IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GLEN ARTHUR SCHALER, Petitioner.	NO. 81864-9 EN BANC Filed July 29, 2010

STEPHENS, J.—This case concerns the interplay between the threats-to-kill provision of Washington's harassment statute, RCW 9A.46.020, and the First Amendment's limits on the criminalization of speech. We adhere to our previous position that the harassment statute must be read to proscribe only "true threats" and hold that the jury instructions in this case did not adequately limit the statute's reach. Given the evidence at trial, the instructional error was not harmless. We therefore reverse and remand for a new trial under proper instructions.

BACKGROUND FACTS AND PROCEDURAL HISTORY

On the morning of August 10, 2005, Director Tonya Heller-Wilson of Crisis Services for Okanogan Behavioral Healthcare received a call from Glen Schaler, who claimed to have killed his neighbors.[1] Schaler was crying and hysterical. He told Heller-Wilson that he awoke from a dream and thought he had killed his neighbor, and that killing his neighbors had been occupying his daytime thoughts, too. Heller-Wilson testified that Schaler seemed extremely upset at the prospect that he might have hurt someone. He threatened to kill himself. Heller-Wilson had a co-worker contact the police.

Deputy Connie Humphrey arrived at Schaler's residence several minutes later, while Schaler was still on the phone with Heller-Wilson. When Humphrey knocked on Schaler's door, Schaler told her to "go away" and said, "'I dreamed I slit her throat.'" Verbatim Report of Proceedings (VRP) (Feb. 6, 2007) at 207. Schaler handed Humphrey the phone through the doorway, and Heller-Wilson asked Humphrey to bring Schaler in for an evaluation if the situation did not turn into a criminal investigation. When Humphrey entered, she observed that Schaler was "sweating and panting," as though he "was having difficulty getting a complete breath." *Id*. at 212. Schaler indicated he had not taken his medication that morning. Humphrey found no evidence that any neighbors had been injured and convinced Schaler to accompany her to Mid Valley Hospital for an evaluation. At Humphrey's urging, Schaler took his medication before leaving for the hospital.

[1] Heller-Wilson's co-worker received Schaler's call and then forwarded it on to Heller-Wilson due to her higher level of experience.

Deputy Humphrey brought Schaler to the hospital and left him in Heller-Wilson's care. Humphrey was called back to the hospital twice during the next several hours to assist Heller-Wilson. Humphrey tried to get Schaler to comply with the mental health staff, who at one point attempted to give Schaler an injection. In response, Schaler stated, "'[B]ring it on, cause there was going to be a fight, and that someone was going to get hurt[,]' [h]e could guarantee it," but then told the staff how he had previously suffered back and neck injuries. *Id*. at 220. Schaler also said that "next time he was going to get a bunch of guns, and it would be [a] blood bath." *Id*. Based on his behavior, Schaler's commitment status was changed from voluntary to involuntary because Heller-Wilson believed Schaler was a danger to himself and to others.

Heller-Wilson came "in and out of the room" while Schaler was receiving medical attention at the hospital, including the drawing of his blood. *Id.* at 250. She testified that Schaler was having some sort of mental breakdown. During Heller-Wilson's contact with Schaler, he repeatedly referred to two neighbors, Kathy Nockels and Denise Busbin. Schaler "was pretty specific that he, he wanted to kill his neighbors." *Id.* at 247. Schaler specifically said that "he wanted to kill them with his bare hands, by strangulation," although he also said, "'I hope I didn't really kill her.'" *Id*. at 248, 267. Schaler said that he had been planning his neighbor's death for months and had dreamt about it, but in the dream she hit him and scratched his face. Heller-Wilson tried to ascertain whether Schaler was making a serious threat:

> I can't recall specifically how I asked him. I, I know that you don't, it's part of my job to try to keep people out of the hospital. And when people tell me that they feel like they want somebody to die, or they want to die, I always go into the explanation that you know, there are times that I wish I were dead, but I don't have a plan to kill myself. I mean, you know, there are just times, and there's times that I wish my, my boss didn't exist, but I don't have a plan to kill him. And I kind of went that way, and I said "You know, sure, you might wish that they weren't there. Maybe you're [sic] life would be a little bit easier." But he said specifically, he wanted to harm them.

