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THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KRIS PEDERSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. INTRODUCTION.

After Kris Pederson's brother evicted him from the home in which he was living, Pederson wanted to show his brother how desperate he felt by killing himself in front of his brother. He fired a single shot from a gun and hit a railing. When he learned that his brother had filed charges against him for this incident, Pederson telephoned his brother and warned that he would get a high powered rifle and shoot his brother and his brother's girlfriend. Pederson drove to the mountains intent on suicide but a state trooper noticed his car lacked a front license plate and then found the arrest warrant.

Pederson was held in jail for almost one year awaiting trial. When the court continued the trial for vacations of prosecution witnesses, Pederson objected. The court permitted the delay without questioning whether it would prejudice Pederson's defense, even though CrR 3.3 prohibits the court from extending the speedy trial deadline without considering the prejudice to the accused. At his trial, the court refused to let Pederson exercise the peremptory strikes to which he was entitled. It also admitted highly prejudicial evidence of Pederson's possession of firearms, and failed to tell the jury of the essential elements of felony harassment in its "to convict" instruction.

B. ASSIGNMENTS OF ERROR.

1. Pederson was denied his right to a speedy trial under CrR 3.3, and as protected by the Sixth Amendment and article I, section 22 of the Washington Constitution.

2. Pederson was denied his right to exercise peremptory challenges of prospective jurors, which undermines his right to a fair trial by impartial jury under the Sixth and Fourteenth Amendments and article I, sections 21 and 22.

3. The court's refusal to limit the admission of highly prejudicial evidence that Pederson possessed firearms that were not involved in the charged offenses denied him a fair trial.

4. The court's failure to instruct the jury that whether Pederson made a "true threat" was an essential element of felony harassment diluted the State's burden of proof and misled the jury.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. It is the court's duty to hold the State to its burden of bringing a person to trial within the mandatory requirements of CrR 3.3 and the constitutional right to a speedy trial. Pederson continually objected to the delay in his trial, but the court continued the case over his objection and without finding that the delay did not prejudice him.

Where CrR 3.3(f)(2) dictates that the court may not continue a case in “the administration of justice” unless it makes a record that the delay will not prejudice the defense, and the court did not make any such finding when continuing the trial over Pederson’s objection, was Pederson denied his right to a speedy trial?

2. During jury selection, the court may not deny an accused person his right to exercise the peremptory challenges to which he is entitled under law. The court refused to let Pederson exercise any peremptory challenges for alternate jurors that ultimately deliberated in his trial, over Pederson’s objection. Is it a structural error for the court to improperly deny Pederson the right to exercise peremptory challenges to which he was entitled?

3. Evidence that a criminal defendant possessed a firearm when he was arrested, but which he was not accused of using to commit the charged crime, is highly prejudicial and likely to persuade the jury that the accused person is violent or dangerous. Over Pederson’s objection, the court admitted into evidence a firearm and ammunition that Pederson had when arrested that he was not alleged to have used to commit a crime. Should the court have limited evidence of Pederson’s

possession of firearms not used to commit the charged crimes so that he could receive a fair trial?

4. To avoid intrusions on protected speech under the First Amendment, only “true threats” may be criminalized. Is the constitutionally-necessary prerequisite that a threat was a “true threat” an essential element of a harassment statute that must be pled in the information and included in the “to-convict” instruction?

D. STATEMENT OF THE CASE.

In 2010, Kris Pederson was living in the home of Marlene Mirante. 9/14/11RP 57. Marlene had become ill and was living in a health care facility; her adult daughter Teresa Mirante wanted Kris to move out of Marlene Mirante’s home. *Id.* at 57-58.¹ Teresa did not live in her mother’s house; she lived with her boyfriend Donald Pederson, who was Kris’s brother. *Id.* at 40, 57.

