

NO. 42035-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LOCKE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Robert Locke found himself economically disadvantaged by the policies and decisions of the governor, including decisions made while she served as attorney general. Several years ago, he was deprived of three paychecks from a non-governmental employer, two of which bounced and the final of which was never provided. Mr. Locke contacted the attorney general's office to issue a complaint but never received a substantive response. More recently, while Mr. Locke was receiving disability benefits for a bad back, his benefits were reduced twice while his fare for public transportation and other essentials were increasing. Out of frustration over the economic climate and what he perceived as the governor's policies, Mr. Locke "flippantly" filled out three communication forms on the governor's website at six in the morning from his personal computer. Though Mr. Locke made impolite statements in the communications, he did not communicate any direct or even implicit threat to harm or take the life of the governor or her family. Nonetheless, Mr. Locke was convicted of one count of threats against the governor.

His conviction should be reversed and dismissed because the State presented insufficient evidence that the communications were either threats or true threats.

In the alternative, Mr. Locke's conviction should be reversed because (1) three communications were alleged to form the basis of a single count but a Petrich unanimity instruction was not provided; (2) the information lacked the essential true threat element; and/or (3) the to-convict instruction lacked the essential true threat element.

If the Court does not reverse Mr. Locke's conviction, the community custody condition requiring Mr. Locke to submit to a mental health evaluation should be stricken because the sentencing court failed to comply with statutory requirements.

B. ASSIGNMENTS OF ERROR

1. In the absence of sufficient evidence to establish beyond a reasonable doubt that Mr. Locke's statements were threats, his conviction violates his constitutional right to due process.

2. In the absence of sufficient evidence to establish beyond a reasonable doubt Mr. Locke's statements were threats, his conviction violates his constitutional right to freedom of speech.

3. In the absence of sufficient evidence to establish beyond a reasonable doubt Mr. Locke's statements were unprotected "true threats," his conviction violates his constitutional right to freedom of speech.

4. In the absence of sufficient evidence to establish beyond a reasonable doubt Mr. Locke's statements were unprotected "true threats," his conviction violates his constitutional right to due process.

5. Absent an election by the State as to the act relied on for conviction or a unanimity instruction issued by the trial court, Mr. Locke was denied his constitutional right to a unanimous jury.

6. The information lacked the essential element of true threat.

7. The to-convict instruction lacked the essential element of true threat.

8. The sentencing court erred by ordering Mr. Locke to obtain a mental health evaluation and follow all treatment recommendations without complying with the requirements of RCW 9.94B.080.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The United States and Washington Constitutions require the State prove all essential elements of a charged offense beyond a reasonable doubt. The crime of threats against the governor or her family requires the State to prove, among other things, that the defendant made a threat and that the threat was a “true threat” unprotected by the First Amendment. A true threat is a statement that a reasonable person would foresee would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another. Must Mr. Locke’s conviction be reversed and dismissed where the State provided insufficient evidence to show Mr. Locke made a threat and that the threat constituted a true threat?

2. Criminal defendants have a state constitutional right to a unanimous jury verdict and a federal constitutional right to a jury trial. Where evidence is presented of multiple distinct acts, any of which could form the basis of a criminal conviction, either (1) the State must elect which act it is relying on, or (2) the trial court must instruct the jury that they must unanimously agree that the same act has been proved beyond a reasonable doubt. In this case, the State presented evidence of three communications by Mr. Locke to

the governor's office. Where the prosecutor failed to elect which act it was relying on as the basis for conviction and the trial court failed to provide a unanimity instruction, is reversal of Mr. Locke's conviction required?

3. Due process requires that all essential elements of a crime be included in the charging document and to-convict jury instruction. To prove the crime of threat against the governor, the State is required to prove, among other things, the essential element that the threat was a true threat—that is, the alleged threat is a statement that a reasonable person would foresee would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another. Where the information and to-convict instruction lacked the element of true threat, was Mr. Locke denied due process?

4. RCW 9.94B.080 permits the sentencing court to order an offender to undergo a mental health evaluation and participate in treatment based upon information in the presentence reports and/or mental health status reports and a finding the defendant fits the definition of mentally ill offender. Must the order requiring Mr. Locke to undergo a mental health evaluation and participate in recommended treatment be stricken because the sentencing court

did not find he was a mentally ill offender and the court had no information or mental status reports upon which to base such a finding?

D. STATEMENT OF THE CASE

1. Mr. Locke's Communications Through the Governor's Website.

Robert Locke was discontent with how the state government was functioning based upon several issues personal to him. Exhibit 6 (transcript of Mr. Locke's recorded statement). In 1999, two of Mr. Locke's paychecks from his employer bounced and the same employer then deprived him completely of his final paycheck and disappeared. Exhibit 6, p.6. Mr. Locke reported the incidents to the attorney general's office. Id. He received a standard response that he would be "hearing very soon" from the office; however, he "[n]ever heard another word." Id.

More recently, Mr. Locke has been unemployable due to severe back pain. Exhibit 6, p.6. Without employment, he did not have health insurance. Id. He was, however, able to receive medical insurance coverage from the Department of Social and Health Services (DSHS). Id. Unfortunately, in quick succession he

received two letters from DSHS, each stating his benefits would be reduced. Id.

This second reduction in benefits put him over the edge. He could no longer afford bus fare in light of recent increases in public transportation costs. Exhibit 6, p.6. Mr. Locke accordingly walks three miles in pain to physical therapy. Id., pp. 6-7. Around six in the morning on January 25, 2011, Mr. Locke decided to give the former attorney general and now governor “a piece of [his] mind.” Id., p.7.

Using the computer in the home of the friends where he was staying, Mr. Locke sent three communications through the governor’s public website. First, Mr. Locke sent an email through the “Contact Governor Gregoire” page. Exhibits 3 and 4; see Governor Gregoire’s Website, <http://www.governor.wa.gov/contact/default.asp> (last visited December 7, 2011). The governor’s contact form contains preset fields, certain of which must be completed. See Exhibit 3; Governor Gregoire’s Website, <http://www.governor.wa.gov/contact/default.asp>. Mr. Locke supplied his own name, telephone number, email address and zip code but listed the address from the television show The Munsters, 1313 Mockingbird Lane, and provided the city as

“Gregoiremustdie.” Exhibit 4; see Exhibit 6, pp.1-2. In the text of the email, Mr. Locke wrote “I hope you have the opportunity to see one of your family members raped and murdered by a sexual predator. Thank you for putting this state in the toilet. Do us a favor and pull the lever to send us down before you leave Olympia.” Exhibit 4.

