

NO. 42135-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD OLSEN,

Appellant.

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

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE	3
D. ARGUMENT	4
1. The trial court committed reversible error in admitting evidence of prior bad acts under ER 404(b)	4
a. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative.	4
b. The testimony about the other acts was improperly used to show action in conformity therewith and was substantially more prejudicial than probative.	7
c. The remedy is reversal and remand for a new trial.....	12
2. The to-convict instruction for felony harassment violated due process because it omitted an essential element of the crime.....	14
a. A to-convict instruction violates due process if it omits an element of the crime charged.....	14
b. The to-convict instruction for the harassment count violated Mr. Olsen's right to due process because it omitted the true threat element	15
c. The remedy is reversal of the harassment conviction and remand for a new trial	19
3. The sentencing court erred in calculating the offender score, requiring remand for resentencing	20
a. The State bears the burden of proving a defendant's offender score by a preponderance of the evidence	20

b. The State failed to prove Mr. Olsen’s California conviction is comparable to a Washington felony; accordingly, the California conviction should not have been counted in the offender score..... 22

c. Because the California terroristic threats conviction is not comparable to a Washington felony, the Washington custodial interference conviction washes out..... 26

d. Mr. Olsen’s sentence must be vacated and his case remanded for resentencing on the existing record 27

E. CONCLUSION..... 28

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Lavery</u> , 154 Wn.2d 249, 111 P.3d 837 (2005)	21, 23
<u>Salas v. Hi-Tech Erectors</u> , 168 Wn. 2d 664, 230 P.3d 583 (2010)	12, 13
<u>State v. Aumick</u> , 126 Wn.2d 422, 894 P.2d 1325 (1995)	14
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003)	15
<u>State v. Dunbar</u> , 117 Wn.2d 587, 817 P.2d 1360 (1991)	18
<u>State v. Ervin</u> , 169 Wn.2d 815, 239 P.3d 354 (2010).....	27
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009)	5, 6, 19
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	20, 27
<u>State v. Goebel</u> , 36 Wn.2d 367, 218 P.2d 300 (1950).....	6
<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1215 (2004).....	16
<u>State v. Lopez</u> , 147 Wn.2d 515, 55 P.3d 609 (2002)	21, 27
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	15, 19
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998)	21
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	15
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982)	5, 6
<u>State v. Schaler</u> , 169 Wn.2d 274, 236 P.3d 858 (2010).....	17, 18
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	6
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	14
<u>State v. Thieffault</u> , 160 Wn.2d 409, 158 P.3d 580 (2007)	24, 26
<u>State v. Williams</u> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	16

Washington Court of Appeals Decisions

State v. Allen, 161 Wn. App. 727, 255 P.3d 784 (2011), review granted, No. 861196 (9/26/11)..... 17

State v. Holmes, 43 Wn. App. 397, 717 P.2d 766 (1986)..... 8, 9

State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004)..... 25, 26

State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001) 10, 11

State v. Rivers, 130 Wn. App. 689, 128 P.3d 608 (2005)..... 20

State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007) 17

State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006)... 24, 26

State v. Thomas, 35 Wn. App. 598, 668 P.2d 1294 (1983)..... 12

State v. Wade, 98 Wn. App. 328, 989 P.2d 576 (1998) 4, 5, 9, 10

United States Supreme Court Decisions

In re Winship, 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 14

Decisions of Other Jurisdictions

United States v. Goodwin, 492 F.2d 1141 (5th Cir. 1974)..... 6

Statutes

Cal. Penal Code § 422(a)..... 22

RCW 9.94A.505 20

RCW 9.94A.510 20

RCW 9.94A.520 20

RCW 9.94A.525 20, 26

RCW 9A.40.060 26

RCW 9A.46.020 15, 22

Rules

ER 403 6, 11

ER 404 4, 8

Other Authorities

WPIC 27.02 19

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting evidence of prior bad acts.

2. The trial court violated Mr. Olsen's Fourteenth Amendment right to due process by omitting the true threat element from the "to convict" instruction for felony harassment.

3. The State presented insufficient evidence to prove the comparability of a prior California conviction for inclusion in Mr. Olsen's offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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

kill.” Did the trial court commit prejudicial error in admitting this evidence?

