

Supreme Court No. 89134-6  
(Court of Appeals No. 42135-6-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

EDWARD OLSEN,

Petitioner.

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PETITION FOR REVIEW

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STATE OF WASHINGTON CRF

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Edward Olsen asks this Court to review the published opinion of the Court of Appeals in State v. Olsen, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, WL 3242666 (No. 42135-6-II, filed June 27, 2013). A copy is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. The trial court calculated Mr. Olsen's offender score as six rather than four because it concluded a prior California conviction for "terroristic threats" was comparable to a Washington conviction for felony harassment. The Court of Appeals recognized that the California crime is broader and therefore not legally comparable, but concluded it was nevertheless properly included in the offender score because it was factually comparable. Does the Court of Appeals' holding conflict with this Court's decisions in In re Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005) and State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007), and the Court of Appeals' opinions in State v. Thomas, 120 Wn. App. 474, 144 P.3d 1178 (2006) and State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004)? RAP 13.4(b)(1), (2).

2. Does the inclusion of the California conviction on the basis of "factual comparability" violate Mr. Olsen's Sixth Amendment right to a jury trial? RAP 13.4(b)(3).

3. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts. In this attempted murder case, the trial court admitted evidence of prior extremely violent acts Mr. Olsen allegedly committed against the complaining witness – acts during which he allegedly threatened to kill her – in order to prove motive, intent, and absence of mistake or accident. The trial court noted that “the evidence that the defendant told the complaining witness during both prior assaults that he was then acting with the intent to kill her does make it more likely that on this occasion, given the other facts surrounding this episode, that he was also acting with the intent to kill.” Did the trial court commit prejudicial error in admitting this evidence? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Edward Olsen was charged with attempted murder, burglary, felony harassment, and malicious mischief based on acts he allegedly committed against Bonnie Devenny, his ex-girlfriend and the mother of his children. CP 163-71. The State alleged Mr. Olsen broke into Ms. Devenny's house, poured gasoline on her, and told her she was going to die. CP 17. Over Mr. Olsen's objections, the trial court admitted evidence of prior crimes Mr. Olsen committed against Ms. Devenny,

during which he had allegedly threatened to kill her. 6/18/10 RP 7.<sup>1</sup> After Mr. Olsen was convicted, he argued that a prior California conviction should not be counted in his offender score because it was not comparable to a Washington felony, and that another conviction therefore washed out. 4/11/11 RP 10-51. The sentencing court rejected the argument and sentenced Mr. Olsen based on an offender score of six. CP 280.

Mr. Olsen appealed and argued the admission of prior acts was improper because they were used to show a propensity to commit such acts and they were substantially more prejudicial than probative. The Court of Appeals held the incidents were properly admitted to show intent, motive, and absence of mistake or accident.

Mr. Olsen also argued that his offender score should have been four rather than six, because his California conviction for “terroristic threats” was not comparable to the Washington crime of felony harassment, and that his prior conviction for custodial interference accordingly washed out. The Court of Appeals acknowledged that the California and Washington crimes are not legally comparable and that the California crime is broader, but affirmed based on its own determination that the California crime was factually comparable.

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<sup>1</sup> Trial transcripts are cited by volume number (e.g. “1 RP”). Pre-trial and post-trial transcripts are cited by date.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **The Court of Appeals' holding that the California conviction for terroristic threats is factually comparable to the Washington crime of felony harassment is incorrect and conflicts with decisions of this Court and the Court of Appeals.**

The Sentencing Reform Act ("SRA") creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant's offender score. RCW 9.94A.505, .510, .520, .525; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525. This Court reviews de novo the sentencing court's calculation of the offender score. State v. Rivers, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

"Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The State bears the burden of proving the existence and comparability of a defendant's out-of-state convictions. State v. Lopez, 147 Wn.2d 515, 521-23, 55 P.3d 609 (2002).

Washington courts apply a two-part test to determine whether the State has satisfied the burden as to comparability. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). First, the elements of the out-of-state crime must be compared to the relevant Washington crime. In re

Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are comparable, the defendant's out-of-state conviction is legally equivalent to a Washington conviction. Id. at 254.

But where the elements of the out-of-state crime are different or broader, the State must prove that the defendant's underlying conduct, as evidenced by the undisputed facts in the record, violates the comparable Washington statute. Lavery, 154 Wn.2d at 255; Morley, 134 Wn.2d at 606. Even if the State presents additional evidence of conduct beyond the judgment and sentence, "the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven at trial." Lavery, 154 Wn.2d at 255 (quoting Morley, 134 Wn.2d at 606).

The California crime of terroristic threats is not legally comparable to Washington's crime of felony harassment. The terroristic threats statute provides:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person

reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

Cal. Penal Code § 422(a) (emphases added).

Under Washington's harassment statute, a threat is not a felony unless it is a threat to kill. RCW 9A.46.020. Furthermore, the person threatened must be placed in reasonable fear that a threat to kill would be carried out; fear of harm short of death is insufficient. State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003).

The California statute is therefore much broader than Washington's felony harassment statute. It encompasses threats to commit great bodily injury, and the victim need only fear for his safety or the safety of his family. The threat need not be a threat to kill and the victim need not fear death. Cal. Penal Code § 422(a).

The Court of Appeals acknowledged the crimes are not legally comparable. Slip Op. at 16. The Court nevertheless affirmed based on its own finding of factual comparability – even though the charging document to which Mr. Olsen pled no-contest simply parroted the California statute and stated that the victim reasonably feared for her safety or the safety of her family. Slip Op. at 15-19; see Ex. 37. The

Court of Appeals' finding conflicts with decisions of this Court and the Court of Appeals.

This Court has made clear that where crimes are not legally comparable, it is nearly impossible for the State to prove factual comparability. In Lavery, this Court explained:

Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258. This Court held the State failed to prove by a preponderance of the evidence that the defendant's federal robbery conviction was comparable to a Washington robbery conviction, because the State did not present evidence that the defendant had admitted or stipulated to the necessary facts, or that those facts had been proved to a jury. Id.

