

66756-4

66756-4

NO. 66756-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY WALKER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES.....iii

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR..... 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE 4

E. ARGUMENT 8

 1. WHETHER THE THREAT WAS A 'TRUE THREAT' WAS AN ESSENTIAL ELEMENT THAT HAD TO BE PLED IN THE INFORMATION AND INCLUDED IN THE 'TO-CONVICT' INSTRUCTION 8

 a. A charging document or to-convict instruction violates due process if it omits an element of the crime charged 8

 b. That the threat was a true threat was an essential element that had to be included in the information and to-convict instruction 11

 c. Because the essential true threat element was not pled in the information reversal is required 14

 d. Because the essential true threat element was not included in the to convict instruction, reversal is required 15

 2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED MR. WALKER A FAIR TRIAL 21

 a. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions 23

b. The prosecutor committed flagrant misconduct and denied Mr. Walker's constitutional rights by arguing Mr. Walker tailored his testimony and was the only witness motivated to lie 24

c. The misconduct prejudiced Mr. Walker; therefore, reversal is required..... 28

3. THE SENTENCE MUST BE REVERSED AND REMANDED BECAUSE THE TRIAL COURT IMPROPERLY CALCULATED THE OFFENDER SCORE..... 30

F. CONCLUSION..... 35

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>City of Tacoma v. Luvane</u> , 118 Wn.2d 826, 827 P.2d 1374 (1992)	12
<u>In re Pers. Restraint of Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002)	31, 32
<u>In re Pers. Restraint of Lavery</u> , 154 Wn.2d 259, 111 P.3d 837 (2005)	32
<u>McClaine v. Territory</u> , 1 Wash. 345, 25 P. 453 (1890)	16
<u>Pasco v. Mace</u> , 98 Wn.2d 87, 653 P.2d 618 (1982).....	16
<u>Sofie v. Fibreboard</u> , 112 Wn.2d 636, 771 P.2d 711 (1989)	16
<u>State v Williams</u> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	13
<u>State v. Ammons</u> , 105 Wn.2d 175, 713 P.2d 719 (1986)	31
<u>State v. Aumick</u> , 126 Wn.2d 422, 894 P.2d 1325 (1995)	9
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002)	18
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978).....	23
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003)	10
<u>State v. Drum</u> , 168 Wn.2d 23, 225 P.3d 237 (2010)	25
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996)	29
<u>State v. Emmanuel</u> , 42 Wn.2d 799, 259 P.2d 845 (1953)	17, 19
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	passim
<u>State v. Goodman</u> , 150 Wn.2d 774, 83 P.3d 410 (2004)	10, 11
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983)	24
<u>State v. J.M.</u> , 144 Wn.2d 472, 28 P.3d 720 (2001)	12

<u>State v. Johnston</u> , 156 Wn.2d 355, 127 P.3d 707 (2006).....	13
<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1215 (2004)	12, 13
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	10, 11
<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996).....	20
<u>State v. Martin</u> , 171 Wn.2d 521, 252 P.3d 872 (2011)	25, 26, 27
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005)	9
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2011)	23
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998)	32
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	9, 20
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008)	16, 17, 18
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	23
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994)	24
<u>State v. Schaler</u> , 169 Wn.2d 274, 236 P.3d 858 (2010)	11, 13, 14
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	9, 17
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995)	10, 15

Washington Court of Appeals Decisions

<u>City of Seattle v. Abercrombie</u> , 85 Wn. App. 393, 945 P.2d 1132 (1997)	11
<u>City of Seattle v. Ivan</u> , 71 Wn. App. 145, 856 P.2d 1116 (1993) ...	12
<u>State v. Allen</u> , 161 Wn. App. 727, 255 P.3d 784 (2011).....	14
<u>State v. Barrow</u> , 60 Wn. App. 869, 809 P.2d 209 (1991)	28
<u>State v. Boehning</u> , 127 Wn. App. 511, 111 P.3d 899 (2005).....	24

<u>State v. Cabrera</u> , 73 Wn. App. 165, 868 P.2d 179 (1994)	31, 33, 35
<u>State v. Castaneda-Perez</u> , 61 Wn. App. 354, 810 P.2d 74 (1991)	27
<u>State v. Cochrane</u> , 160 Wn. App. 18, 253 P.3d 95 (2011)	15
<u>State v. Courneya</u> , 132 Wn. App. 347, 131 P.3d 343, (2006)	10, 11, 14, 15
<u>State v. Echevarria</u> , 71 Wn. App. 595, 860 P.2d 420 (1993).....	23
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996)	24, 27
<u>State v. Hunley</u> , 161 Wn. App. 919, 253 P.3d 448 (2011).....	33
<u>State v. Jackson</u> , 150 Wn. App. 877, 209 P.3d 553 (2009).....	28
<u>State v. Jones</u> , 144 Wn. App. 284, 183 P.3d 307 (2008)	29
<u>State v. Knowles</u> , 91 Wn. App. 367, 957 P.2d 797 (1998)	12
<u>State v. Moreno</u> , 132 Wn. App. 663, 132 P.3d 1137 (2006).....	29
<u>State v. Pope</u> , 100 Wn. App. 624, 999 P.2d 51 (2000)	17
<u>State v. Rivers</u> , 130 Wn. App. 689, 128 P.3d 608 (2005).....	31
<u>State v. Stephenson</u> , 89 Wn. App. 794, 950 P.2d 38 (1998).....	11
<u>State v. Wright</u> , 76 Wn. App. 811, 888 P.2d 1214 (1995)	27

