

No. 42024-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

KYLE ALAN TAYLOR,

Appellant.

---

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

The Honorable Paula Casey, Judge  
Cause No. 10-1-01936-1

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE ..... 7

C. ARGUMENT..... 1

    1. The State concedes that the jury was instructed on an alternative means of committing the crime of intimidating a witness which was not charged in the information ..... 7

    2. The court’s instructions to the jury properly instructed as to all the essential elements of the crime of intimidating a witness ..... 11

    3. The requirement that the threat in a charge of intimidating a witness be a true threat is not an essential element of the offense and it is not error to omit it from the charging language ..... 14

    4. The State recognizes that if this court follows its holding in State v. Hunley, the sentence in this matter will be remanded and the State will be permitted to produce further evidence of Taylor’s prior convictions. However, in order to preserve the issue, the State argues that the decision in Hunley is incorrect ..... 16

    5. The sentencing court did not violate Taylor’s constitutional rights by counting his convictions for third degree theft and second degree robbery separately, or for counting his conviction for first degree burglary separately from the five convictions for first degree theft and theft of a firearm, all of which already are considered the same criminal conduct for purposes of calculating his offender score ..... 29

6. Taylor cannot establish that his trial counsel was ineffective because he cannot establish that the result would have been different had counsel argued that certain of his convictions constituted the same criminal conduct..... 33

D.. CONCLUSION..... 35

## TABLE OF AUTHORITIES

### **U.S. Supreme Court Decisions**

<u>Mitchell v. United States</u> , 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999).....	19
<u>People v. Davis</u> , 65 Ill. 2d 157, 357 N.E.2d 792, 795-96 (1976) .....	26
<u>People v. Williams</u> , 149 Ill. 2d 467, 599 N.E.2d 913, 925 (1992) .....	26
<u>Gray v. State</u> , 317 Md. 250, 562 A.2d 1278, 1282 (1989).....	26

### **Washington Supreme Court Decisions**

<u>In re Pers. Restraint of LaChapelle</u> , 153 Wn.2d 1, 100 P.3d 805 (2004) .....	22
<u>In re Williams</u> , 111 Wn.2d 353, 759 P.2d 436 (1988) .....	24
<u>Island County v. State</u> , 135 Wn.2d 141, 955 P.2d 377 (1998) .....	22
<u>State v. Adams</u> , 91 Wn.2d 86, 586 P.2d 1168, 1171 (1978) .....	35
<u>State v. Ammons</u> , 105 Wn.2d 175, 713 P.2d 719 (1986) .....	21, 23
<u>State v. Barberio</u> , 121 Wn.2d 48, 846 P.2d 519 (1993) .....	32
<u>State v. Borrero</u> , 147 Wn.2d 353, 58 P.3d 245 (2002) .....	14

<u>State v. Brown</u> , 162 Wn.2d 422, 173 P.3d 245 (2007) .....	10
<u>State v. Cannon</u> , 130 Wn.2d 313, 922 P.2d 1293 (1996) .....	24
<u>State v. Davis</u> , 41 Wn.2d 535, 250 P.2d 548 (1953) .....	23
<u>State v. Elliott</u> , 114 Wn.2d 6, 785 P.2d 440, <i>cert. denied</i> , 498 U.S. 838 (1990)....	15
<u>State v. Easter</u> , 130 Wn.2d at 241 .....	19
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999) .....	25
<u>State v. Herzog</u> , 112 Wn.2d 419, 771 P.2d 739 (1989) .....	22, 23, 29
<u>State v. James</u> , 36 Wn.2d 882, 221 P.2d 482 (1950) .....	19
<u>State v. Johnson</u> , 119 Wn.2d 143, 829 P.2d 1078 (1992) .....	15
<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1215 (2004) .....	12
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991) .....	14, 15
<u>State v. Louie</u> , 68 Wn.2d 304, 413 P.2d 7 (1966) .....	23
<u>State v. Mail</u> , 121 Wn.2d 707, 854 P.2d 1042 (1993) .....	22, 24, 29
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251, 1256 (1995) .....	33

State v. Mendoza,  
165 Wn.2d 913, 205 P.3d 113 (2009) ..... 24, 25, 28

State v. Piche,  
71 Wn.2d 583, 430 P.2d 522, 527 (1967) ..... 34

State v. Sweet,  
138 Wn.2d 466, 980 P.2d 1223 (1999) ..... 19

State v. Tandecki,  
153 Wn.2d 842, 109 P.3d 398 (2005) ..... 15, 16

State v. Thomas,  
109 Wn.2d 222, 743 P.2d 816 (1987) ..... 34

#### **Decisions Of The Court Of Appeals**

State v. Blunt,  
118 Wn. App. 1, 71 P.3d 657 (2003)..... 23

State v. Chino,  
117 Wn. App. 531, 72 P.3d 256 (2003)..... 8, 11

State v. Hunley,  
161 Wn. App. 919, 253 P.3d 448 (2011)..... 20, 21, 35

State v. King,  
135 Wn. App. 662, 145 P.3d 1224 (2006)..... 12, 13

State v. Lara,  
66 Wn. App. 927, 834 P.2d 70 (1992)..... 31

State v. Laramie,  
141 Wn. App. 332, 169 P.3d 859 (2007)..... 8, 11

State v. Mehaffey,  
125 Wn. App. 595, 105 P.3d 447 (2005)..... 31

<u>State v. Nitsch</u> , 100 Wn. App. 512, 997 P.2d 1000, <i>review denied</i> 141 Wn.2d 1030, 11 P.3d 827 (2000) .....	31
---	----

