IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAY J. CALDERON, Appellant.	No. 39945-8-II UNPUBLISHED OPINION

Worswick, A.C.J. — Jay Calderon appeals from his convictions for felony harassment and fourth degree assault, raising insufficiency of the evidence, improper jury instructions, and ineffective assistance of counsel. Holding that the trial court failed to properly instruct the jury on felony harassment, we affirm the fourth degree assault conviction and we reverse and remand for a new trial on the felony harassment conviction.

FACTS

Calderon lived with his sister Jennifer Calderon[1] and his mother. Late on the night of July 12, 2009, Calderon asked Jennifer for money after she returned home from work. Calderon seemed very agitated, aggressive, and violent, and was not acting like himself at the time. Jennifer knew Calderon had been taking drugs for the last couple of days because he was "talking in riddles to himself." Verbatim Report of Proceedings (VRP) (Oct. 15, 2009) at 7.

Calderon's demands for money continued but Jennifer refused to give any to him.

[1] Because Jay Calderon and Jennifer Calderon share the same last name, we refer to Jennifer by her first name for clarity. We intend no disrespect.

Calderon then threatened to hurt Jennifer with a knife if she did not give him money. She told him that he was not scaring her and that he needed to grow up.

As the argument escalated, their mother intervened. At one point Calderon exited the house but he came back in and again demanded money from Jennifer. He then grabbed her by the throat, pulled out his knife and held it to her neck and said, "I'm going to F'ing kill you if you don't give me some money. You know what I can do with this knife, right? You know I can kill you with it? You better give me the money now." VRP (Oct. 15, 2009) at 9. Jennifer again refused.

Jennifer said that she was scared he was going to stab her. Their mom again intervened and told Calderon to stop picking on Jennifer. After Calderon left, Jennifer called the police.

Officer Robert Strader of the Chehalis Indian tribal police arrested Calderon at a casino. At first Calderon was pleasant, but then his demeanor quickly changed and he became hostile. Officer Strader could not tell whether Calderon was intoxicated but he could smell alcohol on him. Calderon became more and more hostile and started kicking the back door of the patrol car. And he then said that as soon as he got out of jail he was going to find Jennifer and "kill the bitch." VRP (Oct. 15, 2009) at 20.

Grays Harbor County Sheriff's Deputy Robert Lewis responded and transported Calderon to the jail. Calderon was very excited and demanded a pinch of chew. Deputy Lewis gave him some and he started to calm down. And once they arrived at the jail, Calderon passed out.

Around the same time that Deputy Lewis and Officer Strader dealt with Calderon, Deputy David Blundred of the Grays Harbor County Sheriff's Department responded to Jennifer's home

to discuss the situation and take a statement from her. After he arrived, Deputy Blundred observed red marks on the side of Jennifer's neck.

On July 13, 2009, the State charged Calderon by information with one count of felony harassment—domestic violence and one count of fourth degree assault—domestic violence. Before trial, Calderon sent a letter to the trial court expressing concerns with his counsel and asking the trial court to appoint someone new. And at a pretrial hearing on September 28, the trial court, counsel, and the defendant engaged in the following exchange:

> . . . .
> THE COURT: Are you ready to go to trial?
> [DEFENSE COUNSEL]: Thank you, Your Honor. Well, we were heading that direction, and Mr. Calderon informed me he wanted a different attorney, and so with that said, um, I suppose communications have broken down somewhat.
> THE DEFENDANT: I'm going to hire someone. I—
> THE COURT: Who are you going to hire?
> THE DEFENDANT: I am going to have my dad hire [an attorney]. I am going to ask for bail reduction so I can sell my stuff.
> THE COURT: There is your lawyer. Until I see something different, we are going to trial. If your dad hires somebody else, they have to come in here and take care of business. I am not going to appoint somebody else if you can hire somebody.
> [DEFENSE COUNSEL]: Thank you, Your Honor.

VRP (Sept. 28, 2009) at 1-2.

A jury heard the matter and found Calderon guilty of both felony harassment and fourth degree assault. The trial court sentenced Calderon to 12 months in jail. Calderon now appeals.

ANALYSIS

Jury Instructions

We first turn to Calderon's contention that the trial court's jury instructions relating to the felony harassment charge relieved the State of its burden to prove that Calderon made a "true

threat" and that Jennifer reasonably feared he would kill her. Br. of Appellant at 8. We agree.

