

70602-1

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COA NO. 70602-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID JOHNSON,

Appellant.

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

The Honorable Eric Z. Lucas, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The information omits an essential element of the crime of harassment against a criminal justice participant, in violation of the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution.

Issue Pertaining to Assignment of Error

As a matter of constitutional mandate, a charging document must properly notify the accused of the charge by including all essential elements of the crime. Is reversal of the harassment convictions required because the information fails to allege it was not apparent to the criminal justice participant that the person lacked the present or future ability to carry out the threat?

B. STATEMENT OF THE CASE

The State charged David Johnson with two counts of harassment. CP 205. For count I, the State alleged "That the defendant, on or about the 11th day of August, 2011, without lawful authority, knowingly threatened to cause bodily injury to another and maliciously to do any other act which was intended to substantially harm another with respect to his or her physical health and safety and the person threatened was a criminal justice participant, to-wit: Marysville Officer Bartl, or Officer Paxton, or Officer Shove, who were performing their official duties at the time the threat was

made, and the defendant's words or conduct did place such criminal justice participants in fear that the threat would be carried out, and a reasonable criminal justice participant would have been in fear under all the circumstances that the threat would be carried out; proscribed by RCW 9A.46.020(1) and (2)(b), a felony." CP 205.

The State's allegation for count II used the same charging language, except that "Marysville Custodial Officer Madan or Officer Burtis" were the identified victims. CP 205.

At trial, the jury heard evidence that Johnson, while intoxicated, communicated various threats to officers while restrained during a roadside encounter and during the subsequent booking process. 3RP¹ 10-11, 14, 17-19, 51, 53, 55, 83, 96; 4RP 15, 18-19, 20-23, 33-34, 43-45, 51, 53, 57, 68, 89, 94-95, 98-99, 111-12, 117-18, 127.

For count I, the trial court gave the following "to convict" instruction to the jury:

To convict the defendant of the crime of felony harassment in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 11th day of August, 2011, the defendant knowingly threatened to cause bodily injury immediately or in the future to Officer Bartl OR Officer Paxton OR Officer Shove

¹ The verbatim report of proceedings is referenced as follows: 1RP - 5/3/13; 2RP - 5/13/13; 3RP - 5/14/13; 4RP - 5/15/13; 5RP - 5/16/13; 6RP - 6/6/13; 7RP - 6/27/13.

(2) That the person threatened was a criminal justice participant who was performing his or her official duties at the time the threat was made;

(3) That the words or conduct of the defendant placed the person threatened in fear that the threat would be carried out;

(4) That a reasonable criminal justice participant would have been in fear, under all the circumstances, that the threat would be carried out;

(5) *That it was not apparent to the person threatened that the defendant lacked the present or future ability to carry out the threat.*

(6) That the defendant acted without lawful authority; and

(7) That the threat was made or received in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 159 (Instruction 6) (emphasis added).

The "to convict" instruction for count II was identical, except that the named victims were "Custodial Officer Madan or Officer Burtis." CP 161 (Instruction 8).²

The jury found Johnson guilty on both counts. CP 149-50. The court imposed 60 months confinement. CP 25. Johnson also pled guilty

² The State ultimately elected not to pursue the "maliciously to do any other act which was intended to substantially harm another with respect to his or her physical health and safety" means of committing the crime that had been alleged in the amended information. 4RP 155-57, 163-65.

to one count of driving while under the influence, a gross misdemeanor, for which he was sentenced to 364 days with 363 days suspended. CP 16, 132-45. This appeal follows. CP 1-15.

C. ARGUMENT

THE CONVICTIONS MUST BE REVERSED BECAUSE THE INFORMATION CHARGING HARASSMENT OMITTS THE ELEMENT REGARDING APPARENT ABILITY TO CARRY OUT THE THREAT.

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); U.S. Const. Amend. VI; Wash. Const. Art. I, § 22. Johnson's convictions for harassment must be reversed because the charging document fails to set forth the essential element that it was not apparent to the criminal justice participant that the person lacked the present and future ability to carry out the threat.

RCW 9A.46.020(1)(a)(i) provides a person is guilty of harassment if, without 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." Under this provision, harassment is a gross misdemeanor. RCW 9A.46.020(2)(a).

Harassment is elevated to a felony under RCW 9A.46.020(1)(b) if any of the following apply:

(i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person; *(iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made;* or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. *For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.* (emphasis added).

The State charged and sought to convict Johnson under subsection (iii) of RCW 9A.46.020(1)(b) — threat against a criminal justice participant performing his or her official duties. CP 159, 161, 205.³

Where, as here, the adequacy of an information is challenged for the first time on appeal, the appellate 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)

³ The legislature amended the harassment statute to include this provision in 2011. Laws of 2011, ch. 64 § 1.

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).

"An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (quoting State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). Stated another way, essential elements are those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime. Zillyette, 178 Wn.2d at 158. The rationale behind the requirement that all "essential elements" be included in the information is to give proper notice of the nature of the crime so that the accused can prepare an adequate defense. Kjorsvik, 117 Wn.2d at 101; State v. Leach, 113 Wn.2d 679, 695, 782 P.2d 552 (1989).

Since the legislature defines crimes, courts look to the relevant statute to determine the elements of a crime. State v. Gonzalez-Lopez, 132 Wn. App. 622, 626, 132 P.3d 1128 (2006). The purpose of looking to the statute is to determine the legislature's intent in defining the elements of a crime. Gonzalez-Lopez, 132 Wn. App. at 626. "In determining the

elements of a statutorily defined crime, principles of statutory construction require us to give effect to all statutory language if possible." State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Meaning must be given to every portion of a statute, so that no provision is rendered meaningless or superfluous. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005)

RCW 9A.46.020(1)(b) specifies, with reference to subsection (iii), that "Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat."

In keeping with the above principles of statutory construction, the "to convict" instructions incorporate the statutory requirement that it not be apparent to the criminal justice participant that the person lacked the present and future ability to carry out the threat.⁴ CP 159, 161; see State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (the "to convict" instruction "must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence.").

⁴ The State proposed "to convict" instructions that included the element "that it was not apparent to the person threatened that the defendant did not have the present or future ability to carry out the threat." CP 212, 222, 224. The court modified this language to remove the double negative in the "to convict" instructions given to the jury. SRP 4-5.

The plain language of the statute shows the legislature chose to define the crime of felony harassment under RCW 9A.46.020(1)(b)(iii) to include this requirement. The problem is that the information does not notify the accused that, in order to convict, it must not be apparent to the criminal justice participant that the person lacked the present and future ability to carry out the threat.

Proper jury instructions cannot cure a defective charging document. Vangerpen, 125 Wn.2d at 788. "An information omitting essential elements charges no crime at all." State v. Sutherland, 104 Wn. App. 122, 130, 15 P.3d 1051 (2001). Under the plain language of RCW 9A.46.020(1)(b), the crime of harassment has not been committed against a criminal justice participant if it was apparent that the person "does not have the present and future ability to carry out the threat." The information in Johnson's case fails to allege this element of the crime.

"If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because an element of felony harassment is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse the convictions. McCarty, 140 Wn.2d at 425; State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010).

D. CONCLUSION

For the reasons set forth, Johnson respectfully requests reversal of the convictions.

DATED this 11th day of February 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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DIVISION ONE

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v.)	COA NO. 70602-1-I
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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 11TH DAY OF FEBRUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] DAVID JOHNSON
DOC NO. 738762
STAFFORD CREEEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

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SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF FEBRUARY, 2014.

X *Patrick Mayovsky*