IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FRASER McDONOUGH ROTCHFORD, Appellant.	No. 40113-4-II UNPUBLISHED OPINION

Johanson, J. — After a bench trial, the trial court found Fraser Rotchford guilty of felony harassment. Rotchford challenges the validity of his jury trial right waiver, urging us to reconsider our decision in *Pierce*,[1] apply a *Gunwall*[2] analysis to the waiver of jury trial rights, and conclude that additional safeguards are necessary to ensure a jury trial right waiver is valid under our state constitution. Rotchford also challenges the sufficiency of the evidence that he made "true threats" to kill Jefferson County Mental Health and that people could reasonably fear they would be killed as a result of his threats. Last, Rotchford alleges that he was denied his Sixth Amendment right to effective assistance of counsel because of an irreconcilable conflict with his attorney. We decline to reconsider our holding in *Pierce*, discern no errors, and affirm.

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[1] *State v. Pierce*, 134 Wn. App. 763, 142 P.3d 610 (2006).

[2] *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

FACTS

Background

On June 15, 2009, Rotchford met with probation officers Tracie Wilburn and Tracy Lake related to four previous civil anti-harassment order violations. He explained that he missed a previous meeting because he was "going insane." Report of Proceedings (RP) (Dec. 7, 2009) at 32. During the meeting, Rotchford repeatedly said that he wanted to kill Jefferson County Mental Health, his then current provider for mental health services. In response, the probation officers told him they would notify Jefferson County Mental Health about his statements and advised him to come back and see them if he had "any problems or concerns" or if "anything changes." RP (Dec. 7, 2009) at 38-39.

Within 30 minutes of the initial meeting, Rotchford returned. He told his probation officers that his thoughts were "becoming more justified," that he wanted to kill Jefferson County Mental Health, and that he needed to go to jail. RP (Dec. 7, 2009) at 36. The probation officers notified the Jefferson County Sheriff's Office and, after Rotchford was in custody, the probation officers notified Jefferson County Mental Health of Rotchford's threats.

Deputies Kelli Greenspane and Brian William Tracer responded and took Rotchford into protective custody. Deputy Greenspane read Rotchford his *Miranda*[3] rights. Deputy Tracer then transported Rotchford to jail, during which Rotchford told Deputy Tracer that he wanted to kill "Mental Health" and that "jail was the best place for him otherwise he would have went [sic] to Mental Health." RP (Dec. 7, 2009) at 79. At trial, Deputy Tracer described that Rotchford

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

appeared very angry and had a bright red face during the transport.

Rotchford spent several days, possibly one week, in jail before being released into the community. Based on Rotchford's June 15, 2009 statements, the State charged Rotchford with felony harassment (threats to kill) under RCW 9A.46.020(1)(a)(i) and former RCW 9A.46.020(2)(b) (2003).

Procedure

On August 7, Ben Critchlow, Rotchford's defense counsel, filed a motion stating that Rotchford wanted him to withdraw as counsel and requesting the trial court to appoint substitute counsel. During a hearing on this motion, after the trial court provided examples of what would not disqualify counsel, Rotchford himself tried to explain the need for substitution of his counsel.[4] The trial court cut Rotchford's statements off several times because his reasons appeared to match grounds that the trial court had already said would not support the substitution motion. Eventually, Rotchford stated that he was "uncomfortable with the fact that [his] attorney ha[d] expressed that he [did] not share the same conceptions of what's happening," to which the trial court responded, "[counsel] might disagree with your philosophy but it won't affect his ability to represent you." RP (Aug. 14, 2009) at 6. Rotchford later persisted in explaining his perceived need for new counsel stating that he felt "very strongly about the law," "the history of the law and the history of mental health are . . . incompatible," and that he thought "it would be best" for an attorney other than Critchlow to handle his case. RP (Aug. 14, 2009) at 7. The trial court denied Rotchford's motion to appoint new counsel and Critchlow represented Rotchford for the rest of

[4] At this hearing, Scott Charlton stood in for Critchlow as Rotchford's attorney.

the proceedings.

On November 20, the trial court explained to Rotchford his jury trial rights and that a waiver would result in a bench trial by a judge. Rotchford stated his desire to waive his jury trial rights and stated that he had discussed his waiver with his attorney. Rotchford's attorney reminded the trial court that Rotchford had exercised his jury trial rights in previous criminal proceedings. The trial court then approved a written waiver that Rotchford and his attorney had signed.

