STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'clock _____M
CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

LARRY ALAN TAYLOR,

Defendant.

Case No. **CRF 2014 12107**

MEMORANDUM DECISION AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Defendant LARRY ALAN TAYLOR's Motion to Dismiss is **GRANTED** in part, and **DENIED** in part.
Jed Whitaker, Dep. Prosecuting Attorney, lawyer for the Plaintiff.
Megan E. Marshall Coeur d'Alene, lawyer for Defendant Taylor.

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I. FACTUAL BACKGROUND.

On July 8, 2014, Magistrate Judge Clark Peterson bound over defendant Larry Alan Taylor (Taylor) on four felony counts of Theft by Extortion, I.C. § 18-2403(2)(e). Under that statute, in light of the alleged facts of this case, "A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will: 1) cause physical injury to some person in the future." I.C. § 18-2403(2)(e). Although the bind over order does not reflect the fact that crimes charged are "attempts", both the Complaint and Information charge *Attempted* Grand Theft by Extortion, and

attempt is charged under I.C. § 18-306. At the conclusion of the preliminary hearing, Judge Peterson made it clear Taylor was bound over on *attempted* grand theft by extortion. July 8, 2014, Preliminary Hearing Transcript, p. 57, Ll. 10-11.

On August 20, 2014, Taylor untimely (by one day pursuant to the bind over order) filed a Motion to Dismiss "pursuant to I.C. § 19-815A…on the grounds that the Court erred in finding reasonable or probable cause to believe the defendant committed the crimes of Attempted Grand Theft by Extortion at the preliminary hearing held in this matter on July 8, 2014." Motion to Suppress, p. 1. The State did not object on timeliness grounds. Also, in violation of the bind-over order, a brief and notice of hearing was not filed on August 20, 2014, contemporaneous with the motion. The State did not object to that deficiency. On September 24, 2014, Taylor filed his Notice of Hearing scheduling his motion to dismiss for October 1, 2014, and on September 29, 2014, Taylor filed his "Memorandum in Support of Motion to Dismiss". On October 1, 2014, the day set for the original hearing on his motion to dismiss, Taylor filed an Amended Notice of Hearing scheduling the matter for October 7, 2014. On October 6, 2014, the day before hearing, the plaintiff filed its "Notice of Objection to Defendant's Motion to Dismiss." Oral argument was held on October 7, 2014. At that hearing, counsel for Taylor requested the Court review the transcript of the July 8, 2014, preliminary hearing, which the Court has now read. Counsel for the plaintiff requested the Court listen to the recordings of Taylor's alleged phone calls and messages left on the phone of Kimberly Nagel, Taylor's daughter. Those recordings were also played before Magistrate Judge Clark Peterson on July 8, 2014.

This Court finds the recordings show four phone messages were left by Taylor on the phone of his daughter, Kimberly Nagel. The first three conversations took place on May 23, 2014, and the fourth on June 3, 2014. Preliminary Hearing Transcript, p. 19, L. 13

– p. 23, L. 7; p. 25, Ll. 6-17. The calls collectively show Taylor told his daughter Kimberly Nagel that Taylor was going to die soon unless he got twenty-five thousand dollars from Kimberly for a surgery, and that if he did not get that money, he would kill Kimberly's mother, Eileen Taylor.

II. STANDARD OF REVIEW.

The finding of probable cause by a magistrate may be challenged by a motion to dismiss heard by a district judge. I.C.R. 5.1(b), I.C. § 19-815A. The finding of probable cause shall be based upon substantial evidence upon every material element of the offense charged. I.C.R. 5.1(b). *Id.*

> This test may be satisfied through circumstantial evidence and reasonable inferences to be drawn from that evidence by the committing magistrate. A reviewing court will not substitute its judgment for that of the magistrate as to the weight of the evidence.

State v. Munhall, 118 Idaho 602, 606, 798 P.2d 61, 65 (Ct.App. 1990), citing *State v. Fain,* 116 Idaho 82, 84, 774 P.2d 252, 254 (1989).

> The decision of a magistrate that there exists probable cause to bind a defendant over to district court for trial on the charges should be overturned only on a showing that the committing magistrate abused his discretion.

State v. Owens, 101 Idaho 632, 636, 619 P.2d 787, 791 (1979), *citing State v. O'Mealey,* 95 Idaho 202, 506 P.2d 99 (1973); *Carey v. State,* 91 Idaho 706, 429 P.2d 836 (1967), I.C. § 19-815A.

