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NO. 67829-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC FREEMAN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Eric Freeman, a homeless veteran, sought housing assistance through various agencies but was sent back and forth between and among offices. He was frustrated by the process. But he has no history of violence or hostility and does not remember threatening anyone. Based on the testimony of three agency workers who felt threatened by Mr. Freeman's words, he was convicted of three counts felony harassment.

Mr. Freeman's convictions should be reversed because the charging document did not include an element essential to the crime—that the threat alleged was a "true threat." The convictions should also be reversed because the State failed to prove felony harassment based on a threat to kill as distinguished from a threat to inflict bodily injury. In the alternative, the discretionary costs and fees imposed in the sentence should be vacated because Mr. Freeman does not have the ability to pay.

B. ASSIGNMENTS OF ERROR

1. The information lacked an essential element of the charged crime, that the threat was a “true threat.”

2. In violation of Mr. Freeman’s constitutional right to due process, the State failed to prove all the elements of felony harassment beyond a reasonable doubt.

3. The sentencing court erred in imposing discretionary costs and fees.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires that all essential elements of a crime be included in the charging document. To prove the crime of felony harassment, the State is required to prove, among other things, the essential element that the threat was a true threat. The true threat element requires the alleged threat is a statement that a reasonable person would foresee would be interpreted as a serious expression of intention to kill another. Where the information lacked the element of true threat, was Mr. Freeman denied due process?

2. Constitutional due process guarantees a defendant may not be convicted unless the State proves every element of the crime beyond a reasonable doubt. To prove the crime of felony harassment, the State

was required to prove beyond a reasonable doubt that, among other things, Mr. Freeman uttered a threat to kill, a reasonable speaker would expect the person threatened to understand the statement as a serious intention of a threat to kill, and the threat caused the person threatened to reasonably fear the defendant would kill him or her. Did the State fail to sustain its burden of proof where there was no evidence a reasonable speaker would expect “shooting” to be equated with “killing” and there was no evidence that two of the threatened persons reasonably feared Mr. Freeman would kill them as opposed to inflict bodily injury?

3. Courts may not impose discretionary costs on defendants unless they have a present or future ability to pay. A finding of ability to pay must be supported by the evidence. Though no evidence of Mr. Freeman’s ability to pay was presented, the court entered a generic finding that he had the present or future ability to pay and imposed discretionary costs and fees. Did the sentencing court err in ordering Mr. Freeman to pay discretionary fees and costs?

D. STATEMENT OF THE CASE

Eric Freeman is a homeless veteran of the United States military. 9/21/11RP 87.¹ He has no history of violence. 9/21/11RP 87. He also does not have access to a gun. 9/21/11RP 87.

Mr. Freeman has been searching for housing through local assistance programs for the past couple years. 9/21/11RP 93. He has filled out the necessary paperwork, but has been referred back and forth and among different offices. 9/21/11RP 93. He is frustrated with being homeless and being given the runaround by various organizations. 9/21/11RP 93.

The Opportunity Council at the Whatcom Homeless Service Center in Bellingham, Washington is one of the organizations through which Mr. Freeman applied for housing. 9/21/11RP 10-11, 85, 88. The Opportunity Center generally locks its doors in the afternoons, at which time clients are seen by appointment only. 9/21/11RP 11-12, 31.

According to the State's witnesses, Mr. Freeman appeared at the Opportunity Council on the afternoon of April 15, 2011. Francisco Javier-Flores testified he had never seen Mr. Freeman before he

¹ The verbatim reports of proceedings are referred to herein by the initial date transcribed in each volume: "5/19/11RP"; "6/30/11RP"; and "9/21/11RP."

appeared at the locked doors. 9/21/11RP 12. Mr. Freeman was pulling on the doors, so Mr. Flores retrieved his colleague Sarah Emerson, who usually holds afternoon appointments. 9/21/11RP 13, 32.

