NO. 31866-4

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, vs. THOMAS JOSEPH MITZLAFF, Appellant.	)	MOTION ON THE MERITS (Walla Walla County No. 08-1-00437-3)

I. Identity of Moving Party:

The State of Washington, Respondent, by James L. Nagle, Walla Walla County Prosecuting Attorney, by and through Teresa Chen, Deputy Prosecuting Attorney, asks for the relief designated in Part II.

II. Statement of Relief Sought:

Respondent respectfully requests that the Court of Appeals, Division III, affirm the conviction of Appellant in the above-entitled case.

III. Facts Relevant to Motion:

Respondent respectfully requests that the Court of Appeals, Division III, affirm the conviction of Appellant by jury trial in the above-entitled case. Pursuant to Rule of Appellate Procedure 18.14(e), this motion is made on the grounds that the issues on appeal are clearly controlled by settled law, are factual and supported by the evidence, or are matters of judicial discretion and the decision is clearly within the discretion of the trial court.

The Defendant Thomas Mitzlaff was convicted by jury of assault in the first degree-DV and felony harassment-DV. CP 59-60, 66. The jury found the assault was committed with a deadly weapon. CP 61, 67.

On November 25, 2008, the Defendant was living with his 64-year-old grandmother Marilee Topel in Walla Walla. RP 9, 24-25. At dinner, when Ms. Topel was encouraging her grandson to come up with a plan for his life, the Defendant seemed to snap. RP 26, 28. His eyes became "real big" and "really scary looking." RP 28. Cognizant of her position trapped in a corner of the room, Ms. Topel became afraid and immediately stopped talking. RP 28. The Defendant grabbed his seated grandmother by her hair and

hit her head against the wall two or three times. RP 26-27, 37. A potted plant fell from a nearby stand and hit Ms. Topel on the head. RP 27. Holding a knife to her throat, the Defendant said, "See how easy it would be?" RP 26-27.

Arriving home from work, next-door neighbor Stacie Page turned off her car engine and could hear the Defendant yelling, "I'm going to [expletive] kill you." RP 37-38, 41. "It was loud and angry." RP 41. From the outside, she could see clearly into Ms. Topel's house where the Defendant was shaking his grandmother around by her hair. RP 37. Ms. Topel was covered in sod from the fallen plant. RP 38. Ms. Page called 911 from her cell phone. RP 37. She heard Ms. Topel screaming, "help me, help me" and the Defendant repeating "I'm going to [expletive] kill you" twice more. RP 38. He was kicking his grandmother in the corner of the room. RP 38.

The assault was interrupted by Ms. Page knocking at the door. RP 11, 27, 36. She "was really banging" and calling, "open up, open up." RP 38. The terrified Ms. Topel felt unable to accurately estimate the passage of time, and the banging on her front door seemed to her to be only "faint knocking." RP 27, 33, 38.

She tried to pull the knife from her neck, but feeling its sharpness she released it. RP 35.

The Defendant finally stopped the assault, and Ms. Topel scrambled to the door, grabbing her dog with her. RP 27-28, 38. Ms. Page immediately yanked a trembling and disoriented Ms. Topel out of the house. RP 27-29, 38-40. Ms. Page forcibly led Ms. Topel to safety in the neighbor's home where Ms. Topel told her:

> I'm so scared. Thank you for being there. He has done this before but never like this.

RP 11, 40.

Ms. Page returned to her backyard to make sure Ms. Topel's dog was safely in the backyard with her own dogs. RP 39. She made eye contact with the Defendant through the window; he was still holding the knife. RP 39. Ms. Page watched the Defendant from her driveway until he disappeared from view. RP 40.

Police arrived first, followed by the paramedics. RP 12.

Ms. Page reported to police that the Defendant had assaulted his grandmother. RP 10. Ms. Topel was frightened and crying, hysterical and uncertain what to do. RP 16, 40. Her hair

was disheveled; she was red, blotchy, and visually shaken. RP 40. She reported that the Defendant hit her in the head with a potted plant. RP 15-16. She was in pain, reported bruising, and had a red mark on her neck from the knife. RP 16.

Police located the butcher knife and the potted plant on the kitchen floor. RP 12, 15, 20 (ll. 8-9), 42. An unattached cabinet door was on the kitchen counter. RP 35. Chairs were strewn about, the table tipped, and fragments of the plant pot and glass were shattered everywhere. RP 42. Police found Mr. Mitzlaff lying in bed with his eyes open. RP 12.

At the close of the State's case, the defense made motions to dismiss arguing that there was insufficient evidence of the Defendant's intent to inflict great bodily harm or Ms. Topel's reasonable fear that the Defendant's threat would be carried out. RP 43-44. Applying the proper standard which views the evidence in a light most favorable to the State, the court denied the motions. RP 44-46.

The notice of appeal was filed four and a half years after the judgment and sentence. CP 66, 88; Brief of Appellant at 4, n.1. The Defendant provided no explanation for the delay in the filing of

the appeal. This appeal renews the trial challenge to the sufficiency of the evidence and argues that defense counsel should have requested a jury instruction defining great bodily harm.

IV. Grounds for Relief and Argument:

A. THERE IS SUFFICIENT EVIDENCE FOR THE CONVICTION OF FELONY HARASSMENT.

The Defendant challenges the evidence for the felony harassment conviction, specifically the evidence that Ms. Topel was placed in reasonable fear that the threat to kill would be carried out. Brief of Appellant at 4-7. The evidence is sufficient for the conviction.