United States Supreme Court Decisions

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)	10
<u>Berger v. United States</u> , 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)	23, 24
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)	18

<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)	29
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	9
<u>Neder v. United States</u> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)	16, 17, 18
<u>Portuondo v. Agard</u> , 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000)	25, 26
<u>Virginia v. Black</u> , 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003)	11
<u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)	18
<u>Watts v. United States</u> , 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)	13
Other Federal Decisions	
<u>United States v. Khorramj</u> , 895 F.2d 1186 (7th Cir. 1990)	12
Constitutional Provisions	
Const. art. I, § 3.....	23
Const. art. I, § 21.....	16
Const. art. I, § 22.....	passim
U.S. Const. amend. V	23
U.S. Const. amend. VI	10, 24, 25
U.S. Const. amend. XIV	11
Statutes	
Haw. Rev. Stat. § 707-715 (1988).....	34
RCW 9A.46.020	13, 34

Rules

RAP 2.5..... 25

A. SUMMARY OF ARGUMENT

Anthony Walker's neighbor called 911 and reported Mr. Walker was standing outside his front door threatening him. Though Mr. Walker admitted he knocked on his neighbor's front door to discuss how to handle complaints about Mr. Walker's girlfriend's dog, he denied issuing any threats to his neighbor. Mr. Walker was charged with, but acquitted of, felony harassment against Mr. Cooper.

Nonetheless, Mr. Walker was convicted of one count of felony harassment for threats communicated to a police officer while he was being transported to jail for investigation of the initial complaint. Mr. Walker's conviction must be reversed because the essential "true threat" element was not included in either the charging document or the "to convict" instruction to the jury. In addition, Mr. Walker's conviction should be reversed because the prosecutor infringed on Mr. Walker's constitutional rights and committed misconduct by arguing in summation that Mr. Walker lied and tailored his testimony. Finally, Mr. Walker's sentence should be vacated and remanded for an evidentiary hearing because the State failed to prove the comparability of prior out-of-state convictions.

B. ASSIGNMENTS OF ERROR

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

2. The “to-convict” instruction lacked the essential element of true threat.

3. The prosecutor committed misconduct in closing argument by arguing Mr. Walker tailored his testimony and lied.

4. Mr. Walker’s art. I, § 22 rights under the Washington Constitution were violated when the prosecutor argued during closing argument that Mr. Walker tailored his testimony and was the only witness who was motivated to lie.

5. The prosecutor committed misconduct by arguing in summation that Mr. Walker tailored his testimony and was the only witness who was motivated to lie.

5. The trial court erred in including four out-of-state convictions in Mr. Walker’s offender score without any proof or analysis of their comparability.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires that all essential elements of a crime be included in the charging document and to-convict jury instruction. To prove the crime of felony harassment, the State is

required to prove, among other things, the essential element that the threat was a “true threat”—that is, the alleged threat is a statement that a reasonable person would foresee would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another. Where the information and to-convict instruction lacked the element of true threat, was Mr. Walker denied due process?

2. Article I, section 22 of the Washington Constitution guarantees, among other rights, the right to appear and defend the action, the right to testify, and the right to confront witnesses. Because prosecutors are quasi-judicial officers, they have a duty to ensure a criminal defendant receives a fair trial. Arguing to the jury at closing that the defendant tailored his testimony violates art. I, § 22. It is also misconduct for a prosecutor to imply the jury must determine which witnesses are lying or find the State’s witnesses are lying to acquit. Here, the prosecutor argued on several occasions during closing that Mr. Walker tailored his testimony and was the only witness with motivation to lie. Is Mr. Walker entitled to reversal of his convictions and remand for a new trial?

3. A sentence based on a miscalculated offender score is not authorized by law. A court may not include a prior out-of-state

conviction in an offender score unless its classification is proved by the State by a preponderance of the evidence. If a prior conviction is improperly included in an offender score, the proper remedy is to vacate the sentence and remand the matter to the trial court for an evidentiary hearing. Where the State failed to introduce any evidence or argument relating to the classification of Mr. Walker's prior out-of-state convictions and the trial court conducted no analysis, must Mr. Walker's sentence be vacated and the matter remanded to the trial court for an evidentiary hearing?

