

67926-1

67926-1

NO. 67926-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KRIS PEDERSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

TOMÁS A. GAHAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAR 28 PM 3:22

TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ISSUES PRESENTED</u> | 1 |
| B. <u>PROCEDURAL FACTS</u> | 3 |
| C. <u>SUBSTANTIVE FACTS</u> | 3 |
| D. <u>ARGUMENT</u> | 5 |
| 1. THE TRIAL COURT PROPERLY CONTINUED PEDERSON'S TRIAL | 5 |
| a. CrR 3.3 And Facts Regarding Continuances | 5 |
| b. Trial Was Timely Under CrR 3.3 | 11 |
| 2. PEDERSON NEVER OBJECTED TO THE TRIAL COURT'S DENIAL OF PEREMPTORY CHALLENGES FOR ALTERNATE JURORS, SO THE ISSUE IS WAIVED ON APPEAL | 17 |
| a. Facts Regarding Peremptory Challenges | 17 |
| b. Pederson Waived This Claim..... | 19 |
| 3. THE FIREARMS FOUND IN PEDERSON'S CAR WERE RELEVANT TO THE CHARGED CRIMES .. | 22 |
| a. Facts Regarding Firearms Found On November 8, 2010 | 22 |
| b. The Firearms Were Relevant..... | 24 |
| 4. THE INFORMATION AND THE "TO CONVICT" JURY INSTRUCTION PROVIDED PEDERSON NOTICE OF FELONY HARASSMENT AND PRESERVED HIS FIRST AMENDMENT RIGHT | 27 |

a. Facts Regarding "True Threat" 28

b. The Information And The Jury Instructions
Were Sufficient..... 29

D. CONCLUSION 30

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

| | |
|---|--------------------|
| <u>Seattle v. Harclan</u> , 56 Wn.2d 596, 354 P.2d 928 (1960)..... | 20 |
| <u>State v. Allen</u> , ___ Wn.2d ___, 294 P.3d 679 (2013)..... | 29 |
| <u>State v. Barnes</u> , 158 Wn. App. 602, 243 P.3d 165 (2010)..... | 25, 26 |
| <u>State v. Bird</u> , 136 Wn. App. 127, 148 P.3d 1058 (2006)..... | 20, 22 |
| <u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990)..... | 25 |
| <u>State v. Campbell</u> , 103 Wn.2d 1, 691 P.2d 929 (1984)..... | 11 |
| <u>State v. Downing</u> , 151 Wn.2d 265, 87 P.3d 1169 (2004)..... | 11 |
| <u>State v. Fagalde</u> , 85 Wn.2d 730, 539 P.2d 86 (1975)..... | 20 |
| <u>State v. Freeburg</u> , 105 Wn. App. 492, 20 P.3d 984 (2001)..... | 25, 26, 27 |
| <u>State v. Kenyon</u> , 167 Wn.2d 130, 216 P.3d 1024 (2009)..... | 13 |
| <u>State v. Saunders</u> , 153 Wn. App. 209, 220 P.3d 1238 (2009)..... | 11, 13, 14, 15, 16 |
| <u>State v. Vreen</u> , 143 Wn.2d 923, 26 P.2d 236 (2001)..... | 20 |

| | |
|---|--------|
| <u>State v. Wicke</u> , 91 Wn.2d 638, 591 P.2d 452 (1979)..... | 20, 22 |
|---|--------|

Constitutional Provisions

Federal:

| | |
|---------------------------|--------|
| U.S. Const. amend. I..... | 29, 30 |
|---------------------------|--------|

Statutes

Washington State:

| | |
|---------------------|------------|
| RCW 9A.46.020 | 27, 26, 28 |
|---------------------|------------|

Rules and Regulations

Washington State:

| | |
|--------------|-------------------------|
| CrR 3.3..... | 1, 5, 6, 11, 12, 13, 14 |
| CrR 3.5..... | 11 |
| CrR 6.5..... | 1, 19, 20, 21, 22 |
| ER 401 | 24 |

A. ISSUES PRESENTED

1. CrR 3.3 allows for a continuance of the trial date upon written agreement of the parties and upon a motion by a party where the continuance is required in the “administration of justice.” If a case is continued in the administration of justice, the court must state on the record or in writing its reason for granting the continuance. Here, the trial date was continued on numerous occasions, based on agreements between the parties, accommodations of pre-scheduled vacations and other trials, and to permit Pederson’s defense attorney to adequately prepare a defense. The court granted the continuances in the “administration of justice” and stated on the record or in writing its reason for granting each continuance. Did the trial court preserve Pederson’s right to a timely trial under CrR 3.3?

