IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 66979-6-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
DANTE MARQUIS HAYNES,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 17, 2012
	)	

Lau, J. — A jury convicted Dante Haynes of two misdemeanor offenses: domestic violence fourth degree assault and harassment. On appeal, Haynes challenges the adequacy of the information, two conditions of probation, and the trial court's oral advisement that he is prohibited from possessing firearms. We accept the State's concession and remand for amendment of the term of the no-contact order imposed as a condition of probation. We also strike the court's oral advisement in favor of the written statutory advisement. In all other respects, we affirm.

facts

Dante Haynes and Seantaila Spears dated for several years until 2004. They

have a child in common, DH.

Haynes's convictions stem from an incident that occurred on August 28, 2010. According to the testimony at trial, both Haynes and Spears attended DH's football game on that day. After the game, Spears drove home with her two children, DH and two-year-old JB, in the backseat. Haynes and his girl friend were driving in the same direction. At an intersection, Haynes and his girl friend pulled alongside Spears' car. Haynes was in the passenger seat. Through the open car windows, Haynes and Spears exchanged words. Haynes sprayed a can of beer at Spears. Spears threw a travel cup of cold coffee out of the window, missed Haynes, but hit the outside of the car. Both Haynes and Spears got out of their cars. Haynes struck Spears several times. Spears also tried to hit Haynes, but was unable to make contact. According to Spears, during the confrontation, Haynes said: "I want to kill you. I wish you were dead." Report of Proceedings (RP) (Mar. 2, 2011) at 143. Haynes picked up the travel cup, threw it, and shattered the rear window of Spears' car. Haynes then got back into the car, and he and his girl friend drove away.

The State charged Haynes with third degree assault, based on an injury sustained by J.B. when the window was broken. The State also charged Haynes with felony harassment, based on threats made to Spears and fourth degree assault for striking Spears. Following trial, the jury acquitted Haynes of assault with respect to J.B., convicted him of the lesser crime of misdemeanor harassment, and found him guilty of fourth degree assault. The court suspended Haynes's concurrent 12-month sentences and placed him on probation for 2 years.

ANALYSIS

Charging Document

For the first time on appeal, Haynes argues that the charging document was insufficient because it did not allege that he made a "true threat" and therefore omitted an essential element of the crime of harassment.

A charging document must allege "[a]ll essential elements of a crime, statutory or otherwise," to provide a defendant with sufficient notice of the nature and cause of the accusation against him. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); U.S. Const. amend. VI; Wash. Const. art. I, § 22. The primary purpose of the rule is to give the defendant sufficient notice of the charges so he can prepare an adequate defense. State v. Tandecki, 153 Wn.2d 842, 846-47, 109 P.3d 398 (2005).

Where, as here, the defendant failed to challenge the sufficiency of an information at trial and instead raises his challenge for the first time on appeal, we liberally construe the document in favor of validity. State v. Brown, 169 Wn.2d 195, 197, 234 P.3d 212 (2010). To assess the adequacy of the information, we engage in a two-part inquiry: (1) whether the essential elements appear in any form or can be found by any fair construction in the information and (2) if so, whether the defendant nonetheless was actually prejudiced by the unartful language used. Brown, 169 Wn.2d at 197-98.

Under the harassment statute, RCW 9A.46.020(1)(a)(i), (b), a person commits

harassment if, "[w]ithout lawful authority, the person knowingly threatens" to "cause bodily injury immediately or in the future to the person threatened or to any other person" and "by words or conduct places the person threatened in reasonable fear that the threat will be carried out." Haynes was charged under the felony threat to kill provision of the statute. RCW 9A.46.020(2)(b).

The information alleged in relevant part that Haynes "knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Seantaila Spears, by threatening to kill Seantaila Spears, and in words or conduct did place said person in reasonable fear that the threat would be carried out." CP 112

"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." State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). Accordingly, only "true threats" may be proscribed by law. Schaler, 169 Wn.2d at 283. "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 State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). "The speaker of a 'true threat' need not actually intend to carry it out. It is enough that a reasonable speaker would foresee that the threat would be considered serious." Schaler, 169 Wn.2d at 283 (citation omitted).

