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Court of Appeals
Division III
State of Washington

No. 29268-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DUNCAN J. MCNEIL III,

Appellant.

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

The Honorable Maryann C. Moreno

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erroneously gave Instruction No. 13, which incorrectly and incompletely defined "threat," for purposes of the First Amendment.

2. Insufficient evidence was presented to establish beyond a reasonable doubt Mr. McNeil communicated a "true threat," as required by the First Amendment.

3. Insufficient evidence was presented to establish beyond a reasonable doubt that the alleged victim of Count I was "placed in reasonable fear the threat would be carried out," an essential element of the crime of harassment.

4. The trial court erroneously failed to give a unanimity instruction on Counts I and III when the State failed to elect which of two distinct instances of alleged threats it was relying upon for a conviction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a statute proscribes threats, the constitutional rights to free speech, due process, and trial by jury require the jury be instructed that only "true threats" may be proscribed. 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 the life of

another. When the trial court did not instruct the jury that "threat" was limited to "true threats," did this instructional error violate Mr. McNeil's constitutional rights? (Assignment of Error 1)

2. To obtain a conviction for harassment by threats, the constitutional right to free speech requires the State to prove beyond a reasonable doubt that the threats were "true threats." In the absence of proof Mr. McNeil's statements were "true threats," did the State produce sufficient evidence to support his convictions for harassment? (Assignment of Error 2)

3. The due process provisions of the federal and state constitutions require the State to prove beyond a reasonable doubt every essential element of the crime charged. An essential element of the crime of harassment is that the person threatened is placed "in reasonable fear that the threat will be carried out." In the absence of evidence to establish the named victim of Count I was placed in reasonable fear that the alleged threat would be carried out, was Mr. McNeil's right to due process again violated? (Assignment of Error 3)

4. The constitutional right to trial by jury requires jury unanimity beyond a reasonable doubt of every essential element of the crime charged. When evidence indicates several distinct acts, any one of which could form the basis of a crime, either the State must elect the specific act

upon which it relies for a conviction, or the jurors must be instructed they all must agree beyond a reasonable doubt on the same act. When the State presented evidence of two distinct incidents of alleged threats for Counts I and III, but the State did not elect which specific instance upon which it was relying upon and the trial court failed failing to give a unanimity instruction, was Mr. McNeil's right to trial by jury again violated? (Assignment of Error 4)

C. STATEMENT OF THE CASE

Duncan J. McNeil III leased office space in a commercial building managed by Michael Sullivan, which he used for his work as a court-appointed fiduciary and trustee for a business that had declared Chapter 11 bankruptcy. RP 105, 421, 426. Mr. McNeil's office was down the hall from Mr. Sullivan's management office. RP 105. In March 2001, Mr. McNeil stopped paying rent and, in July 2001, he declared personal bankruptcy. RP 105-06. Mr. Sullivan repeatedly attempted to evict Mr. McNeil for non-payment but he was hindered by the two bankruptcy proceedings. RP 106-07. Mr. McNeil insisted that he could not be evicted due to his position as a court-appointed fiduciary as well as his personal bankruptcy. RP 522-24.

Their relationship deteriorated. Mr. Sullivan did not let Mr. McNeil into his management office after August 2001. RP 171, 151.

According to Mr. Sullivan, when Mr. McNeil passed his office, he frequently yelled, spit, cursed, called him a "fat f**k," stated he would kill him, and pounded on his office door that had a glass window. RP 110-11, 114. Mr. Sullivan kept his office door locked, he left early to avoid Mr. McNeil who regularly arrived later in the day, and he entered or exited the building only through a private door that opened directly into his office. RP 111, 117-18. In the fall of 2001, Mr. Sullivan installed locks on all the bathrooms in the building, but did not provide a key to Mr. McNeil. RP 156-57, 172. Mr. McNeil complained that the electric power to his office was periodically turned off, but Mr. Sullivan denied tampering with the electricity. RP 131, 543-44, 546. Mr. Sullivan alleged Mr. McNeil tried to run him over with a car in the building parking lot on three separate occasions, but Mr. McNeil denied that he ever drove a car at Mr. Sullivan. RP 168-69, 174-75, 564.