The same is true here. There was no jury finding of a threat to kill or fear of death because there was no jury trial. Mr. Olsen entered a no contest plea, and did not stipulate that any alleged facts were true or that the court could look to a probable cause statement or any other documentation to find the necessary facts. 4/11/11 RP 40-42; ex. 37. Furthermore, the charging document stated not that the victim feared

death, but that she feared for her safety or the safety of her family. Ex. 37. Accordingly, the State failed to prove the California conviction was comparable to a Washington felony, and it may not be included in Mr. Olsen's offender score.

Other cases are instructive. In Thiefault, for example, this Court held the State failed to prove the comparability of a Montana robbery conviction by a preponderance of the evidence even though the State presented the judgment and sentence, an affidavit, and the motion for leave to file information which alleged conduct that would have constituted robbery in Washington. State v. Thiefault, 160 Wn.2d 409, 415-17, 158 P.3d 580 (2007). "[A]lthough the motion for leave to file information and the affidavit both described Thiefault's conduct, neither of the documents contained facts that Thiefault admitted, stipulated to, or that were otherwise proved beyond a reasonable doubt." Id. at 416 n.2.

In Thomas, the Court of Appeals held the State failed to prove the comparability of two California burglary convictions by a preponderance of the evidence because California's burglary statute does not require unlawful entry. State v. Thomas, 135 Wn. App. 474, 476-77, 144 P.3d 1178 (2006). The State presented certified copies of charging documents, a judgment on plea of guilty, minutes from a jury trial, and a transcript from the sentencing hearing. The Court of Appeals held the State failed to

prove factual comparability even though the State's evidence showed that California had alleged unlawful entry in the charging documents and the defendant had pled guilty to the crime as charged in one count and had been found guilty beyond a reasonable doubt as charged in the other count. Id. at 483-85. Division Two's decision in this case clearly conflicts with Division One's decision in Thomas. RAP 13.4(b)(2).

In Ortega, the Court of Appeals held the State failed to prove that a Texas conviction for indecency with a child was comparable to a Washington conviction for first-degree child molestation. State v. Ortega, 120 Wn. App. 165, 167, 84 P.3d 935 (2004). Washington's statute required proof that the child was under 12 years old, while Texas law required only proof that the child was under 17 years old. Id. at 172-73. The State presented a presentence report and letters from the Texas victim, her mother, and a county official all stating that the victim was 10 years old at the time of the crime, and also presented the indictment and judgment. Id. at 173-74. But the Court of Appeals held the evidence was insufficient to prove the Texas victim was under 12 years old. Id. at 174. Because the relevant facts were not admitted or proved to a jury beyond a reasonable doubt, the Texas conviction was not comparable to a Washington conviction and could not count as a "strike" for sentencing purposes. Id. at 167.

As in Lavery, Thiefault, Thomas, and Ortega, the State in this case failed to prove the comparability of the foreign conviction because it did not present evidence that Mr. Olsen admitted to the necessary facts or that the facts were proved to a jury beyond a reasonable doubt. The evidence showed only that Mr. Olsen entered a nolo contendere plea; he did not stipulate that he threatened to kill the victim and he did not stipulate that the victim feared death rather than more broadly fearing for her safety or her family's safety. 4/11/11 RP 40-42; ex. 37. Accordingly, the California conviction should not have been counted in the offender score, and the custodial interference conviction washed out. The Court of Appeals' decision to the contrary conflicts with Lavery, Thiefault, Thomas, and Ortega, warranting review under RAP 13.4(b)(1) and (2).

**2. The Court of Appeals' holding that the California conviction for terroristic threats is factually comparable to the Washington crime of felony harassment violates Mr. Olsen's Sixth Amendment right to a jury trial.**

Not only does the Court of Appeals' decision on comparability conflict with Washington law, the court's finding of factual comparability violates Mr. Olsen's Sixth Amendment right to a jury trial, warranting review under RAP 13.4(b)(3).

"Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a

reasonable doubt.” Alleyne v. United States, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2151, 2155 (2013). The rule does not apply only to facts described as elements or aggravating factors. Rather, any “facts that increase the prescribed range of penalties to which a criminal defendant is exposed” must be found by a jury beyond a reasonable doubt. Id. at 2160; see also id. at 2162-63 (a fact which “produced a higher range” must “be submitted to the jury and found beyond a reasonable doubt”).

Although the fact of a prior conviction may be an exception to the above rule, there is no exception allowing courts to find facts underlying prior convictions. See Descamps v. United States, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2276 (2013). In other words, if Mr. Olsen had a prior conviction for felony harassment, or a prior conviction for an out-of-state crime that was legally comparable to felony harassment, the fact of that prior conviction could be used to increase the sentencing range without running afoul of the Sixth Amendment. But where the out-of-state crime is legally broader, courts may not mine the record to determine whether a defendant’s underlying conduct could have formed the basis for conviction under a narrower statute. Id. at 2285-86.

A court’s finding of a prior conviction increases the range of punishment. “Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior

conviction. Those concerns ... counsel against allowing a sentencing court to make a disputed determination about what the defendant and [out of] state judge must have understood as the factual basis of the prior plea, or what the jury in a prior trial must have accepted as the theory of the crime.” *Id.* at 2288. If the comparability of a conviction depends upon what a plea proceeding reveals about the defendant’s underlying conduct, such facts must be found by a jury beyond a reasonable doubt. *Id.*

In this case, the trial court and Court of Appeals made factual findings about Mr. Olsen’s conduct underlying his California conviction for terroristic threats and used those factual findings to increase his offender score from four to six. Such judicial factfinding is prohibited by the Sixth Amendment. For this reason, too, this Court should grant review. RAP 13.4(b)(3).

**3. The trial court committed reversible error in admitting evidence of prior bad acts under ER 404(b).**

The trial court allowed the State to elicit testimony from Ms. Devenny describing prior acts of violence perpetrated by Mr. Olsen. The court admitted the evidence under ER 404 (b) to prove intent, motive, and absence of mistake or accident. This ruling was erroneous. The evidence of the other acts was used for the forbidden purpose of proving action in

conformity therewith. It was extremely prejudicial, and this Court should grant review.

- a. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative.

“The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined.” State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1998). Consistent with this purpose, ER 404(b) provides:

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

The “forbidden inference” of propensity to act in conformity with prior acts “is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact finder to the merits of the current case in judging a person’s guilt or innocence.” Wade, 98 Wn. App. at 336.

