IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KYLE A. TAYLOR, Appellant.	No. 42024-4-II UNPUBLISHED OPINION

Armstrong, P.J. — A jury convicted Kyle Taylor of second degree assault, intimidating a witness, third degree theft, and fourth degree assault after an incident involving his girl friend, Nerissa MacKinnon. On appeal, Taylor challenges his conviction for intimidating a witness, arguing that (1) the State provided insufficient evidence to prove that he intended to use immediate force against MacKinnon; (2) the trial court instructed the jury on an uncharged alternative means; (3) the trial court failed to instruct the jury that the threat must be a "true threat"; and (4) the charging document failed to allege that Taylor attempted to influence witness testimony by means of a true threat. Taylor also contends that the State provided insufficient evidence to prove his criminal history and his defense counsel ineffectively represented him by failing to argue that his prior crimes constituted the same criminal conduct.

Because the State failed to present sufficient evidence that Taylor intended to use immediate force to intimidate a witness, we reverse that conviction. We also vacate Taylor's sentence for his remaining convictions because the prosecutor's unsworn statement was insufficient to prove his criminal history, and we remand for further proceedings.

FACTS

The State charged Taylor with second degree assault, intimidating a witness, third degree theft, and fourth degree assault. The State alleged that the victim MacKinnon was a family or household member under the domestic violence statute, RCW 10.99.020.

Taylor lived with MacKinnon and her five-year-old daughter in Centralia. On December 15, 2010, MacKinnon and Taylor went into the back bedroom and started arguing. MacKinnon asked Taylor to leave her alone; he left the room but returned still upset. MacKinnon testified that he "put all of his weight on me, put his . . . arm on my neck." Report of Proceedings (RP) at 47. She explained that he held her down with his arm. MacKinnon's breath was restricted. MacKinnon told him to "get away from me and off of me because all I felt was hate." RP at 47.

Taylor left the house and MacKinnon decided to pack her belongings and go to her mother's house. She noticed that the presents she had purchased for her daughter earlier that day, worth about $100, were missing.

Taylor returned home at about 3:00 a.m. MacKinnon and Taylor again argued, and MacKinnon asked him where her daughter's recently purchased gifts were; he responded that he buried them in the woods and would not return them. Taylor then shoved MacKinnon twice in the bedroom. MacKinnon testified that:

> he threatened to shoot me, you know, while holding his hand up and making gunshot noises if I were to ever say anything to the police about him . . . he would just hold his hand out and point it towards me and then . . . he would pretty much make the sound of bullets coming out of a gun if I were to ever say anything.

RP at 66. MacKinnon was afraid.

MacKinnon and Taylor continued their argument outside the trailer. Taylor shoved her,

and she fell into the side of the trailer. Taylor left, and MacKinnon reported the incident to police.

The trial court instructed the jury that:

> A person commits the crime of intimidating a witness when he or she by use of a threat against a current or prospective witness attempts to influence the testimony of that person or induce that person not to report the information relevant to a criminal investigation.

Clerk's Papers (CP) at 44. The trial court defined a threat for the jury: "As used in these instructions, threat means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." CP at 45.

The jury convicted Taylor of second degree assault, intimidating a witness, third degree theft, and fourth degree assault. At sentencing on March 10, 2011, the State offered the prosecutor's unsworn statement setting forth Taylor's alleged prior convictions with the crime dates, sentencing dates, sentencing court, and whether his prior convictions were adult or juvenile convictions. The trial court sentenced him with an offender score of 9 for count I (second degree assault) and an offender score of 7 for count II (intimidating a witness).

ANALYSIS

I. Insufficient Evidence

Taylor argues that his conviction for intimidating a witness must be reversed because the crime of intimidating a witness requires a threat that includes intent to use immediate force and

MacKinnon's testimony does not refer to any threat of immediate force.[1] The State argues that based on Taylor's "habitual violence, the victim may have taken the threat to shoot her as an indirect threat of immediate force." Supp. Br. of Resp't at 3. But the State concedes, "There was no direct evidence presented at trial that Taylor threatened to immediately harm the victim," and further concedes that "the State should have used the appropriate [jury instruction]." Supp. Br. of Resp't at 1, 3. We agree with Taylor that this evidence is insufficient proof of an immediate threat.

