IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 66763-7-I
v.	)	DIVISION ONE
	)	UNPUBLISHED OPINION
DEMETRI MANNING, Appellant.	)	FILED: September 17, 2012

Grosse, J. — A "to convict" instruction for a second degree assault charge that does not state that the assault must be intentional is not erroneous when the term "assault" itself includes the element of intent and the jury was given the definition of "assault."

FACTS

On August 16, 2010, Kea King called 911 to report domestic violence incidents involving her boyfriend, Demetri Manning. The first call she made was at 1:30 p.m. from the Greenwood Market in Seattle. She told the 911 operator that "My boyfriend just punched me in my face," and that she could see him leaving her house and driving away. Police officers responded in 10 minutes and met King in the parking lot. The officers saw that King had suffered a cut lip, chipped tooth, and a broken nose. King also showed the officer text messages that Manning sent to her phone, one of which was sent while the police were there. One of those messages stated: "See you knew you was in the wrong. You know you ain't called the police. I'm going to fuck you up

so bad when I see you at the (indiscernible)."

Later that evening, King made two more calls to 911 from her grandmother's house. She reported that Manning was parked outside of the house and she was inside with her child. In her second call, she reported that the police had not yet arrived and that Manning had left. When police arrived, King appeared frightened and had a visible injury to her nose. She told the officers about the earlier incident with Manning and how she received the injury. She also showed the officers messages on her cell phone. She told them that while she was inside the house, her ex-boyfriend was outside in front of the house in his car and was texting threats to kill her. One of the messages stated, "You will die on my life," and another stated, "Your days are numbered." Cell phone records showed that from 12:36 p.m. until 10:21 p.m., Manning placed at least 30 calls and 25 text messages to King's phone.

King was treated for her injuries at the emergency room later that evening. She first met with a triage nurse, who took some information from her. During this time, she told the nurse, "I got punched in the face by my baby daddy."

The State charged Manning with second degree assault and felony cyberstalking. King failed to cooperate as a State's witness and only appeared for trial after the prosecutor threatened to obtain a material witness warrant. King was called to testify but recanted on the stand. She claimed instead that she became angry with Manning for not bringing her diapers and hit him. She claimed to have not remembered how she became injured or if she had been punched. She also testified that she lied about what happened when she called 911. She further claimed that she did not know

Manning's cell phone number and denied receiving texts from him. She also claimed that the police never looked at her phone or saw any text messages and even denied calling the police later that evening or having any contact with them then.

But King did admit that she was in love with Manning and that he was still her boyfriend. She also admitted that she had never before claimed that the fight was mutual and that she was the aggressor. She further admitted that she had told the 911 operator, investigating officers, and medical personnel that Manning had punched her in the face, knocked her to the ground, and threatened her.

Manning did not testify. The jury found him guilty of second degree assault and a misdemeanor charge of cyberstalking. The court sentenced him to a standard range sentence of six months confinement to run concurrently with the sentence of credit for time served on the misdemeanor stalking conviction.

ANALYSIS

I. "To Convict" Instruction

Manning first challenges the second degree assault "to convict" instruction, claiming that it omitted an essential element of the charge by failing to require the State to prove that he "intentionally" assaulted King. We disagree.

We review the adequacy of a challenged "to convict" instruction de novo.[1] Generally, the "to convict" instruction must contain all the elements essential to the crime charged.[2] The elements of second degree assault are set forth in RCW

[1] State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).
[2] State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 916 (1997).

9A.36.021(1)(a):

> A person is guilty of assault in the second degree if he or she . . . [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.

The "to convict" instruction states:

> To convict the defendant of the crime of assault in the second degree, . . . each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about August 16, 2010, the defendant assaulted Kea King.

The jury was further instructed on the definitions of "second degree assault" and "assault" as follows:

> A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.
>
> . . . .
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> An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person.

Manning contends that the "to convict" instruction omitted the element of intent by failing to require the jury to find that Manning "intentionally" assaulted King. Manning relies on case law holding that the jury cannot be required to supply a missing element from the "to convict" instruction by referring to other instructions.[3] But as the State contends, the case law recognizes that the term "assault" itself "adequately conveys the notion of intent" and, therefore, includes the element of intent.[4] As the

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[3] See State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953); State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997).