Tracie Wilburn, one of Rotchford's probation officers, testified that prior to June 15, Rotchford had some problems with Jefferson County Mental Health staff. She testified that, in the weeks leading up to his threats, Rotchford expressed anger during his probation meetings about his prescribed medications and he said he had homicidal thoughts toward people at Jefferson County Mental Health. Wilburn also testified that on June 15, she took Rotchford's threats seriously because he seemed more upset than usual and he told her that he felt more "justified" in wanting to kill Jefferson County Mental Health. RP (Dec. 7, 2009) at 36. Last, Wilburn testified that in a meeting two weeks prior to the June 15 incident, Rotchford admitted that he had stopped taking his prescribed medications.

Tracy Lake, Rotchford's other probation officer, provided testimony similar to Wilburn's. She also testified that Rotchford said he needed to go to jail to "stop himself from what might happen . . . [t]o kill Mental Health." RP (Dec. 7, 2009) at 62. Deputy Greenspane testified that after she detained Rotchford he repeatedly told her that he wanted to kill "Mental Health." RP (Dec. 7, 2009) at 70.

Sheila Hunt-Witte testified that she was the mental health professional at Jefferson County Mental Health who received Wilburn's call relaying Rotchford's threats. Hunt-Witte testified that she believed Rotchford's threats were credible, she told her supervisor about them, and a crisis team meeting occurred the next day to address the situation. Hunt-Witte also testified that she feared injury or death based on Rotchford's threats.

Erik Nygard was the Director of Crisis Services at Jefferson County Mental Health and had met Rotchford several times when he came in for services. Nygard testified that, on learning of Rotchford's threats, he took them seriously and ended Rotchford's access to services. He told the front desk to call the police if they saw Rotchford at the building. Nygard also testified that he verified Rotchford's jail release date and that he exercised greater caution when in public after Rotchford's release.

Rotchford testified that he told his probation officers that he wanted to kill Jefferson County Mental Health and asked them to put him in jail. But Rotchford explained that he asked to go to jail to avoid going to an evaluation at Jefferson County Mental Health and to have some time to "cool off." RP (Dec. 7, 2009) at 140.

The trial court found that (1) Rotchford's comments were threats expressing an intent to harm because the probation officers, deputies, and employees at Jefferson County Mental Health believed he would carry out the threats; and (2) it was reasonable for Jefferson County Mental Health employees to fear their death as a result of Rotchford's threats because of the long-standing animosity and tumultuous relationship between Rotchford and Jefferson County Mental Health. Based on these findings, the trial court determined that a reasonable person in

Rotchford's position would have foreseen that his statements would be taken "as a serious expression of intent to take the life of another individual." RP (Dec. 7, 2009) at 155. Accordingly, the trial court entered a guilty verdict for the crime of felony harassment (threats to kill) and sentenced Rotchford to serve 60 days in jail. The trial court also entered no-contact orders preventing Rotchford from contact with Jefferson County Mental Health and any of its employees. Rotchford timely appeals.

ANALYSIS

I. Jury Trial Right Waiver

Rotchford urges us to reconsider our decision in *Pierce* where we refused to apply a *Gunwall* analysis to determine if additional safeguards are required under the Washington Constitution to waive the right to a jury trial. He asserts that, by refusing to apply *Gunwall*, we have failed to "articulate *any* test for determining the requisites of a valid [jury trial] waiver under the state constitution." Br. of Appellant at 30 n.5. We decline the invitation to reconsider *Pierce*.

In *Pierce*, we stated that "Washington already has rules governing a defendant's waiver of the jury trial right. A defendant may waive the right as long as the defendant acts knowingly, intelligently, voluntarily, and free from improper influences." *Pierce*, 134 Wn. App. at 771 (citing *State v. Stegall*, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994)). Several factors determine if this standard is met, including (1) whether the defendant was informed of his constitutional right to a jury trial; (2) the general facts and circumstances, including the defendant's experience and capabilities; (3) whether there was a written waiver as required by CrR 6.1(a); and (4) an attorney's representation that his client's waiver is knowing, intelligent, and voluntary. *Pierce*,

134 Wn. App. at 771. Based on this standard articulated in *Pierce*, Rotchford is incorrect that "[t]he *Pierce* court did not articulate *any* test" to determine whether a defendant's waiver of the jury trial right is valid under the Washington Constitution. Br. of Appellant at 30 n.5.

