

68338-1

68338-1

COA NO. 68338-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

AARON DODGE,

Appellant.

REC'D

AUG 31 2012

King County Prosecutor
Appellate Unit

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KING COUNTY
APPELLATE UNIT

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

The Honorable Kimberley Prochnau, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information failed to notify appellant of every essential element of the crime of felony harassment under counts I and II.
2. The information failed to notify appellant of every essential element of the crime of witness intimidation under count III.
3. The court erred in calculating the offender score.

Issues Pertaining to Assignments of Error

1. Is reversal of the harassment and witness intimidation convictions required where the State failed to allege the "true threat" element of those crimes in the information?
2. Appellant committed the offenses while in jail. As a matter of law, did the court err in adding one point to the offender score for each count on the basis that appellant was under community custody at the time of the offenses?

B. STATEMENT OF THE CASE

The State charged Aaron Dodge with felony harassment against Suzanne Dodge (count I), felony harassment against Sarah Dodge (count II), and intimidating a witness by directing a threat to Sarah Dodge (count III). CP 98-100. A jury found Dodge guilty on all counts and found an aggravator for count I that there was evidence of an ongoing pattern of psychological or physical abuse of Suzanne Dodge. CP 102-05. The

court imposed a standard range sentence consisting of 60 months confinement for counts I and II and 90 months confinement for count III, to run concurrently. CP 152. Dodge appeals. CP 157.

C. ARGUMENT

1. THE INFORMATION IS DEFECTIVE BECAUSE IT LACKS AN ESSENTIAL ELEMENT OF THE CRIMES OF FELONY HARASSMENT AND WITNESS INTIMIDATION.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). Dodge's convictions must be reversed because the charging document does not set forth the "true threat" element of the crimes.

Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(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?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly

implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

a. The Information Fails To Include The True Threat Element Of Felony Harassment.

"While laws may proscribe 'all sorts of conduct' the same is not true of speech." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004). Speech protected by the First Amendment may not be criminalized. Kilburn, 151 Wn.2d at 42. RCW 9A.46.020, the statute defining the crime of harassment, criminalizes pure speech if read literally. Id. at 41. To avoid unconstitutional infringement on protected speech, the harassment statute and the threat-to-kill provision of RCW 9A.46.020 must be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

"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." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have

some mens rea as to the result of the hearer's fear: simple negligence."

Schaler, 169 Wn.2d at 287.

The information accused Dodge of committing the crime of felony harassment in count I as follows:

That the defendant Aaron Alfred Dodge in King County, Washington, on or about April 21, 2010, having been previously convicted on August 1, 2005, of the crime of Indecent Liberties against Sarah Dodge, a member of this victim's family or household, without lawful authority, knowingly did threaten to cause bodily injury immediately or in the future to Suzanne Dodge; and the words or conduct did place her in reasonable fear that the threat would be carried out; and, in the alternative,

That the defendant Aaron Alfred Dodge in King county, Washington, on or about April 21, 2010, without lawful authority, knowingly did threaten to cause bodily injury immediately or in the future to Suzanne Dodge, by threatening to kill her, and the words or conduct did place her in reasonable fear that the threat would be carried out.

Contrary to RCW 9A.46.020(1), (2), and against the peace and dignity of the State of Washington.

CP 98.

The charging language is substantially the same in count II, except that Sarah Dodge is the named victim. CP 99.

The information fails to allege Dodge made a "true threat." It is silent as to the required mens rea that Dodge be negligent as to the result of the hearer's fear.

This Court has held the "true threat" allegation need not be included in the charging document because it is merely definitional rather

than an essential element. State v. Allen, 161 Wn. App. 727, 753-56 255 P.3d 784 (felony harassment under RCW 9A.46.020), review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011)¹; State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010) (same); State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (telephone harassment under RCW 9.61.230 (2)(b)).

Those decisions cannot be reconciled with the Supreme Court's decision in Schaler and established precedent. The Supreme Court in Schaler pointedly declined to determine whether Tellez was correctly decided because the issue of whether a true threat was an element of harassment was not before it. Schaler, 169 Wn.2d at 289 n.6. The Court, however, stated, "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. That statement accords with Kilburn, where the Court held a harassment conviction must be reversed if the State fails to prove a "true threat." Kilburn, 151 Wn.2d at 54.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a

¹ The Supreme Court granted review of this issue in Allen. Oral argument took place on March 1, 2012.

conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

As Schaler and Kilburn make clear, the State cannot convict someone of harassment unless it proves the existence of a true threat. Schaler, 169 Wn.2d at 286-87, 289 n.6; Kilburn, 151 Wn.2d at 54. Schaler establishes a "true threat" is necessary to prove the mens rea of the crime of felony harassment, which consists of negligence as to the result of the hearer's fear. Schaler, 169 Wn.2d at 286-87, 289 n.6.