If the State offers evidence of other acts, the court must “closely scrutinize” it to determine if it is truly offered for a proper purpose and its probative value outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Prior to the admission of

misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose to admit evidence that in fact will be used for the improper purpose of showing action in conformity therewith. Otherwise “motive” and “intent” could be used as “magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.” Saltarelli, 98 Wn.2d at 364 (quoting United States v. Goodwin, 492 F.2d 1141, 1155 (5<sup>th</sup> Cir. 1974)). Evidence that is admitted for a proper purpose may not be used at trial for an improper purpose. Fisher, 165 Wn.2d at 744-49 (trial court properly admitted evidence of prior acts to explain delay in reporting, but prosecutor improperly used it to show action in conformity therewith, requiring reversal).

ER 404(b) must be read in conjunction with ER 403, which mandates exclusion of evidence that is substantially more prejudicial than probative. Id. at 745. Evidence of prior acts should be excluded if “its

effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” Smith, 106 Wn.2d at 776.

This Court reviews the trial court’s interpretation of ER 404(b) de novo as a matter of law. Fisher, 165 Wn.2d at 745. A trial court’s ruling admitting evidence is reviewed for abuse of discretion. Id. A trial court abuses its discretion where it fails to abide by the rule’s requirements. Id.

- b. The testimony about the other acts was improperly used to show action in conformity therewith and was substantially more prejudicial than probative.

The trial court allowed the State to elicit testimony regarding three prior acts: (1) a 1998 incident in which Mr. Olsen allegedly tied Ms. Devenny up with an electrical cord, choked her, and said, “you’d better say goodbye to your children;” (2) a 2000 incident in which Mr. Olsen allegedly tied Ms. Devenny up with duct tape and threatened to cut her in pieces and put her parts in a bin; and (3) an incident a few weeks prior to the charged crimes in which Mr. Olsen allegedly punched Ms. Devenny six times and said she would be sorry if she reported it. 5 RP 619-22.

The court allowed testimony about these acts to prove intent, motive, and absence of mistake or accident.<sup>2</sup> 6/18/10 RP 7; 1 RP 38-39. But the only way these prior incidents proved intent, motive or absence of mistake was through a propensity inference. Indeed, the trial court said:

The evidence that the defendant told the complaining witness during both prior assaults that he was then acting with the intent to kill her does make it more likely that on this occasion, given the other facts surrounding this episode, that he was also acting with the intent to kill.

6/18/10 RP 12-13; see also 10/22/10 RP 17-18 (“the reason why I felt that the [prior] charges should come in was because they bore a striking similarity to the current charged offense”). The trial court claimed that this was “categorically different” from admitting the prior acts to show propensity. 6/18/10 RP 13. On the contrary, the trial court’s description of the reason the prior acts were relevant to prove intent is exactly the reason it is inadmissible under ER 404(b).

The Court of Appeals reversed a conviction because the trial court committed a similar error in State v. Holmes, 43 Wn. App. 397, 717 P.2d

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<sup>2</sup> The trial court also admitted the prior acts to show Ms. Devenny’s reasonable fear, as relevant to the harassment count and potentially the burglary count. However, the court acknowledged that if the prior acts were relevant only for this purpose, the court would likely have granted the defense attorney’s motion to sever counts. It is only because the court (improperly) admitted the prior acts to show motive or intent to commit attempted murder that the counts were not severed. 6/15/10 RP 34, 75.

766 (1986). The defendant in that case was charged with burglary and the trial court admitted evidence of the defendant's two prior convictions for theft. The State argued, and the trial court agreed, that the evidence was relevant to prove intent. *Id.* at 398. The Court of Appeals held the admission of the prior acts violated ER 404(b):

Although the two prior juvenile convictions for theft may arguably be logically relevant if you accept the basic premise of once a thief, always a thief, it is not legally relevant. It is made legally irrelevant by the first sentence in ER 404(b). The only reason the two convictions were admitted was to prove that since Mr. Holmes once committed thefts, he intended to do so again after entering the Thompson home. This falls directly within the prohibition of ER 404(b).

Holmes, 43 Wn. App. at 400.

In Wade, 98 Wn. App. 328, the appellate court similarly reversed a trial court's admission of prior acts to prove intent. This was so even though the prior acts were close in time to the charged act, and all involved drug dealing. *Id.* at 332. The court reminded the prosecution that "[w]hen the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense." Wade, 98 Wn. App. at 334 (emphasis in original). Such a non-propensity theory rarely exists:

When the State seeks to prove the element of criminal intent by introducing evidence of past similar bad acts, the State is

essentially asking the fact finder to make the following inference: Because the defendant was convicted of the same crime in the past, thus having then possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case.

Id. at 335.

The same problem exists with respect to the argument that the evidence was relevant to rebut Mr. Olsen's defense. See State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001). In Pogue, the trial court admitted evidence of prior acts to rebut a defense, but the Court of Appeals reversed because the way the evidence would rebut the defense was by showing a propensity to act in conformity with prior behavior. Id. at 982. Pogue involved a prosecution for possession of cocaine. Id. at 981. The accused raised a defense of unwitting possession, and the State offered evidence of prior cocaine possession to rebut the defense. Id. at 982. This Court pointed out that "[t]he only logical relevance of his prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident." Id. at 985.

Similarly here, the only logical relevance of the prior acts is based on a propensity argument: Because Mr. Olsen assaulted and attempted to murder Ms. Devenny in the past, it is more likely that he assaulted and

attempted to murder her in 2009. As in Pogue, the admission of the other acts violated ER 404(b).

The Court of Appeals ignored Mr. Olsen's extensive discussion of Wade, Holmes and Pogue and did not address those cases at all in its opinion. It cited a different Court of Appeals opinion in support of its ruling, but that case is not on point. Slip Op. at 9-10 (citing State v. Goglin, 45 Wn. App. 640, 727 P.2d 683 (1986)). In Goglin, the main issue was whether reversal was required for failure to perform a balancing analysis on the record. Goglin, 45 Wn. App. at 645-46. A secondary issue was whether the evidence was relevant and admissible under ER 401 and ER 402. Id. at 646. Neither of these issues is presented here. Rather, the issue is whether the admission and use of Mr. Olsen's prior acts to show action in conformity therewith violates ER 404(b) and ER 403. Under the cases Mr. Olsen cited, the answer is "yes."<sup>3</sup> Accordingly, this Court should grant review.

