984).

In an *alternative means* case the threshold test is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction. *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994); *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987).

When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. *State v. Petrich*, 101 Wn.2d at 570-572. If the State fails to employ one of these options, error has occurred. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1998).

This type of error, however, is subject to harmless error analysis under a constitutional standard. *Id.* The standard for determining whether the error is harmless may be stated as follows: the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Id.* This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged. *Id.* The State

bears the burden to prove the error was harmless beyond a reasonable doubt. *State v. Vander Houwen*, 163 Wn.2d 25, 39, 177 P.3d 93 (2008).

In *Vander Houwen*, the Washington Supreme Court indicated that a jury unanimity issue can also arise when there are multiple victims. Vander Houwen was charged with 10 counts of waste of wildlife, and 10 counts of unlawful hunting based on evidence that he shot and killed 10 different elk. The jury convicted only of two counts of unlawful hunting. The Supreme Court found that because the prosecution did not articulate which charge went with each elk, it is impossible to ensure that all of the jurors voted to convict based on the same two dead elk. *Id.* at 38.

In this case, it is neither inconsistency nor insufficiency of the evidence that renders the verdict problematic. Instead, the error lies in the inability of the State to assure us that 12 jurors who acquitted Vander Houwen of most charges agreed that the same underlying criminal act, proved beyond a reasonable doubt, attached to the two counts of conviction. This clear constitutional error requires reversal.

Id. at 39.

A similar issue is presented in this case. Although the defendant was charged with only one count of harassment, the evidence and closing argument of the prosecutor supported the conclusion that there were several potential victims of this crime. The “to convict” instruction did not identify a particular victim. CP 57-92 (Instruction 10). The prosecutor argued that Mageo, Van Zanten or any of the seven Fife police officers present when defendant made his threats could be considered as

the “criminal justice participant” referenced in the “to convict instruction” for harassment. RP 777-79; see also RP 379- 383, 469, 607, 637. No *Petrich* type instruction was given. CP 57-92. The instructions and argument make it impossible to determine that all 12 jurors found the same “criminal justice participant” was placed in reasonable fear that the threat would be carried out. This was constitutional error. It should be noted that the jury did not convict defendant of assaulting any Fife police officers out of this incident, but did find he committed assaults against Mageo and Van Zuyten. CP 57-92, 97, 99, 100, 101. These mixed verdicts remove any possibility of showing that the error was harmless under the constitutional standard. This conviction must be vacated and remanded for a prosecutorial decision on whether to seek retrial.

- c. This court need not address the contention that the instructions on the harassment were constitutionally insufficient in light of the State’s concession as to error regarding jury unanimity and the fact that the Supreme Court has this issue before it.

Defendant challenges the constitutional sufficiency of the court’s instructions on the harassment charge and argues that it does not set forth the proper mens rea in order to properly protect his first amendment rights to free speech. Appellants Brief at p. 19-25. Defendant notes that this issue is currently pending before the Washington Supreme Court in *State v. Trey M*, Case No. 92593-3, with oral argument having occurred on May 5, 2016. See, Appellant’s brief at 19, n. 8.

The briefing submitted to this court on this issue is nearly identical to the briefing submitted to the Supreme Court in *State v. Trey M*, which may be viewed on the Washington Court website. The Supreme Court decision in Trey M will decide the issue briefed in this case. In light of the State's concession that defendant's harassment conviction must be vacated due to failure to assure jury unanimity, it would seem pointless for this court to address this issue. The Washington Supreme Court has already heard oral argument and will undoubtedly issue an opinion forthwith. If the prosecution decides to retry the harassment count, it can make any necessary adjustments to the instructions as required by the Supreme Court's decision in *State v. Trey M*.

3. DEFENDANT HAS FAILED TO SHOW THAT HIS SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED BY THE PROSECUTORIAL AGENCY THAT FILED CRIMINAL CHARGES AGAINST HIM OR THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION TO DISMISS THE CRIMINAL CHARGES WHEN HE FAILED TO PRESENT ANY VIABLE LEGAL BASIS TO SUPPORT HIS MOTION TO DISMISS.

The due process clause of the Fourteenth Amendment provides that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This clause confers both substantive and procedural protections. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006). The substantive

component of the due process clause protects against certain government actions “regardless of the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). Where government conduct satisfies substantive due process, the procedural component of the due process clause requires that government action be implemented in a fundamentally fair manner. *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). The level of review applied in a substantive due process challenge depends on the nature of the interest involved. *Amunrud*, 158 Wn.2d at 219. Interference with a fundamental right is subject to strict scrutiny and requires a showing that the infringement is narrowly tailored to serve a compelling state interest. *Id.* at 220. If no fundamental right is involved, the standard of review is rational basis. *In re Det. of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014).