<u>State v. Strauss</u> , 93 Wn. App. 691, 969 P.2d 529 (1999).....	18
--	----

<u>State v. Tellez</u> , 141 Wn. App. 479, 170 P.3d 75 (2007).....	12, 13, 16
---	------------

<u>State v. We</u> , 138 Wn. App. at 722 .....	34
---	----

<u>State v. Williamson</u> , 84 Wn. App. 37, 924 P.2d 960 (1996).....	7
--	---

**Statutes and Rules**

CrR 7.1(b) .....	24
CR 7(b)(3) .....	27
CrR 7.8.....	31
CrR 8.2.....	27
CR 11(a) .....	26
RCW 9.94A.010(6).....	25
RCW 9.94A.110(1).....	24
RCW 9.94A.210(1).....	22
RCW 9.94A.500 .....	23
RCW 9.94A.500(1).....	17, 25, 27
RCW 9.94A.525(5)(a) .....	29, 30
RCW 9.94A.530 (2).....	17, 22, 27

RCW 9.94A.535 .....	30
RCW 9.94A.537 .....	18
RCW 9.94A.585(1).....	22
RCW 9.94A.589(1)(a) .....	29, 30
RCW 9A.04.110(25).....	9
RCW 9A.52.050 .....	33
RCW 9A.72.110 .....	8
RCW 9A.72.110(1)(a) .....	8
RCW 10.99.020.....	8
RCW 10.99.045(3)(b).....	25
RCW 10.99.100(2)(a).....	25
RCW 46.61.513.....	25
Laws of 1984, ch. 209, § 5 .....	24
Laws of 1984, ch. 209, § 13(1)(b) .....	22
Laws of 2005, c. 458, § 3 .....	9
Laws of 2007, c. 79, § 3 .....	9
Chapter 231, § 2, LAWS OF 2008 .....	17
Laws of 2004, ch. 209, § 5 .....	23

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the jury was instructed on an alternative means of committing the crime of intimidating a witness that was not charged in the information.

2. Whether the court's instructions to the jury on the charge of intimidating a witness relieved the State of the burden of proving that the threat Taylor made was a true threat.

3. Whether the requirement that the threat be a true threat is an essential element of the charge of intimidating a witness that must be included in the charging document.

4. Whether the summary of the defendant's criminal history, filed by the State, satisfies constitutional due process requirements.

5. Whether the sentencing court should have counted his prior conviction for third degree assault as the same criminal conduct as his conviction for second degree robbery, and his prior convictions for first degree theft and theft of a firearm, which are already counted as same criminal conduct, as the same criminal conduct as the conviction for first degree burglary.

6. Whether Taylor received ineffective assistance of counsel because counsel failed to argue that certain of his prior convictions constituted the same criminal conduct.

B. STATEMENT OF THE CASE.

1. Substantive facts.

On December 15, 2010, Nerissa MacKinnon was living with her boyfriend, Kyle Taylor, in a mobile home on the Bucoda Highway in Thurston County, Washington. They shared a bedroom in a mobile home with MacKinnon's five-year-old daughter. They

rented from Michelle Kampf, who also lived there. Kampf's boyfriend, Troy, sometimes stayed at the residence. [RP 41] On the morning of the 15<sup>th</sup>, Taylor and MacKinnon dropped her daughter off at a school bus stop on the highway at 7:30 and returned home. A short time later they went to Lewis County and shopped at Sears and Big Five, purchasing clothing and other Christmas gifts for MacKinnon's daughter. [RP 43-44] They returned to their residence before noon. [RP 82] MacKinnon went to their bedroom to put away the gifts; Taylor followed and an argument ensued. Taylor wanted to take drugs and get high; MacKinnon did not want him to do so. He had promised that he would not get high that day and she was looking forward to spending quality time with him. [RP 45-46, 84]

MacKinnon asked Taylor to leave the bedroom and he did, but returned, and the argument resumed. Taylor used his body to pin MacKinnon down on the bed, using his arm across her neck to hold her down. She could breathe, but with difficulty. [RP 47-48, 86] MacKinnon told Taylor he was hurting her and that "all I felt was hate." [RP 47] Taylor moved his head so she could see his face and giggled. [RP 86]

Taylor eventually let MacKinnon go, and they continued to argue for about an hour. MacKinnon was emotional and crying, Taylor wanted to go somewhere. [RP 48, 88] They left the mobile home and went to the Lucky Eagle Casino, where they spent approximately two hours, during which time MacKinnon consumed one beer. Upon leaving the casino, they "cruised" for a time but did not stop anywhere. [RP 49-87]