Ms. Emerson went to the doorway to speak to Mr. Freeman; Mr. Flores could hear their conversation from his desk in the front of the office suite. 9/21/11RP 15, 32. Ms. Emerson recognized Mr. Freeman because she had received his housing application the day before. 9/21/11RP 33. He was put on the housing waiting list, behind several hundred people. 9/21/11RP 33.

Ms. Emerson opened the front door to speak with Mr. Freeman. 9/21/11RP 34. When he informed her he was looking for housing, she told him to go to different offices on the other side of the building. 9/21/11RP 34. Mr. Freeman spoke in a raised voice and was upset because he had been “given the runaround by different service providers.” 9/21/11RP 36, 46.

Another colleague, Gary Dolin, overheard the exchange and approached the doorway. 9/21/11RP 52. Mr. Freeman seemed upset because he had not yet received help to alleviate his homelessness. 9/21/11RP 53. Ms. Emerson asked Mr. Dolin to meet with Mr. Freeman; she then returned to her office. 9/21/11RP 38, 54.

Mr. Dolin testified he tried to explain the Opportunity Council's housing assistance program to Mr. Freeman but he was upset and became increasingly "escalated." 9/21/11RP 55. Mr. Freeman eventually said "he would leave and go get a gun and come back and shoot everyone." 9/21/11RP 57. Then Mr. Freeman left, and Mr. Dolin locked the door to the suite. 9/21/11RP 18, 57; *see* 9/21/11RP 22 (as leaving, Freeman told Dolin he could call the police and "tell them Eric Freeman is going to come back with a gun").

Mr. Dolin reported Mr. Freeman's statement to Sarah Emerson, who was back in her office, and called the police. 9/21/11RP 18, 39. Mr. Dolin took Mr. Freeman seriously and thought he and his colleagues were in danger. 9/21/11RP 57-58.

Mr. Flores testified he heard Mr. Freeman tell Mr. Dolin he had been getting the runaround in his search for housing, wanted housing today, and "was going to come back with a gun and take care of us." 9/21/11RP 17. Mr. Flores thought Mr. Freeman seemed very hostile. 9/21/11RP 17-18. Mr. Flores testified he was scared Mr. Freeman would return with a gun and kill the three of them. 9/21/11RP 18.

Ms. Emerson testified she was uneasy because she "felt like [Mr. Freeman] was going to act on the threat." 9/21/11RP 42.

Mr. Freeman was arrested and charged with three counts felony harassment based on threats to kill Mr. Dolin, Mr. Flores and Ms. Emerson. 9/21/11RP 76; CP 31-32. He waived his right to a jury trial. CP 23.

At trial, Mr. Freeman testified he does not recall making any threats to Mr. Dolin, Ms. Emerson or Mr. Flores. 9/21/11RP 85, 88. Though he was likely frustrated when he appeared at the Opportunity Council offices and likely communicated his frustration verbally, it would be completely unlike him to be hostile, angry or threatening. 9/21/11RP 85-86, 93-95, 103. Like the other times he visited the Opportunity Council, Mr. Freeman believes on the date in question he would have asked where he was on the list for housing, speaking to an employee for less than 15 minutes. 9/21/11RP 96-97. Further, Mr. Freeman testified he wanted the State's witnesses to know he is not a threat to any of them. 9/21/11RP 102.

The court convicted Mr. Freeman as charged. 9/21/11RP 116-17.² Additional facts are set forth in the relevant argument sections below.

E. ARGUMENT

1. Mr. Freeman's right to due process was violated because the essential 'true threat' element was not included in the charging document.

- a. The charging document must include each element of the crime charged to comport with due process.

Due process requires that the essential elements of a crime be included in the charging document, regardless of whether they are statutory or non-statutory. U.S. Const. amend. VI; Const. art. I, § 22; *State v. Goodman*, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). In *Goodman*, the Washington Supreme Court relied on *Apprendi v. New Jersey* to hold that all facts essential to punishment must be pled in the information and proved beyond a reasonable doubt. *Goodman*, 150 Wn.2d at 785-86 (relying on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The purpose of the rule is

² Contrary to Criminal Rule 6.1(d), no findings of fact or conclusions of law were entered. The undersigned counsel has requested trial counsel ensure the entry of findings of fact as soon as possible. Mr. Freeman reserves the right to assign supplemental error to those findings, if necessary, once entered.

to give the accused notice of the nature of the allegations so that a defense may be properly prepared. *Id.* at 784; *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). An information that omits essential elements charges no crime at all. *State v. Courneya*, 132 Wn. App. 347, 351, 131 P.3d 343, *review denied*, 149 P.3d 378 (2006).

