

64466-1

64466-1

NO. 64466-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRYAN ALLEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. The constitutional concept of "true threats" is a definition employed by Washington courts to ensure that statutes that prohibit threats are constitutional. Definitions of elements are not themselves elements that must be included in the charging document. Has the defendant failed to establish that the "true threats" definition must be included in the charging document?

2. The state supreme court has approved jury instructions that include the "true threats" definition when defining "threat." Has the defendant failed to establish that the trial court erred in giving the definitional instruction approved by the state supreme court?

3. Washington and many other states have refused to require a jury instruction on cross-racial identifications. Even states that require such an instruction only require it when there is no corroborating evidence. Did the trial court properly refuse to give the disapproved instruction where there was evidence corroborating the victim's identification?

4. A prosecutor is allowed to argue that a state's witness is credible as long as the prosecutor relies on inferences from the facts presented at trial and does not state a personal opinion. The

argument in this case was based on facts presented at trial and was not an expression of personal opinion. Has the defendant failed to establish that the prosecutor's argument was improper?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Bryan Allen was convicted by jury trial of the crime of felony harassment. CP 25. He was sentenced to 14 months of confinement. CP 49. This appeal follows.

2. FACTS OF THE CRIME.

On August 6, 2009, at approximately 7 p.m., Gerald Kovacs was walking on University Way near Northeast 47th Street when he was approached by two men who blocked his path. 3RP 7.¹ The men asked him a question but he did not understand what they were asking, so he responded, "What?" 3RP 7. One of the men asked, "Do you want fire?" 3RP 7. Still not understanding what this question meant, Kovacs again responded, "What?" 3RP 7.

¹ The Verbatim Report of Proceedings will be referenced as follows: October 19, 2009 is "1RP"; October 20, 2009 is "2RP"; October 21, 2009 is "3RP"; October 22, 2009 is "4RP"; October 23, 2009 is "5RP"; and November 6, 2009 is "6RP."

One of the men then clarified that they were talking about marijuana. 3RP 7.

In response, Kovacs told the two men to "F___ off." 3RP 8. This apparently angered the two men because they began screaming and cursing at Kovacs. 3RP 10. They eventually allowed him to keep walking, but when he approached the next street corner he turned around and saw that the same two men were following him. 3RP 10-11. Frightened, Kovacs asked why they were following him, and one of the men said, "I'm going to kill you, you bitch." 3RP 11. As he said this, he lifted the shirt he was wearing and displayed what appeared to be a handgun. 3RP 11. Upon hearing the threat and seeing the gun, the victim ran as fast as he could to a nearby gas station and called the police. 3RP 12.

Kovacs testified that the two men were both African-American. 3RP 9. One was wearing a red hooded shirt and appeared younger than the other man. 3RP 9. The other, older man was the person who threatened to kill Kovacs while displaying the gun. 3RP 9-11. He was wearing a black hooded shirt, dark jeans, a baseball cap, and fancy, metallic-rimmed sunglasses. 3RP 9. Kovacs, who is five feet, nine inches tall and weighs 200 pounds, testified that the man with the gun was "my height or a little

taller" and "my size, maybe a little bigger." 3RP 9, 32. On the 911 tape, which was played for the jury, Kovacs described him as follows: "He was wearing like a black hoodie and jeans and he had like a baseball cap on and he had these big, he had like big sunglasses on with gold, it kind of gold on the frames." 4RP 3.

A Seattle police officer received the dispatch call at 7:25 p.m. and arrived at the gas station, located in the 4700 block of Brooklyn Avenue, at 7:32 p.m. 3RP 48, 50. At 7:28, a University of Washington police officer saw two people who matched the description of the suspects standing on the corner of the 4700 block of University Way. 3RP 39. When the two suspects saw the officer approaching them, one of them ran. 3RP 40. The other suspect, Bryan Allen, did not run and was taken into custody. 3RP 40-41. Allen was searched and did not have a gun or marijuana on his person. 3RP 44.

Kovacs was transported to where Allen was being detained. 3RP 16. Allen was not handcuffed and the officers were instructed to stand away from him. 3RP 50. Allen is six feet, one inch tall and weighs approximately 280 pounds. 3RP 65-66. Kovacs viewed Allen from 15 feet away and positively identified him as the person who threatened him. 3RP 16, 51. Kovacs testified that he was

wearing the exact same clothes that he described, and that he was 100 percent sure that the defendant was the person who had threatened him less than 30 minutes earlier. 3RP 16. Officer Bennett of the Seattle Police testified that Allen was wearing a black hooded shirt, a ball cap, and huge "retro" sunglasses that were distinctive. 3RP 52.

