

NO. 41913-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAMES WESLEY TWIGGS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 10-1-01499-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to meet his burden under *Strickland v. Washington* of showing both deficient performance and resulting prejudice necessary to succeed on a claim of ineffective assistance of counsel?
2. Has defendant failed to show that the “to convict” instructions for the threat to bomb counts omitted an essential element of the crime?
3. Has defendant failed to preserve any claim of definitional error for review when there were no objections to the jury instructions at trial?

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecutor’s Office (“State”) charged James Wesley Twiggs (“defendant”), on April 6, 2010, with two counts of robbery in the first degree, and two counts of threat to bomb or injure property. CP 1-3; RCW 9A.56.200(1)(b); RCW 9.61.160.

The State filed a persistent offender notice on April 6, 2010. CP 4.

Defendant had previously been convicted of two most serious offenses in Washington: indecent liberties in 1981 and child molestation 2 in 2003. CP 63-77.

On June 30, 2010, defendant’s counsel moved for defendant to be examined at Western State hospital to determine defendant’s competency to stand trial. CP 5-8. Defendant was found mentally competent to stand

trial. CP 14-18, 9-13, 99-100. On October 18, 2010, defendant moved for a psychiatric evaluation to determine his sanity during the commission of the crime. CP 19. The psychiatrist opined that defendant was sane during the commission of the robberies. CP 28-32.

On March 1, 2011, the matter proceeded to trial before the Honorable Vicki Hogan. A CrR 3.5 hearing was held to determine the admissibility of the defendant's confession to Detective Barnes and Detective Jimenez. RP 13-62. The court found that the statements were admissible because the statements were knowingly, voluntarily, and intelligently made after the defendant was read his *Miranda* rights. RP 61-62.

The jury found the defendant guilty as charged on all counts. CP 55; 56; 57; 58; RP 431-435. On March 18, 2011¹, defendant was sentenced to life on the two counts of robbery in the first degree and the high end standard range of 43 months for the two counts of threat to bomb or injure property. CP 63-77; RP 444. A timely notice of appeal was filed on March 22, 2011. CP 78-93.

¹ On page 439, there appears to be a scrivener's error at the beginning of the hearing on the transcript. The correct date is reflected with the citations.

2. Facts

On March 24, 2010, Officer Ron Carter arrived at Heritage Bank responding to a bank robbery call. RP 71-72. The assistant manager, Ms. Kornbau, had Officer Carter contact Reinee Goeken, the teller that had been robbed. RP 74.

Ms. Goeken was working as a teller at Heritage Bank when she noticed a homeless looking man coming in, with his hood up. RP 89; 111. The man was later identified as being the defendant by the bank employees in a photo montage and in court. RP 97, 99, 120, 142, 144, 186-187. Defendant approached Ms. Goeken's teller window and handed her a note that said, "two men," "put money in the bag," and the word "bomb" in bold. RP 90; 126; 178. The defendant then grabbed the note back. RP 90. Ms. Goeken grabbed the money from the front part of her drawer and put it into a brown Jack-in-the-Box bag that had been handed to her. RP 90. Ms. Goeken handed defendant the money because she feared for her own safety, as well as the safety of others. RP 93. Defendant ran out the door and got into a tan, or silver van that looked to Ms. Goeken like a Sierra, Sienna, or Scion. RP 139.

On March 31, 2010, Tera Dray was working as a teller at Timberland Bank when a man robbed her window. 195-196. Defendant was later identified by the bank employees through a photo montage, as

well as in court. RP 191-192, 204, 231, 234, 255. Defendant was wearing a “Carhartt work type jacket, black hood, rather bulky for his smaller frame” and blue jeans. RP 220, 246-247. Defendant handed Ms. Dray a note with the word “bomb” and a brown paper bag. RP 197. Ms. Dray took all of the money out of her drawer and put it into the paper bag because she believed that defendant had a bomb. RP 198, 205, 245. Rene Brimhall, also a teller at Timberland Bank, noticed the robbery, pushed the alarm, stood behind Ms. Dray, and stared at the defendant. RP 240-241. Defendant took the money and walked out. RP 198.

After the robberies, the detectives took still photos from the video surveillance tapes from Heritage Bank and Timberland Bank and put them into Crime Stopper fliers and released them to the media to help identify the defendant. RP 373. The photographs were shown to some of the detectives, and Detective Sergeant Mike Portmann suggested that it looked like the defendant. RP 374.

On April 5, 2010, Detective Barnes and Detective Jimenez interviewed defendant in regard to the robberies. RP 285. Defendant initially admitted to the Heritage Bank robbery, but denied the robbery at Timberland Bank. RP 289, 342. Defendant admitted to the Timberland Bank robbery after he was shown a picture of himself from the Crime Stoppers flier. 290, 342.

Defendant did not testify or call any witnesses.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. 668 at 687. The threshold for the deficient performance prong is high. *Strickland* 466 U.S.

668 at 687; *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). “To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome a strong presumption that counsel’s performance was reasonable.” *Grier*, 171 Wn.2d 17 at 33. “When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Id.* at 33.