Id. at 248-49. Schaler repeated his desire to kill his neighbors to Heller-Wilson over the approximately four hours she spent with him. He appeared angry when he made these comments and never said he was not serious or did not mean what he said. Heller-Wilson believed Schaler had made a "viable threat" and so, pursuant to her duty to warn,[2] she contacted Nockels and Busbin to inform them of Schaler's comments. *Id*. at 251-53. On cross-examination, Heller-Wilson acknowledged that the situation was complicated by the fact that Schaler initiated contact with her office, was clearly agitated, and was requesting help from her as a crisis counselor.

Schaler told Heller-Wilson of an incident on June 1, 2005, involving a dispute over fruit trees, which he said was one reason that he wanted to kill his neighbors. Schaler believed that a row of Busbin's fruit trees was interfering with his rightful access to an alley. Nockels called the police after she noticed Schaler cutting the trees with a chain saw. When Nockels asked Schaler to stop, Schaler raised his chain saw toward Nockels and told her to "stay out of this." VRP (Feb. 7, 2007) at 10-11. Deputy Michael Blake arrived in response to the 911 call. After Blake

[2] Under certain circumstances, a mental health counselor has a duty to warn those whom the counselor's patient may harm. *See generally Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983).

arrived, Schaler said that "'it was obvious that somebody [was] going to die.'" VRP (Feb. 6, 2007) at 288. Schaler repeated this statement, and Blake asked what Schaler meant and why it was obvious. Schaler did not answer. Blake informed Schaler that Blake took Schaler's statement very seriously, and after a long pause, Schaler stated that he thought he (Schaler) would be the one to die, citing an incident where he claimed Busbin's husband had threatened him with a shotgun. Blake asked Schaler if he thought he was going to kill someone, and Schaler replied that "when he [Schaler] became angry, he did feel like that he wanted to kill someone, and that that was a natural human response." *Id*. at 291. He did not say anything more specific.

Nockels testified that she believed Schaler was going to kill her as a result of the fruit tree incident. She felt similarly after Heller-Wilson warned her of Schaler's comments at the hospital. Busbin felt Schaler was capable of carrying out the threats. Both women obtained protective orders against Schaler after the tree incident and thereafter made sure that each woman always knew the location of the other.

Schaler was charged with two counts under the threats-to-kill provision of the harassment statute, RCW 9A.46.020(1)(a)(i), (b), (2)(b)(ii), for his statements to Heller-Wilson regarding Nockels and Busbin. Schaler successfully requested a jury instruction requiring the jury to find that he subjectively intended to communicate a threat. No party requested an instruction as to the definition of "true threat," nor did Schaler object to the State's proposed definition of "threat," which was not limited

to true threats. The term "true threat" did not appear in any of the jury instructions. Schaler was sentenced to two 10-month terms of confinement to be served concurrently.

On appeal, Schaler argued that the evidence was insufficient to support the jury's verdict. He also challenged the jury instructions for the first time, arguing that the First Amendment requires an explicit "true threat" instruction. The Court of Appeals held that the trial court erred by failing to instruct the jury on "true threats" but that any error was harmless beyond a reasonable doubt. *State v. Schaler*, 145 Wn. App. 628, 640-41, 186 P.3d 1170 (2008). It further held that the evidence at trial was sufficient to support Schaler's conviction. *Id.* at 644. We granted review. 165 Wn.2d 1015, 199 P.3d 411 (2009).

STANDARD OF REVIEW

Instructional errors based on legal rulings are reviewed de novo, as are constitutional questions. *State v. Grande*, 164 Wn.2d 135, 140, 187 P.3d 248 (2008); *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). We engage in independent review of the record in First Amendment cases "'so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *State v. Kilburn*, 151 Wn.2d 36, 49-50, 84 P.3d 1215 (2004) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 508, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)).