2. CrR 6.5 entitles each party in a criminal case to an additional peremptory challenge against an alternate juror during jury selection. In order to properly preserve an erroneous denial of a party’s peremptory challenges on appeal, a party must make a timely objection either during trial or in a motion for a new trial. Failure to preserve the objection waives the issue on appeal. Here, the trial court erroneously denied both parties the opportunity to use

a peremptory challenge against an alternate juror, but Pederson's attorney never objected. Did Pederson waive the issue on appeal?

3. Evidence is relevant if it has some tendency to prove the crime charged. A determination of the relevance of a piece of evidence against its potential for unfair prejudice is within the discretion of the trial court. Here, Pederson was found with a pistol resembling the description of the pistol used in the shooting two weeks earlier. He was also found with a rifle one day after threatening to kill his brother with a rifle. Did the trial court act within its discretion when it held that both firearms were relevant and therefore admissible?

4. The Washington Supreme Court has ruled that charging documents alleging felony harassment need not allege a "true threat," and that the "to convict" jury instruction for felony harassment need not define a "true threat" for the jury, as long as the jury is also provided with that definitional instruction. Here, the State provided all of the essential elements of felony harassment in the information and in the "to convict" jury instruction, and defined "true threat" in a definitional instruction. Were the information and the "to convict" instruction correct?

B. PROCEDURAL FACTS

Kristopher Pederson was charged with numerous crimes for shooting at his brother and threatening to kill him and his girlfriend, including attempted murder. CP 33-34. Following a jury trial, he was convicted only of two crimes, assault in the second degree with a firearm and felony harassment, and was given a standard range sentence totaling 43 months in custody. CP 118.

C. SUBSTANTIVE FACTS

Kristopher Pederson was upset with his brother, Donald Pederson,¹ and his brother's girlfriend, Teresa Mirante. 11RP 22, 66-69.² Kristopher Pederson lived with them in Mirante's home, but he was asked to leave after being verbally abusive to Mirante and leaving a skinned deer carcass on the porch. 11RP 66-69. On October 25, 2010, Pederson was gathering his possessions, preparing to move out; Donald testified that he saw Pederson leave

¹ Because Donald and Kristopher Pederson share a last name, this brief will refer to Donald by his first name. No disrespect is intended.

² This brief will refer to the Verbatim Report of Proceedings as follows: 1RP (2/22/11); 2RP (3/14, 5/24, 6/28, 7/25, 8/9/11); 3RP (3/24, 4/15, 4/25, 5/5, 5/16, 9/1/11); 4RP (4/1/11); 5RP (9/6/11); 6RP (9/7/11); 7RP (9/8, 9/21-22, 1/4/11); 8RP (9/12/11); 9RP (9/13/11 AM); 10RP (9/13/11 PM); 11RP (9/14/11); 12RP (9/15/11); 13RP (9/19/11); 14RP (9/20/11).

with a "holstered pistol" that Pederson had previously "stashed in the closet." 11RP 63.

The next day, on October 26, 2010, Donald heard Pederson's truck pulling up to the home, and went out on the porch to meet him. 11RP 41. Pederson walked toward the porch, lowered his sunglasses, and said, "You're a f'ing dead man." 11RP 49. Then Donald saw Pederson pull out a pistol from behind his shirt, so Donald dashed back into the house as he heard a shot fired. 11RP 43-44. Donald believed that the silver six-shooter he saw in Pederson's hands was the same revolver Pederson had removed from the closet the day before. 11RP 50. Donald scrambled into his home and ran out the back sliding-glass door while calling 911. 11RP 44.

When the police arrived, Pederson was nowhere to be found, but two weeks later, on November 7, 2010, Donald received a phone call from him. 11RP 7, 72. Pederson told Donald, "Don't bother moving, because I'm a very good shot with my high-powered rifle. And before I kill myself, I'm going to take you and Teresa out." 11RP 76. Donald called the police and reported the threat. 11RP 22.

D. ARGUMENT

1. THE TRIAL COURT PROPERLY CONTINUED PEDERSON'S TRIAL.

Pederson contends that his rights were violated under Criminal Rule (CrR) 3.3 because his trial was significantly delayed by continuances requested by both parties. But every continuance was either requested by Pederson or granted in the administration of justice for reasons articulated on the record or in writing by the court, so his claim fails.

a. CrR 3.3 And Facts Regarding Continuances.

CrR 3.3 requires that a defendant who is detained in jail be brought to trial within 60 days after the commencement date. The rule allows for the resetting of a commencement date when the court grants a continuance. CrR 3.3(c)(2). A continuance can be granted for the following circumstances: 1) "upon written agreement of the parties," which must be signed by the defendant; 2) upon a "motion by the court or a party" where the continuance is "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(1) and (2). If the court grants a continuance based on a motion of the

parties, it must state on the record or in writing the reason for the continuance. CrR 3.3(f)(1). The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay. CrR 3.3(f)(2). When any period of time is excluded from the speedy trial period under CrR 3.3(e), the speedy trial period extends to at least "30 days after the end of that excluded period." CrR 3.3(b)(5).