D. STATEMENT OF THE CASE

Anthony Walker lives in Seattle, Washington with his long-term girlfriend, his stepdaughter, his son and his girlfriend's father. 1/5/11RP 159-60. In the early morning of July 4, 2010, Mr. Walker's neighbor, Jason Cooper, called 911 to report that Mr. Walker was outside his front door (which was closed) yelling threats at him. 1/5/11RP 42-46, 49. Mr. Cooper believed Mr. Walker's conduct resulted from Mr. Cooper's recent report to animal control related to Mr. Walker's girlfriend's noisy dog. 1/5/11RP 42. According to Mr. Cooper, Mr. Walker's threatening language included, "I'm going to fuck you up. I'm going to put my hands on you. I'm going to knock you out." 1/5/11RP 45-46. Mr. Walker

returned to his own home without further incident and of his own volition. 1/5/11RP 45-46.

At least four officers responded to the scene. 1/5/11RP 73, 140. When the police arrived, Mr. Walker was in his own home. 1/5/11RP 52. After speaking with Mr. Cooper, the police assembled in front of Mr. Walker's house. 1/5/11RP 74. Mr. Walker addressed them through an open window. 1/5/11RP 74, 86. The officers described his behavior as erratic and loud. 1/5/11RP 86, 96-97. A couple officers recorded the interactions outside Mr. Walker's house. 1/5/11RP 94-95, 141-42.

In response to the police officer's request, Mr. Walker came outside. 1/5/11RP 75. Mr. Walker was handcuffed and placed in the back of Officer Robert Cambronero's patrol car because he did not cooperate with the police investigation into Mr. Cooper's allegations. 1/5/11RP 76-77, 84. The police decided to transport Mr. Walker to the precinct for further investigation. 1/5/11RP 97. In their separate patrol cars, Officer Jacob Leenstra followed Officer Cambronero, who was transporting Mr. Walker. 1/5/11RP 98.

The transport was interrupted when Officer Cambranero stopped to have a medical check conducted on Mr. Walker. 1/5/11RP 148. Officer Leenstra testified that Mr. Walker told the

officers that he had more “gats”¹ than them and motioned with his head that Officer Leenstra and his colleague were next. 1/5/11RP 108-09. Officer Leenstra believed that Mr. Walker was threatening to assault him and his colleague with a firearm. 1/5/11RP 108-10. Officer Cambronero did not recall Mr. Walker making any inflammatory statements, threats, or discussing possession of guns. 1/5/11RP 153. The medical check cleared Mr. Walker and the police continued to transport him to the precinct. 1/5/11RP 112, 149.

Officer Leenstra rode with Officer Cambronero to transport Mr. Walker to the King County jail. 1/5/11RP 101, 131-32. Through equipment in his patrol car, Officer Cambronero recorded Mr. Walker in the backseat. While in the sally port, a secure garage leading to the holding cell area, Officer Leenstra testified that Mr. Walker directed threatening language at him including that he had been shot three times, was still alive, “Watch I’m going to do to you[,]” and “I’m snatching you.” 1/5/11RP 115. According to Officer Leenstra,

[Mr. Walker] essentially told me he was going to ambush me. I’m not going to see him when he comes. I’m not going to know what happened to me.

¹ Officer Leenstra testified that “gats” is slang for guns. 1/5/11RP 108-09.

He's going to ambush me. He's going to kill me in a manner that several law enforcement officers have been killed in recent years.

1/5/11RP 116-17. Officer Leenstra testified that though he did not take Mr. Walker's initial statements seriously, based on the comments in the sally port he was afraid Mr. Walker would attempt to kill him and potentially his family when he was released from jail.

1/5/11RP 117, 131, 137. Officer Cambronero testified that Mr. Walker threatened to kill Officer Leenstra and called him racial names. 1/5/11RP 150-51.

Mr. Walker testified in his own defense. He admitted he had problems with alcohol in the past and had quit drinking in May 2010. 1/5/11RP 165-66. However, he had some drinks at a late night party on July 3 and did not come home until the early morning. 1/5/11RP 166; 1/6/11RP 6. He went over to Mr. Cooper's house to ask him to talk directly to him, and not his girlfriend, about the dog. 1/6/11RP 9, 31. He admitted that he knocked on his neighbor's door and was angry, but denied threatening to kill him. 1/6/11RP 10, 30. He said he went home when Mr. Cooper did not answer the door and began to get ready for bed. 1/6/11RP 10-11. He recalled going outside and talking to the police. 1/6/11RP 11. But he did not recall saying anything to the police like what the

video indicates. 1/6/11RP 11-12. He only remembers “bits and pieces” of his interactions with the police, even after he was shown the video. 1/6/11RP 35. Mr. Walker testified that he was embarrassed and disgusted with himself. 1/6/11RP 11-12.