Here, Schaler failed to raise his First Amendment argument until appeal. An appellate court may refuse to address a claim of error not raised in the trial court

unless it finds a "manifest error affecting a constitutional right." RAP 2.5(a)(3). An error is "manifest" if it had practical and identifiable consequences in the case. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Even manifest constitutional errors may be harmless. *Id.* at 98.

ANALYSIS

I. Jury Instructions

1. *True Threats*

"The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law . . . abridging the freedom of speech.'" *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). While the scope of the First Amendment is broad, it does not extend to "unprotected speech." *Kilburn*, 151 Wn.2d at 42-43.

"True threats" occupy one category of unprotected speech. *Id*. at 43. 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." *Id.* (internal punctuation and quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001)). The State has a significant interest in restricting speech that communicates a true threat, including "'protect[ing] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.'" *Id*. (quoting *State v. J.M.*, 144 Wn.2d 472, 478, 28 P.3d 720 (2001)). The speaker of a

"true threat" need not actually intend to carry it out. *Id.* at 46. It is enough that a reasonable speaker would foresee that the threat would be considered serious.

Importantly, only threats that are "true" may be proscribed. 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. *Id.* at 43. We recently interpreted the bomb threat statute, RCW 9.61.160, to reach only "true threats" in order to save it from a constitutional challenge. *State v. Johnston*, 156 Wn.2d 355, 364, 127 P.3d 707 (2006). We adhere to this principle and construe the threats-to-kill provision of RCW 9A.46.020 to the same effect.

2. *Instructional Error*

Schaler assigns error to the trial court's failure to give the jury a true threat instruction. Because he did not object to the instructions at trial, the first question we must address is whether this case involves a manifest error affecting a constitutional right. *See* RAP 2.5(a). An error is manifest if it had practical and identifiable consequences in the case. *O'Hara*, 167 Wn.2d at 99. This standard is also referred to as "actual prejudice." *Id.* As we explained in *O'Hara*,

> [T]he focus of the actual prejudice [analysis] must be on whether the error is so obvious on the record that the error warrants appellate review. . . . Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

Id. at 99-100 (citation and footnote omitted). This analysis is distinct from deciding whether the error was harmless and therefore does not warrant reversal. *Id.* at 98.

Schaler argues that he did not make a true threat, as constitutionally required, because he was describing his mental state and the contents of a dream he was having to a mental health specialist after calling a crisis services hotline. Pet. for Review at 13, 16. In the context of his mental health evaluation, Schaler contends, his words were a cry for help, and a reasonable person in his position would not foresee that a listener would take them as a serious expression of intent to kill his neighbors. Appellant's Opening Br. at 11-12.

The State responds that no true threat instruction was necessary because the threats-to-kill provision was sufficiently narrowed by the instructions at trial. Br. of Resp't at 30-31; Suppl. Br. of Resp't at 3-5.

In pertinent part, the threats-to-kill provision reads:

> (1) A person is guilty of harassment if:
> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; [and]
> . . . .
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . . .
> . . . .
> [(2)](b) A person who harasses another is guilty of a class C felony if . . . the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened . . . .

RCW 9A.46.020(1)-(2).

The trial court instructed the jury as to the statutory elements in instructions 5 and 16. Clerk's Papers (CP) at 26, 33, 44. The court further instructed the jury in instruction 10 that "'threat' means to communicate, directly or indirectly, the intent to cause bodily injury immediately or in the future to the person threatened or to any

other person." CP 26, 38 (paralleling RCW 9A.04.110(27)(a)). At Schaler's urging, the court added jury instruction 12, which read, "A person threatens 'knowingly' when the person subjectively intends to communicate a threat." CP at 26, 40, 55-46.

Reading the definitions into the statute, the jury was advised that a person is guilty of threats-to-kill harassment if (1) without lawful authority, he subjectively intends to communicate, directly or indirectly, the intent to kill the person threatened or any other person, and (2) by words or conduct, he places the person threatened in reasonable fear that the threat will be carried out. We can therefore construct the following schematic of what the jury was told is criminalized by the threats-to-kill provision:

> Conduct: Communicating, i.e., uttering words or undertaking expressive conduct to another.
> Circumstances: The words or conduct suggest an intent to kill somebody.
> Result: The person threatened reasonably fears that the threat will be carried out.
> Mens Rea: As to the conduct and circumstances, the person acts intentionally.