Pierce waived his right to a jury trial in a written waiver. *Pierce*, 134 Wn. App. at 767. The trial court advised Pierce that he had the right to have his case heard by an impartial jury of 12 people and that by waiving this right his case would be heard by a judge. *Pierce*, 134 Wn. App. at 767-68. Pierce said he understood and voluntarily wanted to waive his right to a jury trial. *Pierce*, 134 Wn. App. at 767-68. We held that, although our state constitution provides a more expansive right to a jury trial than the federal constitution, it did not automatically follow that additional safeguards were required before this more expansive right could be waived. *Pierce*, 134 Wn. App. at 773. We also held that Pierce had enough information to validly waive his right to a jury trial. *Pierce*, 134 Wn. App. at 773.

In accord with *Pierce*, Rotchford validly waived his right to a jury trial. Rotchford executed a written waiver after consulting with his attorney and the trial court specifically informed Rotchford of his jury trial rights. Rotchford said that he understood his rights, wished to waive them, and knew that by executing a waiver that his case would be decided by a judge. Also, Rotchford and Pierce had similar information when they waived their jury trial rights. Accordingly, Rotchford's jury trial waiver was valid.

II. Sufficiency of the Evidence

Rotchford challenges the sufficiency of the evidence proving that his comments were true threats and created a reasonable fear that he would cause another person's death. He argues that

his comments of *wanting* to kill Jefferson County Mental Health were not threats because they did not directly or indirectly communicate an immediate intent, or specifics about his intended actions. The State argues that Rotchford's statements and harboring of ill feelings toward Jefferson County Mental Health qualifies his threats as true threats. We reject Rotchford's arguments and affirm his conviction.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the trier of fact's decision, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from the evidence. *Kintz*, 169 Wn.2d at 551 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Circumstantial evidence and direct evidence are equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

Under RCW 9A.46.020(1), in order to prove that Rotchford committed the crime of harassment, the State must prove that

> (a) [w]ithout lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . . [and]
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

Harassment involving threats of bodily injury is a gross misdemeanor offense. RCW

9A.46.020(2)(a). But if the threats are to "*kill* the person threatened or any other person" the harassment is a class C felony. Former RCW 9A.46.020(2)(b) (emphasis added).

A. True Threat Analysis

Rotchford argues that his statements of *wanting* to harm another do not fulfill the intent requirement for a comment to rise to the level of a true threat. Rotchford is correct in his assertion that former RCW 9A.04.110(26) (2005) requires that a threat communicate an intent to harm another.[5] But it does not follow, as Rotchford suggests, that a comment must contain the words "intend[]" or "plan[]" to qualify as a threat. Br. of Appellant at 12. We hold that sufficient evidence supports the trial court's finding that Rotchford's comments were true threats.

For a threat to be prosecuted under the harassment statute, it must be a "true threat." *State v. Schaler*, 169 Wn.2d 274, 283-84, 236 P.3d 858 (2010). "The speaker of a true threat *need not actually intend to carry it out*. It is enough that a reasonable speaker would foresee that the threat would be considered serious." *Schaler*, 169 Wn.2d at 283 (emphasis added) (internal quotation marks omitted). Therefore, to establish a "true threat" the State must show that the speaker would foresee that his words or conduct would be taken seriously by his listeners. *Schaler*, 169 Wn.2d at 292.

Schaler guides our analysis here. Schaler called Crisis Services for Okanogan Behavioral Healthcare in hysterics after waking up and thinking that he had killed his neighbors. *Schaler*, 169 Wn.2d at 278. While the Crisis Services director kept Schaler on the phone, a coworker called the police. *Schaler*, 169 Wn.2d at 279. A deputy arrived at Schaler's residence, determined that nobody had been harmed, determined that Schaler had not taken his medication that day, and then

[5] Former RCW 9A.04.110(26) states, "Threat" means "to communicate, directly or indirectly the intent [to]" and then lists various subject matters.

