**FILED**
**APRIL 10, 2012**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

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

| | | |
|---|---|---|
| **STATE OF WASHINGTON,** | ) | **No. 30507-4-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **JAMES W. TWIGGS,** | ) | **UNPUBLISHED OPINION** |
| | ) | |
| **Appellant.** | ) | |
| | ) | |

Brown, J. • James W. Twiggs appeals his convictions for two first degree robbery counts and two threats to bomb or injure property counts arising from two bank robberies. He was sentenced under the Persistent Offender Accountability Act (POAA), chapter 9.94A RCW, to life in prison without the possibility of parole. First, Mr. Twiggs contends by counsel and pro se in his statement of additional grounds for review (SAG) he was denied effective assistance of counsel, mainly by minimal cross-examination and failing to challenge the POAA notice. Second, he contends the trial court improperly instructed on threat. Mr. Twiggs' "SAG" is a letter to his appellate counsel construed by Division Two of this court as a SAG that raises matters outside

our record. Where an ineffective assistance of counsel claim is brought on direct appeal, reviewing courts will not consider matters outside the record; a personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). In our analysis, we reject Mr. Twiggs' remaining contentions. Therefore, we affirm.

FACTS

Mr. Twiggs robbed two banks using bomb threats, one on March 24, 2010 and the other on March 31, 2010. After Mr. Twiggs was apprehended, he confessed.

The State charged Mr. Twiggs with two counts of first degree robbery and two counts of threat to bomb or injure property. The State filed a persistent offender notice on April 6, 2010. Mr. Twiggs had previously been convicted of two most serious offenses in Washington: indecent liberties in 1981 and child molestation in 2003. In the notice, the prosecutor referenced RCW 9.94A.030(28) for the definition of "Most Serious Offense" and RCW 9.94A.030(33) for "Persistent Offender." Clerk's Papers (CP) at 4. Pretrial, defense counsel unsuccessfully challenged Mr. Twiggs' statement, his competency to stand trial, and his sanity during the commission of the crimes. At trial, Mr. Twiggs' counsel cross-examined 5 of the State's 15 witnesses.

When instructing the jury on the threat to bomb charges, the court did not discuss "true threat" in the "to convict" instruction. Instead, it provided a separate

definitional instruction, stating, "threat means to communicate, directly or indirectly, the intent to cause physical damage to the property of a person other than the actor." CP at 49. Further, the court instructed the jury, "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 . . . to carry out the threat." CP at 49 (Jury Instruction No. 14). The jury found Mr. Twiggs guilty as charged.

Later, in arguing for a three-strikes sentence, the prosecutor stated, "I have specified . . . the specific area of the most persistent offender definition that pertains to [Mr. Twiggs'] prior convictions as it relates to this conviction specific to the RCW citation, which is 9.94A.030(32)(v) as in victor, (I)(c)." RP (Mar. 18, 2011) at 443. The court sentenced Mr. Twiggs to life for the two robbery counts and a 43-month high-end standard range sentence for the bomb threat counts.

## ANALYSIS

### A. Assistance of Counsel

The issue is whether Mr. Twiggs was denied effective assistance of counsel. He contends his counsel failed to object to a deficient POAA notice and failed to adequately cross-examine the State's witnesses.

Criminal defendants have the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 22 of the

Washington Constitution. To prevail on a claim of ineffective assistance, a defendant must satisfy the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If a defendant fails to establish either prong, we need not inquire further. *State v. Hendrickson,* 129 Wn.2d 61, 77, 917 P.2d 563 (1996). First, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* Counsel's errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992). Second, it must be shown that counsel's deficient performance was prejudicial. *Hendrickson*, 129 Wn.2d at 78. Prejudice occurs when it is reasonably probable that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. We strongly presume effective representation of counsel; the defendant must show no legitimate strategic or tactical reason exists for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

*POAA Notice.* The persistent offender notice stated:

> YOU, the above named defendant, JAMES WESLEY TWIGGS, are hereby given NOTICE that the offense of ROBBERY IN THE FIRST DEGREE; ROBBERY IN THE FIRST DEGREE; THREAT TO BOMB OR INJURE PROPERTY; THREAT TO BOMB OR INJURE PROPERTY, with which you have been charged, is a "Most Serious Offense" as defined in RCW 9.94A.030(28). If you are convicted at trial or plead guilty to this charge or any other most serious offense, and you have been convicted on two previous occasions of other most serious offenses, you will be classified at sentencing as a "Persistent Offender" as defined in

> RCW 9.94A.030(33) and your sentence will be life without the possibility of parole as provided in RCW 9.94A.570.

CP at 4. The version of RCW 9.94A.030 in effect at the time Mr. Twiggs committed his crimes was Laws of Washington 2009, ch. 375, § 4. The notice incorrectly cited "most serious offense" as being defined in subsection (28) when it should have cited to subsection (32). Additionally, the citation for "persistent offender" was incorrectly cited as being RCW 9.94A.030(33) which should have read RCW 9.94A.030(37).

Mr. Twiggs points to an incorrect reference during the sentencing hearing where the prosecutor referenced "9.94A.030(32)(v) as in victor, (I)(c)." RP (Mar. 18, 2011) at 443. As stated above, RCW 9.94A.030(32) defines "most serious offense." Subsection (v)(i) states a "most serious offense" includes, "A prior conviction for indecent liberties under RCW 9A.44.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b), and *(c) as it existed from July 1, 1979, until June 11, 1986*, and RCW 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988." (Emphasis added.) Mr. Twiggs was convicted of indecent liberties in 1981. The prosecutor likely referenced subsection (c) because after (c) the statute references indecent liberties convictions from 1979 to 1986.

