

NO. 42035-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT LOCKE,

Appellant.

---

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. SUFFICIENT EVIDENCE DOES NOT SUPPORT THE THREAT AND TRUE THREAT ELEMENTS FOR EACH OF THE THREE COMMUNICATIONS.

In his opening brief, Mr. Locke argued his conviction should be reversed because the State failed to prove any of the three communications were a threat or a true threat beyond a reasonable doubt. Op. Br. at 14-30.

Despite Mr. Locke's explicit argument that none of the three communications constituted either a threat (showing intent to kill or cause substantial harm) or a true threat (that a reasonable speaker would foresee to be interpreted as a serious expression of intent to kill or inflict substantial bodily harm), the State argues Mr. Locke "only challenges the sufficiency of the threat in terms of being a true threat." Compare, e.g., Op. Br. at 21-22 (arguing first email constituted neither threat nor true threat), 25 (arguing second email constituted neither threat nor true threat), 28-29 (arguing event request and all three communications constituted neither a threat nor a true threat) with Resp. Br. at 10. The State's failure to contest the argument that the State presented insufficient evidence of intent to kill or inflict substantial bodily harm should be treated as a concession. State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61

(2005) (issue conceded where no argument set forth in response).

This is sufficient basis to reverse the conviction and dismiss the charges. See, e.g., State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The State does not dispute it was required to prove beyond a reasonable doubt that the alleged threat constituted a true threat; that is, that a reasonable speaker would foresee the statement would be interpreted as a serious expression of intent to kill or inflict substantial bodily harm. Compare Op. Br. at 16-19 (arguing “true threat” element subsumed in threat against governor offense) with Resp. Br. at 10-11. The State fails to demonstrate it adequately satisfied this element. See generally Op. Br. at 21-29. In response, the State relies on an inaccurate portrayal of the evidence. First, Mr. Locke did not obscure his location subsequent to sending the communications. See Resp. Br. at 12 (arguing provision of cellular telephone number is per se evasive). To the contrary, he provided his cellular telephone number and answered the phone when the police called him. RP 203-04. He recognized the police would be looking for him. RP 197. Second, providing the address for the television family “the Munsters” is comparable to Mr. Kilburn’s “half smiling” demeanor while delivering the alleged

threat in State v. Kilburn. State v. Kilburn, 151 Wn.2d 36, 52-53, 84 P.3d 1215 (2004) (reversing conviction because alleged threat did not constitute a true threat).

Additionally, the State's argument suffers from internal inconsistency. First the State argues Mr. Locke's communications "gave just enough information to engender fear that this execution would happen, possibly while the governor was *out* at an event." Resp. Br. at 12 (emphasis added). But just a few sentences later, the State argues the conduct was a true threat because the "event location was listed as the *Governor's mansion*, which is reasonably interpreted as defendant *coming to get the Governor*." Id. (emphasis added). The apparent ambiguity in Mr. Locke's communications also thwarts the State's contention that the event request constituted a true threat because, under its own theory, specificity (and not ambiguity) supports that element. Resp. Br. at 12 (relying on the "specificity" of Mr. Locke's communications).

The State also recognizes that the two emails did not constitute true threats, and attempts to back away from its trial theory that each of the three communications constituted a separate threat against the governor. See Resp. Br. at 8 (arguing

emails provide context from the event request, the third communication).

Finally, as set forth below, the three emails did not constitute a continuing course of conduct. See Resp. Br. at 11-12.

2. BECAUSE IN THIS MULTIPLE ACTS CASE THE STATE DID NOT ELECT WHICH ACT FORMED THE BASIS OF THE OFFENSE AND NO UNANIMITY INSTRUCTION WAS PROVIDED, MR. LOCKE'S CONVICTION SHOULD BE REVERSED.

a. In this multiple acts case, the State concedes it did not elect which of the three acts formed the basis of offense.

Because the State presented evidence of three communications each of which could (if sufficient) form the basis of the single count charged and did not elect which act formed the basis of the offense, Mr. Locke was denied his constitutional right to a unanimous jury. Op. Br. at 30-34.

The State does not argue in response that it did in fact make an election at trial. See, e.g., RP 258-61 (relying on all three communications at closing argument); CP 31-34 (slides for closing argument showing same). Its lack of argument constitutes a concession on that issue. Ward, 125 Wn. App. at 144 (issue conceded where no argument set forth in response).

- b. The three separate communications constitute distinct acts requiring election or unanimity, and not a single continuing offense as argued by the State.

Contrary to the State's novel argument on appeal, the three communications do not constitute a single continuing offense.

"[S]everal distinct acts," each of which could be the basis for a criminal charge, is distinct from "one continuing offense." State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984). To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a common sense manner. Id. at 571.

Evidence that the charged conduct occurred over the course of several minutes is not sufficient, in itself, to demonstrate one continuing offense. See State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

Here the State attempts on appeal to tie together three instances of conduct, in order to paint a portrait of an "ongoing course." But at trial the State treated the three communications as repeated commissions of the crime at distinct times and through distinct means.

Where a statute defines a crime as a continuing course of conduct, courts generally conclude the State may prosecute a series of acts as a single count and no unanimity instruction is

required. State v. Kiser, 87 Wn. App. 126, 130, 940 P.2d 308 (1997). In Kiser, for instance, defendant was convicted of one count of assault of a child in the first degree. Id. at 127. The statute defined the crime as a series of acts rather than a single act. Id. at 128; RCW 9A.36.120(b)(ii) (person commits crime by intentionally assaulting child causing substantial bodily harm, and has previously engaged in pattern or practice of assaulting child or causing pain). Thus, because the statute “requires proof of a principal intentional assault which causes substantial bodily harm, and a previous pattern or practice of causing pain,” the crime is “defined not by a single act, but by a course of conduct.” Kiser, 87 Wn. App. at 130. The definition of the crime therefore permits the State to charge an entire episode of assaultive conduct as one count. Id.