The State charged Mr. Walker with two counts felony harassment based on alleged threats to kill Mr. Cooper, his neighbor, and Officer Leenstra. CP 1-2. The jury acquitted Mr. Walker of count one, against Mr. Cooper. CP 46. He was found guilty of felony harassment as to Officer Leenstra and sentenced to 29 months confinement. CP 47, 62, 65.

E. ARGUMENT

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

The requirement that the threat made be a “true threat” was not included in the information or the “to-convict” instruction. CP 1-2, 57. Though a subsequent jury instruction defined “threat” for the jury, the error requires reversal of the conviction.

- a. A charging document or to-convict instruction violates due process if it omits an element of the crime charged.

The “to convict” instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury

measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); see In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. Smith, 131 Wn.2d at 262-63. "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." Id. at 263.

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

challenged jury instruction de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Due process also requires that the essential elements of a crime be included in the charging document, regardless of whether they are statutory or non-statutory. U.S. Const. amend. VI; Const. art. I, § 22; State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). In Goodman, the Washington Supreme Court relied on Apprendi² to hold that all facts essential to punishment must be pled in the information and proved beyond a reasonable doubt. Goodman, 150 Wn.2d at 785-86. The purpose of the rule is to give the accused notice of the nature of the allegations so that a defense may be properly prepared. Id. at 784; State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). An information omitting essential elements charges no crime at all. State v. Courneya, 132 Wn. App. 347, 351, 131 P.3d 343, review denied, 149 P.3d 378 (2006).

Charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those

² Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

challenged before trial or a guilty verdict. Kjorsvik, 117 Wn.2d at 102. The reviewing court determines whether the necessary facts appear in the information in any form. Goodman, 150 Wn.2d at 787-88; Kjorsvik, 117 Wn.2d at 105-06. “If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and reviewing courts reverse without reaching the question of prejudice.” Courneya, 132 Wn. App. at 351.

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

“The First Amendment, applicable to the States through the Fourteenth Amendment, provides that ‘Congress shall make no law . . . abridging the freedom of speech.’” State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting Virginia v. Black, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003)). “A criminal statute that ‘sweeps constitutionally protected free speech activities within its prohibitions’ may be overbroad and thus violate the First Amendment.” State v. Stephenson, 89 Wn. App. 794, 800, 950 P.2d 38 (1998) (quoting City of Seattle v. Abercrombie, 85 Wn. App. 393, 397, 945 P.2d 1132, review denied, 133 Wn.2d 1005, 943 P.2d 663 (1997)). “Overbreadth analysis is intended to ensure

that legislative enactments do not prohibit constitutionally protected conduct, such as free speech.” City of Seattle v. Ivan, 71 Wn. App. 145, 149, 856 P.2d 1116 (1993) (citing City of Tacoma v. Luvane, 118 Wn.2d 826, 827 P.2d 1374 (1992)).

Though speech is generally protected by the First Amendment, a “true threat” is not protected. A true threat is “a statement made ‘in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of [another individual].” State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998) (quoting United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990)). The communication “must be a serious threat, and not just idle talk, joking or puffery.” State v. Kilburn, 151 Wn.2d 36, 46, 84 P.3d 1215 (2004) (citing State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001)). Whether a true threat occurs “is determined under an objective standard that focuses on the speaker.” Id. at 44.

In Kilburn, our Supreme Court considered a First Amendment challenge to RCW 9A.46.020, the felony harassment statute alleged here. The Court noted that because the statute “criminalizes pure speech,” it “must be interpreted with the

commands of the First Amendment clearly in mind.” 151 Wn.2d at 41 (quoting State v Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001) and Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). The Court held that in order to “avoid unconstitutional infringement of protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only ‘true threats.’” Kilburn, 151 Wn.2d at 43; accord State v. Johnston, 156 Wn.2d 355, 363-65, 127 P.3d 707 (2006).

The Washington Supreme Court recently reiterated that “true threat” is an element of felony harassment. In Schaler, the Court reversed the defendant’s felony harassment conviction because the trial court did not instruct the jury that it could only convict if it found the defendant issued a true threat. 169 Wn.2d at 278, 292-93. The full definition of “true threat” was neither in the to-convict instruction nor in a standalone instruction. Id. at 284-86. The Court noted that while the jury was instructed on the necessary mens rea as to the speaker’s *conduct*, it was not instructed on the necessary mens rea as to the *result*. Id. at 285-86. “True threat” includes the latter—that a reasonable speaker would foresee that the statement would be interpreted as a serious expression of intention to inflict harm. Id. at 286-87.

