 73250-1

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October 2, 2015
Court of Appeals
Division I
State of Washington

NO. 73250-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BEE SAYKAO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. This Court held last year that in a charge of felony harassment of a criminal justice participant, statements constitute harassment if it was apparent to the victim that the speaker had either the present ability or the future ability to carry out the threat; the State is not required to prove that the speaker had the ability to carry out the threat both immediately and in the future. The plain wording of the felony-harassment statute, along with the context of a related statute and their conjoined legislative history, shows that the Legislature intended to exclude only those threats made by people who had no ability to carry them out, and interpreting the statute otherwise would create absurd results. While being escorted out of a Department of Corrections office, Saykao threatened to shoot a community-corrections supervisor, who testified that she was afraid Saykao could and would shoot her. Did this Court correctly interpret the statute? Was the evidence sufficient to convict Saykao of felony harassment?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Bee Saykao was charged by First Amended Information with Felony Harassment of a criminal justice participant

under RCW 9A.46.020(1), (2)(b)(iii, iv). CP 32. The charge alleged that on July 29, 2014, in Seattle, King County, Washington, Saykao threatened Kathleen Johnson, a community-corrections supervisor for the state Department of Corrections. CP 32; 4RP 126.[1] After a one-day trial in March 2015, the jury convicted Saykao as charged. CP 83. The court imposed a standard-range sentence of 19 months of confinement. CP 111. Saykao timely appealed. CP 117.

2. SUBSTANTIVE FACTS

As of July 29, 2014, Kathleen Johnson had served 28 years with the Department of Corrections (DOC), including about 14 years as a supervisor overseeing community-corrections officers (CCO's) as they supervise criminal offenders. 4RP 126-29. That day, she was at work at the DOC field office in South Seattle when a CCO asked her to assist a supervised offender, Bee Saykao. 4RP 144-45.

Saykao wanted his property back after being in custody. 4RP 145. Johnson invited him into her office to return his

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[1] The verbatim reports of proceedings are sequentially numbered but divided into several volumes. The State has numbered them as follows: 1RP (Volume 1 – January 30, 2015); 2RP (Volume 2 – February 24, 2015); 3RP (Volume 3 – February 25, 2015); 4RP (Volume 4 – March 2, 2015); 5RP (Volume 5 – March 3, 2015); 6RP (Volume 6 – March 10, 2015).

backpack. 4RP 147. Saykao got upset that his cigarettes were missing and started yelling about it. 4RP 148. Other CCO's came to the office doorway to see what was going on and make sure Johnson was safe. 4RP 207, 237, 255. Johnson told Saykao to leave. 4RP 150. Two other CCO's, Doug Daviscourt and Daniel "Neil" McDonagh, directed Saykao down the hallway toward the exit. 4RP 209, 239.

As Saykao walked angrily down the hallway, Daviscourt heard Saykao mumble something about a gun. 4RP 211. Johnson, following behind, asked Saykao whether he knew his next report date. 4RP 153, 258. Saykao turned and said tersely that he was not coming back. 4RP 153, 258. Johnson replied that it was his choice whether to report back. 4RP 153. Saykao looked at Johnson directly and, as she recalled it, said, "If you don't shoot me, I will shoot you."[2] Id.

Johnson went into a "state of shock" from the threat, because in nearly three decades with DOC, she had only been

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[2] The eyewitnesses to the threat each recalled slightly different wording. Daviscourt quoted Saykao as saying, "You're going to have to shoot me, or I'm going to shoot you." 4RP 211. McDonagh recalled Saykao saying, "You'll have to kill me," followed by "If you don't, I'll kill you." 4RP 241. CCO Rene Vertz recalled that Saykao said, "You're going to have to shoot me or I'll shoot you." 4RP 259.

threatened one other time, 27 years prior, over the phone. 4RP 154. She was "stunned and concerned." 4RP 155.

Johnson's immediate thoughts were that "I've got to get out of here, I've got to go home, I've got to be able to leave at night." Id. It was clear from Saykao's words "that he was probably going to shoot me." Id. Johnson was not worried that Saykao was going to shoot her instantaneously in the DOC office before he left. 4RP 193. "What I was concerned about was that he was headed out a door and I would have to leave my office ... and I would be findable." 4RP 175.