Taylor and MacKinnon returned home around 6:00 p.m., shortly after darkness had fallen, and went straight to their room. MacKinnon's daughter was spending the night with her father and was not present. [RP 50] The couple resumed arguing because MacKinnon wanted to watch a movie and relax, whereas Taylor wanted to do some project involving a noisy power tool. [RP 50-51, 90] They continued to argue, moving separately back and forth between the living room and their bedroom. MacKinnon announced her intent to leave him and move back to her mother's house. At some point in the evening MacKinnon became aware that Taylor was no longer in the house. [RP52-54, 92]

MacKinnon began packing her belongings. As she did so she noticed that the gifts the two of them had purchased that morning for her daughter were missing. [RP 54, 92] Kampf was at

home at the time and MacKinnon told her about the missing items. Kampf attempted to calm MacKinnon, assured her everything would be all right, and tried to persuade her not to leave. [RP 54, 93] MacKinnon could not call anyone. Taylor had destroyed their cell phone two weeks earlier and there was no other phone in the residence at the time. [RP 54-55, 59]

MacKinnon interrupted her packing long enough to break an unspecified number of compact disks belonging to Taylor and to cut up at least some, and perhaps all, of the clothing Taylor had at the residence. [RP 55-56, 58, 163-64] She removed the ornaments from a small Christmas tree in their bedroom and wrote a long letter to Taylor, which she wedged into the branches of the tree. [RP 58, 97-98] MacKinnon also slept for some period of time that she estimated was between an hour and an hour and a half. [RP 59, 96] She woke on two occasions to the sound of dogs barking. The second time, at approximately 3:00 a.m. on December 16<sup>th</sup>, she realized it was because Taylor was at the door. The door was chained so he could not get in, and after first refusing to let him in, she relented and opened the door. She asked Taylor what he had done with her daughter's Christmas gifts and he replied that he had

buried them in the woods where they got their Christmas tree. [RP 60-61, 64, 96-97]

Taylor and MacKinnon talked at length about the gifts, but Taylor refused to return them. MacKinnon never did get them back. [RP 62-63] Following their normal pattern, the two moved back and forth between the living room and bedroom. [RP 64, 99] MacKinnon never saw Taylor read the letter she left in the Christmas tree, but it was removed from the tree during that time. [RP 64] In the letter, MacKinnon had promised to keep Taylor's secrets. Apparently referring to the letter, Taylor threatened to shoot her if she ever talked to the police about him, holding his hand as if it were a pistol and making "gunshot noises" as he did so. [RP 66] MacKinnon testified that she was frightened at the time and was still afraid in court. [66-67] On two occasions while they were in the bedroom Taylor shoved her. [RP 65, 99] As the couple was dividing up the property in the bedroom, Taylor returned a knife that belonged to MacKinnon, keeping one that belonged to him. At some point MacKinnon's right hand was cut. [RP 78-79, 100-101]

Taylor moved back and forth between the mobile home and his pickup, apparently moving some of his belongings. MacKinnon followed him and continued to demand that Taylor return her

daughter's Christmas gifts. [RP 67, 105] Both of them were inside the pickup, with the door open, and Taylor shoved MacKinnon out with such force that she was thrown into the mobile home. [RP68, 106] Taylor left in the pickup shortly thereafter. [RP 73, 107] MacKinnon returned inside the mobile home to find Kampf and her boyfriend, Troy, coming out of their bedroom. Troy loaned MacKinnon his telephone and she called her mother to come pick her up. [RP 73, 76, 108] Her mother arrived a short time later, they loaded the car with some of her belongings, and went to her mother's residence. From there they drove to the Thurston County Sheriff's Office to report the incidents. [RP 76-77, 108-110]

## 2. Procedural facts.

Taylor was tried on the second amended information, which charged four counts: second degree assault, intimidating a witness, third degree theft, and fourth degree assault, all domestic violence. [CP 2-3] Taylor took no exceptions to the jury instructions. [RP 191] The jury found him guilty of all four counts [CP 61, 63, 65, 67] and returned special verdicts on all four counts finding that Taylor and MacKinnon were members of the same family or household. [CP 62, 64, 66, 68]

Sentencing was held on March 10, 2011. [CP 72-82, RP 257-267] A second hearing was held on March 22, 2011, after the parties discovered that five prior convictions in Lewis County had been determined to be the same criminal conduct in that county and therefore they would count in Thurston County as only one point instead of five. [RP 268] The court amended his sentence to 74 months on the second degree assault conviction, 57 months on the intimidating a witness conviction, and 365 days each on the third degree theft and fourth degree assault, all to run concurrently. [CP 16-26]

Taylor promptly appealed.

### C. ARGUMENT.

1. The State concedes that the jury was instructed on an alternative means of committing the crime of intimidating a witness which was not charged in the information.

When a statute provides for alternative means of committing a crime, a defendant may be charged with one, some, or all of the alternatives as long as the charged alternatives are not repugnant to each other. State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996) (citing to several other cases). If the information charges only one of the statutory alternative means of committing a crime, it is error for the court to instruct on any of the uncharged

alternatives. State v. Chino 117 Wn. App. 531, 540, 72 P.3d 256 (2003). If the instructional error favored the prevailing party, it is presumed to be prejudicial, but the presumption can be overcome by affirmative evidence that it was harmless. Id. Such an error is a manifest error of constitutional magnitude and may be raised for the first time on appeal. State v. Laramie, 141 Wn. App. 332, 342, 169 P.3d 859 (2007).