The Court went on to explain that “the omission of the constitutionally required mens rea from the jury instructions . . . is analogous to [a situation] in which the jury instructions omit an element of the crime.” Schaler, 169 Wn.2d at 288. And although it declined to reach whether true threat language must appear in the to-convict instruction, it noted, “[i]t suffices to say that, *to convict*, the State must prove that a reasonable person in the defendant’s position would foresee that a listener would interpret the threat as serious.” Id. at 289 n.6 (emphasis added).

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

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

Where the information lacks any reference to an element, prejudice is presumed and “reviewing courts reverse without reaching the issue of prejudice.” Courneya, 132 Wn. App. at 351.

Vangerpen, 125 Wn.2d at 791-93 (remedy for insufficient information is reversal and dismissal of charge without prejudice); State v. Cochrane, 160 Wn. App. 18, 25-26, 253 P.3d 95 (2011) (following Vangerpen and reversing conviction where information omitted essential element).

Here the information bore no language about a true threat.

See CP 1-2. As to each count, the information charged merely:

That the defendant, ANTHONY BRIAN WALKER in King County, Washington, on or about July 4, 2010, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to [Jason Cooper or Officer Leenstra], by threatening to kill [Jason Cooper or Officer Leenstra], and the words or conduct did place said person in reasonable fear that the threat would be carried out;

CP 1-2. Because the necessary element is “neither found nor fairly implied in the charging document, prejudice is presumed” and this Court should “reverse without reaching the question of prejudice.” Courneya, 132 Wn. App. at 351. Consequently, Mr. Walker’s felony harassment conviction must be reversed and the charge dismissed without prejudice.

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

In the alternative, reversal is required because the essential true threat element was not included in the to convict instruction.

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

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

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

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

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

Although our Supreme Court has acknowledged Neder as the federal standard, its decisions in Brown and Recuenco indicate that it will not follow that standard under the Washington Constitution. In 2002, the Brown court recognized Neder and

applied it in that case, but it did not perform an independent state constitutional analysis and it continued to cite prior Washington cases for the proposition that “[a]n instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

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

³ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

fundamental reservation of power in our constitutional structure.”

Id. at 435. Accordingly, automatic reversal was required.

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

However, even if the court declines to follow the automatic reversal rule, Mr. Walker’s conviction must be overturned on the facts of this case. The to-convict instruction, provided the jury a yardstick by which it could measure the evidence in determining Mr. Manning’s guilt or innocence. Emmanuel, 42 Wn.2d at 817; CP 57. The State acknowledged the same in closing argument by stating, “This is what we in the prosecutor world call a two [sic] convict instruction. This is exactly the road map that you need to follow back in the jury deliberation room.” 1/6/11RP 55. But the to convict instruction lacked any true threat language. See CP 57. It is not sufficient that a subsequent definitional instruction refers to the true threat requirement because here the to-convict instruction “purport[s] to include all the essential elements of the crime.” Emmanuel, 42 Wn.2d at 817. Where the court “[i]n effect . . . furnished a yardstick by which the jury were to measure the evidence in determining appellant’s guilt or innocence of the crime

charged,” it is “not a sufficient answer [to the assignment of error that an element is missing from the to-convict] to say that the jury could have supplied the omission of this element . . . by reference to the other instructions.” Id. at 819. A jury “requires a manifestly clear instruction.” State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), abrogated on other grounds by O’Hara, 167 Wn.2d at 101. Like in Emmanuel, the to-convict instruction purported to contain all essential elements. The jury thus had a right to “regard [it] as being a complete statement of the elements of the crime charged.” Id. Even more egregiously, the prosecutor specifically told the jury it could rely on the to convict instruction to determine Mr. Walker’s guilt.

Moreover, the evidence that Mr. Walker’s statements to Officer Leenstra constituted a true threat was at least equivocal. In fact, the prosecutor referred only generically to the position of a reasonable speaker in closing argument. 1/6/11RP 57-58 (prosecutor closing argument discussing true threat element generically without tie to any evidence then continuing with discussion of listener’s reasonable fear), 61. The prosecutor did not tie any facts specific to the crime alleged to show that a reasonable speaker in Mr. Walker’s position would have known his

statements would be interpreted as a serious expression of intent to carry out the threat. The defense, on the other hand, pointed to specific evidence demonstrating Mr. Walker's statements did not constitute a true threat. At the time that Mr. Walker threatened Officer Leenstra, Mr. Walker was in the back of a fully-marked patrol car, was handcuffed and he was visibly upset in the heat of the moment. 1/6/11RP 73. Defense counsel further argued, "People who have been arrested spout a lot of vulgarity. They say a lot of things. It's just talk. They don't mean it." Id. The jury plainly could have found that Mr. Walker's comments constituted idle talk or puffery and not a true threat.

In light of this disparity of evidence, Mr. Walker was prejudiced by the failure to include the essential true threat element in the to convict instruction. Therefore, reversal is required even if not automatically warranted.