The CCO's decided to let Saykao leave, in part to keep him away from them. 4RP 242. They then conferred with Johnson, who decided to arrest Saykao for violating terms of his community custody. 4RP 244. But Johnson knew that Saykao could be held for only 72 hours. 4RP 162-63.

After the threat, Johnson looked up Saykao's criminal history in a DOC database and learned that he had a history of assaults, one with a weapon, and her fear increased. 4RP 163-64, 263. Johnson had Saykao transferred to another field office and completed a "personal safety plan," which included changing routines, such as taking her cigarette breaks in a secluded area

behind the building instead of out by the street. 4RP 160. "I was afraid that, between my office and my home, while I was taking a break, when I was coming into work, that I could have been assaulted or injured by him or shot." 4RP 200.

C. ARGUMENT

1. THE EVIDENCE WAS SUFFICIENT TO CONVICT SAYKAO AS CHARGED.

A year ago, this Court held that to convict a defendant of felony harassment for a threat against a criminal justice participant, the State need not prove that the defendant had both the present and future ability to carry out the threat. Nonetheless, Saykao contends that this Court was wrong, and thus the evidence in his case was insufficient to convict him. To make this argument, Saykao digs deep into the esoterics and hypertechnicalities of statutory interpretation to arrive at a logically twisted construction that distorts the purposes of the relevant statute. This Court, on the other hand, has properly interpreted the plain meaning of the statute in a way that preserves the legislative intent and does not result in absurdities. This Court should reject Saykao's arguments. The jury had sufficient evidence to convict Saykao by any reading of the statute. His conviction should be affirmed.

a. Additional Relevant Facts.

At the close of trial, the jury was instructed that "[t]hreatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat."[3] CP 99; 4RP 295. In closing, Saykao argued strenuously that the instruction meant that the State was required to prove both present and future ability, and had not done so. 5RP 331, 345-48.

The State argued that the interpretation Saykao was offering would "eliminate all future threats" from the crime of felony harassment of criminal justice participants. 5RP 352. Nevertheless, the State argued, "to say that because Mr. Saykao perhaps wasn't going to pull out his gun in the DOC office and shoot Kathy Johnson right that second, doesn't mean that it was apparent to her that he couldn't carry out the threat, that he was ... not capable of doing that." 5RP 351-52. It was not "apparent to her that ... this threat was completely a physical impossibility at all. And that's what matters." 5RP 352-53.

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[3] The instruction was verbatim from RCW 9A.46.020(2)(b).

b. This Court's Statutory Interpretation Was Correct; The Evidence Was Sufficient To Convict.

i. The evidence was sufficient under this Court's recent holding.

This Court reviews sufficiency of the evidence to determine "whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." State v. McKague, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011). The Court assumes the truth of the State's evidence and views reasonable inferences from the evidence in the light most favorable to the State. State v. Mines,163 Wn.2d 387, 391, 179 P.3d 835 (2008). This Court defers to the trier of fact on issues of credibility or persuasiveness of the evidence. State v. Johnston, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006).

A defendant is guilty of harassment if, without lawful authority, he or she "knowingly threatens ... [t]o cause bodily injury immediately or in the future to the person threatened or to any other person" and "by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(a)(i), (b). The offense is a class C felony if the defendant "harasses a criminal justice participant who is performing his or her duties at the time the threat is made" or because of the

criminal justice participant's actions or decisions in the course of his or her official duties. RCW 9A.46.020(2)(b)(iii), (iv).

A community-corrections officer is a criminal justice participant. RCW 9A.46.020(4)(e). When the threat involves a criminal justice participant, "the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances." RCW 9A.46.020(2)(b).

Most relevant here, "[t]hreatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat." Id. Last year, this Court interpreted that sentence to mean that "if it was apparent to the criminal justice participant that the speaker had *either the present ability or the future ability* to carry out the threat, the statements would constitute harassment." State v. Boyle, 183 Wn. App. 1, 11, 335 P.3d 954 (2014) (emphasis added).

