No. 30437-0-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

KATHY ANN HENDRICKSON,

Defendant/Appellant.

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# Appellant's Brief

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3. The evidence was insufficient to support the conviction for threatening to bomb or injure property (Count 5).

4. The convictions for cyberstalking (Counts 1 & 2), threatening to bomb, harassment, and intimidating a public servant encompass the same criminal conduct.

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2. Was Ms. Hendrickson's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of intimidating a public servant?

3. Was Ms. Hendrickson's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth

Amendment violated where the State failed to prove the essential elements of the crime of threatening to bomb or injure property (Count 5)?

4. Do the convictions for cyberstalking (Counts 1 & 2), threatening to bomb, harassment, and intimidating a public servant encompass the same criminal conduct?

## C. STATEMENT OF THE CASE

Kathy Hendrickson was convicted by a jury of three counts of felony cyberstalking, two counts of threatening to bomb or injure property, two counts of felony harassment, two counts of intimidating a public servant, and one count of identity theft. RP 416-17. The alleged victims of cyberstalking (Counts 1 & 2), the two counts of threatening to bomb or injure property, the two counts of felony harassment, and the two counts of intimidating a public servant were Judge John Lohrmann, a superior court judge, and Richard Wernette, a judicial candidate[1]. RP 366-80. All the charges involving these two victims were based on the single act of sending each of them a threatening e-mail. RP 403. The e-mail sent to Judge Lohrmann read as follows:

Subject: Are you ready for the big BANG!

[1] Judge Richard Wernette was a candidate for superior court judge at the time these offenses were committed but was defeated. He is currently a municipal court judge in College Place WA. RP 150-51

> Election is finally coming to a halt. Are you ready for the BIG BOOM! If elected. YOU will pay the ultimate price. Get it. You are the biggest losers to even be appointed. Life is so short. The end is near. Say your goodbyes.

Exhibit No. 7.

The alleged victim on the remaining count of cyberstalking and the identity theft was Greg Riordan, a person with whom Ms. Hendrickson was romantically involved for 7-8 months in 2006. After the relationship ended, Ms. Hendrickson allegedly sent threatening e-mails to Riordan using a different name and e-mail address, and purchased various items off the internet using Riordan's credit card numbers. RP 13-29.

The court allowed testimony through Joseph Fisk and Detective Maidment of a prior incident under ER 404(b). In that incident Ms. Hendrickson allegedly engaged in similar behavior following the breakup of a romantic relationship and was ultimately convicted of stalking. RP 51-63, 319. Ms. Hendrickson objected to this evidence on the basis that it was irrelevant to the current charge and more prejudicial than probative. RP 2. The Court allowed the evidence finding it relevant and more probative than prejudicial. RP 3.

This appeal followed. CP.

## D. ARGUMENT

1. The trial court abused its discretion in allowing evidence of other acts contrary to ER 404(b).

ER 404(b) prohibits evidence of other crimes to show that the defendant acted in conformity with that character--had a propensity to commit this crime. But evidence of prior crimes may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). To admit evidence of prior convictions under ER 404(b), the court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify, as a matter of law, the purpose of the evidence; (3) conclude that the evidence is relevant to prove an element of the crime charged; and, finally, (4) balance the probative value of the evidence against its prejudicial effect. *State v. Williams*, 156 Wn.App. 482, 490, 234 P.3d 1174 (2010) (citing *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). A trial court's decision to admit evidence of a defendant's prior acts will be reversed showing an abuse of the court's discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

A trial court must determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such

evidence, in view of the other means of proof and other factors. ER 403; Comment, ER 404(b); *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. *State v. Rice*, 48 Wn.App. 7, 13, 737 P.2d 726 (1987). When considering misconduct which does not rise to a level of criminal activity, but which may nonetheless disparage the defendant, extreme caution must be used to avoid prejudice. *State v. Myers*, 49 Wn.App. 243, 247, 742 P.2d 180 (1987) (*citing* 5 K. Tegland, Wash.Prac., Evidence, Comment 404, at 258 (2d ed. 1982)). " 'In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.' " *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)(quoting *State v. Bennett*, 36 Wn.App. 176, 180, 672 P.2d 772 (1983)).