[4] State v. Davis, 119 Wn.2d 657, 835 P.2d 1039 (1992) (citing State v. Hopper, 118 Wn.2d 151,158, 822 P.2d 775 (1992)).

court explained in Hopper:

> The definition of "assault" is a willful act. This court has previously said that language alleging assault contemplates knowing, purposeful conduct. The word "assault" is not commonly understood as referring to an unknowing or accidental act. . . . Commentators support the view that the term "assault" includes the element of intent.[5]

Manning contends that these cases do not control here because they involved the sufficiency of the charging document and the courts in those cases applied a liberal standard of construction because the sufficiency of the information was not challenged at trial. But as the court recognized in State v. Taylor, the standard of construction does not change the definition of assault:

> Application of a strict standard of review does not alter the plain meaning of "assault." This Court has held that the word "assault" conveys an intentional or knowing act. Applying the different standards of construction requires the court to judge the sufficiency of the charging documents as a whole with different levels of scrutiny, but the standards do not require the court to give words different meanings depending upon the standard of construction applied.[6]

The cases upon which Manning relies are distinguishable. Unlike the instructions in Emmanuel and Smith, here, the "to convict" instruction did not purport to list the specific elements of second degree assault and misstate them.[7] Rather, it

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[5] 118 Wn.2d at 158-59 (internal quotation marks omitted) (citations omitted).

[6] 140 Wn.2d 229, 242-43, 996 P.2d 571 (2000).

[7] In Emmanuel, the court gave a very detailed "to convict" instruction in a bribery case, which included all the legal elements of bribery except for one. The court deemed this instruction deficient, reasoning that this instruction purported to contain all essential elements and the jury was not required to search other instructions to determine whether another element alleged in the information would have been added to those specified in the to convict instruction. 42 Wn.2d at 819-20. In Smith, the "to convict" instruction actually misstated the elements of conspiracy to commit murder by stating the wrong crime as the underlying crime that the conspirators agreed to carry out. Instead of stating the underlying crime as the "crime of Murder in the First Degree," the

simply required that the jury find that Manning committed an act of second degree assault. The jury would have logically inferred that this cursory description required reference to the other instructions to determine whether Manning's conduct met the legal requirements of an assault. Indeed, as the Emmanuel court noted, "as a general legal principle all the pertinent law need not be incorporated in one instruction."[8] Here, the definition of "assault" was in fact provided to the jury.

II. Statements Made for Purposes of Medical Diagnosis or Treatment

Manning next contends that statements King made to a nurse and emergency physician were inadmissible hearsay statements because there was no foundation establishing that the statements were necessary for medical diagnosis or treatment. Under ER 803(a)(4), a statement made for the purpose of medical diagnosis or treatment is admissible as an exception to the hearsay rule. The case law recognizes that in cases of child abuse and domestic violence, attributing fault to a particular abuser is relevant to medical diagnosis and treatment.[9] In Sims, the court held that an assault victim's statements to a social worker that the defendant was the one who assaulted her were reasonably pertinent to her treatment when the social worker testified that the medical center had a policy of referring domestic violence victims to the social work department and the social worker discussed a treatment plan with her that included how to avoid threatening situations.[10]

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instruction stated it as the "crime of Conspiracy to Commit Murder in the First Degree." 131 Wn.2d at 262.

[8] 42 Wn.2d at 819.

[9] See State v. Sims, 77 Wn. App. 236, 239-40, 890 P.2d 521 (1995); State v. Butler, 53 Wn. App. 214, 221, 766 P.2d 505, rev. denied, 112 Wn.2d 1014 (1989).

Here, Mary Pham, a nurse, testified about statements King made to her upon her arrival at the emergency room. Pham testified that she worked with the emergency room triaging patients and that her job was to obtain a full history from a patient about what occurred:

> Triaging basically means that we kind of get the history as far as what happened, what's the reason that they're there for the day, or, you know, why they're coming to the emergency department and how emergent it is, and then to just kind of think ahead as far as what resources that person -- that patient will need.

She also explained that she uses this information to assess patients and work with doctors and social workers to come up with a treatment plan for the patient. Pham then testified about her specific interaction with King and stated that she observed visible injuries to her nose and King told her that she received the injury when her "baby daddy" punched her in the face.

Manning moved to exclude the statements as inadmissible hearsay, but the trial court ruled that they were admissible as statements made for medical diagnosis and treatment:

> [I]f you're talking about child abuse or domestic violence or anything like that, the medical staff need to know who inflicted these injuries so they can try to give them help or counseling or whatever to avoid being put back in a situation where they're likely to be injured again.