On October 24, 2010, Donald and Teresa argued with Kris at Marlene Mirante’s home and told Kris he needed to move out. 9/14/11RP 61-62, 65-66. Kris was in the midst of a difficult personal time, having lost his employment and the home he had lived in before,

¹ When necessary for clarity, those involved in the incident are referred to by their first names. No disrespect is intended.

and he was suffering from serious depression exacerbated by alcoholism. Id. at 87, 89, 123; 9/20/11RP 58-61. Kris was suicidal and told his brother Donald that he had nowhere to go. 9/14/11RP at 112. The next day, Kris went to Donald's home with the intent of showing his brother how desperate he was by shooting himself. 9/20/11RP 68. Kris pulled out his gun and Donald fled. Kris fired a single shot that hit the railing outside Donald's home. Id. at 68, 70-72.

Donald told a responding police officer that Kris had said Donald was a "dead man." 9/14/11RP 49. Kris explained that he raised his gun to shoot himself, but paused and the gun misfired. 9/20/11RP 68-70. He told a police detective that he wanted to scare his brother and never intended to hurt him. 9/13/11RP 80.

Kris got into his truck and drove into the mountains. 9/20/11RP 74. He said he intended to make it "the end of my days," but was somehow interrupted when he tried to kill himself. Id. at 75-76. On November 7, 2010, he checked his mail. Id. at 77. He found a summons directing him to appear in court to answer the charge of assault against his brother. Id. at 77-78. Kris was angry and upset. Id. He called his brother on the telephone and said that if he had intended to shoot Donald during the incident, he would have done so. Id. at 78.

According to Donald, Kris said he had a high powered rifle and was coming to get Donald and Teresa. 9/14/11RP 70. Teresa called the police but Kris never came to the house. Id. at 80. Kris drove back to the mountains, again intending to kill himself. 9/20/11RP 70-80.

State trooper Michael Hauser was patrolling I-90 in Kittitas County and stopped Pederson's truck because it did not have a front license plate. 9/15/11RP 22. He suspected Pederson might be intoxicated. Id. at 27. Hauser learned Pederson was wanted by King County police and arrested Pederson.

At Pederson's trial, he testified about his distraught mental state and his lack of intent to harm his brother. 9/20/11RP 85, 89. Two psychologists testified that Pederson's serious depression and alcohol intake diminished his capacity to make rational decisions and intentionally act against his brother. 9/20/11RP 5-6, 9, 142, 148.

The prosecution charged Pederson with attempted first degree murder or assault in the first degree for shooting in the direction of Donald Pederson, and first degree burglary for entering Donald's home after the shooting, as well as felony harassment against both Donald and Teresa. CP 33-34. After his arrest on November 8, 2010, Kris's

trial was continued numerous times. Pretrial proceedings started on September 6, 2011, and jury selection began on September 13, 2011.

The jury acquitted Kris Pederson of most charged offenses, but found him guilty of the lesser offense of second degree assault while armed with a deadly weapon. CP 93, 94, 96, 99. The jury also convicted him of one count of felony harassment against his brother but found him not guilty of felony harassment against Teresa. CP 97-98.

Pertinent facts are addressed in further detail in the relevant argument sections herein.

E. ARGUMENT.

1. **The unnecessary delay in bringing Pederson’s case to trial, over his objection, violated his right to a speedy trial.**
 - a. It is the court’s obligation, and the State’s duty, to bring a person to trial within the required time limits of CrR 3.3 and the state and federal constitutions.

The right to “a speedy trial” is guaranteed by the Sixth Amendment and article I, section 22 of the state constitution. State v. Iniguez, 167 Wn.2d 273, 290, 217 P.3d 768 (2009).² Article I, section

² The Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial” Article I, section 22 similarly provides, “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial.”

10 further dictates that “[j]ustice in all cases shall be administered . . . without unnecessary delay.”

“The right to a speedy trial is ‘as fundamental as any of the rights secured by the Sixth Amendment.’” Iniguez, 167 Wn.2d at 290 (quoting Barker v. Wingo, 407 U.S. 514, 515 n.2, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), Klopfer v. North Carolina, 386 U.S. 213, 223, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967)). The “right has its roots at the very foundation of our English law heritage,” where, “the delay in trial, by itself, would be an improper denial of justice.” Klopfer, 386 U.S. at 223-24.

“A defendant has no duty to bring himself to trial; the State has that duty.” Barker, 407 U.S. at 527. Because “society has a particular interest in bringing swift prosecutions, . . . society’s representatives are the ones who should protect that interest.” Id.