C. ARGUMENT.

1. THE DEFINITION OF "TRUE THREAT" IS NOT AN ELEMENT OF FELONY HARASSMENT AND NEED NOT BE INCLUDED IN THE CHARGING DOCUMENT.

Allen contends that "true threat" is an essential element of the crime of felony harassment and must be included in the charging document. This Court has previously held otherwise. Allen's claim should be rejected.

The crime of harassment is defined in RCW 9A.46.020(1)(a)(i) and (b) as follows: A person is guilty of harassment if, without lawful authority, the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened, or to any other person, and by words or conduct places the person threatened in reasonable fear that the threat will

be carried out. The charging document in this case set forth the elements of the crime as follows: "That the defendant, Bryan Edward Allen in King County, Washington, on or about August 6, 2009, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Gerald Kovacs, by threatening to kill Gerald Kovacs, and the words or conduct did place said person in reasonable fear that the threat would be carried out." CP 1.

Any statute that criminalizes a form of speech "must be interpreted with the commands of the First Amendment clearly in mind." State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007) (quoting State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001)). "True threats" are not protected speech, and may be prohibited. State v. J.M., 144 Wn.2d 472, 477, 28 P.3d 720 (2001). Statements that are not true threats are protected speech, and may not be prohibited. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). Thus, in order for a statute that prohibits threats to comply with the First Amendment, the statute must be interpreted as proscribing only true threats. Id. 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." Id. Thus, in defining statutes that prohibit threats, Washington courts have defined the term "threat" as used in those statutes as prohibiting "true threats" only. See J.M., 144 Wn.2d at 478 (noting that the harassment statute is defined as prohibiting only true threats).

Washington courts have repeatedly held that definitions of elements are not themselves elements. For example, in State v. Lorenz, 152 Wn.2d 22, 34-36, 93 P.3d 133 (2004), the state supreme court held that "sexual gratification" is not an element of the crime of first degree child molestation, but a term that defines the element of "sexual contact." The court stated, "Had the legislature intended a term to serve as an element of the crime, it would have placed 'for the purposes of sexual gratification' in RCW 9A.44.083." Id. at 34. See also State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (definition of "great bodily harm" does not add element to assault statute); State v. Marko, 107 Wn. App. 215, 219-20, 27 P.3d 228 (2001) (definition of threat does not create additional elements); State v. Strohm, 75 Wn. App. 301, 308-09, 879 P.2d 962 (1994) (definitional terms do not add elements to statute). Because "true threat" has not been included in the

harassment statute there is no basis to conclude that the legislature intended that term to be an element of that crime. "True threat" is a definition that courts have applied to the element of threat in order to ensure the statute does not run afoul of the First Amendment. Like other definitions, it does not add any elements to the statute.

In Tellez, 141 Wn. App. at 483-84, this Court held that the concept of "true threat" serves to define and limit the constitutional scope of the threat element in the felony telephone harassment statute, and is not an element of the crime. This Court held that the "true threat" requirement need not be included in the charging document. Id.² Likewise, while the "true threat" concept limits the constitutional scope of the harassment statute as well, it is not an element of the crime of felony harassment. The charging document in this case set forth the elements of the crime of felony harassment. See also State v. Atkins, __ Wn. App. __, __ P.3d __ (Slip Opinion No. 64975-2-I, filed August 2, 2010) (holding "true threat" need not be in charging document).

² In State v. Schaler, __ Wn.2d __, __ P.3d __ (Slip Opinion No. 81864-9, filed July 29, 2010), at note 6 the state supreme court declined to decide whether the definition of true threat is an element of the crime of harassment, stating "We note that there is a Court of Appeals opinion on point, State v. Tellez, but we express no opinion on the matter."

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE DEFINITION OF THREAT.

Allen additionally contends that the trial court erred in not including the constitutional definition of "true threat" in the "to convict" instruction. This claim must be rejected in light of the state supreme court's recent opinion in State v. Schaler, ___ Wn.2d ___, ___ P.3d ___ (Slip Opinion No. 81864-9, filed July 29, 2010).

Like the present case, State v. Schaler involved a prosecution for felony harassment. The trial court in Schaler did not instruct the jury as to the definition of a "true threat." The supreme court held that failing to supply the definition of "true threat" to the jury was error. However, the court noted that the error was unlikely to arise in future cases because the proper definition had been incorporated into Washington Pattern Jury Instruction 2.24, the instruction that defines "threat." In footnote 5, the court expressly approved of this instruction, stating, "Cases employing the new instruction defining 'threat' will therefore incorporate the constitutional mens rea as to the result." Id., slip opinion at 12 n. 5. Instruction 7 in this case is identical to WPIC 2.24, which the court approved in Schaler. CP 20. In light of the court's express approval of the instruction given in the present

case, Allen's claim that the trial court's instructions were inadequate must be rejected.

3. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE JURY AN INSTRUCTION ON HOW IT SHOULD VIEW CROSS-RACIAL IDENTIFICATION.

Allen contends that the trial court erred in refusing to give his proposed instruction regarding cross-racial identification.

Washington courts have previously rejected this claim, concluding that the subject is properly explored through examination and cross-examination and counsel's argument. The instructions given allowed Allen to argue his theory of the case. The trial court did not err in refusing to give the proposed instruction.

In State v. Laureano, 101 Wn.2d 745, 767, 682 P.3d 889 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), a prosecution for first degree murder, the defendant proposed a jury instruction on the reliability of cross-racial identification. The proposed instruction in that case read, in part: "In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. If this is also your experience, you may consider it in evaluating the

witness's testimony." Id. at 769. The court held that the trial court did not err in refusing to give the instruction, citing State v. Jordan, 17 Wn. App. 542, 564 P.2d 340 (1977), and State v. Edwards, 23 Wn. App. 893, 600 P.2d 566 (1979), with approval. In Jordan, this Court held that instructions as to the credibility of identification witnesses are generally inappropriate, as witness credibility is "more properly tested 'by examination and cross-examination in the forum of the trial court.'" Jordan, 17 Wn. App. at 545. The court concluded that cross-examination and closing argument afford counsel the opportunity to point out weaknesses in eyewitness identifications. Id. at 546. See also State v. Hall, 40 Wn. App. 162, 166-67, 697 P.2d 597 (1985). In Edwards, this Court again concluded that the credibility of identification witnesses can be adequately addressed through cross-examination and argument. Edwards, 23 Wn. App. at 896-97.³

The trial court in this case did not err in refusing to give a jury instruction very similar to the one rejected in Laureano. Counsel was allowed to address the issue of cross-racial identification on cross-examination of Officer Bennett, who testified

³ Jordan and Edwards did not involve cross-racial identifications and the instructions rejected in those cases addressed eyewitness identification evidence in general.

that he was aware of studies that showed that cross-racial identifications can be difficult. 3RP 57. Counsel was allowed to address cross-racial identification in closing, where she noted that the issue had been discussed in jury selection, with the jurors sharing their own experiences. 3RP 96-97. The instructions as given allowed counsel to argue the defense theory of the case: that Kovacs' identification was not reliable. The trial court did not err in declining to give an instruction similar to the instruction rejected in Laureano.

Allen suggests that this Court should depart from Washington precedent and follow the rule adopted by two other states, New Jersey and Utah. However, many more states have rejected the notion that a jury instruction regarding cross-racial identifications must be given. Janey v. State, 166 Md. App. 645, 662-63, 891 A.2d 355, 365 (2006); State v. Wiggins, 74 Conn. App. 703, 708, 813 A.2d 1056, 1059 (2003); Lenoir v. State, 77 Ark. App. 250, 260, 72 S.W.3d 899, 905 (2002); Miller v. State, 759 N.E.2d 680, 684 (Ind. App. 2001); State v. Hadrick, 523 A.2d 441,

444 (R.I. 1987); People v. Bias, 131 Ill.App.3d 98, 86 Ill.Dec. 256, 475 N.E.2d 253, 257 (1985).⁴

Moreover, even under the standards set forth by the New Jersey court, an instruction on cross-racial identification would not be required in this case. In State v. Cromedy, 158 N.J. 112, 116-17, 727 A.2d 457, 459 (1999), the rape victim was unable to identify the defendant although she had been shown his photograph the day after the rape, but identified him in a show-up eight months later. No forensic evidence linked the defendant to the crime. Id. It was the lack of *any* corroborating evidence that necessitated the instruction. 158 N.J. at 132. The court cautioned, "The simple fact pattern of a white victim of a violent crime at the hands of a black assailant would not automatically give rise to the need for a cross-racial identification charge." Id.

In the present case, there was evidence corroborating the victim's identification: the fact that the defendant was found within minutes of the crime on the same block on which the crime occurred, wearing the same clothes described by the victim in the

⁴ Notably, even the Utah Supreme Court, which has adopted a rule requiring that a cross-racial identification instruction be given has noted that "subsequent research . . . has shown that a cautionary instruction does little to help a jury spot a mistaken identification." State v. Clopten, 223 P.3d 1103, 1110 (Utah 2009).