So Saykao's case does not need to be complicated. There was more than enough evidence to meet the elements of the charged crime: That on July 29, 2014, in Washington, Saykao made a true threat to Community-Corrections Supervisor Johnson, a criminal justice participant, without lawful authority, and she had a

reasonable fear that Saykao could — and would — carry out the threat of shooting her. RCW 9A.46.020(1), (2)(b), (4). Under the statute and under Boyle, there was more than sufficient evidence to convict Saykao. This Court should affirm the conviction.

ii. Boyle was correct and should stand.

This Court will overrule precedent only when the party seeking to have the decision overruled meets its burden of demonstrating that the precedent is both incorrect and harmful. State v. Stalker, 152 Wn. App. 805, 811-12, 219 P.3d 722 (2009). This is because courts do not "lightly set aside precedent." State v. Kier, 164 Wn.2d 798, 804-05, 194 P.3d 212 (2008). "The law must be reasonably certain, consistent, and predictable so as to allow citizens to guide their conduct in society, and to allow trial judges to make decisions with a measure of confidence." Stalker, 152 Wn. App. at 810-11. The doctrine of *stare decisis* provides this necessary clarity and stability in the law. Id. "'Without *stare decisis*, the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations and assertions — a kind of amorphous creed yielding to and wielded by them [sic] who administer it.'" State v. Ray, 130 Wn.2d 673, 677,

926 P.2d 904 (1996) (quoting State ex rel. State Fin. Comm. v. Martin, 62 Wn.2d 645, 665-66, 384 P.2d 833 (1963)).

When construing a statute, this Court primarily seeks to ascertain and carry out the Legislature's intent. Boyle, 183 Wn. App. at 10-11. Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of its language in the context of the whole statute, related statutory provisions, and the statutory scheme as a whole. Id. at 11. If the statute's meaning is unambiguous, the inquiry ends. Id. The courts presume that the Legislature does not intend absurd results. State v. Ervin, 169 Wn.2d 815, 823, 239 P.3d 354 (2010). "A statute should not be given an interpretation which would make it an absurdity when it is susceptible of a reasonable interpretation which would carry out the manifest intent of the Legislature." Martin v. Dep't of Soc. Sec., 12 Wn.2d 329, 331, 121 P.2d 394 (1942).

In Boyle, this Court was confronted with an argument virtually identical to Saykao's contention — that the relevant sentence in RCW 9A.46.020(2)(b) "clearly states that threatening words only constitute harassment if it is apparent to the criminal justice participant that the defendant has the present and future ability to carry them out." 183 Wn. App. at 11; RCW

9A.46.020(2)(b). In Boyle's case, he was handcuffed when he told a policeman that someone would kill him and his family and "I'll be glad when they do." Boyle, 183 Wn. App. at 5. Boyle argued that the jury should have been instructed that the State had to prove both a present — meaning an immediate — and future ability to carry out the threat. Id. at 11.

The Boyle court found that Boyle had simply misread the statute, and found no ambiguity:

> To the contrary, as the trial court stated, "[T]his sentence is phrased as an exception, not as an element," and it plainly states that threatening words are not harassment if it is apparent to the criminal justice participant that (1) the speaker does not have the present ability to carry out the threat and (2) the speaker does not have the future ability to carry out the threat. Conversely, if it was apparent to the criminal justice participant that the speaker had either the present ability or the future ability to carry out the threat, the statements would constitute harassment.

Id. at 11. The court further noted that:

> Boyle's suggested reading would produce some absurd results. If it must be apparent to the criminal justice participant that the speaker have both the present and the future ability to carry out the threats, then the statute would not prohibit many electronic threats, as it explicitly does. No threats made to third persons not in the speaker's presence would be actionable, nor would any threats of exclusively future harm. The court's instructions here correctly stated the law and did not diminish the State's burden.

Id. at 12.