2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED MR. WALKER A FAIR TRIAL.

During closing argument, the prosecutor repeatedly attacked Mr. Walker's testimony as lies, and argued that he had tailored his testimony during trial. Relying on "commonsense" without any discussion of specific evidence or testimony, the prosecutor

argued, "Who is the only witness that you heard from in this case that has any motivation to lie. He's sitting right here next to defense counsel: The defendant." 1/6/11RP 52. Then, after discussing the other witnesses' lack of motives to lie, again lacking any specific tie to testimony or evidence, the prosecutor argued, "The only person with a motive to tailor their testimony is the defendant." 1/6/11RP 65. On rebuttal, the prosecutor discussed an instance of perceived inconsistency in Mr. Walker's testimony and provided her own explanation (not in evidence) of his thought process. Speaking as if in the mind of Mr. Walker, the prosecutor told the jury, "Oh, crap, she's not going to rejoice on me. This is a big inconsistency. I've got to figure out how to tailor my testimony. So, yeah, [in tailored testimony the defendant says] I go to work drunk." 1/6/11RP 88. Continuing, the prosecutor argued,

The whole point of this, yes, minor inconsistencies that don't necessarily have to do with the underlying facts of this case is that, ladies and gentlemen, the facts show you that the defendant is a liar. What you heard out of his mouth on direct examination versus what I got out of him on cross-examination, yet changing his story tailoring his testimony. Inconsistencies and motivations.

1/6/11RP 88.

a. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions.

As a representative of the State, a prosecuting attorney has the obligation to ensure due process in a criminal case.

Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and “to act impartially in the interest only of justice.” State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); accord State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor’s obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. V, XIV; Const. art. I, §§ 3, 22.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to

produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

A defendant who fails to object to an improper remark may assert prosecutorial misconduct where the prosecutor's argument was so "‘flagrant and ill intentioned’ that it causes enduring and resulting prejudice that a curative instruction could not have remedied." State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)); accord State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996).

- b. The prosecutor committed flagrant misconduct and denied Mr. Walker's constitutional rights by arguing Mr. Walker tailored his testimony and was the only witness motivated to lie.

Article I, section 22 of the Washington Constitution grants criminal defendants the right to present a defense and the right to confront and cross-examine adverse witnesses. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983).⁴ It provides greater protection than the Sixth Amendment's provisions concerning these

⁴ Article I, section 22 states in relevant part:

"In criminal prosecutions the accused shall have the right to appear and defend, . . . to testify in his own behalf, to meet the witnesses against him face to face . . ."

rights. State v. Martin, 171 Wn.2d 521, 537, 252 P.3d 872 (2011).⁵

A claim of the denial of a constitutional right is reviewed de novo.

State v. Drum, 168 Wn.2d 23, 31, 225 P.3d 237 (2010).

In Martin, our Supreme Court considered the propriety of a prosecutor's allegation that the defendant had tailored his testimony while exercising his right to testify. The Court distinguished closing argument from cross-examination and held that suggesting that the defendant was tailoring his testimony through questioning on cross-examination did not violate the Washington Constitution. Martin, 171 Wn.2d at 535-36. In doing so, the Supreme Court adopted United States Supreme Court Justice Ginsberg's dissent in Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) in which she concluded a prosecutor's argument at summation that the defendant tailored his testimony violated the Sixth Amendment.⁶ Martin, 171 Wn.2d at 535. Justice Ginsberg noted that alleging tailoring during closing argument was improper

⁵ Mr. Walker did not object, but may still raise the issue on appeal. Appellate courts will consider manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a). The error in Martin involved a violation of the rights to appear and defend, the right to confront witnesses, and the right to testify, all fundamental constitutional rights under the Washington Constitution. Martin, 171 Wn.2d 521.

⁶ In Portuondo, the Supreme Court held that a defendant's Sixth Amendment rights were not violated by the prosecutor's closing argument which called attention to the fact the defendant had the opportunity to hear all of the witnesses testify and tailor his testimony accordingly. 529 U.S. at 64.

because the jury was unable to “measure a defendant’s credibility by evaluating the defendant’s response to the accusation, for the broadside is fired after the defense has submitted its case.”

Portuondo, 529 U.S. at 78 (Ginsberg, J., dissenting).

While the majority in Martin held the prosecutor did not commit misconduct by specifically asking Mr. Martin on cross-examination whether he had tailored his testimony to conform to other witnesses, the Court left for another day the issue presented here: whether more generic accusations of tailoring in closing argument constitute prosecutorial misconduct in violation of art. I, § 22. Martin, 171 Wn.2d at 538 & n.8.