Though charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before trial, the reviewing court must find that the necessary facts appear in the information in some form. *Kjorsvik*, 117 Wn.2d at 102, 105-06; *Goodman*, 150 Wn.2d at 787-88. “If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and reviewing courts reverse without reaching the question of prejudice.” *Courneya*, 132 Wn. App. at 351.

b. That the threat was a ‘true threat’ was an essential element that had to be pled in the information.

Where a criminal statute implicates speech, the State’s burden includes proving beyond a reasonable doubt that the speech was unprotected by the First Amendment. *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004); *see* U.S. Const. amend. I. A threat is unprotected only if it constitutes 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 individual].” *State v. Knowles*, 91 Wn. App. 367, 373, 957 P.2d 797 (1998) (alteration in original) (quoting *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990)). The communication must be “a serious threat, not one said in jest, idle talk, or political argument.” *Kilburn*, 151 Wn.2d at 43. Whether a true threat occurs “is determined under an objective standard that focuses on the speaker.” *Id.* at 44.

The Washington Supreme Court recently reiterated that “true threat” is an element of felony harassment. In *State v. Schaler*, the Court reversed the defendant’s felony harassment 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, 292-93, 236 P.3d 858 (2010).³ The full definition of true threat was neither in the to-convict instruction nor in a standalone instruction. *Id.* at 284-86. The Court noted that while the jury was instructed on the necessary mens rea as to the speaker’s conduct, it was

³ Though the Court in *Schaler* discussed the “true threat” requirement generally, the issue for that case was limited to whether the element must be included in the jury instructions. Whether the element must also be included in the information is before the Supreme Court in *State v. Allen*, *see infra*.

not instructed on the necessary mens rea as to the result. *Id.* at 285-86. 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.* at 286-87.

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.” *Schaler*, 169 Wn.2d at 288. “It suffices to say that, 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 Washington Supreme Court has taken up the issue left open in *Schaler* by accepting review in *State v. Allen*, 161 Wn. App. 727, 255 P.3d 784 (2011); Supreme Court No. 86119-6 (oral argument held Mar. 1, 2012). In *Allen*, this Court adhered to its own precedent in the face of *Schaler*, 161 Wn. App. at 753-56, holding the lack of “true threat” element in the information was not erroneous. 161 Wn. App. at 756.

- c. Reversal is required because the essential true threat element was not pled in the information.

Where the information lacks any reference to an element, prejudice is presumed and “reviewing courts reverse without reaching the issue of prejudice.” *Courneya*, 132 Wn. App. at 351; *Vangerpen*, 125 Wn.2d at 791-93 (remedy for insufficient information is reversal and dismissal of charge without prejudice); *State v. Cochrane*, 160 Wn. App. 18, 25-26, 253 P.3d 95 (2011) (following *Vangerpen* and reversing conviction where information omitted essential element).

Here the information bore no language about a true threat. *See* CP 31-32. The information charged merely:

That . . . ERIC S. FREEMAN . . . knowingly and without lawful authority, did threaten to kill another immediately or in the future, and by words or conduct place the person threatened, to wit [Gary Dolin, Francisco Javier-Flores, and Sarah Emerson, respectively for each count], in reasonable fear that the threat would be carried out; in violation of RCW 9A.46.020(1)(a)(i)[,](2)(b).

CP 31. Because the necessary true threat element is “neither found nor fairly implied in the charging document, prejudice is presumed”; this Court should “reverse without reaching the question of prejudice.” *Courneya*, 132 Wn. App. at 351. Consequently, Mr. Freeman’s conviction should be reversed and the charges dismissed.