CrR 3.3 sets a definite time line in which a trial must occur. The purpose of CrR 3.3 is “to protect a defendant's constitutional right to a speedy trial.” State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). Speedy trial rules ensure trials occur within a “reasonable period consistent with constitutional standards.” Barker, 407 U.S. at 523.

The trial court must ensure a defendant receives a timely trial under the requirements of CrR 3.3. Kenyon, 167 Wn.2d at 136; CrR 3.3(a)(1) (“It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.”). A trial for a person who is held in custody must occur within 60 days of arraignment. CrR 3.3(b)(1)(i). Failure to comply requires dismissal of the charge with prejudice if the defendant timely objects. CrR 3.3(d)(3), (h).

- b. Pederson’s trial was delayed over his objection and without adequate cause while he waited in custody.

Pederson remained in custody throughout the pretrial proceedings in his case. He objected to several of the unnecessary delays and made plain his desire to receive a timely trial. See 3/14/11RP 10; 5/5/11RP 34; 7/25/11RP 17; 8/9/11RP 21. Instead of receiving a trial within the 60 days allowed under CrR 3.3, he waited in jail for almost one year. The court continued the case numerous times, over Pederson’s express objection, and without following the requirements of CrR 3.3.

Under CrR 3.3(f)(2), the court may continue a trial to a specified date if it finds “such continuance is required in the administration of

justice and the defendant will not be prejudiced in the presentation of his or her defense.” But the court may not simply declare that the delay is required in the “administration of justice.” State v. Saunders, 153 Wn.App. 209, 220, 220 P.3d 1238 (2009). The court must also assess the reasons for the delay and the prejudice to the defense. Id. The justification for the continuance must appear “on the record or in writing.” Id.; CrR 3.3(f)(2).

Five months after his arrest, on March 14, 2011, the court reset the expiration of speedy trial from April 24, 2011 to June 8, 2011, due to vacations of both attorneys as well as further investigation. 3/14/11RP 7, 10; Supp. CP __, sub. no. 31. Pederson complained that he had been incarcerated for five months and the evidence “has been available since day one. And everybody’s had plenty of time to go over the evidence” 3/14/11RP 10. The court ruled that it was continuing the trial for two months due to vacations, not for evidentiary reasons. Id. The court’s written order stated that this delay was required in the administration of justice under CrR 3.3(f)(2). Supp. CP __, sub. no. 31. It made no finding and expressed no concern over whether this delay prejudiced Pederson’s defense as required by CrR 3.3(f)(2).

Immediately thereafter, Pederson filed a *pro se* motion arguing his rights to a speedy trial under CrR 3.3 had been violated. 3/24/11RP 4. Pederson explained that he wanted the record to be clear that he did not want delay in his case. 3/24/11RP 5.

On July 25, 2011, the prosecution said the lead detective had a vacation scheduled and asked for a continuance “in the administration of justice.” 7/25/11RP 17. The prosecutor asked to delay the trial until August 10, 2011. *Id.* Pederson objected and defense counsel announced she was ready to proceed. *Id.* at 17-18. The court granted the motion based on the detective’s vacation as satisfying the “administration of justice” criterion. 7/25/11RP 18; Supp. CP __, sub. no. 74. The court reset the expiration of speedy trial from July 28 to September 9, 2011 and continued the trial until August 10, 2011. Supp. CP __, sub. no. 74.

On August 9, 2011, the prosecution requested another delay. When the court asked for more information, the prosecutor said that “all I can tell the Court at this time” is that “my paralegal’s notified [sic] that these witnesses have pre-planned vacations.” 8/9/11RP 20-22. Pederson objected. 8/9/11RP 21; Supp. CP __, sub. no. 81.

The court refused to find this continuance was warranted “in the administration of justice.” 8/9/11RP 23. However, because the court

previously extended the speedy trial expiration of the case until September 9, 2011, the court set the case for trial on September 6, 2011. Id.; Supp. CP __, sub. no. 81.

Throughout these continuances and notwithstanding Pederson's objections, the court never inquired into the prejudice Pederson's defense might suffer due to the multiple delays that left him in jail awaiting trial for almost one year.