transported Schaler to a hospital. *Schaler*, 169 Wn.2d at 279. At trial, the director who took Schaler's call testified that she saw Schaler at the hospital that night and he "was pretty specific that he, he wanted to kill his neighbors." *Schaler*, 169 Wn.2d at 280. At the hospital, Schaler was very angry and repeated his desire to kill his neighbors multiple times. *Schaler*, 169 Wn.2d at 280. The director believed that he made a "viable threat" and reported the threat to Schaler's neighbors. *Schaler*, 169 Wn.2d at 280. The neighbors testified that they believed Schaler would follow through with his threat because of a previous property line dispute involving his threatening use of a chainsaw, which resulted in the neighbors obtaining protective orders. *Schaler*, 169 Wn.2d at 281. Our Supreme Court stated that, based on these facts, enough evidence existed that a reasonable jury could find that Schaler's threats were true threats.[6] *Schaler*, 169 Wn.2d at 290-91.

As *Schaler* explains, the proper true threat inquiry is whether Rotchford could have reasonably foreseen that his threats would be taken seriously. *Schaler*, 169 Wn.2d at 283. Here, Rotchford repeatedly stated that he wanted to kill Jefferson County Mental Health and needed to go to jail to "stop himself from what might happen." RP (Dec. 7, 2009) at 62. Moreover, Rotchford told Deputy Tracer during his transport that if he did not go to jail to "cool off," he would go to Jefferson County Mental Health. RP (Dec. 7, 2009) at 140. That Rotchford repeated his threat multiple times to several people and had a tumultuous relationship with

[6] Because the jury instructions did not include the definition of "true threat," our Supreme Court ultimately overturned Schaler's conviction. *Schaler*, 169 Wn.2d at 292-93. But our Supreme Court stated that sufficient evidence existed that a reasonable jury could find Schaler's threats were true threats and that double jeopardy did not bar retrial. *Schaler*, 169 Wn.2d at 290-91.

Jefferson County Mental Health supports the trial court's finding that Rotchford could have reasonably foreseen that his threat would be taken seriously.

In addition, significant similarities exist between *Schaler* and Rotchford's case that undermine his argument that explicit words of intent are required for a statement to be a true threat. First, like Rotchford, Schaler stated that he *wanted* to kill his neighbors; he did not say that he intended to kill his neighbors. *Schaler*, 169 Wn.2d at 280. Second, Schaler and Rotchford were both off their medication at the time they made their threats. *Schaler*, 169 Wn.2d at 279. Third, Rotchford had a long-standing, contentious relationship with Jefferson County Mental Health, which analogizes to Schaler's historical problems with his neighbors that resulted in their obtaining protective orders. *Schaler*, 169 Wn.2d at 281.

Evidence about Rotchford's demeanor is also significant. The probation officers testified about differences in Rotchford's demeanor in the time leading up to his threats, which led them to believe that his threats should be taken seriously. And Wilburn testified that Rotchford's words seemed more serious when compared to comments he made about Jefferson County Mental Health during previous probation meetings. The deputies who detained Rotchford also testified that he was very angry when he spoke about Jefferson County Mental Health.

Moreover, Jefferson County Mental Health did take Rotchford's threats seriously as evidenced by holding a crisis meeting about the threats, warning its entire staff, instructing the front desk staff to call the police if they saw him, and discontinuing Rotchford's provided services. Accordingly, sufficient evidence supports the trial court's finding that, for the purposes of former RCW 9A.46.020, Rotchford's comments were true threats that he should have

reasonably foreseen would be taken seriously.

B. Reasonable Fear of Death

Next, Rotchford alleges that the evidence is insufficient to show his statements created a reasonable fear that he would *kill*. Specifically, he argues that no one could reasonably fear his threats because he asked to go to jail and, thus, would not have been able to carry out his threats. We disagree.

In order to prove harassment, the State must show that "the person threatened was placed in reasonable fear of 'the threat'—the actual threat made" and prove that the harm threatened and the harm feared are the same. *State v. C.G.*, 150 Wn.2d 604, 609, 80 P.3d 594 (2003). And for *felony* harassment, the State must prove that the person's words or conduct created a reasonable fear of death, not merely bodily harm or injury. *C.G.*, 150 Wn.2d at 609. "Assuming evidence shows the victim's subjective fear, the standard for determining whether the fear was reasonable is an objective standard considering the facts and circumstances of the case." *State v. Cross*, 156 Wn. App. 568, 582, 234 P.3d 288 (citing *State v. Alvarez*, 74 Wn. App. 250, 260-61, 872 P.2d 1123 (1994), *aff'd*, 128 Wn.2d 1, 904 P.2d 754 (1995)), *petition for review filed* (July 20, 2010). And "neither RCW 9A.46.020 nor the definition of 'threat' in RCW 9A.04.110 requires the State to prove a nonconditional present threat." *Cross*, 156 Wn. App. at 582.