This court reviews the adequacy of a "to convict" jury instruction de novo. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Generally, a "to convict" instruction must contain all elements essential to the conviction. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Even though Calderon did not object to the jury instruction at trial, the omission of an element from an instruction is a constitutional error that the defendant can raise for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); RAP 2.5(a)(3).

A person is guilty of harassment if he knowingly threatens to cause bodily injury immediately or in the future to the person threatened and, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a)(i), (b). When the threat to cause bodily injury is a threat to kill, the harassment constitutes a felony. RCW 9A.46.020(2)(b). But the State must also prove that the victim reasonably feared the defendant would carry out the threat to kill. *State v. C.G.*, 150 Wn.2d 604, 609, 80 P.3d 594 (2003). While a bifurcated instruction is constitutionally permissible, the instructions must clearly set forth this requirement. *Mills*, 154 Wn.2d at 10-11.

In this case, the trial court issued three jury instructions relevant to this issue. Jury instruction 2 provided as follows:

> The defendant has been charged by Information with Harassment—Domestic Violence and Assault in the Fourth Degree—Domestic Violence.
>
> The State has further alleged that Harassment was committed by means of a threat to kill.
>
> A person commits the crime of harassment—Domestic Violence when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person who is a family or household member and when he or she by words or conduct places the person threatened in

> reasonable fear that the threat will be carried out.
>
> A person commits the crime of Assault in the Fourth Degree—Domestic Violence when he intentionally assaults a family or household member.

Supp. Clerk's Papers (CP) at 20. Jury instruction 5, the "to-convict" instruction, provided as follows:

> To convict the defendant of the crime of Harassment—Domestic Violence, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 12, 2009, the defendant knowingly threatened to cause bodily injury immediately or in the future to Jennifer A. Calderon;
>
> (2) That the words or conduct of the defendant placed Jennifer A. Calderon in reasonable fear that the threat would be carried out;
>
> (3) That Jennifer Calderon was a family or household member;
>
> (4) That the defendant acted without lawful authority; and
>
> (5) That the acts occurred in the State of Washington.
>
> If you find from the evidence each of the 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 of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

Supp. CP at 21. In jury instruction 16, the trial court discussed the harassment special verdict form:

> . . . .
>
> You will also be given a special verdict form for the crime of Harassment as charged in Count 1. It [sic] you find the defendant not guilty of the crime of Harassment, do not use the special verdict form. If you find the defendant guilty of the crime of Harassment, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form, [sic] "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."
>
> . . . .

Supp. CP at 23.

In *Mills*, our Supreme Court considered virtually identical bifurcated jury instructions on felony harassment. 154 Wn.2d at 4 (reversing on the grounds that the jury instructions did not clearly set forth the requirement that the jury must find that the victim was placed in reasonable fear that the threat to kill would be carried out). As in *Mills*, the "to convict" instruction here set forth the misdemeanor elements of harassment based on a threat to cause bodily injury. 154 Wn.2d at 13.

And here, much like in *Mills*, the special verdict form asked, "Was the defendant's threat to cause bodily harm a threat to kill the person threatened?" Supp. Clerk's Papers (CP) at 40; 154 Wn.2d at 13. Nowhere was felony harassment separately defined. More importantly, nowhere was the jury instructed that it had to find beyond a reasonable doubt that Jennifer reasonably feared Calderon would carry out his threat to kill her. The jury might have believed it could convict Calderon if he placed Jennifer in reasonable fear of bodily injury without considering whether he placed her in fear of being killed. *See Mills*, 154 Wn.2d at 15. Under *Mills*, the jury was not instructed on all elements required to convict Calderon.[2] Thus, Calderon's argument prevails.

Insufficient Evidence for Felony Harassment

Calderon also contends that insufficient evidence exists to support his felony harassment conviction because the State failed to prove beyond a reasonable doubt that Calderon placed Jennifer in reasonable fear that he would carry out his threat to kill her.[3] We disagree.

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[2] The State attempts to distinguish this case factually from *Mills*. But such factual differences do not detract from the fundamental similarities between the language in the relevant instructions.

"When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). On appeal, "[a]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Hosier*, 157 Wn.2d at 8. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

This court reverses a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, we "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

To convict a defendant of felony harassment based on a threat to kill, the State must prove that the person threatened was placed in reasonable fear that the threat would be carried out. RCW 9A.46.020; *Mills*, 154 Wn.2d at 10-11. Our Supreme Court found insufficient evidence of such a threat where the juvenile defendant told a school vice-principal that she would kill him, and

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[3] The State's brief is silent on this issue.

the vice-principal testified that the defendant's threat caused him concern, not that he actually feared the threat would be carried out. *State v. C.G.*, 150 Wn.2d at 607.