2. A “to convict” instruction violates due process if it does not include every element of the crime. The State charged Mr. Olsen with felony harassment, which requires proof of a true threat, but the “to convict” instruction did not include the true threat element. Did the “to convict” instruction on the harassment count violate Mr. Olsen’s right to due process?

3. Under the Sentencing Reform Act and the Due Process Clause, the State bears the burden of proving the comparability of an out-of-state conviction by a preponderance of the evidence. Here, the State presented evidence of a California “terroristic threats” conviction, but the California statute is broader than Washington’s felony harassment statute, and the State did not present evidence that Mr. Olsen admitted the facts necessary to find the conduct fell within Washington’s felony harassment statute or that those facts were proved to a jury beyond a reasonable doubt. Did the sentencing court err in including the California conviction in Mr. Olsen’s offender score?

C. STATEMENT OF THE CASE

Edward Olsen was charged with attempted murder, burglary, felony harassment, and malicious mischief based on acts he allegedly committed against Bonnie Devenny, his ex-girlfriend and the mother of his children. CP 163-71. The State alleged Mr. Olsen broke into Ms. Devenny's house, poured gasoline on her, and told her she was going to die. CP 17. Over Mr. Olsen's objections, the trial court admitted evidence of prior crimes Mr. Olsen committed against Ms. Devenny, during which he had allegedly threatened to kill her. 6/18/10 RP 7.¹ After Mr. Olsen was convicted, he argued that a prior California conviction should not be counted in his offender score because it was not comparable to a Washington felony, and that in any event the conviction washed out. 4/11/11 RP 10-51. The sentencing court rejected the arguments and sentenced Mr. Olsen based on an offender score of six. CP 280. Mr. Olsen appeals. CP 294.

¹ Trial transcripts are cited by volume number (e.g. "1 RP"). Pre-trial and post-trial transcripts are cited by date.

D. ARGUMENT

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

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

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

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

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

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

If the State offers evidence of other acts, the court must “closely scrutinize” it to determine if it is truly offered for a proper purpose and its probative value outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose to admit evidence that in fact will be used for the improper purpose of showing action in conformity therewith. Otherwise “motive” and “intent” could be used as “magic passwords whose mere

incantation will open wide the courtroom doors to whatever evidence may be offered in their names.” Saltarelli, 98 Wn.2d at 364 (quoting United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir. 1974)). Evidence that is admitted for a proper purpose may not be used at trial for an improper purpose. Fisher, 165 Wn.2d at 744-49 (trial court properly admitted evidence of prior acts to explain delay in reporting, but prosecutor improperly used it to show action in conformity therewith, requiring reversal).

ER 404(b) must be read in conjunction with ER 403, which mandates exclusion of evidence that is substantially more prejudicial than probative. Id. at 745. Evidence of prior acts should be excluded if “its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” Smith, 106 Wn.2d at 776.

This Court reviews the trial court’s interpretation of ER 404(b) de novo as a matter of law. Fisher, 165 Wn.2d at 745. A trial court’s ruling admitting evidence is reviewed for abuse of

discretion. Id. A trial court abuses its discretion where it fails to abide by the rule's requirements. Id.

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

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

The court allowed testimony about these acts to prove intent, motive, and absence of mistake or accident.² 6/18/10 RP 7; 1 RP 38-39. But the only way these prior incidents proved intent, motive

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

or absence of mistake was through a propensity inference. Indeed, the trial court said:

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

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

This Court reversed a conviction because the trial court committed a similar error in State v. Holmes, 43 Wn. App. 397, 717 P.2d 766 (1986). The defendant in that case was charged with burglary and the trial court admitted evidence of the defendant’s two prior convictions for theft. The State argued, and the trial court agreed, that the evidence was relevant to prove intent. Id. at 398. This Court held the admission of the prior acts violated ER 404(b):

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

Holmes, 43 Wn. App. at 400.

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

When the State seeks to prove the element of criminal intent by introducing evidence of past similar bad acts, the State is essentially asking the fact finder to make the following inference: Because the defendant was convicted of the same crime in the past, thus having then possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant

may be convicted on mere propensity to act rather than on the merits of the current case.