In Kenyon, the trial court declared that the lack of an available judge was an unavoidable or unforeseen circumstance under CrR 3.3(e)(8). The Supreme Court ruled that a court's authority to continue a trial based on an unavoidable circumstance requires it to first try to ameliorate the problem. Kenyon, 167 Wn.2d at 138-39. The failure to seek alternatives undermines the court's authority to extend the time for trial under CrR 3.3. Id.

Likewise, the court may not simply declare that the "administration of justice" permits further trial delay under CrR 3.3(f)(2). CrR 3.3(f)(2) authorizes the court to continue a case in the administration of justice only if it also finds "the defendant will not be prejudiced in the presentation of his or her defense." Saunders, 153 Wn.App. at 220. The court may not ignore this mandatory requirement.

Id. The failure to consider the prejudice to the defense undermines the court's authority to extend the time for trial under CrR 3.3. See Kenyon, 167 Wn.2d at 138-39.

The primary driving force of the accused person's right to a speedy trial is the oppressive nature of pretrial incarceration. Doggett, 505 U.S. at 659 (Thomas, J., dissenting). The jailed defendant cannot gather evidence or witnesses to aid in his defense. Barker, 407 U.S. at 533. He suffers prejudice from the anxiety of unresolved charges, job loss, and deprivation of a person's private life. United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971) (criminal charges "may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."). Pederson was particularly likely to be prejudiced in preparing his defense by the lengthy pretrial delay due to his fragile mental state, his diagnosed depression, and the resulting impairment of his ability to convincingly and credibly testify on his own behalf which was necessary for his defense. In fact, when he testified at trial, he appeared easily confused, illustrating the prejudice he suffered from the lengthy trial delay. Under CrR 3.3(f)(2), it was the court's obligation and burden to inquire into and assess this prejudice.

The court failed to make this inquiry even though it was its duty to do so under CrR 3.3(f)(2) as well as its duty to ensure Pederson received a timely trial under CrR 3.3(a)(1).

c. The remedy for the speedy trial violation is dismissal.

The failure to abide by the plain terms of CrR 3.3 requires dismissal of the charge. Saunders, 153 Wn.App. at 221. The trial court bears the responsibility to ensure an accused person receives a timely trial under the framework of CrR 3.3 and the constitutional right to a speedy trial. By extending Pederson's trial beyond the 60 days allowed without assessing the criteria of CrR 3.3(f)(2), over Pederson's objection, the trial court violates CrR 3.3, requiring dismissal of the remaining charges. Id.

2. The court impermissibly denied Pederson the peremptory challenges to which he was entitled

a. The court may not interfere in or unreasonably denied peremptory challenges to prospective jurors.

An accused person has a right to participate in selecting an empaneled jury by fair and impartial means. Batson v. Kentucky, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Irby, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011), U.S. Const. amends. 6, 14; Wash. Const. art. I, section 22. Article I, section 22 contains stronger

protections guaranteeing the right to trial by jury than the federal constitution. Irby, 170 at 884 (right to “appear and defend” mandates defendant’s personal participation in all stages of jury selection); see State v. Williams-Walker, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010) (“greater protection” for jury trial rights under article I, sections 21 and 22 than federal constitution).

The peremptory challenge is a “means of assuring the selection of a qualified and unbiased jury.” Batson, 476 U.S. at 91. Peremptory challenges have “deep historical roots” and the Supreme Court has found that “peremptory challenge is a necessary part of trial by jury.” Id.; Swain v. Alabama, 380 U.S. 202, 212, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Even though the right to peremptory challenges is not explicitly guaranteed in the constitution, the peremptory challenge is “one of the most important rights secured to the accused.” Swain, 380 U.S. at 219 (quoting Pointer v. United States, 151 U.S. 396, 408, 14 S.Ct. 410, 38 L.Ed. 208 (1894)). “The denial or impairment of the right is reversible error without a showing of prejudice.” Swain, 380 U.S. at 219.