In this case, the State asked Jennifer on the witness stand explicitly whether she was afraid Calderon was going to stab her after he held a knife to her neck and threatened to kill her. Jennifer responded with, "Yes. I was scared because he tried to kick me in the face while I was walking by him and he told me—he was saying to himself, you know, I'd like to kick you in the face just to see you cry, break your nose and see." VRP (Oct. 15, 2009) at 9-10. When this evidence is viewed in the light most favorable to the State, it is sufficient to support Calderon's felony harassment conviction. On this issue, Calderon's argument fails.

Ineffective Assistance of Counsel

Calderon lastly contends that he received ineffective assistance of counsel as a result of the disintegration of his attorney-client relationship and for his counsel's failure to request a voluntary intoxication instruction. As a corollary to his attorney-client relationship argument, he also contends that the trial court erred in failing to appoint new counsel. We disagree.[4]

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d

[4] Calderon also contends that he received ineffective assistance for his counsel's failure to object to inadmissible evidence and to request various limiting instructions under ER 402, ER 403, and ER 404(b). Because those arguments only relate to his felony harassment conviction, we do not reach them.

668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's deficient performance, the outcome likely would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). This court starts with a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Additionally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

Disintegration of the Attorney-Client Relationship

Calderon argues that the trial court erroneously refused to inquire after learning that Calderon's relationship with his attorney had disintegrated. The State counters that the trial court did not err in failing to appoint new counsel after Calderon told the court that he intended to hire new defense counsel.

"A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate." *State v. Lopez*, 79 Wn. App. 755, 764, 904 P.2d 1179 (1995). "A court has discretion in deciding whether a particular defendant's reasons for dissatisfaction merit substitution of counsel." *Lopez*, 79 Wn. App. at 764. And if the trial court denies a defendant's request for new counsel, the error is harmless unless the defendant can actually demonstrate ineffective assistance of counsel. *Lopez*, 79 Wn. App. at 767.

In this case, the issue stems from a letter written by Calderon to the trial court expressing concerns with his attorney and requesting a new one. At a pretrial hearing several days later, however, Calderon stated that he and his dad intended to secure counsel on their own. As a result of that statement, the trial court did not conduct any inquiry and simply said that his current

appointed counsel remained his counsel until it heard otherwise.

Calderon represented to the court that he was hiring new trial counsel. He never again raised the issue with the trial court. As a result, he abandoned his previous request for new appointed counsel. And even if the trial court erred in failing to inquire and appoint new counsel at that time, Calderon has not demonstrated ineffective assistance arising therefrom. Thus, his argument on this point fails.

Voluntary Intoxication Instruction

Calderon also argues that his defense counsel was ineffective for failing to propose a voluntary intoxication instruction. The State counters that Calderon was not entitled to the instruction. We agree with the State.[5]

A jury may be instructed on voluntary intoxication only if there is substantial evidence that the defendant's drinking affected his ability to form the necessary mental state to commit the charged crime.[6] *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996). Consequently, a defendant is entitled to an instruction on voluntary intoxication only if (1) a particular mental state is an element of the crime, (2) there is substantial evidence the defendant was drinking, and (3) there is substantial evidence that the drinking affected the defendant's ability to form the required mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). Evidence of drinking alone is insufficient; there must be substantial evidence of the alcohol's effects on the defendant's mind or body. *Gabryschak*, 83 Wn. App. at 253. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

In this case, the only evidence relating to Calderon’s intoxication was that (1) Jennifer

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[5] Because we reverse and remand the felony harassment conviction for improper jury instructions, we only consider this voluntary intoxication argument as it relates to the fourth degree assault charge.

[6] RCW 9A.16.090 provides, “No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.”

believed he had been using drugs for the last couple of days, (2) he was acting in an aggressive and agitated manner, (3) Officer Strader could smell alcohol on Calderon, and (4) Calderon passed out when Deputy Lewis brought him to the jail. While all of this evidence certainly suggests that Calderon may have been intoxicated, it is not sufficient to persuade a fair-minded person that the intoxication affected his ability to form the general intent required to assault Jennifer. Calderon has not demonstrated that the outcome would have differed had his defense counsel requested the instruction. Thus, his argument on this issue fails.

Affirmed in part, reversed and remanded in part.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.