

NO. 42035-0

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

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT LOCKE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko

No. 11-1-00452-1

BRIEF OF RESPONDENT

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

1. Was a *Petrich* instruction required when the three communication were a continuing course of conduct?
2. Was there sufficient evidence to convict defendant of threats against governor where there was evidence of a true threat?
3. Were all essential elements included in the information and were the jury instructions proper?
4. Should the court remand for resentencing only so that the condition that defendant obtain a mental health evaluation can be removed from defendant's judgment and sentence?

B. STATEMENT OF THE CASE.

1. Procedure

On January 26, 2011, the State charged defendant Robert Locke with one count of threat against governor or family. CP 1.

On April 12, 2011, the case was called for trial in front of the Honorable Susan Serko. RP 4. A CrR 3.5 hearing was held on April 13, 2011. RP 40-93. The court denied defendant's motion to suppress. RP 89-93, CP 52-54. On April 15, 2011, the jury found defendant guilty as charged. RP 289, CP 28. Sentencing was held on April 22, 2011. RP 297. Defendant had an offender score of zero and the crime of threat against governor or family is unranked so the sentencing range was zero to

twelve months. CP 40-51. The court sentenced defendant to twelve months. RP 302, CP 40-51.

Defendant filed this timely appeal. CP 55.

2. Facts

On January 25, 2011, Barbara Winkler, the executive scheduler for the Governor, came into work and logged onto the computer system. RP 96. When she checked the new requests that had come in during the night, she discovered that one of the requests had a death threat. RP 96. The events request had been entered that morning at 6:13 a.m. RP 99, Exhibit 2. The name on the event request was Robb Locke. RP 100. The organization was listed as Gregoire Must Die. RP 101. Defendant had elected “request event at mansion” and had listed the Governor as the honoree. RP 102. The event requested was “Gregoire’s public execution.” RP 102. Ms. Winkler was alarmed and immediately checked to see if the Governor had anything scheduled outside the office that day since it said public execution. RP 103. The fact that the request said “Gregoire Must Die” and also “public execution” concerned her. RP 114, 115. Ms. Winkler called the mansion and made sure the Governor was not intending to go out. RP 104. She also talked to the Executive Protection Unit. RP 104. Ms. Winkler considered the statements serious especially in light of the recent shooting that had occurred in Arizona. RP 105. Ms. Winkler testified that while she had received e-mails with distasteful

comments before, this was the first time that she had received a death threat. RP 106, 115. She had never before received an event request for a public execution. RP 123. A further check of the computer system revealed that two more e-mails from the same person had been sent to the governor's office. RP 123.

Rebecca Larson is the executive receptionist for the Governor. RP 125. When Ms. Winkler told her about the event request she had received, Ms. Larson checked the system and found that two additional e-mails had come in that morning from the same person that sent the event request. RP 126. Ms. Larson said the e-mails were alarming. RP 127. The first one was sent on January 25, 2011 at 6:09:15 a.m. from Robb Locke. RP 130. The address was listed as 1313 Mockingbird Lane, with the city "Gregoire Must Die." RP 130. The e-mail stated, "I hope you have the opportunity to see one of your family members raped and murdered by a sexual predator. Thank you for putting this state in the toilet. Do us a favor and pull the lever to send us down before you leave Olympia." RP 130, Exhibit 4. The second e-mail was sent on January 25, 2011 at 6:11:25 a.m. from the same e-mail address, also from Robb Locke. RP 131, Exhibit 5. The address was again 1313 Mockingbird Lane in the city "Gregoire Must Die." RP 131. It also had a phone number. RP 131. The e-mail stated, "You fucking CUNT!! You should be burned at the stake like any heretic?" RP 131, Exhibit 5. The e-mails were also turned over

to the Executive Protection Unit and Ms. Larson stated she would have done so even regardless of the event request. RP 137.

Phil Dubois is a correspondence analyst in the Governor's Office. RP 149. He also viewed the e-mails and was disturbed. RP 150. He interpreted the e-mails as a threat to harm the Governor. RP 154.

Sgt. Carlos Rodriguez is the head of the Executive Protection Unit. RP 164, 166. Ms. Winkler contacted him after she viewed the event request. RP 167. Trooper Rodriguez viewed the communication and saw it as a serious threat to do harm to the Governor. RP 171. The current events such as the shooting of the congresswoman Arizona influenced his assessment of the seriousness of the situation. RP 178.