Second, a defendant must show that he or she was prejudiced by the deficient representation. *Strickland*, 466 U.S. 668 at 687. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. 668 at 695. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. 668 at 694. “A court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law and must exclude the possibility of arbitrariness, whimsy, caprice, nullification, and the like.” *Grier*, 171 Wn.2d 17 at 34; *see also Strickland*, 466 U.S. 668 at 694-95.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to

find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L.Ed.2d 1 (2003). Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for

counsel's unprofessional errors, the result would have been different.”
Strickland, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation.
Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Defendant has failed to demonstrate that his attorney's representation fell below an objective standard of reasonableness and the

defendant failed to show that “but for” the deficient representation, the outcome of the trial would have been different.

- a. Neither defendant or his attorney detrimentally relied on the errors in the persistent offender notice; defendant cannot show deficient performance or resulting prejudice.

In this case, defendant seeks to show ineffective assistance of his trial counsel for his failure to object to the State’s “affirmative misrepresentation” in the persistent offender notice. Brief of Appellant at p. 3. Defendant alleges that he was misled by the notice and that he thought he was being given notice that he could be subject to home detention. Brief of Appellant at p. 5.

The persistent offender notice stated the following:

You, the above named defendant, JAMES WESLEY TWIGGS, are hereby given NOTICE that the offense of ROBBERY IN THE FIRST DEGREE; ROBBERY IN THE FIRST DEGREE; THREAT TO BOMB OR INJURE PROPERTY; THREAT TO BOMB OR INJURE PROPERTY, with which you have been charged, is a **“Most Serious Offense”** as defined in RCW 9.94A.030(28). If you are convicted at trial or plead guilty to this charge or any other most serious offense, and you have been convicted on two previous occasions of other “most serious offenses,” you will be classified at sentencing as a **“Persistent Offender,”** as defined in RCW 9.94A.030(33) and your sentence will be life without the possibility of parole as provided in RCW 9.94A.570.

CP 4; *See* Appendix A.

The version of RCW 9.94A.030 in effect at the time the defendant committed his crimes was Laws of Washington 2009 Ch. 375 § 4. *See* Appendix B. The notice incorrectly cited “most serious offense” as being defined in subsection (28) of RCW 9.94A.030, when it should have been cited to subsection (32). In addition, the citation for “persistent offender” was incorrectly cited as being RCW 9.94A.030(33), which should have read RCW 9.94A.030(37).

Although, the subsections of “most serious offense” and “persistent offender” were cited incorrectly, the necessary information appears in the persistent offender notice. It is unlikely that the defendant was misled by the notice because of the incorrect citations. The notice clearly explained to the defendant what the consequences would be if he was convicted of a third most serious offense. The notice was titled “PERSISTENT OFFENDER NOTICE (THIRD CONVICTION).” The notice explained that robbery in the first degree is a most serious offense. The notice also explicitly stated that if defendant is convicted of a third most serious offense, then he will be sentenced to life without the possibility of parole. Therefore, the defendant received the information alert him to the possible application of the POAA.

The definitions within RCW 9.94A.030 were alphabetically ordered. It is unreasonable to contend that the defendant and his attorney relied upon the listed subsection regarding “home detention,” instead of

finding the listing for “most serious offense” in RCW 9.94A.030. The defendant’s argument requires this Court to accept a contention that someone reading the notice would disregard everything else contained in the notice and rely only upon the citations for subparagraphs of RCW 9.94A.030. Moreover, “home detention” is RCW 9.94A.030(30) and not subsection (28), which makes even less sense with why the defendant would think that he could have been subjected to home detention.

Defendant’s argument also fails because notice of the potential application of the POAA is not required before imposition of a life without parole sentence. In *State v. Crawford*, 159 Wn.2d 86, 93, 147 P.3d 1288 (2006), Crawford was charged and convicted of first degree robbery and second degree assault. *Id.* at 89. Crawford had an extensive criminal history including: a 1998 Washington conviction for second degree robbery, and a 1993 Kentucky conviction for first degree sex abuse. *Id.* at 90. Crawford was sentenced to life without the possibility of parole. *Id.* at 89. Crawford appealed and contended that due process requires the State to provide pretrial notice that Crawford faced a mandatory life sentence. *Id.* The Supreme Court of Washington held that Crawford was not denied due process because due process does not require pretrial notice of a possible life sentence under the POAA. *Id.* at 93.

Defendant has failed to show that he was prejudiced by the persistent offender notice. The defendant was sentenced to life without the possibility of parole because he had two prior convictions of most

serious offenses, and he was found guilty of a third most serious offense, robbery. It was the defendant's own actions and not the notice caused him to be sentenced to life. If the defendant's trial attorney had objected to the notice, the notice could have been corrected, but the outcome of the case would have stayed the same. The defendant had a fair trial and was given the opportunity to be heard at sentencing. In addition, nothing in the record suggested that the defendant's trial attorney or defendant was confused or misled by the notice. In fact, the defendant's trial attorney stated at the sentencing hearing that the defendant understood that the State was seeking to "sentence him under the three strikes." RP 440.

