No. 90815-0

(Court of Appeals No. 71965-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KANE BOYLE,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decision

United States Supreme Court Decisions and Grant of Certiorari

United States Constitution

Washington Constitution

Washington Statute and Session Law

Washington Court Rules

Other Authority

A. IDENTITY OF PETITIONER

Kane Boyle, defendant and appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Boyle seeks review of the Court of Appeals decision affirming his Kitsap County Superior Court conviction for harassment of a criminal justice participant. State v. Kane Boyle, ___ Wn. App. ___, ___ P.3d ___ (No. 71965-3-I, 7/28/14), also found at 2014 WL 4345404.

A copy of the Court of Appeals decision, dated July 28, 2014, is attached as Appendix A. A copy of the order granting the State's motion to publish the decision, dated August 25, 2014, is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. The due process clauses of the federal and state constitutions require the State to prove each element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The jury may not be instructed in a manner that reduces or eliminates this burden of proof. Washington's felony harassment of a criminal justice participant statute provides, "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). Boyle proposed jury instructions that included similar language, but the Court of Appeals held that the trial court was not required to instruct the jury that it must appear to the criminal justice participant that the defendant had the present and future ability to carry out the threat. Where no other reported case addresses the new crime of felony harassment of a criminal justice participant, should this Court review Mr. Boyle's case to interpret the language of RCW 9A.46.020(2)(b) and clarify the elements of the crime?

2. The First Amendment protects the right of citizens to free expression, but a "true threat" is not protected speech. The jury was instructed that it was an element of felony harassment of a criminal justice participant that the defendant's words or conduct placed the police officer in "such a fear that a reasonable criminal justice participant would have [believed] that the threat would be carried out," but not that Mr. Boyle intended to threaten the officer. The United States Supreme Court will be deciding a case addressing whether the First Amendment requires that the defendant intend his words or conduct to be threatening in Elonis v. United States, No. 13-983, cert.

granted, 134 S. Ct. 2819 (2014). Should this Court accept review to address its current definition of "true threat" in light of the upcoming Elonis opinion and to determine if the jury instructions permitted Mr. Boyle to be convicted in the absence of a finding that his speech was a true threat not protected by the First Amendment?

3. Due process requires the State to prove each element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Mr. Boyle was highly intoxicated, handcuffed, and in the custody of an armed patrol officer when he expressed his dislike of police officers and his opinion that police officers will be harmed by people in the community. Should this Court accept review of Mr. Boyle's felony harassment of a criminal justice participant because the State did not prove beyond a reasonable doubt that (1) a reasonable person in Mr. Boyle's position would have known his statements would have been perceived as a threat and not political speech, or (2) that a reasonable criminal justice participant in the position of the person threatened would interpret Mr. Boyle's drunken statements as a threat?

D. STATEMENT OF THE CASE

Patrol officer Stephen Morrison was in the parking lot of a popular restaurant when he saw a man who appeared to be intoxicated. 2RP 75, 78-79. Staggering, the man returned to his pickup truck when the officer shined his spotlight on him. 2RP 78-79. Instead of warning the man about the dangers of driving while intoxicated, Officer Morrison parked out of sight and waited until the pickup left its parking spot, drove to another level of the parking garage, and parked in front of the restaurant. 2RP 82-83. The path took the car onto a public street for a few feet. 2RP 118-19.

Officer Morrison contacted the driver, Kane Boyle, who appeared very intoxicated. 2RP 84-85, 87-88. When Mr. Boyle refused to take field sobriety tests, the officer arrested him for driving while under the influence of alcohol. 2RP 89.

