30437-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

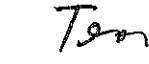
KATHY ANN HENDRICKSON,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99301
(509) 545-3561

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Page No.

Statutes and Rules

Page No.

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial, conviction, and sentence of the Appellant.

III. ISSUES

1. Did the court abuse its discretion in admitting evidence offered to show a common scheme or plan and over the Defendant's ER 401 and ER 403 objections?
2. Is there sufficient evidence of an attempt to influence a public servant where the Defendant's threats demonstrated an intent to frighten the recipients into withdrawing from the elections?
3. Is there sufficient evidence of a threat to bomb property?
4. Did the court abuse its discretion in finding none of the offenses encompassed the same criminal conduct where the offenses have different victims, times, or intents?

IV. STATEMENT OF THE CASE

The Defendant Kathy Hendrickson has been convicted by a jury of three counts of felony cyberstalking (against Richard Wernette, John Lohrmann, and Gregory Riordan – CP 43-45), two counts of threatening to bomb property (on July 31, 2008 and August 14, 2008 – CP 53-56), two counts of felony harassment (against Richard Wernette and John Lohrmann – CP 60-61), two counts of intimidating a public servant (on July 31, 2008 and August 14, 2008 – CP 64-65), and one count of identity theft (regarding Gregory Riordan – CP 79). CP 88-90, 100-22; RP 416-17.

The prosecutor made a pretrial motion to admit testimony regarding the details of the Defendant's prior stalking conviction for the purpose of showing a common scheme to stalk ex-boyfriends. CP 8-23; RP 1. Defense argued that the evidence was irrelevant and more prejudicial than probative. RP 2. The court granted the motion, finding the evidence relevant and finding that the probative value outweighed the prejudicial effect. RP 3.

The Honorable John Lohrmann testified that during his 2008 campaign, he received a frightening email communicating a bomb threat. RP 144-45, 149.

> 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 ever be appointed. Life

is so short. The end is near. Say your goodbyes.

Plaintiff's Exhibit 7. The threat to bomb put the judge in mind of the 1974 killing of Judge James Lawless[1] by mailed pipe bomb in the Franklin County Courthouse. RP 146.

The Honorable Richard Wernette testified that he is the College Place Municipal Court Judge as well as a pro tem superior court commissioner. RP 150. In 2008, he ran against Judge Lohrmann. RP 151. Judge Wernette received two threatening emails. RP 156-57. He received the identical email received by Judge Lohrmann. RP 157, PE 7. And he received a second email.

> I will see to it you do not become elected. Better check before you leave home. You never know what is out there to encounter you. Maybe when you start your car, it will go BOOM! Get the hint! Say your prayers. YOU might not see tomorrow.

Plaintiff's Exhibit 8. The judge believed that the emails threatened his and maybe his family's life. RP 158. The judge testified that he had never received a threat against his life although he had practiced family and criminal defense law for decades. RP 159. He took the threat very seriously and warned his family to take precautions. RP 159-61.

The sender sent emails to three judges: Judge Lohrmann, Judge

Wernette, and Judge Debra Stevens. RP 147, 160-61. However, Judge Stevens' email was misspelled so that it is likely that she did not receive the threat. RP 147. The emails came during election season as all three judges were running for office.

V. ARGUMENT

A. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE DEFENDANT'S PRIOR STALKING CONVICTION TO SHOW A COMMON SCHEME TO STALK EX-BOYFRIENDS.

The Defendant argues that the court abused its discretion in admitting evidence of her prior stalking conviction). Appellant's Brief at 9-12.

> A trial court's decision to admit or exclude prior bad acts evidence is reviewed for abuse of discretion. *Lough* 125 Wash.2d at 864–65, 889 P.2d 487. Judicial discretion is not abused unless the reviewing court determines that no reasonable person would take the same view adopted by the trial court. *State v. Huelett,* 92 Wash.2d 967, 969, 603 P.2d 1258 (1979).

Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 434-35, 167 P.3d 1193 (2007).

At trial, the Defendant did not deny that there was a proper ER 404(b) purpose for admitting the evidence. RP 2. Instead, the Defendant objected under ER 402 (irrelevant evidence inadmissible) and ER 403 (relevant

---

[1] *See State v. Young*, 89 Wn.2d 613, 574 P.2d 1171 (1978).

evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). RP 2 ("We are simply saying it is totally irrelevant, your Honor, and it's more prejudicial than probative."). And the court ruled on those objections, specifically. RP 5 (finding the evidence relevant and finding the probative value outweighed the prejudicial effect).

Because the Defendant did not object under ER 404, the claim is waived on appeal. RAP 2.5(a).

