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No. 67675-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH W,

Juvenile Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The information was deficient under the Sixth Amendment and article I, section 22 because for each count it failed to allege an element of the crime.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

An information is constitutionally deficient if it fails to set forth every element of the crime charged. The State charged Elijah with three counts of “threats to bomb or injure property,” which requires proof of a true threat, but did not allege that Elijah issued a true threat. Was the information in this case constitutionally deficient?

C. STATEMENT OF THE CASE

The State charged Elijah W. with three counts of “threats to bomb or injure property.” CP 1-2. The information did not allege a “true threat” for any count. CP 1-2.

The juvenile court found Elijah guilty on each count, but only based on the first of two alternative means alleged – that Elijah “threatened to bomb or otherwise injure a public or private school building.” CP 29-30; 5/23/11 RP 36. Elijah appeals. CP 32-37.

D. ARGUMENT

The information omitted an essential element of the crime, requiring reversal and dismissal without prejudice to the State's ability to refile.

1. An information is constitutionally deficient if it fails to set forth every element of the crime charged.

Article I, section 22 of our state constitution¹ and the Sixth Amendment to the federal constitution² require the State to provide an accused person with notice of the offense(s) charged. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). An offense is not properly charged unless the information sets forth every essential element of the crime, both statutory and nonstatutory. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The charging document must contain: (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. Auburn v. Brooke, 119 Wn.2d 623, 630, 836 P.2d 212 (1992). "This doctrine is elementary and of universal application, and is founded on the plainest principle of justice." Pelkey, 109 Wn.2d at 488 (quoting State v. Ackles, 8 Wash. 462, 464-65, 36 P. 597 (1894)).

¹ "In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him"

² "In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation"

A challenge to the sufficiency of the charging document is of constitutional magnitude and may be raised for the first time on appeal. State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989)). Where, as here, the issue is raised for the first time on appeal, the standard of review set forth in Kjorsvik applies. This Court asks: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice? Kjorsvik, 117 Wn.2d at 105-06. If the answer to the first question is “no,” reversal is required without reaching the second question. State v. Zillyette, ___ Wn.2d ___, 270 P.3d 589, 591 (2012); State v. McCarty, 140 Wn.2d 420, 425-28, 998 P.2d 296 (2000).

2. The information violated Elijah’s constitutional rights because it omitted the true threat element.

The State charged Elijah with three counts of “threats to bomb,” in violation of RCW 9A.04.010. CP 1. The statute, in relevant part, makes it unlawful “for any person to threaten to bomb or otherwise injure any public or private school building ... or to communicate or repeat any information concerning such a

threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.” RCW 9.61.160(1). The First Amendment limits the reach of the statute to “true threats,” which are statements “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 take the life of another individual.” State v. Johnston, 156 Wn.2d 355, 359-61, 127 P.3d 707 (2006).

Notwithstanding the above, the information did not include the true threat requirement. For each count, it tracked only the statutory language, alleging:

That the respondent, Elijah [W.], in King County, Washington, on or about [date], did threaten to bomb or otherwise injure any public or private school building; and did communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

CP 1-2.

Although this Court has held that a “true threat” is not an essential element that must be pled in the information and included in the “to convict” instruction, this Court should revisit that decision

in light of intervening jurisprudence. State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007).³ In State v. Schaler, the Supreme Court reversed the defendant's conviction because the trial court did not instruct the jury that it could only convict if it found the defendant issued a true threat. State v. Schaler, 169 Wn.2d 274, 278, 236 P.3d 858 (2010). The full definition of "true threat" was neither in the to-convict instruction nor in a standalone instruction. The Court noted that while the jury was instructed on the necessary mens rea as to the speaker's conduct, it was not instructed on the necessary means rea as to the result. Id. at 286. "True threat" includes the latter – that a reasonable speaker would foresee that the statement would be interpreted as a serious expression of intention to inflict harm. Id.

The Court went on to explain that "the omission of the constitutionally required mens rea from the jury instructions ... is analogous to [a situation] in which the jury instructions omit an element of the crime." Id. at 288. And although it declined to reach the issue Elijah raises here, it noted, "[i]t suffices to say that,

³ This Court recently declined to overrule Tellez in Allen, but the Supreme Court granted review in Allen. State v. Allen, 161 Wn. App. 727, 255 P.3d 784, review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011). This Court should therefore take the opportunity to reevaluate the issue.

to convict, the State must prove that a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious." Id. at 289 n.6 (emphasis added).

The above reasoning supports Elijah's argument that a "true threat," i.e. the mens rea as to the result, is an element that must be included in the information (and the to-convict instruction for jury-trial cases). "[A] crime defined by a particular result must include the intent to accomplish that criminal result as an element." State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). For example, "[t]he crime of murder is defined by the result of death, RCW 9A.32.030, and the rule is well established that the crime of attempted murder requires the specific intent to cause the death of another person." Id. Thus, for attempted murder, the mens rea as to the result must be pled in the information and included in the to-convict instruction. See id. The same is true for murder. See, e.g., WPIC 27.02 (to-convict instruction for second-degree intentional murder). As the Supreme Court explained in another case, the elements of a crime are "the actus reus, mens rea, and causation." State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (emphasis added). Because the definition of "true threat" is the mens rea for bomb threats, it must be included in the information.

The information in this case was constitutionally deficient because it omitted the true threat element.

3. The remedy is reversal of the convictions and dismissal of the charges without prejudice to the State's ability to refile.

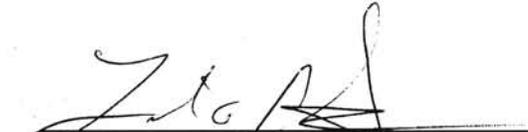
Washington courts "have repeatedly and recently held that the remedy for an insufficient charging document is reversal and dismissal of charges without prejudice to the State's ability to refile charges." State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). This Court should reverse Elijah's convictions and remand for dismissal of the charges without prejudice. Id.

E. CONCLUSION

For the reasons set forth above this Court should reverse the convictions and remand for dismissal of the charges without prejudice to the State's ability to refile.

DATED this 9th day of April, 2012.

Respectfully submitted,


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DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the **Appellant's Opening Brief** filed under **Court of Appeals No. 67675-0** to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for respondent **PROSECUTING ATTY KING COUNTY KING CO PROS/APP UNIT SUPERVISOR, W554 KING COUNTY COURTHOUSE 516 THIRD AVENUE SEATTLE WA 98104**, appellant **ELIJAH W, 9909 64TH AVE. S., APT B, SEATTLE WA 98118** and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.

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Washington Appellate Project

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