Pederson was given an initial trial date of April 11, 2011. CP 126. On March 14, 2011, both Pederson's attorney and the prosecutor requested a continuance to accommodate a pre-scheduled two-week vacation for defense counsel, and a four-day prosecutor's vacation, and to permit the defense attorney more time to prepare her case and gather incoming forensic discovery. Appendix at 1.³ Pederson himself complained about the continuance, saying that evidence had been available since day one. 2RP 10. The court continued the case until May 9, 2011, ruling that it was accommodating the vacation schedules of both attorneys. Appendix at 1.

One month later, on April 15, 2011, both parties appeared before the presiding court; the prosecutor indicated that she had

³ The Appendix summarizes the various continuances, their reasons, the new trial dates, the court's basis, and the cite to the record.

not received any supporting evidence regarding Pederson's recently-invoked diminished capacity defense claim and therefore requested that Pederson be sent to Western State Hospital for an evaluation. Appendix at 1; 3RP 6-9. Pederson's defense attorney countered that she had not yet received her expert's report, and that the State's request was premature. 3RP 6-13. Both parties also expressed their concern that the case would have to be continued beyond the current trial date in order to secure the mental health evaluation and to accommodate their own vacations and witness availability, but neither had enough information to select a particular trial date yet. 3RP 6-13. The court made no ruling but was on notice that the parties would likely request a continuance. Appendix at 1.

Ten days later and three weeks prior to trial, on April 25, 2011, the prosecutor made a motion to compel any mental health evaluation of Pederson in anticipation of the diminished capacity defense. Appendix at 1. At the hearing, Pederson's attorney also indicated that voluntary intoxication would be another likely defense, which further concerned the prosecutor, who was attempting to prepare for trial by the actual trial date. 3RP 14-23; Appendix at 1. Because defense counsel told the court that she

had not yet obtained evaluations in support of either the diminished capacity or the voluntary intoxication defense, the court did not grant the motion to compel, and the trial date remained May 9, 2011. 3RP 18-23.

On May 5, 2011, both parties requested a continuance. Appendix at 1. Pederson's attorney gave formal notice of a voluntary intoxication defense, and told the court that she was expecting delivery of the defense expert's report on May 12, 2011. Appendix at 1. Given the defense attorney's representations, the presiding judge granted the continuance in the administration of justice to May 23, 2011, with Pederson's speedy trial expiring thirty days later. 3RP 26-27; Appendix at 1. But on the day that Pederson's trial was scheduled to begin, the prosecutor was in trial on another case, so the parties were heard the following day, on May 24, 2011, for a continuance motion. Appendix at 1.

On May 24, 2011, Pederson's attorney made a motion to continue the trial date and Pederson agreed with his counsel's request. Appendix at 1. While the prosecutor on the case was still in trial on another matter, Pederson's attorney indicated that she had finished interviewing State's witnesses and wanted to review transcripts of those interviews with her client before trial.

Appendix at 1. Pederson's attorney also made the request to accommodate her pre-planned training, which would last from June 12 until June 25, 2011. 2RP 11. Pederson, his attorney said, agreed to the continuance. 2RP 11; Appendix at 1. The State did not object, and the court granted the defense attorney's request in the "administration of justice," giving a new trial date of June 28, 2011, with an expiration thirty days later. 2RP 11; Appendix at 1.

On June 28, 2011, the day trial was scheduled to begin, Pederson's attorney requested another continuance. CP 127, 128; Appendix at 2. The defense mental health expert who had evaluated Pederson and was scheduled to provide evidence for Pederson regarding his voluntary intoxication defense was not available to testify until August 9, 2011, so Pederson's lawyer was asking to continue the start of trial until July 25, 2011. Sub. CP 127, 128; Appendix at 2. The State did not object, but noted on the trial continuance order that she "may need to make [a] future motion to continue" with regard to the actual trial date, as she had not yet confirmed witness availability for the new date selected by Pederson's attorney. CP 127, 128. The continuance order indicated that Pederson agreed to the continuance, and bore his

signature. CP 127, 128. The court granted the continuance.

CP 127, 128.

On July 25, 2011, the prosecutor, who was in trial on another case, asked the court to continue Pederson's trial until August 10, 2011, over Pederson's objection, because of issues with witness unavailability; one of the primary detectives was not available.