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

The State prosecuted Mr. Freeman for felony harassment based on a threat to kill. CP 31-32; 9/21/11RP 115-16. Thus, as discussed below, the State was required to prove Mr. Freeman uttered a true threat to kill and the persons threatened were placed in reasonable fear that Mr. Freeman would kill them. The State failed to prove Mr. Freeman uttered a true threat to kill.

Moreover, at trial, two of the witnesses (Mr. Dolin and Ms. Emerson) testified the threat they heard was Mr. Freeman would come back with a gun and shoot them. Neither testified that Mr. Freeman threatened to kill them. And though both witnesses testified they took Mr. Freeman seriously and were concerned they were in danger, neither testified they were placed in reasonable fear Mr. Freeman would kill them. Because the State failed to satisfy its burden on every element, Mr. Freeman's convictions should be reversed and the charges dismissed.

- a. Due process requires the State prove each element of the crime beyond a reasonable doubt.

A criminal defendant may only be convicted if the State proves every element of the crime beyond a reasonable doubt. U.S. Const.

amend. XIV; Const. art. I, § 3; *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi*, 530 U.S. at 490; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

Mr. Freeman was charged with and convicted of three counts of felony harassment based on a threat to kill heard by three individuals, RCW 9A.46.020(1)(a)(i), (2)(b)(ii). CP 31-32; 9/21/11RP 116-17. Under RCW 9A.46.020, a person is guilty of felony harassment if “[w]ithout lawful authority, the person knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person,” and “[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1). To “threaten” is defined as “to communicate, directly or indirectly the intent . . . [t]o cause bodily

injury in the future to the person threatened or to any other person.”

RCW 9A.04.110(28)(a). As charged here, the crime may be elevated to a felony only if the threat to cause bodily injury is a threat “to kill the person threatened or any other person.” RCW 9A.46.020(2)(b).

The “threat to kill” component is essential to the crime of felony harassment. First, to satisfy the true threat element the State must show beyond a reasonable doubt that a reasonable speaker in Mr. Freeman’s position would expect his statement to be taken as a serious expression of a threat to kill, and not just to inflict bodily injury. *See Kilburn*, 151 Wn.2d at 43 (discussing true threat requirement). Second, the State must also show Mr. Dolin and Ms. Emerson were placed in reasonable fear that Mr. Freeman would, beyond merely inflicting bodily injury, kill him or her. *State v. Mills*, 154 Wn.2d 1, 9-10, 109 P.3d 415 (2005) (State must prove victim was placed in reasonable fear that the threat to kill, the one made, is the one that will be carried out); *State v. C.G.*, 150 Wn.2d 604, 609-10, 612, 80 P.3d 594 (2003); *State v. J.M.*, 144 Wn.2d 472, 482, 28 P.3d 720 (2001).

In *C.G.*, our Supreme Court explained that the State’s heightened burden in proving felony harassment directly correlates to the Legislature’s primary goal in criminalizing threats—to address the

harm caused to the victim. *C.G.*, 150 Wn.2d at 610. A person placed in fear of being killed is harmed more than a person threatened with bodily injury. *Id.* This greater harm accords with the Legislature's elevation of a threat to kill to a felony. *Id.* Thus, in order to prove the felony, the State must show the threat actually caused the victim to fear being killed. *Id.*

b. The State failed to prove a threat to kill beyond a reasonable doubt.

As set forth above, to prove the crime of felony harassment, the State was required to prove (1) a reasonable speaker would expect his communication to be interpreted as a serious expression of the intent to kill and (2) the threatened persons were placed in reasonable fear that Mr. Freeman would kill them. Even when viewed in the light most favorable to the State, the evidence is insufficient to prove felony harassment in this case.