Any time the court selects alternate jurors, “[e]ach party shall be entitled to one peremptory challenge for each alternate juror to be

selected.” CrR 6.5 (emphasis added). CrR 6.5 provides the court with discretion whether to select alternate jurors. The court may select 12 jurors and hope no juror becomes unable to serve over the course of the case. Without alternate jurors, the minimum number the court may provide in most felony trials is six peremptory challenges for each the prosecution and defense. CrR 6.4(e)(2). When alternates are included on the jury panel, the parties are entitled to additional peremptory challenges allowed for each alternate. CrR 6.5.

By mandating that “each party shall be entitled” to specified additional peremptory challenges when the court seats alternate jurors, the court rule is construed as “presumptively imperative and operates to create a duty.” See State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

The trial court refused to give an additional peremptory challenge to Pederson for each alternate juror despite the mandatory language of CrR 6.5. The court permitted no additional peremptory challenges for any alternate selected, yet it added two alternate jurors to the panel. Additionally, those alternate jurors deliberated in the verdicts rendered.

- b. The court denied Pederson the peremptory challenges to which he was entitled.

Before commencing jury selection, the court announced that the parties would not receive additional peremptory challenges for alternate jurors. 9/8/11RP 6. The court explained, “you’d have six peremptories, not one for each alternate,” and at the close of the case, the court would randomly select the number of a juror who would be designated the alternate and excused. Id. When questioned about why the parties would not receive an additional peremptory for each alternate, the court explained that since the alternate was not being designated until the end of the trial, “we don’t know who will be the alternate, so I don’t add a peremptory for that. So there’ll be six peremptories,” even though they would be selecting 14 jurors. Id. at 7.

Defense counsel and the prosecutor questioned the court about this prohibition, explaining they expected to receive one additional peremptory for each alternate, as was the practice of other judges. 9/8/11RP 6, 19. Defense counsel asked if the court would at least permit one additional peremptory for the two alternates seated. 9/8/11RP 19. The court agreed to permit one additional peremptory for the two alternates. Id. at 20.

However, when the time came to exercise peremptory challenges, there were only 26 potential jurors remaining in the courtroom due to the number of jurors dismissed for cause or due to personal hardship. 9/13/11RP 43. The prosecution asked the court to bring in some additional prospective jurors so that each party would retain the right to strike an alternate. Id. The court declined. Id. at 40-41. Instead, the court ruled “I’ll say only six peremptories [each]. I think I have discretion to do that.” 9/13/11RP 43.

After the prosecution and defense exercised six peremptory strikes each, three unselected jurors remained. 9/13/11RP 46-47. The court *sua sponte* excused one of the remaining prospective jurors, Juror 69, who had been the subject of a denied challenge based on concern about her ability to sit as a juror. 9/13/11RP 31-33, 38-39, 47. Then the court empaneled the remaining two jurors without affording Pederson the opportunity to exercise any additional peremptory challenges. Id. at 46-47. The court sat 14 jurors. Id. at 47.

During the course of the trial, the juror in seat 13 (juror 30 during jury selection), was excused because she was sleeping during the testimony. 9/14/11RP 107-08, 141-43; 158. At the close of the case, the

court randomly selected Juror 11 as the alternate and he was excused before deliberations. 9/21/11RP 116.

- c. Denying Pederson his right to exercise peremptory challenges is a structural error when Pederson was not permitted to participate in the selection of jurors who deliberated in the case.

The trial court claimed it had “discretion” to deny peremptory challenges to the defense. 9/13/11RP 43. Yet under CrR 6.5, the defense was “entitled” to at least one peremptory challenge for each alternate selected. A court abuses its discretion when it misunderstands and misapplies mandatory requirements of a court rule. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The court misunderstood the requirements of CrR 6.5 when it denied Pederson peremptory challenges for jurors that would serve in the case.

“Any impairment of a party’s right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply.” State v. Evans, 100 Wn.App. 757, 774, 998 P.2d 373 (2000). The Supreme Court explicitly adopted the reasoning of Evans in State v. Vreen, 143 Wn.2d 923, 931-32, 26 P.3d 236 (2001). In Vreen, the court held that if jurors deliberate and render a verdict after the court has improperly denied the defendant

the opportunity to exercise a peremptory strike to which he was entitled, the error is structural and reversal is required. Id. at 932.

