

No. 42919-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN ALLEN BOOTH, JR.,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court's instructions to the jury misstate the law in the to-convict instructions, thereby denying Booth his right to a trial by jury and requiring this Court to reverse the convictions?
- B. Did the State present sufficient evidence to sustain the conviction for Attempted Extortion in the First Degree?

II. STATEMENT OF THE CASE

David West, Sr., Denise Salts and David West, Jr. lived at 101 Wings Way in Lewis County, Washington.¹ RP (12/9/11) 128-29.² West and Salts had been in a dating relationship for approximately 13 years. RP (12/9/11) 127-28. DJ was West's teenage son. RP (12/9/11) 128; RP (12/12/11) 183. West also had a daughter, Jessica Porter, who lived three and half hours away in White Salmon, Washington. RP (12/12/11) 182, 185.

The weekend of August 8, 2010 Porter, her boyfriend Shane Reynolds, and their two children visited West. RP (12/12/11) 197-98. On August 8, 2010 after a day spent at the lake with his family West was paid a visit by Robbie Russell, John Booth and Ryan McCarthy. RP (12/12/11) 186-87. Porter had never seen Booth

¹ The State will refer to David West, Sr., as West and David West, Jr. as DJ for the remainder of its response. There is no disrespect intended in referring to West, Jr. as DJ, as it is done for clarity purposes and is how most of the witnesses refer to West, Jr.

² The verbatim report of proceedings contains numerous volumes, none of which are sequentially numbered. The State will refer to the report of proceedings by RP then the date of the proceeding followed by the page number.

before and West had never mentioned Booth as being a friend. RP (12/12/11) 191. Russell went into the house with West while Booth and McCarthy stayed outside. RP (12/12/11) 188, 201. Booth then came into the house to use the bathroom, leaving McCarthy outside. RP (12/12/11) 188, 202. Booth exited the bathroom and sat down next to DJ. RP (12/12/11) 188. Booth asked DJ questions regarding Porter's children, if they were DJ's brother and sister and if the two young children lived at the West residence. RP (12/12/11) 188. DJ told Booth that the children were his niece and nephew and they did not live at the West residence. RP (12/12/11) 188. Booth's questions made Porter uncomfortable. RP (12/12/11). Reynolds was also uncomfortable about the situation and he did not like that McCarthy was "outside scoping out the house." RP (12/12/1) 202. Russell emerged from the computer room with West and winked at Booth, who got up, and all three men left the West residence. RP (12/12/11) 189, 203. West appeared upset, which surprised Reynolds. RP (12/12/11) 203. West told Porter to pack up the children and go home immediately. RP (12/12/11) 190.

On August 20, 2010 West and Salts were preparing for a birthday party that was scheduled for August 21, 2010. RP (12/9/11) 129. Later that evening a good family friend, Tony

Williams, came over to the West residence to hang out. RP (12/9/11) 132-33. Later that evening, John Lindberg, another friend of West and Salts, went over to the West residence, arriving around 12:30 a.m. on August 21, 2010. RP (12/7/11) 117-18. When Lindberg pulled up to the residence he had to stop and be let in the gate. RP (12/7/11) 118-19. Lindberg noticed another car come speeding up the road behind him and shut off its lights. RP (12/7/11) 119. The other car drove up, turned around and backed in parking next to Lindberg's car. RP (12/7/11) 120. Lindberg walked up to the front door of the West residence and two men, identified by Lindberg as Booth and McCarthy, got out of the car and were right behind Lindberg when he knocked on the door. RP (12/7/11) 120-23. The three men were let into the house and all three sat down at the kitchen table and waited for West. RP (12/7/11) 121-22.

Lindberg had a conversation with Booth while sitting at the kitchen table. RP (12/7/11) 125-26. Booth asked West about a truck and West got on the computer to show Booth photographs of the truck. RP (12/7/11) 126-27. Booth asked West if they could step out back. RP (12/7/11) 130. West and Booth were outside for approximately 15 to 20 minutes. RP (12/7/11) 130. When West

returned to the kitchen his face was red and he appeared stressed out. RP (12/7/11) 146. West asked Lindberg if he had any money West could borrow. RP (12/7/11) 146. Lindberg told West he had 100 dollars West could borrow. RP (12/7/11). West then walked out of the kitchen and Lindberg followed West to the master bedroom. RP (12/7/11) 147. Lindberg informed West that he had more money but he did not want to tell West in front of Booth. RP (12/7/11) 148. Lindberg told West he could have the money. RP (12/7/11) 148. West told Lindberg, "Fuck it. I'm going to end this bullshit once and for all." RP (12/7/11) 148. West then grabbed a shotgun, walked out of the bedroom, cocked back the gun, aimed it towards the table and ordered Booth and McCarthy to leave. RP (12/7/11) 149, 201. The next thing Lindberg heard was rapid gunfire that was not from the shotgun. RP (12/7/11) 150-51. Lindberg heard three or four shots and saw West start to lean over and fall to the ground. RP (12/7/11) 151.