According to Mr. Sullivan, Mr. McNeil's hostile behaviors escalated and culminated in three incidents in May 2002. RP 167. On May 16, 2002, Mr. Sullivan was in his office with business associates Stan Ashby and Ken Hall when Mr. McNeil came to his locked door, stated he wanted to speak to Mr. Sullivan and yelled, "Where is that fat f**k." RP 119-20, 212-13, 237, 245. Mr. McNeil testified he was upset that someone had cut his extension cords that he ran from his office to a

hallway outlet so as to maintain electricity. RP 579-80. Mr. Sullivan was in an inner office and could not be seen by Mr. McNeil. RP 120. Mr. Hall said that Mr. Sullivan was not in the office. RP 214. Mr. McNeil then yelled at Mr. Ashby and Mr. Hall, pounded on the door, and stated he would kill them. RP 121. He also stated that he knew where Mr. Hall lived and would kill his family, even though they had not previously met. RP 215-16. Mr. Sullivan testified the statements were directed at Mr. Ashby and Mr. Hall only because he was in his inner office and, therefore, he did not feel specifically threatened at that time. RP 122, 125. On the other hand, Mr. Hall and Mr. Ashby were afraid Mr. McNeil might act on his statements. RP 215, 240.

The three men waited "a while" for Mr. McNeil to leave and then left the building together through the private door in Mr. Sullivan's office. RP 121-22, 217. Mr. Sullivan and Mr. Ashby testified that Mr. McNeil was also outside the building and yelled that he would kill all three men. RP 121, 125, 239. They further testified that they were afraid Mr. McNeil might act on his statements. RP 125, 240. Mr. Hall, however, did not remember seeing Mr. McNeil outside the building that day. RP 218.

The following day, on May 17, 2002, Mr. Sullivan was outside the office building with Mr. Hall and Patrick De La Pena, another business associate, when Mr. McNeil came out of the building carrying an

aluminum baseball bat. RP 126-27. He approached the group at "quick gait," "a little faster than normal." RP 127, 184-85. Mr. Sullivan ran away, but testified that he heard Mr. McNeil and Mr. Hall arguing and he saw Mr. McNeil poke Mr. Hall with the bat. RP 127, 129. Mr. Sullivan did not hear any verbally threatening statement directed at him, but he felt threatened when Mr. McNeil "charged" at him with the bat, although not necessarily afraid of being killed. RP 130, 173-74. Mr. De La Pena testified that Mr. McNeil screamed that someone turned off his electricity, a remark seemingly directed at Mr. Hall. RP 185. Mr. McNeil also "talked about killing someone" and "jabbed" Mr. Hall in the stomach with the bat. RP 185-87. Mr. Hall testified that Mr. McNeil asked, "where is that fat f**k going," and stated he was going to kill Mr. Sullivan. RP 219, 220-21. According to Mr. Hall, Mr. McNeil then screamed at Mr. Hall, yelled profanities, hit him in the chest with the bat, and again stated he knew where Mr. Hall lived and he was going to kill Mr. Hall and his family. RP 219.

Mr. McNeil was charged by an amended information filed on June 17, 2002, with five counts of harassment by threats to kill, in violation of RCW 9A.46.020. CP 7-8. Counts I, II, and III alleged Mr. McNeil threatened to kill Mr. Sullivan, Mr. Hall, and Mr. Ashby, respectively, on May 16, 2002. CP 7. Count IV alleged Mr. McNeil threatened to kill Mr.

Sullivan on May 17, 2002. CP 8. Count V alleged Mr. McNeil threatened to kill Mr. Hall on May 17, 2002, while armed with a deadly weapon other than a firearm, RCW 9.94A.510(4), 9.94A.602. CP 8. The matter proceeded to trial before a jury. After the parties rested, the court granted Mr. McNeil's motion to dismiss the deadly weapon enhancement attached to Count V. RP 644-53.