Therefore, the defendant has failed to prove that his attorney was deficient in failing to object to the notice or that he was prejudiced by the errors in the persistent offender notice.

- b. Defendant has failed to prove that the performance of his counsel was deficient by not cross examining every witness.

It is not a requirement for effective assistance of counsel to cross examine every witness. "A decision not to cross examine a witness is often tactical because counsel may be concerned about opening the door to damaging rebuttal or because cross examination may not provide evidence useful to defense." *State v. Brown*, 143 Wn.2d 431, 451, 21 P.3d 687 (2001). Defendant's trial attorney cross examined more than Detective Portmann and Officer Jimenez as alleged by defendant, such as Detective

Barnes, Ms. Goeken, and Detective Loeffelholz. RP 37-39, 101-103, 391. The defendant has failed to show that it was not a tactical decision to cross examine only some of the witnesses. Moreover, the defendant has failed to show how the decision to not cross examine every witness has prejudiced the defendant.

To focus on the alleged claim that defense counsel's performance was ineffective because defense counsel did not cross examine every witness is to lead the court away from the proper standard of review under *Strickland* and its progeny. The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). The Sixth Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L.Ed.2d 1 (2003).

The entirety of the record reveals that defendant received his Sixth Amendment right to counsel. Defense counsel represented the client during the CrR 3.5 hearing by cross examining the detectives. RP 13-43. Although the content of the opening statement is not contained in the record on review, defense counsel did present one to the jury. RP 69. He made objections, all of which were valid. RP 56, 75, 76, 78, 80, 81, 93, 105, 130, 180, 184, 188, 207, 231, 295. He cross-examined the State's

witnesses highlighting lack of personal knowledge and decay in memory. RP 101-103, 107, 154-155, 305-309, 315-316. He made a coherent closing argument. RP 418-421. It is clear that defendant had counsel that represented his interests and who tested the State's case. Looking at the entirety of the record, defendant cannot meet his burden on either prong of the *Strickland* test.

2. THE JURY INSTRUCTION FOR THE THREAT TO BOMB COUNTS INCLUDED ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME.

A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, *review granted*, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). A trial court has broad discretion in determining the number and wording of jury instructions. *State v. Dana*, 73 Wn.2d 533, 536, 439 P.2d 403 (1968). This type of challenge is reviewed under the abuse of discretion standard.

CrR 6.15 requires a party objecting to the giving or refusal of an

instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). This rule reflects a policy of encouraging the efficient use of judicial resources and the appellate courts will not sanction a party's failure to point out at trial an error that might have been able to be corrected to avoid an appeal. *State v. Scott*, 110 Wn.2d 682, 685, 75 P.2d 492 (1988).

Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963). A challenge to a jury instruction may not be raised for the first time on appeal unless the instructional error is of constitutional magnitude. RAP 2.5(a)(3); *State v. Dent*, 123 Wn.2d 467, 478, 869 P.2d 392 (1994). "No error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made." *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988); *State v. Kroll*, 87 Wn.2d 829, 843, 558 P.2d 173 (1976).

Defendant argues that the State failed to list an essential element in the "to convict" jury instructions in the defendant's case because the

instructions failed to list an essential element, "true threat." Brief of Appellant 11.

Jury instructions must clearly set forth the elements of the crime charged. *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). A "to convict" instruction must contain all of the essential elements; the jury should not be required to search the other instructions to see if another element should be added to those listed. *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). A "to convict" instruction which purports to be a complete statement of the law and yet omits an element creates a constitutional error requiring reversal. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

- a. "True threat" is not an essential element of threat to bomb.

RCW 9.61.160 defines the crime of threaten to bomb or injure as:

(1) It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy; or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

The statute does not use the term “true threat.” The term that the statute uses is “threatened.” No Washington case has held that “true threat” is an essential element of the crime of threat to bomb or injure property.

The pattern instructions do not treat “true threat” as an essential element. 11A *Washington Practice*, Criminal Pattern Instruction No. 86.02 (2010); *See* Appendix C. The State’s “to convict” instructions mirror the pattern instructions in WPIC 86.02. The court instructed the jury that “to convict” the defendant of threatening to bomb or injure property, as charged in counts II and IV; each of the following elements of the crime must be proven beyond a reasonable doubt:

- (1) That on or about [the relevant charging date], the defendant;
 - (a) threatened to bomb or otherwise injure a building or structure or place used for human occupancy, to [a particular victim bank]; or
 - (b) communicated any information concerning a threat to bomb or otherwise injure a building structure or a place used for human occupancy; and
 - (i) That the defendant acted knowing such information was false; and
 - (ii) That the defendant acted with the intent to alarm the person or persons to whom the information was communicated; and
- (2) That this act occurred in the State of Washington.

CP 33-54 Instruction No. 15 and 16, *See* RCW 9.61.160; *See* 11A

Washington Practice, Criminal Pattern Instruction No. 86.02 (2010). The

“to convict” instruction follows the statutory language and uses the term “threatened.”

In a separate instruction, the court defined threat as:

Threat means to communicate, directly, or indirectly, the intent to cause physical damage to the property of a person other than the actor. 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 of 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 33-54 Instruction No. 14.