Here, the prosecutor did not cross-examine Mr. Walker about the possibility he was tailoring his testimony. Unlike in Martin, where the prosecutor explicitly cross-examined the defendant about his access to discovery and witness testimony in advance of his own testimony, here the prosecutor’s cross-examination included no allegations or implications particular to Mr. Walker’s ability to tailor. See 171 Wn.2d at 524-25. Instead, the prosecutor waited until closing argument to allege generically and repeatedly that Mr. Walker was a liar and tailored his testimony, thus violating Mr. Walker’s art. I, § 22 rights.

Beyond the constitutional issue examined in Martin, prosecutors commit misconduct by focusing on which witnesses are telling the truth and which are lying. “The testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.” State v. Castaneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991). Thus, for example, it is misconduct “for a prosecutor to argue that, in order to believe a defendant, a jury must find that the State’s witnesses are lying.” State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995); accord Fleming, 83 Wn. App. at 213-14.; Castaneda-Perez, 61 Wn. App. at 362-63 (it is “misleading and unfair [for prosecutor] to make it appear that an acquittal requires the conclusion” that the State’s witnesses are lying”). As the Wright court noted, these arguments misstate the jury’s role and the burden of proof; the jury need not determine who is telling the truth to determine whether the State has met its burden of proof. Wright, 76 Wn. App. at 825-26. Similarly, in State v. Barrow, this Court held that a prosecutor commits misconduct by arguing the defense theory is that the State’s witness is lying, as such arguments “are irrelevant and interfere with the jury’s duty to make credibility determinations.” State v. Barrow, 60 Wn. App.

869, 876, 809 P.2d 209, review denied, 118 Wn.2d 1007, 822 P.2d 288 (1991).

Here, the prosecutor focused in closing argument on Mr. Walker's motive to lie and tailor testimony. For example, the prosecutor argued, "The only person with a motive to tailor their testimony is the defendant." 1/6/11RP 65. The prosecutor specifically pitted Mr. Walker's testimony against the State's witnesses, implying that the jury must decide which was lying and which were telling the truth. E.g., 1/6/11 52 (defendant "is the *only* witness" with motivation to lie (emphasis added)), 64-65 (defendant but not his neighbor had motive to tailor testimony), 88 (neighbor had nothing to gain from lying but defendant tailored testimony).

c. The misconduct prejudiced Mr. Walker; therefore, reversal is required.

Where a prosecutor commits misconduct not affecting a constitutional right, an appellate court will reverse and remand for a new trial if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Jackson, 150 Wn. App. 877, 883, 209 P.3d 553 (2009). Even if a defendant does not object to improper remarks at trial, reversal is required if the remarks are so "flagrant and ill-intentioned" that they cause prejudice that a

curative instruction could not have remedied. State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008).

Where a prosecutor improperly encourages the jury to draw an adverse inference from the exercise of a constitutional right, it is subject to the constitutional standard of prejudice. A constitutional error is presumed prejudicial and the State bears the burden of proving beyond a reasonable doubt that the jury would have reached the same result absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). In other words, the court must reverse unless convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt on the greater charge rather than the lesser. State v. Moreno, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006).

As argued above, the prosecutor's comments infringed on Mr. Walker's constitutional rights as well as nonconstitutional standards. Under either standard, however, the improper comments prejudiced Mr. Walker. The jury was forced to decide between two different scenarios. Under the State's theory, Mr. Walker was fully cognizant of his conduct, willfully aggressive

toward the police, placed Officer Leenstra in reasonable fear of harm and should have reasonably known his statements would be perceived as expressions of a serious intent to inflict harm. Under Mr. Walker's theory, he was in a vulnerable and compromised position and was merely spewing puffery. The claim of tailoring undoubtedly caused the jurors to dismiss Mr. Walker's proffer and enhanced the standing of the State's theory. Absent the error, the jury could have reached a very different conclusion. As a result, the error was not harmless and Mr. Walker is entitled to reversal of his conviction.

3. THE SENTENCE MUST BE REVERSED AND REMANDED BECAUSE THERE WAS NO PROOF OR ANALYSIS OF THE COMPARABILITY OF OUT-OF-STATE CONVICTIONS.

"[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record." State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). In establishing a defendant's criminal history for sentencing purposes, the State must prove the existence of a prior conviction by a preponderance of the evidence. E.g., State v. Ammons, 105

Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986).

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). When the record does not support the criminal history and offender score calculation, the error may be raised on appeal even if no objection was raised below. Ford, 137 Wn.2d at 484-85; In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

To increase an offender score through an out-of-state conviction, the State must prove the crime is a felony in Washington. State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). "To properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes." Ford, 137 Wn.2d at 479. "If the elements are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense." Id.

Classification of an out-of-state conviction is a mandatory step. Ford, 137 Wn.2d at 483. “[T]he sentencing court must engage in some comparison of the elements and any conclusion must be supported by evidence in the record.” Id. at 483 n.4.⁷ Even where the State makes “[c]onclusory argument” regarding classification, it is “an insufficient basis upon which [the trial court can] determine classification.” Id.