First, the State did not prove that a reasonable speaker would expect his statement that he would get a gun and shoot everyone would be interpreted as a serious expression of intent to kill. Beyond the threat to impose bodily injury, a threat to kill must include the actual threat to take a life. *Mills*, 154 Wn.2d at 9. One can be shot and not be killed. 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 (Freeman was hostile but not physically violent); 9/21/11RP 39-40, 49 (Freeman used big gestures and was angry but no weapon apparent and did not become physically aggressive); 9/21/11RP 56, 66 (Freeman's demeanor was agitated and frustrated but did not make fist or brandish weapon). Mr. Freeman has no history of violence—at the Opportunity Council where the statement was uttered or otherwise. 9/21/11RP 44, 87, 96-97. Moreover, as discussed below, two of the witnesses did not interpret the statement as a serious intent to kill. In light of the circumstances and the words uttered, the State did not prove beyond a reasonable doubt that Mr. Freeman communicated a true threat to kill.

Second, the State did not prove that two of the victims—Mr. Dolin and Ms. Emerson—were placed in reasonable fear that Mr. Freeman would kill them. The third threatened person, Mr. Flores, overheard Mr. Freeman utter the statement to Mr. Dolin and testified he thought Mr. Freeman “was going to come back with a gun and take care of us.” 9/21/11RP 17. Mr. Flores further clarified he was scared because Mr. Freeman threatened to kill him and he took the threat seriously. 9/21/11RP 18. Conversely, Ms. Emerson did not hear Mr.

Freeman utter the threat. Instead, Mr. Dolin told her Mr. Freeman threatened to come back with a gun and shoot them. 9/21/11RP 39. With regard to her fear, Ms. Emerson testified only that she thought Mr. Freeman was going to act on this threat. 9/21/11RP 42-43. She did not testify, and the State did not otherwise prove that Ms. Emerson feared Mr. Freeman was not simply going to inflict bodily harm but would actually kill her.

The testimony from Mr. Dolin was similarly deficient. Mr. Dolin testified Mr. Freeman said he would “come back with a gun and shoot everyone.” 9/21/11RP 57. Further, Mr. Dolin testified he took Mr. Freeman seriously and believed he and his co-workers were in danger. 9/21/11RP 57-58. But Mr. Dolin did not specify whether he felt in danger of bodily injury or being killed.

Thus, Mr. Freeman’s convictions must bear the same fate as the juvenile adjudication in *C.G.* In *C.G.*, while being disciplined at school, C.G. told the vice-principal “I’ll kill you Mr. Haney, I’ll kill you.” *C.G.*, 150 Wn.2d at 606-07. Mr. Haney testified C.G.’s threat caused him “concern” and made him fear C.G. might try to harm him or someone else in the future. *Id.* at 608. Like Ms. Emerson and Mr. Dolin, Mr. Haney did not testify the threat caused him specifically to

fear for his life. Our Supreme Court reversed C.G.'s adjudication, finding the State had not proved all the elements of the crime. The Court explained the statute requires proof of reasonable fear that the threat to kill would be carried out as an element of the offense. *Id.* at 612. Because the victim did not testify the threat caused him to fear for his life, the adjudication for felony harassment could not be sustained. *Id.*

Consequently, the State failed to sustain its burden because the evidence was insufficient Mr. Freeman uttered a true threat to kill as well as that either Ms. Emerson or Mr. Dolin feared that a threat to kill would be carried out.

c. The convictions should be reversed.

Because the evidence was insufficient to prove each element beyond a reasonable doubt, Mr. Freeman's convictions should be reversed and the charges dismissed with prejudice. *See, e.g., Jackson*, 443 U.S. at 319; *Kilburn*, 151 Wn.2d at 54 (reversing conviction for felony harassment in absence of evidence defendant's statement was a true threat); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

When this Court dismisses a conviction based upon the lack of evidence of an element of the crime, it may remand for the entry of a

judgment for a lesser-included offense. *State v. Hutchins*, 73 Wn. App. 211, 218, 868 P.2d 196 (1994). Thus, this Court may remand for reversal and entry of a judgment of guilty for misdemeanor harassment, which only requires a threat of bodily injury. *See* RCW 9A.46.020(1)(a)(i).

3. The sentencing court erred in finding Mr. Freeman had the present or future ability to pay and in imposing discretionary fees and costs.