Even were the issue preserved for review, a reasonable person could agree that there is a substantial similarity between the manner in which the Defendant stalked both men such as would permit the admission of Joseph Fisk's testimony to establish a common scheme or plan to stalk ex-boyfriends.

The Defendant had been charged with stalking Greg Riordan CP 24-29; RP 382. The State asked the court to admit evidence of the Defendant's 2006 stalking of Joseph Fisk, an incident "markedly similar" to the alleged stalking of Mr. Riordan, for the purpose of demonstrating a common scheme or plan. CP 9-10.

ER 404(b) allows that evidence of bad acts is admissible when offered for a purpose other than proving the actor acted in conformity with character, e.g. it is admissible to show motive, preparation, or plan. "Plan"

has been interpreted to mean the proving of a common plan or scheme. *Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 434, 167 P.3d 1193 (2007).

The Defendant terrorized her ex-boyfriends through similar campaigns. She met both men in online dating. CP 8, 14. When the men ended their relationship with the Defendant, she responded by slashing Mr. Riordan's tires and Mr. Fisk's new girlfriend's tires. CP 8-9, 14. She broke into the men's houses. CP 9, 15. She accessed their password-protected accounts. CP 9, 16. She impersonated them, set up false computer accounts to humiliate them and steal from them, and she contacted their employers to make false complaints which nearly lost them their jobs. CP 9, 17.

The Defendant argues that the lesson in *State v Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995) was that bad acts evidence should only be admitted when the victim's credibility is compromised by drugs. Appellant's Brief at 11. This is not the lesson in *Lough*. The holding is that the word "plan" in ER 404(b) can mean "common plan or scheme." *State v Lough*, 125 Wn.2d at 854 ("The heart of the controversy involves the meaning of the word 'plan'"). Therefore, the State offered the evidence for a proper and admissible purpose.

The Defendant argues that the evidence should have been suppressed

as overkill. Appellant's Brief at 11-12 (arguing that the victim-witnesses in the other counts had "impeccable" reputations such that the Fisk evidence was "not essential" to proving the offense). First, the reputations of victim-witnesses in other counts did not speak to the reliability of the circumstantial evidence on the unrelated count of stalking. Second, the jury acquitted on the stalking count (CP 88-90), so the Defendant fails to demonstrate that the State's evidence was sufficient. Third, there is no rule that prevents the State from presenting its best evidence for that reason that the offense might be proved with lesser evidence.

Because a reasonable person could agree that the evidence demonstrated a common scheme, the court did not abuse its discretion.

B. THERE IS SUFFICIENT EVIDENCE FOR THE INTIMIDATION COUNTS.

The Defendant argues that there is insufficient evidence that she attempted to influence judges Lohrmann and Wernette.

The parties agree on the standard of review for a challenge to the sufficiency of the evidence. Appellant's Brief at 13-14. After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential

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

RCW 9A.76.180 defines the offense as an attempt to influence the official action of a public servant by use of a threat. The Defendant argues that there is insufficient evidence of an attempt to influence, citing *State v. Montano*, 169 Wn.2d 872, 877, 239 P.3d 360 (2010). Appellant's Brief at 15.

In *Montano*, the Washington Supreme Court noted that threats alone would not satisfy the element of "attempt to influence." *State v. Montano*, 169 Wn.2d at 877, *citing State v. Stephenson*, 89 Wn. App. 794, 807, 950 P.2d 38 (1998). So defendant Montano's threat to "kick [Officer Smith's] ass" after Montano had been tased twice were simply angry words. *State v. Montano*, 169 Wn.2d at 875, 879. The court found "simply no evidence" to suggest any purpose of influencing official action. *State v. Montano*, 169 Wn.2d at 879.

As the Defendant notes, circumstantial evidence is no less reliable than direct evidence. Appellant's Brief at 14, *citing State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). And intent can be inferred from circumstances as a matter of logical probability. Appellant's Brief at 14, *citing State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991)

(overruled on a different point of law).

The circumstantial evidence here is that the Defendant was threatening three people who had ***one thing*** in common. At the time, they were involved in elections for judicial positions. That being the common thread, the inference is clear. She was attempting to persuade them to withdraw their names from consideration. In so doing, they would take the target off their backs and remove themselves from her sights. The standard on review requires that the inferences be interpreted this way.

On top of that circumstance, the words in the email make very clear what the Defendant wanted. She wanted the judges ***out of the election***. She wrote "If elected, YOU will pay the ultimate price." PE 7. "I will see to it you do not become elected." PE 8. She was attempting to influence them to withdraw their names from consideration.