Salts was outside watering her tomatoes when she heard gunshots coming from inside the house. RP (12/9/11) 139. Salts entered the house from the back door near the kitchen. RP (12/9/11) 140. Salts walked through the door and saw McCarthy sitting at the kitchen table and Booth standing next to him. RP

(12/9/11) 140. Booth said "How are you doing?" and then said something to Salts about calling the police. RP (12/9/11) 169. Salts saw West sitting down on the floor and realized something was wrong. RP (12/9/11) 141. Salts was about to walk back out the back door when Booth came to the door and shut it. RP (12/9/11) 141. Booth then shot Salts in the face. RP (12/9/11) 142. Salts fell to the floor and laid there until Booth left. RP (12/9/11) 143.

Lindberg heard Salts' voice and then a bang and Salts hitting the floor. RP (12/7/11) 151. Lindberg was hiding in the master bedroom. RP (12/7/11) 152. Lindberg heard Williams say, "Don't. You don't have to shoot." RP (12/7/11) 152. Lindberg heard what sounded like a magazine come out of gun and it sounded like the gun was jammed or Booth was reloading. RP (12/7/11) 152. Lindberg was pacing in the master bedroom thinking he was going to die next. RP (12/7/11) 153. Lindberg stated that he heard someone come down the hall and saw McCarthy go into DJ's room. RP (12/7/11) 153-54. According to Lindberg, DJ and Booth were in the hall and Booth grabbed DJ by the hair and was holding DJ down by West's head.³ RP (12/7/11) 154. Lindberg then described seeing Booth shoot West in the head. RP (12/7/11) 154. Lindberg

³ It should be noted that it is clear from other testimony that the man in the hallway was not West but was actually Williams.

explained that Booth and DJ walked away and while they had their backs turned Lindberg made a run for it and hid in the master bathroom. RP (12/7/11) 154. Lindberg closed the bathroom door and heard another gunshot and someone hit the floor, which he assumed was DJ. RP (12/7/11) 155. Lindberg hid in the bathroom for approximately 20 to 30 minutes. RP (12/7/11) 156. Lindberg then made a run for it, running out the front door of the West residence and ran for the gate. RP (12/7/11) 156-58. The vehicle Booth and McCarthy had arrived in was gone. RP (12/7/11) 158. At trial Lindberg testified, "Oh, it didn't take more than five minutes to kill everybody." RP (12/7/11) 168.

A neighbor called 911 and reported the shooting. RP (12/13/11) 113. Lewis County Sheriff's Deputies Curtis Spahn, Christopher Rubin, Matthew Wallace and Christopher Fulton along with Reserve Deputy Clarence Lupo initially responded to the shooting at 101 Wings Way. RP (12/7/11) 215, RP (12/13/11) 168, 213. While on his way to the scene Deputy Wallace saw a white Camaro that had been reported as leaving the site of the shooting. RP (12/7/11) 215. The Camaro stopped without being signaled to by Deputy Wallace and Deputy Wallace contacted the driver of the car, Lindberg. RP (12/7/11) 218-19. Lindberg was very nervous,

visibly shaking, unable to control his hands, crying and extremely excited. RP (12/7/11) 221-22. Lindberg told Deputy Wallace that Booth had done the shooting. RP (12/7/11) 233.

The deputies arrived at the West property, tactically approached the residence, knocked and announced and eventually made entry into the West residence. RP (12/13/11) 168-72. Deputy Wallace immediately announced there was a body on the floor. RP (12/13/11) 173. Deputies saw Salts lying on the kitchen floor, covered in blood, moaning and groaning. RP (12/13/11) 174, 230. Deputy Lupo stated that the kitchen floor looked like a slaughter house. RP (12/13/11) 233. There was blood on the floor that coagulated and the cabinets had what appeared to be marks on them in blood where someone was trying to get up. RP (12/13/11) 233. Salts had tried to scoot herself over to West, leaving the bloody mess in the kitchen. RP (12/9/11) 143-44. Salts was airlifted to Madigan Hospital where she was treated for a life-threatening gunshot wound to her face. RP (12/7/11) 109-10, 113; RP (12/13/11) 196.

