

NO. 43878-0-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

FRED HENRY CARPENTER IV,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Thomas McPhee, Judge
Cause No. 12-1-00773-3

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 626-0148

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	1
D. ARGUMENT	5
01. CARPENTER’S TWO CONVICTIONS FOR FELONY HARASSMENT, COUNTS III AND IV, MUST BE REVERSED WHERE THE INFORMATION FAILED TO ALLEGE THE ESSENTIAL ELEMENT OF “TRUE THREAT.”.....	5
02. A CONVICTION FOR OBSTRUCTING A LAW ENFORCEMENT OFFICER PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE THE ESSENTIAL ELEMENT THAT THE DEFENDANT KNEW THAT THE LAW ENFORCEMENT OFFICER WAS DISCHARGING OFFICIAL DUTIES MUST BE REVERSED.....	9
E. CONCLUSION	10

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>State of Washington</u>	
<u>Auburn v. Brooke</u> , 119 Wn.2d 623, 836 P.2d 212 (1992).....	6
<u>State v. Allen</u> , 161 Wn. App. 727, 225 P.3d 784 (2011), <u>review granted</u> , 172 Wn.2d 1014, 262 P.3d 63 (2011).....	8
<u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992).....	5
<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1215 (2004)	6, 7, 8
<u>State v. Kitchen</u> , 61 Wn. App. 911, 812 P.2d 888 (1991)	8
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	5, 6, 8, 9
<u>State v. Knowles</u> , 91 Wn. App. 367, 957 P.2d 797 (1998).....	7
<u>State v. Leach</u> , 113 Wn.2d 679, 782 P.2d 552 (1989).....	6
<u>State v. Royse</u> , 66 Wn.2d 552, 403 P.2d 838 (1965).....	6
<u>State v. Schaler</u> , 169 Wn.2d 274, 284, 236 P.3d 858 (2010).....	6, 7, 8
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995)	9
<u>State v. Williams</u> , 144 Wn.2d 197, 226 P.3d 890 (2001).....	7
 <u>Federal Cases</u>	
<u>Lassiter v. City of Bremerton</u> , 556 F.3d 1049 (9 th Cir. 2009)	9
<u>United States v. Khorrami</u> , 895 F.2d 1186, (7 th Cir. 1990)	7
 //	
 //	

Constitutional Provisions

U.S. Const. amend. 6 5
Const. art. 1, § 22 5

Statutes

RCW 9.94A.535 2
RCW 9A.36.021 2
RCW 9A.36.041 2
RCW 9A.46.020 2, 6
RCW 10.99.020 2

Rules

WPIC 120.02 9

Other

2 C. Torcia, Wharton on Criminal Procedure (13th ed. 1990) 5

A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count III, felony harassment, from the jury for lack of sufficiency of the information.
02. The trial court erred in not taking count IV, felony harassment, from the jury for lack of sufficiency of the information.
03. The trial court erred in not taking count VI, obstructing a law enforcement officer, from the jury for lack of sufficiency of the information.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the information charging counts III and IV is defective in failing to allege the essential element of “true threat” for the crime of felony harassment?
[Assignments of Error Nos. 1 and 2].
02. Whether the information charging count VI is defective in failing to allege the essential element that Carpenter knew that the law enforcement officer was discharging official duties at the time of the crime of obstructing a law enforcement officer?
[Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Fred H. Carpenter IV (Carpenter) was charged by first amended information filed in Thurston County Superior Court on August 21, 2012, with two counts of assault in the second degree while in

the presence of a child (domestic violence), counts I-II, two counts of felony harassment while in the presence of a child (domestic violence), counts III-IV, assault in the fourth degree (domestic violence), count V, and obstructing a law enforcement officer, count VI, contrary to RCWs 9A.36.021(1)(g), 9.94A.535(3)(h)(ii), 10.99.020, 9A.46.020(2)(b)(ii), 9A.36.041 and 9A.76.020. [CP 19-20].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 8]. Trial to a jury commenced on August 20, the Honorable Thomas McPhee presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 283-84].¹

Carpenter was found guilty as charged and given an exceptional sentence of 104 months based on the jury's findings that counts I-IV were aggravated domestic violence offenses, with the court finding that the set of convictions for counts I and II and the set of convictions for counts III and IV constituted the same criminal conduct. [CP 53, 55-57, 59-61, 63-65, 67-71, 90-100; RP 08/29/12 18-21]. Timely notice of this appeal followed. [CP 89].