The jury was provided "to convict" instructions that included the elements of gross misdemeanor harassment only, plus special verdict forms asking the jury to determine whether the threats consisted of threats to kill. CP 182-86 (Instruction Nos. 7-11); CP 195, 197, 199, 201, 203. The jury was also provided a definitional instruction for "threat," which provided, "Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person." CP 188 (Instruction No. 13). The jury returned a verdict of "guilty" of Counts I, III, IV, and V, "not guilty" of Count II, and "not guilty" of making any threats to kill. CP 195, 196, 197, 199, 201, 203.

Mr. McNeil was sentencing on June 4, 2003, a timely notice of appeal was filed on July 3, 2003, and an appellate file was opened by the Court of Appeals on July 7, 2003. CP 204-09, CP ___, sub. nos. 126, 134. On October 6, 2003, Community Corrections Officer Matthew Shanks filed a Notice of Violation, alleging, inter alia, Mr. McNeil's location was

unknown. CP 210-12. On November 7, 2003, the Court Commissioner ruled Mr. McNeil was a fugitive from justice and that the appeal would be dismissed unless he returned to the jurisdiction of the court by December 8, 2003. CP __, sub. nos. 145, 151. On February 23, 2004, the Court dismissed the appeal and on March 4, 2004, the Court issued a mandate. CP __, sub. no. 151.

In 2007, the Washington Supreme Court ruled the "fugitive disentitlement doctrine" was incompatible with the constitutional right to appeal, which may be waived only by a voluntary, knowing, and intelligent waiver of that right. City of Seattle v. Klein, 161 Wn.2d 554, 567-68, 166 P.3d 1149 (2007).

In 2010, Mr. McNeil filed a motion for relief pursuant to CrR 7.8, and on October 29, 2010, the court entered an order allowing Mr. McNeil to file a new Notice of Appeal. CP 402.

Mr. McNeil now appeals his convictions for gross misdemeanor harassment.

D. ARGUMENT

1. Instructional error deprived Mr. McNeil of his constitutional right to due process, trial by jury, and free speech.

a. When a defendant is charged with harassment by threats, the jury must be instructed that the crime penalizes only "true threats" that are unprotected by the constitutional right to freedom of expression.

The constitutional right to due process and to trial by jury requires that jury instructions define every express and implied element of the crime charged. U.S. Const. art. III, § 2, amend. VI, XIV; Wash. Const. art. I, §§ 3, 21, 22; State v. Robbins, 138 Wn.2d 486, 494, 980 P.2d 725 (1999). In addition, when a statute implicates free speech, the jury must be specifically instructed that only unprotected speech may be proscribed. State v. Schaler, 169 Wn.2d 274, 285-87, 236 P.3d 858 (2010); State v. Atkins, 156 Wn. App. 799, 805, 236 P.3d 897 (2010).

The First Amendment protects the right of an individual to freely express himself, even if the expressions are distasteful or offensive. U.S. Const. amend. I; Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573, 122 S.Ct. 1700, 152

L.Ed.2d 771 (2002), quoted with approval in United States v. Alvarez, __ U.S. __, 132 S.Ct. 2537, 2543, __ L.Ed.2d __ (2012). Article I, section 5 of the Washington Constitution similarly protects the right to freedom of expression. The right to free speech is both a fundamental right and a key to ensuring the exercise of other constitutional rights. Nelson v. McClatchy Newpapers, Inc., 131 Wn.2d 523, 536, 936 P.2d 1123 (1997).

A threat is pure speech. State v. Williams, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). In general, a statute that criminalizes pure speech violates the right to free speech. Id. at 207-08, citing Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). One of the few, narrowly drawn exceptions is speech that constitutes "true threats," which are not protected by the constitution. Watts, 394 U.S. at 707; Williams, 144 Wn.2d at 207.

Not all threats are "true threats." Watts, 394 U.S. at 707. In Washington, courts adhere to an objective test for a "true threat":

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

State v. Kilburn, 151 Wn.2d 36, 43-44, 84 P.3d 1215 (2004) (internal citations and punctuation omitted).

The harassment statute, RCW 9A.46.020(1)(A), provides, in pertinent part:

> (1) A person is guilty of harassment if:
> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; ... and
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

RCW 9A.46.020 has been consistently construed as limited to "true threats," thereby avoiding a claim of unconstitutional overbreadth.

> [O]nly threats that are "true threats" may be proscribed. The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole. ... We adhere to this principle and construe the threats-to-kill provision of RCW 9A.46.020 to the same effect.

Schaler, 169 Wn.2d at 283-84; accord Kilburn, 151 Wn.2d at 42; Williams, 144 Wn.2d at 209.

Instructional error and constitutional questions are reviewed de novo. Schaler, 169 Wn.2d at 282. Where, as here, an appellant raises a question of freedom of expression, the appellate court must conduct an

independent review to determine whether there has been a "forbidden intrusion on the field of free expression." Kilburn, 151 Wn.2d at 49-50.

b. The trial court failed to correctly define the term "threat" as limited to "true threats".

The court gave a definitional instruction for the term "threat," which mirrored the relevant statutory definition of "threat," former RCW 9A.04.110(25)(b), but which did not limit the term to "true threats."

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

CP 188, Instruction No. 13. Significantly, in 2008, the pattern jury instruction defining "threat," was amended to encompass both the statutory definition of threat and to comport with the First Amendment, and reads, in pertinent part:

> To be a threat, a statement or act must occur in a context or under circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat rather than as something said in [jest or idle talk] [jest, idle talk, or political argument].

WPIC 2.24.

This issue is controlled by Schaler, wherein the Washington Supreme Court ruled that a definitional instruction for "threat," identical to the instruction at issue here, was constitutionally defective. 169 Wn.2d at 287. The Court reasoned that the instruction failed to require the jury to

determine whether a reasonable person would foresee that the statement would be interpreted as a serious expression of intent to harm another person, as required by the First Amendment. Id. at 286-87.

> Because the First Amendment limits the statute to proscribing "true threats," it must be read to reach only those instances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to take the life of another person. This standard requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence. ... Because the First Amendment requires negligence as to the result but the instructions here required no mens rea as to the result, the jury could have convicted Schaler based on something less than a "true threat." The instructions were therefore in error.

Id. at 287 (emphasis in original, internal citations and punctuation omitted).

Because the instruction of "threat" in the present case was identical to the instruction condemned in Schaler, it, too, was constitutionally defective.

c. Mr. McNeil may address this First Amendment issue for the first time on appeal.

A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a). An error is manifest if it had practical and identifiable consequences in the trial. Schaler, 169 Wn.2d at 282-83. Appellate courts will consider a challenge to a jury instruction for the first time on appeal when the instruction invades a fundamental

constitutional right, including the right to jury trial. State v. Green, 94 Wn.2d 216, 231, 616 P.2d 619 (1988).

This issue is also controlled by Schaler, wherein the Court further ruled the erroneous instruction was a manifest error and affected a constitutional right, insofar as it allowed a conviction based on protected speech. 169 Wn.2d at 288-89. Mr. McNeil's challenge to the identical instruction is therefore similarly manifest and properly before this court.

d. The State cannot prove beyond a reasonable doubt the instructional error was harmless, and reversal is required.

Instructional error is reviewed for constitutional harmless error. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (adopting constitutional harmless error analysis set forth in United States v. Neder, 527 U.S. 1, 119 S.Ct. 1835, 144 L.Ed.2d 35 (1999)). Under this analysis, instructional error is presumed prejudicial unless the State can prove the error was harmless. State v. Johnston, 156 Wn.2d 355, 366, 127 P.3d 707 (2006). An error of constitutional magnitude is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable juror would have reached the same verdict in the absence of the error. Chapman v. California, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

> A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case.

State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977), quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970) (emphasis added by Wanrow court). An instructional error is not harmless "when the evidence and the instructions leave it ambiguous as to whether the jury could have convicted on improper grounds." Schaler, 169 Wn.2d at 288.

Here, the State cannot prove beyond a reasonable doubt the constitutionally defective definition of "true threat" was harmless. The State presented evidence that Mr. McNeil repeatedly stated he was going to kill Mr. Sullivan, Mr. Ashby, and Mr. Hall. RP 121, 125, 215-16, 219, 220-21, 237, 239. No evidence was presented that Mr. McNeil stated he would injure the men. But the jury specifically found Mr. McNeil not guilty of making any threats to kill. CP 195 (Special Verdict Ct. I), 199 (Special Verdict Ct. III), 201 (Special Verdict Ct. IV), 203 (Special Verdict Ct. V). The special verdicts of "not guilty" indicate that the jury was not persuaded beyond a reasonable doubt that Mr. McNeil's statements were serious threats, unprotected by the constitution, rather than mere rhetoric, idle talk, or hyperbole. Under these circumstances, the

failure to correctly limit the proscribed speech to "true threats" cannot be deemed harmless.

In the absence of an instruction properly defining "true threats," the State was relieved of its burden to establish that his statements were unprotected by the constitutional right to free speech. Instructional error requires reversal of Mr. McNeil's convictions. Schaler, 169 Wn.2d at 288-90; Johnston, 156 Wn.2d at 366.

2. Insufficient evidence was presented to establish beyond a reasonable doubt Mr. McNeil uttered a "true threat," in further violation of his right to due process and free speech.

a. When the State seeks a conviction for an offense that proscribes speech, it bears the burden of proving beyond a reasonable doubt that the proscribed speech was not constitutionally protected.

When a criminal statute proscribes threats, the State bears the burden of proving beyond a reasonable doubt that the threats were "true threats," including that a reasonable person in the defendant's position would foresee that the threats would be interpreted as a serious expression to carry out the threats, rather than mere idle talk. Kilburn, 151 Wn.2d at 43, 54. Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99

S.Ct. 2871, 61 L.Ed.2d 560 (1979); State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

b. The State failed to present sufficient evidence to establish beyond a reasonable doubt Mr. McNeil's statements were "true threats," unprotected by the First Amendment.

As discussed above, the State presented evidence that Mr. McNeil repeatedly stated he was going to kill Mr. Sullivan, Mr. Ashby, and Mr. Hall. RP 121, 125, 215-16, 219, 220-21, 237, 239. Yet the jury specifically found him not guilty of making any threats to kill. CP 195 (Special Verdict Ct. I), 199 (Special Verdict Ct. III), 201 (Special Verdict Ct. IV), 203 (Special Verdict Ct. V). Again, the special verdicts of "not guilty" indicate that the jury was not persuaded beyond a reasonable doubt that Mr. McNeil's statements were serious threats, unprotected by the constitution, rather than empty rhetoric and an expression of his frustration with Mr. Sullivan's refusal to talk to him, the unsuccessful attempts to evict him, the refusal to provide a bathroom key, and the tampering with his electric power.

c. The proper remedy is reversal and dismissal of the charges.

Mr. McNeil's convictions for harassment were based upon insufficient evidence his statements were true threats. A conviction based on insufficient evidence cannot stand. State v. Spruell, 57 Wn. App. 383,

389, 788 P.2d 21 (1990). To retry Mr. McNeil for the same conduct would violate the prohibition against double jeopardy. Burks v. United States, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1979); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996), quoted with approval in State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). In the absence of sufficient evidence to establish Mr. McNeil's statements were "true threats," unprotected by the First Amendment, his convictions for harassment must be reversed and the charges dismissed.

3. Insufficient evidence was presented to establish beyond a reasonable doubt that Mr. Sullivan was "placed in reasonable fear the threat would be carried out" on May 16, 2002, as charged in Count I.

a. The State was required to produce sufficient evidence to establish beyond a reasonable doubt every element of the crime of harassment.

The constitutional guarantee of due process requires the State to produce sufficient evidence to prove beyond a reasonable doubt every essential element of the crime charged. U.S. Const. amend. XIV; Wash. Const. art. I, §3; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1968, 25 L.Ed.2d 368 (1970); City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). In addition, the federal constitutional right to trial by jury and the state constitutional right to conviction only upon a unanimous jury verdict require jury unanimity on all essential elements of the crime

charged. U.S. Const. amend. VI; Wash. Const. art. I, § 21; State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). When the evidence indicates several distinct acts, any one of which could form the basis for a conviction, either the State must elect which act it is relying on as the basis for the charge, or the court must instruct the jury it must unanimously agree that the same act has been proven beyond a reasonable doubt. Camarillo, 115 Wn.2d at 64; Kitchen, 110 Wn.2d at 411; State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

b. The State presented insufficient evidence to establish Mr. McNeil's words or conduct on May 16, 2002 placed Mr. Sullivan in reasonable fear the alleged threats would be carried out.