Taylor was charged with, among other crimes, intimidating a current or prospective witness, RCW 9A.72.110(1)(a):

In that the defendant, KYLE ALAN TAYLOR, in the State of Washington, on or about December 16, 2010, by use of a threat directed against a current or prospective witness, attempted to influence the testimony of that person, Nerissa Ann MacKinnon, a family or household member, pursuant to RCW 10.99.020.

[CP 2]

RCW 9A.72.110 provides:

(1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:

- (a) Influence the testimony of that person;
- (b) Induce that person to elude legal process summoning him or her to testify;
- (c) Induce that person to absent himself or herself from such proceedings; or

(d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

(2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official proceeding.

(3) As used in this section:

(a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in \*RCW 9A.04.110(25).<sup>1</sup>

(b) "Current or prospective witness" means:

(i) A person endorsed as a witness in an official proceeding;

(ii) A person whom the actor believes may be called as a witness in any official proceeding; or

(iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child.

(c) "Former witness" means:

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<sup>1</sup> This statute was amended by Laws of 2005, c. 458, § 3, changing subsection (25) to subsection (26), which was subsequently amended by Laws of 2007, c. 79, § 3, changing subsection (26) to subsection (27).

(i) A person who testified in an official proceeding;

(ii) A person who was endorsed as a witness in an official proceeding;

(iii) A person whom the actor knew or believed may have been called as a witness if a hearing or trial had been held; or

(iv) A person whom the actor knew or believed may have provided information related to a criminal investigation or an investigation into the abuse or neglect of a minor child.

(4) Intimidating a witness is a class B felony.

Intimidating a witness is an alternative means crime. State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007).

The jury in Taylor's case was given Instruction No. 14:

To convict the defendant of the crime of intimidating a witness as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16<sup>th</sup> day of December, 2010, the defendant by use of a threat against a current or prospective witness attempted to influence the testimony of that other person or attempted to induce a person not to report information relevant to a criminal investigation; and

(2) That this act occurred in the State of Washington.

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 of 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 47]

It is not harmless error if it is possible that the jury convicted on the basis of the uncharged alternative. Chino, 117 Wn. App. at 540-41. Here it is not only possible but highly likely. The evidence was that Taylor threatened to shoot MacKinnon if she went to the police, and the prosecutor argued in closing that the State was relying on the alternative of inducing a person not to report relevant information to the police. [RP 222]

Because this error is not harmless, the State concedes that Taylor's conviction for intimidating a witness, domestic violence, must be reversed and remanded for a new trial. Laramie, 141 Wn. App. at 344.

2. The court's instructions to the jury properly instructed as to all the essential elements of the crime of intimidating a witness.

Because the State has conceded that the conviction for intimidating a witness must be reversed and remanded for a new trial, this section of the argument is largely academic. However, Taylor is incorrect that the words "true threat" must be included in the instructions to the jury. [Taylor's opening brief at 8]

Threats are a form of “pure speech” and any statute which criminalizes speech must be scrutinized in light of the First Amendment. State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007). To pass constitutional muster, a threat must be a “true threat”, which is defined as “a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life’ of another person.” State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). It must be a “serious threat,” not “jest, idle talk, or political argument.” Id. To determine if a threat is “true,” it is examined under an objective standard, focusing on the speaker. Id., at 44. The threat is a true threat if the speaker can reasonably foresee that, given the circumstances, the person who hears the threat would believe someone is subject to physical violence. State v. King, 135 Wn. App. 662, 669, 145 P.3d 1224 (2006).

In Tellez, the defendant, who had been convicted of felony telephone harassment, made a similar argument that a true threat is an essential element of that crime which required both inclusion in the charging document and definition in the “to-convict” instruction. Id., at 483. The court held that a true threat “merely

defines and limits the scope of the essential threat element in the felony telephone harassment statute and is not itself an essential element of the crime.” Id., at 484.

No Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document of “to convict” instruction. We decline to go any further than the Supreme Court because it is not necessary. So long as the court defines a “true threat” for the jury, the defendant’s First Amendment rights will be protected.

Id., at 483-84. In Tellez, the defendant was convicted of felony telephone harassment.

The witness intimidation statute does not prohibit any speech other than true threats. King, 135 Wn. App. at 670-71. The King court explained that the crime of intimidating a witness is different than felony harassment.

The statute prohibiting harassment covers a virtually limitless range of utterances and contexts, any of which might be protected. Both the speech and context of witness intimidation, by contrast, are limited by the language of the statute. The statute requires the State to prove that the defendant communicated an intent to harm a person who has appeared, presumably against him, in a legal proceeding. . . . There is, then, no constitutionally protected speech prohibited by a statute that outlaws solely threats to witnesses.