The court instructed the jury that to convict Taylor of intimidating a witness, it has to find:

> (1) That on or about the 16th day of December, 2010, the defendant by use of a threat against a current or prospective witness attempted to influence the testimony of that other person or attempted to induce a person not to report information relevant to a criminal investigation; and
>
> (2) That this act occurred in the State of Washington.

CP at 47. The trial court also defined a "threat" for the jury: "[T]hreat means to communicate, directly or indirectly, the *intent immediately* to use force against any person who is present at the time." CP at 45 (emphasis added). These jury instructions are patterned on former RCW 9A.72.110(1)(a), (d), (3)(a)(i) (2010).[2]

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[1] Taylor also appeals his conviction for intimidating a witness on other grounds, including: (1) the trial court instructed the jury on an uncharged alternative means in violation of his right to due process; (2) the trial court failed to instruct the jury that the threat must be a "true threat"; and (3) the charging document failed to allege that Taylor attempted to influence witness testimony by means of a true threat.

[2] Although a "threat" for purposes of witness intimidation need not always include use of immediate force, the State concedes that it failed to request a jury instruction patterned on WPIC 2.24, which would have provided a different statutory definition of "threat" not involving immediate force, such as the former RCW 9A.04.110(27)(a) (2010) definition: "Threat" means to "'communicate, directly or indirectly the intent: (a) To cause bodily injury in the future to the person threatened or to any other person." But, because the State undertook to prove witness

MacKinnon testified:

> [Prosecutor]: Did the defendant threaten you during this time?
> [MacKinnon]: Umm, it's - - yeah, he did. Yes.
> [Prosecutor]: Can you explain how he did that?
> [MacKinnon]: Umm, referring back to my letter, in my letter I stated that all of his secrets were safe with me and that I wouldn't talk about things that I know, and during our arguments, umm, he threatened to shoot me, you know, while holding his hand up and making gunshot noises if I were to ever say anything to the police about him.
> [Prosecutor]: Can you describe for the jury—using your hand, can you show what you mean by the gesture that he made?
> [MacKinnon]: Umm, he would just hold his hand out and point it towards me and then—I'm not good at sound effects, but, you know, he would pretty much make the sound of bullets coming out of a gun if I were to ever say anything.
> [Prosecutor]: And you're saying that he said that if you—he threatened to shoot you if you ever went to the police?
> [MacKinnon]: Yes.

RP at 66. MacKinnon stated that she was afraid. We hold that this evidence, without more, is not enough to show that Taylor intended to use immediate force against MacKinnon.

II. Sentencing

Taylor also contends that the State provided insufficient evidence to prove his prior convictions. Taylor argues that this court's opinion in *State v. Hunley*, 161 Wn. App. 919, 253 P.3d 448, *review granted*, 172 Wn.2d 1014 (2011), requires his sentence to be vacated because RCW 9.94A.500 and .530 violate due process. The State concedes that under *Hunley*, we should remand to permit the State to present evidence of Taylor's past convictions. We agree and remand Taylor's convictions for second degree assault, third degree theft, and fourth degree assault with instructions to the parties to comply with the requirements set forth in *Hunley*, 161

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intimidation under the immediate use of force definition of "threat," it failed to present sufficient evidence to support the conviction.

Wn. App. at 931-32.

Taylor has also argued that the trial court violated his rights to due process and to remain silent at sentencing by not requiring the State to prove that none of his prior crimes constituted the same criminal conduct. Without accepting that the State has this burden, Taylor can raise the issues at the full resentencing hearing.[3]

We reverse Taylor's conviction for intimidating a witness, vacate his sentences, and remand for further proceedings consistent with this opinion.

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.

Armstrong, P.J.

We concur:

Hunt, J.

Penoyar, J.

[3] Because of the abbreviated sentencing hearing consisting of only the prosecutor's unsworn listing of Taylor's criminal history, our record contains no information pertaining to Taylor's actual convictions.