West was found, deceased, partially propped up on a wall. RP (12/12/11) 215. There was a single-shot shotgun by West's side, lying parallel to West with the barrel facing towards the dining

room table. RP (12/12/11) 215. West sustained at least three gunshot wounds, one to the abdomen, one into his thigh and a third, fatal shot, to the head. RP (12-8-11) 52-57. DJ was found, deceased, between an end table and the couch. RP (12/12/11) 215. DJ sustained a close-range (less than two feet) gunshot wound to the left side of his head. RP (12/8/11) 38-39. The bullet entered the left side of DJ's head, exited the right side of his neck and then reentered his body around his collarbone. RP (12/8/11). DJ had a second gunshot wound that exited the left upper part of DJ's neck behind the left ear. RP (12/8/11) 45-46. This second gunshot was not likely the fatal shot. RP (12/8/11) 45-46. Williams was located, deceased, in the hallway between the east and west bedrooms. RP (12/12/11) 217. William's head was resting against the doorjamb area entering the east bedroom and his feet were at the west bedroom. RP (12/12/11) 217. Williams was shot in the head, in his right eye. RP (12/8/11) 58. Williams was shot at extremely close range and there was stippling and tattooing on Williams' face similar to that found on Salt's face. RP (12/8/11) 66. Williams was shot from approximately 10 inches away. RP (12/8/11) 76.

Booth called Gregory Sage around seven in the morning on August 21, 2010. RP (12/9/11) 112. Sage recalled that Booth was

not his normal composed self, but instead sounded frantic and anxious. RP (12/9/11) 112. Booth told Sage that a man had pulled a shotgun on Booth and he had to drop the man. RP (12/9/11) 113.

Booth was eventually located and arrested in Spokane. RP (12/13/11) 62-63. Booth had been staying at Michael Yeager's house while in Spokane. RP (12/7/11) 70. Yeager did not know Booth but allowed Booth to stay at his home because Yeager's neighbor had asked if Booth could stay at Yeager's house. RP (12/7/11) 70.

Detective Sergeant Breen listened to Booth's jail phone calls, which were being recorded. RP (12/13/11) 12-13. One call that caught Detective Sergeant Breen's attention was made by Booth to the Zacher residence in Spokane. RP (12/13/11) 14-15. On February 15, 2011 Booth spoke to Eric Zacher and told Zacher that Booth was concerned that he had left his "heater" on in Yeager's attic. Ex. 107.⁴ This statement caught Detective Sergeant Breen's attention because Booth had stayed with Yeager in August and the weather would not have been cold. RP (12/13/11) 18-19. Booth also asked Zacher to "shoot on over" to check on the heater. Ex. 107. Detective Sergeant Breen believed that Booth was

⁴ The State will be filing a supplemental designation of Clerk's papers designating exhibit 107 – the phone call from Booth to Eric Zacher.

discussing the location of the firearm used in the murders. RP (12/13/11) 18-19. Detective Sergeant Breen requested Spokane Police Department go back over to Yeager's residence and get a consent to search for the firearm. RP (12/13/1) 19. Detective Dave Knetchel with the Spokane County Sheriff's Office went back to Yeager's residence in February 2011 to attempt to locate the firearm. RP (12/7/11) 85-86. Detective Knetchel located a nine millimeter pistol in the attic in Yeager's garage. RP (12/7/11) 89, 93. The gun was found in a holster, loaded, with a bullet in the chamber. RP (12/7/11) 93. Testing of the undamaged bullets from the West home revealed they had been fired from the gun recovered in Yeager's attic. RP (12/12/11) 30, 68, 41-42, 45, 49, 54. The crime laboratory only found Booth's DNA on the gun. RP (12/9/11) 95.

The State charged Booth with Count I: Murder in the Second Degree, for the death of West; Count II: Murder in the First Degree, for the death of DJ; Count III: Murder in the First Degree, for the death of Williams; Count IV: Attempted Murder in the First Degree, for the shooting of Salts; Count V: Attempted Extortion in the First Degree; and Count VI: Unlawful Possession of a Firearm in the First Degree. CP 69-75. The State alleged in Counts I-V that Booth

was armed with a firearm. CP 69-74. The State alleged in Counts I-VI that Booth committed multiple current offenses, coupled with his high offender score, results in some of the current offenses going unpunished. CP 69-75. The State also alleged in Counts II and III that Booth demonstrated or displayed an egregious lack of remorse. CP 70-42.

Booth filed a number of pretrial motions, including a motion to change venue, a motion to suppress evidence and a motion to dismiss, which were denied by the trial court. RP (10/28/11) 66-78, 92-106; RP (11/21/11) 2-7; CP 52-56, 77, 89-315, 425-56.