As in Sims, the statements here were made to medical personnel who testified that the triage protocol used with King included obtaining information that would allow hospital providers to assess what types of treatment plans or resources would be

[10] 77 Wn. App. at 240.

appropriate for the patient. Thus, they were properly admitted as statements made for medical diagnosis and treatment.

Manning contends that because there was no testimony that King actually obtained additional treatment that addressed the domestic violence concerns, as was the case in Sims, there was insufficient foundation to admit the statements under ER 803(a)(4). While this would be true if the statements were made to a social worker or other counseling professional as in Sims, here, the statements were made to a triage nurse who sufficiently established that the statements were made to her for purposes of diagnosis or treatment. As noted above, she testified that she gathered this information and passed it on to other hospital personnel for assessment of further treatment options.

III. Excited Utterance

Manning next contends that the trial court erred by admitting evidence of the 911 call because King recanted her testimony and the statements were inadmissible hearsay. We disagree.

During pretrial hearings, the prosecutor informed the court that he did not expect King to appear to testify and sought to introduce evidence of her 911 call. After hearing argument, the court ruled that evidence of the 911 call was admissible as both an excited utterance and present sense impression. After trial began, the prosecutor informed the court that King indicated she would appear to testify in court. When King appeared, the court recessed so both attorneys could speak with her. Defense counsel informed the court that King appeared to recant her story and was now claiming that

she started the fight and that she and Manning had hit each other.

King then testified that she and Manning had both been fighting and she hit him first. She admitted calling 911 but claimed that she had lied about some of the things she said during the call. She also claimed that she made the call 5 to 10 minutes after the fight with Manning ended. The recording of the 911 call was admitted and played for the jury without objection by Manning.

Manning now contends that the 911 call was inadmissible as an excited utterance because King later recanted those statements.[11] The State contends that because Manning failed to object or ask the court to reconsider its ruling after King recanted on the stand, the issue has not been preserved for appeal. We agree. As the State correctly notes, this was the result in Sims, where the court held that the defendant failed to preserve for review his objection to admission of a statement as an excited utterance based on a later recantation because he did not present this argument to the trial court as a basis for excluding the statement.[12] We therefore decline to consider this issue as not properly preserved for review.

Manning further contends that even if King had not recanted, the trial court still erred by ruling that the 911 call was an excited utterance. He notes that King was calm during the call, declined medical aid, and was not present at the scene when police arrived. We disagree.

The determination of whether a statement is admissible as an excited utterance

[11] See State v. Brown, 127 Wn.2d 749, 759, 903 P.2d 459 (1995).
[12] 77 Wn. App. at 238.

is highly factual. The crucial question is whether the declarant made the statement while still under the influence of the stressful event to the extent that the statement "'could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'"[13]

Here, the trial court found that the statements were made while King was still under the stress of the assault and while King was watching events occur:

> I do -- I find that it is and [sic] excited utterance. It's true that it is not excited in the classic sense of, you know, the person is hysterical, can hardly make sense, but it's clearly -- she's clearly under the stress of a -- of a startling event. I think most of us could be [sic] find getting hitting in the face to be a startling event. And this is something that obviously just happened as was noted here. She seems to be bleeding at the time, she's asking for a napkin and for some water and so onto [sic] try and clean herself up while she's on the phone with the 911.
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> And I think that it's close enough in time and it's -- there's indications that this is what, you know, these [sic] upset about this. Now, also the latter part of it -- certainly part of it appears to be present sense and -- present sense impression to the extent that she's talking about, you know, he's walking out of the house, he's leaving right now, which way he's going, he's going that -- south and so on. That's all just reporting exactly what what [sic] she's seeing as she's seeing it.

Manning fails to show the trial court's ruling amounts to an abuse of discretion. It is supported by the record and consistent with the law.

IV. True Threat

Manning challenges the information and "to convict" instruction for failing to include as an element of the crime of cyberstalking that the threat made was a "true threat," even though the jury was given a separate instruction defining "threat" as a

[13] 77 Wn. App. at 238 (quoting Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

true threat. He acknowledges this court's decisions in State v. Tellez,[14] State v. Atkins,[15] and State v. Allen,[16] which hold that the existence of a "true threat" is not an essential element of the crime of felony harassment that needs to be included in information or "to convict" instruction and that a separate instruction defining "threat" as a true threat is sufficient to protect First Amendment rights. But he contends that they were wrongly decided and conflict with the Supreme Court's decision in State v. Schaler.[17] We disagree.