No mens rea was specified as to the result. The jury instructions did not state that the defendant must know or foresee that the person threatened (or, for that matter, any listener) would reasonably fear that the threat will be carried out. This is because the statute uses the term "knowingly threaten" in subsection (1)(a) but includes no mens rea term in the separate subsection listing the result requirement, (1)(b). RCW 9A.46.020(1). If "knowingly threaten" had been left to its ordinary meaning, it could 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? However, the term "knowingly threaten" was expressly defined in instruction 12 as "intend[ing] to communicate a threat." And the definition of "threat" in RCW 9A.04.110(27)(a), contained in instruction 10 in this case, said nothing about the *fear* that typically results from a threat. It defined threat merely in terms of communicating (conduct) and what the communication means (circumstances), i.e., it required the jury to find only that the words spoken suggested an intent to kill. Under these instructions, the statutory requirement of knowing or even intentional threatening refers only to the conduct and circumstances proscribed, but not the proscribed result.

In some criminal contexts, the lack of mens rea as to a proscribed result poses no problem. For example, one can commit first degree murder if, in the course of committing first degree burglary, one causes the death of a nonparticipant; no mens rea as to the result of death is required. RCW 9A.32.030(1)(c).

In the context of criminalizing speech, however, the lack of mens rea as to the result is critical. Because the First Amendment limits the statute to proscribing "true threats," it must be read to reach only those instances "'wherein *a reasonable person would foresee* that the statement would be interpreted as a serious expression of intention . . . to take the life of another person." *Kilburn*, 151 Wn.2d at 43 (emphasis added) (internal punctuation and quotation marks omitted) (quoting *Williams*, 144 Wn.2d at 208-09). This standard requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence.[3] *See* W. Page

Keeton et al., Prosser & Keeton on Torts § 31, at 169 (5th ed. 1984) (describing negligence as the failure to guard against "a risk of [certain] consequences, sufficiently great to lead a reasonable person . . . to anticipate them"). Because the First Amendment requires negligence as to the result but the instructions here required no mens rea as to result, the jury could have convicted Schaler based on something less than a "true threat." The instructions were therefore in error.[4]

This error was manifest and affected a constitutional right. Because they did not comply with the First Amendment's "true threat" requirement, the instructions given at trial allowed the jury to convict Schaler based on his utterance of protected speech.[5] *See Johnston*, 156 Wn.2d at 364-65 (holding that the failure to instruct on "true threat" was not harmless because the evidence was close on whether the

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[3] The First Amendment requires only simple negligence, not "criminal negligence," as to the result. *Cf.* RCW 9A.08.010(1)(d) (defining "criminal negligence" as the failure to be aware of a "substantial risk," which constitutes a "gross deviation" from reasonable care in the situation).

[4] Justice J.M. Johnson's dissent argues that our holding is at odds with *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), in which the United States Supreme Court upheld a cross burning law without discussing any negligence requirement. Dissent (J.M. Johnson, J.) at 2 n.1. But, the law at issue in *Black* required an even greater mens rea as to the listener's fear. *Black*, 538 U.S. at 360 ("Intimidation . . . is a type of true threat[] where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear* of bodily harm or death." (emphasis added)).

[5] Although the instructions in this case erroneously failed to limit the statute's scope to "true threats," the problem is unlikely to arise in future cases. After our opinion in *Johnston* limited the bomb threat statute's scope to "true threats," the Washington Pattern Jury Instructions Committee amended the pattern instruction defining "threat" so that it matches the definition of "true threat." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.24, at 72 (3d ed. 2008) ("To be a threat, a statement or 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 . . . ."). Cases employing the new instruction defining "threat" will therefore incorporate the constitutional mens rea as to the result.

defendant had the appropriate mens rea). The trial court could have corrected the error given the clear state of the law at the time that it instructed the jury. We therefore hold that the error was manifest and thus properly addressed on appeal.