In State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007), we held that the true threat concept is definitional and "limits the scope of the essential threat element," but

"is not itself an essential element of the crime." Tellez, 141 Wn. App. at 484; see also State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010); State v. Allen, 161 Wn. App. 727, 755-6, 255 P.3d 784 (2011), review granted, 172 Wn.2d 1014, 262 P.3d 63 (2011). Haynes contends that our holding in Tellez cannot be reconciled with the Supreme Court's decision in Schaler.

In Schaler, the defendant challenged the jury instructions defining the crime of felony harassment. Schaler, 169 Wn.2d at 281-82. Because the instructional definition of threat was not limited to true threats, the court concluded the jury could have erroneously convicted Schaler based on "something less than a 'true threat'" and reversed.[1] Schaler, 169 Wn.2d at 287-88. But the court in Schaler expressly declined to reach the question of whether a true threat is an essential element of the crime of felony harassment that must be alleged in the charging document. Schaler, 169 Wn.2d at 288, n.6. Our decision in Tellez is not inconsistent with Schaler, and we continue to adhere to it.[2] The information was sufficient.

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[1] The court observed in Schaler that the instructional error was unlikely to arise in the future because the Washington Pattern Jury Instruction was amended so that the definition of "threat" encompasses only true threats. See 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.24, at 72 (3d ed. 2008) ("To be a threat, a statement of act must occur in a context . . . where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk."). Haynes does not challenge the jury instructions and in any event, the trial court instructed the jury in accordance with the amended pattern instruction approved of in Schaler.

[2] Moreover, the information specifically alleged that Haynes knowingly threatened to kill Spears and his words or conduct placed Spears in reasonable fear. Consistent with Schaler, this language in the charging document "satisfies the 'know or foresee' mens rea element" as to the result of intending the hearer's fear. Allen, 161

Treatment Condition of Probation

Haynes challenges a condition of probation imposed by the trial court requiring compliance with treatment ordered as a component of the parenting plan involving DH.[3]

We review sentencing conditions for abuse of discretion. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The superior court has the authority to grant probation under RCW 9.95.210.[4] City of Spokane v. Marquette, 146 Wn.2d 124, 129, 43 P.3d 502 (2002). The court's decision to suspend a sentence and impose probation for a misdemeanor conviction is "not a matter of right but a matter of grace, privilege, or clemency" that may be "'granted to the deserving, and withheld from the undeserving . . . .'" State v. Williams,

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Wn. App. at 755. "Knowingly threaten" may be "understood to require that the speaker be aware that his words or actions frightened the hearer—after all, how can one knowingly threaten without knowing that what one says is threatening to another?" Schaler, 169 Wn.2d at 286.

[3] Although Haynes did not oppose the condition of probation at sentencing, we have generally held that a defendant does not waive a challenge to the legality of sentencing conditions by failing to object below. See State v. Armstrong, 91 Wn. App. 635, 638-39, 959 P.2d 1128 (1998) (allowing challenge to community placement conditions).

[4] RCW 9.95.210(1) states: "In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer."

97 Wn. App. 257, 263, 983 P.2d 687 (1999) (quoting State v. Farmer, 39 Wn.2d 675, 679, 237 P.2d 734 (1951)). The court also has the discretion to impose conditions of probation that "bear a reasonable relation to the defendant's duty to make restitution or that tend to prevent the future commission of crimes." Williams, 97 Wn. App. at 263.[5]

Relying on State v. Summers, 60 Wn.2d 702, 707, 375 P.2d 143 (1962), Haynes argues that the court lacked a tenable basis to impose compliance with court-ordered treatment as a probation condition because there is no showing that the condition relates to the prevention of future crimes. In Summers, the defendant was convicted of manslaughter based on evidence that he hit another man in the head and caused his death. The trial court suspended the sentence and imposed probation conditions that required, among other things, that Summers support his own children in amounts to be set by the probation officer. Summers, 60 Wn.2d at 703. The Supreme Court concluded the trial court abused its discretion because the statute in effect at the time provided that the court could require family support as a condition of probation but only where a court order was in place. Summers, 60 Wn.2d at 707. Moreover, the court concluded that supporting the offender's own children had no bearing on restitution or prevention of future crimes and the condition was an unlawful delegation of power in allowing the probation officer to set the amount of support. Summers, 60 Wn.2d at 707-08.