Within minutes, Mr. Locke fired off a second email using the same online contact form. Exhibit 5. The text of this email stated, “You fucking CUNT! You should be burned at the stake like any heretic.” Id. He filled out the other preliminary information identically to the first communication. Compare Exhibit 5 with Exhibit 4.

Finally, and again within just a couple minutes, Mr. Locke submitted an event request form to the governor, through the “Invite Governor Gregoire to an Event” page. Exhibit 1; “Invite Governor Gregoire to an Event,” Governor Gregoire’s Website, <http://www.governor.wa.gov/event/event.asp> (last visited December 7, 2011). The website again contains preset fields and also provides preset answers in a dropdown menu format for certain fields, such as the governor’s role, the size of the audience and whether time is sought for questions. See id. Mr. Locke completed this form by providing

his name and listing the organization “Gregoire Must Die [sic].” Exhibit 2. He “request[ed] an event at [the governor’s] mansion” at which the governor would be an honoree. Id. For the topic, he selected “other” and wrote, “Gregoire’s public execution.” Id. He requested five minutes for questions and a microphone, listed an audience of greater than 150, and listed the event length as 15 minutes. Id.

2. Mr. Locke Was Fully Cooperative with Police and Apologetic for Any Misunderstanding.

Several hours later, the police contacted Mr. Locke at the telephone number he had provided in his emails to the governor’s office. RP 203-04.¹ Detective James Kirk identified himself and said he wanted to talk to Mr. Locke about some emails he had sent that morning. RP 204. Mr. Locke answered affirmatively, but then his cellular phone lost service and dropped the call. RP 204, 207.

That afternoon, Detective James Kirk and two other officers went to an address associated with Mr. Locke in Graham, Washington, but no one was home. RP 205. Neighbors confirmed Mr. Locke lived at the address. RP 205.

¹ This brief does not rely upon the transcript from the March 10, 2011 hearing regarding a trial continuance. All references to the “RP” refer to the two-volume verbatim report of proceedings covering April 12 through 22, 2011.

The officers subsequently located Mr. Locke walking nearby and approached him. RP 196-97, 206. Mr. Locke confirmed his identity and stated, "Yeah, I know why you're here . . . I figured you guys would be contacting me." RP 197. Mr. Locke agreed to be transported to the State Patrol office, where he provided a recorded statement. RP 207. Mr. Locke explained fully the circumstances that caused him to send the communications through the governor's website. Exhibit 6. His "frame of mind was, I'm hurting and I'm angry, and I have three miles to walk to my physical therapy." Id., p.10. He did not have any intention whatsoever of carrying out a threat and stated, "quite frankly, I wouldn't even have the means too [sic]." Id. He does not own a car, has never owned any weapons, has only been to Olympia once and has "no business in Olympia whatsoever." Id., pp.10-11.

When given the opportunity to add to the statement, Mr. Locke stated, "I sure would like that, those paychecks back from 1999. And, I do, I profusely apologize for my temper. . . . it was the worst judgment." Exhibit 6, p.15. He had "needed the outlet at the moment . . . [a]nd, it was there." Id.

3. The Trial, Conviction and Sentence.

Mr. Locke was charged with a single count of threats against governor or family, RCW 9A.36.090(1). CP 1. At trial, the State presented testimony from the governor's executive scheduler, Barbara Winkler. RP 95. On January 25, 2011, Ms. Winkler arrived at her office in the Capitol Building around 7:15 a.m. RP 96, 118. She checked new event requests and saw the one Mr. Locke had sent. RP 96-97. Ms. Winkler was "alarmed" when she opened the request. RP 103. She did not recall receiving any previous communications from Mr. Locke. RP 105. Ms. Winkler did not focus on the fact that the words "Gregoire must die" were listed as the name of an organization, but focused on those words and "public execution." RP 115; see RP 122-23 (reported message not as event request but as a threat). Though no date was provided for the event, she considered the statements to be serious and forwarded the event request to a member of the governor's Executive Protection Unit. RP 103-05 (also noting nearness in time to shooting of congresswoman and judge in Arizona), 117. Ms. Winkler only later became aware of the emails Mr. Locke had sent. RP 120.

The governor's executive receptionist, Rebecca Larsen, testified she discovered two emails from Mr. Locke after Ms. Winkler told her about the event request she had received. RP 126. Ms. Larsen located the emails by searching a contact database for Mr. Locke's name. RP 126. Ms. Larsen turned the emails over to Trooper Steve Day, who was serving as part of the Executive Protection Unit, because she found the emails "alarming." RP 126-27, 129. Ms. Larsen was not aware of a city named "Gregoire must die" and believed "1313 Mockingbird Lane" is an address from a movie. RP 140.

A correspondence analyst, Phil Dubois, testified he received a telephone call from Ms. Larsen while he was reading the two emails from Mr. Locke. RP 149, 151, 154. Ms. Larsen informed Mr. Dubois she had contacted security. RP 154. He interpreted them as serious expressions of intent to do harm to the governor. RP 154. He forwarded the emails to his manager and a fellow analyst so that they were aware of the situation. RP 155. Mr. Dubois works in a building across the street from the governor's office. RP 157.

The Executive Protection Unit officer Ms. Winkler had contacted, Carlos Rodriguez, reviewed all three communications

and interpreted them as serious threats to do harm to the governor. RP 164, 167, 169, 171, 178. Sergeant Rodriguez did not see the communications in the context of the request forms available on the governor's website. RP 180-82; compare Exhibits 1 and 3 with Exhibits 2, 4 and 5. He recognized 1313 Mockingbird Lane as the address from the television show The Munsters. RP 186. When he contacted Washington State Patrol to investigate further, he relayed that information. RP 178-79, 186.