According to Officer Morrison, Mr. Boyle became very angry when he was arrested, handcuffed, and placed in the back of the patrol car. 2RP 90-91. Mr. Boyle shouted obscenities and made unsavory comments while they waited in the patrol car for a tow truck and as the officer drove Mr. Boyle to the jail. 2RP 92-93, 126-28. According to the officer, the statements were:

> People will look you and your family up and do them in. I would never threaten your family. 2RP 96-97.
>
> I would never attack children, but cops and child molesters are fair game. 2RP 97.
>
> People should shoot you guys in the face, and I'll be glad when they do. I would not do it myself, but you know someone will. 2RP 98.
>
> Remember Forza Coffee, it was good stuff. 2RP 98.
>
> You wait and see what happens when I get out. I'm not threatening you. 2RP 99.
>
> I hope your children die. 2RP 100.
>
> Punch me in the face twice. I know you want to. 2RP 100.
>
> F*** your face, f***ing swine. Read my record. Read it twice.[1] 2RP 101.
>
> I hope you and your family burns [sic] in hell. 2RP 102.
>
> Someone will kill you and your family. I'm not saying it's going to be me, but someone is going to snipe cops and their families. 2RP 102.

Officer Morrison testified he felt threatened by these remarks and was worried Mr. Boyle might do something when released from jail. 2RP 102-04, 136. The officer never asked for any assistance from his department in dealing with Mr. Boyle. 2RP 125. He told his wife

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[1] Over objection, the officer testified that Boyle's record included a prior assault. 2RP 54, 60-61, 101-02.

to be careful, but did not describe Mr. Boyle or mention anything to his children. 2RP 135, 145.

Mr. Boyle was charged and convicted of felony harassment of a criminal justice participant. CP 70, 120. His conviction was affirmed in a published decision, and he now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **This Court should accept review to address the interpretation the newly enacted provision of RCW 9A.46.020 creating a class C felony for harassment of a criminal justice participant.**

The crime of harassment is a gross misdemeanor that may be elevated to a class C felony in certain circumstances, such as threats to kill or when the defendant has a prior conviction for harassing the same victim. RCW 9A.46.020(2). In 2011, the legislature amended the statute to elevate harassment to a class C felony if the defendant harasses a criminal justice participant. Laws of 2011, ch. 64 § 1. The new section of the statute reads:

> A person who harasses another is guilty of a class C felony if any of the following apply: . . . (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) 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. For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a

> reasonable fear that a reasonable criminal justice participant would have under all the circumstances. 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) (emphasis added).[2] Mr. Boyle's case is the only reported appellate court opinion addressing the elements of felony harassment of a criminal justice participant. Mr. Boyle's case provides this Court with the appropriate vehicle to address the meaning of the underlined statutory language, and this Court should accept review. RAP 13.4(b)(3), (4).

At his trial for harassment of a criminal justice participant performing his official duties, Mr. Boyle proposed a "to convict" instruction and an instruction defining felony harassment that included language modeled after the statutory language underlined above. Mr. Boyle's proposed definition of felony harassment of a criminal justice participant included the sentence, "It is not felony harassment if it is apparent to the criminal justice participant that the defendant does not have the present and future ability to carry out the threat." CP 82. The trial court refused to give the instruction, instead ending its definition

[2] A police officer is a criminal justice participant. RCW 9A.46.020(3).

of felony harassment a sentence stating "It is not harassment if it is apparent to the criminal justice participant that the person does not have the ability to carry out the threat." CP 106.

Mr. Boyle's proposed "to convict" instruction also included the element "That it was apparent to Stephen Morrison that the defendant had the present and future ability to carry out the threat." CP 84. In contrast, the court instructed the jury that it was an element of the crime that "It was apparent to Stephen Morrison that the defendant had the ability to carry out the threat." CP 114. The trial court's instructions thus changed the statute's requirement that the criminal justice participant perceive that the defendant had the present and future ability to carry out the threat to a requirement that the police officer believe a present or future ability. See 2RP 194.

The authority to define the elements of a crime rests with the legislature. State v. Tinker, 155 Wn.2d 219, 221, 118 P.3d 885 (2005). The court's primary duty in interpreting statutes is to "determine the legislature's intent." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the statute's meaning is clear, then "the court must give effect to that plain meaning as an expression of legislative intent." Id. "The 'plain meaning' of a statutory provision is to be discerned from

the ordinary meaning of the language of the statute in which the provision is found, relative provisions, and the statutory scheme as a whole." Id. A statute is ambiguous if it is subject to more than one reasonable interpretation, and, under the rule of lenity, is interpreted in favor of the defendant. Id. at 600-01.