[5] While the Sentencing Reform Act of 1981, chapter 9.94A RCW, requires that conditions of community supervision relate directly to the crime, the SRA applies only to felony offenses. Williams, 97 Wn. App. at 263.

This case is more analogous to Williams. Eighteen-year-old Williams pleaded guilty to five misdemeanors. The district court granted probation and ordered the probation department to set the conditions for probation. There was no evidence in the record that substance abuse played a role in the crimes. Nonetheless, the probation department ordered Williams to abstain from alcohol and drugs and submit to alcohol and drug testing. The court later revoked probation based on violations of the conditions. On appeal, Williams challenged the drug and alcohol conditions and argued that the court unlawfully delegated its authority to the probation department. We held that the court had the authority to impose a condition that is not directly related to the crime if the condition "tend[s] to prevent the future commission of crimes." Williams, 97 Wn. App. at 263. We concluded that the conditions related to the potential use of drugs and alcohol were "merely an extension of the more general probationary requirement to conduct himself in a lawful manner." Williams, 97 Wn. App. at 263.

Here, Haynes had a criminal history of domestic violence involving interactions with Spears. As the trial court observed and counsel acknowledged, because Haynes and Spears are the parents of DH, there is both the likelihood of future contact and a history of conflict surrounding that contact. Because Haynes's current and past criminal conduct related to his shared parenting of DH with Spears, the condition of compliance with the evaluation and treatment imposed by family court services in the parenting plan is reasonably related to preventing the commission of future crimes. We conclude the court did not abuse its discretion in imposing the condition of probation.

Oral Advisement Regarding Firearm Ineligibility

A person is guilty of unlawful possession of a firearm if he possesses a firearm after being convicted of domestic violence assault in the fourth degree. RCW 9.41.040(2)(a)(i). Following a conviction for such an offense, the trial court is required to notify the defendant, both orally and in writing, that he may not possess a firearm unless his right to do so has been restored. RCW 9.41.047(1).

The trial court in this case correctly advised Haynes in writing of the prohibition. The "Notice of Ineligibility to Possess Firearm" stated, "Pursuant to RCW 9.41.047, you are not permitted to possess a firearm until your right to do so is restored by a court of record. You are further notified that you must immediately surrender any concealed pistol license." (Boldface omitted.) At sentencing, the court explained, "It is important that you not be around guns. You might hang out with people who have guns. I don't know. I say this to everybody. . . . You might be in a car with a friend who happens to have a gun. If you have access to that gun, you are in violation." RP (Mar. 21, 2011) at 16-17. The court further told Haynes that he had to be "careful" because if he were in a car and the police found a gun in a place where he had "access" to it, "you are the one who gets charged." RP at 17.

To establish unlawful possession of a firearm, however, the State must prove knowing possession of a firearm. RCW 9.41.040; State v. Anderson, 141 Wn.2d 357, 362, 5 P.3d 1247 (2000). While possession may be actual or constructive, proximity alone is insufficient to establish constructive possession. State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). Being in a car and within reaching distance of a

firearm would not amount to a violation if the person has not exercised dominion and control over the firearm or the premises where the firearm is found. State v. Lee, 158 Wn. App. 513, 517, 243 P.3d 929 (2010). The court's suggestion to the contrary was erroneous.[6]

No-Contact Order

Finally, as a part of Haynes's sentence, the court entered a no-contact order prohibiting Haynes from having contact with Spears or J.B. The duration of the original order was five years, but the court subsequently amended the order to expire after four years. The State concedes that, as with all conditions of probation, the duration of the no-contact order cannot exceed the length of probation. See RCW 9.95.210(1) (superior court may suspend the sentence "upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer).

The concession is well taken, and we remand for amendment of the no-contact order. We also strike the oral advisement in favor of the accurately worded written advisement. We otherwise affirm.

WE CONCUR:

[6] The trial court's oral advisement is not a final judgment appealable as a matter of right. RAP 2.2(a)(1); State v. Lee, 158 Wn. App. 513, 516, 243 P.3d 929 (2010). Because the remarks amount to probable error implicating constitutional rights, and in the interests of judicial economy, we grant discretionary review as to this issue. RAP 2.3(b)(2).