

FILED
June 29, 2012
Court of Appeals
Division III
State of Washington

NO. 30235-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESUS V. MORALES,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

- 1) The charging document omitted an essential element of the offense charged in Count I.
- 2) Jury instruction No. 7 was given in error.
- 3) The court erred when it sentenced Appellant.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

- 1) The charging document did not omit an essential element.
- 2) Instruction No. 7 was inartful not error or if error it was harmless.
- 3) The court properly sentenced appellant.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT

RESPONSE TO ASSIGNMENT OF ERROR 1

Morales' first assignment of error is based on the supposition that the State intended to name Mr. Diaz as a victim because his name was inserted in the "to-convict" instruction.

Appellant was charged under the following section of RCW

9A.46.020;

(1) A person is guilty of harassment if:

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

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

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

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

(Emphasis mine.)

The amended information added the second count to the indictment. Both of the counts are set forth in general language;

On or about February 15, 2011, in the State of Washington, without lawful authority, you knowingly threatened to cause bodily injury immediately or in the future to Yanett Farias and the threat to cause bodily injury consisted of a threat to kill Yanett Farias or another person, and did by words or conduct place the person threatened in reasonable fear that the threat would be carried out. (CP 2-3)

This charging language clearly identifies “Yanett Farias” as the victim. Both counts simply indicate that the defendant threatened bodily harm to Yanett Farias. This general language is appropriate in a case such as this and in harassment cases in general. At no time until this appeal did Morales challenge the Information. State v. Dixon, 78 Wn.2d 796, 802, 478 P.2d 931 (1971);

Defendants here, as noted, challenged the statute-but not the complaint-for vagueness, indefiniteness and uncertainty. Not having moved against the complaint per se as they had a right to do, they must be deemed to have found it legally sufficient. A complaint, information or indictment, though sufficient to charge a crime, may be subject to attack because it is too indefinite or uncertain to enable the accused to prepare his defense. It is also subject to a demand for a bill of particulars. See State v. Royse, 66 Wn.2d 552, 403 P.2d 838 (1965)

It was apparent from the testimony at trial that the crime charged was alleged to have been perpetrated against, and only against, the person named in the information, Yanett Farias.

It is clear that the through out this trial the intent of the State and the understanding of the defendant was that there was only one victim, Yanett Farias. It is equally clear that the reason the instruction was given in the form it was, was to address the fact that the person to whom the threat was made was distinct from the intended victim, Yanett Farias. This was to distinguish the two counts, information, that where identical but for the dates. The State was indicating that while the Harassment charge, Information, listed only one person, Ms. Farias, the threat was made to her brother-in-law with the intent that it would then be imparted to the true victim. And that the communicant, Mr. Diaz, believed that this was an actual, valid, threat and passed the information this threat to kill on to the victim, albeit through this wife, the sister of the victim.

Counsel for Morales was not confused;

MR. DOLD: Count I talks about a threat to Yanett Farias, Count II talks about a threat to Yanett Farias. I don't believe the *Information* was ever amended to include Trinidad Diaz, although the Jury Instructions did include his name.

Second, the Court had a chance -- In the instructions the Court was -- The jury was instructed in the disjunctive. They could find one or the other. The Court had an opportunity to hear the testimony. Mr. Diaz was never in any fear. He communi (sic) -- He received a threat, according to his testimony, and whether the jury believed that or not, they, they found my client guilty of the threat as it was communicated to Yanett. I don't believe that he is a separate victim. I don't believe the jury found that he was a separate victim. I don't think he

was ever charged with being a separate victim in this proceeding. There was one victim and there was one threat. The threat, as the Court heard it, was to kill Yanett at the daycare. That's what Mr. Diaz testified to. That's what Ms. -- that's what Yanett testified to, Farias Quiroz I think is her last name, that's what she testified to, and that's what the Court heard occurred.

...

And I, I believe the Court heard the testimony. There was no basis to find that Mr. Diaz himself was threatened. The testimony was very clear --

...