In interpreting a statute, the court may not render any portion of the statute meaningless or superficial. State v. K.L.B., 180 Wn.2d 735, 842, 328 P.3d 886 (2014). Here the Court of Appeals interpreted the relevant language of RCW 9A.46.020(2)(b) as an "exception," rather than an element of the crime, and concluded the trial court's instructions were correct. Slip Op. at 9-10. The Court of Appeals thus rendered the word "and" meaningless or superficial.

This Court has held that the word "and" should not be interpreted to mean "or." Ski Acres, Inc. v. Kittitas County, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992) ("The Legislature would have used the word 'or' if it had intended to convey a disjunctive meaning."); State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982) ("Presumably, the drafters of the Justice Court Criminal Rules would have used the word "or" if they intended to convey a disjunctive interpretation of the rule. . . . the word "and" is obviously conjunctive.") (interpreting Former

JCrR 4.10); accord Ahten v. Barnes, 158 Wn. App. 343, 352 n.5, 242 P.2d 35 (2010) (declining to read "or" into statute using word "and").

The legislature elevated the crime of harassment to a class C felony when the person harassed is a criminal justice participant, but provided that threatening words do not constitute harassment "if it is apparent to the criminal justice participant that the [defendant] does not have the present and future ability to carry out the threat." RCW 9A.46.020(2)(b). Mr. Boyle had the right to a jury determination of every element of the crime beyond a reasonable doubt, and it is reversible error to instruct the jury in a manner that relieves the State of his high burden of proof. U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22; Apprendi v. New Jersey, 530 U.S. 471, 477-78, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

RCW 9A.46.020(2)(b) provides that "Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the [defendant] does not have the present and future ability to carry out the threat." The jury instructions in Mr. Boyle's case permitted the jury to convict him of felony harassment if the criminal justice participant believed that Mr. Boyle had the ability to carry out the

threat in the present or the future. This Court should accept review of this important issue of statutory construction. RAP 13.4(b)(3), (4).

2. **This Court should accept review to address whether the First Amendment requires a subjective intent to threaten in light of the United States Supreme Court's upcoming decision in Elonis v. United States, No. 13-983.**

The First Amendment protects the right of an individual to freely express himself in order to permit the free exchange of ideas necessary for a democracy, even if the ideas are distasteful or offensive.[3] U.S. Const. amends. I, XIV; Virginia v. Black, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); New York Times v. Sullivan, 376 U.S. 254, 269-70, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (noting national commitment to permitting robust public debate that may include vehement and even sharp attacks). Article I, section 5 of the Washington Constitution similarly guarantees the right to freely express ideas.[4] The right to free speech is both a fundamental right and a key to ensuring the exercise of other constitutional rights. Nelson v.

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[3] The First Amendment states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

The First Amendment is applicable to the states through the Fourteenth Amendment. Black, 538 U.S. at 358.

[4] Article I, section 5 reads, "Every person may freely speak, write and publicly on all subjects, being responsible for the abuse of that right."

McClathy Newspapers, Inc., 131 Wn.2d 523, 535-36, 936 P.2d 1123, cert. denied, 522 U.S. 866 (1997).

Some speech, however, is exempt from First Amendment protections, including "true threats." Black, 538 U.S. at 359; Watts v. United States, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969). This Court has defined "true threat" as "a statement made in a context or under such circumstances where a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intent to inflict bodily harm upon or take the life of another person." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (quoting State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001)) (internal quotation marks omitted). The Kilburn Court rejected the defendant's argument that actual intent to cause injury is required, but added that the harassment statue's knowledge element requires the defendant "subjectively know" that he is communicating a threat to cause bodily injury to the person threatened or to another person. Id. at 44-48. "This standard requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." State v. Schaler, 169 Wn.2d 274, 287, 236 P.3d 858 (2010).