Id., at 669-70. In other words, the State cannot meet its burden of proving the crime of witness intimidation without proving that the threat was a true threat, and therefore a defendant's First Amendment rights are protected without instructing the jury specifically on the definition of a true threat. The very context of intimidating a witness is one in which the speaker must foresee that the victim will interpret it as an intent to inflict harm. "[I]t is the context that makes a threat 'true' or serious." Id., at 669. If that context does not exist, then the State cannot prove the charge. Because the jury instructions in Taylor's trial properly explained the crime to the jury, it was not necessary to use the words "true threat" or define them.

3. The requirement that the threat in a charge of intimidating a witness be a true threat is not an essential element of the offense and it is not error to omit it from the charging language.

A defendant may challenge the constitutional sufficiency of a charging document for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The time at which a defendant challenges the charging document controls the standard of review for determining the charging document's validity. State v. Borrero, 147 Wn.2d 353, 360, 58 P.3d 245 (2002). When the charging document is challenged after the verdict, the language is

construed liberally in favor of validity. Id. at 360. Here, Taylor challenged the information after the verdict so this Court should construe the language liberally and in favor of validity.

A charging document must include all essential elements of a crime, statutory or nonstatutory, "to afford notice to an accused of the nature and cause of the accusation against him." Kjorsvik, 117 Wn.2d at 97. An "essential element is one whose specification is necessary to establish the very illegality of the behavior." State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

The court uses a two-pronged analysis to determine the constitutional sufficiency of a charging document challenged for the first time on appeal: 1) do the essential elements appear in any form, or by fair construction can they be found in the charging document; and, if so, 2) can the defendant show that he or she was actually prejudiced by the language of the charging document. Kjorsvik, 117 Wn.2d at 105-06.

The first prong of the test looks to the face of the charging document itself. State v. Tandecki, 153 Wn.2d 842, 849, 109 P.3d 398 (2005). The charging document can use the language of the statute if it defines the offense with certainty. State v. Elliott, 114 Wn.2d 6, 13, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990).

However, the charging document does not need to mirror the language of the statute. Tandecki, 153 Wn.2d at 846.

As noted in the previous section, no Washington court has ever found that a “true threat” is an essential element of any crime involving threatening language. Tellez, 141 Wn. App. at 483-84. Because it is not an essential element it need not be included in the charging language. In addition, for all the reasons discussed above concerning a true threat and jury instructions, the charging language in this case is sufficient . [CP 2]

4. The State recognizes that if this court follows its holding in State v. Hunley, the sentence in this matter will be remanded and the State will be permitted to produce further evidence of Taylor’s prior convictions. However, in order to preserve the issue, the State argues that the decision in Hunley is incorrect.

At both sentencing hearings, the State presented the Prosecutor’s Statement of Criminal History, listing Taylor’s prior convictions, all of which took place in either Thurston County or neighboring Lewis County. [CP 69] Taylor did not object to that history, and asked for a sentence within the range determined by the offender score that was calculated using that criminal history. [RP 261-62, 273-74] When informed that he had one prior conviction that counted as a strike, he again did not object. [RP 266-67] Taylor now argues for the first time on appeal that the

prosecutor's statement of criminal history violates his constitutional rights in two ways.

a. Right to remain silent.

First, Taylor claims that the criminal history, which was offered pursuant to RCW 9.94A.530 (2), infringes on his right to remain silent. He is apparently arguing that if he had to acknowledge or dispute his criminal history, it would force him to incriminate himself. That is not the case.

Chapter 231, § 2, LAWS OF 2008, amended RCW 9.94A.500(1) to add this language:

A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein.

The statute then continues, as it did prior to 2008:

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. . . .

RCW 9.94A.530(2) was also amended by the 2008 legislation to read as follows:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant

to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of the sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

Taylor reads more into the 2008 language than is there. All it says is that the State can meet its burden of producing prima facie evidence of a defendant's criminal history by producing a list of the convictions it believes exist.

"Use of information regarding a defendant's conduct, including statements about crimes already punished, does not violate the Fifth Amendment." State v. Strauss, 93 Wn. App. 691, 700, 969 P.2d 529 (1999). "Statements about past offenses already punished cannot incriminate [the defendant] as to those offenses, nor increase his punishment for those offenses." Id. The Fifth Amendment protects a person from "having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the

Government.” State v. Sweet, 138 Wn.2d 466, 480, 980 P.2d 1223 (1999) (citing to State v. Easter, 130 Wn.2d at 241).

An incriminating question is defined as “one the answer to which will show, or tend to show, [the person] guilty of a crime for which he is yet liable to be punished.” State v. James, 36 Wn.2d 882, 897, 221 P.2d 482 (1950) (citing to other cases). Once a sentence is imposed, incrimination is complete. Mitchell v. United States, 526 U.S. 314, 325, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999).

Taylor apparently equates some presumed duty to notify the court of a missing or erroneous conviction with self incrimination. If he was being required to produce some information or evidence regarding the underlying crimes being sentenced, that might be true. But there is no authority that being required to either tell the court that the State’s summary is incorrect or being stuck with it is in any way requiring him to incriminate himself. The fact that the offender score determines the standard sentencing range is not the same thing as saying that he is being forced to produce evidence that increases his punishment for the crime being sentenced.