In any event, while the subsections defining "most serious offense" and "persistent offender" were cited and referenced incorrectly, the necessary information appears in the POAA notice. It is unlikely Mr. Twiggs would have been misled by the notice because of the incorrect citations. The notice clearly explained to him what the

consequences would be if he was convicted of a third most serious offense. The notice was titled, "PERSISTENT OFFENDER NOTICE (THIRD CONVICTION)." CP at 4. The notice explained that robbery in the first degree is a most serious offense. The notice explicitly stated that if Mr. Twiggs is convicted of a third most serious offense, then he will be sentenced to life without the possibility of parole. Therefore, he received the necessary information to alert him to the possible POAA application.

Moreover, notice of the potential POAA application is not required before imposing a life without parole sentence. *State v. Crawford*, 159 Wn.2d 86, 93, 147 P.3d 1288 (2006). In *Crawford*, our Supreme Court held that Mr. Crawford was not denied due process because due process does not require pretrial notice of a possible life sentence under the POAA. *Id.* at 93.

Accordingly, even assuming counsel was deficient in not citing the correct definitional statutes Mr. Twiggs fails to show that he was prejudiced by the persistent offender notice when such notice is not required. The court sentenced Mr. Twiggs to life without the possibility of parole because he had two prior convictions of most serious offenses, and he was found guilty of a third most serious offense, robbery.

Mr. Twiggs next argues his defense counsel was ineffective for failing to sufficiently cross-examine the State's witnesses. Effective assistance of counsel does not require cross-examination of every witness. "A decision not to cross examine a witness is often tactical because counsel may be concerned about opening the door to

damaging rebuttal or because cross examination may not provide evidence useful to defense." *State v. Brown*, 143 Wn.2d 431, 451, 21 P.3d 687 (2001). Mr. Twiggs' attorney cross-examined 5 of the State's 15 witnesses. Mr. Twiggs fails to show it was not a tactical decision to limit cross-examination to five witnesses. And, he fails to show how that decision caused him prejudice. Essentially, our effective-assistance standard is whether, after examining the whole record, we can conclude the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). The Sixth Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Our record shows defense counsel cross-examined the detectives during the CrR 3.5 hearing, challenged Mr. Twiggs' competency and sanity, made pertinent objections during trial, cross-examined the State's witnesses to highlight lack of personal knowledge and memory decay, and vigorously argued his case. Mr. Twiggs counsel represented his interests and tested the State's case. The cross-examination decisions are tactical. In sum, Mr. Twiggs fails to show how the trial outcome would have differed with more cross-examination. Accordingly, he fails to meet his burden to show ineffective assistance of counsel.

B. Instructions

The issue is whether the trial court failed to instruct the jury regarding an

essential element of threat to bomb. Mr. Twiggs challenges the "to convict" jury instruction for the first time on appeal.

We review the adequacy of jury instructions de novo. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). A jury instruction must correctly state the applicable law. *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). "Generally, a criminal defendant may not raise an objection to a jury instruction for the first time on appeal unless it relates to a 'manifest error affecting a constitutional right.'" *State v. O'Donnell*, 142 Wn. App. 314, 321-22, 174 P.3d 1205 (2007) (quoting RAP 2.5(a)(3)). "When a constitutional error is asserted for the first time on appeal, the reviewing court must first determine whether the 'error is truly of constitutional magnitude.'" *Id.* at 322 (quoting *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)).

"Both the United States and Washington constitutions require that the jury be instructed on all essential elements of the crime charged." *Id.* (citing *State v. Van Tuyl*, 132 Wn. App. 750, 758, 133 P.3d 955 (2006)). Thus, the omission of an essential element of a crime from a jury instruction is "'of sufficient constitutional magnitude to warrant review when raised for the first time on appeal.'" *Id.* (quoting *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005)).

RCW 9.61.160(1) provides a person is guilty of threatening to bomb or injure if the person, "threaten[s] to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any

other building, common carrier, or structure." Mr. Twiggs asserts a true threat is an essential element of the witness intimidation statute that must be included in the jury instructions. Mr. Twiggs relies on *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006) where the Washington Supreme Court reversed a conviction under the bomb threat statute for the trial court's failure to define a true threat for the jury.

But Mr. Twiggs overstates *Johnston*'s holding. Division One of this court noted:

> The *Johnston* court did not rule that a true threat is an essential element of the crime of threatening to bomb a building. It did not require that the information charging the defendant with criminal use of threatening language allege a true threat. Nor did it rule that a "to convict" instruction is inadequate if it does not require the jury to find a true threat beyond a reasonable doubt. No Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document or "to convict" instruction.

*State v. Tellez*, 141 Wn. App. 479, 483, 170 P.3d 75 (2007). Thus, the true threat concept is definitional, not an essential element of any threatening-language crime. *Id.* at 484. Accordingly, the error raised by Mr. Twiggs for the first time on appeal is not of constitutional magnitude. Since Mr. Twiggs did not object below and does not now raise a manifest error of constitutional magnitude, this issue is waived.

Nevertheless, we note the court provided a separate instruction defining "threat" as, "to communicate, directly or indirectly, the intent to cause physical damage to the property of a person other than the actor. 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 . . . to carry out the threat." CP at 49 (Jury Instruction No. 14).

The *Johnston* court decided a true threat is a serious threat, not one said in jest, idle talk, or political argument; that whether a true threat has been made is determined under an objective standard that focuses on the speaker; and the court defined that objective standard as a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict bodily harm upon or to take the life of another individual. *Johnston*, 156 Wn.2d at 360-61. The court's definition meets the *Johnston* standard. The court's use of the word "threat" in the definitional instruction instead of "true threat" is of no consequence since the jury was properly defined as to the standard. Thus, the jury was properly instructed.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Brown, J.

WE CONCUR:

Siddoway, A.C.J.

Kulik, J.