MR. DOLD: -- three minutes, "I will be there to take care of Yanett in the morning, tomorrow morning." Mr. Diaz didn't do anything in response to the threat. He told his wife, who called her sister, and Yanett was advised. (RP 460-1, 466-7)

RESPONSE TO ASSIGNMENT OF ERROR 2. .

There can be no dispute that the "to convict" instruction for count one lists not only the victim named in the Information but also Trinidad Diaz. (CP 39) There also can be no dispute that there was no challenge to this instruction when initially given, when it was discussed by all of the parties just prior to the court reading this instruction to the jury or as the instructions were read to the jury. (RP 379-80, 389-90, 395-6,406-07)

As indicated above it would appear that the reason Mr. Diaz's name was inserted, without objection, in to the to-convict instruction was to differentiate the two counts as well as set forth that in the first count the actual communication was not to the actual victim but to this other party, her brother-in-law. The law clearly allows for the crime of Harassment to

be charge in a manner such at this. While the instruction was inartfully stated and would have been a more accurate statement if it would merely have been written in the conjunctive form rather than both conjunctive and disjunctive, it did not affect the outcome of this trial.

Appellant sets forth a lengthy analysis regarding the failure to either name Mr. Diaz as a victim in the Information or remove his name from the to-convict instruction. Morales indicates it was error because Morales could not defend against this uncharged crime or in the alternative that the inclusion of Mr. Diaz in the to-convict instruction thereby allowed the jury to convict for a crime that was not charged.

Appellant fails in his argument to establish that either of these “errors” is fatal to count one. The facts which were set forth at trial leave absolutely no doubt how the jury came to their decision. Even trial counsel for appellant agreed with this. Trial counsel, at sentencing, during the argument as to whether these two counts should be scored as two offenses or on ongoing crime stated the following:

MR. DOLD: Count I talks about a threat to Yanett Farias, Count II talks about a threat to Yanett Farias. I don't believe the *Information* was ever amended to include Trinidad Diaz, although the Jury Instructions did include his name.
Second, the Court had a chance -- In the instructions the Court was -- The jury was instructed in the disjunctive. They could find one or the other. The Court had an opportunity to hear the testimony. Mr. Diaz

was never in any fear. He communi (sic) -- He received a threat, according to his testimony, and whether the jury believed that or not, they, they found my client guilty of the threat as it was communicated to Yanett. I don't believe that he is a separate victim. I don't believe the jury found that he was a separate victim. I don't think he was ever charged with being a separate victim in this proceeding. There was one victim and there was one threat. The threat, as the Court heard it, was to kill Yanett at the daycare. That's what Mr. Diaz testified to. That's what Ms. -- that's what Yanett testified to, Farias Quiroz I think is her last name, that's what she testified to, and that's what the Court heard occurred.

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And I, I believe the Court heard the testimony. There was no basis to find that Mr. Diaz himself was threatened. The testimony was very clear --

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MR. DOLD: -- three minutes, "I will be there to take care of Yanett in the morning, tomorrow morning." Mr. Diaz didn't do anything in response to the threat. He told his wife, who called her sister, and Yanett was advised. (RP 460-1, 466-7)

Based on this statement it is hard to conceive how Morales can now state either allegation 1) that he did not know what the basis of the charge was or 2) that the jury could have found him guilty because of the conjunctive/disjunctive way the to-convict instruction was given.

Appellant states that "While the evidence that Mr. Morales threatened Ms. Farias on February 14 is substantial, the jury's decision to convict on that count, if properly instructed, was not inevitable. It is possible Mr. Morales was conviction based on Mr. Diaz's testimony that

he believed the threat would be carried out. Accordingly, the conviction on Count 1 should be reversed.” (Appellant’s brief at 12)

This not supported by the evidence presented at the trial.

In this trial the facts were unrefuted. Those who testified regarding Count I all stated that Morales went to the home of the victim’s sister and confronted Mr. Diaz, the victim’s brother-in-law. That during this confrontation Morales stated that he was going to kill the victim. Morales’ threat was very specific, to the point of telling Mr. Diaz the exact time and location where this killing was going to occur. Morales stated that the following morning when she (the victim) went to drop off the children at the babysitter’s he would be there waiting for her....that we was going to kill her.” (RP 248) This threat was not done in a joking manner. Mr. Diaz described Morales as “very angry” “his voice was trembling a lot, well, we was really angry.” (RP 250) This threat was then communicated to the victim’s sister. Mr. Diaz testified that he told his wife to let her (the victim) know everything that he had said. So she called her and told her and Janett (the victim) called the Sheriff’s Office.” (RP 250, 257-8) This testimony was made without objection from Morales.

The threat to kill and the location that this was to occur were confirmed on cross-examination as well as the fact that this information

had been imparted to both Mr. Diaz and the victim was confirmed on cross-examination. (RP 253, 256)

The next person to testify was Ms. Castel, the person who took care of the three children that the victim and Morales have in common. She testified that she was at her home daycare when the victim's three children arrived at her home and came running in, they were screaming, crying, saying that their dad wanted to kill their mom. (RP 262) Ms. Castel observed Morales in his truck blocking the victims attempt to leave. She observed the victim's oldest daughter attempting to call and finally calling the police. Ms. Castel testified that she personally heard Morales state "This is as far as you've gone, you fucking bitch, because I'm going to kill you here." (RP 263, 267)

Eventually Ms. Castel went outside her residence and yelled "NO" at Morales and testified that when Morales heard her scream he left. (RP 269) eventually the victim ran into the house and told Ms. Castel "I thought, I thought they would be killing me today" and "If it wouldn't ve (sic) been for you, he could've killed me." (RP 274)

Once again almost all of the testimony regarding the actions of Morales were reconfirmed on cross-examination. (RP 275-286)

When the victim took the stand she testified that on the 14th of February, the date of Count I, Morales had come to her home and he was

angry. (RP 303) The victim stated she received a call from her sister and that she got very scared and called the police. She states she was scared “because I know him very well and I know that when he’s not well, he is very dangerous.” (RP 304) She stated that she made a statement to the police and that we stayed up all night because she was “very scared.”

On cross examination the following was elicited:

Q: Okay. The -- You -- When you spoke to your sister-in-law (sic) and all these terrible things were being talked about

--

A: She is my sister.

Q: Sorry, sister. When you spoke to your sister and all these terrible things were being talked about, didn’t you think that it might be better if someone else took the kids?

A: No. No.

Q: Okay. That idea didn’t cross your mind?

A: No, because I do not want to cause or create more problems to innocent people. Because every time somebody helped me out, he’d always get really angry towards them.

Even if the statement by Morales that there is no “direct” evidence, as to whether the victim was told by her sister of the threats, was taken at face value the circumstantial evidence was enormous. The evidence presented meets the test set forth in State v. Thomas, 150 Wn.2d 821, 874-75, P.3d 970 (2004):

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of

the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). (Emphasis mine.)

That is also why "Credibility determinations are within the sole province of the jury and are not subject to review." not this court or the parties to this appeal. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). With regard to any of the inconsistencies brought forth at trial "Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990)." Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This in many ways a challenge of the evidence presented, a sufficiency argument, the evidence was more than sufficient to support count one of the Information and clearly excludes the possibility that the jury convicted Morales based on the allegation that Mr. Diaz was a victim due to phrasing set forth in Instruction 7. Evidence is sufficient to support a conviction if, when

viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.

State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

The evidence presented at trial was without a doubt overwhelming for both of the charged counts. State v. Flores, 164 Wn.2d 1, 186 P.3d 1038, 1046-47 (2008):

In evaluating whether the error is harmless, this court applies the "overwhelming untainted evidence" test. *State v. Davis*, 154 Wash.2d 291, 305, 111 P.3d 844 (2005) (quoting *State v. Smith*, 148 Wash.2d 122, 139, 59 P.3d 74 (2002)), *aff'd on other grounds by* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Under that test, when the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* 2 Evidence that is merely cumulative of overwhelming untainted evidence is harmless. *State v. Nist*, 77 Wash.2d 227, 236, 461 P.2d 322 (1969); *see also* Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L.REV. 277, 319 (1995) ("Regardless of the announced standard of review for harmless error, Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative.").