The new language, in fact, does not require the defendant to do anything. If the prosecutor’s summary includes a conviction that

should not be there, it is certainly in the best interest of the defendant to object to that at sentencing. The prosecutor's summary is prima facie evidence; the court is free to accept or reject it as it determines. Why a defendant would want to let a conviction count toward his criminal history, be sentenced to a longer term than he should be, and then seek a resentencing on appeal is a mystery. On the other hand, if the State has omitted a relevant conviction, the statute does not require the defendant to bring it to the court's attention. Since this was a jury conviction, not a guilty plea, there is no statutory obligation on the defendant to correct errors in his favor. All the new language says is that if a defendant does not challenge the State's summary, it becomes prima facie evidence of his criminal history. Neither of these scenarios even remotely requires a defendant to incriminate himself.

A similar argument was raised in State v. Hunley, 161 Wn. App. 919, 253 P.3d 448 (2011).<sup>2</sup> Because the court decided that case on different grounds, it did not address that issue. Id., at 927 n. 5.

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<sup>2</sup> *Review granted*, 86135-8 (Sept. 26, 2011).

b. Shifting of the burden of proof.

Taylor cites to Hunley to support his argument that the prosecutor's statement of criminal history, unsupported by an unspecified quantity of evidence, unconstitutionally shifts the burden of proof to the defendant. The State recognizes that this court has made that holding in Hunley, but to preserve the issue offers the following argument that Hunley is incorrectly decided.

The Washington Supreme Court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function, as is the establishment of the sentencing process. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986). The Sentencing Reform Act of 1984 (SRA) represented a significant change from the prior indeterminate sentencing scheme and was challenged on several constitutional grounds, including separation of powers and due process. It survived each of those challenges because the legislature has the authority to establish penalties and the procedures for imposing them. The preponderance of the evidence standard satisfies due process. See *generally* Ammons, 105 Wn.2d at 180-81, 185.

Constitutional challenges to the provisions of the SRA are governed by the same standards as constitutional challenges to

other statutes. A statute is presumed constitutional and the party challenging the statute has the burden of proving it unconstitutional beyond a reasonable doubt. Island County v. State, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998).

The SRA has been amended many times since its enactment. Between 1981 and 2004 it was amended 181 times. In re Pers. Restraint of LaChapelle, 153 Wn.2d 1, 7, 100 P.3d 805 (2004). None of those changes, however, has diminished the principle that a defendant may not appeal a standard range sentence unless the trial court refused to consider information mandated by the SRA or considered information in violation of the SRA. Compare former RCW 9.94A.210(1) (Laws of 1984, ch. 209, § 13(1)(b)) with RCW 9.94A.585(1). Accord State v. Mail, 121 Wn.2d 707, 713, 854 P.2d 1042 (1993). The restriction upon appeals from standard range sentences does not violate a defendant's constitutional rights because the legislature took steps to ensure that a judge does not rely upon "material facts of constitutional magnitude that are not true." State v. Herzog, 112 Wn.2d 419, 431, 771 P.2d 739 (1989); RCW 9.94A.530(2).

The 2008 amendments to RCW 9.94A.530(2) did not alter the prior language requiring the defendant to object to information

presented in a presentence investigation report. The contemporaneous objection requirement has been part of the SRA since its inception. See Laws of 2004, ch. 209, § 5. Requiring a defendant to raise an objection to the information presented in a presentence investigation report is not a violation of his constitutional rights against self-incrimination. Ammons, 105 Wn.2d at 184; State v. Blunt, 118 Wn. App. 1, 9-11, 71 P.3d 657 (2003).

This statute was merely a codification of the fundamental and well-established principle that a party may not assert on appeal a claim that was not raised at trial. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1953). In State v. Louie, 68 Wn.2d 304, 413 P.2d 7 (1966), the court noted that it had adhered to a contemporaneous objection requirement “with almost monotonous continuity”, citing to 34 prior cases going back to 1895. Id., at 312.

The 2008 amendments to RCW 9.94A. 500 and .530 extend the contemporaneous objection requirement to information that is at least as reliable as presentence investigation (PSI) reports and subject the new information to the very process that Herzog found protected a defendant’s due process rights. A presentence report is commonly understood as a report completed by the Department

of Corrections (DOC). State v. Mendoza, 165 Wn.2d 913, 922, 205 P.3d 113 (2009). Although neither the statute nor the court rule requires this report to be submitted under penalty of perjury, CrR 7.1(b) requires that the report of the presentence investigation shall include the defendant's criminal history. If a defendant fails to object to that criminal history he is precluded from challenging the sufficiency of the proof of prior convictions. See, e.g., State v. Cannon, 130 Wn.2d 313, 330-31, 922 P.2d 1293 (1996) (criminal history and the circumstances surrounding the current crime); State v. Mail, *supra* (criminal history and facts underlying the prior offenses); In re Williams, 111 Wn.2d 353, 365-68, 759 P.2d 436 (1988) ( due process not violated by the use of an unobjected-to Department of Licensing abstract of the defendant's driver's license record to prove the existence of prior convictions). This is consistent with the principle that a defendant can affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence. Mendoza, 165 Wn.2d at 920.

