

66047-1

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NO. 66047-1-1

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

STATE OF WASHINGTON
Respondent,

v.

BRANDI MARTINEZ

Appellant.

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY**

The Honorable David Needy, Judge

RESPONDENT'S BRIEF

**SKAGIT COUNTY PROSECUTING ATTORNEY
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I. SUMMARY OF ARGUMENT

On January 30, 2010, Ms. Brandi Martinez drove Veronica Ceja home from a party that they had both attended. Prior to arriving at their destination, Officer Edgar Serrano was alerted by dispatch of a possible motor vehicle accident and hit and run involving a white Honda-like vehicle. Officer Serrano was in the area of the possible collision and soon spotted a white Honda driven by Ms. Martinez. Officer Serrano noticed that the vehicle was traveling at a high rate of speed and paced the vehicle at fifty miles per hour in a twenty-five mile per hour zone. Officer Serrano was in full uniform and in a marked patrol car. He activated his lights and siren and attempted to pull Ms. Martinez over, but she failed to stop. Ms. Martinez then turned off her headlights and taillights, turned in to a residential community and continued to travel at a high rate of speed, losing traction numerous times as Officer Serrano followed her. At trial, Ms. Martinez's passenger, Ms. Veronica Ceja, testified that the driving was crazy, fast and that she feared they would crash and she would be injured. She was so fearful that at one point she wanted to jump from

the moving vehicle. Ms. Martinez was convicted by a jury of her peers of Attempting to Elude and Resisting Arrest. She was also found guilty by unanimous yes of the special allegation that her conduct endangered others. She now appeals her convictions.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to prove beyond a reasonable doubt that Ms. Martinez threatened physical injury or harm to her passenger.
2. Whether the term “threaten” is unconstitutionally vague such that it violates due process vagueness prohibitions.

III. STATEMENT OF THE CASE

1. Statement of Procedural History

¹On July 27, 2010, Ms. Brandi Martinez was charged by amended information with Attempting to Elude a Police Officer with an enhancement and resisting arrest. CP 6-7. Ms. Martinez was tried before a jury of her peers and the jury found her guilty of both counts CP 37-38. The jury also found her guilty of the enhancement

by unanimous yes. CP 39. Ms. Martinez timely filed notice of appeal on September 15, 2010. CP 53.

2. Statement of Facts

In the early morning hours of January 30, 2010, Officer Edgar Serrano of the Mount Vernon Police Department was dispatched to a possible motor vehicle accident and hit and run in the area of North LaVenture Road in Mount Vernon, WA. 8/23/2010 RP 4-6. The car involved was described as white Honda-type vehicle. 8/23/2010 RP 6. Officer Serrano was in the area and quickly was able to find a vehicle matching the description of the suspect vehicle; he also noticed that this suspect vehicle was speeding and paced the vehicle at fifty miles per hour in a twenty-five mile per hour zone. 8/23/2010 RP 6-8. Officer Serrano activated his lights and siren in an attempt to pull over the suspect vehicle. 8/23/2010 RP 9. The vehicle did not stop and instead pulled into a residential neighborhood. 8/23/2010 RP 9. The driver, Ms. Brandi Martinez, turned off all the lights from the vehicle—headlights and tail lights—in an apparent attempt to make it more difficult to spot the vehicle as she continued to speed away from the officer. 8/23/2010 RP 9. The vehicle continued at a high rate of speed in the residential neighborhood going