Appendix at 2. The court pointed out that "when the court granted a continuance, the defense continuance, it specifically indicated that the trial date may need to be adjusted for ...availability of the State's witness," adding that "[p]rescheduled vacation is a basis to continue." Appendix at 2. The new trial date was set for August 10, 2011, with an expiration date of September 9, 2011.

Appendix at 2.

On August 9, 2011, the State asked for another continuance to accommodate officer availability. 2RP 20. The court denied the request, finding that the prosecutor already had this opportunity at the prior hearing, but agreed to move the trial date within its current expiration date to September 1, 2011. 2RP 21-23. The expiration date of September 9, 2011, remained in place. 2RP 23.

On September 1, 2011, pretrial hearings began in the case.⁴

b. Trial Was Timely Under CrR 3.3.⁵

The decision whether to grant or deny a continuance rests within the sound discretion of the trial court. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). A reviewing court will not disturb the trial court's decision absent a clear showing that the trial court's decision was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Id. Moving for a continuance "by or on behalf of any party waives that party's objection to the requested delay." CrR 3.3 (f)(2). Granting a defense counsel's request for a continuance to ensure effective representation and a fair trial is not necessarily an abuse of discretion. State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984).

Pederson relies on State v. Saunders, 153 Wn. App. 209, 220 P.3d 1238 (2009). Saunders was charged with one count of

⁴ Pederson's brief indicates that pretrial proceedings did not begin until September 6, 2011, but pretrial motions began on September 1, 2011 with the CrR 3.5 testimony of a witness. Brief of Appellant at 7; 3RP 55.

⁵ A court may grant a continuance based on "written agreement of the parties, which must be signed by the defendant" or "on a motion of the court or a party" where a continuance is "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(1), (2).

failing to register as a sex offender. Saunders' attorney moved for a continuance of the first trial date over his client's objection because the attorney needed "more time to prepare for trial." 153 Wn. App. at 212. Then, again over Saunders' objection, his attorney requested another continuance for "ongoing invest[igation]/negotiations, defense attorney in trial." Id. A third continuance was requested by the defense attorney and the State for "further negotiations," and Saunders voiced his objection on the record, saying that he was "ready to go to trial." Id. The court's order merely stated that the continuance was for "negotiations," but never indicated that it was in the "administration of justice," nor did it explain the court's basis for the continuance. Id.

Then Saunders filed a pro se motion to dismiss his case based on a violation of CrR 3.3. Id. at 212-13. At that hearing, the prosecutor explained that the case was still in the "negotiations" phase. Id. The court, with no explanation, ordered one more continuance: "I'm going to grant one more continuance, last continuance without good explanation, which I haven't actually heard." Id. at 213. On the day of trial, the prosecutor requested yet another continuance because a "trial prosecutor" had not yet been assigned. Id. at 214. The court granted a six-day continuance,

finding that it was “required in the administration of justice pursuant to CrR 3.3(f)(2) and the defendant will not be prejudiced in his or her defense,” but did not explain how the State’s failure to assign the case to a “trial prosecutor” warranted a continuance in the “administration of justice.” Id. at 215.

The reviewing court, relying on the Washington Supreme Court’s opinion in State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009), found that a trial court continuing a trial pursuant to a motion made by the court or by a party “is required to state on the record or in writing the reasons for the continuance.” Saunders, 153 Wn. App. at 220. The Saunders court pointed out that CrR 3.3 provides “flexibility in avoiding the harsh remedy of dismissal with prejudice,” including providing the 30-day buffer period for excluded times, but insisted that the rule still requires that a “stated lawful basis” for continuances be made on the record or in writing. Id. Because the trial court never provided its reasoning for granting the continuances, the appellate court found that they were “manifestly unreasonable,” and therefore an abuse of the court’s discretion. Id. at 221.

In the case at hand, although both his attorney and counsel requested an initial continuance on March 14, 2011, Pederson did

object. Appendix at 1. But the similarities between this case and Saunders end there. In Saunders, the only reason given for the initial continuances was that the attorneys needed to prepare for trial and wanted to negotiate; the basis for the later continuance was the State's failure to assign the case to a "trial prosecutor." 153 Wn. App. at 215. Here, Pederson's attorney had a three-week vacation scheduled before the trial date, the State had a four-day vacation, and Pederson's attorney was still awaiting crucial forensic discovery from police. Appendix at 1. While Pederson himself told the trial court that the evidence was ready from the start, this contradicts the representations of both the State and Pederson's own attorney, who asserted on the record that there was substantial additional evidence which still had not been submitted to either party. Appendix at 1. The court's continuance on March 14, 2011, based on the attorney's vacations and the "administration of justice," was a "stated lawful basis" and thus satisfied the rule.