Detective Kirk reviewed the three communications after being contacted by his supervisor, whom Sergeant Rodriguez had called. RP 202-03. Detective Kirk also did not view the communications in the context of the request forms available on the governor's website and did not look at the governor's website. RP 217-19. He testified that he looked at the communications more seriously in light of recent events, including the shooting in Arizona. RP 204, 222-24. He also testified that his job is to regard such communications in the worst light possible and then investigate. RP 227.

Mr. Locke was convicted as charged. CP 28. The court sentenced him to the maximum term of confinement and imposed community custody conditions, including that Mr. Locke submit to a

mental health evaluation and recommended treatment. CP 42-50 (Judgment & Sentence). Mr. Locke objected to the mental health evaluation condition; there was no specific evidence presented that Mr. Locke suffered from mental illness; and neither the State nor the Department of Corrections filed a presentence report. See RP 300-04.

Additional facts are set forth in the relevant argument sections below.

E. ARGUMENT

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. LOCKE'S COMMUNICATIONS CONSTITUTED A THREAT.

- a. When the State seeks a conviction for an offense that implicates speech, it bears the burden of proving beyond a reasonable doubt every element of the offense, including that the implicated speech was not constitutionally protected.

A criminal defendant has the right to a jury trial and may only be convicted if the State proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368

(1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Drum, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

Where a criminal statute implicates speech, the State's burden includes proving beyond a reasonable doubt that the speech was unprotected by the First Amendment. State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004); see U.S. Const. amend. I. A threat is unprotected only if it constitutes a "true threat." A true threat is "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 individual].'" State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998) (alteration in original) (quoting United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir.1990)). The communication must be "a serious threat, not one said in jest, idle talk, or political argument." Kilburn, 151 Wn.2d at 43. Whether a

true threat occurs “is determined under an objective standard that focuses on the speaker.” Id. at 44.

Where a challenge to the sufficiency of evidence implicates core First Amendment rights, the appellate court must conduct an independent review of the record to determine whether the speech in question is unprotected. State v. Johnston, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006). “It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court’s findings.” Kilburn, 151 Wn.2d at 49. Rather, the “rule of independent review” requires an appellate court to “freshly examine ‘crucial facts’”— those facts that are intricately intermingled with the legal question. Id. at 50-51. “Also, the appellate court may review evidence ignored by a lower court in deciding the constitutional question.” Id. at 51 (citations omitted).

- b. The threats against governor or family statute implicates free speech and requires proof of a ‘true threat’ that is unprotected by the First Amendment.

Mr. Locke was charged with a single count of threats against governor or family, RCW 9A.36.090(1). CP 1. This statute provides:

- (1) Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing,

print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the governor of the state or his or her immediate family, the governor-elect, the lieutenant governor, other officer next in the order of succession to the office of governor of the state, or the lieutenant governor-elect, or knowingly and willfully otherwise makes any such threat against the governor, governor-elect, lieutenant governor, other officer next in the order of succession to the office of governor, or lieutenant governor-elect, shall be guilty of a class C felony.

RCW 9A.36.090. The statute criminalizes threats, a form of pure speech. State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001). “Content-based restrictions on speech are presumptively unconstitutional and are thus subject to strict scrutiny.” Id. at 208; Collier v. City of Tacoma, 121 Wn.2d 737, 748-49, 854 P.2d 1046 (1993) (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986)). A content-based restriction will survive strict scrutiny only if the restriction is narrowly tailored to promote a compelling state interest. See United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

In accordance with First Amendment principles, Washington courts construe statutes which criminalize threats as limited to true threats, thereby avoiding a claim of overbreadth. For example, in Williams, the Washington Supreme Court considered the

harassment statute, RCW 9A.46.020, and stated, “A distinction must be drawn between ‘true threats’ and protected speech.” 144 Wn.2d at 209. In State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001), the Washington Supreme Court again considered the harassment statute in light of the First Amendment, and stated, “[A] statute . . . which makes criminal a form of free speech, must be interpreted with the commands of the First Amendment clearly in mind.” 144 Wn.2d at 477 (quoting Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). In Kilburn, the Washington Supreme Court yet again considered the harassment statute, and stated, “In order to preserve the vital right to free speech, it is imperative that a court carefully assess statements at issue to determine whether they fall within or without the protection of the First Amendment.” 151 Wn.2d at 42.

Our Supreme Court has reached similar holdings as to other statutes that criminalize threats. E.g., Johnston, 156 Wn.2d at 360 (threats to bomb statute, RCW 9.61.160, “must be construed to limit its application to true threats in order to avoid facial invalidation of the statute on overbreadth grounds under the first amendment to the United States Constitution and article I, section 5 of the Washington Constitution.”); State v. Pauling, 149 Wn.2d 381, 386,

69 P.3d 331 (2003) (extortion statute, RCW 9A.56.130, must be narrowly construed as limited to unprotected speech); City of Bellevue v. Lorang, 140 Wn.2d 19, 23, 992 P.2d 496 (2000) (municipal antiharassment ordinance must be carefully drawn so as not to burden protected speech).

Likewise, federal courts have interpreted statutes criminalizing threats against an executive officer as limited to true threats. E.g., Watts, 394 U.S. at 707-08 (interpreting federal statute criminalizing threats against the president, which is virtually identical to RCW 9A.36.090(1), to require proof that the threat was a true threat); United States v. Bagdasarian, 652 F.3d 1113, 1117-18 (9th Cir. 2011) (interpreting federal statute criminalizing threats against presidential candidates to require a true threat); United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983) (interpreting federal statute criminalizing threats against the president to require proof that the threat was a true threat).

Accordingly, to avoid a claim of overbreadth, the threats against the governor statute must be interpreted to require proof beyond a reasonable doubt that Mr. Locke made a threat and that the threat was a true threat.

- c. For each of the three alleged communications, the State failed to prove beyond a reasonable doubt that Mr. Locke's statements constituted 'threats' and were 'true threats' unprotected by the First Amendment.

The State failed to show beyond a reasonable doubt that any of the three communications from Mr. Locke contained a threat or constituted a true threat.