Following Schaler and Kilburn, a "true threat" must be deemed an essential element of felony harassment. The State's information is deficient because it omits the "true threat" requirement.

b. The Information Fails To Include The True Threat Element Of Witness Intimidation.

The same analysis applies to the crime of witness intimidation. The information accused Dodge of committing this crime as follows: "That the defendant Aaron Alfred Dodge in King County, Washington, on or about April 21, 2010, did knowingly direct a threat to Sarah Dodge, a

former witness because of the witness' role in an official proceeding; Contrary to RCW 9A.72.110(2), (3), (4), and against the peace and dignity of the State of Washington." CP 100.

The "true threat" requirement is missing from the information on the witness intimidation charge. As argued above, the existence of a "true threat" is an essential element of threat crimes involving speech. Harassment is an example of one such offense. Schaler, 169 Wn.2d at 284. Other statutory offenses are likewise limited to "true threats." See State v. Johnston, 156 Wn.2d 355, 357, 363-64, 127 P.3d 707 (2006) (threats to bomb or injure property); State v. Brown, 137 Wn. App. 587, 591, 154 P.3d 302 (2007) (threats involving intimidating a judge); State v. Smith, 93 Wn. App. 45, 49 n.3, 966 P.2d 411 (1998) (threats to bomb a government building); State v. Stephenson, 89 Wn. App. 794, 800-01, 966 P.2d 411 (1997) (threats involving intimidating a public servant).

The true threat requirement is imposed so that criminal statutes prohibiting threats do not encompass constitutionally protected speech. State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001). The witness intimidation statute, which likewise criminalizes speech, must therefore be construed to prohibit only true threats. State v. King, 135 Wn. App. 662, 666, 145 P.3d 1224 (2006), review denied, 161 Wn.2d 1017, 171 P.3d 1056 (2007). "Intimidation in the constitutionally prescribable sense of

the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Virginia v. Black, 538 U.S. 343, 360, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

Division Three in King held an instruction defining "true threat" is not needed for the crime of intimidating a former witness because the witness intimidation statute by its very language encompasses "true threats." King, 135 Wn. App. at 671-72. It reasoned "[t]he statute prohibiting harassment covers a virtually limitless range of utterances and contexts, any of which might be protected. Both the speech and context of witness intimidation, by contrast, are limited by the language of the statute. The statute requires the State to prove that the defendant communicated an intent to harm a person who has appeared, presumably against him, in a legal proceeding." Id. at 669-70. That reasoning implies the language of the witness intimidation statute itself is sufficient to convey the true threat requirement.

But that reasoning is infirm. A person can utter a threat against a former witness that rises no further than the level of jest, idle talk, or hyperbole. See Kilburn, 151 Wn.2d at 43 ("A true threat is a serious threat, not one said in jest, idle talk, or political argument."); Schaler, 169 Wn.2d at 283 ("The First Amendment prohibits the State from criminalizing

communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole."). Common sense tells us that a person may jokingly direct a threat to a former witness or use hyperbole in so doing. In fact, the trial court here instructed the jury on the definition of a true threat in relation to all the charges, including the witness intimidation charge. CP 136 (Instruction 14). In successfully arguing for the admission of ER 404(b) evidence, the State maintained such evidence was relevant to show the existence of a true threat for purposes of the witness intimidation charge. 5RP² 88, 92. The trial court admitted the evidence for that purpose. 6RP 34.

This Court should reject King's ill-reasoned premise that the language of the witness intimidation statute necessarily conveys the true threat requirement. The information charging Dodge with witness intimidation is defective in failing to include the "true threat" element of the crime. U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; Hamling, 418 U.S. at 117; Vangerpen, 125 Wn.2d at 787.

c. The Remedy Is Reversal Of The Convictions.

Courts presume prejudice and reverse conviction where a necessary element is neither found nor fairly implied from the charging

² The verbatim report of proceedings is referenced as follows: 1RP – 11/21/11; 2RP – 12/22/11; 3RP – 12/28/11; 4RP – 1/3/12; 5RP – 1/4/12; 6RP – 1/5/12; 7RP – 7/11/12; 8RP – 1/12/12; 9RP – 2/10/12.

document. McCarty, 140 Wn.2d at 425; State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010). This Court must therefore presume prejudice and reverse the convictions because the necessary "true threat" element is neither found nor fairly implied in the information for all three counts.