Initially, a court could order DOC to prepare a presentence investigation report in every case. See former RCW 9.94A.110(1) (Laws of 1984, ch. 209, § 5). Budget considerations eventually prompted the legislature to limit PSIs to felony sexual offenses and

mentally ill defendants. RCW 9.94A.500(1). The legislature also ordered prosecutors to provide judges with the defendant's criminal history. See, e.g., RCW 46.61.513 (prosecutor to verify the defendant's criminal history); RCW 10.99.045(3)(b) (prosecutor to provide the court with the defendant's criminal history); RCW 10.99.100(2)(a) (same). The prosecutor, therefore, was assigned the PSI writer's task of summarizing the defendant's criminal history.

The courts, however, have not extended the benefits of the contemporaneous objection requirement to a prosecutor's summary of a defendant's criminal history. See generally State v. Mendoza, *supra*. This meant that whenever there was no PSI, which occurs in the majority of cases, the State was required to amass certified copies of a defendant's prior convictions or other comparable evidence or face an appeal and resentencing hearing. See, e.g., Mendoza, *supra*; State v. Ford, 137 Wn.2d 472, 476-79, 973 P.2d 452 (1999). Satisfying this burden took a significant amount of time, contrary to the SRA's goal of "mak[ing] frugal use of the state's and local governments' resources." RCW 9.94A.010(6).

The legislature could reasonably have considered that

“an inflexible rule requiring formal proof of earlier court records only by authenticated or certified copies of those records and proof of identity [is] incompatible with considerations of judicial economy and efficiency essential to the disposition of present-day caseloads. Nor do such procedures provide any necessary or useful safeguards to the defendants in cases such as this where the fact that the prior conviction had occurred has never been denied.”

People v. Williams, 149 Ill. 2d 467, 599 N.E.2d 913, 925 (1992), quoting People v. Davis, 65 Ill. 2d 157, 357 N.E.2d 792, 795-96 (1976).

The legislature could also reasonably have determined that a criminal history prepared by a prosecutor is at least as reliable as a criminal history prepared by a DOC employee. Presumably the DOC employee and the prosecutor are equally concerned for their professional reputations, but the prosecutor is also subject to RPC 3.3.<sup>3</sup> A prosecutor’s signature on the criminal history summary, moreover, constitutes a statement that the prosecutor has made a reasonable inquiry into the defendant’s criminal history and that the list of prior offenses is accurate. See *generally* CR 11(a) (made

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<sup>3</sup> RPC 3.3 requires a prosecutor to only offer evidence to a court that the prosecutor believes to be truthful, and to correct any erroneous information provided to the court by the prosecutor. At least one court has noted that this rule entitles a trial judge to expect total candor from a prosecutor without resorting to the administration of an oath. See Gray v. State, 317 Md. 250, 562 A.2d 1278, 1282 (1989)

applicable to pleadings in criminal matters by CrR 8.2 and CR 7(b)(3)).

Further, the legislature chose language that allows each sentencing judge to decide what weight to give to the prosecutor-prepared summary of criminal history. RCW 9.94A.500(1). (A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed herein. *If the court is satisfied by a preponderance of the evidence* that the defendant has a criminal history, the court shall specify the convictions it has found to exist.”) (Emphasis added.)

In Taylor’s case, the court did not abuse its discretion by accepting the prosecutor’s summary of criminal history. Each conviction was listed with the dates of the crimes and sentencing, the court in which they were sentenced, and whether they were adult or juvenile convictions. [CP 69] This is more than the “bare assertion” that Taylor refers to in his opening brief at page 13.

In addition, Taylor’s failure to object to his criminal history constituted an “acknowledgment.” RCW 9.94A.530(2) (“Acknowledgment includes . . . not objecting to criminal history

presented at the time of sentencing.”) At the time of the first sentencing, Taylor did not claim he had not had time to review the State’s summary, and apparently accepted it without question. [RP 261] Twelve days later, when the resentencing hearing took place, he most certainly had had time to inspect if carefully, and in fact the parties had discovered on March 10, 2011, the same day the first sentencing hearing was held, that Lewis County had counted five of his convictions in that jurisdiction as the same criminal conduct. [RP 268] Again, Taylor made no objection [RP 273-74] If there were any errors, he had ample opportunity to bring them to the attention of the court but, even on appeal, he does not dispute his criminal history. His argument in the following section that some of those convictions should constitute the same criminal conduct for purposes of calculating his offender score specifically references those convictions. His decision to “acknowledge” the prior convictions relieved the State of its burden to produce evidence. Mendoza, 165 Wn.2d at 920.

Since the sentencing court considered all the information mandated by the SRA, and based Taylor’s sentence solely upon information that was acknowledged, his standard range sentence

was imposed in a constitutional manner and is not reviewable by the appellate courts. State v. Mail, *supra*; State v. Herzog, *supra*.

5. The sentencing court did not violate Taylor's constitutional rights by counting his convictions for third degree theft and second degree robbery separately, or for counting his conviction for first degree burglary separately from the five convictions for first degree theft and theft of a firearm, all of which already are considered the same criminal conduct for purposes of calculating his offender score.

a. Right to remain silent.