The holdings and logic of Evans and Vreen control the outcome of Pederson's case. The court denied Pederson his right to exercise peremptory challenges to which he was "entitled" under CrR 6.5. The premise of a peremptory challenge is that the accused need not identify a specific basis on which to challenge a particular juror, and therefore, the accused person is not required to show that a particular juror sat on the case that should have been excused. Vreen, 143 Wn.2d at 931. Instead, denying the accused the right to exercise a peremptory challenge to which he was entitled is a fundamental error undermining the integrity of the trial process. Vreen, 143 Wn.2d at 931.

Pederson's desire to exercise additional peremptory challenges is plain from the record. He refused to give up his right to exercise such challenges when asked by the court to confer with the prosecution to see if there could be a compromise in which the parties would agree to give up the ability to use peremptory challenges. 9/13/11RP 40-41. He explained it was a "problem" that the court did not have sufficient potential jurors for him to exercise additional peremptories. Id. at 43. He used the six peremptories he was allowed. Id. at 44-46. However,

the court sat two additional jurors as alternates and Pederson was unable to exercise the peremptory challenges to which he was entitled because the court refused to allow him to do so and declined to bring in additional prospective jurors. The court's refusal to follow the clear directive of CrR 6.5 and to deny Pederson the right to exercise peremptory challenges to which he was entitled requires a new trial.

Vreen, 143 Wn.2d at 932; Evans, 100 Wn.App. at 774.

3. The court unreasonably denied Pederson's request to limit the admission of evidence about his possession of an unrelated firearm and let the jury infer he had a propensity toward violent acts.

- a. The right to a fair trial includes the right to be tried for only the charged offense.

An accused person's right to a fair trial is a fundamental part of due process of law. United States v. Salerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. The right to a fair trial includes the right to be tried for only the offense charged. State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971).

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dowling v. United

States, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (the introduction of improper evidence deprives a defendant of due process where “the evidence is so extremely unfair that its admission violates fundamental conceptions of justice”).

Allegations that an accused person committed an uncharged crime are presumed inadmissible. ER 404(b). Uncharged criminal conduct may be admitted into evidence only when it is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the accused’s propensity to commit certain acts, and (2) substantial probative value outweighs its prejudicial effect. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)); ER 404(b).³ Doubtful cases should be resolved in favor of the defendant. Smith, 106 Wn.2d at 776.

³ Under ER 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This Court reviews *de novo* whether a trial court correctly interpreted an evidentiary rule in deciding to admit evidence. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The DeVincentis Court warned that the State's burden of proving the admissibility of the uncharged conduct is "substantial." Id. at 17-18.

The purpose of a motion in limine is to avoid objections to contested evidence during trial. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). A losing party is deemed to have a standing objection unless the court specifically requires further objections when it makes its ruling. Id. Here, Pederson objected to the prosecution's introduction into evidence of firearms Pederson possessed that were not used to commit the charged offenses. 9/6/11RP 112-17; 9/7/11RP 141-42; CP 23-24. The court denied his request.

- b. The admission of a gun in the accused's possession that was not used to commit a crime is highly prejudicial, lacks probative value, and highlights the violent propensity of the accused.

Courts have long recognized the unduly prejudicial effect of evidence indicating an accused person possessed a firearm. Evidence alleging the defendant possessed a weapon that is not connected to the charged crime should not be admitted. State v. Freeburg, 105 Wn.App.

492, 501, 20 P.3d 984 (2001); State v. Oughton, 26 Wn.App. 74, 83-84, 612 P.2d 812 (1980). When the fact of gun possession has no direct bearing on an issue in the case, its admission into evidence causes unnecessary prejudice. State v. Rupe, 101 Wn.2d 664, 707-08, 683 P.2d 571 (1984). “Many view guns with great abhorrence and fear.” Id. at 708. “[O]thers may consider certain weapons as acceptable but others as dangerous.” Id. Many or all people “might believe that [the] defendant is a dangerous individual” if he or she has a gun. Id.