Id. at 335.

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

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

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

Not only did the trial court admit the evidence for the improper purpose of proving action in conformity therewith, but the prosecutor improperly made a propensity argument to the jury. During summation, the prosecutor began his discussion of the prior acts by admonishing the jury that it could not consider them to show action in conformity therewith but only to show motive and intent. 7 RP 874. However, after describing the prior incidents in detail, the prosecutor concluded by saying:

Again, it's a similar incident. What can we draw from this incident? We can infer from this incident that the defendant had premeditated intent during the November 29 incident. It's kind of consistent in these three instances.

7 RP 876. In other words, the prosecutor argued that because Mr. Olsen intended to kill Ms. Devenny during these prior acts he must have intended to kill Ms. Devenny during the extremely similar act at issue in this case. That is precisely the inference forbidden under ER 404(b).

The admission of the prior acts violated not only ER 404(b), but also ER 403, under which evidence should be excluded if it is substantially more prejudicial than probative. The prior acts

admitted here were extremely prejudicial. Ms. Devenny testified that in 1998, Mr. Olsen “tied me up with an electrical cord and choked me” in front of one of the children. 5 RP 620-21. She said Mr. Olsen told her, “You better say ‘good-bye’ to your children.” 5 RP 622. Ms. Devenny further testified, “He said he was going to leave me in the woods so say good-bye.” 5 RP 622. Regarding the 2000 incident, Ms. Devenny testified, “[Mr. Olsen] duct taped me and told me that he was going to cut me in pieces and put me in a blue bin.” 5 RP 623. These descriptions served to inflame the passions of the jury against Mr. Olsen, and were substantially more prejudicial than probative.

c. The remedy is reversal and remand for a new trial.

Evidentiary errors require reversal if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). “[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). In Salas, the Supreme Court held the trial court abused its discretion

under ER 403 by admitting evidence of the plaintiff's immigration status in a personal-injury case. Id. at 672-73. The Court further held that reversal was required: "We find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury." Id. at 673.

If the risk of prejudice inherent in admitting immigration status is great, the risk of prejudice inherent in admitting evidence of prior brutal attempted murders is certainly great. The prosecutor in this case vigorously argued that because Mr. Olsen intended to murder Ms. Devenny during prior incidents, he intended to murder her during this incident. The descriptions of the prior incidents were especially brutal. Absent the evidence, it is reasonably probable that at least one juror would have found Mr. Olsen's actions did not rise to the level of attempted murder, even if they did constitute burglary predicated on assault. As in Salas, this Court cannot say the admission of the improper evidence had no effect on the jury. Accordingly, this Court should reverse the attempted murder conviction, and remand for a new trial at which evidence of the prior acts will be excluded.

2. The to-convict instruction for felony harassment violated due process because it omitted an essential element of the crime.

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

The “to convict” instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error, because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); see In re Winship, 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. Smith, 131 Wn.2d at 262-63. “It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.” Smith, 131 Wn.2d at 263.

Because the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude, it may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Omission of an element from the to-convict instruction “obviously affect[s] a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict.” State v. O’Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). This Court reviews a challenged jury instruction de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

- b. The to-convict instruction for the harassment count violated Mr. Olsen’s right to due process because it omitted the true threat element.

The State charged Mr. Olsen with felony harassment in violation of RCW 9A.46.020. CP 168. The statute provides that a person is guilty of felony harassment if he knowingly threatens to kill the person threatened or any other person and by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020. The First Amendment limits the reach of the statute to “true threats,” which are statements “made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be

interpreted as a serious expression of intention to inflict bodily harm upon or take the life of another individual.” State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001). The State may not prohibit or sanction statements that are not true threats. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

Consistent with the above, the information included the true threat element. CP 168. However, the “to convict” instruction omitted this element. The “to convict” instruction for Count Four provided:

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

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

CP 241. The “to convict” instruction did not include the true threat element. Rather, the true threat requirement was relegated to a mere definitional instruction. CP 240.³