Here, the probation officers and deputies testified that Rotchford repeatedly stated that he wanted to kill Jefferson County Mental Health and that they believed these threats. Wilburn testified that, although Rotchford had made similar comments in past probation meetings, this time she believed the threats were serious. Nygard testified that he believed Rotchford's threats

were serious, called a crisis team meeting for Jefferson County Mental Health staff, and discontinued Rotchford's mental health services. Nygard also testified about his personal safety concerns when he went out in public after Rotchford's release from jail. Moreover, Hunt-Witte testified that she believed Rotchford would have injured or killed her if he had not been taken to jail. Accordingly, sufficient evidence supports the trial court's finding that individuals could reasonably, and actually did, fear that Rotchford would carry out his threats to kill.

That Rotchford asked to go to jail after making his threats does not alter our analysis. Although a gross misdemeanor harassment case, *Cross* is instructive because of similar facts. *Cross*, 156 Wn. App. at 571. While being transported to jail, Cross told an officer that he would, "kick [the officer's] ass if [he] wasn't in handcuffs." *Cross*, 156 Wn. App. at 580. Cross argued that the officer could not have taken the threat seriously because he was in handcuffs in the back of a patrol car at the time of the threat. *Cross*, 156 Wn. App. at 583. We disagreed because Cross would soon be out of the patrol car for the booking process and could harm the officer by kicking, biting, or head-butting him. *Cross*, 156 Wn. App. at 583-84. We held that "when the condition stated is temporary, the State need not prove a nonconditional present threat" to support a finding that the victim's fear of the threat was reasonable. *Cross*, 156 Wn. App. at 584.

Here, although Rotchford did go to jail for a short time, he could have carried out his threats on release. There is nothing in this case, either the fact that Rotchford asked to go to jail or that Rotchford was in jail at the time Jefferson County Mental Health was notified of the threat, which precluded the trial court from finding that the people threatened could reasonably take Rotchford's threats seriously and fear their death.

Sufficient evidence supports the trial court's determination that Rotchford's comments were true threats that created a reasonable fear of death by those who were threatened. We affirm Rotchford's felony harassment conviction.

III. Sixth Amendment Right to Counsel

Last, Rotchford argues that he did not receive his Sixth Amendment right to counsel. He alleges that he had an irreconcilable conflict with his attorney and that the trial court erred by failing to hold an adequate inquiry into the extent of the conflict. Our review of the record reveals that Rotchford had an opportunity to explain his concerns on the record. As a result, there is sufficient information in the record for us to determine that the conflict between Rotchford and his counsel was not of the type or severity that required substitution of counsel.

We review a trial court's denial of a motion to substitute counsel for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). An abuse of discretion occurs if a trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A defendant's Sixth Amendment right to counsel is violated if the relationship between attorney and client completely collapses and the trial court refuses to substitute new counsel. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). But there is a difference between a complete collapse of the relationship or irreconcilable differences and a "mere lack of accord." *Cross*, 156 Wn.2d at 606 (citing *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)). We review (1) the extent of the conflict, (2) the trial court's inquiry

into the conflict, and (3) the timeliness of the motion. *Stenson*, 142 Wn.2d at 724. Irreconcilable differences are an exception to the prejudice prong of the *Strickland*[7] ineffective-assistance-of-counsel test; the defendant does not have to show prejudice in order to establish ineffective assistance of counsel resulting from a complete breakdown of the attorney-client relationship. *Stenson*, 142 Wn.2d at 722.

In *Stenson*, our Supreme Court provided examples of what constituted a complete breakdown of communication between an attorney and client. First, a complete breakdown exists where a defendant refuses to cooperate or communicate with his attorney in any way. *Stenson*, 142 Wn.2d at 724 (citing *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)). Next, a complete breakdown exists where a defendant has been at odds with his attorney for a long time and the "relationship was a 'stormy one with quarrels, bad language, threats, and counter-threats.'" *Stenson*, 142 Wn.2d at 724 (quoting *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979)). Last, a complete breakdown exists where an attorney's actions are especially egregious, including "verbally assaulting [the] client by using a racially derogatory term and threatening to provide substandard performance for him if he chose to exercise his right to go to trial." *Stenson*, 142 Wn.2d at 724-25 (citing *Frazer v. United States*, 18 F.3d 778, 783 (9th Cir. 1994)).