The Black Court, however, held that true threats include "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Black, 538 U.S. at 359. The United States Supreme Court is now poised to decide if the First Amendment requires proof of the defendant's subjective intent to threaten in Elonis v. United States, No. 13-983, cert. granted 134 S. Ct. 2819 (2014).[5] An issue presented is:

> Whether, consistent with the First Amendment and Virginia v. Black, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a 'reasonable person' would regard the statement as threatening, as held by other federal courts of appeal and state courts of last resort.

Petition for Writ of Certiorari at (I)[6].

This issue is critical to Mr. Boyle's case. Consistent with Washington case law, the jury was not instructed that it was required to find that he intentionally threatened the police officer. CP 106-09, 114-

[5] Oral argument is scheduled for December 1, 2014.

[6] The court has also ordered the parties to address whether, as matter of statutory interpretation, 18 U.S.C. § 875(c) requires proof of the defendant's "subjective intent to threaten." 134 S. Ct. 2819.

15. Mr. Boyle was under the influence of alcohol and in police custody when the statements were made, and he told the officer several times that he would not hurt him or his family. 2RP 96-99, 102. Whether the First Amendment required that the jury find Mr. Boyle had the subjective intent to threaten the law enforcement office is thus an important issue in his case.

This Court may accept review of an issues presented for the first time in a petition for review. RAP 13.7(b); State v. Hughes, 154 Wn.2d 118, 128, 129, 110 P.3d 192 (2005) (addressing Blakely issues raised in supplemental petitions for review); Cummins v. Lewis County, 156 Wn.2d 844, 851, 133 P.3d 458 (2006) (Supreme Court generally does not address an issue raised for the first time in supplemental brief and not raised in petition for review); State v. Leach, 113 Wn.2d 679, 692, 782 P.2d 552 (1989) (sufficiency of municipal court charging document raised for first time in petition for review to Court of Appeals). Accepting review of Mr. Boyle's case will give this Court the opportunity to readdress the test for true threats set forth in Kilburn and other cases if necessitate by the Elonis decision. This Court should accept review of Mr. Boyle's case to address whether the First Amendment requires that the State prove the

subjective intent to threaten in a prosecution under Washington's felony harassment statute. RAP 13.4(b)(3), (4).

3. **This Court should accept review because the State did not prove the elements of felony harassment of a criminal justice participant beyond a reasonable doubt.**

Mr. Boyle was convicted of felony harassment of a criminal justice participant for comments he made to a police officer who arrested him for driving while under the influence of alcohol and took him to jail. None of the comments were direct threats to harm the officer, but rather expressed Boyle's political view that police officers were properly in danger from attack by citizens. Boyle was drunk, handcuffed and in police custody when he made them. Thus, the State did not prove beyond a reasonable doubt that (1) a reasonable person in Mr. Boyle's position would understand his comments would be perceived as a threat to harm the officer or his family or (2) a reasonable police officer in Officer Morrison's position would interpret Boyle's statements as a genuine threat. This Court should accept review because Mr. Boyle's conviction raises important constitutional issues. RAP 13.4(b)(3), (4).

Due process forbids conviction for a crime unless the State proves every element of the offense beyond a reasonable doubt. U.S.

Const. amends. VI, XIV; Const. art. I §§ 3, 22; Apprendi, 530 U.S. at 477. On appellate review, the court looks at the evidence in the light most favorable to the prosecution to determine if a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). Because the crime of harassment implicates First Amendment rights, the appellate courts must conduct "an independent review of the whole record" to insure the conviction "does not constitute a forbidden intrusion on the field of free expression." Kilburn, 151 Wn.2d at 50, 52 (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)). This involves independent review of the "crucial facts necessary to the legal determination of whether speech is protected." Id. at 51.

The State did not prove beyond a reasonable doubt that a reasonable person in Mr. Boyle's positon would have understood that his statements would be taken as a threat or that a reasonable criminal justice participant in the officer's positon would have viewed the

statements as a threat.[7] Whether a statement is protected by the First Amendment depends both on the words and their context. State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003). A threat is "an expression of an intention to inflict . . . injury . . . on another." Webster's New Third International Dictionary 2382 (1976). The words uttered do not demonstrate an intent to actually injure Officer Morrison or his family.