A person has a liberty interest in being free from incarceration absent a criminal conviction. *See, Meachum v. Fano*, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451 (1976) (once defendant is convicted, he is constitutionally deprived of the liberty interest in being free from confinement). Pretrial detainees, whether or not they have been declared unfit to proceed, have not been convicted of any crime; consequently, constitutional questions regarding the conditions and circumstances of their confinement are properly addressed under the due process clause of the Fourteenth Amendment, rather than under the Eighth

Amendment's protection against cruel and unusual punishment. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983).

The United States Supreme Court has addressed the due process issue of how long an incapacitated criminal defendant may be held “solely on account of his incapacity to proceed to trial.” *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). The Supreme Court stated that “[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed” and held that the individual “cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.” *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

At issue in *Jackson*, was an Indiana statute that allowed a defendant to be indefinitely committed solely because he was incompetent to stand trial. Jackson was a developmentally disabled deaf-mute with a mental capacity of a pre-school child. By the time the Supreme Court decided his case, Jackson had been confined for three and a half years, yet the record showed a “lack of substantial probability” that he would *ever* be found competent to stand trial *Id.* at 738-39. The court stated that “even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that

goal.” *Id.* at 738. Prior to *Jackson*, criminal defendants found to be incompetent could be confined until their competence was restored, even if there was little to no probability of that occurring. The Court in *Jackson* did not articulate a hard and fast time limitation on commitment to attain competency, requiring only that commitment be for a reasonable period of time. *Id.* at 733.

Jackson also sought dismissal of his criminal charges arguing that he had shown enough for a complete insanity defense. The Court noted that determination of competency was a distinct issue from criminal responsibility at the time of the offense and that the state court proceedings had not addressed criminal responsibility. The Court also noted:

Dismissal of charges against an incompetent accused has usually been thought to be justified on grounds not squarely presented here: particularly, the Sixth-Fourteenth Amendment right to a speedy trial, or the denial of due process inherent in holding pending criminal charges indefinitely over the head of one who will never have a chance to prove his innocence. *Jackson* did not present the Sixth-Fourteenth Amendment issue to the state courts.

Jackson, 406 U.S. at 740. The Court then remanded the case to the state courts.

The United States Supreme Court has not yet dealt with a substantive due process claim based upon a delay in transporting an incapacitated defendant to a facility for competency restoration, such as is

raised in this case. The jurisdictions that have examined such a claim have done so in the context of a civil suit and have relied, in part, upon the framework set forth in *Jackson*, but also upon *Bell v. Wolfish*, 44 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), and *Youngblood v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1980). *See, Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003); *Trueblood v. Washington State DSHS*, 101 F. Supp. 3d 1010 (W.D. Wash 2015), vacated in part at ___ F.3d ___ (9th Cir. 2016) (2016 WL 2610233); *Disability Law Center v. Utah*, ___ F. Supp. 3d ___ (C.D. Utah, 2016) (2016 WL 1389592, issued April 7, 2016); *Advocacy Ctr. for Elderly & Disabled v. La. Dep't of Health & Hosps.*, 731 F.Supp.2d 603, 609 (E.D.La.2010); *Weiss v. Thompson*, 120 Wn. App. 402 85 P.3d 944 (2004); *In re Loveton*, 244 Cal. App. 4th 1025, 198 Cal. Rptr. 3d 514 (2016); *see also, Terry ex rel. Terry v. Hill*, 232 F.Supp.2d 934, 941–44 (E.D.Ark.2002) (applying *Bell* and state law in finding a due process violation).

The nature of the civil action in the above list of cases varies from actions brought alleging a violation of a federal statute, to those seeking injunctive relief, to those filed as habeas corpus actions. Consequently, the named defendant/respondent in the civil suit is usually the governmental agency, or its director, that is responsible for the care and treatment of the mentally ill; on occasion it was the person in charge of the detention facility where the plaintiff was being held. None of these cases

were brought against the prosecuting authority that initiated criminal charges against the incapacitated defendant.

The proper test for determining whether there has been a substantive due process violation is to balance the individual's interest in liberty against the government's asserted reasons for restraining individual liberty. *Youngberg v. Romeo*, 457 U.S. 307, 321, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

As alluded to above, two governmental agencies are involved when a criminal defendant is found incompetent to stand trial in Washington. The prosecutorial agency pursuing criminal charges against the defendant (“prosecution”), and the governmental agency that is responsible for overseeing competency evaluations and any following restorative services care and treatment of the mentally ill (“treatment agency”), which in Washington is the Department of Social and Health Services (“DSHS”).