The State's response to Taylor's argument that his right to remain silent, which is actually the right against self-incrimination, was violated is the same as to the previous claim that acknowledging his criminal history violated his right to remain silent in Section 4, *supra*.

b. Due process violation.

Taylor argues that absent information to the contrary, every conviction with the same date of crime and same sentencing date must be counted as the same criminal conduct for purposes of calculating his offender score. However, RCW 9.94A.525(5)(a) does not require that. That statute reads, in relevant part:

In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same

criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations.

RCW 9.94A.525(5)(a).

RCW 9.94A.589(1)(a) provides:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. . . .

“[T]he same criminal conduct statute is not mandatory.” State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000, *review denied* 141 Wn.2d 1030, 11 P.3d 827 (2000). Nor is the current sentencing court bound by a previous sentencing court’s application of the same criminal conduct standard. State v. Lara, 66 Wn. App. 927, 931, 834 P.2d 70 (1992). The current court must make its own determination as to whether prior offenses constituted the same criminal conduct. State v. Mehaffey, 125 Wn. App. 595, 601, 105 P.3d 447 (2005).

Taylor presents no authority for his position that unless the State provides evidence that two or more prior convictions, sentenced on the same date and with the same date of crime, are not the same criminal conduct the court is required to count them as the same. In this case, he never even raised the issue. It was the State who discovered that the five theft charges had been sentenced in Lewis County as the same criminal conduct and thus counted as only one point. At his second sentencing hearing, Taylor never mentioned the matters that he raised in his CrR 7.8 motion. [CP 83-98] If this court remands this matter for retrial on the witness intimidation charge, Taylor can raise sentencing issues

in the trial court. See generally State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993).

c. Assault and robbery convictions.

Taylor was convicted of third degree assault and second degree robbery on the same date and the date of the crime was the same for both offenses. [CP 17] He maintains that the sentencing court in this current case must consider those as the same criminal conduct. As argued above, that is not the case. The current court has the discretion to apply the statute as it sees fit. Further, Taylor essentially puts the burden on the State to relitigate every prior conviction that shares an offense date and a sentencing date with any other, a burden that the statute does not impose.

d. First degree burglary, theft of a firearm, and first degree theft convictions.

The sentencing court has already counted the four counts of theft of a firearm and one count of first degree theft from Lewis County as one point in Taylor's offender score. [CP 17-18, RP 268-270] He asserts in his supplemental brief that Lewis County also scored the burglary charge sentenced on the same day as same criminal conduct with the theft charges, but the State apparently did not have that understanding. [RP 268-270] Even if it did, the

current sentencing court may, as noted above, make its own determination.

A sentencing court has the discretion to apply the burglary anti-merger statute and count burglary separately from other crimes committed at the same time. RCW 9A.52.050 authorizes separate punishments for burglary and other crimes committed during the burglary, even where those offenses would ordinarily constitute the same criminal conduct. Given the number of convictions Taylor acquired on the same date resulting from crimes committed on the same date, it seems reasonable that the Lewis County court would not have counted burglary as the same criminal conduct. The Thurston County court is certainly not required to do so.

6. Taylor cannot establish that his trial counsel was ineffective because he cannot establish that the result would have been different had counsel argued that certain of his convictions constituted the same criminal conduct.

To prevail on a claim of ineffective assistance of counsel, Taylor must show that his counsel at sentencing was deficient, meaning that his performance "fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251, 1256 (1995). The competency of his counsel must be judged from the

record as a whole, and not from an isolated segment. State v. Piche, 71 Wn.2d 583, 591, 430 P.2d 522, 527 (1967).

Taylor must first show that there was error, and that the outcome would have been different had the alleged error not occurred. State v. We, 138 Wn. App. at 722. Once the error has been identified, two prongs are considered to assess the performance of defense counsel. The appellant must demonstrate (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate. Such a finding of ineffective representation should reverse a defendant's conviction if counsel's conduct created a

reasonable possibility of contributing to that conviction.

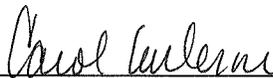
State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168, 1171 (1978)

In order to find ineffective assistance of counsel, this court must determine the likelihood that the crimes Taylor lists would have been found to be the same criminal conduct had the issue been argued. For all the reasons discussed above, that seems remote.

#### D. CONCLUSION.

The State concedes that the conviction for intimidating a witness must be reversed and remanded because the jury was instructed on an uncharged alternative. The State also acknowledges that this court is likely to find that the prosecutor's summary of Taylor's criminal history is insufficient based upon Hunley. The remainder of Taylor's claims are without merit.

Respectfully submitted this 7<sup>th</sup> day of October, 2011.



\_\_\_\_\_  
Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief on the date below as follows:

*Electronically filed at Division II*

TO: DAVID C. PONZOHA, CLERK  
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via email to:

JODI R. BUCKLAND  
ATTORNEY FOR APPELLANT  
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of October, 2011, at Olympia, Washington.

  
Chong McAfee

# THURSTON COUNTY PROSECUTOR

**October 07, 2011 - 11:39 AM**

## Transmittal Letter

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