Some of the statements were clearly not threats. 2RP 90, 92, 100. Other statements were not threats but predictions, expressing Boyle's opinion that police officers are at risk but not from him. 2RP 96-97 ("People will look you and your family up and do them in. I would never threaten your family."); 2RP 98 ("People will shoot you guys in the face, and I'll be glad when they do. I would not do it

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[7] The elements of felony harassment are outlined in subsection (1) above. The element of misdemeanor harassment are:

> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any another person; or . . .
> (iv) To maliciously do any act that was intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words and conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

RCW 9A.46.020(1).

myself, but you know someone will." "Remember Forza Coffee, it was good stuff."); RP 102 ("Someone will kill you and your family. I'm not saying it is going to be me, but someone is going to snipe at cops and their families."). Others just express an immature hope that something bad would happen to Officer Morrison's family. 2RP 100, 102. These statements do not suggest that Boyle believes someone should hurt the officer or his family.

Other comments only come close to being a literal threat when viewed together: "I would never attack children, but cops and child molesters are fair game;" "You wait and see when I get out. I am not threatening you," and "F*** your face, f***ing swine. Read my record. Read it twice." 2RP 97, 99, 101. However, these statements are not direct threats on the officer or his family.

Moreover, threats are evaluated in light of the surrounding circumstances. See Kilburn, 151 Wn.2d at 52-53. Mr. Boyle was highly intoxicated and under the control of an armed officer when the statements were made.

A reasonable person in Mr. Boyle's position would not foresee that the armed law enforcement officer would interpret his drunken comments as a serious threat. And a reasonable police officer in

Officer Morrison's positon would not interpret those comments as a threat. The State therefore failed to prove beyond a reasonable doubt that Mr. Boyle was guilty of felony harassment of a criminal justice participant. This Court should accept review. RAP 13.4(b)(3), (4).

F. CONCLUSION

Kane Boyle asks this Court to accept review of the Court of Appeals decision affirming his conviction for harassment of a criminal justice participant.

DATED this 24th day of September 2014.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS DECISION TERMINATING REIVEW

July 28, 2014

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KANE BOYLE, Appellant.	No. 71965-3-I DIVISION ONE UNPUBLISHED OPINION FILED: July 28, 2014

LEACH, J. — Kane Boyle appeals his conviction for felony harassment of a criminal justice participant. He contends that insufficient evidence of a "true threat" supports his conviction. He also claims that the jury instructions did not require that the State prove every element of this crime beyond a reasonable doubt. Finally, he claims that juror misconduct violated his right to a fair trial. Because the record contains sufficient evidence of a "true threat," the jury instructions correctly stated the law, and Boyle fails to show juror misconduct, we affirm.

Background

While on patrol the evening of December 21, 2011, Port Orchard Police Officer Stephen Morrison saw a man, later identified as Boyle, get out of a truck in a local restaurant parking lot. Boyle had difficulty walking and appeared intoxicated. After Boyle got back in the truck, drove away briefly, then returned

and parked, Morrison contacted him. Based upon his observations and this contact, Morrison arrested Boyle for DUI (driving under the influence of an intoxicant) and placed him in wrist restraints. At this point, Boyle became "really very angry" and started "yelling profanities." Morrison placed Boyle in the backseat of his patrol car. Boyle continued shouting profanities while Morrison read him the Miranda[1] warning and then began to kick the door panel of the patrol car. Boyle was "getting worked up more and more" and shouting comments that caused Morrison to become concerned. At this point, Morrison began making notes "almost verbatim" of Boyle's statements. He noted that the tone of Boyle's voice was "[e]xtremely angry. He was furious." Boyle made a series of threatening statements. "People will look you and your family up and do them in. I would never threaten your family." "I would never attack children, but cops and child molesters are fair game." "People should shoot you guys in the face and I'll be glad when they do. I would not do it myself, but you know someone will." "Remember Forza Coffee, it was good stuff." "Forza Coffee, that's what should happen to all cops and their families." "You wait and see what happens when I get out. I'm not threatening you." "I hope your children die." "F**k your face, f***ing swine. Read my record. Read it twice." "Someone will kill you and your family. I'm not saying it's going to be me, but someone is going to snipe cops and their families."

