

67829-9

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NO. 67829-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ERIC FREEMAN,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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Marla L. Zink  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

APPELLANT'S REPLY BRIEF  
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A. ARGUMENT IN REPLY

**1. Because the information lacked an essential element, Mr. Freeman's conviction is subject to automatic reversal.**

In his opening brief, Mr. Freeman argued that the failure to include in the information the essential "true threat" element requires reversal of that conviction. Op. Br. at 8-12. The State argues that the "true threat" requirement is not an element but a definition. Resp. Br. at 5-7. This is contrary to *State v. Schaler*, 169 Wn.2d 274, 288, 292-93, 236 P.3d 858 (2010) and the additional authorities cited in the opening brief. "True threat" is an essential element that must be pled in the information.

Notably, the State does not contest that automatic reversal is the appropriate remedy for failure to include an essential element in the charging document. *Compare* Op. Br. at 12 *with* Resp. Br. at 4-7. Accordingly, the State concedes that if the information is found insufficient the convictions must be reversed. *See State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005).

In sum, Mr. Freeman's conviction should be reversed because the State failed to plead the essential true threat element in the information.

**2. The State presented insufficient evidence that Mr. Freeman threatened to kill.**

Mr. Freeman's convictions should be reversed on the independent basis that the State presented insufficient evidence that he threatened to kill anyone. *See* Op. Br. at 13-20. The State argues in response that Mr. Freeman's threat to shoot was per se a threat to kill. Resp. Br. at 9-13. But shooting does not per se result in death.

Shooting someone may kill them, but it is not a necessary result. Indeed, one of the definitions of "shoot" is "to wound or kill with a missile discharged from a firearm." *Webster's Third New International Dictionary* 2100 (1993) (emphasis added) (most definitions focus only on the action of setting, throwing or sending forth). The historical practice of kneecapping, the act of shooting a bullet into another's knee, is but one of example where a shooting is done other than with intent to kill. *See* "Kneecapping," Urban Dictionary, <http://www.urbandictionary.com/define.php?term=kneecapping> (last visited Aug. 15, 2012). Not surprisingly, courts regularly distinguish between shooting and killing. *E.g.*, *State v. Pedro*, 148 Wn. App. 932, 951-52, 201 P.3d 398 (2009) (shooting in direction of victim sufficient to constitute intent to impose great bodily harm, which includes injury less than death such as significant serious permanent disfigurement or a

significant permanent loss or impairment of the function of any bodily part or organ); *United States v. Adams*, 265 F.3d 420, 425 & n.2 (6th Cir. 2001) (referring to cases where shooting does not result in death, including “shooting a blank”); *State v. Rogers*, 976 S.W.2d 529, 532 (Mo. Ct. App. 1998) (distinguishing culpability for first shot, which was fired into air, and second shot, which killed victim).

Thus a shooting without more is not per se a killing. Similarly, a threat to shoot, standing alone, is not necessarily a threat to kill. Here, the circumstances were insufficient to elevate the threat to shoot to a threat to kill. No witness testified that Mr. Freeman threatened specifically to kill them and neither Mr. Dolin nor Ms. Emerson testified they were placed in reasonable fear Mr. Freeman would kill them. When Mr. Freeman communicated the statement to Mr. Dolin, he was not wielding a weapon or otherwise expressing any physical aggression. 9/21/11RP 17-18, 28; 9/21/11RP 39-40, 49; 9/21/11RP 56, 66. The State argues Mr. Freeman was “agitated, frustrated and angry.” Resp. Br. at 9. But those emotions are no more consistent with a threat to kill than with a threat to impose bodily injury or intimidate through shooting. Further, the witnesses did not know Mr. Freeman as a violent person. In fact, Mr. Freeman has no history of violence. 9/21/11RP

44, 87, 96-97. Mr. Freeman confirmed he did not even have access to a gun. 9/21/11RP 87, 105. Consequently, the circumstances do not elevate Mr. Freeman's "threat to shoot" to a "threat to kill."