Booth elected to have his case tried by a jury. See RP (12/5/11). The State presented its evidence and witnesses, including a number of people who testified regarding Booth's dealings with collecting drug debts in the Lewis County area. RP (12/12/11) 125-177. Booth testified in his own defense. RP (12/14/11) 60. Booth testified that he was a drug dealer who had met West in July 2010. RP (12/14/11) 61. According to Booth, he fronted West a pound of methamphetamine for the agreed price of 14,000 dollars, to be paid back to Booth in a week. RP (12/14/11) 61-62. West did not have all the money the following week so Booth and West agreed to a payment plan of 1,000 dollars a week.

RP (12/14/11) 62. Booth explained that on August 20, 2010 he went to the West home with a friend to collect the payment owed by West. RP (12/14/11) 62-64. West did not have the money when Booth arrived. RP (12/14/11) 63-64. Booth testified that he left his friend at the West residence to collect the money with the understanding that once West gave Booth's friend the money the friend would leave. RP (12/14/11) 63-64. Booth explained he received a phone call from his friend and Booth called Dee Draper to give his friend a ride. RP (12/14/11) 64. Booth stated he saw his friend the next day and the friend gave Booth the rundown of what had occurred at the West residence. RP (12/14/11). Booth testified that he took the gun from his friend and cleaned up with WD-40 with the intention of circulating the gun back on the street. RP (12/14/11) 65.

During cross-examination Booth refused to name the "friend" who Booth supposedly left at the West residence to collect the money. RP (12/14/11) 81-83. The deputy prosecutor asked for the name and Booth responded, "Joe Nameless." RP (12/14/11) 81. The deputy prosecutor asked again about "Joe Nameless" and Booth responded, "That or Joe Mama." RP (12/14/11) 83. The deputy prosecutor asked if this was funny to Booth and Booth

replied, “You’re amusing me.” RP (12/14/11) 83. Later during cross-examination the deputy prosecutor asked Booth if he had shot anyone else the evening of August 20, 2010. RP (12/14/11) 89. Booth responded, “Thinking about shooting you.” RP (12/14/11) 89.

Booth was found guilty as charged on all six counts. CP 557-562. The jury also found that Booth was armed with a firearm and displayed or demonstrated an egregious lack of remorse.⁵ CP 563-69. Booth was sentenced as a persistent offender to life in prison. RP (12/16/11) 34-35; CP 634-42.

The State will supplement the facts as necessary throughout the argument below.

III. ARGUMENT

A. THE TO-CONVICT INSTRUCTIONS DID NOT CONTAIN MISTATEMENTS OF THE LAW AND THEREFORE BOOTH’S RIGHT TO A TRIAL BY JURY WAS NOT VIOLATED BY THE LANGUAGE OF THE INSTRUCTIONS.

Booth contends that all of the to-convict instructions contain language that is a misstatement of the law and therefore Booth’s constitutional right to a jury trial was violated. Brief of Appellant 13. Booth argues that the language, “then it will be your duty to return a

⁵ The State erred when it submitted Special Verdict Form A-1 and asked the jury to return a special verdict of whether Booth was armed with a deadly weapon at the time of the commission of Count I, Murder in the Second Degree. Therefore, Booth did not receive a firearm enhancement on Count I, he received a deadly weapon enhancement.

verdict of guilty” is incorrect because a jury does not have a duty to convict. CP 527, 530-32, 536, 540; Brief of Appellant 13. The to-convict instructions contain the proper language, correctly reflect the law and, therefore, Booth’s right to a jury trial was not violated by the trial court’s instructions to the jury. Booth’s convictions should be affirmed.

1. Standard Of Review

Challenged jury instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793 (2012). Constitutional violations are reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

2. The Duty Language In The To-Convict Jury Instructions Did Not Violate Booth’s Right To A Jury Trial.

Booth contends that certain language in every single WPIC to-convict jury instruction renders them all unconstitutional. Brief of Appellant 13. Booth’s argument is, in essence, every single conviction ever obtained using a WPIC to-convict jury instruction is subject to reversal. Specifically, Booth contends that the following language is a misstatement of the law:

If you find from the evidence that each of these elements has 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 the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 527, 530-32, 536, 540; WPIC 26.02; WPIC 27.02; WPIC 100.02; WPIC 133.02. Booth argues that the language, "it will be your duty to return a verdict of guilty," violates his right to a jury trial because a jury does not have a duty to convict. Brief of Appellant 13.