Pederson agreed to the next continuance, which was a joint motion granted on May 5, 2011, so he waived any objection to this ruling under CrR 3.3(f)(2). But even if he had objected, the court's ruling "in the administration of justice" is more than supported by the record, which shows that a new affirmative defense had been

raised – involuntary intoxication – requiring a report from Pederson’s defense expert that could not be ready in time for trial. Appendix at 1. The next continuance was requested by Pederson’s attorney because she wanted to review the transcript of just-completed interviews with Pederson before the start of trial, and because the prosecutor assigned to the case was in trial on another matter. Appendix at 1. Pederson also agreed with this request for a continuance, but even if he had not, the fact that one of the attorneys was in trial and that Pederson and his attorney wanted time to review witness transcripts before trial would have provided ample basis for granting the continuance. Appendix at 1.

In all of the continuances granted by the trial court, the bases for the continuances were stated on the record, and were valid reasons. Appendix 1-2. This is in stark contrast to the continuances granted, without explanation or even argument, in Saunders, 153 Wn. App. at 220.

Pederson also argues that the trial court never considered how these continuances prejudiced him. But most of the continuances were requests to accommodate crucial aspects of *his* defense, whether it was determining the exact nature of his mental health defense (diminished capacity vs. voluntary intoxication),

to allow his defense counsel to return from vacation, or to permit Pederson to prepare his case with his attorney by reviewing the transcripts of witness interviews. Appendix at 2. While it is true that Pederson was in custody during this time period, to proceed on an attempted murder charge without adequately examining the potential defenses and preparing her client, who eventually testified, would have been far less reasonable than the requests for continuances themselves. 14RP 56-126.

The bases for each continuance were articulated on the record or written on the requests for continuances themselves. Appendix at 1-2. Unlike Saunders, this was not a question of mismanagement or a lack of due diligence; the parties were actively working toward trial but were bound by the unpredictable nature of the process and reliance on the myriad factors that inevitably affect a serious case on its journey toward trial: the availability of witnesses, prescheduled vacations, preparation of mental health defenses, and awaiting expert evaluations. Appendix at 1-2. The decision to continue the trial, even for several months, to ensure that Pederson's defense attorney was adequately prepared for trial and to accommodate prescheduled vacations and witness availability issues, was well within the court's discretion.

2. PEDERSON NEVER OBJECTED TO THE TRIAL COURT'S DENIAL OF PEREMPTORY CHALLENGES FOR ALTERNATE JURORS, SO THE ISSUE IS WAIVED ON APPEAL.

While Pederson correctly points out that the trial court erred when it denied both parties their right to exercise a peremptory challenge for the alternate jurors, Pederson's attorney did not object. The issue, therefore, was not preserved on appeal.

a. Facts Regarding Peremptory Challenges.

Prior to voir dire, the trial judge informed the parties of her preferred method for jury selection, indicating that she permitted a peremptory challenge "on any juror at any time." 7RP 5. She told the parties that they would have "six peremptories" and she would not add one for the alternates. 7RP 7. The prosecutor inquired further, and the judge replied that she does not "add a peremptory" for alternates. 7RP 7. Later in the pretrial proceedings, the prosecutor raised the issue again, saying that she was "surprised by the lack of peremptory challenge to the ..alternates," but that she did not have a "specific legal objection." 7RP 19.

Then Pederson's defense attorney asked the court for additional peremptories for the alternates:

[I]n my experience, most courts – not to say if it's right or wrong – add additional peremptories for 14 people as opposed to six peremptories for 12 people. So my request would be not that we get one for each, but that we have one additional one to address the two additional people who may very well, in fact, be part of the jury. And, as I'm sure the Court's aware, dynamic and mix and all of those things are important in the inexact science of jury selection.

7RP at 19. The trial judge responded that she was "comfortable with adding a peremptory" and agreed to do so. 7RP 19.

After the parties had concluded their voir dire of the jury and had exercised their strikes for cause, the defense attorney noted a disparity in the number of jurors left relative to the number of peremptory challenges allotted: "I count 27 jurors so that would leave us with 13. I suppose the court could seat only one alternate." 9RP 40. The State expressed concern at seating only one alternate and asked the court to consider requesting more jurors, but the court declined. 9RP 40. As a solution, the trial judge initially proposed withdrawing the additional peremptory strikes she had granted to each party for the alternates. 9RP 40-41. The judge asked if the parties agreed, but, after conferring with each other, the prosecutor and the defense attorney had a different proposal. 9RP 41. The prosecutor agreed to forgo her additional peremptory strike, and both parties believed that this would still

permit the defense attorney to retain her additional peremptory for the alternate juror. 9RP 41.