The offense charged here, threats against the governor, is not in its essence an ongoing enterprise. RCW 9A.36.090(1) (using singular form of “threat” and including in definition any singular “letter, paper, writing, print, missive, or document”); see State v. Campbell, 69 Wn. App. 302, 311, 848 P.2d 1292 (1993) (welfare fraud contemplates a continuing course of conduct to obtain undeserved public assistance, so neither election nor unanimity

instruction required), reversed on other grounds, 125 Wn.2d 797, 888 P.2d 1185 (1995); State v. Gooden, 51 Wn. App. 615, 620, 754 P.2d 1000 (promoting prostitution is continuing course of conduct that does not require unanimity instruction because, unlike molestation, it is "ongoing enterprise"), review denied, 111 Wn.2d 1012 (1988).

Likewise, the State's conduct at trial did not reflect a theory of continuing course of conduct. For example, in closing argument, the prosecutor used slides that specifically argued Mr. Locke made "three separate communications" and rhetorically posited, "Evidence defendant made a threat? *Three* statements . . . ." CP 31-34. The State's argument invited the jury to return a verdict based on any of the three communications.

The makeup of the three communications further demonstrates there was no continuing course. The three communications were made in different forms and from different templates. Two were emails sent through the template on the governor's website. The third communication was an event request form derived from a separate page on the governor's website. This is the equivalent of criminal activity occurring in different places. See, e.g., Handran, 113 Wn.2d at 17 (evidence that conduct

occurred at different places tends to show distinct acts). Moreover, the emails and event request forms were received by different personnel in different offices. Thus, separate witnesses were required to testify as to each. The communications represented three separate transactions. The distinct evidence caused Mr. Locke to present distinct defenses. Compare, e.g., RP 266 (arguing form in which event request was received) with RP 268-69 (arguing content of email caused immediate reaction but did not rise to level of threat to kill). There was no continuing course.

Because the failure to require a unanimous verdict is an error of constitutional magnitude, the error requires reversal 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); State v. Kitchen, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). 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; State v. King, 75 Wn. App. 899, 903, 878 P.2d 466 (1994). Likely because it cannot, the State does not argue that (assuming a multiple acts error) any error was harmless. See generally Resp. Br. at 6-8. As set forth in Section B.1 and in the opening brief, a reasonable juror could have doubt

whether each (or at least one) communication constituted a threat against the governor. See Section B.1, supra; Op. Br. at 20-29. Consequently, the State cannot overcome the presumption of prejudice. See Kitchen, 110 Wn.2d at 411.

3. BECAUSE THE ESSENTIAL TRUE THREAT ELEMENT WAS NEITHER PLED IN THE INFORMATION NOR INCLUDED IN THE TO-CONVICT INSTRUCTION, THE CONVICTION SHOULD BE REVERSED.

In his opening brief, Mr. Locke argued that the failure to include in the information and to-convict instruction the essential element that the threat forming the basis of the threat against the governor must have been a “true threat” requires reversal of that conviction. Op. Br. at 35-46. The State argues that the “true threat” requirement is not an element but a definition. Resp. Br. at 14-16. This is contrary to State v. Schaler, 169 Wn.2d 274, 288, 292-93, 236 P.3d 858 (2010) and the additional authorities cited in the opening brief. “True threat” is an essential element that must be pled in the information and included in the to-convict jury instruction.

Notably, the State does not contest that automatic reversal is the appropriate remedy for failure to include an essential element either in the charging document or the to-convict instruction.

Compare Op. Br. at 39-44 with Resp. Br. at 14-16. Accordingly, the State concedes the issue. Ward, 125 Wn. App. at 144.

In sum, Mr. Locke's conviction should be reversed because the State failed to plead the essential true threat element in the information and it was not included in the to-convict instruction.

4. THE COURT SHOULD ACCEPT THE STATE'S CONCESSION THAT THE MENTAL HEALTH EVALUATION CONDITION WAS IMPROPERLY ENTERED AND IT SHOULD BE STRICKEN.

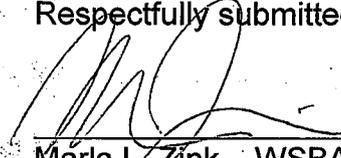
In his opening brief, Mr. Locke argued the sentencing condition requiring he submit to a mental health evaluation and comply with follow-up treatment was imposed without following the proper statutory procedures and without support in the evidence. Op. Br. at 46-50. The State concedes that the condition was improperly imposed and should be stricken. Resp. Br. at 16-18. For the reasons set forth in the parties' briefs, the Court should accept the State's concession and, if it otherwise affirms the conviction, strike the sentencing condition and remand to the trial court to remove it from the judgment and sentence. See State v. Brooks, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008); State v. Jones, 118 Wn. App. 199, 212, 76 P.3d 258 (2003).

**B. CONCLUSION**

For the reasons set forth above and in Mr. Locke's opening brief, his conviction should be reversed and dismissed with prejudice due to insufficient evidence. Alternatively, the lack of a unanimity instruction as to the multiple acts presented and the lack of the essential true threat element in the charging document and to-convict instruction require reversal of the conviction. If, however, the Court does not reverse the conviction, the community custody condition requiring a mental health evaluation should be stricken.

DATED this 23rd day of May, 2012.

Respectfully submitted,



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DIVISION TWO**

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

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