¹ The State will refer to the verbatim report of proceedings by using the date

approximately forty miles per hour through the residential streets. 8/23/2010 RP 10. Officer Serrano witnessed Ms. Martinez lose traction and slide around on the vehicle's back tires while trying to elude him through the neighborhood. 8/23/2010 RP 10. There were houses and numerous parked vehicles on the streets as Ms. Martinez raced through the neighborhood. 8/23/2010 RP 10. Officer Serrano backed off from following Ms. Martinez, but he never lost sight of the vehicle. 8/23/2010 RP 11. He continued following the vehicle and noticed excessive speed and he also noticed the car lose traction again as it continued through the neighborhood. 8/23/2010 RP 11. Ms. Martinez did a lap through the residential neighborhood and once she had completed it, she went through the neighborhood a second time still racing away from Officer Serrano. 8/23/2010 RP 11. Ms. Martinez finally stopped the vehicle at the end of a dead-end cul-de-sac where there was a parking lot, boats, RVs, and numerous cars parked. 8/23/2010 RP 12. Both front doors to the vehicle opened and Officer Serrano saw Ms. Martinez exit from the driver's side and take off. 8/23/2010 RP 13-14. Veronica Ceja, the passenger, took off in a different direction. 8/23/2010 RP 13.

followed by "RP" and the page number.

During the elude from Officer Serrano, Ms. Martinez had a passenger in her front seat, Ms. Ceja. Ms. Ceja testified at trial that the driving was “all crazy like,” and she estimated the speed to be fifty miles per hour in the neighborhood. 8/24/2010 RP 62. Ms. Ceja testified that she was afraid while a passenger in Ms. Martinez’s vehicle that night because of the high rate of speed and because she thought they may crash and she may be injured in a crash. 8/24/2010 RP 77-78. She was so terrified by Ms. Martinez’s driving, Ms. Ceja testified to wanting to jump out of the moving vehicle so that she could get away. 8/24/2010 RP 63, 77-78.

IV. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT TO PROVE THAT MS. MARTINEZ THREATENED PHYSICAL INJURY OR HARM TO HER PASSENGER.

The test for reviewing a defendant’s challenge to the sufficiency of evidence in a criminal case is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.” *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the

evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068, 1074 (1992); *State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068, 1074 (1992); *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980). Courts do not have to be convinced of the defendant's guilt beyond a reasonable doubt, only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023 (2000). The role as the reviewing court is not to reweigh the evidence and substitute judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Instead, this Court defers to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Here, the prosecution filed an endangerment special allegation under RCW 9.94A.834, seeking an enhanced sentence. To return the special verdict for endangerment, Ms. Martinez's jury had to find beyond a reasonable doubt that Ms. Martinez threatened one or more persons other than herself or the pursuing law enforcement officer with physical injury or harm while attempting to elude Officer Serrano's police vehicle. RCW 9.94A.834. Ms. Martinez appeals the jury's endangerment finding, asserting that it is unsupported by the evidence.

The legislature enacted this sentencing enhancement in 2008 to protect public safety. Public testimony held on January 10, 2007, in support of this sentencing enhancement before the House Committee on Public Safety and Emergency Preparedness is summarized as follows:

When these offenders decide to run away from police they are endangering society as a whole. This includes children on their way to school, people out shopping, pedestrians, etc. Currently the penalty for a first time offender is 30 days in jail...Offenders need to know that there is [sic] going to be consequences for their actions of endangering others.
House Comm. on Pub. Safety & Emergency Preparedness, H.B. Rep. on H. B. 1030, 60th Leg., Reg. Sess. (Wash. 2008).

Substantial evidence also supports the jury's finding that Ms. Martinez threatened her *passenger* with physical injury or harm while

she attempted to elude Officer Serrano. Ms. Martinez sped through a residential neighborhood with lots of park cars, RVs, homes and apartments; lost traction multiple times while speeding which caused the vehicle to slide on its back tires; and drove with her headlights and taillights off so that no one could see her. Any rational juror could find that Ms. Martinez's actions threatened her passenger because she could have lost control of her vehicle during her abrupt maneuvering or she could have collided with an oncoming vehicle as she turned into the cul de sac without any headlights activated. In fact, Ms. Martinez's own passenger said that the driving was crazy and fast and that she was afraid they may crash and that she may have been injured in the crash.