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

The State charged Boyle with one count of felony harassment (threats to kill) and one count of felony harassment (criminal justice participant). The jury convicted Boyle of felony harassment (criminal justice participant) and acquitted him of the other count. Before sentencing, Boyle moved for a new trial based upon allegations of erroneous jury instructions and juror misconduct. The court denied the motion.

Boyle appeals.

Analysis

Sufficiency

Boyle contends that the State did not present sufficient evidence of three claimed elements of felony harassment of a criminal justice participant: (1) "a reasonable person in Boyle's position would have known his statements would be perceived as a threat," (2) "a reasonable criminal justice participant in the officer's position would have interpreted Boyle's statements as a threat," and (3) "it was apparent to the officer that Boyle had the present and future ability to carry out any threat." We review constitutional questions de novo, and in a case involving pure speech, we engage in an independent review of the entire record to ensure a conviction is not a "forbidden intrusion into the field of free expression."[2] Sufficient evidence supports a conviction if, "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

[2] State v. Locke, 175 Wn. App. 779, 790, 307 P.3d 771 (2013), review denied, 179 Wn.2d 1021 (2014).

could have found the essential elements of the crime beyond a reasonable doubt.'"[3] For this analysis, circumstantial evidence is as reliable as direct evidence.[4] A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from that evidence.[5] A reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case.[6] We defer to the trier of fact on issues of credibility or persuasiveness of the evidence.[7]

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."[8] This offense is a class C felony if the defendant "threaten[s] to kill the person threatened or any other person" or "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.[9] 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

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[3] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).
[4] State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).
[5] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[6] State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).
[7] State v. Johnston, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006).
[8] RCW 9A.46.020(1)(a)(i), (b).
[9] RCW 9A.46.020(2)(b)(iii), (iv), (4)(a).

circumstances."[10] "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."[11]

A statute that makes a threat a crime may proscribe only "true threats."[12] A "true threat" 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.'"[13] This objective standard focuses on the speaker, who need not actually intend to carry out the threat: "[i]t is enough that a reasonable speaker would foresee that the threat would be considered serious."[14] "A true threat is a serious threat, not one said in jest, idle talk, or political argument."[15] An indirect threat may constitute a true threat.[16]

Boyle argues that his statements were at most "predictions, expressing Boyle's opinion that police officers are at risk but not from him," "an immature hope that something bad would happen to Officer Morrison's family," or even Boyle's "political view." But viewing the evidence in the light most favorable to

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[10] RCW 9A.46.020(2)(b).

[11] RCW 9A.46.020(2)(b).

[12] State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010); Locke, 175 Wn. App. at 789.

[13] Locke, 175 Wn. App. at 789 (alteration in original) (internal quotation marks omitted) (quoting State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013)).

[14] Schaler, 169 Wn.2d at 283; State v. Kilburn, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004).

[15] Kilburn, 151 Wn.2d at 43.

[16] Locke, 175 Wn. App. at 792 (citing Kilburn, 151 Wn.2d at 48).

the State, the record shows that Boyle repeatedly stated that Officer Morrison and his family should be attacked or killed. He threatened that "[p]eople will look you and your family up and do them in" and warned, "[C]ops and child molesters are fair game." He expressed a desire that "[p]eople should shoot you guys in the face." He warned, "You wait and see what happens when I get out" and invited Morrison to "[r]ead my record. Read it twice." Morrison's check of Boyle's criminal record revealed a conviction for assault. Boyle predicted, "Someone will kill you and your family. I'm not saying it's going to be me, but someone is going to snipe cops and their families."