911 call, including distinctive sunglasses, and the fact that the defendant's companion fled as soon as police approached, indicating consciousness of guilt.

This case is similar to State v. Salaam, 225 N.J. Super. 66, 541 A.2d 1075 (1988), in which the New Jersey appellate court held that the instruction was not required. In that case, the victim of a robbery observed the defendant under well-lighted conditions for a period of five minutes, during which time he was just a few feet from her. 541 A.2d at 1076. She gave police a detailed description of her assailant and the police detained the defendant, who matched the description, within ten minutes. Id. Within a half hour of the robbery, the victim identified the defendant without hesitation. Id. Although the victim had described the suspect as holding a pistol, the defendant was found in possession of a toy cap gun. Id. The court held that the instruction was not required. Id.

Finally, even if this Court were to adopt a new rule in this state that a cross-racial identification instruction is required, any error in not giving the instruction was harmless in this case. An error in refusing a defense-proposed instruction is harmless if the reviewing court concludes that, if instructed properly, any reasonable jury would have reached the same result. State v.

Buzzell, 148 Wn. App. 592, 601, 200 P.3d 287 (2009). In Buzzell, this Court held that the court's failure to give a consent instruction was harmless where the defense theory of consent was presented to the jury through the testimony and argument. Id. In the present case, the issue of cross-racial identification was brought to the jury's attention in voir dire, cross-examination, and closing argument. As in Buzzell, this Court can conclude that any reasonable jury would have reached the same result even if the defense-proposed instruction had been given. As such, any error was harmless.

4. THE PROSECUTOR PROPERLY RELIED ON THE FACTS TO ARGUE THAT THE JURY SHOULD FIND THE VICTIM CREDIBLE IN CLOSING ARGUMENT.

Allen contends that the prosecutor's argument was improper because he argued that the victim was a credible witness. Allen's claim is frivolous. The prosecutor did not express a personal opinion. His argument was properly based on the facts admitted at trial and reasonable inferences that could be drawn from those facts regarding the victim's credibility.

The appellate court reviews a prosecutor's allegedly improper remarks in the context of the total argument, the issues in

the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). A prosecutor may not personally vouch for the credibility of a witness. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). A prosecutor may comment on the veracity of a witness, as long as he does not state a personal belief that the witness is telling the truth. State v. Sandoval, 137 Wn. App. 532, 540, 154 P.3d 271 (2007). Prosecutors may argue inferences from the evidence regarding a witness's credibility, and prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

In response to defense counsel's closing argument that Kovacs was mistaken when he identified Allen, the prosecutor made the following argument:

So, what's important here is whether or not you accept Mr. Kovacs. I would point out to you from the evidence Mr. Kovacs is not a flake. He's not some derelict. The evidence would show he is a teacher, very passionate about his work. Not only is he a teacher he is a special education teacher. . .

3RP 105-06. Defense counsel objected to the argument as vouching. 3RP 106. The objection was overruled and the prosecutor continued:

The evidence will show that he teaches kids that have disabilities. The evidence will show that Kovacs has two master's degrees. This is a person that was walking on the street minding his own business and within a matter of minutes he's threatened with death.

3RP 106.

The prosecutor's argument did not contain an unmistakable expression of his personal opinion of Kovacs' credibility. The prosecutor was arguing reasonable inferences from the evidence regarding the victim's background. Kovacs testified that he is a special education teacher in the Renton School District. 3RP 5. He teaches middle school children with behavioral disabilities such as autism. 3RP 6. He has a master's degree in teaching from the University of Washington and a master's degree in special education from Pacific Lutheran University. 3RP 6. He testified that he served for four years in the Army National Guard and has two adopted children. 3RP 6, 13.

It was a reasonable inference for the prosecutor to argue that Kovacs was not a "flake" or a "derelict." These were proper facts for the jury to consider in determining the likelihood that

Kovacs' identification of the defendant could be mistaken. If Kovacs had been a drug-addicted street person, rather than an employed teacher, the jury likely would have viewed his ability to perceive and recall events in a different light. It was entirely proper to highlight Kovacs' background, and reasonable inferences drawn from those facts, in arguing that his identification of Allen could be viewed as credible. Allen's claim that the prosecutor's argument was improper should be rejected.

D. CONCLUSION.

The defendant's conviction should be affirmed.

DATED this 4th day of August, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BRYAN ALLEN, Cause No. 64466-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

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Name
Done in Seattle, Washington

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