Because threatening to shoot someone is not per se a threat to kill, the State must present sufficient evidence that a threat to shoot constituted a true threat to kill to support a felony harassment conviction. Mr. Freeman's three felony harassment convictions are based on insufficient evidence because the State failed to prove a reasonable speaker would understand Mr. Freeman's threat to shoot here would be interpreted as a threat to kill and that the three threatened persons were placed in reasonable fear that Mr. Freeman would kill them.

**3. Mr. Freeman properly challenges for the first time on appeal the court's imposition of discretionary fees and costs.**

Mr. Freeman argued alternatively in his opening brief that the court's boilerplate finding that he had or likely would have the future ability to pay discretionary costs and fees was clearly erroneous because the only evidence regarding his financial capacity showed he lacked income, means of employment, housing and financial resources. Op. Br. at 20-23. In response, the State argues Mr. Freeman cannot

raise the issue for the first time on appeal and the issue is best addressed when the obligations are enforced. Resp. Br. at 13-17. The State's argument is wrong on both counts.

Our courts have long held that sentencing errors may be reviewed for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999) (collecting cases). Further, this Court has previously reviewed the imposition of costs for the first time on appeal. *E.g.*, *State v. Bertrand*, 165 Wn. App. 393, 398, 403-04, 267 P.3d 511 (2011); *State v. Curry*, 62 Wn. App. 676, 678-79, 814 P.2d 1252 (1991), *aff'd* 118 Wn.2d 911, 829 P.2d 166 (1992); *see State v. Baldwin*, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991) (noting imposition of fees for recoupment of attorney's fees implicates constitutional right). The issue should be reviewed even absent objection below.

The State's argument that the unsupported imposition of costs is "best addressed" when the State seeks to enforce payment is similarly misplaced. The constitution and statutes require the sentencing court to find the defendant has an ability to pay by substantial evidence. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). That substantial evidence must be presented at

sentencing. *See* RCW 10.01.160(3). Though fees and costs may not be collected immediately, the court must have substantial evidence at the time it enters the finding. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Mr. Freeman's ability to ask for the costs to be reduced once payment is enforced does not justify the court's imposition of discretionary fees and costs absent evidence Mr. Freeman has or will have a likely ability to pay such costs. As discussed in his opening brief, the State presented no evidence regarding Mr. Freeman's ability to pay discretionary costs. On the other hand, Mr. Freeman qualified for court-appointed counsel, at trial and on appeal, and was homeless. 9/21/11RP 87. Substantial evidence does not support the court's boilerplate finding that Mr. Freeman has or will likely have the ability to pay discretionary costs. *Cf. Curry*, 62 Wn. App. at 683 (affirming imposition of discretionary costs where evidence before trial court showed likely future ability to pay). Accordingly, the discretionary costs were erroneously imposed and this Court should strike that portion of the judgment and sentence.

B. CONCLUSION

As set forth in his opening brief and herein, Mr. Freeman's convictions should be reversed because the State (1) violated his due process rights by failing to include all elements of the crime in the charging document, (2) failed to present sufficient evidence Mr. Freeman uttered a true threat to kill, and (3) presented insufficient evidence of reasonable fear of a threat to kill.

Alternatively, the Court should strike the discretionary costs imposed because the finding that Mr. Freeman has the present or likely future ability to pay is clearly erroneous.

DATED this 17th day of August, 2012.

Respectfully submitted,



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Marla L. Zink – WSBA 39042  
Washington Appellate Project  
Attorney for Appellant

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	)	
RESPONDENT,	)	
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v.	)	NO. 67829-9-I
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ERIC FREEMAN,	)	
	)	
APPELLANT.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/>	KIMBELY THULIN, DPA	<input checked="" type="checkbox"/>	U.S. MAIL
	WHATCOM COUNTY PROSECUTOR'S OFFICE	<input type="checkbox"/>	HAND DELIVERY
	311 GRAND AVENUE	<input type="checkbox"/>	_____
	BELLINGHAM, WA 98225		

**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF AUGUST, 2012.

X \_\_\_\_\_ 

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DIVISION ONE

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711