The Boyle court readily identified the fallacy of the argument that Saykao now makes, and disposed of it succinctly and clearly. The statute plainly and unequivocally means that when criminal justice participants are threatened, it is not felonious if it was obvious that the threat was impossible. Reading the statute as Boyle did, and Saykao now does, would absurdly disqualify a broad range of threats that the statute means to prohibit, as the court in Boyle noted. Id. at 12.

The statute is unambiguous at the most basic level of interpretation. The fact that the sentence at issue is written in the negative, as an exception, means it is not an affirmative requirement of proof. A commonsense reading brings this into focus. Here is the sentence:

> "Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person ***does not have*** **the present and future ability** to carry out the threat." RCW 9A.46.020(2)(b).

The phrase "*does not have*" is synonymous with the word "*lacks*." Thus, the following sentence is synonymous with the statutory sentence:

> "Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person ***lacks*** **the present and future ability** to carry out the threat."

But these two sentences are *not* synonymous:

> "A threat without present and future ability is not felony harassment."
>
> "A threat must have present and future ability to be felony harassment."

That is because the first sentence does not rule out felony harassment if *either* present *or* future ability is present, but the second sentence does. So it is plain that the statutory sentence is meant to require a *lack of both* present and future ability to *exclude* the threat — but does not require the existence of both to make the threat felonious. There is no ambiguity.

Nonetheless, Saykao engages in confusing semantic contortionism in which the word "and" becomes an all-powerful talisman in deriving the Legislature's meaning. But it is quite telling that in Saykao's Brief of Appellant (BOA), the very first sentence of his Arguments actually gets it right:

> The pertinent statute clearly and unambiguously provides that a conviction for felony harassment of a criminal justice participant is unlawful if it was apparent to the criminal justice participant **that the person making the threat *lacked both* the present and future ability to carry out the threat.**

BOA at 6 (extra emphasis added).

Indeed, that is the natural reading of the statute. But Saykao then goes on to conjure a different reading that requires a complete twisting of syntax. His lengthy discussion of whether the word "and" should be conjunctive or disjunctive misses the point: It would matter only if the sentence were warped into an affirmative requirement of proof of both present and future ability, which it is not. The only way to reach Saykao's desired result is to rewrite the sentence.

So Saykao also argues that requiring proof of both present and future ability does not result in absurdity or thwart legislative intent because threats lacking present ability — i.e., any threat not made in person, electronic threats, threats against non-present third-parties such as family members, or threats of exclusively future harm — can still be prosecuted as gross misdemeanors. He seems to be arguing that the Legislature wanted only an extremely limited kind of harassment against criminal justice participants to be felonious. A reading of the statute as a whole, and in the context of its legislative history, shows why Saykao is wrong.

In the harassment statute itself, "[a]ny criminal justice participant who is a target for threats or harassment under

subsection (2)(b)(iii) or (iv) of this section, and any family members residing with him or her, shall be eligible for the address confidentiality program created under RCW 40.24.030." RCW 9A.46.020(3); RCW 40.24.030. That program allows the criminal justice participant and her entire household to use a special address issued by the secretary of state in lieu of her real home address, just as if she were the victim of domestic violence or sexual assault. RCW 40.24.030(1). The express legislative purpose of the program is "to prevent their assailants or probable assailants from finding them." RCW 40.24.010.

Note that the program applies to criminal justice participants only when they are victimized under the *felony* section of the harassment statute. <u>See</u> RCW 9A.46.020(2)(b), (3); RCW 40.24.030(1)(b) ("... any criminal justice participant ... *who is a target for threats or harassment prohibited under RCW 9A.46.020(2)(b)(iii) or (iv)*") (emphasis added). It makes absolutely no sense that the Legislature would provide a shield solely designed to protect them from threats of future harm, but simultaneously exclude most threats of future harm from the program's shelter — i.e., every future threat not accompanied by a

present, in-person threat, threats against family members, telephone or email threats, or even threats sent through the mail.