Although Division One has held that a “true threat” is not an essential element of harassment that must be included in the “to convict” instruction, that decision should be revisited in light of intervening jurisprudence. State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007).⁴ In State v. Schaler, the Supreme Court reversed the defendant’s conviction because the trial court did not instruct the jury that it could only convict if it found the defendant issued a true threat. State v. Schaler, 169 Wn.2d 274, 278, 236 P.3d 858 (2010). The full definition of “true threat” was neither in the to-convict instruction nor in a standalone instruction. The Court noted that while the jury was instructed on the necessary mens rea as to the speaker’s conduct, it was not instructed on the necessary mens rea as to the result. Id. at 286. “True threat” includes the latter – that a reasonable speaker would foresee that the statement

³ And the definitional instruction omitted the “threat to kill” requirement of felony harassment. CP 240.

⁴ Division One recently declined to overrule Tellez in Allen, but the Supreme Court has granted review in Allen. State v. Allen, 161 Wn. App. 727, 255 P.3d 784 (2011), review granted, No. 861196 (9/26/11). This Court should therefore take the opportunity to reevaluate the issue and weigh in on the matter.

would be interpreted as a serious expression of intention to inflict harm. Id.

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

The above reasoning supports Mr. Olsen’s argument that a “true threat,” i.e. the mens rea as to the result, is an element that must be included in the to-convict instruction. “[A] crime defined by a particular result must include the intent to accomplish that criminal result as an element.” State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). For example, “[t]he crime of murder is defined by the result of death, RCW 9A.32.030, and the rule is well established that the crime of attempted murder requires the specific intent to cause the death of another person.” Id. Thus, for attempted murder, the mens rea as to the result must be included in the to-convict instruction. See id. The same is true for murder.

See, e.g., WPIC 27.02 (to-convict instruction for second-degree intentional murder). As the Supreme Court explained in another case, the elements that must be included in the to-convict instruction are “the actus reus, mens rea, and causation.” Fisher, 165 Wn.2d at 754 (emphasis added). Because the definition of “true threat” is the mens rea for felony harassment, it must be included in the to-convict instruction.

c. The remedy is reversal of the harassment conviction and remand for a new trial.

Where an essential element is omitted from the “to convict” instruction, reversal is required unless the State can prove beyond a reasonable doubt the error did not contribute to the verdict obtained. Mills, 154 Wn.2d at 15 n.7. The State cannot meet that stringent standard here. Although Ms. Devenny testified that Mr. Olsen called her a bitch and said she was going to die, the couple had a history of violent altercations. Given that history, a reasonable person in Mr. Olsen’s position would not necessarily foresee that the statement would be interpreted as a serious expression of intent to kill, as opposed to the type of hyperbolic venom regularly spewed during arguments in their unstable relationship. This Court cannot know beyond a reasonable doubt

that no juror would have acquitted if required to find a true threat. Accordingly, the conviction on count four should be reversed and the case remanded for a new trial.

3. The sentencing court erred in calculating the offender score, requiring remand for resentencing.

- a. The State bears the burden of proving a defendant's offender score by a preponderance of the evidence.

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

"Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The State bears the burden of proving the existence and comparability of a

defendant's out-of-state convictions. State v. Lopez, 147 Wn.2d 515, 521-23, 55 P.3d 609 (2002).

Washington courts apply a two-part test to determine whether the State has satisfied the burden as to comparability. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). First, the elements of the out-of-state crime must be compared to the relevant Washington crime. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are comparable, the defendant's out-of-state conviction is legally equivalent to a Washington conviction. Id. at 254.

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

- b. The State failed to prove Mr. Olsen's California conviction is comparable to a Washington felony; accordingly, the California conviction should not have been counted in the offender score.

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

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

Cal. Penal Code § 422(a) (emphasis added). Under Washington's harassment statute, a threat is not a felony unless it is a threat to kill. RCW 9A.46.020. The California statute, which encompasses threats to commit great bodily injury, is therefore much broader than Washington's felony harassment statute.

Where crimes are not legally comparable, it is very difficult for the State to prove factual comparability. As the Lavery Court explained:

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

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

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

conviction was comparable to a Washington felony, and it may not be included in Mr. Olsen's offender score.