Freeburg involved a murder prosecution where the defendant had a gun in his possession when he was arrested, but this gun was not used in the incident. 105 Wn.App. at 496. The trial court admitted this gun as evidence of consciousness of guilt, to show that Freeburg fled the scene and was armed when arrested because he was trying to evade police. Id. at 497. The Court of Appeals ruled that the gun was not probative of Freeburg’s flight and did not show his consciousness of guilt when he had not tried to flee or use the gun when he was arrested. Id. at 500.

The Court concluded that Freeburg’s possession of a gun had no relevant connection to the charged crime and was “highly prejudicial.” Id. at 501. The jury was likely to view the evidence that Freeburg had a

gun when arrested “as tending to show he was a ‘bad man,’ or had a propensity to carry guns,” or was likely to have been armed during the incident. Id. at 502. The Freeburg Court held, “[g]iven the powerful nature of the evidence, its lack of relevance, and the absence of a limiting instruction, we cannot characterize its admission as harmless. We therefore reverse and remand for a new trial.” Id.

Similarly to Freeburg, the prosecution introduced into evidence the rifle that Pederson had in his car when he was arrested, even though he was not accused of using it. The rifle was a hunting rifle that was unloaded and properly stored in his car. 9/13/11RP 44, 46. Detective Bartlett called it a “long arm firearm.” 9/13/11RP 42. It was a single shot rifle that would need to be reloaded with a new cartridge each time it was fired. 9/13/11RP 59. It is not a high-powered rifle. 9/13/11RP 60.

The prosecution introduced extensive testimony about this rifle even though Pederson was not alleged to have used it and legally possessed and stored it. 9/14/11RP 13; 9/15/11RP 22. The rifle was physically admitted into evidence and available for the jury to observe. Ex. 26; 9/13/11RP 45.

The prosecution also introduced into evidence a revolver Pederson had with him when arrested. This gun was not forensically

connected to the shooting, but may have been the gun Pederson used when he fired a single shot at his brother's home on October 27, 2010. 9/13/10RP 77. The rifle was not alleged to have been used. Donald Pederson did not testify about the rifle. He claimed his brother Kris called him on November 7, 2010, and threatened to shoot him with "a high powered rifle." 9/14/11RP 70. Donald did not claim that the hunting rifle in Kris's car was a high powered rifle or say that Kris owned such a rifle. Detective Bartlett verified that the hunting rifle was not high powered. 9/13/11RP 60.

Even though Pederson was not alleged to have threatened to use this rifle, it was admitted into evidence and displayed to the jury as if it was probative of Pederson's propensity for committing violent acts. As in Freeburg, the jury was likely to view the evidence that Pederson had this rifle, along with a revolver, when arrested "as tending to show he was a 'bad man,' or had a propensity to carry guns," or was likely to have been armed during the incident. 105 Wn.App. at 502. "Given the powerful nature of the [firearm] evidence, its lack of relevance, and the absence of a limiting instruction, [this Court] cannot characterize its admission as harmless." Id.

- c. Reversal is required due to the use of Pederson's lawful and innocuous possession of a rifle as evidence of his dangerousness.

When the prosecution relies upon unduly prejudicial information, the accused is deprived of the right to a fair trial.

Evidence of weapons is highly prejudicial, and courts have "uniformly condemned . . . evidence of . . . dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged."

Freeburg, 105 Wn.App. at 501 (quoting United States v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977)). The court denied Pederson's request to limit the firearm evidence admitted in the case, and the prosecution was able to use this evidence to show Pederson was a violent and dangerous person. The erroneous admission of a rifle, along with ammunition for that rifle, unfairly affected the jury's deliberations and requires reversal.

4. Pederson was convicted of felony harassment even though the jury was not expressly instructed that a "true threat" was an essential element of the crime.

- a. Principles of due process require essential elements of an offense be pled in the information and included in the "to convict" instruction.

Real notice of the nature of the charge is "the first and most universally recognized requirement of due process." Henderson v. Morgan, 426 U.S. 637, 645, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976)

(quoting Smith v. O’Grady, 312 U.S. 329, 334, 61 S.Ct. 572, 85 L.Ed. 859 (1941)); U.S. Const. amend. 6; Const. art. I, § 3. Thus, due process requires that all facts essential to punishment – whether statutory or nonstatutory – be pled in the information and proved beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). At a minimum, “the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime.” State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) (citation omitted).