That same day, Trooper James Kirk was contacted by Sgt. Carlos Rodriguez to work on the case. RP 202. Trooper Kirk reviewed the e-mail and called the phone number that was listed on one of the e-mails. RP 202-3. Trooper Kirk took the communications as a serious threat to do harm. RP 227. Defendant answered the phone and Trooper Kirk said he wanted to talk to defendant about some e-mails. RP 204. Defendant said, "yeah," and then either hung up the phone or lost service. RP 204. When the Trooper called defendant back, the phone went straight to voicemail. RP 204. Trooper Kirk and Trooper Havenner then went to defendant's residence but defendant was not there. RP 205. Trooper Kirk observed a person walking down the road that matched defendant's description. RP 206. Trooper Havenner contacted defendant first. RP 206. Defendant

told Trooper Kirk he did not hang up on him but that he had poor cell service. RP 207.

Trooper Havenner was requested to assist with the investigation of defendant. RP 196. The investigation took him to defendant's residence in Graham. RP 196. Trooper Havenner went to defendant's residence but defendant was not there. RP 196. As he left the residence, the Trooper observed a person walking down the street who matched the description of defendant. RP 196. The Trooper stopped his car, walked up to defendant and asked him what his name was. RP 197. Defendant stated, "Yeah, I know why you're here," and also said "I figured you guys would be contacting me." RP 197. He then told the Trooper his name was Robert Locke. RP 197.

Defendant agreed to talk with the Troopers. RP 207. It was about 3 p.m. on January 25, 2011. RP 208. Defendant acknowledged sending the e-mails around 6 a.m. RP 209. Defendant told Trooper Kirk he Googled "Governor of Washington" and used the website to e-mail the Governor. RP 210. Defendant stated that he had typed "Gregoire Must Die." RP 211. Defendant admitted to filling out the request form and then stated, "Right, because I was flippantly checking off things." RP 212, 224. Defendant said he sent the e-mail because when the Governor was the Attorney General in 1997, he sent an e-mail to the Attorney General about the fact that he did not get two paychecks from an employer and he never received a response from the A.G. RP 212-13, 219-20. Then when

the Governor was on the campaign trail, he received two notices that his DSHS benefits were being reduced. RP 213, 220-21. Defendant said he remembered saying she was heretic but did not recall making any direct threat. RP 222. Defendant said he was sorry. RP 225. Defendant never expressed surprise that the police were there. RP 226.

C. ARGUMENT.

1. A **PETRICH** INSTRUCTION WAS NOT REQUIRED AS THE THREE COMMUNICATIONS WERE A CONTINUING COURSE OF CONDUCT.

In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged has been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the facts show two or more criminal acts that could constitute the crime charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). A separate unanimity instruction is not required, however, where the criminal acts are merely part of a continuing course of conduct. *Crane*, 116 Wn.2d at 330. Evidence tends to indicate a continuing course of conduct if each of the defendant's acts promotes one objective and occurred at the same time and place. See *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395, review denied, 129 Wn.2d 1016, 917 P.2d 575 (1996).

“To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner.” *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). In *Crane*, the Supreme Court held that the “continuous course of conduct” exception applied to an assault that occurred during a two-hour span. 116 Wn.2d at 330.

When spatial and temporal separations between acts are short, they can be said to be a continuing course of conduct. See *Love*, 80 Wn. App at 361 (citing *Petrich*, 101 Wn.2d at 571). When making this inquiry, the court looks to each of the acts that constitute the same course of conduct that make up one criminal charge. *Id.*

In the instant case, the three communications sent by defendant were sent over a span of four minutes. The first e-mail that referenced hoping the Governor got to see her family raped and murder was sent at 6:09:15 a.m. RP 130. The second email that included the hope that the Governor be burned at the stake was sent at 6:11:25 a.m. RP 131. The request for an event for the Governor’s public execution came in at 6:13 a.m. RP 96, 99. The three communications were all sent at the about the same time: between 6:09 and 6:13 a.m. All three were sent to the same place: the Governor’s office. They were all to promote the same objective of threatening violence and engendering the fear that the violence would occur. The spatial and temporal separations of the communications are mere minutes and they should be considered the same

course of conduct.

The State was not required to elect any of the communication as they were part of a continuing course of conduct. The State did not argue that these any one of the three communications could support the charge. The State's argument consistently looked at the communications as a continuing course of conduct. *See* RP 258-59, 261, 276-77. The e-mails at the very least provided context for the event request. RP 36-39. The facts of this case do not support the giving of a *Petrich* instruction nor do they require the State to elect any certain basis for the charge. The three communications were a continuing course of conduct. There was no error.

2. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT GUILTY OF THREATS AGAINST GOVERNOR WHERE THERE WAS EVIDENCE OF A TRUE THREAT.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). This standard also applies to aggravating circumstances. *See State v. Gordon*, 172 Wn.2d 671, 260 P.3d 884 (2011). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App.

214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Defendant was charged with Threats Against Governor or Family. CP 1. See RCW 9A.36.090. There are two methods to committing the crime. RCW 9A.36.090 and *State v. Phillips*, 53 Wn. App. 533, 534, 768 P.2d 1019 (1989).