Appellant's claim that the jury could infer that the information of the threat from the 14th as told to the victim is baseless. Appellant states "[b]ut Mr. Diaz's wife did not testify, so there is no direct evidence she told Ms. Farias of the threat." This is a baseless claim. The testimony is more than clear that the information was imparted to Ms. Farias. An

officer testified that she went to the home of Mr. Diaz based on the statements made to him by the victim, so obviously she, the victim, had been told about the threats made by Morales to her brother-in-law. Further, the victim stated that she was told about the threats and that was why she was unable to sleep, which was confirmed by her daughter. (RP 352) She also testified that she was very nervous as she drove to the babysitters house the next morning because “I knew that he could be out there outside of the babysitter’s” ... “I thought that when I arrived at the babysitter’s I was going to have him coming at me from the front, but he did not arrive from the front he arrived beside me.” (RP 306) The victim had a contingency plan if, when she arrived at the daycare, Morales was there.

The victim’s daughter confirmed the phone call on the 14th and that after the all her mother was very scared and nervous and that after the phone call the victim called the police. (RP 350-1) The daughter testified that they were told to watch for their dad and if he was there they were to run. (RP 353)

Appellant can not overcome the law as set forth in State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977) which was recently cited in a case arising from this very court State v. Kiehl, 128 Wn.App. 88, 113 P.3d 528 (Div. 3 2005). Kiehl a case addressing an allegation based

on facts very similar to those presented in this case stated the following, “The adequacy of jury instructions is a question of law subject to de novo review. See State v. Pirtle, 127 Wash.2d 628, 656, 904 P.2d 245 (1995). An instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Wanrow, 88 Wash.2d 221, 237, 559 P.2d 548 (1977) (quoting State v. Golladay, 78 Wash.2d 121, 139, 470 P.2d 191 (1970), overruled by, State v. Arndt, 87 Wash.2d 374, 553 P.2d 1328 (1976)). In Kiehl this court found that there was insufficient evidence to support the crime charged as stated above that clearly is not the case herein.

Wanrow at 237 states:

More importantly, there is a test for reviewing instructions that is clearly designed for and consistently applied to cases in which the instruction given is an erroneous statement of the law.

When the record discloses *an error in an instruction* given on behalf of the party in whose favor the verdict was returned, the error is *presumed to have been prejudicial*, and to furnish ground for reversal, unless it affirmatively appears that it was harmless. . .

.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 final outcome of the case*.

(Italics ours.) State v. Golladay, 78 Wash.2d 121, 139, 470 P.2d 191, 202 (1970) Quoting State v. Britton, 27 Wash.2d 336, 341, 178 P.2d 341 (1947); Accord, State v. Martin, 73 Wash.2d 616, 627, 440 P.2d 429 (1968); State v. Odom, 8 Wash.App. 180, 188, 504 P.2d 1186 (1973); State v. Rogers, 5 Wash.App. 347, 352, 486 P.2d

1125 (1971); State v. Johnson, 1 Wash.App. 553, 463 P.2d 205 (1969).

The State proved each and every element of the charged crime beyond a reasonable doubt. That crime being two counts of Felony Harassment Threat to Kill against Yanett Farias.

RESPONSE TO ASSIGNMENT OF ERROR THREE.