3. *Harmless Error*

We must further determine whether the omission of the constitutionally required mens rea from the jury instructions is subject to harmless error analysis. The situation is analogous to one in which the jury instructions omit an element of the crime.[6] An omission of an essential element from the jury instructions may be harmless when it is clear that the omission did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002). This is clear, for example, when the omitted element is supported by uncontroverted evidence. *Id.* at 341. On the other hand, error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds. *See id.* at 341-43 (holding that erroneous accomplice liability instructions were not harmless for any charges against the defendants wherein the jury might have convicted on an improper understanding of the law); *see also Johnston*, 156 Wn.2d at 364-65 (stating that the error was not harmless because the jury could have convicted "merely on the basis that Johnston said the words" of a threat).

[6] 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 Wn. 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.

Here, we cannot know whether the jury properly determined that Schaler's threats to kill his neighbors were "true threats." Certainly, there was evidence that Schaler said he wanted to kill his neighbors, described planning to do so, and dreamt about the event. However, Schaler never explicitly said that he would do so, his behavior at the time was erratic, and he was often contradictory. For example, he said that he wished to kill his neighbor with his bare hands, but in the same breath said that he hoped he did not kill her. Also, when he threatened to fight with the mental health workers who wanted to give him an injection, Schaler said that someone would get hurt but then suggested that, from prior injuries, he himself would be the one hurt.

Such utterances do not unequivocally lead to a finding of a true threat. They are also consistent with an impression of Schaler as mentally unstable and lashing out somewhat incoherently at those around him. *Cf. Johnston*, 156 Wn.2d at 357-58, 364-65 (suggesting that a drunken defendant's outbursts might not have been true threats). Furthermore, Schaler's statements took place in the context of a mental health evaluation, which occurred in the hospital while Schaler received medical treatment. The statements were uttered to a crisis counselor, Heller-Wilson, who testified that Schaler was in the midst of a mental breakdown. Schaler appeared to be very upset at the idea that he might have hurt someone. Indeed, he had called the crisis hotline for help and stated that he was considering suicide.

Thus, while the jury could have concluded that Schaler's statements were serious threats and that a reasonable speaker would so regard them, they could also

have concluded that Schaler's threats were a cry for help from a mentally troubled man, directed toward mental health professionals who could help him.[7] For this reason we cannot conclude on the record that there was "uncontroverted evidence" that Schaler's threats were true threats. Therefore, the omission of a true threat instruction was not harmless. Reversal is required because the jury was not asked to decide whether a reasonable person in Schaler's position would foresee that his statements or acts would be interpreted as a serious expression of intent to carry out the threat, and the evidence was ambiguous on the point.[8]

II. Sufficiency of the Evidence

The final question we must answer is whether the case should be remanded

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[7] Justice J.M. Johnson's dissent revives the debate over a speaker-centric versus a hearer-centric, true threat requirement, arguing that the difference is minimal and matters only in cases in which the victim has an unusual sensitivity. *See* dissent (J.M. Johnson, J.) at 3 n.2, 6. While the standards may yield no meaningful difference in many cases, in this case the difference is not academic. Here, there was a genuine issue of whether a reasonable person in Schaler's position would foresee that threats he uttered to a mental health counselor while receiving medical care, which referred to third parties not present, would be interpreted as serious expressions of intent to harm those third parties. Indeed, the dissenting opinions in this case illustrate that reasonable minds can differ on this question, confirming that it should have been submitted to the jury. *Compare* dissent (J.M. Johnson, J.), *with* concurrence and dissent (Sanders, J.).