Whoever [1] knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the governor of the state ... or [2] knowingly and willfully otherwise makes any such threat against the governor, ...shall be guilty of a class C felony.

Phillips, 53 Wn. App. at 534. Defendant in the instant case committed the crime by the second means. The State was required to prove that on January 25, 2011, defendant knowingly and willfully made any threat against the governor of the state. See RCW 9A.36.090 and CP 10-27, instruction 10. Defendant only challenges the sufficiency of the threat in terms of being a true threat.

The offense of threats against governor or family is complete when the threat is communicated. *Phillips*, 53 Wn. App. at 535. The person who makes the threat does not need to actually intend to carry out the threat in order for it to be a true threat. *Virginia v. Black*, 538 U.S. 343, 359-60, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), *State v. Kilburn*, 151 Wn.2d 36, 45-48, 84 P.3d 1215 (2004). Because the statute in this case regulates pure speech, case law suggests that it must be interpreted in light of the First Amendment. See *State v. Williams*, 144 Wn.2d 197, 207, 26

P.3d 890 (2001). “Whether a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke.” *Kilburn*, 151 Wn.2d at 46, *see also State v. Johnston*, 156 Wn.2d 355, 360-61, 127 P.3d 707 (2006). “A true threat is a serious threat, not one said in jest, idle talk, or political argument.” *Kilburn*, 151 Wn.2d at 43. “True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular or group of individuals.” *Black*, 538 U.S. at 359. True threats are not protected speech so that individuals are protected from the fear of violence, “the disruption engendered by that fear, and the possibility that the threatened violence will occur.” *Johnston*, 156 Wn.2d at 362.

In the instant case, the State presented sufficient evidence that defendant made a true threat. While defendant analyzed the evidence in the light most favorable to him, case law requires that the evidence presented be analyzed in the light most favorable to the State. The evidence does not support that these communications were a joke, a jest, idle talk, or political argument. Defendant started by expressing a hope that violent things would happen to the governor’s family, then expressed his desire that the governor be burned at the stake and finally, sent a formal event request for a public execution with the governor listed as the

honoree. RP 96, 99, 100-103, 130-31, Exhibits 2, 4 and 5. The intensity and specificity of the communications increased over a very short period of time which is alarming.

The final communication, which was an event request for a public execution, is the best example of how this is more reasonably interpreted as a serious threat instead of a joke. Throughout the course of the communications, defendant used his own name, cell phone number and e-mail but used a fake address. RP 100-102, 130, 131. The mobile nature of a cell phone or e-mail means that the authorities would not necessarily be able to immediately find defendant. The use of a fake address, whether from a sitcom or just made up, shows an attempt to obscure his location and delay the authorities finding him. Further, the organization is listed as Gregorie Must Die and indicates that the event will be public. RP 101-102. Defendant gave just enough information to engender fear that this execution would happen, possibly while the governor was out at an event. Defendant requested the event, and there is nothing in the event request to suggest that he was just hoping someone else would execute the governor. Defendant was the requestor and made the affirmative act to request the execution of the governor. This was active, deliberate actions and not passive. The event location was listed as the Governor's mansion which is reasonably interpreted as defendant coming to get the Governor. A reasonable person would not view this as just idle talk, jest, or political argument. There is nothing in the event request that suggests any of these

types of speech. The event request is a threat, especially in light of the other communications, that defendant wanted to harm the governor and was taking matters into his own hands by formally announcing her public execution. Viewing the evidence in the light most favorable to the State suggest the inference that defendant requesting the public execution was threatening to publicly execute the governor. There is nothing to suggest that defendant was passively requesting that someone else commit a public execution. Defendant communicated a serious expression of intent to do harm. Defendant's communications were a true threat.

Whether or not defendant was actually going to commit the public execution is irrelevant and is not a requirement in order for the threat to be a true threat. See *Kilburn*, 151 Wn.2d at 46, 48. Unlike the defendant in *Kilburn*, there was no indication in any of defendant's communications that he was joking. The defendant in *Kilburn* laughed and giggled as if he were not serious. *Id.* at 52-53. There was nothing in the tone of defendant's communications to suggest that he was just joking.

Defendant's e-mails both contained violent images and his event request then indicated a desire to execute the governor. Defendant's communications became increasing more violent and serious as they progressed. Further, as the test requires that the threats are looked at from the defendant's perspective in that a reasonable person making the statements would interpret them as a serious expression of intent to do harm. Based on the tone of the communications, the violent images and

the actual threat that defendant was planning a public execution, a reasonable person would foresee that the statements would be taken seriously and not as a joke. Defendant's actions even confirm this. Arguable, defendant hung up on the officers when they called his phone. RP 204. He then left his house and was found walking on the side of the road. RP 196, 206. When the Troopers talked to him, he knew exactly why they were there and never expressed surprise that they were there. RP 197, 226. Further, given the climate of the time, including the recent shooting of a congresswoman in Arizona, a reasonable person would expect any threat of this type to be taken seriously. A reasonable person would foresee that these communications would be taken as serious threats and not as a joke. Defendant's own actions support this conclusion. The State presented sufficient evidence of a true threat.