The language Booth complains is included in every WPIC to-convict jury instruction. See *e.g.* WPIC 26.04; WPIC 26.06; WPIC 40.02. This same argument has been rejected by both Division One and Division Two of the Washington State Court of Appeals. *State v. Brown*, 130 Wn. App. 767, 124 P.3d 663 (2005); *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998), *rev. denied* 137 Wn.2d 1024 (1999); *State v. Meggyesy*, 90 Wn. App. 319, 958 P.2d 319, *rev. denied*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005). The Supreme Court has repeatedly denied review. Under the principles of *stare decisis*, a court cannot overturn a prior holding unless it is shown by clear evidence that it is both incorrect

and harmful. *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Booth has failed to make any new arguments sufficient to meet this burden.

3. *Meggyesy* Is A Correct Statement Of The Law.

In *Meggyesy*, the defendant argued that the above cited language violated his “right to trial” under the state and federal constitutions. Division One rejected *Meggyesy*’s argument. Here, in short, Booth claims that Division One (and Division Two in subsequent cases) got it wrong – over and over again.

In *Meggyesy*, the court held that the to-convict instruction did not implicate the federal constitutional right to a jury trial or misstate the law, and that neither the state nor the federal constitutions invalidated the instruction. *Meggyesy*, 90 Wn. App. at 701-04 (applying the six-step analysis set forth in *State v. Gunwall*, 106 Wn.2d 54, 59, 720 P.2d 808 (1986)).⁶ In rejecting *Meggyesy*’s argument, the court noted that the challenged language appropriately directed the jury to consider the evidence and to determine whether the State had proven each element of the offense beyond a reasonable doubt. *Meggyesy*, 90 Wn. App. at

⁶ The *Gunwall* factors are: (1) the language of the Washington Constitution, (2) differences between the state and federal language, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern.

699. In so ruling the court was fully aware and acknowledged that juries do have the power to acquit against the evidence – Booth’s arguments to this Court. *Id.* at 700, citing *United States v. Simpson*, 460 F.2d 515, 519 (9th Cir. 1972). At the same time, the court recognized that instructing the jury that it “may” convict, Meggyesy’s proposed instruction, is tantamount to notifying the jury of its power to acquit against the evidence and that the defendant is not entitled to a jury nullification instruction. *Meggyesy*, 90 Wn. App. at 700. The court noted that under the federal constitution, the circuit courts have clearly held that while jury nullification is always possible, no case has held that an accused is entitled to a jury nullification instruction. *Id.* Booth does not cite contrary authority here. As the court stated, because the judge did not instruct the jury to render a guilty verdict, but only to convict if all elements of the charge were met beyond a reasonable doubt, the instructions did not invade the province of the jury. *Id.* at 699-701.

Meggyesy also argued, as Booth does, that under the state constitution the result must be different. The court in *Meggyesy* rejected that argument as did this Court in *Brown* and *Bonisisio*.

Booth does not address *State v. Wilson*, which is discussed in *Meggyesy*.⁷ *Wilson* complained of an instruction that stated that if the jury found the elements of the crime, the jury “must” find the defendant guilty. *State v. Wilson*, 9 Wash. 16, 21, 36 P. 967 (1894). The Supreme Court stated that taking all the language in context, “it clearly appears that all the court intended to say was that, if they found the evidence that all the acts necessary to constitute the crime had been committed by the defendant, the law **made it their duty** to find him guilty.” *Wilson*, 9 Wash. At 21 (emphasis added). The Court held that there was no instructional error. *Id.*

Meggyesy was correctly decided by Division One and followed by this Court in subsequent cases. The challenge Booth is making has been made multiple times, in *Meggyesy*, *Brown* and *Bonisisio*, if not other cases. This Court should continue to adhere to law from these cases and find Booth’s argument does not merit reversal.

4. Booth Ignores This Court’s Holding In *Brown*.

Booth attempts to distinguish his case and argument from *Meggyesy* and *Bonisisio* by arguing that he is attacking the “duty” language. Brief of Appellant 25-7. Booth further argues that unlike

⁷ *Meggyesy*, 90 Wn. App. at 703, citing *State v. Wilson*, 9 Wash. 16, 36 P. 967 (1894).

Meggyesy and *Bonisisio* he did not request a jury instruction that affirmatively notifies the jury of its power to acquit. Brief of Appellant 26. While it is true that Booth did not request a jury instruction that stated the jury may convict like the defendant's did in *Meggyesy* and *Bonisisio*, Booth fails to acknowledge the subsequent case, from this Court, that has upheld the "duty" language. See *Brown*, 130 Wn. App. at 770-71.

Brown argued that the to-convict instruction, which contained the same duty language as Booth's, violated his right to a jury trial. *Id.* at 770. Brown made the same argument as Booth does, that the instruction misled the jury into believing it lacked the power to acquit against the evidence. *Id.* Brown argued to this Court that his case was distinguishable from *Meggyesy* and *Bonisisio* because he did not ask for a jury instruction that stated the jury may convict and Brown was instead attacking the "duty" language in the to-convict instruction. *Id.* at 770-71. Brown further argued that the "duty" language conveyed to the jury that they could not acquit Brown if the State had proven the elements beyond a reasonable doubt. *Id.* at 771. This Court held that it found "no meaningful difference between Brown's argument and the issues raised in *Bonisisio* and *Meggyesy*." *Id.* This Court acknowledged that the argument was

slightly different but “reject[ed] Brown’s argument that the court erred in giving the “duty” instruction.” *Id.*

Booth’s argument is no different than the argument Brown made and this Court rejected over seven years ago. This Court should not depart from this precedent and should affirm Booth’s convictions.

B. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO THE JURY TO SUSTAIN BOOTH’S CONVICTION FOR ATTEMPTED EXTORTION IN THE FIRST DEGREE.

The State presented sufficient evidence to sustain the jury’s conviction for Attempted Extortion in the First Degree. Booth argues the State did not prove that Booth intended to make or implied a threat of bodily injury to West, a necessary element of the crime. Brief of Appellant 28-30. The State respectfully disagrees with Booth’s interpretation of the evidence presented at trial. The evidence was sufficient to prove Booth guilty beyond a reasonable doubt.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a

reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. There Was Sufficient Evidence Presented To Prove Booth Committed Attempted Extortion In The First Degree.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *Salinas*, 119 Wn.2d at 201. If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

The State charged Booth with Attempted Extortion in the First Degree. CP 73-74. The elements of Extortion in the First Degree are: "knowingly obtains or attempts to obtain property or services of another by threat that communicates directly or indirectly an intent to cause bodily injury in the future to the person threatened or to any other person." CP 534; RCW 9A.56.110; RCW 9A.56.120(1); WPIC 76.01. In order to prove Attempted Extortion in the First Degree the State was required to prove that Booth took a substantial step towards the commission of Extortion in the First Degree. RCW 9A.28.020; RCW 9A.56.120; WPIC 100.01; CP 534.

A substantial step is defined as “conduct that strongly indicates a criminal purpose and that is more than mere preparation.” WPIC 100.03; CP 533.

The State elicited testimony from a number of people regarding Booth’s activities in collecting, or taxing, for debts. Hankins testified that he had met Booth in February 2010. RP (12/12/11) 163. Hankins owed Russell money, 2,100 dollars, for methamphetamine he had purchased from Russell. RP (12/12/11) 163-64. Russell met with Hankins regarding the debt and Booth came with Russell to that meeting. RP (12/12/11) 163. Later, on August 20, 2010 Hankins got in contact with Booth regarding a debt that Russell believed Hankins owed Russell. RP (12/12/11) 165-67. Russell held Hankins responsible for his currently pending felony charges and believed Hankins owed Russell indefinitely, which meant Russell could come and get money from Hankins whenever he wanted. RP (12/12/11) 166. Hankins figured Booth would most likely come out and try to enforce and collect the unlimited debt for Russell. RP (12/12/11) 168. There was an agreement, prior to the meeting that Booth would not attempt to enforce the debt at that time. RP (12/12/11) 168. Hankins did not actually owe Russell, or Booth, any money at the time of the meeting. RP (12/12/11) 170.

Linn Perry testified that his son, Conrad, got in trouble from time to time and Perry went to his son's garage to check up on Conrad in July 2010. RP (12/12/11) 174-75. Perry met Booth at Conrad's garage.⁸ RP (12/12/11) 174-75. Perry saw Booth again at Conrad's garage approximately a week after their initial meeting. RP (12/12/11) 176. Booth informed Perry that Conrad owed Booth money. RP (12/12/11) 176. Booth told Perry that he could pay the debt if Perry wanted to. RP (12/12/11) 176. Perry informed Booth that he was talking to the wrong person. RP (12/12/11) 176. Booth told Perry that he had killed for five dollars before and that if Conrad did not pay up he would kill Conrad. RP (12/12/11) 176. Booth also threatened to kill Perry. RP (12/12/11) 177.