The nature of a threat depends upon a totality of the circumstances, and a reviewing court does not limit its inquiry to a literal translation of the words spoken.[17] Among the facts and circumstances the jury could consider here was the murder of four Lakewood, Washington, police officers two years before at a Café Forza coffeehouse, to which Boyle made two deliberate and direct references.[18] And though Boyle followed several of his threats with "I'm not threatening you" or "I would never threaten your family," his "furious" demeanor, violent kicking of the patrol car door, "continual[ ] yelling," reference to his criminal record, and repeated threats strongly contradict the literal translation of those disclaimers. Boyle's statements cannot be described fairly as "jest, idle

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[17] Locke, 175 Wn. App. at 790.

[18] See Locke, 175 Wn. App. at 792 (noting relevance of recent shooting of congresswoman to threat inquiry, especially where defendant was aware of attack).

talk, or political argument," especially when considered as a whole. A juror could reasonably find Boyle's statements to be a "serious expression of intention to inflict bodily harm upon or to take the life of" Morrison or his family and that a reasonable speaker would foresee that Morrison would consider them serious.[19] Similarly a juror could reasonably find Morrison's fear that Boyle would carry out his threats upon his release "a fear that a reasonable criminal justice participant would have under all the circumstances." Sufficient evidence supports Boyle's conviction for felony harassment.

Jury Instructions

Boyle claims the trial court instructions misstated one element of felony harassment. He asserts that the State had to prove both his "present and future" ability to carry out an expressed threat. We disagree.

Boyle's proposed jury instruction defining felony harassment included this sentence: "It is not felony harassment if it is apparent to the criminal justice participant that the defendant does not have the present and future ability to carry out the threat." Boyle's proposed "to convict" instruction required the jury to find "[t]hat it was apparent to Stephen Morrison that the defendant had the present and future ability to carry out the threat." Unlike Boyle's proposed definition instruction, this proposed "to convict" instruction does not mirror the text of RCW 9A.46.020(2)(b), which states: "Threatening words do not constitute

[19] Morrison testified that though he rarely spoke about his work to his family, after Boyle's arrest he warned his wife to be "very vigilant" in watching for strangers around their home.

harassment if it is apparent to the criminal justice participant that the defendant does not have the present and future ability to carry out the threat."

The trial court rejected Boyle's instructions. Instead, the court's instruction defining felony harassment stated, "It is not harassment if it is apparent to the criminal justice participant that the person does not have the ability to carry out the threat." The court's "to convict" instruction required the jury to find that Boyle knowingly threatened "to cause bodily injury immediately or in the future to Stephen Morrison or his family," that Boyle's words or conduct "placed Stephen Morrison in such a fear that a reasonable criminal justice participant would have that the threat would be carried out," and that "[i]t was apparent to Stephen Morrison that the defendant had the ability to carry out the threat." Boyle contends that the court's instructions "misstated this element of the crime and reduced the State's burden of proof." He reasons that because he was handcuffed, intoxicated, and in police custody, he had no present ability to carry out his threats, and therefore his statements cannot satisfy the test for felony harassment.

We review jury instructions and questions of statutory interpretation de novo.[20] When construing a statute, we primarily seek to ascertain and carry out the legislature's intent.[21] Statutory interpretation begins with the statute's plain

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[20] State v. Sweat, 180 Wn.2d 156, 159, 322 P.3d 1213 (2014); Singh v. Edwards Lifesciences Corp., 151 Wn. App. 137, 150, 210 P.3d 337 (2009) (citing Thompson v. King Feed & Nutrition Serv., Inc., 153 Wn.2d 447, 453, 105 P.3d 378 (2005)).

[21] State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012).

meaning, which we discern from the ordinary meaning of its language in the context of the whole statute, related statutory provisions, and the statutory scheme as a whole.[22] If the statute's meaning is unambiguous, our inquiry ends here.[23]

RCW 9A.46.020 prohibits a threat that threatens bodily injury "immediately or in the future." For harassment elevated to a felony because the person threatened is a criminal justice participant, the statute specifies, "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."[24] Boyle misreads the statute when he argues, "Despite its structure, the sentence 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." 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

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[22] State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013); Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

[23] Lake, 169 Wn.2d at 526.

[24] RCW 9A.46.020(2)(b).

carry out the threat, the statements would constitute harassment. RCW 9A.46.020(1), which defines harassment to include threats to cause bodily injury "immediately or in the future," is consistent with this conclusion.

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.[25] 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.

Juror Misconduct

Based on his attorney's posttrial conversations with several jurors, Boyle requested a new trial because of alleged juror misconduct. Boyle's counsel stated that juror 4, a nurse, told her that this juror had been held hostage for 12 hours by a patient who threatened to kill her. Juror 4 did not disclose this during voir dire. At a hearing on Boyle's motion, juror 4 testified that in her conversation with defense counsel, she had referred to an ICU (intensive care unit) patient who tried to kick her when she entered his room during her 12-hour shift and denied ever being held hostage or telling counsel that she had been held hostage by a patient. She stated that in deliberations she discussed the incident as an example of how she takes informal notes of an incident before transferring

[25] RCW 9A.46.020(1)(b).

them to an official report that becomes the permanent record, similar to Officer Morrison's police report. Boyle contends that juror 4 "committed misconduct by withholding relevant information in voir dire and interjecting related information during deliberation."

We will disturb a trial court's denial of a motion for a new trial only where the trial court abused its discretion or erroneously interpreted the law.[26] A court abuses its discretion when its decision adopts a view that no reasonable person would take or that is based on untenable grounds or reasons.[27] A party who moves for a new trial based on a juror's alleged failure to disclose information during voir dire must show (1) that the information was material and (2) that truthful disclosure would have provided a basis for a challenge for cause.[28]

Here, juror 4 stated that she did not describe this incident during voir dire because she did not connect it to the charges against Boyle and that her experience with a violent patient did not bias or prejudice her against Boyle. Boyle fails to show how this information was material to the charges or likely to be the basis of a successful challenge for cause.[29] The trial court found "[t]hat the experiences of the juror were not something about which she was directly asked and that she did not fail to disclose any information that she was asked to disclose."

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[26] State v. Cho, 108 Wn. App. 315, 320, 30 P.3d 496 (2001).
[27] State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).
[28] Cho, 108 Wn. App. at 321.
[29] Contra Cho, 108 Wn. App. at 327-28 (fact that juror in criminal trial was retired police officer was material and likely basis for challenge for cause).

Juror 4 did not commit misconduct by impermissibly sharing in deliberations "specialized knowledge" that was "outside the realm of most jurors' experience." A juror properly brings his or her opinions, insights, common sense, and everyday life experience into deliberations.[30] The trial court found that "the experiences that [juror 4] described in deliberation were a valid application of life experience and common sense used to weigh and evaluate the evidence presented at trial, and [were] not the introduction of any improper new evidence concerning the case." We defer to the court's finding that juror 4's testimony was "credible and truthful." The court did not abuse its discretion in denying Boyle's motion for a new trial.

Conclusion

Because sufficient evidence supports Boyle's conviction for felony harassment of a criminal justice participant, the court's instructions correctly advised the jury of the law, and Boyle fails to show juror misconduct, we affirm.

Leach, J.

WE CONCUR:

Spearman, C.J.

Dwyer, J.

[30] State v. Briggs, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989).

APPENDIX B

ORDER GRANTING MOTION TO PUBLISH

July 24, 2014

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KANE BOYLE, Appellant.	No. 71965-3-I ORDER GRANTING MOTION TO PUBLISH OPINION

Respondent State of Washington having filed a motion to publish opinion, and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore, it is hereby

ORDERED that the unpublished opinion filed July 28, 2014, shall be published and printed in the Washington Appellate Reports.

DATED this 25th day of August, 2014.

FOR THE COURT:

Leach, J.
Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71965-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Randall Sutton, DPA
Respondent Jeremy Morris, DPA
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

NINA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 24, 2014

WASHINGTON APPELLATE PROJECT

September 24, 2014 - 4:45 PM

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Court of Appeals Case Number: 71965-3

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