Further, the “to convict” instruction must contain all elements essential to the conviction. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). A reviewing court “may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

b. The “true threat” requirement is an element.

Where a statute “criminalizes pure speech,” it “must be interpreted with the commands of the First Amendment clearly in mind.” Kilburn, 151 Wn.2d at 49 (quoting State v Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001), and Watts v. United States,

394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)). Only “true threats” may be prohibited without violating the First Amendment.

Kilburn, 151 Wn.2d at 43.

The Supreme Court has reiterated this basic principle in both the criminal and civil arenas. In re Det. of Danforth, 173 Wn.2d 59, 71, 77, 263 P.3d 783 (2011) (majority of the court agrees that a “true threat” is required for civil commitment under RCW 71.09.020); Schaler, 169 Wn.2d at 287-88 (reversing for insufficiency of instruction regarding constitutionally-required mens rea); State v. Johnston, 156 Wn.2d 355, 364-65, 127 P.3d 707 (2006) (“the jury must be instructed that a conviction under RCW 9.61.160 requires a true threat and must be instructed on the meaning of a true threat”) (emphases added).

There are cases in which this Court has refused to hold that the true threat requirement is an element of a harassment offense. See State v. Atkins, 156 Wn.App. 799, 236 P.3d 897 (2010) (holding that the “constitutional concept” of a true threat merely limits the scope of the threat requirement); State v. Tellez, 141 Wn.App. 479, 484, 170 P.3d 75 (2007) (holding that merely defining the term, “true threat,” suffices to protect First Amendment rights). But these cases invert the analysis. The “true threat” requirement does not “limit[] the scope of the

essential threat element.” Atkins, 156 Wn.App. at 805. Rather, only true threats may support a prosecution under a harassment statute. Virginia v. Black, 538 U.S. 343, 359-60, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); Kilburn, 151 Wn.2d at 43; Johnston, 156 Wn.2d at 364-65.

While the federal circuit courts are split regarding whether the analysis contains a subjective or only an objective component, the federal courts unanimously agree that the “true threat” requirement is an element. See e.g., United States v. Bagadasarian, 652 F.3d 1113, 1118 (9th Cir. 2011) (discussing application of true threat requirement to prosecution for threats to presidential candidate or former president); United States v. D’Amario, 330 Fed. Appx. 409, 413 (3rd Cir. 2009) (two “essential elements of prosecution” for violation of 18 U.S.C. § 115 are true threat and intent to intimidate); United States v. Fuller, 387 F.3d 643, 647 (7th Cir. 2004) (“the only two essential elements for [a prosecution under 18 U.S.C. § 871] are the existence of a true threat to the President and that the threat was made knowingly and willfully”); United States v. Francis, 164 F.3d 120, 123 n.4 (2nd Cir. 1999) (“We have routinely used the term ‘true threat’ in setting forth the second element of the crime...”). These decisions are entirely consistent with the precedent construing the “true threat” requirement. Because only

“true threats” may be prosecuted, the “true threat” requirement is an essential element of a harassment statute.

c. The omission of the element was prejudicial error.

The “to convict” instruction “carries with it a special weight” because it is the “yardstick” by which the jury measures guilt or innocence. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). For this reason, the omission of an essential element from the instruction is a manifest error affecting a constitutional right that may be reviewed for the first time on appeal. Id. Here, the omission of this element denied Pederson the notice to which he was constitutionally entitled, and permitted the jury to convict even if it concluded that he was engaging in mere braggadocio or idle talk based on his own mental disturbances. This Court should conclude the omission of the essential “true threat” element was error and requires reversal.

F. CONCLUSION.

For the reasons stated above, Mr. Pederson respectfully asks this Court to reverse his convictions and dismiss the charges due to the violation of his right to a speedy trial. Alternatively, this Court should order a new trial at which he is accorded the right to exercise the peremptory challenges to which he is entitled and to properly instruct the jury on all essential elements of the crimes charged.

DATED this 12th day of October 2012.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67926-1-I
v.)	
)	
KRISTOPHER PEDERSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> KRISTOPHER PEDERSON 354296 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF OCTOBER, 2012.

X _____ *gnt*

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710