Wolfe met Booth several weeks prior to August 20, 2010. RP (12/12/11) 126. Booth told Wolfe that he had a nine to five job as a painter in Tacoma but he was in Lewis County doing his side job, taxing people. RP (12/12/11) 133. Wolfe explained that Booth meant he was collecting debts, drug debts. RP (12/12/11) 133. Wolfe accompanied Booth out to the West residence. RP (12/12/11) 134-36. After leaving the West residence Booth and his friend were discussing how this gentleman (West) owned a Harley,

⁸ The State will refer to Linn Perry as Perry and Conrad Perry as Conrad for clarity purposes, no disrespect intended.

that the debt was not satisfied and Booth needed to make a phone call. RP (12/12/11) 139. Wolfe testified that Booth had taken some compensation "but not all debt was satisfied. So whoever they needed to contact was not going to be happy, but they did take a portion of the drugs and portion of the money and that's how - - they were like 'We should have just took the bike. She can drive a five speed.'" RP (12/12/11) 140.

Porter and her boyfriend, Reynolds, visited Porter's father, West, the weekend of August 8, 2010. RP (12/12/11) 182-85, 197-98. On August 8, 2010 Russell, Booth and McCarthy paid West a visit. RP (12/12/11) 186-87, 199. Russell went inside and spoke with West while Booth and McCarthy waited outside. RP (12/12/11) 188. Porter went back in the house with her two children who were around between one and four years of age. RP (12/12/11) 186, 188. Booth came inside the house to use the bathroom and then sat down in the living room area next to DJ. RP (12/12/11) 188. Booth started asking DJ questions about Porter's children. RP (12/12/11) 188. Booth asked DJ if the kids lived at the house and if they were DJ's brother and sister. RP (12/12/11) 188. Booth's question made Porter uncomfortable. RP (12/12/11) 188. Reynolds was uncomfortable about the three men being at the house,

especially with McCarthy “outside scoping out the house.” RP (12/12/11) 202. Reynolds testified that he felt afraid and intimidated, particularly because his kids were present. RP (12/12/11) 202. Russell and West walked out of the computer room and Russell winked at Booth, who got up and left with Russell. RP (12/12/11) 189, 203. West appeared to be scared and upset, which surprised Reynolds. RP (12/12/11) 203. West told Porter that she, Reynolds and the kids needed to go home, which was odd because during previous visits West never told Porter to leave, and West wanted her to leave immediately. RP (12/12/11) 191.

Robert Downing has known West for five years and considered West a close friend. RP (12/12/11). West had purchased a boat at auction for 6,500 dollars. RP (12/12/11) 121. West called Downing on August 20, 2010 to ask Downing to come to the West residence. RP (12/12/11) 119. West wanted to sell his boat to Downing. RP (12/12/11) 119. According to Porter, West liked going out on his boat and had not spoken of selling it. RP (12/12/11) 184. Downing testified that West was anxious when he spoke to Downing on August 20, 2010. RP (12/12/11) 122. West offered to sell Downing the boat for only 1,000 dollars. RP (12/12/11) 122.

Lindberg arrived at the West residence around 12:30 a.m. on August 21, 2010. RP (12/7/11) 117-18. As Lindberg was driving up the driveway another vehicle came speeding down the roadway, pulled in right behind Lindberg and shut off its lights. RP (12/7/11) 119. Lindberg walked up to the front door of the West residence and the two men in the car, Booth and McCarthy, were right behind him. RP (12/7/11) 120-21, 123. Booth and McCarthy walked into the house behind Lindberg. RP (12/7/11) 121. Booth and McCarthy sat down at the kitchen table with Lindberg. RP (12/7/11) 121-22. Booth asked West about a truck. RP (12/7/11) 126-27. Booth asked West if West had any pictures of the truck. RP (12/7/11) 127. West showed Booth pictures of the truck on West's computer. RP (12/7/11) 127.

Booth asked West if they could step outside to talk. RP (12/7/11) 130. West appeared calm when he went outside to speak to Booth. RP (12/7/11) 146. Booth and West were outside for approximately 15 to 20 minutes and when they came back inside West appeared very stressed and his face was beat red. RP (12/7/11) 146. Booth walked in and leaned against the back counter, crossing his arms and just looked around which made Lindberg feel intimidated. RP (12/7/11) 200. West asked Lindberg if

Lindberg had any money West could borrow. RP (12/7/11) 146. Lindberg told West he had 100 dollars. RP (12/7/11) 146. Lindberg then followed West back to the master bedroom to tell West he had more money West could have and explained he did not want to tell West in front of Booth. RP (12/7/11) 148. At this point West said, "Fuck it. I'm going to end this bullshit once and for all." RP (12/7/11) 148. West then grabbed a shotgun, walked out of the master bedroom, cocked the gun and aimed it towards the table. RP (12/7/11) 149. West told Booth and McCarthy to leave. RP (12/7/11) 201. Lindberg testified that the next thing he heard were shots being fired. RP (12/7/11) 150.