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401; *State v. Lough*, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). In *Lough*, the Supreme Court concluded the trial court did not abuse its discretion in deciding that the evidence of prior druggings and rapes was relevant to the specific issue of whether the conduct on which

the current rape charge was based actually occurred or was, as the Defendant contended, a fabrication or mistake by the victim. *Id*. The evidence was relevant to a material assertion of the Defendant that the victim had consented to sexual intercourse and to the question whether he rendered her so helpless that she was unable to refuse. The complaining witness was the only witness. Her credibility was difficult to assess because of faulty memory. The evidence of prior similar conduct was thus highly relevant to show the existence of a plan to drug, render unconscious and rape women with whom the Defendant had a personal relationship. Therefore, the Court concluded that the trial court did not abuse its discretion in deciding the testimony of the other four women was relevant. *Id*.

The present case is distinguishable from *Lough*. Here, there is not a problem with the victim being the sole witness or having a faulty memory from being drugged, as was the case in *Lough*. Two of the alleged victims in this case were judges so their credibility is impeccable. The remaining victim, Mr. Riordan, was in the Army Corp of Engineers and his concise testimony was supported by a host of State witnesses including a handwriting expert and a computer forensics expert. See RP 8, 67, 107, 116, 164, 224, 294.

Thus, unlike *Lough*, evidence of the prior incident is not essential to make the existence of any fact that is of consequence in the current incident more probable or less probable than it would be without the evidence. Instead, the evidence of the other crime only shows that Ms. Hendrickson acted in conformity with that character exhibited in the prior incident and had the propensity to commit this crime. This is precisely the type of evidence prohibited by ER 404(b). The probative value of this evidence was minimal and was far outweighed by its prejudicial effect. Therefore, the trial court abused its discretion in allowing the evidence.

2. Ms. Hendrickson's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of intimidating a public servant.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[T]he use of the reasonable-doubt standard is

indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship,* 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore,* 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin,* 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green,* 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant."

*Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

A person is guilty of intimidating a public servant if, by use of a threat, he or she attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant. RCW 9A.76.180(1). The statute's plain language suggests three purposes:

> First, it protects public servants from threats of substantial harm based upon the discharge of their official duties.... Second, it protects the public's interest in a fair and independent decision-making process consistent with the public interest and the law. And third, by deterring the intimidation and threats that lead to

> corrupt decision making, it helps maintain public confidence in democratic institutions.

*State v. Stephenson*, 89 Wash.App. 794, 803-04, 950 P.2d 38 (1998).

Thus, to convict a person of intimidating a public servant, there must be some evidence suggesting an attempt to influence, aside from the threats themselves or the defendant's generalized anger at the circumstances. *State v. Montano*, 169 Wn.2d 872, 877, 239 P.3d 360 (2010). The statute is not intended to punish displays of anger or threats alone. *Montano*, 169 Wn.2d at 879, 239 P.3d 360 (2010) (reversing conviction for intimidating a public servant arising out of breaking free from an arresting officer, grabbing him, and threatening to beat him up); see *State v. Burke*, 132 Wash.App. 415, 421-22, 132 P.3d 1095 (2006) (holding that "physical attack," yelling profanities, and making "fighting threats" were not enough to prove intent to influence a police officer who was shutting down a house party).

In *Montano*, the court explained that treating a police officer inappropriately does not always amount to intimidating a public servant:

> The evidence arguably shows that Montano resisted arrest, and charging him with that crime is appropriate. But the State cannot bring an intimidation charge any time a defendant insults or threatens a public servant. Though such behavior is certainly reprehensible, it does not rise to the level of intimidation. The legislature held the same view, as evidenced by its inclusion in the

> statute the requirement that the defendant must threaten with the " 'attempt[ ] to influence a public servant's ... official action.' "

*Montano*, 169 Wash.2d at 879, 239 P.3d 360 (quoting RCW 9A.76.180(1)).

Herein, the two emails at issue do not contain any language suggesting any attempt to influence, aside from the threats themselves or the defendant's generalized anger toward the sitting judge and the then judicial candidate. See Exhibits 7 & 8. As discussed in the preceding cases, the statute is not intended to punish displays of anger or threats alone. Therefore the evidence is insufficient to support the convictions for intimidating a public servant.