III. ANALYSIS.

Taylor argues:

> In the case at hand, a review of the transcript of the evidence and testimony elicited at the preliminary hearing demonstrates: (1) the state charged two different counts for the same course of conduct with regards to Counts I and II, and (2) the state failed to present substantial evidence on every material element of the offense, attempted grand theft by extortion, sufficient to establish probable cause for the offense: (A) no

> evidence was presented that Mr. Taylor attempted to compel or induce Eileen Taylor to give him money nor was a fear instilled in Eileen Taylor, (B) no evidence was presented that Mr. Taylor attempted to compel or induce Kimberly Nagel to give him money nor was a fear instilled in Kimberly Nagel, and (C) there was no evidence presented that a demand for money and/or a threat were made with regards to Counts III and IV.

Memorandum in Support of Motion to Dismiss, p. 4. The Court disagrees that Count I and Count II should be one count, and the Court disagrees with Taylor's arguments regarding a lack of proof by substantial evidence on all elements of the offense of attempted grand theft by extortion. However, the Court finds that the third call made on May 23, 2014, does not, with substantial evidence, support a charge of attempted grand theft by extortion.

Taylor argues, "Essentially, Counts I and II are not separate and distinct for purposes of two charges. The voicemail that corresponds with Count I was continued in Count II." *Id.,* p. 5. The Court disagrees. If Taylor had to call up again, whether it was to finish his earlier message or elaborate in a new message, it does not matter; Taylor still completed a separate and distinct act each time he called.

In the first call, after discussing his poor physical condition and need for surgery, Taylor states in part: "I need twenty five thousand dollars, I need you to help me", "Like I told the officer in Post Falls…", "If you guys can't help me, Lord have mercy on your souls." "Now, I'm dying, I need twenty five thousand dollars, I need it now, not next year, not next month, your mother has the fuckin' money, she stole it from me my whole life…" The message audibly ends due to capacity of the machine and length of the message.

In the second message, Taylor states in part: "I'm dying", "If you guys can't find it in your fuckin' heart to give me twenty five thousand dollars of my fuckin' money that was stolen from me…", "You've got my word, I need this money and if I don't get it, I'm not threatening anybody, I'm just telling you a cold hard fact just like I told the Post Falls Police Department when they came out…" "Your mother only has to worry if I'm dying, and I'm

dying.", "I don't have a problem, and I told the officer, I'll walk right in and shoot her in the fuckin' head and turn myself in…", "I need the money and I need it now. If you can't come up with it, honey, you have a good life, I love you, your Mom, you may not have her, and that is my word, and that is not a threat at all, I'm not threatening nobody, I'm just saying if I'm going, there's other people going with me."

In the third message, Taylor discusses his surgery he needs, but doesn't threaten any other person (such as Kimberly or her mother). Taylor simply says if he doesn't get the surgery, Kimberly "won't have a dad".

In the fourth message which Taylor left in June, in its entirety, Taylor says: "Well I guess nobody ever understood me or heard me, but here's the deal, I'm going to ruin your Mom, so anything you are involved with your Mom, I'm sorry, it is going to happen, now I start getting shitty, that is just the way it is, I'm dying so I don't give a fuck, so everything that you are involved in with her, you'd better get out, because I'm going to fuckin' ruin it."

Count III of the Information, which was based on the third message left on May 23, 2014, must be dismissed. While Taylor's message to Kimberly Nagel that if Taylor doesn't get surgery, she (Nagel) "won't have a dad", is a guilt trip on an immense scale, it is not a threat to "cause physical injury to some person in the future" as charged under I.C. § 18-2403(2)(e).

However, Count I, II and IV are supported by substantial evidence.

In Taylor's brief, he discusses probable cause needs to exist for each count. Memorandum in Support of Motion to Suppress, pp. 10-12. At oral argument, counsel for Taylor argued: "You have to take each count separately as if they were tried separately." No citation was given for that argument, but perhaps counsel had in mind ICJI 110. Idaho Criminal Jury Instruction 110, captioned "Consider each count separately", reads in its

entirety:

> Each count charges a separate and distinct offense. You must decide each count separately on the evidence and the law that applies to it, uninfluenced by your decision as to any other count. The defendant may be found guilty or not guilty on either or both of the offenses charged.