In contrast to these examples of irreconcilable conflicts, our Supreme Court determined that the relationship between Stenson and his counsel had not completely broken down. Stenson's attorney did not think it was prudent to aggressively try to prove Stenson's innocence during the guilt phase of his trial (because the State's evidence was overwhelming) and, instead,

[7] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

focused on gaining jury sympathy to avoid the death penalty. *Stenson*, 142 Wn.2d at 721, 729. Stenson stated "strong words were exchanged between himself and [his attorney]." *Stenson*, 142 Wn.2d at 727. At one point, Stenson's attorney told the trial court that he had no attorney–client relationship with Stenson and that he "[could not] stand the sight of [Stenson]." *Stenson*, 142 Wn.2d at 729. Our Supreme Court said that "the effects of any breakdown in communication on attorney performance seem[ed] negligible" in Stenson's case. *Stenson*, 142 Wn.2d at 729. In addition, "there [was] no evidence to suggest that the representation Stenson received was in any way inadequate." *Stenson*, 142 Wn.2d at 730.

Our Supreme Court applied this same standard in *Cross*, 156 Wn.2d at 605. Cross and his attorney disagreed about whether to introduce expert testimony about Cross's mental health status during the penalty phase of the trial. *Cross*, 156 Wn.2d at 605. Our Supreme Court characterized this conflict as "only about trial strategy." *Cross*, 156 Wn.2d at 608. Accordingly, our Supreme Court decided that "[t]his is not the type of conflict with counsel that raises Sixth Amendment concerns." *Cross*, 156 Wn.2d at 609.

Comparing Rotchford's conflict with *Stenson* and *Cross*, it is clear that Rotchford's conflict did not result in a complete breakdown of communication and a denial of his right to effective assistance of counsel. Rotchford stated that he believed his case to be ideological and he was concerned that his counsel did not see things the same way that he did. From Rotchford's other statements to the trial court, we can infer that the disagreement related to Rotchford's mental health issues. But there is no evidence in the record that Rotchford and his attorney were unable to communicate because of this "ideological" disagreement. In fact, Rotchford continued

working with his attorney throughout his trial as evidenced by Rotchford's statements on the record that he discussed the waiver of his jury trial rights with his attorney. The date of Rotchford and his attorney's signature on the jury trial waiver form is September 18, 2009, which is one month after Rotchford's asserted total breakdown of communication. In addition, there is no evidence that Rotchford and his attorney's communication contained contentious language, derogatory comments, or threats.

Accordingly, we hold that there was not a complete breakdown of communication or irreconcilable conflict between Rotchford and Critchlow. The trial court did not err when refusing to appoint new counsel to assist Rotchford in this case.[8]

We affirm Rotchford's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

I concur:

[8] Although the irreconcilable conflict test includes a consideration of the extent of the trial court's inquiry of the conflict and the timeliness of Rotchford's motion, we do not need to address these factors in detail where it is clear that no irreconcilable conflict existed. *Stenson*, 142 Wn.2d at 731 ("Because it does not appear that the extent of the conflict was very great or the breakdown in communication very severe, we do not discuss in great detail the remaining factors in the . . . irreconcilable conflict" test.). But, we note in this case that, although the trial court made a minimal effort to understand the problems between Rotchford and his counsel, Rotchford's persistence ultimately resulted in his concerns being made on the record and known to the trial court. Based on the concerns that Rotchford presented to the trial court, including that he did not know if the conflict affected the "showing of the case," the conflict between Rotchford and his attorney did not justify the substitution of counsel. RP (Aug. 14, 2009) at 6.

Armstrong, P.J.

Quinn-Brintnall, J. (dissenting) — Fraser Rotchford appeals (1) the validity of his jury trial waiver, (2) the sufficiency of the evidence supporting his conviction, and (3) the effectiveness of his counsel. I agree with the majority's decisions declining to reconsider our decision in *State v. Pierce*, 134 Wn. App. 763, 142 P.3d 610 (2006), and holding that Rotchford received effective assistance of counsel. But because, in my opinion, Rotchford's statements to his probation officer were clearly a cry for help and not a true threat, the evidence is insufficient to support Rotchford's felony harassment conviction. Accordingly, I respectfully dissent.