A prosecuting agency has legitimate interests in bringing accused persons to trial and protecting the public from arrested persons who present a demonstrable threat to the community. *United States v. Salerno*, 481 U.S. 739, 749–50, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). As one justice put it: “The safeguards that the Constitution accords to criminal defendants presuppose that government has a sovereign prerogative to put on trial those accused in good faith of violating valid laws. Constitutional power to bring an accused to trial is fundamental to a scheme of ‘ordered

liberty' and prerequisite to social justice and peace." *Illinois v. Allen*, 397 U.S. 337, 347, 90 S. Ct. 1057, 1063, 25 L. Ed. 2d 353 (1970)(Brennan, J. concurring). Thus, even with all the constitutional protections afforded a criminal defendant, the United States Supreme Court has recognized that a government's "regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest" because the "government's interest in preventing crime by arrestees is both legitimate and compelling." *Salerno*, 481 U.S. at 748-49; *see also, De Veau v. Braisted*, 363 U.S. 144, 155, 80 S. Ct. 1146, 1152, 4 L. Ed. 2d 1109 (1960).

The United States Supreme Court has also upheld governmental civil detention of mentally unstable individuals who present a danger to the public, *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), as well as the continued detention of dangerous defendants who become incompetent to stand trial, *Jackson*, 406 U.S. at 731-739; *Greenwood v. United States*, 350 U.S. 366, 76 S. Ct. 410, 100 L. Ed. 412 (1956). Although without a criminal conviction, a showing of dangerousness by clear and convincing evidence is required. *Addington*, 441 U.S. at 432.

While a prosecution agency has no interest – indeed, no ability - to pursue criminal charges against an incapacitated defendant, it maintains an interest in: 1) seeing if the defendant's competency can be restored; 2) its ability to pursue its prosecution if competency is achieved, and 3)

assuring the safe custody transfer of a dangerous incapacitated offender to a treatment agency. Once it is established that the incapacitated defendant is unlikely to ever regain competency, then its interest in prosecution ends. Both the prosecution and treatment agencies have an interest in preventing any mentally ill and dangerous person from being released into the community. DSHS, as a treatment agency, has no interest in the prosecution of criminal charges, but does have an interest in providing restorative treatment and care to the mentally ill.

Defendant asserts that his substantive due process rights were violated by the delay between the time the court signed the order for transfer to WSH for restoration of competency, and the date that he was actually transported¹ and further argues that the trial court should have dismissed his case because of this delay.

Defendant's only authority for this claimed substantive due process violation are the decisions in *Mink* and *Trueblood, supra*. Both *Mink* and *Trueblood* concerned federal civil lawsuits filed against the governmental agencies and officials responsible for the treatment of the mentally incapacitated in Oregon and Washington, respectively. Although both cases involved incapacitated criminal defendants, the prosecuting agencies

¹ The trial court signed an order for competency restoration on August 6, 2014; defendant was admitted to WSH on October 20, 2014; the staff at WSH issued a report indicating defendant was competent on November 28, 2014. CP180-82, 194-201. The court entered an order of competency on December 10, 2014 and his case proceeded to trial on September 3, 2015. CP 202-03; RP 1-4.

were not named as defendants. Neither case balanced the incapacitated individual's interest in liberty against a prosecution agency's asserted reasons for restraining individual liberty or its interest in seeing violations of the law prosecuted. Thus, although those decisions found a substantive due process violation by a treatment agency for the delay in providing restoration treatment, the cases do not provide authority that there was a substantive due process violation by a prosecution agency.

There is also considerable difference in the remedies sought by the plaintiffs in *Mink* and *Trueblood*, which were injunctive and declaratory relief, as opposed to Toombs, who seeks dismissal of his criminal charges. Although Toombs may be in a similar factual situation as some of the plaintiffs in *Mink* and *Trueblood*, his legal posture is completely different as his case is a criminal prosecution not a civil action. *Mink* and *Trueblood* are inapposite as neither stand for the proposition that his rights have been violated by a prosecution agency or that he is entitled to a dismissal of his criminal charges as a remedy. Defendant has provided *no* authority to support his argument that dismissal is appropriate. The State has looked for a case similar to the facts presented here, but has found none on point.