This instruction is identical to the pattern instruction found in WPIC 2.24, definition of threat. The commentary to WPIC 2.24 discusses the definition of threat and explicitly recommends to not use the term “true threat” in the jury instructions.

Instructing jurors using this term could unnecessarily confuse the issues by causing jurors to speculate about “false” threats. Accordingly, the committee incorporated the constitutional concepts into the instruction's final paragraph without directly referring to the legal term of art.

“True threat” is not an essential element that is included in the statute, or pattern instruction. “True threat” refers to the use of a threat and is not a term of art.

b. Instructional error in definitional instructions cannot be raised first time on appeal.

The Supreme Court of Washington has found that definitional instructions to the jury cannot be raised on the first time during appeal. For example, in *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988), Brown was charged and convicted as an accomplice to burglary. *Id.* at 683. Brown made no objection at trial to the judge's failure to define "knowledge" in the jury instructions and challenged the issue for the first time on appeal. *Id.* at 683. Brown argued that this was a constitutional error that could be challenged for the first time on appeal under RAP 2.5(a)(3). *Id.* at 684. The Court held that Brown's challenge was not an issue of constitutional magnitude. *Id.* at 687. Brown was seeking to avoid the consequences of his failure to comply with the procedural requirements by making his challenge a constitutional one. *Id.* 686. Failure to give a definitional instruction is not the same as failure to instruct on an essential element. *Id.* at 690.

In this case, defendant is seeking to avoid the consequences of his failure to comply with the procedural requirements by attempting to word his definitional challenge as a constitutional one, when it is, at most, a challenge to a definitional instruction. The defendant did not object to the wording of the jury instructions in regard to instruction 15 and 16, threat to bomb or injure during trial. RP 396-404. The defendant did not

preserve the error during trial such that he can challenge the definitional instruction on appeal. In addition, the definition of “threat” was defined correctly as “true threat.”

Defendant misinterprets *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006), by arguing that “true threat” was an essential element of RCW 9.61.160. Johnston argued that because the jury instructions did not define “threat” as a “true threat,” there was an error in affirming his conviction for threatening to bomb Sea-Tac Airport. *Id.* at 357. The Court held that RCW 9.61.160 must be construed to limit its application to “true threats” in order to avoid interference with the constitutional protection of free speech. *Id.* at 360. A “true threat” is a statement “in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted... as a serious expression of an intention to inflict bodily harm upon or take the life of another individual.” *Id.* at 361.

This case, however, is distinguishable from *Johnston* because the jury instructions defined “threat” as a “true threat.” Thus, the jury instructions in this case are constitutionally sufficient.

The defendant’s challenge to the definitional instruction is not properly preserved for appeal. The “to convict” instructions listed every essential element. Furthermore, the definition of “threat” was consistent with the meaning of “true threat.” The jury had the correct instructions

required to determine that the State had proven every essential element of RCW 9.61.160 beyond a reasonable doubt.

D. CONCLUSION.

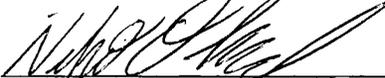
For the reasons argued above, the State respectfully requests that the Court affirm defendant's convictions.

DATED: August 10, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

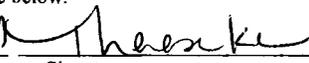

KATHLEEN PROCTOR

Deputy Prosecuting Attorney
WSB # 14811


Niko Olsrud
Legal Intern

Certificate of Service:

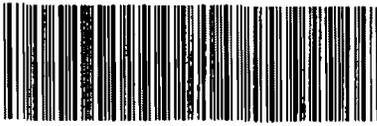
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.10.11 
Date Signature

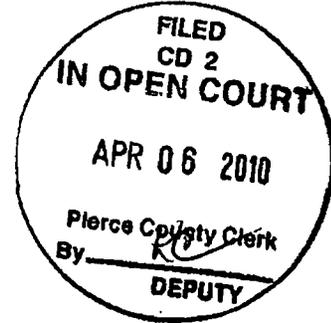
APPENDIX “A”

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 10-1-01499-5

vs.

JAMES WESLEY TWIGGS,

PERSISTENT OFFENDER NOTICE
(THIRD CONVICTION)

Defendant.

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YOU, the above named defendant, JAMES WESLEY TWIGGS, are hereby given NOTICE that the offense of ROBBERY IN THE FIRST DEGREE; ROBBERY IN THE FIRST DEGREE; THREAT TO BOMB OR INJURE PROPERTY; THREAT TO BOMB OR INJURE PROPERTY, with which you have been charged, is a "Most Serious Offense" as defined in RCW 9.94A.030(28). If you are convicted at trial or plead guilty to this charge or any other most serious offense, and you have been convicted on two previous occasions of other "most serious offenses," you will be classified at sentencing as a "Persistent Offender," as defined in RCW 9.94A.030(33) and your sentence will be life without the possibility of parole as provided in RCW 9.94A.570.

DATED this 6 day of April, 2010.