//

//

¹ Unless otherwise indicated, all references to the Report of Proceedings are to the transcripts entitled Volumes I-III.

02. Substantive Facts

On June 9, 2012, Deputies Brooks and Hovda were dispatched to a reported domestic disturbance in progress at a home in Thurston County. [RP 190]. Carpenter was eventually taken into custody after running from the residence and being tased, struck with a baton and pepper sprayed for failing to comply with the arresting officers' multiple commands. [RP 192-93, 195, 199, 207-210, 263-67].

Amanda Sreap, who was in a relationship with Carpenter, and Kerrie Dolinski, Carpenter's ex-girlfriend and mother of his then 14-year-old son, F.H.C., were inside the double-wide mobile home when the police arrived. [RP 44, 116, 259]. Carpenter had strangled Sreap several times in addition to slapping and pushing her against the wall and floor during an earlier argument. [RP 51-54]. "She had a little redness on her neck." [RP 219]. Dolinski said "it was scary." [RP 52]. She could hear Sreap gasping for breath. [RP 55]. At one point, Carpenter grabbed Dolinski by the throat and threw her against the wall. [RP 56]. He later threatened both women, saying "I'm just gonna kill you both. I'm going to get a knife." [RP 54]. Dolinski feared for her life. [RP 55-56].

Sreap's testimony was sketchy: "I kind of remember a little bit of an argument. And the last thing I remember, I was in the hospital." [RP

120]. She did not recall making any prior statements to the police that Carpenter had strangled her or that he was trying to kill her, which was contradicted by Deputy Brooks, who testified without objection that Sreap had told him both of these things. [RP 121-25, 129-130, 234-35, 237, 242-43]. Sreap did remember saying she thought it was Carpenter's alcoholism that had started the argument and that he had called her a bitch. [RP 125]. She didn't "really remember" her treatment in the hospital. [RP 126].

F.H.C. witnessed Carpenter screaming at Sreap before hitting her in the face and throwing her across the room. [RP 140, 142, 148]. He also saw his dad "choking her." [RP 148]. "He was choking (Sreap) in her throat and just like on top of her, screaming at her." [RP 148]. This happened more than one time. [RP 149]. "At least five times." [RP 150]. F.H.C. was afraid that his mom or Sreap was going to get hurt. [RP 152-53]. He heard his dad tell Dolinski and Sreap "that he was going to get a knife and kill them." [RP 154]. F.H.C. called 911 to report the incident, the recording of which was played to the jury. [RP 154, 160, 175-183].

Carpenter rested without presenting evidence. [RP 274-75].

//

//

//

01. CARPENTER'S TWO CONVICTIONS FOR
FELONY HARASSMENT, COUNTS III
AND IV, MUST BE REVERSED
WHERE THE INFORMATION FAILED
TO ALLEGE THE ESSENTIAL ELEMENT
OF "TRUE THREAT."

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charged in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. art. 1, Section 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information "will be more liberally construed in favor of validity...." Kjorsvik, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

(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.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient “to use words conveying the same meaning and import as the statutory language.” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, “state the acts constituting the offense in ordinary and concise language...” State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). The question “is whether the words would reasonably appraise an accused of the elements of the crime charged.” Kjorsvik, 117 Wn.2d at 109.

The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

Given that speech protected by the First Amendment may not be criminalized, only “true threats” may be prohibited without unconstitutionally infringing on protected speech. State v. Kilburn, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004). In this context, RCW 9A.46.020, the harassment statute, must be interpreted to prohibit only “true threats.” State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

Recognizing this, our Supreme Court has defined “true threat” as “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. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (citing State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998) (quoting United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990)); State v. Kilburn, 151 Wn.2d at 54. “This standard requires the defendant to have some mens rea as to the result of the hearer’s fear; simple negligence.” State v. Schaler, 169 Wn.2d at 287.