In his brief, defendant provides no other legal basis for his argument that he was entitled to dismissal. He discusses the delay as if it were a violation of the time for trial rule, CrR 3.3. *See* Appellant's Brief at p. 27. Under the criminal rules, all proceedings related to the

competency of a defendant to stand trial are excluded from the time for trial computation, so the time elapsed pending the restoration of Toomb's competency is excluded from the time for trial calculation. CrR 3.3(e)(1)². Defendant acknowledges that he is not entitled to a dismissal under the time for trial rule. *See* Appellant's brief at p. 27, n.14.

Defendant mentions "speedy trial" perhaps alluding to his constitutional right to a speedy trial, but does not present any argument on this claim. The four factors to be considered for a constitutional claim are (1) the length of pretrial delay, (2) the reason for delay, (3) the defendant's assertion of his rights, and (4) prejudice to the defendant. ***Barker v. Wingo***, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). There is no discussion of these factors in his brief.

Nor was there any legal basis for dismissal articulated in the motions for dismissal filed in the superior court. CP 183-184, 188-189, 192-193. The motions ask the court to find DSHS in contempt and seek a dismissal, but with no legal basis identified as to why defendant should be entitled to a dismissal. *Id.* The verbatim report of proceedings indicates that defendant relied upon ***State v. Moen***, 150 Wn.2d 221, 76 P.3d 721 (2003), in arguing for dismissal of the charges. 9/3/14 RP 3-4. ***Moen*** dealt with the court's authority to dismiss under CrR 8.3(b). The trial

² CrR3.3(e)(1) provides "Competency Proceedings. All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent."

court did not believe that case supported the dismissal of the charges in defendant's case; it denied the motion to dismiss. 9/3/14 RP 3-4, CP 186. The motion to dismiss was not mentioned the next time defendant sought to have DSHS held in contempt for the delay in getting defendant transported for treatment. 9/24/14 RP 2-5. It does not appear that there was ever any argument on the motion to dismiss filed on October 15, 2014. CP 192-93. It should be noted that dismissal under CrR8.3(b) is an extraordinary remedy and is improper absent material prejudice to the rights of the accused. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Defendant presents no argument as to how the trial court erred in denying his motion pursuant to this rule, and appears to have abandoned this argument on appeal.

Defendant was ultimately found competent and brought to trial. Defendant has presented no argument or evidence as to how he was prejudiced in the presentation of his case by the delay in the competency restoration process or any other articulation of how his rights were materially prejudiced.

Defendant has failed to show that he was entitled to a dismissal of his charges or that the trial court erred in denying the motion to dismiss.

4. THIS COURT SHOULD REFUSE TO CONSIDER DEFENDANT’S CONSTITUTIONAL CHALLENGE TO A PORTION OF THE FIFE MUNICIPAL CODE PROSCRIBING RESISTING ARREST AS THIS CLAIM WAS NOT RAISED BELOW AND DEFENDANT HAS NOT MADE THE SHOWING NECESSARY FOR REVIEW PURSUANT TO RAP 2.5.

A court presumes that statutes or other legislative enactments are constitutional, and the party challenging the law generally bears the burden of proving its unconstitutionality. *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011). When the challenge to a law is on the basis that it restricts free speech, the State usually bears the burden of justifying a statute that restricts free speech. *Id.* at 6. In *State v. Homan*, this court summarized the test to be employed under *Immelt* when assessing the constitutionality of a statute under the First Amendment:

A law is unconstitutionally overbroad under the First Amendment if two requirements are satisfied. First, the law must actually implicate constitutionally protected speech. A defendant may invoke the First Amendment only if a law places some burden on free speech. The First Amendment does not extend to “unprotected speech.” *See State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013) (“true threats” are unprotected speech).

Second, the law must prohibit a substantial amount of constitutionally protected speech. “ ‘[W]e have vigorously enforced the requirement that a statute’s overbreadth be substantial, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.’ ” *[Immelt]*... (quoting *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)). The mere fact that some impermissible applications of a law are conceivable does not render that law unconstitutionally overbroad.

There must be a realistic danger that the challenged law will significantly compromise recognized First Amendment protections.

Homan, 191 Wn. App. 759, 766-67, 364 P.3d 839 (2015)(internal citations to *Immelt* omitted).

For the first time on appeal, defendant challenges the constitutionality of one section of the Fife Municipal Code proscribing disorderly conduct; he argues it is overbroad as it criminalizes protected speech and, therefore, his arrest on that provision was unlawful. He contends that his conviction for resisting arrest must be vacated as that requires a “lawful” arrest. Appellant’s Brief at p 27-30.