These two counts were and are separate. They are not only separated temporally but physically. The first act took place on February 14th at or near the home of Mr. Diaz in the town of Wapato, Washington and the threat was made to Mr. Diaz and directed towards the victim. (RP 247) The second criminal act and the basis for the second count in the Information occurred the following day, February 15, at the home of Ms. Castel. As described at trial the defendant used his truck to physically block in the victim's vehicle all the while screaming "bitch I'm going to kill you" and "I swear to you, you fucking bitch, that I am going to kill you. You are a fucking bitch." All while his children were either in the vehicle listening to this or running from the vehicle to the house of Ms. Castel. (RP 308,310, 327, 356)

The State realizes that State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010) is applicable. There is no denying the analysis set forth therein is appropriate to the present case. The State would point out to this

court to additional language in Hall that supports separate convictions based on Morales' first contact with Mr. Diaz and the second confrontation with the victim:

Our determination might be different if Hall had changed his strategy by, for example, sending letters in addition to phone calls or sending intermediaries, or if he had been stopped by the State briefly and found a way to resume his witness tampering campaign. But those facts are not before us.

Hall, 168 Wn.2d at 737.

Contained within RCW 9A.46 are the statute in question as well as Stalking as defined in RCW 9A.46.110. These are captioned under the heading "Harassment." The statute defining "Harassment," the specific crime, states in subsection (1) Without lawful authority, the person knowingly threatens" it then defines various methods that may be alleged. This statute also contains the "Stalking" statute. In this specific statute the legislature set forth the following definition, **9A.46.110. Stalking** (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime: (a) He or she intentionally and **repeatedly** harasses or **repeatedly** follows another person;" This statute specifically defines in subsection "(e) "Repeatedly" means on two or more separate occasions."

It is obvious that the legislature in the Stalking statute was defining a pattern of activity that was to be punished. The important word,

obviously, is repeatedly. No where in the specific statute for “harassment” is this type of verbiage found. The clear intent from the legislature was that an act of harassment in the form of stalking would have to be proven as an act over time and or with multiple acts, whereas harassment is set out in the singular.

State v. Sullivan, 143 Wn.2d 162, 174-5, 19 P.3d 1012 (2001);

" 'This court has the ultimate authority to determine the meaning and purpose of a statute.' " In interpreting statutory provisions, the primary objective is to carry out the intent of the Legislature. When a statute is unambiguous, it is not subject to judicial construction and its meaning must be derived from the plain language of the statute alone. We do not add to or subtract from the clear language of a statute unless that is imperatively required to make the statute rational. Legislative definitions provided by the statute are controlling. In the absence of a statutory definition, we will give the term its plain and ordinary meaning ascertained from a standard dictionary. We will avoid unlikely, absurd or strained consequences.

It is therefore the position of the State by setting forth that the other act of “harassment” covered in the same statute specifically requires “repeated” acts to qualify as a criminal act and in the “Harassment” statute this language is glaringly absent that the legislature meant to punish each act of harassment that is a distinctive act, such as was the case here.

The State is well aware that there could easily be a factual situation were a very similar factual pattern could be ruled to be one continuous act. If for instance the first action in this case had been directly to the victim

and not to her brother in law that may well set this up to be one course and conduct. Or even using the brother-in-law scenario if Morales had changed his threat to “tell” that your sister-in-law that I am going to go to the daycare tomorrow morning and kill her that could have changed the nature of this argument. However that did not occur.

What occurred was Morales went to Mr. Diaz’s house and made his threat; he did not contact the victim after that and threaten her. He had contacted her earlier but she testified that he was angry, was not yelling and it was not characterized as harassment. (RP 303) It was not until the next day, in a completely different location and the harassment was not just a verbal threat but an actual physical act along with numerous threats that the next harassment, count two, occurred.

IV. CONCLUSION

Based on the forgoing facts and law Morales appeal should be denied. This appeal should be dismissed.

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DECLARATION OF SERVICE

I, David B. Trefry state that on March 2012, emailed as copy, by agreement of the parties, of the Respondent's Brief , to Janet Gemberling , c/o Robert Canwell, at Robert Canwell, admin@gemberlaw.com and to Jesus Morales, C/O Janet Gemberling at P.O. Box 9166, Spokane, WA 99209.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of June, 2012 at Spokane, Washington.

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