Alternatively, if the conviction is affirmed, this Court should strike the erroneous imposition of discretionary fees. The sentencing court imposed the following discretionary fees: \$200 for a “criminal filing fee”; \$900 for court-appointed attorney recoupment (RCW 9.94A.760); and a \$500 fine pursuant to RCW 9A.20.021. CP 17; RCW 9.94A.760.⁴

The State presented no evidence at sentencing that Mr. Freeman had the present or likely future ability to pay these discretionary financial obligations. In fact the evidence demonstrated he did not: Mr. Freeman was represented by court-appointed counsel, as he is on appeal. Also, Mr. Freeman was homeless. 9/21/11RP 87.

⁴ The remaining fees were mandatory and are not disputed here. CP 17 (listing fees and costs imposed); *see, e.g., State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (victim assessment mandatory); *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory).

The court did not make an oral finding that Mr. Freeman had the ability to pay these costs. The judgment and sentence contains only boilerplate language stating:

The Court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 15. These finding are reviewed under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011); *State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116 (1991).

Though mandatory fees were properly imposed, it was improper for the court to impose an additional \$1,600 in costs and fees because Mr. Freeman lacks the present and future ability to pay. Courts may not require a defendant to reimburse the state for costs unless the defendant has or will have the means to do so. *Curry*, 118 Wn.2d at 915-16; RCW 10.01.160(3). The court must consider the financial resources of the defendant before imposing discretionary costs. *Id.* This requirement is both constitutional and statutory. *Id.* Additionally, a trial court's findings of fact must be supported by substantial evidence. *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)).

The sentencing court erred in imposing discretionary costs and fees upon Mr. Freeman without specifically finding he had the ability to pay. Substantial evidence did not support the court's boilerplate finding. Contemporaneous to the imposition of these costs, Mr. Freeman was represented by court-appointed counsel and was found indigent for purposes of appeal. The court did not take Mr. Freeman's financial status into account; instead, the court imposed the costs and fees, without any specific findings that Mr. Freeman had the present or future ability to pay.

In cases where the imposition of discretionary costs has been affirmed, the record contained specific evidence of the defendant's ability to pay. For example, in *Richardson*, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. *State v. Richardson*, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). In *Baldwin*, this Court affirmed the imposition of costs because a presentence report "establishe[d] a factual basis for the defendant's future ability to pay." *Baldwin*, 63 Wn. App. at 311.

But unlike the defendant in *Richardson*, the record does not indicate Mr. Freeman is employed. Further, unlike in *Baldwin*, the State did not submit evidence establishing a factual basis for Mr. Freeman's future ability to pay. To the contrary, the totality of the evidence showed Mr. Freeman was indigent and homeless at the time of sentencing and likely to remain so. Thus, the court's finding that Mr. Freeman had the ability to pay was clearly erroneous and this Court should strike the discretionary costs imposed.

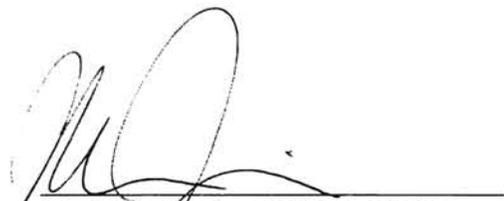
F. CONCLUSION

Mr. Freeman's convictions should be reversed because the State violated his due process rights by failing to include all elements of the crime in the charging document, failed to present sufficient evidence Mr. Freeman uttered a true threat to kill, and presented insufficient evidence of reasonable fear of a threat to kill.

If any of the convictions are upheld, 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 9th day of April, 2012.

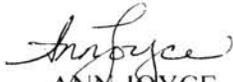
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MLZ', is written over a horizontal line.

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

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. 67829-9** to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for respondent **DONA BRACKE, WHATCOM PROSECUTING ATTORNEY'S OFFICE 311 GRAND AVE BELLINGHAM WA 98225-4048**, appellant **NO KNOWN ADDRESS** and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.



ANN JOYCE

Washington Appellate Project

Date: April 9, 2012

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