A challenge to the constitutionality of a statute may be raised for the first time on appeal if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). To satisfy this standard, a defendant must “identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. MacFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Williams*, 137 Wn.2d 746, 975 P.2d 963 (1999). Defendant fails to make this showing.

The terms of the municipal code are purportedly set forth in Instruction No. 30, which reads:

A person commits the crime of Disorderly Conduct when he:

- 1) challenges another person to fight, except as a part of an organized athletic event; or
- 2) uses “fighting words” tending toward or causing a breach of the peace; or
- 3) 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; *see also*, RP 689. Defendant asserts that the provisions of subparagraph 3 are unconstitutional under *Immelt*. He makes no argument that the other subsections are unconstitutional. His argument assumes that one problematic section will render the entire provision unconstitutional. *See* Appellant’ Brief at p. 28-30. This assumption is faulty.

In *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982), the Supreme Court invalidated two out of three sections of the statute proscribing the crime of obstruction of a public servant, but the third section remained presumptively valid. *Id.* at 95-102. White had brought his challenge to the statute in the context of a motion to suppress his confession to burglary that he had made subsequent to his arrest for obstruction. White could show that he was arrested pursuant to the invalidated sections and, therefore, entitled to suppression of his confession as a “fruit” of his illegal arrest. *Id.* at 102.

In this case, defendant makes no showing that he was arrested under the section of the disorderly conduct provision that he challenges as unconstitutional. Under the facts of this case, he could have been arrested under any or all of the provisions. The testimony indicates that he was arrested under the first two prongs. *See* RP 381, 461, 466 (defendant arrested “for disorderly conduct and the fighting words and stance”). Without a showing that his arrest was based solely upon the challenged provision, he does not show that his arrest was unlawful or that his rights at trial were actually prejudiced by the alleged error. Defendant fails to meet the standard imposed by RAP 2.5 and *McFarland*.

Furthermore, the evidence adduced at trial indicates that defendant was arrested for both assault in the third degree *and* disorderly conduct. RP 433, 462-63 (arrest for assault third for “threatening actions/behavior toward Mageo”). Defendant makes no challenge to the lawfulness of his arrest for assault in the third degree. The jury found him guilty of this assault; there was clearly probable cause for a lawful arrest. Consequently, even if defendant were able to show that he was arrested pursuant to an unconstitutional provision of the disorderly conduct law, he has not shown that he was arrested unlawfully. Defendant’s failure to show that his trial rights were actually prejudiced by his claimed error means that he has not shown manifest constitutional error that may be raised for the first time on review. This court should decline review for

failure to properly preserve the issue in the trial court and for failing to meet the standard under RAP 2.5.

5. CORRECTION OF ANY CLERICAL ERROR
MAY BE DONE ON REMAND.

Defendant complains that the court failed to reduce to judgment the ruling it made regarding same criminal conduct. As the State has conceded, the conviction for harassment must be vacated and remanded to the trial court. Defendant may call the court's attention to this omission on remand.

6. LEGAL FINANCIAL OBLIGATIONS AND
APPELLATE COSTS ARE APPROPRIATE IN
THIS CASE ONLY IF THE STATE IS THE
SUBSTANTIALLY PREVAILING PARTY.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P. 2d 583 (1999). As the Court pointed out in *State v. Sinclair*, 192 Wn. App. 380, 612-613, 367 P.3d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See also*, RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). The issue is not whether the court has the authority to order appellate costs; but when and how should it make that decision.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In

1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. In *State v. Barklind*, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, *supra*, at 239, the Supreme Court held this statute constitutional, affirming this court’s holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

In *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that “costs” did not include statutory attorney fees. *Keeney*, at 142.

Nolan, *supra*, examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, at 624-625, 628.

In *Nolan*, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in *Blank*, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See, Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* The proper time for findings with regard to ability to pay "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241-242. *See also, State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999).

The imposition of LFOs has been much discussed in the appellate courts lately. In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015),

the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id., at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.*, at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.*, at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's

argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

The State has yet to “substantially prevail” and submit a cost bill. In light of the concession that one of defendant’s convictions should be vacated, it is unlikely that the State will be deemed to be a “substantially” prevailing party. This Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

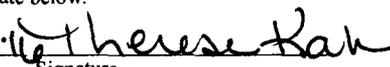
For the foregoing reasons the court should vacate defendant’s conviction for harrasment and remand to the trial court for further proceedings on that matter. All other convictions should be affirmed.

DATED: July 14, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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.

7.15.16 
Date Signature

PIERCE COUNTY PROSECUTOR

July 15, 2016 - 10:37 AM

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