Other cases are instructive. In Thiefault, for example, the Supreme Court held the State failed to prove the comparability of a Montana robbery conviction by a preponderance of the evidence even though the State presented the judgment and sentence, an affidavit, and the motion for leave to file information which alleged conduct that would have constituted robbery in Washington. State v. Thiefault, 160 Wn.2d 409, 415-17, 158 P.3d 580 (2007).

"[A]lthough the motion for leave to file information and the affidavit both described Thiefault's conduct, neither of the documents contained facts that Thiefault admitted, stipulated to, or that were otherwise proved beyond a reasonable doubt." Id. at 416 n.2.

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

comparability even though the State's evidence showed that California had alleged unlawful entry in the charging documents and the defendant had pled guilty to the crime as charged in one count and had been found guilty beyond a reasonable doubt as charged in the other count. Id. at 483-85.

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

As in Lavery, Thiefault, Thomas, and Ortega, the State in this case failed to prove the comparability of the foreign conviction because it did not present evidence that Mr. Olsen admitted to the necessary facts or that the facts were proved to a jury beyond a reasonable doubt. The evidence showed only that Mr. Olsen entered a nolo contendere plea; he did not stipulate that he threatened to kill the victim. 4/11/11 RP 40-42; ex. 37. Accordingly, the California conviction should not have been counted in the offender score.

- c. Because the California terroristic threats conviction is not comparable to a Washington felony, the Washington custodial interference conviction washes out.

Class C felony convictions “wash out” after a period of five crime-free years in the community and may not be included in the offender score. RCW 9.94A.525(2)(c). Custodial interference in the first degree is a class C felony. RCW 9A.40.060(4). As explained above, Mr. Olsen’s California conviction must be treated as misdemeanor because the State failed to prove terroristic threats is comparable to a Washington felony. Accordingly, the time Mr. Olsen spent in custody due to parole revocations for the terroristic threat conviction must be treated as misdemeanor

probation violations. Our supreme court has held that time spent in custody on misdemeanor probation violations does not interrupt the wash-out period for felony convictions. State v. Ervin, 169 Wn.2d 815, 826, 239 P.3d 354 (2010). Because the probation violations do not count against the wash-out period, Mr. Olsen's custodial interference conviction washes out and must not be included in the offender score. Id.; 4/11/11 RP 48-49.

- d. Mr. Olsen's sentence must be vacated and his case remanded for resentencing on the existing record.

Because both the California conviction for terroristic threats and the Washington conviction for custodial interference should not have been included in the offender score, this Court should vacate the sentence and remand for resentencing. On remand, the State may not introduce new evidence because Mr. Olsen specifically objected to the State's evidence of the comparability of the California conviction as well as the washout calculations. Lopez, 147 Wn.2d at 520. As in Lopez, this Court should "hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced." Lopez, 147 Wn.2d at 520-21 (quoting Ford, 137 Wn.2d at 485).

E. CONCLUSION

Mr. Olsen's attempted murder conviction should be reversed and his case remanded for a new trial because the trial court committed prejudicial error in admitting evidence of prior bad acts. The harassment conviction should be reversed and remanded for a new trial because the "to convict" instruction omitted an essential element of the crime. In the alternative, the sentence should be vacated and the case remanded for resentencing on the existing record because the California conviction for terroristic threats and the Washington conviction for custodial interference were erroneously included in the offender score.

DATED this 23rd day of January, 2012.

Respectfully submitted,



Lila J. Silverstein - WSBA 38394
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 42135-6-II
v.)	
)	
EDWARD OLSEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> RANDALL SUTTON KITSAP COUNTY PROSECUTING ATTORNEY 614 DIVISION ST. PORT ORCHARD, WA 98366-4681	() () (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA PORTAL
<input checked="" type="checkbox"/> EDWARD OLSEN 782316 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVENUE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF JANUARY, 2012.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎ (206) 587-2711

WASHINGTON APPELLATE PROJECT

January 23, 2012 - 4:22 PM

Transmittal Letter

Document Uploaded: 421356-Appellant's Brief.pdf

Case Name: STATE V EDWARD OLSEN

Court of Appeals Case Number: 42135-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Appellant'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: Ann M Joyce - Email: ann@washapp.org

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

rsutton@co.kitsap.wa.us