- i. *The first email was neither a threat nor a true threat.*

The first email from Mr. Locke is time-stamped "6:09:15 AM" with the subject "other." Exhibit 4. Mr. Locke listed his own first and last name (Robb Locke), zip code and telephone number. Compare Exhibit 4 with Exhibit 6. For the address, Mr. Locke stated, "1313 Mockingbird Lane" with the city "Gregoiremustdie." Exhibit 4. The text of the message states, "I hope you have the opportunity to see one of your family members raped and murdered by a sexual predator. Thank you for putting this state in the toilet. Do us a favor and pull the lever to send us down before you leave Olympia." Exhibit 4.

In the context of RCW 9A.36.090(1), "'threat' means to communicate, directly or indirectly the intent: (a) To cause bodily injury in the future to the person threatened or to any other person." RCW 9A.04.110(28). The jury in this case was instructed, "Threat

means to communicate, directly or indirectly, the intent to take the life of, or to inflict bodily harm upon the governor of the state.” CP 19.

Mr. Locke’s first email does not communicate an intent to take the governor’s life or to cause her bodily injury. Mr. Locke’s statements demonstrate an interest in having the governor subjected to witnessing acts perpetrated on her family members: “I hope you have the opportunity to see one of your family members raped and murdered by a sexual predator.” Exhibit 4. He further expresses his belief that the governor has caused harm to the state: “Thank you for putting this state in the toilet.” Exhibit 4. But he never states any intent to harm or kill the governor or any other person. In fact, he asks that she “pull the lever to send us down before you leave Olympia,” thereby acknowledging the governor will serve out her term. Exhibit 4.

Contrary to the threatening statements in Kilburn and State v. Phillips, Mr. Locke’s email does not express an intent to harm or kill. In Kilburn, the Supreme Court ultimately found insufficient evidence of a true threat. However, the Court plainly viewed the statement “I’m going to bring a gun to school tomorrow and shoot everyone and start with you,” as constituting threatening language.

Kilburn, 151 Wn.2d at 39. Similarly, in Phillips, the Court of Appeals reviewed a conviction for threats against the governor where the defendant told a crisis counselor that “*he* was going to ‘blow away’ the governor” among others. 53 Wn. App. 533, 768 P.2d 1019 (1989) (emphasis added). Because the language itself was plainly threatening, the dispositive issue before the court was not whether the statement constituted a threat but whether the threat had to reach the governor. Id. at 533-34. Unlike these cases, Mr. Locke’s first email does not express an intent to carry out an act against the governor.

Even if the first email contained threatening language, however, the State failed to show beyond a reasonable doubt that the email was a true threat. Mr. Locke characterized his conduct as “flippantly” filling out forms on the governor’s website. RP 212. He was acting out of dissatisfaction over the economic climate and the governor’s, and former attorney general’s, economic decisions. RP 212-13. He was upset that “his benefits were being reduced, not once but twice” and because the rise in bus fare forced him to walk in pain for three miles to physical therapy. RP 213, 221-22. He had never made any other communications with the governor’s office. See RP 105, 120. Under the objective standard, a

reasonable person would not anticipate that his first email would be taken as a serious expression of intent to harm or kill the governor—particularly where the email does not state such an intention on its face.

Moreover, Mr. Locke used the address 1313 Mockingbird Lane—the address of television family The Munsters—and the city “Gregoiremustdie” in lieu of a real, physical address. Exhibits 4 and 5; RP 186, 216. A reasonable person who communicates such falsities would not expect the recipient to take the expressions as serious intentions.

Mr. Locke’s email communication is more akin to Kilburn than to the threatening statements made in United States v. Howell, 719 F.2d 1258 (5th Cir. 1983). In Kilburn, an eighth grade student told a classmate “I’m going to bring a gun to school tomorrow and shoot everyone and start with you,” and then said, “maybe not you first.” 151 Wn.2d at 39. Kilburn had also stated “[t]here’s nothing an AK 47 wouldn’t solve.” Id. at 39. Kilburn was reading a book on guns at the time he made the statement and the students knew they were not supposed to speak of guns in light of recent school shootings like at Columbine, Colorado. Id. at 39, 53. The classmate to whom Kilburn made the statement became

increasingly concerned about it and her mother contacted 911. Id. at 39. Nonetheless, the Court held Kilburn's statements did not constitute a true threat because Kilburn was "half smiling" when he made the statement, "was acting kind of like he was joking," and had not acted in a threatening manner before. Id. at 52-53.

In Howell, on the other hand, the Fifth Circuit held the government sufficiently proved the defendant's statements "I will kill the president" and "'It's too bad that John Hinckley did not get him. I will kill the President if I get a chance" constituted true threats in light of the circumstances. 719 F.2d at 1261. Not only did Howell make direct threats against the life of the president, but he also told a secret service officer he had a ".357 caliber pistol," that he completely understood the seriousness of his statements and that he stood by his statements. Id. at 1260. In context, Howell's statements were "unambiguous" and demonstrated an "apparently quite serious intention to take the life of the President." Thus, "the United States proved to the satisfaction of the jury that it was a true threat." Id. at 1261.

Like the defendant in Kilburn, Mr. Locke had no prior history of threatening behavior or harassing the governor. Just as Kilburn half smiled and acted "kind of like" he was joking, Mr. Locke used

an address from The Munsters television show and a fictional city. Exhibits 4 and 5; RP 186, 216. Moreover, unlike the defendant in Howell, who reaffirmed his intentions and access to weapons when speaking with the secret service, Mr. Locke apologized for his statements when contacted by the police and explained he had no means or intention of harming the governor. Exhibit 6, p.10; RP 207-08, 225; see RP 197, 199, 216, 224-25 (Mr. Locke was civil and cooperative with police).

Mr. Locke's first communication contains neither a threat nor a true threat.

ii. The second email was neither a threat nor a true threat. Like the first email, the second email arrived from "Robb Locke" and the email address "robblocke2004@yahoo.com." Exhibit 5. Mr. Locke listed the address as "1313 Mockingbird Lane," the city as "Gregoiremustdie" and his own zip code and telephone number. Exhibit 5. The selected subject was again "other." Exhibit 5. The text of the message stated, "You fucking CUNT!! You should be burned at the stake like any heretic." Exhibit 5.

Mr. Locke's second email also did not constitute a threat or a true threat. Like the first, this email did not communicate any intent

to harm the governor. Instead, Mr. Locke expressed his discontent with her policies by stating “You should be burned at the stake like any heretic.” Unlike the plain threats communicated in Howell (e.g., “I will kill the president”), Mr. Locke’s email expressed no intent that *he* would do anything to harm the governor or incite others to do so. 719 F.2d at 1260. He communicated only that he thought she *deserved* harm. Thus, unlike in Kilburn, Howell and Phillips, this second email did not contain threatening language. Id.; Kilburn, 151 Wn.2d at 39; Phillips, 53 Wn. App. at 534.

Mr. Locke’s email is comparable to the statements made against presidential candidate Barack Obama in Bagdasarian, 652 F.3d 1113. In that case, the Ninth Circuit reviewed Bagdasarian’s conviction for threats against a major presidential candidate. 652 F.3d at 1115. Bagdasarian was prosecuted for making the following remarks to an online message board: “Re: Obama fk the niggas, he will have a 50 cal in the head soon.”; “shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right? ? ? ? long term? ? ? ? never in history, except sambos.” Id. The Ninth Circuit held the first statement did not constitute a threat because “[i]t conveys no explicit or implicit threat on the part of Bagdasarian that he himself will kill or injure Obama.” Id. at 1119.

Instead, it is a *prediction* that Obama “will have a 50 cal in the head soon.” *Id.* Similarly, the second posting is not a threat because it is either “an imperative to encourage others to take violent action” or “simply an expression of rage or frustration.” *Id.* Like Bagdasarian’s statements, Mr. Locke conveyed no explicit or implicit threat that he himself would kill or harm the governor. At the most, Mr. Locke expressed a desire for someone else to burn the governor at the stake like a heretic. But the most reasonable interpretation of Mr. Locke’s second email is that it was “simply an expression of rage or frustration.” Bagdasarian, 652 F.3d at 1119. It was not a threat.

For the additional reasons set forth above, it was also not a true threat because a reasonable speaker, like Mr. Locke, would not expect the communication to be taken as an expression of serious intent to cause harm. See Section E.1.c.i, supra.

iii. The event request was neither a threat nor a true threat. In his third communication from the governor’s website, Mr. Locke submitted an event request form. He listed his name (“Robb Locke”) and the organization “Gregoire Must Die [sic].” Exhibit 2. He did not include an address but listed the request type as “Request event at mansion.” *Id.* The governor’s role was as

“Honoree.” Id. Mr. Locke listed the topic as “Gregoire’s public execution” with an event length of 15 minutes. Id. The event request includes time for questions and answers and requires a microphone. Id. Notably, the details provided in the event request form were not manifestations of Mr. Locke’s imagination and forethought. To the contrary, the governor’s website form contained spaces for a requestor to fill in specifically-named categories, and in many cases a list of dropdown options was provided. Exhibit 1; RP 96, 102-03.

Like Mr. Locke’s other communications, this event request form does not communicate any intent to kill or harm the governor. Additionally, the request does not include any specific details regarding the “execution,” such as how it is to occur or even that Mr. Locke would serve as the executioner. See United States v. Callahan, 702 F.2d 964, 966 (11th Cir.1983) (specification of date, time and place in letter stating “It is essential that Reagan and Bush are assassinated on Inauguration Day in front of the television cameras” and expressing willingness to accept consequences of the murders contributes to finding that statement is a “true threat”); see also Phillips, 53 Wn. App. at 534 (defendant not only stated he would “blow away” the governor and others but also further

explained that he had “approved the prison code of ‘blowing away’ those who wronged him”).

Furthermore, in light of Mr. Locke’s other communications, which expressed dissatisfaction with the governor’s leadership, a reasonable speaker would expect that this event request form would not be taken as an intent to cause harm but as an intent to communicate disapproval. Contrary to what Mr. Locke likely expected, the sergeant charged with protecting the governor did not even check whether an organization by the name “Gregoire must die” exists. RP 183-84; see RP 112-13, 115 (though scheduler for governor sometimes checks information provided by organizations to determine veracity, she did not focus on “Gregoire must die” as being listed as an organization).

Consequently, none of the three communications admitted at trial constituted a true threat or even a threat under the statute.

d. The proper remedy is reversal and dismissal of the charge.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. E.g., Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Double Jeopardy Clause of the Fifth

Amendment bars retrial of a case dismissed for insufficient evidence. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), reversed on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State failed to prove Mr. Locke made a threat and that the threat constituted a true threat, the Court should reverse his conviction and dismiss the charge with prejudice.

2. MR. LOCKE WAS DENIED HIS RIGHT TO A UNANIMOUS JURY WHERE THE JURY WAS NOT INSTRUCTED IT MUST UNANIMOUSLY AGREE ON THE ACT UNDERLYING THE OFFENSE, AND THE STATE DID NOT ELECT A PARTICULAR ACT.

a. The state constitution requires a unanimous jury in criminal cases.

The Washington Constitution requires a unanimous jury verdict in criminal matters. Const. art. I, §§ 21, 22; State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990). The federal constitution guarantees a right to trial by jury. U.S. Const. amend. VI; Camarillo, 115 Wn.2d at 63-64. When the State “presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act.” State v. Kitchen, 110 Wn.2d 403, 409, 756

P.2d 105 (1988) (citing State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). Requiring a unanimous verdict on one criminal act protects a criminal defendant's right to a unanimous verdict based on an act proved beyond a reasonable doubt. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007). In the absence of either an election by the State or an instruction by the court, constitutional error "stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all elements necessary for a conviction." Id. at 411.

This error is a manifest error affecting a constitutional right that can be raised for the first time on appeal. State v. Bobenhouse, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009); State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); RAP 2.5(a). The constitutional error resulting from the failure to either elect the incident relied upon for conviction or to properly instruct the jury is harmless only if the reviewing court is satisfied that each incident established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 405-06.

- b. The absence of either a jury instruction requiring unanimity on the statement constituting the threat or an election by the State deprived Mr. Locke of his right to a unanimous jury.

Here, the State presented evidence of three separate acts, which it alleged constitute threats against the governor. The State introduced two email communications and one event request from Mr. Locke to the governor's office. Exhibits 2, 4 and 5; RP 96-97, 100-05 (testimony regarding event request); RP 126-32, 151, 154 (testimony regarding two email communications); RP 167, 171, 179 (testimony of officer on Executive Protection Unit regarding all three communications); RP 202-03 (testimony of investigating Washington State Patrol detective that he considered all three communications). In closing argument, the prosecutor relied on all three communications as examples of threats. RP 258-61; CP 31-34 (State's powerpoint presentation used in closing (slide provides support for "knowingly and willfully" to include "three separate communications"; slides of event request and two emails; slide states "Evidence defendant made a threat? Three statements . . ."). Accordingly, the State did not elect between the multiple acts. See State v. Sargent, 62 Wash. 692, 695, 114 P. 868 (1911) (in making an election, State must announce particular act on which it relies).

Moreover, the jurors were never instructed that all 12 of them must agree that the same criminal act had been proved beyond a reasonable doubt. See CP 10-27. “When the State chooses not to elect, [a Petrich] jury instruction must be given to ensure the jury’s understanding of the unanimity requirement.” Petrich, 101 Wn.2d at 572. Here, the to-convict instruction merely informed the jury it must find “(1) on January 25, 2011, the defendant knowingly and willfully, (2) makes any threat against the governor of the state. (3) That any of these acts occurred in the State of Washington.” CP 22. No instruction informed the jury that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. See Petrich, 101 Wn.2d at 572. Therefore, it is possible that some of the jurors relied on one communication and some relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. See Kitchen, 110 Wn.2d at 411.

In sum, Mr. Locke was denied his constitutional right to a unanimous verdict.

c. The error requires reversal of Mr. Locke’s conviction.

The failure to require a unanimous verdict is an error of constitutional magnitude, and as such, is reversible unless it is

“harmless beyond a reasonable doubt.” Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1975); Kitchen, 110 Wn.2d at 405-06; State v. King, 75 Wn. App. 899, 903, 872 P.2d 1115 (1994), review denied, 125 Wn.2d 1021 (1995). If the State can prove the violation was harmless beyond a reasonable doubt, the failure to give a “unanimity” instruction does not require reversal. Camarillo, 115 Wn.2d at 65. But the failure to give a unanimity instruction is harmless only if no rational juror could have a doubt regarding any of the factual alternatives. Kitchen, 110 Wn.2d at 406, 411; King, 75 Wn. App. at 903. This harmless error standard “presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged.” Kitchen, 110 Wn.2d at 411.

Here a jury could have a reasonable doubt as to at least some, if not all, of the factual alternatives. See Section 1.c, supra (arguing State presented insufficient evidence that any of the communications constituted a threat). In these circumstances, the absence of a unanimity instruction requires reversal. Kitchen, 110 Wn.2d at 411.

3. WHETHER THE THREAT WAS A 'TRUE THREAT' WAS AN ESSENTIAL ELEMENT THAT HAD TO BE PLED IN THE INFORMATION AND INCLUDED IN THE 'TO-CONVICT' INSTRUCTION.

The requirement that the threat made be a "true threat" was not included in the information or the to-convict instruction. CP 1, 22. Though a separate jury instruction defined "threat" for the jury, the error requires reversal of the conviction.

- a. The charging document and to-convict instruction must include each element of the crime charged to comport with due process.

The to-convict instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); see Winship, 397 U.S. 358. Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. Smith, 131 Wn.2d at 262-63. "It cannot be said that a defendant has had a fair trial if

the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.” Id. at 263.

Because the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude, it may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Omission of an element from the to-convict instruction “obviously affect[s] a defendant’s constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict.” State v. O’Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). This Court reviews a challenged jury instruction de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Due process also requires that the essential elements of a crime be included in the charging document, regardless of whether they are statutory or non-statutory. U.S. Const. amend. VI; Const. art. I, § 22; State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). In Goodman, the Washington Supreme Court relied on

Apprendi² to hold that all facts essential to punishment must be pled in the information and proved beyond a reasonable doubt. Goodman, 150 Wn.2d at 785-86. The purpose of the rule is to give the accused notice of the nature of the allegations so that a defense may be properly prepared. Id. at 784; State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). An information omitting essential elements charges no crime at all. State v. Courneya, 132 Wn. App. 347, 351, 131 P.3d 343, review denied, 149 P.3d 378 (2006).

Charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before trial. Kjorsvik, 117 Wn.2d at 102. The reviewing court determines whether the necessary facts appear in the information in any form. Goodman, 150 Wn.2d at 787-88; Kjorsvik, 117 Wn.2d at 105-06. "If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and reviewing courts reverse without reaching the question of prejudice." Courneya, 132 Wn. App. at 351.

² Apprendi, 530 U.S. at 490.

- b. That the threat was a true threat was an essential element that had to be included in the information and to-convict instruction.

As discussed above, a statute such as RCW 9A.36.090 that criminalizes speech must be limited to comport with the First Amendment. Thus, the Washington Supreme Court recently reiterated that “true threat” is an element of felony harassment. In State v. Schaler, the Court reversed the defendant’s felony harassment conviction because the trial court did not instruct the jury that it could only convict if it found the defendant issued a true threat. 169 Wn.2d 274, 278, 292-93, 236 P.3d 858 (2010). The full definition of true threat was neither in the to-convict instruction nor in a standalone instruction. Id. at 284-86. The Court noted that while the jury was instructed on the necessary mens rea as to the speaker’s *conduct*, it was not instructed on the necessary mens rea as to the *result*. Id. at 285-86. True threat includes the latter—that a reasonable speaker would foresee that the statement would be interpreted as a serious expression of intention to inflict harm. Id. at 286-87.

The Court went on to explain that “the omission of the constitutionally required mens rea from the jury instructions . . . is analogous to [a situation] in which the jury instructions omit an

element of the crime.” Schaler, 169 Wn.2d at 288. Although it declined to reach whether true threat language must appear in the to-convict instruction, it noted, “[i]t suffices to say that, *to convict*, the State must prove that a reasonable person in the defendant’s position would foresee that a listener would interpret the threat as serious.” Id. at 289 n.6 (emphasis added).

The Washington Supreme Court has taken up the issue left open in Schaler by accepting review in State v. Allen, 161 Wn. App. 727, 255 P.3d 784 (2011); Supreme Court No. 86119-6. In Allen, Division One of this Court adhered to its own precedent in the face of Schaler. 161 Wn. App. at 753-56. The court thus held that the lack of “true threat” element in the information and to-convict instruction was not erroneous. Id. at 756.

- c. Because the essential true threat element was not pled in the information, reversal is required.

Where the information lacks any reference to an element, prejudice is presumed and “reviewing courts reverse without reaching the issue of prejudice.” Courneya, 132 Wn. App. at 351. Vangerpen, 125 Wn.2d at 791-93 (remedy for insufficient information is reversal and dismissal of charge without prejudice); State v. Cochrane, 160 Wn. App. 18, 25-26, 253 P.3d 95 (2011)

(following Vangerpen and reversing conviction where information omitted essential element).

Here the information bore no language about a true threat.

See CP 1. The information charged merely:

That ROBERT RAY LOCKE, in the State of Washington, on or about the 25th day of January, 2011, did unlawfully, feloniously, and willfully deposit for conveyance in the mail or for delivery from any post office or by any letter carrier a letter, paper, writing, print, missive or document which contained a threat to take the life of or to inflict bodily harm upon the governor of the State of Washington or his or her immediate family, the governor-elect, the lieutenant governor, other officer next in the order of succession to the office of governor, or lieutenant governor-elect, contrary to RCW 9A.36.090(1), and against the peace and dignity of the State of Washington

CP 1. Because the necessary element is “neither found nor fairly implied in the charging document, prejudice is presumed” and this Court should “reverse without reaching the question of prejudice.” Courneya, 132 Wn. App. at 351. Consequently, Mr. Locke’s conviction must be reversed and the charge dismissed.

d. Because the essential true threat element was not included in the to-convict instruction, reversal is required.

In the alternative, reversal is required because the essential true threat element was not included in the to-convict instruction. The United States Supreme Court has held that under the federal

constitution, harmless error analysis applies where the trial court omits an element from the to-convict instruction. Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). But our state constitutional right to a jury trial is stronger, requiring automatic reversal where the court omits an element from the to-convict instruction.

Article I, Section 21 provides that “[t]he right of trial by jury shall remain inviolate.” Const. art. I, § 21. There is no equivalent federal provision, and therefore our Supreme Court has repeatedly held that the state constitution provides a stronger right to a jury trial than the United States Constitution. E.g. State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008); Sofie v. Fibreboard, 112 Wn.2d 636, 644-50, 771 P.2d 711 (1989); Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982).

Furthermore, in looking to the law regarding the specific issue raised here, our state courts have required automatic reversal for this type of error for over 100 years. During our first year of statehood, the Supreme Court held in McClaine v. Territory, 1 Wash. 345, 25 P. 453 (1890), that the omission of an element from what we would now call the to-convict instruction required reversal. The court noted that a problem with a definitional instruction could

possibly be considered harmless in light of other instructions, but that the omission of an element from the to-convict instruction required reversal, without any reference to how much evidence was presented on that element or whether the outcome would have been the same with the proper instruction. Id. at 354-55.

Many cases over the next century reaffirmed the rule that automatic reversal is required where the to-convict instruction omits an element. The Supreme Court so held in the 1953 case of State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953), as well as much later cases like Smith, 131 Wn.2d at 265 (“Failure to instruct on an element of an offense is automatic reversible error.”). And this Court as recently as the year 2000 stated, “A harmless error analysis is never applicable to the omission of an essential element of the crime in the ‘to convict’ instruction. Reversal is required.” State v. Pope, 100 Wn. App. 624, 630, 999 P.2d 51 (2000).

Although our Supreme Court has acknowledged Neder as the federal standard, its decisions in Brown and Recuenco indicate that it will not follow that standard under the Washington Constitution. In 2002, the Brown court recognized Neder and applied it in that case, but it did not perform an independent state constitutional analysis and it continued to cite prior Washington

cases for the proposition that “[a]n instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). But see DeRyke, 149 Wn.2d at 912-13 (applying harmless error standard).

More recently in the Recuenco series of cases, the United States Supreme Court held that a Neder harmless error standard must be applied to Blakely³ errors because the failure to instruct on an element is indistinguishable from a failure to instruct on a sentence enhancement. Washington v. Recuenco, 548 U.S. 212, 222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). But on remand, our Supreme Court held that automatic reversal was required under Washington law, because the sentence imposed was not supported by the jury’s actual verdict, notwithstanding what a jury might have found if properly instructed. Recuenco, 163 Wn.2d at 441-42. The Court cited Article I, Section 21 of our state constitution, reiterated that it provides stronger protection than the federal constitution, and stated “our right to a jury trial is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” Id. at 435. Accordingly, automatic reversal was required.

³ Blakely, 542 U.S. 296.

Similarly here, this Court should hold that automatic reversal is required because the to-convict instruction omitted an essential element of the crime.

However, even if the court declines to follow the automatic reversal rule, Mr. Locke's conviction must be overturned on the facts of this case. The to-convict instruction provided the jury a yardstick by which it could measure the evidence in determining Mr. Locke's guilt or innocence. Emmanuel, 42 Wn.2d at 817; CP 22. But the to-convict instruction lacked any true threat language. See CP 22. It is not sufficient that a separate definitional instruction refers to the true threat requirement because here the to-convict instruction "purport[s] to include all the essential elements of the crime." Emmanuel, 42 Wn.2d at 817. Where the court "[i]n effect . . . furnished a yardstick by which the jury were to measure the evidence in determining appellant's guilt or innocence of the crime charged," it is "not a sufficient answer [to the assignment of error that an element is missing from the to-convict] to say that the jury could have supplied the omission of this element . . . by reference to the other instructions." Id. at 819. A jury "requires a manifestly clear instruction." State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), abrogated on other grounds by O'Hara, 167 Wn.2d at

101. Like in Emmanuel, the to-convict instruction purported to contain all essential elements. The jury thus had a right to “regard [it] as being a complete statement of the elements of the crime charged.” Id.

Moreover, the evidence that Mr. Locke’s communications constituted a true threat was at least equivocal. See Section E.1.c, supra (arguing each of the three communications fail to constitute a true threat). For example, Mr. Locke used the address 1313 Mockingbird Lane—the address of television family, The Munsters—and the city “Gregoiremustdie” in lieu of a real, physical address. Exhibits 4 and 5; RP 186, 216. The sergeant charged with protecting the governor did not even check whether an organization by the name “Gregoire must die” exists. RP 183-84.

Mr. Locke characterized his conduct as “flippantly” filling out forms on the governor’s website. RP 212. He was acting out of dissatisfaction over the economic climate and the governor’s, and former attorney general’s, economic decisions. RP 212-13. He was upset that “his benefits were being reduced, not once but twice” and because the rise in bus fare forced him to walk in pain for three miles to physical therapy. RP 213, 221-22. He had never

made any other communications with the governor's office. See RP 105, 120.

In light of the evidence, the jury could have found that Mr. Locke's communications constituted idle talk, jokes and/or political statements and not true threats. Therefore, Mr. Locke was prejudiced by the failure to include the essential true threat element in the to-convict instruction. Consequently, reversal is required here, even if not automatically warranted.

4. BECAUSE THE SENTENCING COURT FAILED TO COMPLY WITH RCW 9.94B.080 WHEN IT ORDERED MR. LOCKE TO UNDERGO A MENTAL HEALTH EVALUATION AND COMPLETE ANY RECOMMENDED TREATMENT, THE CONDITION SHOULD BE STRICKEN.

A court's sentencing authority derives expressly from statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). RCW 9.94B.080 authorizes imposition of a mental health evaluation condition only where the sentencing court follows certain procedures. Specifically, the court must find "that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is

likely to have influenced the offense.” RCW 9.94B.080;⁴ State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003) (interpreting prior codification of RCW 9.94B.080 at former RCW 9.94A.505(9)); see also State v. Brooks, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008) (same); State v. Lopez, 142 Wn. App. 341, 353–54, 174 P.3d 1216 (2007) (applying same as to condition requiring psychiatric evaluation). The court’s decision must be based upon information in the presentence report or prior mental health evaluations in the case. RCW 9.94B.080. The statute provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94B.080.

⁴ Though the title of chapter 9.94B RCW refers to “crimes committed prior to July [sic] 1, 2000,” RCW 9.94B.080 is applicable to crimes committed after the year 2000, as recognized by Laws of 2008, ch. 231, § 55. This legislation recodified former RCW 9.94A.505(9) (2004) as RCW 9.94B.080.

The statute refers to RCW 71.24.025, the Community Mental Health Services Act, for the definition of “mentally ill person.” RCW 9.94B.080. The Act’s definition of “mentally ill persons” in turn refers to four other subsections of the definitional statute. RCW 71.24.025(18). The Legislature’s definition covers people with serious mental impairments that substantially and negatively impact their cognitive or volitional functions or render them dangerous to themselves or others. RCW 71.24.025(1), (4), (27); RCW 71.05.020(17), (23), (24). A person may benefit from mental health counseling and not fit the definition of mentally ill person.

In Jones, the Court of Appeals held the trial court exceeded its authority in ordering a mental health evaluation without complying with the unambiguous criteria of former RCW 9.94A.505(9). The court so held even though significant evidence was presented at trial that the defendant suffered from bi-polar disorder and his failure to take prescribed medications contributed to his crimes. 118 Wn. App. at 208-11. A sentencing court may not order an offender to participate in a mental health evaluation and any recommended treatment as a condition of community custody “unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from

a mental illness which influenced the crime.” Id. at 202. Thus the court ordered the trial court to strike the community custody condition requiring a mental health evaluation and treatment because, without the necessary mental health report, the court could not comply with the statutory requirements. Id. at 212.

Here, the record does not demonstrate the sentencing court had any information concerning Mr. Locke’s mental health status. Neither the State nor the Department of Corrections submitted a presentence report. Thus the court could not have relied upon such a report in imposing the condition that Mr. Locke participate in a mental health evaluation. See RP 302-04. Mr. Locke objected to the State’s request to impose the condition. RP 300, 302-03. Additionally, though the court made a finding that the condition is “crime related treatment or counseling and is reasonably related to the circumstances of the offense and is needed to prevent reoffense safety to the community,” the court did not find that “reasonable grounds exist to believe that [Mr. Locke] is a mentally ill person as defined in RCW 71.24.025.” Compare CP 47 (Judgment & Sentence) with RCW 9.94B.080.

The sentencing court required Mr. Locke to obtain a mental health evaluation and follow all treatment recommendations without

reviewing any report concerning his mental health status or finding him a mentally ill person. The court erred by not following RCW 9.94B.080. Accordingly, the condition must be stricken. Brooks, 142 Wn. App. at 851-52; Jones, 118 Wn. App. at 212.

F. CONCLUSION

Mr. Locke's conviction should be reversed and dismissed with prejudice because there was insufficient evidence that the statements were threats and constituted true threats. In the alternative, the conviction should be reversed because (1) multiple acts were alleged to form the basis of a single count but a unanimity instruction was not provided; (2) the information lacked the essential true threat element; and/or (3) the to-convict instruction lacked the essential true threat element. If the Court does not reverse the conviction, the community custody condition requiring Mr. Locke to submit to a mental health evaluation and follow recommended treatment should be stricken.

DATED this 9th day of December, 2011.

Respectfully submitted,



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Attorney for Appellant

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

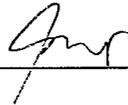
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 42035-0-II
v.)	
)	
ROBERT LOCKE,)	
)	
APPELLANT.)	

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