The First Amendment, through the Fourteenth Amendment, prohibits the State from criminalizing protected forms of speech. *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). Because true threats are one category of unprotected speech, the State may prohibit such threats through the felony harassment statute. *Schaler*, 169 Wn.2d at 283. "A true threat is 'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.'" *Schaler*, 169 Wn.2d 283 (quoting *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)). Accordingly, we construe RCW 9A.46.020 to reach only true threats. *Schaler*, 169 Wn.2d at 283-84.

Rotchford argues that his statements are insufficient to support a true threat finding because they were statements of feelings or desires rather than intention and because they were uttered as a cry for help. The definition of threat under RCW 9A.04.110(27) only requires proof of a true threat, it does not require the use of specific words to communicate that threat. *Schaler*, 169 Wn.2d at 283-84. In order to establish a "true threat," the State must show that the

defendant would foresee that his words or conduct would be taken seriously by his hearers. *Schaler*, 169 Wn.2d at 292. Here, the trial court found that a reasonable person in Rotchford's position would have reasonably foreseen that his statements would be interpreted as a serious expression of his intent to take the life of another. My review of the record does not reveal evidence sufficient to support this finding.

I agree with the majority to the extent that, in other circumstances, the *words* Rotchford spoke could reasonably be considered a true threat. But in this case, Rotchford spoke the words in the context of explaining his condition to his probation officers in an attempt to get help. The probation officers notified Deputy Kelli Greenspane of the Jefferson County Sheriff's Office who took Rotchford into protective custody. Tellingly, Rotchford was not arrested on felony harassment charges. He was taken into protective custody. And, although angry, Rotchford told Deputy Brian Tracer that "jail was the best place for him otherwise he would have went [sic] to Mental Health." Report of Proceedings at 79. Approximately one week after his release from jail, the Jefferson County Prosecutor's Office charged Rotchford with felony harassment for the statements he made to his probation officers and sheriff's deputies.

In *Schaler*, our Supreme Court determined that it was possible for a reasonable jury to find that Schaler's statements were not true threats because Schaler was "mentally unstable," the statements were made in the context of a mental health evaluation to a crisis counselor, and he expressed concern that he may have hurt someone. 169 Wn.2d at 289. The *Schaler* court held that if the jury had been properly instructed as to the definition of a true threat, it could have found Schaler's statements "were a cry for help from a mentally troubled man, directed toward

mental health professionals who could help him." 169 Wn.2d at 289-90. Under this rationale, statements that are genuine cries for help are not true threats sufficient to support a felony harassment conviction. *See Schaler*, 169 Wn.2d at 290. But the *Schaler* court held that on the evidence presented there, it was equally possible for a reasonable jury to find that Schaler made true threats rather than genuine cries for help because (1) Schaler had admitted that he had been planning on killing his neighbors for months and wanted to do it; (2) a mental health professional questioned Schaler over four hours and, based on his demeanor, determined that Schaler was serious; and (3) Schaler's comments were the culmination of a violent history of animosity between Schaler and his neighbors (including restraining orders and an incident involving a chainsaw). 169 Wn.2d at 291.

Here, in my opinion, the evidence supports only a determination that Rotchford's comments were a cry for help. Rotchford did not express any type of plan or details about his desire to "kill mental health." And although both of his probation officers and the deputies expressed concern regarding Rotchford's demeanor, they spoke to him for only a short time and were not trained mental health professionals. Finally, there was no evidence of a history of violence between Rotchford and Jefferson Mental Health. Although Rotchford had previously expressed anger and frustration towards Jefferson Mental Health, he had never acted out violently based on these feelings and Jefferson Mental Health never sought a restraining order. Because the additional factors in *Schaler* are not present in this case, Rotchford's comments can only be characterized as cries for help and not as true threats. Accordingly, based on the evidence in this case, I cannot hold that any rational trier of fact could find beyond a reasonable doubt that

Rotchford made a true threat to kill Jefferson Mental Health. I would reverse

Rotchford's felony harassment conviction and remand the case to the trial court for entry of an order dismissing the charges.

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QUINN-BRINTNALL, J.