2. THE COURT MISCALCULATED THE OFFENDER SCORE IN WRONGLY ADDING ONE POINT FOR COMMITTING THE CURRENT OFFENSES WHILE UNDER COMMUNITY CUSTODY.

Community custody is that portion of an offender's sentence served in the community. An offender is not under community custody while in jail. Because Dodge was not under community custody when he committed the crime, it was legal error to add an extra point to his offender score. State v. Crawford, 164 Wn. App. 617, 619, 267 P.3d 365 (2011).

Under the Sentencing Reform Act, the sentencing grid defines the standard sentence range based on two critical pieces of information: the offender score and the seriousness level of the offense. State v. Thomas, 150 Wn.2d 666, 670-71, 80 P.3d 168 (2003); RCW 9.94A.510 (1). "The sentencing judge must calculate, in a mathematical fashion, an offender score for each offense. This score determines the sentencing range applicable to the offender." In re Pers. Restraint of LaChapelle, 153 Wn.2d 1, 6, 14, 100 P.3d 805 (2004). The court has the responsibility of

accurately calculating the standard range. State v. Haddock, 141 Wn.2d 103, 108, 3 P.3d 733 (2000).

Former RCW 9.94A.525(19)³ states "If the present conviction is for an offense committed while the offender was under community custody, add one point." Relying on this provision, the court added one point to Dodge's offender score for each of the three offenses. CP 150.

"Community custody" means "that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department." Former RCW 9.94A.030(5).⁴ "Any period of community custody shall be tolled during any period of time the offender is in confinement for any reason." Former RCW 9.94A.625(3).⁵

³ Laws of 2008, ch. 231 § 3 (eff. June 12, 2008). This was the version in effect at the time of offense. Any sentence imposed under the authority of the Sentencing Reform Act must be in accordance with the law in effect at the time the offense was committed. RCW 9.94A.345.

⁴ Laws of 2009, ch. 28 § 4 (eff. Aug. 1, 2009). This was the version in effect at the time of offense.

⁵ Laws of 2008, ch. 231 § 28 (eff. Aug. 1, 2009). This was the version in effect at the time of offense.

Dodge was confined in jail when he committed the offenses of felony harassment and witness intimidation. 7RP 40. What he said to a jail psychiatrist formed the basis for the charges. 7RP 40-42, 45.

"[T]ime spent incarcerated does not meet the definition of 'community custody.'" Crawford, 164 Wn. App. at 623 (citing State v. Jones, 172 Wn.2d 236, 243-45, 257 P.3d 616 (2011)). Dodge's confinement in jail tolled his term of community custody. As explained in Crawford, "[a] term of community custody is tolled when an offender is in confinement because the offender is not then serving a portion of his sentence 'in the community.'" Crawford, 164 Wn. App. at 623. "The nature of community custody is such that an offender cannot be simultaneously incarcerated and 'under community custody.'" Id.

This Court in Crawford therefore held it was error to add a point to the offender score on the premise that the offender committed the offense while under community custody where the offender was in jail at the time of the offense. Id. at 619, 623. Crawford is directly on point. Because Dodge was not serving time in the community when he committed the crimes of felony harassment and witness intimidation, the point added to his offender score for committing those crimes under community custody was unauthorized.

Although defense counsel did not object to the offender score, an illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). This error is not waived. "Waiver does not apply where the alleged sentencing error is a legal error." Crawford, 164 Wn. App. at 624 (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)); see also State v. Wilson, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010) (for sentencing purposes, a defendant may waive factual errors but cannot waive legal errors).

The addition of a point to Dodge's offender score based on misinterpretation of the Sentencing Reform Act is a legal error that cannot be waived. Crawford, 164 Wn. App. at 624. The case must be remanded for resentencing based on a correct offender score. Id.

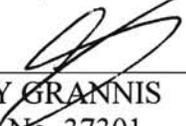
D. CONCLUSION

For the reasons stated, Dodge requests reversal of the convictions. In the event this Court declines to do so, remand for resentencing based on a correct offender score is required.

DATED this 21st day of August 2012

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 68338-1-I
)	
AARON DODGE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF AUGUST, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AARON DODGE
DOC NO. 885384
MONROE CORRECTIONS CENTER
P.O. 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST, 2012.

x *Patrick Mayovsky*