Salts testified that she did not expect to see Booth and McCarthy the evening of August 20, 2010 and was surprised when they showed up so late at night. RP (12/9/11) 138-39. Salts explained that Booth and McCarthy were not friends of West and prior to August 2010 she had never seen Booth or McCarthy. RP (12/9/11) 136.

The State presented a case full of circumstantial evidence to prove Booth committed the crime of Attempted Extortion in the First Degree on or about and between August 8, 2010 and August 21, 2010. The State proved that Booth took a substantial step to

attempt to obtain property by threat of bodily injury to either West or any other person. Booth was known to “tax” people for drug debts. RP (12/12/11) 133, 139-40, 163, 168, 176-77. Booth had previously threatened to kill Linn and Conrad Perry for not paying Conrad’s debt. RP (12/12/11) 176-77. Booth had been over to the West residence previously with Russell on August 8, 2010. RP (12/12/11) 186-87, 199. While at the West residence Booth asked a number of questions of DJ regarding the small children who were at the house. RP (12/12/11) 188. The questions made Porter uneasy and Reynolds felt intimidated in part because his children were present. (12/12/11) 188, 202. When Russell, Booth and McCarthy left West appeared to be upset and scared. RP (12/12/11) 203. West was scared enough by the visit that he demanded his daughter pack up her stuff and the kids and leave immediately. RP (12/12/11) 191. The logical inference from this encounter is that West was concerned about his daughter and grandchildren’s safety.

West was trying to come up with money by selling his boat. RP (12/12/11) 119-22. West offered to the sell the boat at a significant loss of 5,500 dollars. RP (12/12/11) 121-22. West was obviously desperate to come up with the money that he knew Booth would be back to collect.

Booth showed up to the West residence, unexpected, late in the evening August 20, 2010 or very early in the morning August 21, 2010. RP (12/9/11) 138-39, RP (12/17/11) 117-121. Booth, by his own admission, was carrying a loaded pistol while he was at the West residence. RP (12/14/11) 70. Booth also admitted that his line of work included assaulting people, which was evidenced by his criminal record that Booth recited for the jury. RP (12/14/11) 67-69. Booth asked about a truck. RP (12/7/11) 126-27. After looking at pictures of the truck Booth asked to speak to West outside. RP (12/7/11) 130. When West returned from speaking to Booth, his demeanor had notably changed. RP (12/7/11) 146. West was stressed and his face was red. RP (12/7/11) 146. West asked Lindberg for money. RP (12/7/11) 146. Next, West retrieved his single-shot shotgun from his bedroom and told Lindberg, "Fuck it. I'm going to end this bullshit once and for all." RP (12/7/11) 148; RP (12/12/11) 219. West ordered Booth and McCarthy to leave after cocking the shotgun and pointing it at the men. RP 12/7/11) 149, 201.

The State only had to prove that Booth took a substantial step towards attempting to obtain money by the threat of bodily harm. The State does not have to prove that Booth actually

threatened West or anyone else with bodily harm. Booth's actions, by showing up to the West residence with McCarthy, unannounced and carrying a loaded firearm while attempting to collect an alleged drug debt is sufficient evidence that Booth took a substantial step towards committing Extortion in the First Degree. The evidence submitted to the jury regarding Booth's activities in attempting to extort money from others and collecting on behalf of Russell give credibility to the State's case. The actions of West, appearing upset after Russell, Booth and McCarthy paid him a visit and scared enough to order his daughter and grandchildren to leave immediately also are telling. West is scared and he is scared for a reason. These people are threatening harm to West and/or his family if he does not pay up. West was so desperate to come up with money that he was willing to sell his beloved boat and ask a friend for whatever cash he had on hand.

There was sufficient evidence presented to the jury, when viewing the evidence in the light most favorable to the State, for any jury to find Booth guilty of Attempted Extortion in the First Degree. This Court should affirm Booth's conviction.

IV. CONCLUSION

There was no error in the to-convict instruction. The instruction did not violate Booth's right to a jury trial by telling the jury it had a duty to convict Booth if the State proved all of the elements of the charged offenses beyond a reasonable doubt. The State also presented sufficient evidence to the jury to find Booth guilty of Attempted Extortion in the First Degree. For the foregoing reasons, this court should affirm Booth's conviction.

RESPECTFULLY submitted this 9th day of April, 2013.

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by: _____
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