The State presented evidence that, on May 16, 2002, Mr. McNeil stated he was going to kill Mr. Hall and Mr. Ashby when they were inside Mr. Sullivan's office and, again later, stated he was going to kill Mr. Sullivan, Mr. Hall, and Mr. Ashby when they were outside the office building. RP 119-20, 121-22, 125, 212-13, 215-16, 237, 239, 245. In closing argument, however, the prosecutor elected to rely upon the incident inside Mr. Sullivan's office only.

> We basically have two incidents here. The first is May 16th. These are Counts I, II and III.
>
> Again, this is in Mike Sullivan's office with Stan Ashby and Ken Hall, and defendant banging on the door,

> yelling, spitting, trying to get in and threatening to kill each of the victims.
>
> The second proof of charges – and these are for Count IV and V, the following day, May 17th, involving Ken Hall and Mike Sullivan outside [the office building].

RP 668-69. But Mr. Sullivan testified that he was not threatened inside his office on May 16, 2002. RP 122, 125. Rather, he specifically testified that Mr. McNeil's statements at his office were directed only at Mr. Hall and Mr. Ashby at that time, and he was not threatened until he was outside the building on that day. RP 125.

In light of the State's election to rely upon only the statements directed at Mr. Ashby and Mr. Hall while they were inside Mr. Sullivan's office, together with Mr. Sullivan's testimony that he was not placed in reasonable fear that Mr. McNeil would carry out the alleged threats at that time, the evidence did not support the jury's verdict as to Count I.

c. The proper remedy is reversal and dismissal of Count I.

Mr. McNeil's conviction for harassment of Mr. Sullivan, as alleged in Count I, was based upon insufficient evidence that his statements placed Mr. Sullivan in reasonable fear that his alleged threats would be carried out. Again, a conviction based on insufficient evidence cannot stand, and to retry Mr. McNeil for the same conduct would violate the prohibition against double jeopardy. State v. Spruell, 57 Wn. App. at

389; Burks, 437 U.S. at 18; Hardesty, 129 Wn.2d at 309, quoted with approval in Hickman, 135 Wn.2d at 103. Mr. McNeil's conviction for Count I must be reversed and the charge dismissed.

4. The trial court erroneously failed to provide a unanimity instruction for Counts I and III, when the State presented evidence of two distinct acts of alleged harassment, either of which could be the basis of a criminal charge.

a. A criminal defendant has a constitutional right to a unanimous verdict on every essential element of the crime charged.

When the evidence indicates several distinct acts, any one of which could form the basis for a conviction, either the State must elect which act it is relying on as the basis for the charge, or the court must instruct the jury it must unanimously agree that the same act has been proven beyond a reasonable doubt. Camarillo, 115 Wn.2d at 64; Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572. Failure to follow either alternative is an error of constitutional magnitude due to the possibility some jurors may have relied on one act while other jurors relied on another, in violation of a defendant's right to a unanimous jury. Kitchen, 110 Wn.2d at 409. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all elements necessary for a conviction." Id. at 411. Thus, when the State fails to elect which act it relying on for a conviction,

a court's failure to give a unanimity instruction is a manifest error affecting a constitutional right that can be raised for the first time on appeal. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991); RAP 2.5(a).

b. Mr. McNeil's constitutional right to trial by jury and a unanimous verdict was violated when the State introduced evidence of two distinct incidents on May 16, 2002 and the trial court failed to give an instruction requiring juror unanimity as to which incident was proven beyond a reasonable doubt.