MARK LINDQUIST
Pierce County Prosecuting Attorney

By: [Signature]
PHILIP K. SORENSEN
Deputy Prosecuting Attorney
WSB # 16441

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Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

- (ix) Assault of a child in the second degree;
 - (x) Extortion in the first degree;
 - (xi) Robbery in the second degree;
 - (xii) Drive-by shooting;
 - (xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; and
 - (xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;
 - (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection; and
 - (c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.
- (55) "Work crew" means a program of partial confinement consisting of civic improvement tasks for the benefit of the community that complies with RCW 9.94A.725.
- (56) "Work ethic camp" means an alternative incarceration program as provided in RCW 9.94A.690 designed to reduce recidivism and lower the cost of corrections by requiring offenders to complete a comprehensive array of real-world job and vocational experiences, character-building work ethics training, life management skills development, substance abuse rehabilitation, counseling, literacy training, and basic adult education.
- (57) "Work release" means a program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school.

Sec. 4. RCW 9.94A.030 and 2009 c 28 s 4 are each amended to read as follows:

<< WA ST 9.94A.030 >>

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

- (1) "Board" means the indeterminate sentence review board created under chapter 9.95 RCW.
- (2) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department, means that the department, either directly or through a collection agreement authorized by RCW 9.94A.760, is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.
- (3) "Commission" means the sentencing guidelines commission.
- (4) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.
- (5) "Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence **under this chapter** and served in the community subject to controls placed on the offender's movement and activities by the department.
- (6) ~~"Community custody range" means the minimum and maximum period of community custody included as part of a sentence under RCW 9.94A.701, as established by the commission or the legislature under RCW 9.94A.850.~~
- (7) "Community protection zone" means the area within eight hundred eighty feet of the facilities and grounds of a public or private school.
- (8) (7) "Community restitution" means compulsory service, without compensation, performed for the benefit of the community by the offender.

~~(9)~~ (8) "Confinement" means total or partial confinement.

~~(10)~~ (9) "Conviction" means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

~~(11)~~ (10) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

~~(12)~~ (11) "Criminal history" means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.

(a) The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.

(b) A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon.

(c) The determination of a defendant's criminal history is distinct from the determination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.

~~(13)~~ (12) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity. This definition does not apply to employees engaged in concerted activities for their mutual aid and protection, or to the activities of labor and bona fide nonprofit organizations or their members or agents.

~~(14)~~ (13) "Criminal street gang associate or member" means any person who actively participates in any criminal street gang and who intentionally promotes, furthers, or assists in any criminal act by the criminal street gang.

~~(15)~~ (14) "Criminal street gang-related offense" means any felony or misdemeanor offense, whether in this state or elsewhere, that is committed for the benefit of, at the direction of, or in association with any criminal street gang, or is committed with the intent to promote, further, or assist in any criminal conduct by the gang, or is committed for one or more of the following reasons:

(a) To gain admission, prestige, or promotion within the gang;

(b) To increase or maintain the gang's size, membership, prestige, dominance, or control in any geographical area;

(c) To exact revenge or retribution for the gang or any member of the gang;

(d) To obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang;

(e) To directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage for the gang, its reputation, influence, or membership; or

(f) To provide the gang with any advantage in, or any control or dominance over any criminal market sector, including, but not limited to, manufacturing, delivering, or selling any controlled substance (chapter 69.50 RCW); arson (chapter 9A.48 RCW); trafficking in stolen property (chapter 9A.82 RCW); promoting prostitution (chapter 9A.88 RCW); human trafficking (RCW 9A.40.100); or promoting pornography (chapter 9.68 RCW).

~~(16)~~ (15) "Day fine" means a fine imposed by the sentencing court that equals the difference between the offender's net daily income and the reasonable obligations that the offender has for the support of the offender and any dependents.

~~(17)~~ (16) "Day reporting" means a program of enhanced supervision designed to monitor the offender's daily activities and compliance with sentence conditions, and in which the offender is required to report daily to a specific location designated by the department or the sentencing court.

~~(18)~~ (17) "Department" means the department of corrections.

~~(19)~~ (18) "Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community custody, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

~~(20)~~ (19) "Disposable earnings" means that part of the earnings of an offender remaining after the deduction from those earnings of any amount required by law to be withheld. For the purposes of this definition, "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonuses, or otherwise, and, notwithstanding any other provision of law making the payments exempt from garnishment, attachment, or other process to satisfy a court-ordered legal financial obligation, specifically includes periodic payments pursuant to pension or retirement programs, or insurance policies of any type, but does not include payments made under Title 50 RCW, except as provided in RCW 50.40.020 and 50.40.050, or Title 74 RCW.

~~(21)~~ (20) "Drug offender sentencing alternative" is a sentencing option available to persons convicted of a felony offense other than a violent offense or a sex offense and who are eligible for the option under RCW 9.94A.660.

~~(22)~~ (21) "Drug offense" means:

(a) Any felony violation of chapter 69.50 RCW except possession of a controlled substance (RCW 69.50.4013) or forged prescription for a controlled substance (RCW 69.50.403);

(b) Any offense defined as a felony under federal law that relates to the possession, manufacture, distribution, or transportation of a controlled substance; or

(c) Any out-of-state conviction for an offense that under the laws of this state would be a felony classified as a drug offense under (a) of this subsection.

~~(23)~~ (22) "Earned release" means earned release from confinement as provided in RCW 9.94A.728.

~~(24)~~ (23) "Escape" means:

(a) Sexually violent predator escape (RCW 9A.76.115), escape in the first degree (RCW 9A.76.110), escape in the second degree (RCW 9A.76.120), willful failure to return from furlough (RCW 72.66.060), willful failure to return from work release (RCW 72.65.070), or willful failure to be available for supervision by the department while in community custody (RCW 72.09.310); or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as an escape under (a) of this subsection.

~~(25)~~ (24) "Felony traffic offense" means:

(a) Vehicular homicide (RCW 46.61.520), vehicular assault (RCW 46.61.522), eluding a police officer (RCW 46.61.024), felony hit-and-run injury-accident (RCW 46.52.020(4)), felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)), or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)); or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a felony traffic offense under (a) of this subsection.

~~(26)~~ (25) "Fine" means a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specific period of time.

~~(27)~~ (26) "First-time offender" means any person who has no prior convictions for a felony and is eligible for

the first-time offender waiver under RCW 9.94A.650.

~~(28)~~ (27) "Home detention" means a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance.

~~(29)~~ (28) "Legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction. Upon conviction for vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in the conviction, subject to RCW 38.52.430.

~~(30)~~ (29) "Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies:

- (a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
- (b) Assault in the second degree;
- (c) Assault of a child in the second degree;
- (d) Child molestation in the second degree;
- (e) Controlled substance homicide;
- (f) Extortion in the first degree;
- (g) Incest when committed against a child under age fourteen;
- (h) Indecent liberties;
- (i) Kidnapping in the second degree;
- (j) Leading organized crime;
- (k) Manslaughter in the first degree;
- (l) Manslaughter in the second degree;
- (m) Promoting prostitution in the first degree;
- (n) Rape in the third degree;
- (o) Robbery in the second degree;
- (p) Sexual exploitation;
- (q) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;
- (r) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;
- (s) Any other class B felony offense with a finding of sexual motivation;
- (t) Any other felony with a deadly weapon verdict under RCW 9.94A.602;
- (u) Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection;
- (v)(i) A prior conviction for indecent liberties under RCW 9A.88.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b), and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988;

(ii) A prior conviction for indecent liberties under RCW 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988, if: (A) The crime was committed against a child under the age of fourteen; or (B) the relationship between the victim and perpetrator is included in the definition of indecent liberties under RCW 9A.44.100(1)(c) as it existed from July 1, 1988, through July 27, 1997, or RCW 9A.44.100(1) (d) or (e) as it existed from July 25, 1993, through July 27, 1997;

(w) Any out-of-state conviction for a felony offense with a finding of sexual motivation if the minimum sentence imposed was ten years or more; provided that the out-of-state felony offense must be comparable to a felony offense under Title 9 or 9A RCW and the out-of-state definition of sexual motivation must be comparable to the definition of sexual motivation contained in this section.

~~(30)~~ (30) "Nonviolent offense" means an offense which is not a violent offense.

~~(31)~~ (31) "Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. **In addition, for the purpose of community custody requirements under this chapter, "offender" also means a misdemeanor or gross misdemeanor probationer convicted of an offense included in RCW 9.94A.501(1) and ordered by a superior court to probation under the supervision of the department pursuant to RCW 9.92.060, 9.95.204, or 9.95.210.** Throughout this chapter, the terms "offender" and "defendant" are used interchangeably.

~~(32)~~ (32) "Partial confinement" means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

~~(33)~~ (33) "Pattern of criminal street gang activity" means:

(a) The commission, attempt, conspiracy, or solicitation of, or any prior juvenile adjudication of or adult conviction of, two or more of the following criminal street gang-related offenses:

(i) Any "serious violent" felony offense as defined in ~~RCW 9.94A.030~~ **this section**, excluding Homicide by Abuse (RCW 9A.32.055) and Assault of a Child 1 (RCW 9A.36.120);

(ii) Any "violent" offense as defined by ~~RCW 9.94A.030~~ **this section**, excluding Assault of a Child 2 (RCW 9A.36.130);

(iii) Deliver or Possession with Intent to Deliver a Controlled Substance (chapter 69.50 RCW);

(iv) Any violation of the firearms and dangerous weapon act (chapter 9.41 RCW);

(v) Theft of a Firearm (RCW 9A.56.300);

(vi) Possession of a Stolen Firearm (RCW 9A.56.310);

(vii) Malicious Harassment (RCW 9A.36.080);

(viii) Harassment where a subsequent violation or deadly threat is made (RCW 9A.46.020(2)(b));

(ix) Criminal Gang Intimidation (RCW 9A.46.120);

(x) Any felony conviction by a person eighteen years of age or older with a special finding of involving a juvenile in a felony offense under RCW 9.94A.833;

(xi) Residential Burglary (RCW 9A.52.025);

(xii) Burglary 2 (RCW 9A.52.030);

(xiii) Malicious Mischief 1 (RCW 9A.48.070);

(xiv) Malicious Mischief 2 (RCW 9A.48.080);

(xv) Theft of a Motor Vehicle (RCW 9A.56.065);

(xvi) Possession of a Stolen Motor Vehicle (RCW 9A.56.068);

- (xvii) Taking a Motor Vehicle Without Permission 1 (RCW 9A.56.070);
 - (xviii) Taking a Motor Vehicle Without Permission 2 (RCW 9A.56.075);
 - (xix) Extortion 1 (RCW 9A.56.120);
 - (xx) Extortion 2 (RCW 9A.56.130);
 - (xxi) Intimidating a Witness (RCW 9A.72.110);
 - (xxii) Tampering with a Witness (RCW 9A.72.120);
 - (xxiii) Reckless Endangerment (RCW 9A.36.050);
 - (xxiv) Coercion (RCW 9A.36.070);
 - (xxv) Harassment (RCW 9A.46.020); or
 - (xxvi) Malicious Mischief 3 (RCW 9A.48.090);
 - (b) That at least one of the offenses listed in (a) of this subsection shall have occurred after July 1, 2008;
 - (c) That the most recent committed offense listed in (a) of this subsection occurred within three years of a prior offense listed in (a) of this subsection; and
 - (d) Of the offenses that were committed in (a) of this subsection, the offenses occurred on separate occasions or were committed by two or more persons.
- ~~(35)~~ **(34)** "Persistent offender" is an offender who:
- (a)(i) Has been convicted in this state of any felony considered a most serious offense; and
 - (ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted; or
 - (b)(i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection ~~(35)~~ **(34)**(b)(i); and
 - (ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection. A conviction for rape of a child in the first degree constitutes a conviction under (b)(i) of this subsection only when the offender was sixteen years of age or older when the offender committed the offense. A conviction for rape of a child in the second degree constitutes a conviction under (b)(i) of this subsection only when the offender was eighteen years of age or older when the offender committed the offense.
- ~~(36)~~ **(35)** "Predatory" means: (a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was: (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, "school" does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; or (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or

her authority.

~~(37)~~ (36) "Private school" means a school regulated under chapter 28A.195 or 28A.205 RCW.

~~(38)~~ (37) "Public school" has the same meaning as in RCW 28A.150.010.

~~(39)~~ (38) "Restitution" means a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs.

~~(40)~~ (39) "Risk assessment" means the application of an objective the risk instrument supported by research and adopted by recommended to the department for the purpose of assessing an offender's risk of reoffense; taking into consideration the nature of the harm done by the offender; place and circumstances of the offender related to risk; the offender's relationship to any victim; and any information provided to the department by victims. The results of a risk assessment shall not be based on unconfirmed or unconfirmable allegations by the Washington state institute for public policy as having the highest degree of predictive accuracy for assessing an offender's risk of reoffense.

~~(41)~~ (40) "Serious traffic offense" means:

(a) Nonfelony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502), nonfelony actual physical control while under the influence of intoxicating liquor or any drug (RCW 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run an attended vehicle (RCW 46.52.020(5)); or

(b) Any federal, out-of-state, county, or municipal conviction for an offense that under the laws of this state would be classified as a serious traffic offense under (a) of this subsection.

~~(42)~~ (41) "Serious violent offense" is a subcategory of violent offense and means:

(a)(i) Murder in the first degree;

(ii) Homicide by abuse;

(iii) Murder in the second degree;

(iv) Manslaughter in the first degree;

(v) Assault in the first degree;

(vi) Kidnapping in the first degree;

(vii) Rape in the first degree;

(viii) Assault of a child in the first degree; or

(ix) An attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious violent offense under (a) of this subsection.

~~(43)~~ (42) "Sex offense" means:

(a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(12);

(ii) A violation of RCW 9A.64.020;

(iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080; or

(iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;

(c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or

(d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

~~(44)~~ (43) "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

~~(45)~~ (44) "Standard sentence range" means the sentencing court's discretionary range in imposing a nonappeal-

able sentence.

~~(46)~~ (45) "Statutory maximum sentence" means the maximum length of time for which an offender may be confined as punishment for a crime as prescribed in chapter 9A.20 RCW, RCW 9.92.010, the statute defining the crime, or other statute defining the maximum penalty for a crime.

~~(47)~~ (46) "Stranger" means that the victim did not know the offender twenty-four hours before the offense.

~~(48)~~ (47) "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

~~(49)~~ (48) "Transition training" means written and verbal instructions and assistance provided by the department to the offender during the two weeks prior to the offender's successful completion of the work ethic camp program. The transition training shall include instructions in the offender's requirements and obligations during the offender's period of community custody.

~~(50)~~ (49) "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.

~~(51)~~ (50) "Violent offense" means:

(a) Any of the following felonies:

(i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;

(ii) Criminal solicitation of or criminal conspiracy to commit a class A felony;

(iii) Manslaughter in the first degree;

(iv) Manslaughter in the second degree;

(v) Indecent liberties if committed by forcible compulsion;

(vi) Kidnapping in the second degree;

(vii) Arson in the second degree;

(viii) Assault in the second degree;

(ix) Assault of a child in the second degree;

(x) Extortion in the first degree;

(xi) Robbery in the second degree;

(xii) Drive-by shooting;

(xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; and

(xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection; and

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.

~~(52)~~ (51) "Work crew" means a program of partial confinement consisting of civic improvement tasks for the benefit of the community that complies with RCW 9.94A.725.

~~(53)~~ (52) "Work ethic camp" means an alternative incarceration program as provided in RCW 9.94A.690 designed to reduce recidivism and lower the cost of corrections by requiring offenders to complete a comprehensive array of real-world job and vocational experiences, character-building work ethics training, life management skills development, substance abuse rehabilitation, counseling, literacy training, and basic adult education.

~~(54)~~ (53) "Work release" means a program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school.

APPENDIX “B”

APPENDIX “C”

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Washington Pattern Jury Instructions--Criminal
 2008 Edition Prepared by the Washington Supreme Court Committee On Jury Instructions, Hon. Sharon S. Armstrong, Co-Chair, Hon. William L. Downing, Co-Chair

Part
 X. Arson and Related Crimes
 WPIC CHAPTER
 86. Other Property Crimes

WPIC 86.02 Threatening to Bomb or Injure Property—Elements

To convict the defendant of threatening to bomb or injure property, each of the following two elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date), the defendant
 - (a) threatened to bomb or otherwise injure a *[public or private school building][or][a place of worship or public assembly][or][governmental property][or] [[a] [any other] building or structure] [or][a common carrier] [or][a place used for human occupancy]; [or]*
 - (b) communicated *[or repeated]* any information concerning a threat to bomb or otherwise injure a *[public or private school building][or][a place of worship or public assembly][or][governmental property][or] [[a] [any other] building or structure] [or][a common carrier][or][a place used for human occupancy]; and*
 - (i) That the defendant acted knowing such information was false; and
 - (ii) That the defendant acted with the intent to alarm the person *[or persons]* to whom the information was communicated *[or repeated]*;
 - and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that element (2) and either of the alternative elements (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt. If your finding is based on alternative element (1)(b), both (i) and (ii) must be proved.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to either element

(1) or (2), then it will be your duty to return a verdict of not guilty.

NOTE ON USE

Use paragraphs (i) and (ii) only if element (1)(b) is given.

WPIC 2.24, Threat—Definition, and WPIC 2.05, Building—Definition, may be used with this instruction, if appropriate.

WPIC 10.01, Intent—Intentionally—Definition, and WPIC 10.02, Knowledge—Knowingly—Definition, may be used with this instruction if the defendant is charged with communicating or repeating information concerning a threat to bomb or injure property. Do not use WPIC 10.01, Intent—Intentionally—Definition or WPIC 10.02, Knowledge—Knowingly—Definition, if the defendant is charged only with threatening to bomb or injure property and is not charged with communicating or repeating information concerning a threat to bomb or injure property.

Use bracketed material as applicable. The instruction is drafted for cases in which the jury needs to be instructed using two or more of the alternatives for element (1). Care must be taken to limit the alternatives to those that were included in the charging document and are supported by sufficient evidence. For directions on when and how to draft instructions with alternative elements, see the Introduction to WPIC 4.20 and the Note on Use and Comment to WPIC 4.23, Elements of the Crime—Alternative Elements—Alternative Means for Committing a Single Offense—Form. For the related jury interrogatory, see WPIC 190.09, Special Verdict Form—Elements with Alternatives. For any case in which substantial evidence supports only one of the alternatives in element (1), revise the instruction to remove references to alternative elements, following the format set forth in WPIC 4.21, Elements of the Crime—Form.

For a discussion of the phrase “this act” in element (2), see the Introduction to WPIC 4.20 and the Note on Use to WPIC 4.21, Elements of the Crime—Form.

COMMENT

RCW 9.61.160(1).

The first clause of RCW 9.61.160(1) makes it unlawful to threaten to bomb or otherwise injure certain buildings, structures, common carriers, or places. The second clause makes it unlawful to communicate or repeat information regarding a threatened bombing or injury. “The first clause does not require any specific intent; it merely requires proof of the threat. In contrast, the second clause requires (1) knowledge of the falsity of the information and (2) an intent to alarm the listener.” *State v. Edwards*, 84 Wn.App. 5, 9, 924 P.2d 397 (1996), overruled in part by *State v. Johnston*, 156 Wn.2d 355, 362–63, 127 P.3d 707 (2006).

Threat to property is defined in RCW 9A.04.110(27)(b): “Threat means to communicate, directly or indirectly, the intent ... to cause physical damage to the property of a person other than the actor.”

The threat must be a “true threat” to support a conviction under RCW 9.61.160. See *State v. Johnston*, 156 Wn.2d at 366. For a discussion of how to instruct jurors about true threats, see the Comment to WPIC 2.24, Threat—Definition.

The statute does not require that the threat be one that the defendant intends to carry out. See *State v. John-*

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ston, 156 Wn.2d at 362. *[Current as of July 2008.]*
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