ICJI 110. Just because the jury is instructed to decide each count separately on the evidence and the law that applies to it, does not mean all counts are going to be tried separately to separate juries. It also does not mean that the evidence from one count is to be disregarded as evidence for another count. Evidence from one count may provide context for evidence in a different count. What the instruction makes clear is just because a jury finds a person guilty or not guilty of count one, that finding of guilty or not guilty on count one cannot influence their decision in deciding count two.

As the above shows, regarding the first message, the elements of an *attempt* under I.C. § 18-2403(2)(e) are met. Taylor attempts to "obtain property" "by extortion when he compels or induces another person (Kimberly Nagel) to deliver such property to himself…by means of instilling in (her) a fear that, if the property is not so delivered, the actor or another will: 1) cause physical injury to some person (Eileen Taylor) in the future." Taylor tells Kimberly Nagel what he needs, "I need twenty five thousand dollars, I need you (Kimberly) to help me", and he tells Kimberly Nagel by strong inference what will happen if he does not get what he needs: "Like I told the officer in Post Falls…", "If you guys can't help me, Lord have mercy on your souls."

Regarding the second message, the elements of an *attempt* under I.C. § 18-2403(2)(e) are met. The second message occurred in a second call shortly after the first call, but it was a separate act of Taylor's. After leaving the first message, and having the first message end because Taylor exhausted the machine's capacity, Taylor called and left another message. In the second message, Taylor again attempts to "obtain property" "by

extortion when he compels or induces another person (Kimberly Nagel) to deliver such property to himself when he says, “I need this money and if I don’t get it…” In the second message, Taylor provides *additional* facts. In the second message, those additional facts make explicit (“I don’t have a problem, and I told the officer, I’ll walk right in and shoot her in the fuckin’ head and turn myself in…”) what Taylor in the first message had left implicit (”If you guys can’t help me, Lord have mercy on your souls.”) Taylor now made explicit to Kimberly Nagel “by means of instilling in (her) a fear that, if the property is not so delivered, the actor or another will: 1) cause physical injury to some person (Eileen Taylor) in the future.”

Regarding the message left days later, the elements of an *attempt* under I.C. § 18-2403(2)(e) are met: “Well I guess nobody ever understood me or heard me, but here’s the deal, I’m going to ruin your Mom, so anything you are involved with your Mom, I’m sorry, it is going to happen, now I start getting shitty, that is just the way it is, I’m dying so I don’t give a fuck, so everything that you are involved in with her, you’d better get out, because I’m going to fuckin’ ruin it.” The statute does not require a threat of death, but only physical injury. Thus, Taylor’s threat, “I’m going to ruin your Mom,” is sufficient. That threat is explicit. What is left unsaid is under what circumstances “I’m going to ruin your Mom” will occur, and it is implicit that “I’m going to ruin your Mom” would occur if Kimberly did not get him twenty-five thousand dollars.

Evidence of other crimes is ordinarily inadmissible. I.R.E. 404(b). While not discussed by the parties, there would appear to not be a problem with this evidence being admissible under I.R.E. 404(b), as evidence of a continuous chain of conduct, *State v. Labelle,* 126 Idaho 564, 887 P.2d 1071 (1994); or a common plan or scheme *State v. Pugsley,* 128 Idaho 168, 911 P.2d 761 (Ct.App. 1995).

Also not raised by the parties, but worth quick analysis, is whether any double jeopardy issue is presented. The Court finds no double jeopardy issue is present in this case. The Idaho Court of Appeals noted in *State v. Hussain,* 143 Idaho 175, 177, 139 P.3d 777, 779 (Ct.App. 2006):

> [T]he United States Supreme Court established the basic test to determine if a defendant's chargeable offenses are singular or plural in *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The "test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Id.* at 304, 52 S.Ct. at 180, 76 L.Ed. at 309; *see also United States v. Costa,* 947 F.2d 919, 926 (11th Cir.1991) ("In order to avoid multiplicity, only one fact or element need be different between each charge.").

In the present case, no additional element needs to be proven as the charges are the same. However, the facts of each count for each charge are different.

IV. ORDER.

IT IS HEREBY ORDERED THAT LARRY ALAN TAYLOR's Motion to Dismiss is GRANTED as to Count III and DENIED as to Count I, II and IV.

DATED this 8th day of October, 2014

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of October, 2014 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Megan E. Marshall
Prosecuting Attorney – Jed Whitaker

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy