Supreme Court No. 102310-3
Court of Appeals No. 56951-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EARL C. MCCORMACK

Petitioner.

PETITION FOR REVIEW

PETER B. TILLER
Attorney for Petitioner
THE TILLER LAW FIRM
118 North Rock Street
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. IDENTITY OF PETITIONER

Petitioner, Earl McCormack, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

McCormack seeks review of the unpublished opinion of the Court of Appeals in cause number 56951-5-II (Slip op. July 25, 2023). A copy of the decision is attached as Appendix A at pages A-1 through A-33.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review where Mr. McCormack received ineffective assistance of counsel due to counsel's failure to have his client's mental health evaluated for potential defenses including voluntary intoxication and pathological intoxication?

2. Should this Court accept review where McCormack's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated

where the State failed to prove the essential elements of the crime of felony harassment of a criminal justice participant?

D. STATEMENT OF THE CASE

Earl McCormack was charged by amended information filed in Lewis County Superior Court on November 17, 2021, with one count of second degree identity theft, two counts of harassment of criminal justice participant performing official duties, and intimidating a public servant. Clerk's Papers (CP) at 1-4, 12-15.

Mr. McCormack, driving a Toyota 4Runner, was stopped by Washington State Patrol Trooper Sean Self on the afternoon of August 20, 2021, while traveling southbound on Interstate 5 in Lewis County, Washington. RP at 132. The Toyota 4Runner with Oregon plates was reported by other drivers as traveling "in an unsafe manner." RP at 132, 139. Trooper Self was at the Chehalis State Patrol Office when reports were received from drivers on Interstate 5 about the 4Runer, and he left the office and set up his vehicle on the southbound on-ramp of Interstate 5 at Exit 79. RP at 133. State Patrol Trooper Jeb Jewell was also parked on the

on ramp to watch for the 4Runner. RP at 133, 215.

Trooper Self saw the 4Runner matching the description given by drivers travelling southbound and started following the vehicle. RP at 134, 138. After observing the 4Runner swerving, tailgating other vehicles, cutting off another vehicle, and changing lanes without signaling, Trooper Self activated his overhead lights, signaling the vehicle to stop. RP at 139, 142, 143. The driver changed lanes and then slammed on his brakes, swerved over the fog line, and then exited the Interstate and stopped at a stop light at the bottom of the Exit 76 offramp, then accelerated onto Rice Road, and then stopped on a gravel parking lot. RP at 143-44. Trooper Jewell also followed the 4Runner and pulled into the gravel lot behind Trooper Self's vehicle. RP at 217.

The traffic stop was recorded by dash camera on Trooper Self's vehicle. RP at 140.

Trooper Self contacted the driver, who told the Trooper that he did not have a driver's license with him or any other identification, and that his name was "Jackson C. McCormack," that his date of birth was November 23, 1987. RP at 152-53.

Trooper Self said that the driver then said his middle initial was "M." and not "C." RP at 152-53.

Trooper Self said that he could smell the odor of intoxicants and saw an open beer bottle in the vehicle. RP at 151, 153.

The driver initially performed field sobriety tests, but took a break to urinate in nearby bushes. RP at 156. The driver then returned to where the Troopers were standing and said that he did not want to perform any more field sobriety tests. RP at 154, 155, 157. Trooper Self placed Mr. McCormack under arrest for driving under the influence of intoxicants. RP at 157. When being handcuffed, Trooper Self said that Mr. McCormack became uncooperative and tensed his arms so that the Trooper could not put him in handcuffs, and Trooper Jewell helped handcuff Mr. McCormack. RP at 158-60.

Trooper Jewell testified that when Trooper Self began the arrest process with Mr. McCormack, he was initially calm and cooperative, but became more vocal and then said he would kill Trooper Self and Jewell and their families. RP at 220.

Trooper Self said that until he was handcuffed, Mr.

McCormack's demeaner was calm and cooperative, and this changed and he became angry and agitated. RP at 158, 160. Trooper Self said that as they were walking him back to the Trooper's car, Mr. McCormack said "you want this shit. Get the f*ck out of my face," and after sitting in the car with his legs out, said "I'll kill you both. I'll kill your families," "I'm in the mob" and "if you arrest me, you're dead" and that the comments were directed to both Trooper Self and Trooper Jewell. RP at 162, 177, 221.

Trooper Jewell described himself as having Asian features and said that Mr. McCormack "really honed in my race and his desire to stab every Asian person and Chinese person he saw in the face." RP at 221. Trooper Jewell said that Mr. McCormack made threats to his family members and that those threats caused him concern and he took the threats seriously. RP at 221, 223.

Trooper Self asked Mr. McCormack if there was anyone who could get the 4Runner, and he gave the name "Jack McCormack." RP at 181. When Trooper started the process to tow the vehicle, he said that Mr. McCormack said that he would kill

them if his car was towed. RP at 227.

Trooper Self said that based on Mr. McCormack's demeanor and behavior, he was concerned about the threats to kill the Troopers. RP at 178. Two video clips of the interaction between Trooper Self and Mr. McCormack were played to the jury. RP at 180. Exhibit 10.

While being transported to the hospital for a blood draw Mr. McCormack slammed his forehead six times against the partition separating the back seat from the front seat in Trooper Self's vehicle, which was recorded on a rear facing camera. RP at 182-83. Trooper Self removed him from the car and noted that he had a large gash on his forehead and blood dripping down his face. RP at 183.

Trooper Self said that he was concerned for Trooper Jewell's safety based on threats made by Mr. McCormack. RP at 179. Trooper Jewell testified that after he spoke to his wife, he reiterated previous discussions they had about getting a concealed weapons permit. RP at 224. Trooper Jewell was also concerned about Mr. McCormack's statements that he had killed his own

mother and that he was "a mobster or in the mob" and was in fear that the threats would be carried out by Mr. McCormack. RP at 225.

The defense rested without calling witnesses. Mr. McCormack did not appear for trial. RP at 234.

The jury found Mr. McCormack guilty of identity theft in the second degree, two counts of harassment of a criminal justice participant, and one count of intimidating a public servant. RP at 292. The court sentenced Mr. McCormack to a standard range sentence.

On appeal, Division 2 affirmed the convictions and found that the trial court did not abuse its discretion by denying a motion to continue the trial to investigate a "pathological intoxication" defense or mental health issues, and that his counsel was not ineffective, and that sufficient evidence supported the convictions challenged on appeal. McCormack, slip op., at *1, *33.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review

are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW WHERE MR. MCCORMACK'S ATTORNEY WAS INEFFECTIVE IN FAILING TO INVESTIGATE A POTENTIAL VOLUNTARY INTOXICATION OR PATHOLOGICAL INTOXICATION DEFENSE.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685–86, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient and (2) that the deficient representation prejudiced the defendant. Grier, 171 Wn.2d at 32–33. If a defendant fails to establish either prong, the reviewing court need not inquire further. Strickland, 466 U.S. at 697. "Deficient performance is performance

falling 'below an objective standard of reasonableness based on consideration of all the circumstances.' " State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (quoting State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995)).

"Counsel's failure to consider alternate defenses constitutes deficient performance when the attorney neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so." In re Pers. Restraint of Davis, 152 Wn.2d 647, 722, 101 P.3d 1 (2004) (quoting Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002)). "Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert." In re Pers. Restraint of Brett, 142 Wn.2d 868, 881, 16 P.3d 601 (2001) (quoting Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir. 1999)).

Ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the State's case. Davis, 152 Wn.2d at 722. In many cases, though, "the real issue is not

whether the defendant performed the act in question, but whether he had the requisite intent and capacity." State v. Jury, 19 Wn. App. 256, 265-66, 576 P.2d 1302 (1978). Courts have held that counsel's performance was deficient when "'counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available.'" In re Pers. Restraint of Monschke, 160 Wn. App. 479, 490, 251 P.3d 884 (2010) (quoting Jury, 19 Wn. App. at 263). Showing counsel failed to conduct appropriate factual or legal investigations to determine what matters of defense were available and what witnesses could be called to support a defense can overcome the presumption of reasonable performance. Thomas, 109 Wn.2d at 230; Jury, 19 Wn. App. at 263.

In this case, defense counsel's failure to conduct investigation into Mr. McCormack's mental health issues, and whether a voluntary intoxication or pathological intoxication defense was possible, fell below an objective standard of reasonableness. Statements made by Mr. McCormack said that he made the statement to police while in "a blackout drunk" (RP (3/21/22) at 12) and that he had a history of multiple hospitalizations "in a mental ward" "for

certain instances just like this," (RP (3/21/22) at 12) call out for investigation of a mental health or intoxication defense, and in fact counsel argued that Mr. McCormack may have a mental illness, that he takes medication, and that he was drunk at the time the incident. RP at 277-78. Instead, defense counsel did not consider obtaining an expert for "habitual intoxication [sic] because, based on what he's told me in the past, that wouldn't apply given the fact that he independently remembered a lot of the stuff that happened during his interaction with the troopers." RP at 13. Similarly, counsel also summarily rejected the idea of an evaluation for voluntary intoxication. RP at 13.

Mr. McCormack statements to the court about his high level of intoxication and prior hospitalizations, however, increases the probability that Mr. McCormack suffers from an underlying mental illness exacerbated by alcohol, meriting investigation that voluntary intoxication or pathological intoxication diminished or eliminated his capacity to knowingly commit the alleged offenses. It would be up to an expert to determine whether his mental conditions and intoxication rose to the level to merit requesting that the court grant

an instruction for voluntary intoxication or pathological intoxication, but counsel never sought expert evaluation on this question. RP at 13. Mr. McCormack was adamant that he had been hospitalized in a mental ward multiple times. Nevertheless counsel did not actually have his client evaluated by an expert. Instead, trial counsel seems have selected the path of least resistance, apparently telling Mr. McCormack that everything was on video and that he was going to lose at trial. RP (3/21/22) at 9, 11.

A "voluntary intoxication" instruction would allow the jury to consider evidence of intoxication when deciding whether the State proved that the defendant acted with the requisite intent. State v. Thomas, 123 Wn.App. 771, 781, 98 P.3d 1258 (2004). A voluntary intoxication defense does not require expert testimony because the effects of alcohol are commonly known, and the jurors can draw reasonable inferences from the evidence presented. Id. at 781–82. The court must provide a voluntary intoxication instruction when (1) the charged offense has a particular mens rea, (2) there is substantial evidence the defendant was drinking and/or using drugs, and (3) there is evidence the drinking or drug use affected the defendant's

ability to acquire the required mental state. State v. Ager, 128 Wn.2d 85, 95, 904 P.2d 715 (1995).

A pathological intoxication defense is warranted in cases in which a defendant whose consumption of alcohol or drugs is voluntary, but who is also unaware of some atypical effect which such consumption may have upon him or her. See, e.g., People v. Murray, 247 Cal.App.2d 730, 732, 56 Cal.Rptr. 21 (1967) (dictum) (intoxication involuntary if defendant was unaware of combined effects of drugs and alcohol); Comment, Pathological Intoxication and the Voluntarily Intoxicated Criminal Offender, 1969 Utah L.Rev. 419, 426-28 (complete defense should be allowed for person having "grossly excessive" reaction of which he or she was previously unaware); State v. Lopez, 175 Ariz. 407, 413, 857 P.2d 1261, 1267 (1993) (pathologic intoxication is "a condition, quite rare, in which an individual exhibits sudden and unpredictable behavior very shortly after ingesting a very small amount of alcohol."); City of Minneapolis v. Altimus, 238 N.W.2d 851, 857 (Minn. 1976), ("if the defendant is mentally deficient due to involuntary intoxication, then he may be excused from criminal

responsibility only if temporarily insane ...."); Commonwealth v. Smith, 831 A.2d 636, 639 (Pa. 2003) ("where the defendant unknowingly suffers from a physiological or psychological condition that renders him abnormally susceptible to legal intoxicant (sometimes referred to as pathological intoxication")); State v. Sette, 611 A.2d 1129, 1138 (N.J. App. 1992) (describing pathological intoxication as a " 'relatively rare phenomenon . . . where a small amount of alcohol [or drug] may, because of an abnormal bodily condition of which the defendant is unaware, trigger an explosive reaction and a loss of self control.' ").

Having not investigated the defense of diminished capacity or pathological intoxication, counsel was not in a position to determine that there was no basis to investigate the defense. That determination requires expert assessment, which counsel never sought. Even if the record showed counsel determined there was no basis for a voluntary intoxication or pathological intoxication defense based on his assessment of the evidence, that determination would be deficient due to lack of expert investigation into the viability of the defense.

State v. Fedoruk, 184 Wn. App. 866, 339 P.3d 233 (2014), is instructive in this regard. In that case, Fedoruk held defense counsel's failure to timely retain a mental health expert or investigate the possibility of a mental health defense in that murder case amounted to deficient performance that prejudiced the outcome. 184 Wn. App. at 870. The defendant had a long and documented history of serious mental illness and had previously been found not guilty by reason of insanity in another case. Id. at 871-72, 885. This background information was available to the defense from the beginning of the case. Id. at 881. Defense counsel, however, did not attempt to retain a mental health expert to investigate a mental health defense until the day before jury selection. Id. The Court concluded the failure to investigate a mental health defense fell below an objectively reasonable standard. Id. at 883.

Similarly, counsel never investigated a voluntary intoxication or pathological intoxication defense, and never attempted to obtain an expert to evaluate Mr. McCormack and the evidence for that defense. As in Fedoruk, counsel's failure to investigate a mental health defense constituted deficient

performance.

There can be no legitimate trial strategy or tactics justifying counsel's failure to investigate an intoxication defense. Counsel performed deficiently in not seeking expert assistance and otherwise failing to investigate a pathological intoxication defense. The first prong of the Strickland test is satisfied.

Mr. McCormack also suffered prejudice. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A "reasonable probability" is lower than a preponderance but more than a "conceivable effect on the outcome." Strickland, 466 U.S. at 693-94. It exists when there is a probability "sufficient to undermine confidence in the outcome." State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Mr. McCormack suffered prejudice from counsel's deficient performance because it deprived him of a fair trial. Jeffries, 105 Wn.2d at 418. The record contains testimony supporting Mr. McCormack's high level of intoxication, and more tellingly, his

delusional thought process and behavior, which included claiming to be in "the mob," claiming to have killed his mother — which was investigated and determined to be false — and his beating his head on the patrol car partition. Mr. McCormack's bizarre statements and violent behavior when intoxicated support a voluntary intoxication or pathological intoxication defense, which was essentially taken away from Mr. McCormick before he even got a chance to be evaluated for the same.

Defense counsel's failure to pursue an evaluation or testing necessary to support his only reasonable defense — that based on intoxication exposing an underlying a mental illness, resulted in extreme prejudice to his case from counsel's deficient performance because there could be no verdict other than guilty. As defense counsel noted: the interaction between Mr. McCormack and the Troopers was on video; without further investigation into why Mr. McCormack reacted the way he did to the Troopers and the role intoxicants played, conviction was all but assured. Without it, he had no defense at trial, much less a fair one. The second Strickland prong is satisfied and this Court should accept review.

2. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW WHERE THE STATE FAILED TO PROVE THE ELEMENT OF HARASSMENT OF A CRIMINAL JUSTICE PARTICIPANT AND INTIMATING A PUBLIC SERVANT.

In this case, the State provided insufficient evidence to prove all the elements of felony harassment and intimidating a public servant. The State presented insufficient evidence that Mr. McCormack's threats to the Troopers placed either of them in reasonable fear that Mr. McCormack would carry out his alleged threats.

Mr. McCormack was initially cooperative and performed some of the field sobriety tests. RP at 154-56. After he stopped the field sobriety tests, Mr. McCormack's demeanor changed and he became agitated, angry and began making abusive statements to the Troopers and by threatening to kill them and their families, and resisted being handcuffed by tensing his arms. RP at 158, 159, 160, 162. By the time Mr. McCormack began making abusive statements Trooper Self was in the process of placing him in handcuffs. RP at

160-62. His antagonistic comments continued after he was cuffed and placed in the patrol car. RP at 162. Throughout this portion of the incident when he made his allegedly threatening statements, Mr. McCormack was handcuffed, highly intoxicated, and during the latter part of the episode he was restrained in the Trooper's vehicle. Some of his statements were obvious hyperbole or transparently absurd, i.e. that he was a member of "the mob." RP at 162. A reasonable officer would not have been frightened that a drunk Mr. McCormack would carry out his "threats." Under these circumstances, a reasonable officer would not be afraid that Mr. McCormack would follow through with any alleged threat to cause bodily injury. Mr. McCormack's intoxicated state, his expression of frustration---demonstrated when he rammed his head against the partition---would not, "under all the circumstances," frighten a reasonable officer into fearing that Mr. McCormack would carry out a threat to kill or inflict bodily injury. RCW 9A.46.020(2)(b).

A reasonable officer would not view Mr. McCormack's drunken, antagonistic statements as "true threats." In addition, the State failed to meet the requirements of RCW 9A.46.020(2)(b)

relating to Mr. McCormack's present and future ability to carry out his allegedly threatening words. Here, Mr. McCormack was handcuffed and did not demonstrate any knowledge of the Trooper's or their family's locations or demonstrate knowledge of any personal details indicating the possibility of locating the Troopers at a future date.

The evidence was insufficient to prove all facts necessary for conviction. State v. W.R., 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). Mr. McCormack's harassment convictions must be reversed, and the charges dismissed with prejudice. Id.

Both our federal and state constitution's guarantee individuals the right to freedom of speech. U.S. Const. amend. I; Wash. Const. art. I, § 5. Crimes that have a threat to commit bodily harm as an element require the State to prove the threat was a "true threat" so as not to violate the First Amendment's free speech clause. State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004); State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001); State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). Washington courts apply an objective reasonable-person test to determine what

constitutes a "true threat." Kilburn, 151 Wn.2d at 43-44, 45. A threat is a "true threat" if it 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.' " State v. Locke, 175 Wn.App. 779, 789, 307 P.3d 771 (2013) (alteration in original) (internal quotation marks omitted) (quoting State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013)). State v. Trey M., 186 Wn.2d 884, 907, 383 P.3d 474 (2016). "A true threat is a serious threat, not one said in jest, idle talk, or political argument." Kilburn, 151 Wn.2d at 43, 84 P.3d 1215.

Mr. McCormack's statements were at most "hyperbolic expressions of frustration." State v. Kohonen, 192 Wn.App. 567, 583, 370 P.3d 16 (2016). The alleged threats were more accurately termed as the precisely the type of hyperbole protected under the First Amendment.

The evidence was insufficient to prove a true threat. A reasonable person could not foresee that the absurd, drunken statements made while in custody would be interpreted as anything

more than "hyperbolic expressions of frustration." Id. Because of this, the harassment convictions must be reversed, and the charges dismissed with prejudice. Kohonen, 192 Wn.App. at 583.

Regarding the last count, a person is guilty of intimidating a public servant "if, by use of a threat, he or she attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant." RCW 9A.76.180(1). In order to establish a prima facie case, the State must provide some evidence both that the defendant made a threat and that the threat was made with the purpose of influencing a public servant's official action. State v. Montano, 169 Wn.2d 872, 876, 239 P.3d 360 (2010). The issue is whether sufficient evidence existed that Mr. McCormack intended the alleged threats to influence an official action by the officers. Intimidating a public servant requires the State to prove (1) an attempt to influence a public servant's official action (2) by use of a threat. State v. Moncada, 172 Wn. App. 364, 367, 289 P.3d 752 (2012). "The statute is not intended to punish displays of anger or threats alone." State v. Toscano, 166 Wn. App. 546, 555, 271 P.3d 912 (2012). Rather, the State must prove "the threat was made with

the purpose of influencing a public servant's official action." Montano, 169 Wn.2d at 876.

In State v. Burke, a police officer pursued underage drinkers through a house party and had an angry conversation with the occupant. 132 Wn. App. 415, 417-18, 132 P.3d 1095 (2006). Burke testified he overheard the conversation and was disappointed the party might be over. Id. at 418. Intoxicated, Burke charged at the officer and "belly bump[ed] him." Id. at 417. Burke did not listen to the officer's commands to get back, yelled profanities, and took a "fighting stance." Id. at 417-18.

The Court held Burke's aggressive behavior met the definition of a threat. Id. at 421. His behavior did not, however, prove he tried to influence the officer's behavior. Id. The Court explained there was no evidence linking Burke's disappointment with the party ending and his aggressive actions towards the officer. Id. at 422. Rather, the evidence showed "only that Burke was drunk and angry." Id. "Evidence of anger alone is insufficient to establish intent to influence [a public servant's] behavior." Id.

Similarly, in Montano, supra, the defendant became violent

and enraged when police officers tried to arrest him. Montano, 169 Wn.2d at 874-75. Montano "struggled violently with the police officers who were attempting to subdue him. From his initial refusal to provide identification to his final thrashings that resulted in a stun gun's being used on him twice, Montano grew increasingly enraged and violent. After being subdued physically, he [lashed] out verbally, hurling threats and insults at the officers." Montano, 169 Wn.2d at 879. Montano hurled threats at the officers as they tried to subdue him, including, "I know when you get off work, and I will be waiting for you," and "I'll kick your ass." Id. at 875. Montano's insulting commentary continued as he was taken to jail. Id. The Supreme Court held the State failed to make a prima facie showing that Montano intimidated a public servant. Id. at 880. The court explained there was "simply no evidence to suggest Montano engaged in his behavior, or made his threats, for the purpose of influencing the police officers' actions." Id. at 879. "Instead, the evidence shows a man who was angry at being detained and who expressed that anger toward the police officers." Id. The Court emphasized "the State cannot bring an intimidation charge any time a defendant insults or

threatens a public servant." Id. Rather, "some evidence is required to link the defendant's behavior to an official action that the defendant wishes to influence." Id. at 879-80.

In Moncada, supra, while driving west on the freeway, a Washington State Trooper observed Moncada walking in the opposite direction with his arm outstretched as if hitchhiking or "making obscene gestures." The trooper parked his car and got out. Moncada quickly walked toward the trooper, clenching his fists and looking tense. When the trooper told him to stop, Moncada continued to walk towards him. Moncada yelled, "What the f* ck do you want?" When the trooper asked why he was on the freeway, Moncada said: "F*ck you. What the f* ck are you going to do? Shoot me?"' As the trooper retrieved his stun gun, Moncada said "F* cking shoot me" and "Tase me or I will f* cking kill you." Moncada, 172 Wn.App. ar 366.

Division Three concluded that a defendant's generalized display of anger, through words and conduct, is not enough to show an attempt to influence official action. "The facts here are similar to those in Burke and Montano. Like in Montano and Burke, Moncada

immediately confronted the trooper. He hurled threats and swear words. 'Tase me' is more specific than what was hurled in Burke. But it is still essentially an expression of anger and an invitation to fight. In context, we conclude that Mr. Moncada's words and conduct here do not show an attempt to influence but rather a drunken tirade." Moncada, 172 Wn.App. at 369.

In this case, the evidence is insufficient to establish the requisite nexus between Mr. McCormack's alleged threats and an attempt to influence the Troopers. His behavior was even less egregious toward the Troopers than that of Montano, Burke and Moncada. For instance, before he was arrested, Montano struggled violently with the police officers who were attempting to subdue him. From his initial refusal to provide identification to his final thrashings that resulted in two taseings, Montano grew increasingly enraged and violent. Burke "belly bumped" the officer and swung at him his fists. Moncada advanced toward the trooper making threats and using obscenities. Here, Mr. McCormick was initially cooperative and started taking the field sobriety tests. He tensed his arms when Trooper Self started to handcuff him. Trooper Self

testified that after he was cuffed and placed in the back of hte car he made statements such as "I'll kill you both," "I'll kill your families," and "if you arrest me, you're dead." RP at 162, 177.

The evidence demonstrated that Mr. McCormack was drunk and became increasingly agitated and angry, but evidence of anger and even threatening remarks alone is insufficient to support a charge of intimidating a public servant. Montano, 169 Wn.2d at 878-79. The alleged threat that he would kill them "if you arrest me" cannot be reasonably viewed as an attempt to influence the Troopers' "decision or official action," the statement was made after he was arrested an placed in the Trooper's car. Under Montano and Burke, the State's evidence was insufficient to prove beyond a reasonable doubt the crime of intimidating a public servant.

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F. CONCLUSION

For the foregoing reasons, this Court should accept review and reverse the convictions.

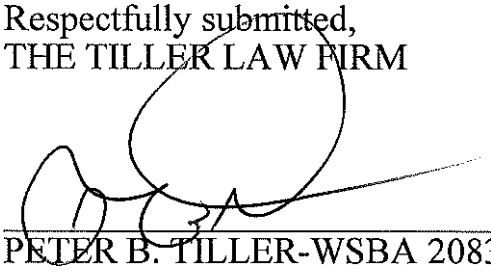
DATED: August 23, 2023.

Certification of Compliance with RAP 18.17:

This petition contains 4998 words, excluding the parts of the petition exempted from the word count by RAP 18.17.

DATED: August 23, 2023.

Respectfully submitted,
THE TILLER LAW FIRM



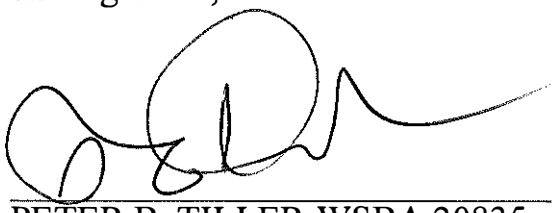
PETER B. TILLER-WSBA 20835
Attorney for Earl McCormack

CERTIFICATE OF SERVICE

The undersigned attorney for the Appellant, hereby certifies that one copy of the Petition was e-filed by JIS Link to Mr. Derek M. Byrne, Court of Appeals, Division 2, Sara I. Beigh, Lewis County Prosecuting Attorney's office, and to Earl C. McCormack, Appellate, postage pre-paid on August 23, 2023, at the Centralia, Washington post office addressed as follows:

Sara I. Beigh Lewis County Prosecutor's Office sara.beigh@lewiscountywa.gov	Mr. Derek M. Byrne Clerk of the Court Court of Appeals 909 A St, Ste. 200 Tacoma, WA 98402-4454
EARL C MCCORMACK DOC # 432352 Coyote Ridge Corrections Center 1301 N Ephrata Ave Connell, WA 99326	

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on August 23, 2023.



PETER B. TILLER-WSBA 20835
Attorney for Earl McCormack

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Washington State
Court of Appeals
Division Two

July 25, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EARL C. MCCORMACK, Appellant.	No. 56951-5-II UNPUBLISHED OPINION

LEE, J. — Earl C. McCormack appeals the trial court's denial of his motion to continue the trial date in order to obtain an evaluation for "pathological intoxication." McCormack claims the trial court abused its discretion in denying the motion and violated his right to present a defense. McCormack also alleges he received ineffective assistance of counsel when his defense counsel failed to investigate McCormack's mental health issues and failed to investigate the possibility of a pathological intoxication defense. Additionally, McCormack appeals his convictions following a jury trial for second degree identity theft (count I), harassment of a criminal justice participant (count II and count III), and intimidating a public servant (count IV). McCormack argues there is insufficient evidence to support each of his convictions.

Because McCormack, who was represented by counsel, moved pro se to continue his trial the day before trial was set to begin, when he had no supporting evidence of "pathological intoxication," and after his trial had already been continued twice, we hold that the trial court did not abuse its discretion in denying McCormack's motion to continue. Additionally, because

The driver of the truck sat facing forward and did not initially respond to Trooper Self knocking on the driver-side window. When the driver did finally respond to Trooper Self, Trooper Self noticed a half-empty open beer bottle in the front seat cupholder. Additionally, Trooper Self smelled a "strong odor of intoxicants," and observed that the driver had "bloodshot, watery eyes, and his eyelids were drooping down." 1 Verbatim Rep. of Proc. (VRP) (Mar. 22, 2022) at 153.

Trooper Self requested the driver's license or other form of identification. The driver stated he did not have his license, but identified himself as Jackson C. McCormack with a specific birthdate. However, before providing the birthdate, McCormack stated his middle initial was actually "M" and not "C."

Trooper Self asked McCormack if he was willing to perform field sobriety tests.[1] McCormack agreed and stepped out of the truck. Trooper Self then began to administer the horizontal gaze nystagmus (HGN) test.[2] During this time, Trooper Jewell ran McCormack's information through the WSP dispatch system. Trooper Jewell could not match McCormack's name with the truck's vehicle identification number.

Prior to completion of the HGN test, McCormack informed Trooper Self he needed to urinate. Trooper Self allowed McCormack to so do nearby. When McCormack returned, Trooper Self asked McCormack if he was on any medications. McCormack stated he was on a medication for depression and anxiety. According to McCormack, he had been taking that medication for

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[1] Field sobriety tests are "designed to make observations on someone's ability to do . . . basic motor functions; balance, walk in a straight line." 1 VRP (Mar. 22, 2022) at 154.

[2] An HGN test is one of the field sobriety tests. When an officer administers an HGN test, he or she observes "whether or not [a person's] eyes smoothly follow a stimulus in front of them." 1 VRP (Mar. 22, 2022) at 154.

was agitated, he did not appear to resist being led to the patrol car. When McCormack sat in the patrol car, he sat sideways such that his feet hung out the door.

Trooper Self read McCormack his *Miranda*[4] rights. McCormack continued to make angry comments at Trooper Self and Trooper Jewell. Comments McCormack made included: "You guys are dead," "You arrest me, you're dead," "Your whole family is dead you little b[****]," "You're f[***]ing dead too you stupid f[***]," "I killed my mom," and "You're a stupid f[***]ing b[****]." Ex. 10 (338), at 2:27-5:45. During that time, Trooper Self asked McCormack if there was anyone who could come pick up the truck. McCormack replied with the phone number and name of his father, "Jack" McCormack. 1 VRP (Mar. 23, 2022) at 181.

After McCormack provided his father's information, Trooper Self attempted to close the door of the patrol car. Trooper Self needed to ask McCormack to move his leg several times before McCormack complied. Once Trooper Self closed the door, for the next several minutes, he and Trooper Jewell processed McCormack's vehicle. McCormack's father was unable to pick up the truck, so the troopers arranged to have it towed.

Inside the patrol car, McCormack made "constant statements." 1 VRP (Mar. 23, 2022) at 178. The statements included, "You're a f[***]ing piece of sh[**] white boy Indian, you're the first one to die . . . smile while your kids get f[***]ing killed," "I'm with the f[***]ing mob, b[****]," "If you impound my f[***]ing car, see what the f[***] happens," "I am a serial killer." Ex. 10 (338), at 8:14-13:43. McCormack also yelled racial epithets at Trooper Jewell, who is half-Thai. The racial comments included, "I'm killing all the Chinese people . . . I'm stabbing them in

[4] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

counsel. In December 2021, McCormack requested new counsel again, once more due to a communication breakdown with his attorney. The trial court again granted McCormack's request and appointed new counsel, Donald Blair, with a note that the court would likely not entertain further new counsel requests from McCormack. As a result of the new counsel appointments, McCormack's trial was continued twice and ultimately set for March 22 and March 23, 2022.

B. MOTION TO CONTINUE

On March 21, 2022, the trial court held a pretrial conference. During the pretrial conference, McCormack stated he was not ready to go to trial the next day because he had not had sufficient time to consult with his attorney. McCormack's counsel disagreed with McCormack's characterization of the extent to which he was able to communicate with McCormack about his defenses and possible outcomes. Counsel informed the trial court that he had met with McCormack several times and they talked about the facts of the case at length, which was fairly straightforward because the incident was caught on video. In their discussions, McCormack was able to recall what he said and did during the incident, which correlated with what was in the video. Counsel also informed the court that he had spoken with the two troopers involved, negotiated the case with the State, explained the likelihood of a conviction and the consequences of a conviction to McCormack, and was prepared to go to trial the next day.

McCormack stated he wanted to continue the trial so he could have time to look into and possibly be evaluated for "pathological intoxication." VRP (Mar. 21, 2022) at 10. McCormack had never previously mentioned pathological intoxication. McCormack stated:

> I've been looking at stuff on the law library, and I want time. I want to waive my right for 60 days, but I want time to be able to look into certain things for my defense, such as pathological intoxication, I want to get evaluated for that. . . . I

VRP (Mar. 21, 2022) at 10-12. The trial court asked McCormack's counsel to respond to McCormack's statements. McCormack's counsel then addressed McCormack regarding their discussions of his case, confirming with McCormack that McCormack was able to tell counsel what happened during the incident. Counsel also pointed out that McCormack's claim of being blacked out drunk was contrary to his ability to recall what happened.

The trial court expressed skepticism that evidence of pathological intoxication would be admissible or that "there's any scientific basis to allow an expert to testify in court to this theory of pathological intoxication." VRP (Mar. 21, 2022) at 17. The trial court denied McCormack's request for a continuance.

C. TRIAL

McCormack's jury trial began the next day, on March 22, 2022. The State proposed jury instructions, which did not include any instructions on an intoxication defense or diminished capacity. McCormack's counsel did not propose jury instructions nor did he object to the instructions proposed by the State.

1. Preliminary Hearing

McCormack expressed dissatisfaction that the trial court denied his request for a continuance. The trial court responded, "[Y]ou brought a motion to continue yesterday on your own, and I heard your motion, and I considered it, and I denied the motion." 1 VRP (Mar. 22, 2022) at 9. McCormack also expressed frustration at his counsel and his counsel's purported failure to consult with McCormack on possible defenses. In response, counsel informed the court that he had met with McCormack a number of times to discuss the facts of the case, which included

Self's concern was based on McCormack's "demeanor and behavior" and "[b]ecause [he must] take everything everybody says seriously." 1 VRP (Mar. 23, 2022) at 178. Trooper Self believed his fear was reasonable.

After Trooper Self secured McCormack in the patrol car, he closed the door. Trooper Self testified he did not hear all of McCormack's statements from inside the patrol car. However, Trooper Self heard McCormack say that McCormack had killed his mother. Trooper Self testified that he was concerned about this statement. After learning McCormack's true name, Trooper Self called several police agencies to determine if McCormack's statement was true. Trooper Self learned that while McCormack's mother was deceased, McCormack did not in fact kill her.

3. Trooper Jewell's Testimony

Trooper Jewell also testified during the trial. Trooper Jewell was hired by WSP in June 2019. Trooper Jewell completed at least 1,000 hours of training prior to becoming commissioned as a trooper.

Trooper Jewell testified he was also concerned about McCormack's threats to kill him and his family. Trooper Jewell stated, "Mr. McCormack, especially during the process when [McCormack] was in the back of the car, we were working on towing his vehicle, really honed in on my race and his desire to stab every Asian person and Chinese person he saw in the face." 1 VRP (Mar. 23, 2022) at 221. Trooper Jewell testified that he took McCormack's threats seriously. Trooper Jewell stated that he has rarely had interactions "that escalated to this nature of repeated 'I'm going to kill your family, I'm going to kill your family, I'm going to kill your family, I'm going to kill you.'" 1 VRP (Mar. 23, 2022) at 223-24. Trooper Jewell felt that McCormack "really focused" on a plan to kill Trooper Jewell and his family. 1 VRP (Mar. 23, 2022) at 224. Trooper

counsel are mutually exclusive." *State v. Vermillion*, 66 Wn. App. 332, 340, 832 P.2d 95 (1992), *review denied*, 120 Wn.2d 1030 (1993). McCormack brought the motion without informing his own counsel of his desire to continue the trial in order to evaluate a possible pathological intoxication defense. McCormack had no grounds to bring a pro se motion to continue the trial date when he was represented by counsel; therefore, we need not address the motion on its merits. However, we reach the merits of McCormack's challenge to the trial court's ruling on the motion to continue because the trial court entertained and decided the motion.

1. Legal Principles

Trial courts have the discretion to grant or deny a motion for a continuance. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). A trial court's decision is reviewed for abuse of discretion. *Id.* Reviewing courts will not overturn a trial court's decision absent a clear showing that the decision was manifestly unreasonable or based on untenable grounds. *Id.* "In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." *Id.* at 273.

A denial to a motion for a continuance may rise to the level of a constitutional violation if that denial prevents a defendant from presenting evidence material to his or her defense. *Id.* at 274-75. Whether there is any constitutional violation is determined on a case by case basis. *Id.* at 275.

2. No Abuse of Discretion

McCormack argues that the trial court abused its discretion in denying his motion to continue because "[a] defense based on voluntary intoxication or pathological intoxication would

1038 (2016). Appellate courts will only overturn a trial court's decision if that decision was manifestly unreasonable or based on untenable grounds. *Downing*, 151 Wn.2d at 272. Because McCormack requested a continuance the day before his trial after his trial had already been continued twice, McCormack did not have evidence of pathological intoxication, and McCormack never mentioned any defense other than a general denial of the charges until the eve of his trial, the trial court's denial of McCormack's request to continue the trial was not unreasonable. Therefore, the trial court did not abuse its discretion when it denied McCormack's request for a continuance.

2. No Violation of a Right to Present a Defense

McCormack alternatively argues that the trial court's denial of his request for a continuance amounted to a violation of his right to present a defense. Specifically, McCormack argues that "the [trial] court's denial of [his] motion to continue was prejudicial," he "had the right to explore a pathological intoxication defense," and "the [trial] court's decision unfairly prejudiced [him] by neutering his ability to propound a complete defense." Br. of Appellant at 31.

Criminal defendants have a constitutional right to present a defense. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. However, defendants "do not have the right to introduce evidence that is irrelevant or otherwise inadmissible." *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004), *review denied*, 154 Wn.2d 1026 (2005); *State v. Arndt*, 194 Wn.2d 784, 812, 453 P.3d 696 (2019) (stating "a defendant's constitutional right to present a defense is not absolute."), *cert. denied*, 142 S. Ct. 726 (2021). "Whether a Sixth Amendment right has been abridged presents a legal question that is reviewed de novo." *Arndt*, 194 Wn.2d at 797.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

McCormack argues that his defense counsel's representation fell below an objective standard of reasonableness because counsel failed to conduct an investigation into McCormack's mental health issues and whether a pathological intoxication defense was possible. McCormack asserts because he made statements to the troopers in "'a blackout drunk'" state and purportedly has a history of hospitalizations "'in a mental ward,'" his counsel should have investigated a mental health defense. Br. of Appellant at 37. McCormack further argues that "[i]t would be up to an expert to determine whether his mental conditions and intoxication rose to the level to merit requesting that the court grant an instruction for voluntary intoxication or pathological intoxication, but [his] counsel never sought expert evaluation on this question." Br. of Appellant at 38-39. We disagree.

1. Legal Principles

We review ineffective assistance of counsel claims de novo. *State v. Fedoruk*, 184 Wn. App. 866, 879, 339 P.3d 233 (2014). Individuals possess the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Quy Dinh Nguyen*, 179 Wn. App. 271, 287, 319 P.3d 53 (2013), *review denied*, 181 Wn.2d 1006 (2014). "To prove ineffective assistance of counsel, an appellant must show (1) that his counsel's performance was deficient and (2) that this deficient performance prejudiced him." *State v. Burke*, 132 Wn. App. 415, 419, 132 P.3d 1095 (2006). "Failure to establish either part defeats the ineffective assistance of counsel claim." *Nguyen*, 179 Wn. App. at 287. Courts are highly deferential to a counsel's decisions and a "strategic or tactical decision is not a basis for finding error." *State v. Walters*, 162 Wn. App. 74, 80, 255 P.3d 835 (2011). "The benchmark for judging any claim of ineffectiveness must be

length. McCormack had ample opportunity to discuss his mental health with his counsel. But without any further information, and without anything in the record to indicate that McCormack suffered from mental illness, there was nothing for McCormack's counsel to have investigated. Accordingly, we hold that McCormack's counsel's performance was not deficient.

3. Failure to Investigate Voluntary Intoxication or Pathological Intoxication Defense

a. Intoxication

McCormack argues there is "no legitimate trial strategy . . . justifying [his] counsel's failure to investigate an intoxication defense." Br. of Appellant at 41. We disagree.

Again, McCormack met with his counsel several times, during which they discussed his case at length, including "the possibility that [McCormack] might have been intoxicated." 1 VRP (Mar. 22, 2022) at 11. McCormack's counsel discussed with McCormack that pursuing an intoxication defense "might be a doubled-edged [sic] sword." 1 VRP (Mar. 22, 2022) at 11. McCormack was also informed that he may need to testify regarding his intent if he pursued an intoxication defense. McCormack chose to not testify, as evidenced by his voluntarily not attending his own trial. Despite the challenges with an intoxication defense, McCormack's counsel emphasized McCormack's likely intoxication during his cross-examination of Trooper Self. Furthermore, "[t]he effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol use." *Thomas*, 123 Wn. App. at 782.

The record shows that McCormack's counsel considered an intoxication defense, discussed it with McCormack, and in light of McCormack's decision to absent himself from trial, McCormack's counsel pursued a different strategy. A strategic or tactical decision is not a basis

> And essentially, it was not—these threats were not true threats, and he was explaining to me why. So I hadn't considered an expert for his habitual intoxication because, based on what he's told me in the past, that wouldn't apply given the fact that he independently remembered a lot of the stuff that happened during his interaction with the troopers.

1 VRP (Mar. 22, 2022) at 12-13. The record shows that McCormack's counsel discussed intoxication with McCormack and that McCormack had opportunity to discuss the possibility of an expert evaluation for pathological intoxication well before the eve of trial. And, as with the intoxication defense discussed above, McCormack's counsel pursued a different strategy based on his conversations with McCormack. Thus, McCormack's claim of ineffective assistance for failure to investigate pathological intoxication fails.

C. SUFFICIENCY OF EVIDENCE

McCormack argues that there was insufficient evidence to support his convictions of identity theft, harassment, and intimidating a public servant. We disagree.

1. Standard of Review

The State must prove all elements of a crime beyond a reasonable doubt. *State v. Christian*, 200 Wn. App. 861, 864, 403 P.3d 925 (2017). Evidence is sufficient to support a conviction if, after viewing evidence in a light most favorable to the State, any reasonable juror could find the elements of the crime beyond a reasonable doubt. *State v. Pinkney*, 2 Wn. App. 2d 574, 579, 411 P.3d 406 (2018).

Challenges to sufficiency of the evidence admit the truth of the State's evidence and all reasonable inferences arising therefrom. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265-66, 401 P.3d 19 (2017). We consider direct evidence and circumstantial evidence to be equally reliable. *State v. Ozuna*, 184 Wn.2d 238, 248, 359 P.3d 739 (2015). "We must defer to the trier of fact on

"Means of identification" is information or an item that is "personal to or identifiable with an individual or other person," such as "[a] current or former name of the person, telephone number, an electronic address, or identifier of the individual." RCW 9.35.005(3); *see State v. Presba*, 131 Wn. App. 47, 55-56, 126 P.3d 1280 (2005) (holding that a name, social security number, former address, and date of birth all constitute a "means of identification."), *review denied*, 158 Wn.2d 1008 (2006).

b. Sufficient evidence McCormack committed identity theft

McCormack argues that his use of another's name and birthdate during a traffic stop does not give rise to a reasonable inference of the intent to commit the crimes of driving under the influence[6] or driving with a suspended license.[7] Rather, McCormack argues he only sought to "frustrate or antagonize" the police. Br. of Appellant at 53.

Here, the record shows that McCormack provided the name "Jackson C. McCormack" to Trooper Self when he was first pulled over. McCormack quickly corrected himself and stated his middle initial was actually "M" and not "C." McCormack then provided the specific birthdate. The record reflects that Jackson M. McCormack, with the same birthdate that McCormack provided to Trooper Self, is an actual individual residing in Mountlake Terrace. The record also shows that McCormack's name is not Jackson. Moreover, the fact that McCormack provided a specific name and specific birthdate to Trooper Self, and then *corrected* the middle initial, gives rise to the inference that McCormack knew Jackson M. McCormack was a real person and

[6] RCW 46.61.502.

[7] RCW 46.20.342.

a. Legal principles

A person is guilty of harassment if "the person knowingly threatens. . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person; . . . and . . . [t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(a), (b). The State must prove the victim is placed in reasonable fear that the threat will be carried out. *State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003).

Harassment is a felony if "the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or . . . the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties." RCW 9A.46.020(2)(b)(iii), (iv). Criminal justice participants include law enforcement officers. RCW 9A.46.020(4).

When the threat involves a criminal justice participant, "the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances." RCW 9A.46.020(2)(b). There is no 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). In this case, the parties do not dispute that Trooper Self and Trooper Jewell are criminal justice participants who were performing official duties when McCormack made his statements.

Only a true threat suffices for a harassment conviction. *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004). True threats are not protected by the First Amendment. U.S. CONST. amend. I; *Kilburn*, 151 Wn.2d at 43 ("To avoid unconstitutional infringement of protected speech,

b. McCormack made true threats

McCormack argues that his "absurd, drunken" statements to Trooper Self and Trooper Jewell were "at most 'hyperbolic expressions of frustration.'" Br. of Appellant at 50 (quoting *Kohonen*, 192 Wn. App. at 583). Conversely, the State argues McCormack's threats were true threats because his statements were continuous, repeated, and he made the statements with specificity to Trooper Self and Trooper Jewell. We agree with the State.

Here, starting when Trooper Self and Trooper Jewell handcuffed McCormack, McCormack became increasingly vitriolic. He made a continuous stream of statements, including, "I'm gonna kill both you guys," "I'm gonna kill both your f[***]ing families," "I killed my mom," "You guys are dead," "You arrest me, you're dead," "Your whole family is dead you little b[****]," "You're f[***]ing dead too you stupid f[***]," and "I'm a f[***]ing mobster, you know that sh[**]." Ex. 10 (338), at 1:58-5:45. McCormack also focused on Trooper Jewell's race, with comments such as: "I'm killing all the Chinese people . . . I'm stabbing them in the f[***]ing face," "You know how many Chinese people I'm going to kill now?" and "You touched [my car] your little Chinese family is dead." Ex. 10 (338), at 14:39-19:10. In the video footage, McCormack is clearly angry and agitated; his comments cannot reasonably be construed as idle talk, political argument, or made in jest. Furthermore, continuous angry and yelled threats to kill the troopers, their families, and members of the Asian race rise well beyond "absurd, drunken" statements and "hyperbolic expressions of frustration." Under these circumstances, it is clear that McCormack's statements were more than recklessly made; McCormack understood that his statements could be interpreted as a serious expression of intention to "cause bodily harm immediately or in the future" to Trooper Self, Trooper Jewell, and their families. Indeed, McCormack's statements *directly*

McCormack's argument is belied by modern day internet capabilities. McCormack had requested Trooper Self's and Trooper Jewell's names, which they provided. Indeed, it often takes little more than a name and employer, if even that, to facilitate an internet search that could reveal considerable information on a person and their families.

Furthermore, Trooper Self was concerned enough about McCormack's statements that *after* McCormack had been booked into jail, Trooper Self spent time calling around police agencies to determine if McCormack had truly killed his mother. It is unlikely Trooper Self would have done so if he did not have any fear of McCormack's threats. And Trooper Self had previous experiences while on duty encountering persons who are drunk; this was not Trooper Self's first encounter with an angry drunk.

Courts look at the totality of the circumstances when assessing the reasonableness of a criminal justice participant's fear. RCW 9A.46.020(2)(b); *Boyle*, 183 Wn. App. at 9. Based on McCormack's repeated threats to kill Trooper Self and his family, along with McCormack's angry—and at one time, violent—behavior and demeanor, a reasonable juror could find that Trooper Self was placed in reasonable fear. We hold that sufficient evidence exists for Trooper Self's reasonable fear.

d. Trooper Jewell's reasonable fear

Trooper Jewell testified that he took McCormack's threats seriously. Trooper Jewell stated that he has rarely encountered anyone whose threats escalated as much as McCormack's threats did. According to Trooper Jewell, "McCormack really focused on 'I plan to do this.'" 1 VRP (Mar. 23, 2022) at 224.

McCormack's statements enough that after the incident, he told his wife to carry a gun "more frequently." 1 VRP (Mar. 23, 2022) at 224.

Considering all of the circumstances—McCormack's continued and focused threats against Trooper Jewell, McCormack's demeanor and behavior, Trooper Jewell urging his wife to carry a gun as result of this incident, along with national anti-Asian sentiment and modern-day internet search capabilities—a reasonable juror could find beyond a reasonable doubt that Trooper Jewell had a fear "that a reasonable criminal justice participant would have." RCW 9A.46.020(2)(b). Therefore, we hold that sufficient evidence exists for Trooper Jewell's fear.

4. Intimidating a Public Servant

McCormack argues that the State did not present sufficient evidence that he intended to "influence an official action by the officers." Br. of Appellant at 54. Specifically, McCormack contends that there was no "nexus" between his alleged threats and an attempt to influence the troopers. Br. of Appellant at 60.

a. Legal principles

RCW 9A.76.180(1) provides: "A person is guilty of intimidating a public servant if, by use of a threat, he or she attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant." "A police officer is a public servant." *Burke*, 132 Wn. App. at 421. Here, there is no dispute that Trooper Self and Trooper Jewell are public servants.

A threat is to "communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time." RCW 9A.76.180(3)(a). A threat also includes communication of the intent to cause bodily injury in the future to the person threatened and "any other act which is intended to harm substantially the person threatened or another with respect to

Ex. 10 (338), at 2:45-2:55, 13:33, 19:00-19:10. McCormack's specific threats are directly linked to official actions: McCormack's arrest and the towing of McCormack's vehicle.

Viewing the evidence in a light most favorable to the State, a trier of fact could reasonably infer that McCormack's threats regarding his arrest and the towing of his vehicle indicate an intent to influence the troopers' official actions. Therefore, we hold there is sufficient evidence of McCormack's intent to influence and affirm his intimidating a public servant conviction.

CONCLUSION

The trial court did not abuse its discretion in denying McCormack's motion to continue. Also, because McCormack did not inform his counsel of any mental health issues or raise the possibility of a pathological intoxication defense with counsel until the day before trial, McCormack's counsel did not render ineffective assistance. Finally, sufficient evidence exists for each of McCormack's convictions challenged on appeal. Accordingly, we affirm.

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.

J, J.

We concur:

Glasgow, CJ

Glasgow, C.J.

Che, J.

Che, J.

THE TILLER LAW FIRM

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