At trial, the State presented evidence that, on May 16, 2002, Mr. McNeil stated he was going to kill Mr. Hall and Mr. Ashby when they were inside Mr. Sullivan's office and, later, stated he was going to kill Mr. Sullivan, Mr. Hall, and Mr. Ashby when they were outside the office building. RP 119-20, 121-22, 125, 212-13, 215-16, 237, 239, 245. Mr. Sullivan testified that he was not threatened inside his office but he was threatened outside the building. RP 123-25. On the other hand, Mr. Hall testified he was threatened inside the office but did not remember seeing Mr. McNeil outside the building on that day. RP 215, 218. Mr. Ashby also testified that he was threatened inside the office. RP 237-38. In response to a question as to whether Mr. McNeil threatened all three men outside the building, Mr. Ashby testified, "I remember he specifically, a

specific threat at [Mr. Sullivan] at that point, and I think there were other threats, but I don't recall." RP 239.

However, the jury was not instructed it had to unanimously agree as to which alleged threats had been proven beyond a reasonable doubt to support a conviction for harassment. Rather, the "to convict" instructions directed the jury to determine only whether Mr. McNeil threatened to cause bodily injury to Mr. Sullivan, Mr. Hall, and Mr. Ashby on May 16, 2002, without directing the jury to determine whether the threats occurred in Mr. Sullivan's office or outside the building. CP 182-84 (Instruction Nos. 7-9).

Assuming, arguendo, the State did not elect which May 16, 2002 incident it was relying upon, the evidence and the instructions invited the jury to consider both incidents, inside the office and outside the building.

c. The proper remedy is reversal.

Failure to give a unanimity instruction in a multiple acts case is an error of constitutional magnitude that may be raised for the first time on appeal. State v. Bobenhouse, 166 Wn.2d 881, 892-93 n.4, 214 P.3d 907 (2009). Again, an error of constitutional magnitude is reversible unless it is "harmless beyond a reasonable doubt," that is, the error is harmless "only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable about."

Chapman, 386 U.S. at 24; State v. Guloy, 105 Wn.2d 412, 426, 705 P.2d 1182 (1985); Kitchen, 110 Wn.2d at 406. In a multiple acts case, the failure to give a unanimity instruction is presumed to be prejudicial error. State v. Jones, 71 Wn. App. 798, 822, 863 P.2d 85 (1993).

Here, given the two incidents of alleged threats on May 16, 2002, Mr. Sullivan's testimony that he was threatened outside the building only, the testimony of Mr. Ashby and Mr. Hall that they was threatened inside the office only, and the jury verdict of "guilty" as to Mr. Sullivan and Mr. Ashby but "not guilty" as to Mr. Hall, the jury could not have not been unanimous as to which incident it was relying for the convictions for harassment on May 16, 2002. The trial court's failure to require a unanimous verdict was not harmless error beyond a reasonable doubt. Mr. McNeil's convictions on Counts I and III must be reversed.

E. CONCLUSION

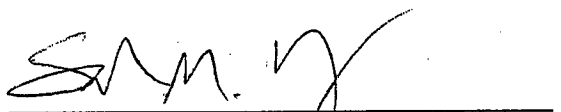
The failure to correctly instruct the jury that only "true threats" may be proscribed violated Mr. McNeil's right to free speech, due process, and trial by jury. Insufficient evidence was presented to establish Mr. McNeil uttered a "true threat," in further violation of his right to due process and free speech. In addition, insufficient evidence was presented to establish Mr. Sullivan was placed in reasonable fear the alleged "true threats" on May 16, 2002 would be carried out, in violation of his proof

beyond a reasonable doubt of every essential element of the crime. Finally, the trial court failed to instruct the jury that it must be unanimous as to which May 16, 2002 incident was proven beyond a reasonable doubt, again in violation of his right to trial by jury and a unanimous verdict.

For the foregoing reasons, Mr. McNeil respectfully requests this Court reverse his convictions for gross misdemeanor harassment.

DATED this 15th day of August 2012.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. DUNCAN MCNEIL III, Appellant.	)))))))))	NO. 29268-1-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY, DPA SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260-0270	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] DUNCAN MCNEIL DOC #856779	( ) ( ) (X)	U.S. MAIL HAND DELIVERY SERVED BY PRIVATE E-MAIL AT APPELLANT'S REQUEST

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF AUGUST, 2012.

X_____

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