The evidence for Count 8 (Richard Wernette) is insufficient for a second reason. Namely, Mr. Wernette was not a judge and thus not a "public servant" at the time the offense was committed. "'Public servant' means any person other than a witness who presently occupies the position of or has been elected, appointed, or designated to become any officer or employee of government, including a legislator, judge, judicial officer, juror, and any person participating as an advisor, consultant, or otherwise in performing a governmental function." RCW 9A.04.110(23). The plain language of the statute does not include judicial candidates.

This issue was further addressed in *State v. Stephenson*, where the defendant argued two judges were not "public servants" because there was no evidence that they filed their oaths of office with the Secretary of State. *Stephenson*, 89 Wash.App. at 807-08, 950 P.2d 38 . The court noted that according to RCW 2.08.080, a superior court judge must before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the state of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state. The court held that since both the judges had taken the oath, they were "public servants" within the meaning of the statute. *Stephenson*, 89 Wash.App. at 808, 950 P.2d 38.

Furthermore, the Court stated both judges were "in actual possession of the office [of judge], exercising its functions and discharging its duties under color of title." Thus, they also occupied their positions as judges de facto. *Id*. (quoting *State v. Franks*, 7 Wash.App. 594, 596, 501 P.2d 622 (1972).

Herein, Judge Wernette was only a judicial candidate at the time of these offenses. He had neither taken an oath of office nor was he a judge de facto. Therefore, he was not a "public servant."

3. Ms. Hendrickson's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of threatening to bomb or injure property (Count 5).

The law regarding sufficiency of the evidence is set forth in the previous issue.

RCW 9.61.160(1), Threats to bomb or injure property, provides:

> It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy; or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

Here, there is no language in the e-mail to Judge Lohrmann indicating a threat to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy. See Exhibit 7. The "big bang" or "big boom" language in the e-mail could refer to a gun or any other loud device. Nowhere does the word "bomb" appear. Likewise, nowhere do the words school, church, building, government property, building, common carrier,

or and other place of human occupancy appear. Although it is clearly a threatening letter, it does not constitute a threat to bomb within the meaning of the statute. Therefore, the evidence is insufficient to support the conviction.

4. The convictions for cyberstalking (Counts 1 & 2), threatening to bomb, harassment, and intimidating a public servant encompass the same criminal conduct.

A defendant's current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses "encompass the same criminal conduct." RCW 9.94A.589(1)(a); *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998). "Same criminal conduct" is indicated when two or more crimes that require the same criminal intent are committed at the same time and place and involve the same victim. RCW 9.94A.589(1)(a). The absence of any of these elements precludes a finding of "same criminal conduct." *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The Legislature intended that courts construe the phrase, "same criminal conduct," narrowly. *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). To determine if two crimes share a criminal intent, the focus is on whether the defendant's intent, viewed objectively, changed

from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Courts should also consider whether one crime furthered the other. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Standard of Review. Appellate courts review a trial court's finding that the offenses did not constitute the same criminal conduct for abuse of discretion. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Here, the trial court never considered whether these offenses constituted the same criminal conduct. RP 424-33. It is undisputed that the crimes at issue were committed at the same time and place and involved the same two judge victims. The alleged victims of the crimes of cyberstalking (Counts 1 & 2), threatening to bomb or injure property, felony harassment, and intimidating a public servant were a superior court judge and a judicial candidate. RP 366-80. All the charges involving these two victims were based on the single act of sending each of them a threatening e-mail. RP 403. The first two elements are therefore met.

The only remaining issue then is whether the crimes involved the same criminal intent. Since there was only one act, the sending of the e-mails, Ms. Hendrickson's intent, viewed objectively, did not change from one crime to the next. See *Dunaway*, supra. There is also no question that

one crime furthered the other. See *Lessley*, supra. Therefore, the crimes of cyberstalking, threatening to bomb or injure property, felony harassment, and intimidating a public servant constitute the same criminal conduct. The defendant's offender score and sentence should be reduced accordingly.

## E. CONCLUSION

For the reasons stated, the convictions indicated should be reversed and the case remanded for resentencing using a lowered offender score.

Respectfully submitted, September 4, 2012,

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s/David N. Gasch
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on September 4, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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