3. ALL ESSENTIAL ELEMENTS WERE ALLEGED
IN THE INFORMATION AND THE JURY WAS
PROPERLY INSTRUCTED.

Defendant claims that the definition of a true threat is an essential element of the crime that the State had to plead and prove. Specifically, defendant claims the charging information and the jury instructions were insufficient. However, as the definition of true threat is not an element of the crime and the proper definition was included in the jury instructions, there is no error.

A charging document is sufficient if it sets forth all elements of the offense. *State v. Kjorsvik*, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). Jury instructions satisfy due process if the jury is informed of all the elements of the offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted.” *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). A to-convict instruction should have all of the essential elements of a crime but it, “need not contain all pertinent law such as definitions of terms.” *State v. Fisher*, 165 Wn.2d 727, 754-55, 20 P.3d 937 (2009).

Defendant’s argument is inconsistent with case law. The term “true threat” is a concept that defines and limits the scope of the word threat but is not an essential element of any crime. See *State v. Allen*, 161 Wn. App. 727, 751, 255 P.3d 784 (2011), *review granted*, 172 Wn.2d 1014, 262 P.3d 63 (2011), *State v. Atkins*, 156 Wn. App. 799, 802, 236 P.3d 897 (2010), *State v. Tellez*, 141 Wn. App. 479, 483-84, 170 P.3d 75 (2007). The true threat language does not need to be included in the charging document or the to convict instruction. *Tellez*, 141 Wn. App. at 483-84, *Allen*, 161 Wn. App. at 751. “A separate instruction defining true threat protects the defendant’s First Amendment rights.” *Id.*

In the instant case, the State has never disputed that it was required to prove that defendant’s threat was a true threat. The parties discussed the meaning of true threat, its application to the instant case, the need for jury instructions and the fact that it was a term of art. RP 28-29. The

State proposed a jury instruction that defined true threat that was based on RCW 9A.36.090 and *Phillips*, 53 Wn. App. 533. RP 230, CP 67-86, number 8. Defendant proposed a similar instruction that left out the first sentence of the State's proposed instruction. RP 238-248, CP 6-7. The court accepted the State's proposed instruction and the jury was so instructed. CP 10-27, instruction 7. The jury was properly instructed in the case.

There is also no requirement that all definitions be contained in the to-convict instruction. The information contained the essential elements from the statute and there is no requirement that all definitions be contained in the information. Clearly defendant was on notice as to the true threat aspect of the case and was able to prepare for it as the issue was discussed immediately as one of defendant's motions in limine. RP 28-29. Case law was followed in this case. There is no error.

4. THE STATE CONCEDES THAT THE PROPER
PROCEDURE WAS NOT FOLLOWED IN
ORDERING DEFENDANT TO OBTAIN A
MENTAL HEALTH EVALUATION.

When sentencing a defendant to community custody, RCW 9.94A.703 provides guidance for what restrictions the court may include as part of community custody. Elements mandatory for the court to include in the order of community custody appear in RCW 9.94A.703(1).

RCW 9.94A.703(2) lists conditions that the court may choose to waive but shall otherwise impose.

A defendant can raise objections to community custody conditions for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (citing *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 831 (2000)). The Washington Supreme Court has generally reviewed matters of sentencing conditions for abuse of discretion. *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Generally, a sentencing judge may impose and enforce crime-related prohibitions and affirmative conditions. *State v. Cayenne*, 165 Wn.2d 10, 14, 195 P.3d 521 (2008); RCW 9.94A.505(8). A crime-related prohibition is statutorily defined as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted...” RCW 9.94A.030(13).

Defendant only challenges the provision of his sentence that requires him to have a mental health evaluation and follow-up treatment. RP 302-303, CP 40-51. The court ordered the evaluation under RCW 9.94A.703(3)(c). RP 302-303. However, defendant is correct that RCW 9.94B.080 applies to his case. *See* Laws of 2008, ch. 231, §55 (statute applicable to crimes committed after 2000). RCW 9.94A.080 requires the court to obtain a pre-sentence report prior to imposing the condition of a mental health evaluation. In the instant case, no pre-sentence report was done. Despite the fact that the condition is arguably crime related the

mandates of the statute were not followed. This court should remand to remove that condition only or to order the trial court to follow the procedures of the statute and order a pre-sentence report.

D. CONCLUSION.

The State respectfully requests this Court affirm defendant's convictions and sentence.

DATED: MARCH 22, 2012

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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.

3/23/12
Date
Johnson
Signature

PIERCE COUNTY PROSECUTOR

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Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

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