[8] Justice J.M. Johnson's dissent criticizes the "policies" behind our holding, arguing that the victims and therapist in this case "did exactly what they were supposed to do," yet our opinion "declares this was not enough to justify the State acting to protect Nockels and Busbin, despite conduct that clearly signaled danger to their lives." Dissent (J.M. Johnson, J.) at 6-7. This argument misdescribes our opinion. At no point do we fault Heller-Wilson for warning Nockels and Busbin, nor do we fault their feeling frightened as a result, nor do we criticize the State for bringing charges. Where we find fault is in the inaccurate jury instructions, which could have allowed the jury to reach a guilty verdict without finding a *constitutionally required* fact. This error was not harmless because, even though the evidence supported finding the fact, the evidence was controverted. We are not motivated by any policy against the justifiable acts of the therapist, victims, or prosecutor. The only policies in play are those enshrined in the constitutional right to trial by jury and proof beyond a reasonable doubt.

for a new trial under proper instructions or instead dismissed. Schaler argues that we should dismiss due to a lack of sufficient evidence to sustain a conviction. *See Burks v. United States*, 437 U.S. 1, 11 & n.6, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."). We do not agree that dismissal is required.

There was ample evidence from which a reasonable jury could determine that Schaler's threats were "true threats." As discussed above, the evidence at trial was open to interpretation as to whether Schaler's threats were "true threats" or a cry for help—but both conclusions were possible. Schaler admitted to Heller-Wilson that he had been planning to kill his neighbors for months and that he wanted to do so. His demeanor did not suggest to Heller-Wilson that his words were idle talk or a joke. Heller-Wilson questioned Schaler to determine if he was serious and came to believe that he was. Moreover, the threats at issue built upon Schaler's history of unpleasant interactions with his neighbors, including the fruit tree dispute (in which he wielded a chain saw) that resulted in his neighbors obtaining restraining orders. From the evidence, the jury could have concluded that a reasonable speaker in Schaler's position would have foreseen that his threats would be interpreted as a serious expression of his intention to take the life of another individual. Double jeopardy therefore does not bar retrial.

III. Invited Error

Justice J.M. Johnson's dissent argues that Schaler knew about the true threats

requirement because he brought a pretrial motion to dismiss based on lack of evidence of a true threat, yet did not request a true threats instruction. The dissent characterizes this as "actively participat[ing] in determining the jury instructions" and "assent[ing] to them." Dissent (J.M. Johnson, J.) at 9. It criticizes us for allowing Schaler to invite error and then, on appeal, obtain a reversal based on it.

Invited error was not raised by the parties at any point in this litigation. *See State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999) ("[W]e are not in the business of inventing unbriefed arguments for parties sua sponte."). Deciding this case on new grounds never considered by the parties is ill advised, at best. Moreover, the invited-error doctrine as applied to jury instructions precludes a defendant from arguing that an instruction he proposed was erroneous. *See State v. Henderson*, 114 Wn.2d 867, 867-71, 792 P.2d 514 (1990); *see also Studd*, 137 Wn.2d at 552 (allowing the defendant to escape the doctrine if he also proposed an instruction correcting the error); *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (interpreting *Studd*'s holding to be that "those defendants *who had proposed the erroneous instruction* without attempting to add a remedial instruction had invited the error" (emphasis added)); *State v. Aho*, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) ("Under the invited error doctrine, a defendant may not *request that instructions be given to the jury* and then complain upon appeal that the instructions are constitutionally infirm." (emphasis added)). The dissent admits that Schaler did not propose the erroneous definition of "threat," which was not limited to true threats, and did not propose the "to convict" instruction. This case should

not be decided on the unbriefed invited-error doctrine.

CONCLUSION

The threats-to-kill provision of the harassment statute must be read in light of the First Amendment to proscribe only "true threats." The provision therefore requires proof that the defendant was (at least) negligent as to his threats' effect on listeners. Specifically, the State must establish that a reasonable person in the defendant's position would foresee that his statements or acts would be interpreted as a serious expression of intention to carry out the threat. The failure of the instructions at Schaler's trial to inform the jury of this requirement was a manifest constitutional error. Furthermore, the error was not harmless because the evidence at trial was open to interpretation. The jury could have concluded that Schaler's outbursts were a cry for help and that a reasonable person in Schaler's situation would not have foreseen them being interpreted as serious. Alternatively, the jury could have concluded that Schaler's utterances constituted a true threat. We therefore reverse Schaler's conviction and remand for a new trial.

AUTHOR:
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WE CONCUR:
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Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice Gerry L. Alexander

Justice Tom Chambers