This issue was litigated before the trial court and resolved in the State's favor. RP 329, 333.

The Defendant argues that there is insufficient evidence for count eight, i.e. that Judge Wernette was a "public servant" at the time of the offense. Appellant's Brief at 16. A public servant is any government employee. RCW 9A.04.110(23). The Defendant argues that Judge Wernette "was only a judicial candidate at the time of these offenses." Appellant's

Brief at 17. Judge Wernette testified that at the time of the threats he was running for superior court judge. RP 151. However, he is and was a public defender, a pro tem superior court commissioner, and municipal court judge. RP 150-51. Trial counsel acknowledged "I don't believe that on the specific issue of public servant that I can argue against Number 8, because Richard Wernette was at all times a judge in College Place Court." RP 327. Quite apart from his candidacy, Judge Wernette meets the definition of "public servant" three times over.

C. THERE IS SUFFICIENT EVIDENCE FOR THE THREATS TO BOMB PROPERTY.

The Defendant claims that there is insufficient evidence of a threat (1) to bomb (2) property. The standard of review resolves these claim for the State.

First, the Defendant argues that perhaps this was a threat to shoot, not bomb. Appellant's Brief at 18. This argument denies the standard of review. Every inference is interpreted in favor of the State and most strongly against the Defendant. *State v. Salinas*, 119 Wn.2d at 201. Therefore, a "BIG BOOM" threat against a judge is accorded the obvious inference, the obvious conclusion which both judges immediately grasped. RP 149 ("It was a bomb threat"). This was a threat to bomb.

Second, the Defendant argues that if this was merely a threat to shoot, it is possible that property would not have been damaged. Appellant's Brief at 18-19. But it is already resolved that this was a threat to bomb, not shoot. Therefore, necessarily there would be damage to property. RCW 9.61.160(1) has the element of damage to "any place used for human occupancy." Judge Lohrmann was immediately put in mind of Judge Lawless who was killed by a mailed pipe bomb, which destroyed a courtroom. And Judge Wernette was warned that the bomb might be placed in his car. The element of property is satisfied by the standard, which accords all reasonable inferences for the State.

D. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT NONE OF THE OFFENSES (WITH DIFFERENT VICTIMS, TIMES, AND INTENTS) ENCOMPASSED THE SAME CRIMINAL CONDUCT.

The Defendant claims that "the crimes of cyberstalking, threatening to bomb or injury property, felony harassment, and intimidating a public servant constitute the same criminal conduct." Appellant's Brief at 21. Unfortunately, the argument is no more specific than that.

Same criminal conduct means 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 various crimes involve three

different victims, two different dates, and various criminal intents. They do not encompass the same criminal conduct.

Clearly the cyberstalking of Wernette, Lohrmann, and Riordan (one, two, and three respectively) are not the same criminal conduct. CP 43-45. They regard different victims. Likewise, the harassment counts (six and seven) regard different victims (Wernette and Lohrmann respectively). CP 60-61.

The emails were sent to more than one person. The threats to bomb (counts four and five) and intimidating counts (eight and nine) are differentiated by date, not victim. CP 53-56, 64-65. They are not the same criminal conduct because they are committed at different times.

If the Defendant means that counts one and six (cyberstalking and harassment of Wernette) are one conduct and counts two and seven (cyberstalking and harassment of Lohrmann) are another conduct, this is incorrect as well. These counts have different criminal intents. Cyberstalking has the intent to harass, intimidate, torment, or embarrass. RCW 9.61.260. *Felony* harassment has the intent to put someone in fear of their life. RCW 9A.46.020(2)(b)(ii).

If the Defendant means that counts four and eight (threat to bomb and intimidating a public servant on 7/31/08) are one conduct and counts five and

nine (threat to bomb and intimidating a public servant on 8/14/08) are another conduct, this again is incorrect. These counts have different criminal intents. A threat to bomb has the intent to alarm. RCW 9.61.160(1). Intimidating a public servant has the intent of influencing an official action. RCW 9A.76.180(1).

As the Defendant has said, the standard of review is abuse of discretion. Appellant's Brief at 20, *citing State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). An abuse of discretion results when a trial court's decision is **manifestly unreasonable or based on untenable grounds or untenable reasons**. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). While another court may disagree, the trial court is granted deference under the standard.

Because the various offenses have different victims, times, and intents, the court did not abuse its discretion in finding that none of the offenses encompassed the same criminal conduct. CP 103.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: November 5, 2012.

Respectfully submitted:

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

David Gasch <gaschlaw@msn.com> Kathy A. Hendrickson DOC # 895317 3420 NE Sand Hill Road Belfair, WA 98528	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 5, 2012, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**