In Schaler, the trial court failed to give any instruction addressing the requirement of a true threat in a felony harassment case; this was not a case where the court simply failed to include the true threat requirement in the "to convict" instruction.[18] The court held that the instructions were error because the First Amendment requires negligence as to the result and the instructions did not require a mens rea as to result.[19] But the court was also careful to note that the pattern jury instruction defining "threat" had since been amended to include the definition of "true threat," and that "[c]ases employing the new instruction defining 'threat' will therefore incorporate the constitutional mens rea as to the result."[20] Here, the jury was given an instruction that defined "threat" as a true threat. Thus, the concerns in Schaler were not at issue in this case.

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[14] 141 Wn. App. 479, 170 P.23d 75 (2007).
[15] 156 Wn. App. 799, 236 P.3d 897 (2010).
[16] 161 Wn. App. 727, 255 P.3d 784 (2011).
[17] 169 Wn.2d 274, 236 P.3d 858 (2010).
[18] 169 Wn.2d at 288 n.6.
[19] 169 Wn.2d at 287.
[20] 169 Wn.2d at 287-88 n.5.

The Schaler court was also clear that it was not addressing whether this mens rea is in fact an element of felony harassment:

> The situation is not *identical* to omitted-element cases. Whether the constitutionally required mens rea is an "element" of a felony harassment charge is a question that we need not decide. (We note that there is a Court of Appeals opinion on point, State v. Tellez, 141 W. App. 479, 170 P.3d 75 (2007), but we express no opinion on the matter.) 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. So, it is useful to consider other cases in which something that the State had to prove to convict was omitted from the jury instructions.[21]

After Schaler, this court decided Allen, where, as here, the defendant challenged the information and "to convict" instruction, contending that they failed to include as an essential element of felony harassment that the threat be a true threat.[22] There, as here, the jury was given a separate instruction defining "threat" as a true threat.[23] The court held that existence of a true threat was not an essential element of the crime and did not need to be included in the information or "to convict" instruction. Rather, a separate instruction defining "threat" as a true threat was sufficient to protect First Amendment rights.[24] The court relied on precedent in Tellez and Atkins, and addressed the effect of Schaler as follows:

> The Supreme Court emphatically stated in Schaler that its opinion did not address the issues raised in Tellez. Accordingly, we hold that this court's previous cases addressing this issue are dispositive and hold that true threat is merely the definition of the element of threat which may be contained in a separate definitional instruction. In fact, "[n]o Washington court has ever held that a true threat is an essential element of any

[21] 169 Wn.2d at 288 n.6
[22] 161 Wn. App. at 748.
[23] 161 Wn. App. at 750-51.
[24] 161 Wn. App. at 751.

> threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document or 'to convict' instruction." "This court has consistently repeated that "[s]o long as the court defines a "true threat" for the jury, the defendant's First Amendment rights will be protected."[25]

Manning correctly notes that our State Supreme Court has accepted discretionary review in Allen.[26] But until a decision is issued in that case, Allen is still good law and we adhere to its reasoning.

Manning further contends that there was insufficient evidence of a true threat to support his conviction. We disagree.

Evidence is sufficient to support a conviction when, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.[27] 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."[28]

Here, the evidence showed that immediately after he punched King and she told him she was going to call the police, Manning repeatedly called and sent text messages to King threatening to hurt her again, stating: "You knew you was in the wrong. You know you ain't called the police. I'm going to fuck you up so bad when I see you at the (indiscernible)." Viewed in the light most favorable to the prosecution, a

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[25] 161 Wn. App at 755-56 (citations omitted) (alternations in original).
[26] 172 Wn.2d 1014, 262 P.3d 63 (2011).
[27] State v. Green, 94 Wn.2d 216, 221, 61 P.2d 628 (1980).
[28] State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (internal quotation marks omitted) (citations omitted).

reasonable person would foresee this threat as a serious intent to harm King. Thus, there was sufficient evidence of a true threat.

V. Community Custody Condition

The State concedes that the trial court incorrectly imposed as a condition of community custody that Manning obtain an alcohol evaluation because there was no showing that this condition was crime related. Accordingly, we remand for the trial court to vacate that condition.

We affirm the judgment and sentence and remand for resentencing.

Grosse, J.

WE CONCUR:

Spearman, A.C.J.

Cox, J.