While this evidence is not unequivocal proof that Ms. Martinez endangered her passenger, it is sufficient evidence to warrant an inference of threatened harm to Ms. Martinez's passenger. Therefore, because this Court interprets all reasonable inferences from the evidence strongly against the defendant, this Court should find that substantial evidence supports the jury's endangerment special verdict.

**B. THE WORD "THREATEN" IS NOT
UNCONSTITUTIONALLY VAGUE, THUS THE STATUTE
SHOULD NOT BE DEEMED VOID FOR VAGUENESS.**

RCW 9.94A.834 allows the prosecutor to file a special allegation that the defendant's conduct during an attempted elude caused endangerment. The special allegation statute reads as follows:

(1) The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.

(2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered during the commission of the crime.

RCW 9.94A.834.

When a claim is made that a statute is void for vagueness on its face, the test is whether the statute satisfies the due process requirements of adequate notice and adequate standards to prevent arbitrary enforcement. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984). Adequate notice requires describing the proscribed conduct sufficiently that persons of ordinary intelligence are not required to guess at its meaning. Adequate standards for adjudication require sufficient specificity so that police, judges and juries are not free to decide what is or is not prohibited depending on the facts in each case. *Maciolek*, at 264 676 P.2d 996 (quoting *State v. Carter*, 89 Wn.2d 236, 239-40, 570 P.2d 1218 (1977)). The standards must be sufficiently definite that one can evaluate the lawfulness of particular conduct. A statute is presumed constitutional, and the challenging party must prove unconstitutionality beyond a reasonable doubt. *Maciolek*, 101 Wn.2d at 263, 676 P.2d 996. Statutes must be interpreted according to their plain meaning to give effect to legislative intent. *Pacific First Fed. Sav. & Loan Ass'n v. State*, 92 Wn.2d 402, 598 P.2d 387 (1979). If the statutory language is clear, the courts will not further interpret the statute. *Griffin v. Department of Soc. & Health Servs.*, 91 Wn.2d 616, 590 P.2d 816 (1979). Furthermore, “[s]imply because a statute could have been

worded more precisely does not render it unconstitutional.” *State v. LaLonde*, 35 Wn. App. 54, 59, 665 P.2d 421, *review denied*, 100 Wn.2d 1014 (1983).

A statute or ordinance should not be declared unconstitutional unless it appears unconstitutional beyond a reasonable doubt. *State v. Dixon*, 78 Wn.2d 796, 479 P.2d 931 (1971); *State v. Primeau*, 70 Wash.2d 109, 422 P.2d 302 (1966). Therefore, RCW 9.94A.834 is presumed constitutional with a heavy burden placed on the appellant to prove the statute is unconstitutional. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996, (1984); *Spokane v. Vaux*, 83 Wn.2d 126 (1973).

To meet this burden the appellant must prove that the statute does not satisfy the requirements of due process. The test for evaluating the vagueness of legislative enactments contains two components: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996, (1984); *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *State v. Hilt*, 99 Wn.2d 452, 662 P.2d 52 (1983). “Common intelligence” is the test of what is fair warning. *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984). Thus, if men of ordinary intelligence can understand a penal statute, notwithstanding some *possible areas of disagreement*, it is not

wanting in certainty. See *Spokane v. Vaux*, 83 Wn.2d 126, 129, 516 P.2d 209 (1973)(emphasis added).

There are statutes which contain both precisely worded prohibitions and prohibitions of uncertain application, and such a statute, though potentially vague as to some conduct, may nevertheless be constitutionally applied to one whose act clearly falls within the statute's "hard core." *Bellevue v. Miller*, 85 Wn.2d 539, 541, 536 P.2d 603 (1975); See also, *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984).

Under RCW 9A.04.110(27), the term threat is specifically described under the definitional section of the criminal code as follows, in pertinent part:

- (27) "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; or
 - (j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships.