After counting the remaining jurors, however, the defense attorney realized that there still were insufficient jurors to accommodate even one additional peremptory challenge for an alternate: "My math brings us to 26 total [jurors]. So we would still have the problem of either the court needing to say only six peremptories or..." 9RP 43. The trial judge interrupted to accept the suggestion, saying, "I'll say only six peremptories. I think I have discretion to do that." 9RP 43. Then the parties proceeded to use their peremptory challenges, without any further comment or objection from either party regarding the number of peremptory challenges allotted by the trial court. 9RP 43-47.

b. Pederson Waived This Claim.

Pederson argues that he was entitled to an additional peremptory challenge against the alternate jurors under Criminal Rule 6.5 (CrR 6.5). The State concedes that the trial judge erroneously precluded both parties from exercising their seventh peremptory challenge for an alternate juror, but Pederson's

attorney never objected. The issue, therefore, is not preserved for appeal.

CrR 6.5 provides that "each party shall be entitled to one peremptory challenge for each alternate juror to be selected." Under State v. Vreen, 143 Wn.2d 923, 26 P.2d 236 (2001), the erroneous denial of a litigant's peremptory challenge, when properly preserved, cannot be harmless when the objectionable juror actually deliberates. Vreen, 143 Wn.2d at 932. In order "[t]o preserve judicial error for appeal," a timely objection must be made; otherwise, a party waives his right to make such a challenge on appeal. State v. Wicke, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). "An error must be called to the trial court's attention at a time that still affords the court an opportunity to correct it." State v. Fagalde, 85 Wn.2d 730, 539 P.2d 86 (1975). The error may be raised during the course of trial or in a motion for a new trial. Seattle v. Harclaon, 56 Wn.2d 596, 354 P.2d 928 (1960).

In State v. Bird, the trial judge miscounted the remaining peremptory challenges, and barred the defense attorney from executing his final challenge against an alternate juror, in violation of CrR 6.5. 136 Wn. App. 127, 134, 148 P.3d 1058 (2006). The State conceded the error, but argued that the defense attorney had

not properly objected. Id. The court pointed out that the defense attorney “raised the trial court’s error at the conclusion of voir dire and in his motion for a new trial.” Id. Because the “objection was timely made and allowed the trial court to correct its error by seating a new venire for jury selection,” the court found that the issue was properly preserved on appeal. Id.

Here, Pedersen’s defense attorney waived the right to raise a challenge based on a violation of Rule CrR 6.5 because she never objected. The closest Pederson’s attorney came to making an objection was when she told the trial judge that in her experience, other judges had given an additional peremptory challenge for an alternate, but that she did not believe that was either “right or wrong.” 7RP 19. Later, when it became apparent that there were not sufficient jurors to proceed with all of the peremptory challenges required to permit one for the alternates, she mentioned to the court a potential solution to the problem of not having enough jurors to allow for the additional peremptory: “So we would still have the problem of either the court needing to say only six peremptories...” 43. Once offered this solution by the defense attorney, the trial judge seized upon it, ruling, “I’ll say only six peremptories. 7RP 43. I think I have discretion to do that.”

7RP 43. Pederson's attorney simply proceeded with jury selection and, unlike the defense attorney in Bird, never raised an objection, either at the start of trial or at its conclusion.

A trial court must be afforded an opportunity to correct a CrR 6.5 error before it may be addressed on appeal. Wicke, 91 Wn.2d at 642. Here, the trial court was never afforded that opportunity. Pederson cannot successfully raise this issue for the first time on appeal.

3. THE FIREARMS FOUND IN PEDERSON'S CAR WERE RELEVANT TO THE CHARGED CRIMES.

Pederson argues that the trial court erred in admitting the weapons found in his car two weeks after the shooting and one day after his death threat, but the weapons were relevant to the charged crimes and their admissibility was within the court's discretion.

a. Facts Regarding Firearms Found On November 8, 2010.

Donald Pederson described the gun that his brother pointed at him on the day of the shooting as a "six-shot-revolver." 11RP 50. Donald also testified that on November 7, 2010, Pederson called

him and told him not to “bother moving,” because Pederson was a “very good shot” with his “high-powered rifle.” 11RP 76.

At trial, Deputy Soderstrom testified at trial that he found two bullet holes in and near Donald’s front door following the shooting, and found a spent bullet round inside the home. 12RP 101. He testified that there was no casing found, just a round, which was consistent with a bullet fired from a revolver. 12RP 107. On November 8, 2010, Pederson’s vehicle was stopped near Ellensburg on suspicion of driving while under the influence of alcohol. 10RP 22-23; 11RP 13-22. He had a six-shot revolver on his person and a rifle in the back of his truck. 10RP 23; 11RP 13-22.