The information for felony harassment in count III provided:

In that the defendant, FRED HENRY CARPENTER, IV, in the State of Washington, on or about June 9, 2012, without lawful authority, knowingly threatened to kill Amanda Kay Sreap, a family or household member, pursuant to RCW 10.99.020, and the defendant’s words or conduct placed Amanda Kay Sreap in reasonable fear that the threat would be carried out...²

[CP 20].

This information does not allege that Carpenter made a “true threat.” However, Division I of this court has recently held that a “true threat” allegation is definitional and need not be included in the

² The same language charged Carpenter with felony harassment against Dolinski in count IV. [CP 20].

information. State v. Allen, 161 Wn. App. 727, 755-56, 225 P.3d 784 (2011), review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011). This authority ignores that the Schaler court declined to resolve the issue of whether a “true threat” is an essential element of harassment because the issue was not before it. State v. Schaler, 169 Wn.2d at 289 n.6. Importantly, the court noted “(i)t 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. See State v. Kilburn, 151 Wn.2d at 54 (harassment conviction must be reversed if the State fails to prove a “true threat”).

In light of Schaler and Kilburn , the point remains this: A “true threat” is an essential element of felony harassment and must be alleged in the information, for a person cannot be convicted of felony harassment unless the State proves the existence of a true threat—Schaler 169 Wn.2d at 286-87, 289 n.6; Kilburn, 151 Wn.2d at 54—and a “true threat” is required to prove the mens rea of felony harassment. Schaler 169 Wn.2d at 286-87, 289 n.6. The information in this case did not allege this essential element.

The information is thus defective, and the conviction obtained on this charged must be reversed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). Carpenter need not show prejudice, since Kjorsvik calls

for a review of prejudice only if the “liberal interpretation” upholds the validity of the information, which cannot be done in this case. See Kjorsvik, 117 Wn.2d at 105-06.

02. A A CONVICTION FOR OBSTRUCTING A LAW ENFORCEMENT OFFICER PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE THE ESSENTIAL ELEMENT THAT THE DEFENDANT KNEW THAT THE LAW ENFORCEMENT OFFICER WAS DISCHARGING OFFICIAL DUTIES MUST BE REVERSED.³

To convict Carpenter of obstructing a law enforcement officer, the State was required to prove, in part, the essential element that he knew the law enforcement officer was discharging official duties at the time. See Lassiter v. City of Bremerton, 556 F.3d 1049, 1053 (9th Cir. 2009). And while the “to-convict” instruction, court’s instruction 44, was modeled on WPIC 120.02 [CP 47] and included this element, proper jury instructions cannot cure a defective information. State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995).

The information for obstructing a law enforcement officer provided:

In that the defendant, FRED HENRY CARPENTER, IV, in the State of Washington, on or about June 9, 2012, did willfully hinder, delay, or obstruct any law enforcement

³ For the sole purpose of avoiding needless duplication, the discussion in the prior section relating to the right of a person to be informed of the essential elements of an offense is hereby incorporated by reference.

officer in the discharge of his or her official powers or duties.

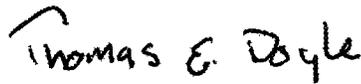
[CP 20].

This information does not allege that Carpenter “knew that the law enforcement officer was discharging official duties at the time,” though, as previously noted, this language does appear in the court’s to-convict instruction as an element of the offense. [CP 47]. Moreover, the prosecutor acknowledged during closing argument that Carpenter’s knowledge in this context is an element it had the burden to prove. [RP 333]. The information is thus defective, and the conviction obtained on this charged must be reversed based on the authority cited in the preceding argument.

E. CONCLUSION

Based on the above, Carpenter respectfully requests this court to reverse his convictions for felony harassment and obstructing a law enforcement officer.

DATED this 18th day of January 2013..


THOMAS E. DOYLE
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Carol La Verne
paoappeals@co.thurston.wa.us

Fred H. Carpenter VI #791979
Monroe Correctional Complex
P.O. Box 777
Monroe, WA 98272

DATED this 18th day of January 2013.

Handwritten signature of Thomas E. Doyle in black ink.

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

January 18, 2013 - 3:45 PM

Transmittal Letter

Document Uploaded: 438780-Appellant's Brief.pdf

Case Name: State v. Carpenter

Court of Appeals Case Number: 43878-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: ted9@me.com

A copy of this document has been emailed to the following addresses:
paoappeals@co.thurston.wa.usa