In *State v. Brown*, the appellant argued that RCW 9.61.160 (Threats to bomb or injure property) lacked adequate notice and was vague. *State v. Brown*, 50 Wn. App. 405, 408-410, 748 P.2d 276, 278 - 279 (1988). The court disagreed and found that the term

“threaten” did not fail to give Brown adequate notice nor was it vague. “From both the plain meaning and the legislative definition of “threaten”, it is implicit that “threaten to bomb” means expressing an intent to cause injury or damage. The words “threaten” and “bomb” are terms readily understood by persons of ordinary intelligence. The overwhelming likelihood that a threat to bomb will cause fear, alarm or worse makes it unnecessary to expressly add additional elements to give adequate notice of the conduct proscribed by the statute.” *State v. Brown*, 50 Wn. App. 405, 408-410, 748 P.2d 276, 278 - 279 (1988). Like *Brown*, in the instant case, the term “threaten” as used within RCW 9.94A.834 is a term readily understood by persons of ordinary intelligence. There is no need to make unnecessary additional elements to RCW 9.94A.834 when adequate notice of the conduct proscribed within RCW 9.94A.834 exists. Also, RCW 9A.04.110(27), provides a definition to the term threat, which provides ample notice.

Furthermore, criminal statutes require particular scrutiny and may be facially invalid if they “make unlawful a substantial amount of constitutionally protected conduct ... even if they also have legitimate application.” *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d

572 (1989)(quoting *City of Houston v. Hill*, 482 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). A statute regulating behavior and not pure speech will not be overturned unless the overbreadth is both real and substantial in relation to the statute's legitimate sweep. *Broadrick v. Oklahoma*, 413 U.S. 601 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). A statute will be overturned only if the court is unable to place a sufficiently limiting construction on a standardless sweep of legislation. *City of Tacoma v. Luvone*, 118 Wn.2d 826, 840, 827 P.2d 1374 (1992).

Vagueness challenges to statutes which do not involve First Amendment rights are to be evaluated under the particular facts of each case. *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S.Ct. 1853, 1857, 100 L.Ed.2d 372 (1988). A defendant whose conduct clearly fits within the proscriptions of a statute does not have standing to challenge the constitutionality of that statute for vagueness. *State v. Hegge*, 89 Wn.2d 584, 589, 574 P.2d 386 (1978).

Here, Ms. Martinez's conduct clearly fits within the proscriptions of the enhancement statute for attempting to elude a police officer. Ms. Martinez drove in a reckless manner by driving her vehicle at speeds of fifty miles per hour in a highly populated

residential community. Ms. Martinez lost traction in her vehicle due to the high rate of speed and also deactivated the headlights and taillights to her vehicle causing further danger to other vehicles or pedestrians on the road. Furthermore, Ms. Martinez had a passenger in her vehicle, Ms. Ceja, at the time of the elude and Ms. Ceja testified that the driving was crazy, fast and caused her to be scared that she would be injured in a possible collision. The statute here is not vague and thus should not be deemed void for vagueness. Furthermore, the evidence supports that Ms. Martinez's conduct fits the enhancement statute, thus the jury's verdict and decision as to the enhancement should remain undisturbed.

V. CONCLUSION

There was sufficient evidence beyond a reasonable doubt in this case that Ms. Martinez threatened physical injury or harm to her passenger, Ms. Ceja. The enhancement statute at issue in this case is not vague, thus it should not be found void for vagueness. Furthermore, if this court finds that any error occurred in the enhancement instruction it should be deemed harmless error because the jury verdict would have been the same beyond a reasonable doubt. However, the State does not believe an error

occurred, thus the jury verdicts should remain undisturbed. The State respectfully requests that the appellant's requests for reversal be denied.

DATED this 20th day of July, 2011.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
MELISSA W. SULLIVAN, WSBA#38067
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: DAVID DONNAN, addressed as, 1511 3rd Avenue, Suite 701, Seattle, Washington 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 21st day of July, 2011.


KAREN R. WALLACE, DECLARANT