During pretrial motions, Pederson’s attorney moved to suppress any evidence of the firearms. 5RP 112-13. Pederson’s attorney argued that the guns were not relevant to the shooting because there was no forensic evidence tying them to the actual shooting, and because they were found two weeks after the shooting. 5RP 112-13. The State countered that the revolver was consistent with the gun seen by Donald on the day of the shooting and that the rifle was evidence of the felony harassment charge, where Pederson told Donald that he was going to murder him with

his “high powered rifle,” just one day before the rifle was found in his truck. 5RP 114.

The trial judge ruled that both firearms were relevant and therefore admissible, despite the absence of forensic evidence connecting them directly to the shooting. 6RP 145. The court found that the rifle was “relevant to a threat made on November 7th.” 6RP 145. The court ruled that the ultimate question was one for the jury:

I think Mr. Don Pederson should be able to say what he believes he saw, and the jurors can hear about whether that compares in any way with the revolver that was in the car, adding that “the reference to the ...rifle in the November 7th alleged threat... makes the [rifle] relevant.

6RP 146.

b. The Firearms Were Relevant.

Evidence Rule (ER) 401 defines “relevant evidence” as evidence having “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The balancing of the relevance and probative value of evidence versus its potential for unfair prejudice is within the trial court’s

discretion. State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990). Evidence of a gun in the possession of a defendant who makes a threat to shoot someone is relevant evidence in a charge of felony harassment. State v. Barnes, 158 Wn. App. 602, 604, 243 P.3d 165 (2010).

Pederson repeats the argument made by his defense attorney during pretrial motions, contending that the trial court abused its discretion when it admitted the gun and rifle into evidence. He relies extensively on State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001). But the facts here are altogether separate from Freeburg because the gun evidence here was relevant and probative of the crimes charged.

In Freeburg, the defendant was arrested three years after a homicide he was accused of committing, and the trial court permitted the State to introduce evidence that the defendant had a gun on him at the time of his arrest. 105 Wn. App. at 495. The gun found on Freeburg was not the same gun that was used in the homicide three years earlier. Id. Upon review, the court found that the evidence of the gun was prejudicial and not probative: “The State failed to show that the fact Freeburg carried a loaded gun ... in 1997 was evidence of consciousness of guilt in the 1994

shooting ... or that its probative value outweighed its harmful effect.” 105 Wn. App. at 501.

In State v. Barnes, in contrast, Barnes walked into a bank and threatened to shoot everyone at the branch; the police found a gun in his car later that same day. 158 Wn. App. at 604. The defendant was charged with felony harassment and the court of appeals found that the gun was properly admitted into evidence because it assisted the jury in assessing the nature of the threat. Id. In other words, the fact that the defendant actually had a gun accessible to him made his threat to return to the bank and shoot everyone much more plausible, and therefore relevant. The court ruled that the gun evidence was properly offered to prove that Barnes made a “true threat” as required to prove a violation of RCW 9A.46.020(1)(a)(i). Id. at 610.

Here, unlike Freeburg, the revolver found on Pederson’s person matched the description Donald gave the jury of the gun that was used to shoot at him two weeks earlier, and was consistent with the type of gun that would expend a round like the one found after the shooting. Like in Barnes, the rifle found in Pederson’s car one day after the threatening phone call to Donald lent credibility to the nature of the death threat. The fact that

Pederson had access to a **gun** was evidence that could lead a reasonable person to infer that his threat was genuine and that he had taken steps to carry it out.

The trial court here admitted the guns into evidence because they were directly connected to the crimes themselves. 6RP 143-46. This is not akin to Freeburg, where three years separated the crime from the arrest, and there was no evidence connecting the two. The trial court here rightly determined that the weight that should be given to the evidence should be determined by the jury, but that both weapons were relevant and more probative than prejudicial. 6RP 143-46. This decision was well within the trial court's discretion.

4. THE INFORMATION AND THE "TO CONVICT" JURY INSTRUCTION PROVIDED PEDERSON NOTICE OF FELONY HARASSMENT AND PRESERVED HIS FIRST AMENDMENT RIGHT.

Pederson argues that the charging language and the "to convict" jury instruction for the charge of felony harassment were insufficient because they did not describe a "true threat," but the Washington Supreme Court has ruled that "true threat" is not an

essential element of the crime that needs to be included in either document.

a. Facts Regarding "True Threat."

In count IV of the charging document, Pederson was accused of felony harassment- domestic violence, for knowingly and without lawful authority threatening to "cause bodily injury immediately or in the future to Donald Pederson, by threatening to kill him, and the words or conduct did place said person in reasonable fear that the threat would be carried out; Contrary to RCW 9A.46.020(1)(2)." CP 35.

In the jury instruction defining "threat," the jury was instructed as follows:

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 or 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 80. The "to convict" instruction asked the jury to find, before conviction, that Pederson "knowingly threatened" Donald "immediately or in the future," that the words "placed Donald in

reasonable fear that the threat would be carried out,” and that Pederson acted “without lawful authority.” CP 82.

b. The Information And The Jury Instructions Were Sufficient.

Pederson contends that the charging document was deficient because it failed to allege that the threat was a “true threat” (i.e., that it was more than “idle talk” and that a reasonable victim would take it seriously), and that the “to convict” instruction was similarly flawed, violating Pederson’s First Amendment right to free speech by failing to require that the jury find that the threat was “true.” But Pederson briefed these arguments prior to the Washington Supreme Court’s holding in State v. Allen, ___ Wn.2d ___, 294 P.3d 679 (2013), which is exactly on point. In Allen, the court dealt with jury instructions and charging language mirroring Pederson’s for the same charge. Id.

The Washington Supreme Court settled this issue in Allen, finding explicitly that the definition of “true threat” was not an element that had to be alleged, nor did it have to be included in the charging document. Id. at 688-89. Because the jury was instructed as to the proper definition of a “true threat” in the jury instructions,

"the defendant's First Amendment rights were protected." Id. The information and the jury instructions were free from error and this Court should affirm the conviction.

D. CONCLUSION

For the foregoing reasons, the defendant's convictions should be affirmed.

DATED this 28 day of March, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
TOMAS A. GAHAN, WSBA #32779
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX

| Date | Request | Reason | Ruling | New Trial Date | Cite |
|---------|--|---|--|----------------|-----------|
| 3/14/11 | Joint motion to continue | <ul style="list-style-type: none"> • Defense vacation: 4/20-5/3/11 • State vacation: 4/18-4/22/11 • Defense wants time to prepare case • Defense still awaiting evidence-bulk of forensics | Granted for vacation & administration of justice | 5/9/11 | 2RP 7-10 |
| 4/15/11 | Parties put on record there may be a request for a continuance | <ul style="list-style-type: none"> • Pending diminished capacity defense information • Vacation and witness availability conflicts (defense has two-week vacation coming up before trial date) • Defendant's possible commitment to Western State Hospital for diminished capacity defense | No ruling, but court on notice | 5/9/11 | 3RP 6-13 |
| 4/25/11 | State's motion to compel diminished capacity discovery | <ul style="list-style-type: none"> • With imminent trial date, State requests reports for diminished capacity defense • Defense just added voluntary intoxication defense, but has not yet provided records supporting defense • State wants to send defendant to Western State for evaluation | No ruling, but court on notice | 5/9/11 | 3RP 14-23 |
| 5/5/11 | Joint motion to continue | <ul style="list-style-type: none"> • Defense will raise voluntary intoxication defense, awaiting expert report due 5/12/11 • Pederson agrees to continuance and to extension of speedy trial | Granted for administration of justice | 5/23/11 | 3RP 26-27 |
| 5/24/11 | Defense motion to continue (Defendant in agreement) | <ul style="list-style-type: none"> • State currently in another trial • Defense attorney wants more time to review recent witness interviews with defendant • Trial will take 3 weeks and State is in trial on another case | Granted | 6/28/11 | 2RP 11 |

APPENDIX

| | | | | | |
|---------|---|---|--|---------|-----------------|
| | | <ul style="list-style-type: none"> • Defense attorney has pre-planned training from 6/12-6/25. • Defendant agrees with continuance | | | |
| 6/28/11 | Defense motion to continue | <ul style="list-style-type: none"> • Defense expert unavailable until 8/9/11 • State puts on record that it “may need to make future motion to continue” with regard to new trial date, as witness availability for the State on new date selected by defense counsel was not available • Defendant agrees to continuance | Granted, with understanding State may ask for different date depending on witness availability | 7/25/11 | Sub CP 127, 128 |
| 7/25/11 | State’s motion to continue. Defendant objected. | <ul style="list-style-type: none"> • State still in trial on another case • State witness on vacation • Court: “When the court granted a continuance, the defense specifically indicated that the trial date may need to be adjusted for ...availability of the State’s witness. Prescheduled vacation is a basis to continue ...” | Granted | 8/10/11 | 2RP 17-19 |
| 8/9/11 | State’s motion to continue. Defendant objected | <ul style="list-style-type: none"> • Officer vacation | Denied: Court denies continuance but moves trial date within speedy to 9/1/11 (speedy expiration is 9/9/11). | 9/1/11 | 2RP 20-23 |
| 9/1/11 | Trial Starts | | | | |

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE V. KRIS PEDERSEN, Cause No. 67926-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

03/28/13

Date