The legislative history of these sections supports this.[4] The Legislature in 2011 added criminal justice participants to the felony section of the harassment statute and to the address-confidentiality program in the same bill. WA F. B. Rep., 2011 Reg. Sess. H.B. 1206. The final bill report stated that the act "relates to increasing the penalty for harassment of a criminal justice participant." Id. The Legislature clearly intended to increase the penalties for *all* harassment of criminal justice participants. It was not surgically targeting rare situations where the threat happens with a perfect confluence of factors, i.e., the person making the threat is in the physical presence of the victim, is threatening to harm the victim both instantaneously *and* in the future, and can accomplish the harm both instantaneously *and* later.

Moreover, Boyle was decided in July 2014 and published in August 2014. 183 Wn. App. at 1. The Legislature has since convened and concluded its 2015 regular session and three special

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[4] See State v. Evans, 177 Wn.2d 186, 193, 298 P.3d 724 (2013) (legislative history can be of assistance in discerning legislative intent).

sessions.[5] Surely, if this Court had grossly and unjustly misconstrued the Legislature's intent, resulting in undeserved felony convictions, our lawmakers would have changed the wording of the statute. But they did not.[6] Legislative inaction following judicial interpretation of statutes indicates acceptance, and where statutory language remains unchanged after a court decision, the court "will not overrule clear precedent interpreting the same statutory language." Stalker, 152 Wn. App. at 812-13. This court should follow Boyle.

Saykao has not met his burden of showing that this Court's decision in Boyle was incorrect and harmful. Boyle controls here, and as such there was overwhelming evidence to convict Saykao under the law.

iii. Even taking Saykao's fallacious interpretation as true, the jury still had sufficient evidence to convict.

Interestingly enough, Saykao cannot show insufficiency of the evidence in his case even if this Court were to accept his contorted and incorrect reading of the statute. As previously stated,

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[5] See http://leg.wa.gov ("The 2015 3rd Special Session adjourned sine die on July 10, 2015.")

[6] Legislative Information Center, Bills Passed The Legislature, 2015 Regular, 1st, 2nd, and 3rd Special Sessions (updated July 28, 2015), http://leg.wa.gov/LIC/Documents/Statistical%20Reports/BILLS%20PASSED%20THE%20LEGISLATURE.pdf.

this Court defers to the trier of fact on issues of credibility or persuasiveness of the evidence. Boyle, 183 Wn. App. at 7. A reviewing court must not determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but must make its factual examination in a manner as devoid of subjective reactions, argument or comment as possible. State v. Green, 92 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Circumstantial evidence is no less reliable than direct evidence. State v. Embry, 171 Wn. App. 714, 742, 287 P.3d 648 (2012).

In this case, the jury heard that immediately following Saykao's threat to shoot Johnson, he was allowed to exit the building. 4RP 242. Johnson immediately feared that she had to leave the building and go home that day, with Saykao out there — indicating her belief in his present ability to carry out the threat. 4RP 155, 175, 193. So she had him arrested. 4RP 244. Then in the days following, Johnson remained fearful that he could be released and return to carry out his threat, so she changed her personal habits to hide from him — indicating her belief in his future ability. 4RP 160, 163-64, 200.

The jury was fully instructed on the complete wording of the "present and future" portion of the statute. CP 99; 4RP 295.

Saykao was then allowed to misstate the law repeatedly to argue that Saykao should be acquitted because the State had not proven both a present and future ability. 5RP 331, 345-48. The jury surely considered his arguments, and rejected them.

Even if this Court were to decide that it was wrong last year in Boyle — which it obviously should not do — Saykao still cannot show that the evidence and all reasonable inferences, in the light most favorable to the State, were insufficient for any rational jury to convict him. His conviction should be affirmed by any reading of the statute.

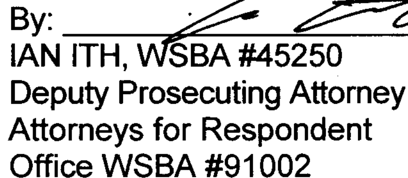
D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Saykao's judgment and sentence.

DATED this 2nd day of October, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Christopher Gibson, the attorney for the appellant, at Gibsonc@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Bee Thow Saykao, Cause No. 73250-1, 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.

Dated this 2nd day of October, 2015.

UBrame

Name:
Done in Seattle, Washington