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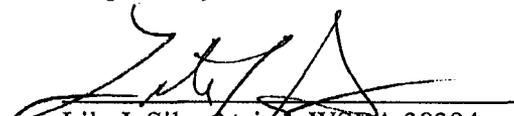
<sup>3</sup> The Court of Appeals also cited this Court's decision in Powell for the proposition that the prior acts were admissible to show intent. Slip Op. at 9 (citing State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995)). But in that case, this Court held the prior acts in question were not admissible to show intent, and it made the general statement that prior threats "are probative upon the question of the defendant's intent." Id. Mr. Olsen does not contend the evidence is not probative. The problem is that the way in which it is probative is through the forbidden propensity inference. See ER 404(b); Wade, 98 Wn. App. at 334; Holmes, 43 Wn. App. at 400.

E. CONCLUSION

Edward Olsen respectfully requests that this Court grant review.

DATED this 23rd day of July, 2013.

Respectfully submitted,



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## APPENDIX A

FILED  
COURT OF APPEALS  
DIVISION II

2013 JUN 27 AM 9:31

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

EDWARD MARK OLSEN,

Appellant.

No. 42135-6-II

PUBLISHED OPINION

QUINN-BRINTNALL, J. — On December 21, 2010, a jury found Edward Olsen not guilty of attempted first degree murder but guilty of attempted second degree murder, first degree burglary, and felony harassment, all with domestic violence aggravators, for pouring gasoline on and threatening to kill Bonnie Devenny while she was in bed.<sup>1</sup> The trial court sentenced Olsen to an exceptional sentence of 360 months in light of the crimes having occurred in the presence of Devenny and Olsen's 12-year-old son, J.E.O. Olsen appeals his conviction and sentence, arguing that (1) the trial court improperly admitted evidence of incidents of past domestic violence in Olsen and Devenny's relationship; (2) the trial court's "to convict" instruction for felony harassment omitted an essential element of the crime; and (3) the trial court erred in

<sup>1</sup> The jury also found Olsen guilty of third degree malicious mischief, a misdemeanor, for breaking the passenger window of Devenny's car.

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concluding that for calculating Olsen's offender score, a California conviction for "terrorist threats" was comparable to felony harassment in Washington.

Because the trial court properly admitted evidence of Olsen and Devenny's relationship and in *State v. Allen*, 176 Wn.2d 611, 627-28, 294 P.3d 679 (2013), our Supreme Court held that the definition of "true threat" need not be provided in a trial court's "to convict" instructions, we affirm Olsen's convictions. And finding no error in the trial court's calculation of Olsen's offender score, we affirm his sentence.

## FACTS

### BACKGROUND

Around 4:00 AM on November 29, 2009, Devenny was awakened by Olsen, the estranged father of her three children, dousing her bed in gasoline while threatening that she was going to die. Devenny "struggled and jumped up out of bed screaming." 5 Report of Proceedings (RP) at 626. J.E.O., Devenny and Olsen's 12-year-old son who had fallen asleep in Devenny's room while watching television earlier in the evening, awoke to his mother's screaming. J.E.O. grabbed Olsen and "tried to get him as far away as possible from [Devenny]." 5 RP at 586. J.E.O. forced Olsen into the hallway, while Devenny made it into the bathroom across the hall and escaped through the bathroom window. Devenny ran across the street to the Wyatt House Retirement Center where J.E.O. later ran to meet her.

Wyatt House caretaker Terrance Black let Devenny and J.E.O. inside the secured facility and because Devenny "was just screaming that the gasoline was burning her," called 911. 3 RP at 231. During the call, Devenny relayed that Olsen had broken into her home and thrown gasoline on her and that she was worried that "he's coming after me." Clerk's Papers (CP) at 176. Bainbridge Island Police Officer Michael Tovar responded quickly to the scene where he

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observed that Devenny was "hyperventilating," "looked scared," and had "obvious redness to her legs." 3 RP at 242-44. Devenny told Tovar that "she was lying in bed when she was awoken by a male pouring gas on top of her . . . who she identified as Mr. Olsen." 3 RP at 246. Devenny also told Tovar that while pouring the gasoline, Olsen "was saying something to the effect of: 'Die, bitch. Die.'" 3 RP at 246. Bainbridge Island Police Officer Lloyd Berg arrived in time to hear Devenny tell Tovar about the altercation. Berg could smell the gasoline on Devenny.

Officers Berg and Tovar then left the Wyatt House to see if Olsen was still at Devenny's home. Berg and Tovar entered through the open front door and performed a sweep of the residence. Tovar immediately smelled gasoline once inside. Both Tovar and Berg noticed that the gasoline smell was strongest in the master bedroom and both noticed a red gasoline can near the foot of the bed. Completing the sweep, Berg and Tovar checked the perimeter of the house but did not find Olsen. They noted that the front passenger window of Devenny's car was broken.

Bainbridge Island Police Detective Trevor Ziemba responded to a call about the incident at approximately 5:00 AM. Even though Devenny had changed her clothes, Ziemba could still smell gasoline. After interviewing Devenny and J.E.O., Ziemba went to Devenny's home. Upon entering, he immediately smelled gasoline and the odor "was just unbelievable." 4 RP at 330. The gasoline smell in the master bedroom was "so strong" that it made Ziemba "nauseous" and he "could only spend a limited amount of time in the room." 4 RP at 331. Ziemba noticed a lighter on the night stand near the bed which he collected as evidence. Police were unable to locate Olsen at the time, but were able to corral the family dog which had run off during the incident. They did not notice any gasoline smell on the dog.

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Toward the end of January, Olsen turned himself in to law enforcement in Arizona. Detectives Ziembra and Christian Hemion flew to Arizona to bring Olsen back to Washington. After transporting Olsen to Washington, Hemion advised Olsen of his *Miranda*<sup>2</sup> rights. Olsen waived those rights and spoke with the detectives about the incident. Olsen told the detectives that on the night of the incident, he broke out the window of Devenny's car with a large rock so that he could open the home's garage door with the opener in the car. Olsen then said that he "drank some alcohol," "had a casserole and . . . watched some TV." 4 RP at 352. Sometime later, Olsen needed to use the bathroom, but "there was a dog in there" that was denying him access to the bathroom. 4 RP at 352. Then,

because he had to use the bathroom so bad . . . he tried to use the casserole to coax the dog out of the bathroom, and when that didn't work he then went into the garage and took a can of gasoline, went into the bathroom and poured gasoline -- or started pouring gasoline on the dog as the dog ran into the bedroom and then jumped on the bed, which was occupied by [Devenny] and [J.E.O.].

4 RP at 353. Olsen told the detectives that he did not believe Devenny was in the house as these events transpired and that the dog jumping on the bed was "why there [was] gasoline in the bedroom." 4 RP at 425.

The State initially charged Olsen with attempted first degree murder and first degree burglary, both with domestic violence aggravators. RCW 9A.32.030(1)(a), .020(1); RCW 9A.52.020; RCW 10.99.020. The State later amended the charges to add attempted second degree murder, felony harassment, and third degree malicious mischief, all with domestic violence aggravators. RCW 9A.32.050(1)(a); RCW 9A.28.020(1); RCW 9A.46.020(1); RCW 9A.48.090(1)(a); RCW 10.99.020.

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

PROCEDURE

Pretrial proceedings began on June 15, 2010. The trial court heard the State's offer of proof and argument from both parties concerning admitting evidence under ER 404(b) of two previous incidents of domestic violence involving Devenny and Olsen. The court found by a preponderance of the evidence that

[o]n April 22, 1998 Ms. Devenny allowed [Olsen], her ex-boyfriend, to stay at her house. While she was on the phone [Olsen] became angry and started yelling at her. [Olsen] threw Ms. Devenny on the bed so she landed on her stomach and wrapped a cord around her neck. He began to choke Ms. Devenny so hard that she vomited. . . .

[Olsen] grabbed a couple of pillows and covered her face so she couldn't breathe and became light-headed. She continued to fight him.

[Olsen] started tying Devenny up with an extension cord telling her that he was going to rape and kill her and [bury] her that night. She was able to escape when [Olsen] thought that someone else was in the house.

The second episode . . . involve[s] a California incident occurring on May 23, 2000. . . .

. . . Ms. Devenny contacted law enforcement and reported that for the past several days she and [Olsen] had been arguing back and forth about their relationship. That evening [Olsen] told her that he was tired of their arguments and began pushing her around and hitting her in the head. Ms. Devenny fell down, and [Olsen] sat on top of her and held her down.

He then wrapped duct tape around her lower legs. As [Olsen] was doing this, he told her to say good-bye to her children because this would be the last time they would see their mom.

[Olsen told Devenny] that he was, quote, going to kill her and cut her up into little pieces. [Olsen] told Ms. Devenny that he was going to put her pieces in a plastic storage container that was on the floor next to her.<sup>[3]</sup>

RP (June 18, 2010) at 2-4.

Trial began on December 13. In addition to eliciting testimony concerning the November 29 events, the State called Devenny to testify—after the trial court gave a limiting instruction—

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<sup>3</sup> The transcripts mention written ER 404(b) findings on multiple occasions. Written ER 404(b) findings were not designated for our review.

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about three previous incidents of domestic violence involving her and Olsen.<sup>4</sup> Devenny testified that about a week before the gasoline incident, she and Olsen got into “a verbal altercation that turned physical” and Olsen struck her six times in the face in front of their three children. 5 RP at 619. She also testified that in 1998, Olsen tied her up with an electrical cord and choked her. She said that at the time Olsen told her, “You better say ‘good-bye’ to your children.” 5 RP at 622. Last, Devenny testified concerning the 2000 incident from California where Olsen began duct taping her and told her “he was going to cut [her] in pieces and put [her] in a blue bin.” 5 RP at 623.

Two of Devenny’s three children testified about the fight that occurred shortly before the gasoline event. J.E.O. testified that “[t]here was a lot of fist throwing” from both Devenny and Olsen and that Devenny received a “bloody eyebrow, and that is about it.” 5 RP at 581-82. J.E.O.’s older brother, J.M.O., testified that he heard an argument but did not see the actual fight or that Devenny suffered any injuries as a result. J.M.O. also testified that the incident from 2000 began as a result of Devenny punching their five year-old brother, E.J.O., in the face. E.J.O. fell down the stairs on account of the blow and, in the process, knocked over J.M.O. Devenny then hit J.M.O. for crying. According to J.M.O., Olsen came in the door shortly

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<sup>4</sup> As previously discussed, the trial court ruled at a pretrial ER 404(b) hearing that evidence of the 1998 and 2000 incidents would be admissible. Prior to Devenny’s testimony, the trial court heard an offer of proof outside the jury’s presence concerning a fight that occurred approximately one week before the gasoline incident. The trial court ruled that the State had proven by a preponderance of the evidence (based on what appeared “to be a healing wound above [Devenny’s] left eyebrow” in pictures taken on the night of the gasoline incident) that the fight from the week before the gasoline incident occurred. 5 RP at 567. The trial court also ruled that “evidence of an assault so close in time to the charged event is relevant to the issue of motive and intent.” 5 RP at 568.

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thereafter and began tying Devenny up to stop her from hitting the children. Olsen did not testify.

On December 21, the jury returned its verdict finding Olsen not guilty of attempted first degree murder but guilty of attempted second degree murder, first degree burglary, felony harassment, and third degree malicious mischief. The jury also found that all of the crimes were aggravated domestic violence offenses. On April 11, 2011, the trial court sentenced Olsen to an exceptional sentence of 360 months. Olsen appeals his sentence and convictions.

#### DISCUSSION

##### PRIOR BAD ACTS

Olsen argues that the trial court abused its discretion in allowing the State to present evidence under ER 404(b) of prior acts of violence that Olsen committed against Devenny to show intent, motive, and absence of mistake or accident related to the attempted murder charges. Specifically, Olsen contends that these acts were irrelevant and that the potential prejudicial effect of the evidence outweighed any probative value such evidence might hold. Because the trial court properly interpreted ER 404(b) and did not abuse its discretion in admitting evidence of the incidents for the limited purposes of establishing motive, intent, or lack of mistake, we disagree.

We review a trial court's interpretation of ER 404(b) de novo. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). If the trial court has correctly interpreted ER 404(b), we review the trial court's ruling to admit or exclude evidence of misconduct for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 744-45, 202 P.3d 937 (2009). A trial court abuses its discretion by not following the requirements of ER 404(b) in admitting evidence of a defendant's prior acts of misconduct. *Fisher*, 165 Wn.2d at 744-45.

Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” “ER 404(b) is not designed ‘to deprive the State of relevant evidence necessary to establish an essential element of its case,’ but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” *Foxhoven*, 161 Wn.2d at 175 (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)). Thus, evidence of prior bad acts must be relevant to a material issue before the jury, *State v. Gogolin*, 45 Wn. App. 640, 644, 727 P.2d 683 (1986), and ER 404(b) must be read in conjunction with ER 403, which “requires exclusion of evidence, *even if relevant*, if its probative value is substantially outweighed by the danger of unfair prejudice.” *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

With these considerations in mind, Washington courts have developed a four-part test for ruling on the admissibility of prior acts evidence: before admitting ER 404(b) evidence, a trial court “must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). “This analysis must be conducted on the record.” *Foxhoven*, 161 Wn.2d at 175.

Here, Olsen does not challenge the trial court’s oral ruling that the State proved the three previous instances of misconduct by a preponderance of the evidence. Accordingly, these unchallenged findings are treated as verities on appeal. *State v. Chanthabouly*, 164 Wn. App. 104, 129, 262 P.3d 144 (2011) (unchallenged oral rulings are verities on appeal), *review denied*,

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173 Wn.2d 1018 (2012). Thus, we must solely determine whether the trial court admitted the evidence on appropriate legal grounds (steps 2 and 3 of the test described above) and, if so, whether the trial court abused its discretion in concluding that the probative value of the evidence outweighed its potential for prejudice (step 4).

Contrary to Olsen's characterization of the trial court's ER 404(b) analysis, the court performed extensive, on-the-record analysis of why the State should be allowed to submit evidence of Olsen's prior violence toward Devenny. As to the incidents from 1998 and 2000, the trial court ruled that evidence of these prior acts "is relevant in the Attempted Murder in the First Degree charge on the issue of intent" and also to rebut Olsen's "statements to the police that the splashing of gasoline upon Devenny and her son was accidental or incident[al] to trying to use the gas to move the dog." RP (June 18, 2010) at 13. The trial court also ruled that "the evidence is also relevant . . . to the issue of motive, which goes towards premeditation in that it was clearly expressed in the prior incidents that the defendant's intent was to kill" Devenny. RP (June 18, 2010) at 13. As to the fight between Devenny and Olsen that occurred one week before the gasoline incident, the trial court ruled that "evidence of an assault so close in time to the charged event is relevant to the issue of motive and intent." 5 RP at 568.

Washington law clearly supports admitting evidence of prior acts in circumstances such as this. In *State v. Powell*, 126 Wn.2d 244, 261, 893 P.2d 615 (1995) (quoting *State v. Parr*, 93 Wn.2d 95, 102, 606 P.2d 263 (1980)), for instance, the Washington Supreme Court pointed out that "[i]t is undoubtedly the rule that evidence of quarrels between the victim and the defendant preceding a crime, and evidence of threats by the defendant, are probative upon the question of the defendant's intent." Moreover, when a defendant asserts that certain conduct is accidental, evidence of prior misconduct is *highly* relevant as it will tend to support or rebut such a claim.

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*Gogolin*, 45 Wn. App. at 646. Thus, in *Gogolin*, Division One of this court allowed evidence of a defendant's prior assaultive behavior toward his wife as "the evidence was relevant and probative since it tended to rebut [the defendant's] defense of accident by demonstrating his history of hostility and abusive conduct toward [the victim]." 45 Wn. App. at 646. The *Gogolin* court further stated that "the evidence tended to make more probable the fact that [the victim's] injuries resulted from an intentional assault rather than an accident." 45 Wn. App. at 646. Accordingly, we hold that the trial court correctly interpreted ER 404(b) when it concluded that the State could present evidence of Olsen's prior assaultive behavior toward Devenny to show intent and motive and, especially, to counter his claims of accident.

In addition to determining whether the trial court admitted the evidence on appropriate legal grounds, we must also decide whether the trial court abused its discretion in concluding that the probative value of the evidence outweighed its potential for prejudice. On the record here, the trial court carefully weighed the probative value of the offered evidence against its potentially prejudicial effects. While recognizing that "evidence of this type is prejudicial," the court concluded that the evidence "does have a high degree of value to proving the intent and motive. It also does have a high degree of value in rebutting absence of mistake." RP (June 18, 2010) at 15. Olsen utterly fails to explain how the trial court's analysis entailed an abuse of discretion. The evidence admitted clearly had a high degree of probative value—especially in light of Olsen's claim that the spilling of gasoline on Devenny and J.E.O. was an accident

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incidental to his attempt to *relocate* the dog. Accordingly, we hold that the trial court did not abuse its discretion in admitting evidence of Olsen's prior bad acts.<sup>5</sup>

#### FELONY HARASSMENT INSTRUCTION

Olsen next argues that the trial court erred in giving a "to convict" instruction on the felony harassment charge that omitted the requirement that the threat be a "true threat." Because the trial court properly gave a definitional instruction limiting criminalized behavior to "true threats," and the Washington Supreme Court has recently held that when such a definitional instruction is given, "true threat" need not be defined as an element in the "to convict" instructions for felony harassment, we disagree.

We review jury instructions *de novo*, "within the context of the jury instructions as a whole." *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions, "taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996).

Because threatening language *may* be protected by the First Amendment, jury instructions must carefully distinguish "true threats" (which receive no First Amendment protection) from constitutionally protected speech. *State v. Williams*, 144 Wn.2d 197, 207-08,

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<sup>5</sup> Olsen makes passing reference in his brief, without explicitly raising the issue of prosecutorial misconduct, to the fact that "the prosecutor improperly made a propensity argument to the jury" based on the admitted ER 404(b) evidence. Br. of Appellant at 11. Because this court "will not review issues for which inadequate argument has been briefed or only passing treatment has been made," *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004), we do not fully address this issue. We note, however, that our review of the prosecutor's closing argument reveals that the prosecutor was not focused on proving Olsen's conformity with prior behavior but, instead, on countering Olsen's claim that pouring gasoline on Devenny occurred accidentally while he was attempting to douse the dog.

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26 P.3d 890 (2001). 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 person.” *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (internal quotation marks omitted) (quoting *Williams*, 144 Wn.2d at 207-08).

Here, the trial court gave the following definitional instruction of “true threat” in instruction 23:

Threat means to communicate, directly or indirectly, the intent—  
To cause bodily injury in the future to the person threatened or to any other person; or  
To do any other act which is intended to harm substantially the person threatened or another with respect to that person’s health, safety, business, financial condition or personal relationships.  
To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP at 240. This instruction clearly defines “true threats,” including the constitutionally required mens rea element distinguishing “true threats” from idle talk or jests.<sup>6</sup> Accordingly, this instruction does not run afoul of the First Amendment.

Nevertheless, Olsen contends that because only “true threats” may be prosecuted, the “to convict” instruction for the felony harassment charge must include an element stating that the

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<sup>6</sup> See *State v. Schaler*, 169 Wn.2d 274, 283-84, 236 P.3d 858 (2010).

defendant's threat constituted a "true threat."<sup>7</sup> The Washington Supreme Court has recently rejected this argument.

In *Allen*, the defendant argued that even though the trial court gave a separate definitional instruction for true threats, "because only true threats may be prosecuted, the true threat requirement is an essential element [that] must be included in the information and to-convict instruction" for felony harassment. 176 Wn.2d at 626-27. The *Allen* court<sup>8</sup> rejected this argument, holding that "failure to include the true threat requirement in the . . . to-convict instruction was not error." 176 Wn.2d at 630. As the *Allen* court explained, Washington appellate courts have consistently arrived at this conclusion:

[T]he Court of Appeals has repeatedly held the true threat requirement is not an essential element of harassment statutes. In *State v. Tellez*, 141 Wn. App. 479, 170 P.3d 75 (2007), the defendant, charged with felony telephone harassment

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<sup>7</sup> The trial court gave the "to convict" instruction for felony harassment as instruction 24:

To convict the defendant of the crime of Harassment as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt—

- (1) That on or about November 28, 2009 through November 29, 2009, the defendant knowingly threatened to kill Bonnie Devenny immediately or in the future;
- (2) That the words or conduct of the defendant placed Bonnie Devenny in reasonable fear that the threat to kill would be carried out;
- (3) That the defendant acted without lawful authority; and
- (4) That the threat was made or received in the State of Washington.

CP at 241. We note that the second element of this instruction appears to state the requirement that the threat be a "true threat"—that a reasonable person in the speaker's position would foresee that his or her words or conduct would place the victim in *reasonable fear* that the *threat to kill would be carried out*. Cf. ¶ 3 of the trial court's instruction 23.

<sup>8</sup> The *Allen* decision produced four opinions by the Supreme Court (the lead opinion, cited herein, two concurrences, and a dissent). Thus, the lead opinion in *Allen* is a plurality decision only signed by four justices. However, the other three opinions in *Allen* do not address this issue—whether the "to convict" instructions for felony harassment must explicitly limit threats to "true threats"—at all and, accordingly, common sense dictates that the whole of the court agreed with the lead opinion's assessment of this particular issue.

based on a threat to kill, claimed the information and to-convict instruction were deficient because they lacked the requirement of a true threat, an essential element of the crime. The Court of Appeals agreed with the State that “the constitutional concept of ‘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.” *Tellez*, 141 Wn. App. at 484. In so holding, the court in *Tellez* construed our holding in [*State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006)]—that it is error not to give a limiting instruction defining threat to include only true threats—as characterizing the true threat concept as definitional, and not as an essential element of any threatening-language crime. *Tellez*, 141 Wn. App. at 484. In *State v. Atkins*, 156 Wn. App. 799, 236 P.3d 897 (2010), the defendant, charged with felony harassment, likewise contended the information and to-convict instruction were deficient for failing to contain the essential element of a true threat. The Court of Appeals found *Tellez* dispositive, holding that so long as the jury was instructed as to the true threat requirement, the defendant’s First Amendment rights were protected.

176 Wn.2d at 629-30.

This case is on all fours with the *Allen* case—the jury instructions in both cases are nearly identical. Here, the trial court properly provided a definitional instruction limiting threats to “true threats” (instruction 23 discussed above) in conjunction with the “to convict” instruction for felony harassment (instruction 24). Nothing more is required. Accordingly, we reject Olsen’s contention that the trial court’s jury instructions were erroneous.

#### COMPARABILITY OF “TERRORISTIC THREATS” CONVICTION

Last, Olsen contends that the State failed to prove that his 2000 California conviction for “terrorist threats” was comparable to the Washington crime of felony harassment and, in result, the trial court miscalculated his offender score. Because Olsen specifically pleaded no contest in 2000 to threatening to kill Devenny, we hold that Olsen’s prior offense for terroristic threats is factually comparable to felony harassment in Washington and, accordingly, the trial court did not err when it included Olsen’s 2000 California conviction in calculating his offender score.

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We review the trial court's classification of out-of-state crimes and the trial court's calculation of a defendant's offender score de novo. *State v. Labarbera*, 128 Wn. App. 343, 348, 115 P.3d 1038 (2005); *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). "When prior out-of-state convictions are used to increase an offender score, the State must prove the conviction would be a [comparable] felony under Washington law." *Labarbera*, 128 Wn. App. at 348; RCW 9.94A.525(3).

We employ a two-part test to determine the comparability of a foreign offense. *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, we determine whether the foreign offense is legally comparable—"that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Thieffault*, 160 Wn.2d at 415. Second, if the foreign offense elements are broader than Washington's elements, precluding legal comparability, we determine "whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute." *Thieffault*, 160 Wn.2d at 415 (citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). "In making its factual comparison, [this court] may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." *Thieffault*, 160 Wn.2d at 415 (citing *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005)).

Here, Olsen pleaded no contest in 2000 to committing the California felony crime of "terrorist threats." At the time, the former *Cal. Penal Code* § 422 (1998) defined the crime as follows:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person

threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety.

Washington's harassment statute at the time<sup>9</sup> provided,

- (1) A person is guilty of harassment if:
- (a) Without lawful authority, the person knowingly threatens:
    - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person. . . .

. . . .

(2) A person who harasses another is guilty of a gross misdemeanor . . . , except that the person is guilty of a class C felony if . . . (b) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

Former RCW 9A.46.020 (1999).

The elements of the California and Washington crimes are not legally comparable: under California's statute, it is possible to be convicted of a felony for threatening great bodily injury or death, whereas felony harassment in Washington requires a true threat involving death; a threat involving bodily injury constitutes only a misdemeanor. Thus, we must determine whether the *conduct* underlying Olsen's "terroristic threats" conviction would have been a felony violation of Washington's harassment statute. *Thiefault*, 160 Wn.2d at 415.

Unlike in Washington, California allows defendants to plead "no contest" to charged offenses. Under California law, the "legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes." *California v. Wallace*, 33 Cal. 4th 738, 749, 93 P.3d 1037, 16 Cal. Rptr. 3d 96 (2004) (quoting *Cal. Penal Code* § 1016(3)). And under established California law, a guilty plea "amounts to an admission of every

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<sup>9</sup> Although Washington's current harassment statute is nearly identical to the statute in effect in 2000, "the elements of the out of state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed." *In re Lavery*, 154 Wn.2d at 255.

element of the crime charged.” *California v. Jones*, 52 Cal. 2d 636, 651, 343 P.2d 577 (1959) (emphasis added), *cert. denied*, 361 U.S. 926 (1960). Thus, when a defendant is charged under a California statute that employs the inclusive disjunctive—as is this case with “or” here—the defendant, in pleading no contest, admits guilt to all elements of the statute set forth in the charging document.<sup>10</sup> *California v. Tuggle*, 232 Cal. App. 3d 147, 154, 283 Cal. Rptr. 422 (1991), *overruled on other grounds by California v. Jenkins*, 10 Cal. 4th 234, 893 P.2d 1224, 40 Cal. Rptr. 2d 903 (1995).

In 2000, while Olsen and Devenny were living in California, Olsen began duct taping her and told her “he was going to cut [her] in pieces and put [her] in a blue bin.” 5 RP at 623. The information charging Olsen with violating California’s terrorist threats statute states that Olsen “did willfully and unlawfully threaten to commit a crime which would result in death *and* great bodily injury to [Devenny], with the specific intent that the statement be taken as a threat.” Ex: 37 (emphasis added). The information also stated that

[i]t is further alleged that the threatened crime, on its face and under the circumstances in which it was made, was so unequivocal, unconditional, immediate and specific as to convey to BONNIE MARIE DEVENNY a gravity of purpose and an immediate prospect of execution.  
It is further alleged that the said BONNIE MARIE DEVENNY was reasonably in sustained fear of his/her safety and the safety of his/her immediate family.

Ex. 37. Thus, Olsen, by pleading no contest, pleaded guilty to threatening to kill Devenny *and* threatening to gravely injure her. Because of this, the conduct that Olsen pleaded no contest to in the 2000 information involves (1) a true threat against Devenny (2) involving a threat to kill that (3) placed Devenny in fear of “an immediate prospect of execution” of the threat, namely Olsen

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<sup>10</sup> In addition, during Olsen’s current trial, he signed a stipulation admitting that “[i]n the year 2000 in Solano County, California the defendant Edward Mark Olsen pleaded guilty to Terrorist Threats.” CP at 203.

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carrying out his threat to kill. Ex. 37. Accordingly, the conduct underlying Olsen's terrorist threat conviction would have satisfied the conduct necessary to be convicted of felony harassment in Washington under RCW 9A.46.020; the crimes are factually comparable and the trial court correctly included this conviction in calculating Olsen's offender score.

Shortly before we heard oral argument in this case, Olsen submitted a statement of additional authorities pursuant to RAP 10.8, directing our attention to *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003). In *C.G.*, a juvenile case also involving a threat to kill under RCW 9A.46.020, our Supreme Court held that

[i]n order to convict an individual of felony harassment based upon a threat to kill, RCW 9A.46.020 requires that the State prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out as an element of the offense.

150 Wn.2d at 612.

As we explained previously, the 2000 information filed in California alleged that Olsen communicated the death threat to Devenny in such a manner as "to convey to [Devenny] a gravity of purpose and an immediate prospect of execution" and that the threat left Devenny "in sustained fear of [her] safety." Ex. 37. Having stipulated to both of these facts by pleading no contest, we are satisfied that Olsen stipulated to Devenny's being "placed in reasonable fear that a threat to *kill* [would] be carried out."<sup>11</sup> *C.G.*, 150 Wn.2d at 610.

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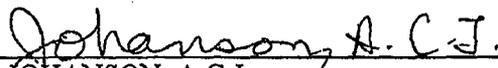
<sup>11</sup> Olsen argues that because the 2000 information states that Devenny was "reasonably in sustained fear of his/her safety and the safety of his/her immediate family" and does not explicitly mention fear of death, the State failed to prove a degree of fear sufficient to establish felony harassment under *C.G.* Ex. 37. This reading of the information, though, divorces a single sentence from the entirety of the document. When read as a whole, the information clearly explains that the threat involved (a) a "true threat," e.g., "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," *Kilburn*, 151 Wn.2d at 43 (internal quotation marks omitted) (quoting

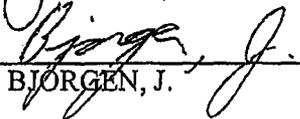
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The conduct underlying Olsen's terrorist threat conviction would have satisfied the conduct necessary to be convicted of felony harassment in Washington under RCW 9A.46.020. The crimes are factually comparable and none of the cases Olsen relies on dictate a different result. Accordingly, we conclude that the trial court correctly included this conviction in calculating Olsen's offender score and, in result, the trial court's calculation of Olsen's offender score is legally correct. Finding no error, we affirm Olsen's convictions and sentence.

  
QUINN-BRINTNALL, J.

We concur:

  
JOHANSON, A.C.J.

  
BJORGEN, J.

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*Williams*, 144 Wn.2d at 207-08); that (b) caused the person threatened "reasonable fear that the threat made is the one that will be carried out." *C.G.*, 150 Wn.2d at 610.

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 42135-6-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent Jeremy Morris, DPA  
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- petitioner
- Attorney for other party

  
MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: July 23, 2013

# WASHINGTON APPELLATE PROJECT

## July 23, 2013 - 3:57 PM

### Transmittal Letter

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Court of Appeals Case Number: 42135-6

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