Appellate review is proper even if a defendant fails to object specifically to the classification. Id. at 483-85; cf. Goodwin, 146 Wn.2d at 873-74 (defendant may not stipulate to a sentence in excess of that authorized by statute). Here, Mr. Walker neither objected to nor affirmed the State’s inclusion of the four out-of-state convictions. Where a non-Washington conviction that was not adequately proved forms the basis of an offender score, the proper remedy is to reverse the sentence and remand for an evidentiary

⁷ To determine whether a foreign conviction is comparable to a Washington offense, the court engages in a two-step analysis. First, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479 (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). If the elements of the foreign conviction are comparable to the elements of a Washington offense on their face, the foreign offense counts toward the offender score as if it were the comparable Washington offense. In re Pers. Restraint of Lavery, 154 Wn.2d 259, 255, 111 P.3d 837 (2005). If the elements of the prior offense are not comparable, or are broader than the pertinent crime in Washington, then the court may look to the facts admitted by the defendant or proved at trial to determine if the prior offense is comparable. Id. at 256-57.

hearing to allow the State to prove the classification. Ford, 137 Wn.2d at 485-86; Cabrera, 73 Wn. App. at 170.⁸

At sentencing here, the State included four out-of-state convictions as part of Mr. Walker's offender score. CP 68. The out-of-state crimes were committed in 1981 and 1982. The State provided no evidence to show these convictions were comparable to any Washington felony. The State did not even provide the specific statutes under which Mr. Walker was convicted, a breakdown of the elements of each crime, or the judgment and sentences. Similarly, the State presented no evidence of the facts of Mr. Walker's out-of-state convictions. As discussed above, the State bears the burden of showing that the crimes for which Mr. Walker was convicted in foreign jurisdictions are legally or factually comparable to Washington felonies. The State accordingly did not prove the offenses were comparable to Washington felonies.

The trial court furthermore, conducted no comparability analysis. The trial court therefore erred in including the offenses in

⁸ In State v. Hunley, 161 Wn. App. 919, 928-29, 253 P.3d 448 (2011), Division Two of this Court held the 2008 amendments to the Sentencing Reform Act, which "attempt to overrule Ford and its progeny by providing that a criminal history summary provides prima facie evidence of criminal history, and that failure to object to this summary constitutes acknowledgement[.]" are unconstitutional. The Supreme Court accepted review. 172 Wn.2d 1014, ___ P.3d ___ (Sep 26, 2011) (No. 86135-8; oral argument scheduled for March 13, 2012).

Mr. Walker's offender score. See CP 68 (Judgment & Sentence, Appendix B: Criminal History).

If a comparability analysis had been undertaken, it would have demonstrated the out-of-state offenses were not comparable to Washington felonies. For example, Hawaii's terroristic threatening statute in the 1980s criminalized the following conduct:

A person commits the offense of terroristic threatening if he threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:

(1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person; or

(2) With intent to cause, or in reckless disregard of the risk of causing evacuation of a building, place of assembly, or facility of public transportation.

Haw. Rev. Stat. § 707-715 (1988). In Washington, this crime would be most comparable to harassment, which only constitutes a felony (i) if the person has a prior conviction for any crime of harassment of the same victim or subject of a no-contact or no-harassment order or (ii) if the threat includes a threat to kill. RCW 9A.46.020. The legal elements of the Hawaii crime of terroristic threatening, accordingly, are not comparable to a Washington felony.

Moreover, the State presented no facts related to Mr. Walker's prior conviction. Thus the crimes cannot be found factually comparable.

As discussed, where the State does not present evidence demonstrating comparability by a preponderance of the evidence, the out-of-state convictions cannot be included in Mr. Walker's offender score. Consequently, Mr. Walker's sentence must be reversed and the matter remanded for an evidentiary hearing.

Ford, 137 Wn.2d at 485-86; Cabrera, 73 Wn. App. at 170.

F. CONCLUSION

Mr. Walker's conviction must be reversed and dismissed without prejudice because the essential true threat element was not included in the charging document. In the alternative, the conviction must be reversed and remanded for a new trial either because the essential true threat element was not included in the "to convict" instruction or because the prosecutor committed misconduct in closing argument and infringed upon Mr. Walker's constitutional rights. Absent reversal of the conviction, the sentence must be reversed and remanded for an evidentiary

hearing because the State failed to prove the comparability of four out-of-state convictions.

DATED this 7th day of November, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Zink', written over a horizontal line.

Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66756-4-I
v.)	
)	
ANTHONY WALKER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF NOVEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<p>[X] ANTHONY WALKER 930169 LARCH CORRECTIONS CENTER 15314 DOLE VALLEY RD YACOLT, WA 98675-9531</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF NOVEMBER, 2011.

X _____ 

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