The standard for such a challenge is whether, after viewing evidence in the light most favorable to the state, any rational trier of fact could have found the facts beyond a reasonable doubt. *State v. Hepton*, 113 Wn. App. 673, 681, 54 P.3d 233 (2002); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The standard admits the truth of the state's evidence *and* all inferences that can reasonably be drawn from this evidence in

the state's favor and interpreted most strongly against the defendant. *State v. Hepton*, 113 Wn. App. at 681; *State v. Schelin*, 147 Wn.2d 562, 573, 55 P.2d 632 (2002); *Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct. at 2789.

The Defendant relies upon *State v. Kiehl*, 128 Wn. App. 88, 113 P.3d 528 (2005). Brief of Appellant at 5. In that case, the defendant Kiehl told his mental health counselor that he was going to kill Judge Matheson. *State v. Kiehl*, 128 Wn. App. at 90. The jury was instructed that, to convict of felony harassment, it must find that the defendant threatened the judge and put *the counselor* in reasonable fear that the threat would be carried out. *State v. Kiehl*, 128 Wn. App. at 92. The parties disagreed on the elements of the crime. The court of appeals held that a proper instruction would have advised that the threatened person, i.e. the judge, was placed in reasonable fear. Because the prosecutor had interpreted the statute differently, Judge Matheson did not testify at trial. *State v. Kiehl*, 128 Wn. App. at 91. And no evidence was presented establishing that the judge was placed in reasonable fear that the threat would be carried out. *Id.*

No such misunderstanding occurred here. The jury was

properly instructed that it must find that Ms. Topel was placed in reasonable fear that the threat would be carried out against Ms. Topel. CP 48. Unlike Judge Matheson, Ms. Topel testified.

The Defendant argues that it is significant that it was the neighbor, not the grandmother, who testified about the explicit threat to kill. Brief of Appellant at 6. It is not. It is not plausible that Ms. Topel did not hear the threat. The victim was closer to the Defendant than the neighbor when the threat was made repeatedly. The Defendant was holding his grandmother by her hair. The neighbor was outside in her driveway and could hear the threat as she turned off her car engine. Under the standard of review, the State is accorded every inference that can reasonably be drawn in favor of guilt. Ms. Topel was aware of the threat that was made in her presence inches from her ear.

The Defendant challenges the sufficiency of the evidence for Ms. Topel's reasonable fear that the threat would be carried out. Brief of Appellant at 6-7. The evidence is that the Defendant shook his grandmother by her hair, repeatedly slammed her head against the wall, kicked her, and knocked a potted plant onto her head. He held a butcher knife against her throat, repeatedly threatened to kill

her, telling her how easy it would be. He did not release her until confronted by the neighbor. Ms. Topel then fled from her home. Apparently, she did not think it safe to leave the dog with the Defendant. She repeatedly thanked her neighbor for rescuing her. She said that her grandson had "done this before, but never like this." RP 40. She cried hysterically, appeared terrified and confused. She consulted with police and paramedics, bringing police into her home after the Defendant was detained. RP 13, 41. And finally she appeared and testified against him.

Under the standard of review which admits all inferences that can reasonably be drawn from this evidence in the state's favor and interpreted most strongly against the defendant, the grandmother was placed in reasonable fear.

The Defendant cites *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003) in support of her argument challenging the degree of harm the victim would reasonably fear. In that case, a high school student C.G. was given a "time out" for her use of profanity. *State v. C.G.*, 150 Wn.2d at 606. When she continued to be disruptive by kicking the carrel and making other noises, the vice principal asked her to leave the classroom. *Id.* She left with some

resistance, yelling at the vice principal, "I'll kill you, Mr. Haney, I'll kill you." *State v. C.G.*, 150 Wn.2d at 607. Mr. Haney testified that he was concerned that she might try to harm him in the future. *Id.* The supreme court found that there was not sufficient evidence that Mr. Haney felt that C.G. would *kill* him.

The inferences in that case are significantly different than those here. C.G. was a youth threatening an adult male. She was an angry, disruptive teenager intent on making noise to get attention. She did not specify any means of carrying out the threat and she had no apparent means.

Mr. Mitzlaff, on the other hand, was an adult male threatening an elderly female. He was not throwing a tantrum. He was not making false threats for attention. He was actually harming her. And when he realized he had the attention of a witness, he backed off. Mr. Mitzlaff actually harmed his grandmother by knocking her head into the wall repeatedly. He held a specific and deadly weapon to her throat – so tightly that it left a mark. He made her observe how easy it would be to kill her with the knife to her throat.

The inferences in this case provide sufficient evidence that

the victim was placed in reasonable fear that the Defendant would kill her. The conviction must be affirmed.

B. THERE IS SUFFICIENT EVIDENCE OF FIRST DEGREE ASSAULT.

The Defendant argues that holding a knife to his grandmother's throat and threatening to kill her did not indicate an intent to kill or seriously injure. Brief of Appellant at 9. This is implausible and fails to apply the proper standard of review. Permitting the state every inference that can reasonably be drawn in the state's favor and interpreted most strongly against the defendant, this evidence is sufficient to prove an intent to kill or seriously injure.

The Defendant argues that because he held the blunt side to his grandmother's throat, he did not intend to kill her. Brief of Appellant at 9. As the trial judge said: "Common sense tells us it would have been a very easy maneuver to simply turn the knife probably less than ninety degrees in which it could be used to inflict deadly bodily harm." RP 45. As the prosecutor said: "How easy would that have been for him to just twist that knife a little bit, assuming you believe that the blunt edge was against her throat?

It would take nothing." RP 71.

The Defendant argues in effect that to prove intent to kill the State must prove a substantial step to kill. Brief of Appellant at 9 ("used or attempted to use the knife in a manner that reflected intent" to inflict great bodily harm). Attempted murder is a different crime. A substantial step is not an element of the crime of assault. To show intent to kill, the State is not required to prove the knife was turned in any particular direction and perforating the victim's body in the direction of a vital organ.

The Defendant argues that because he released his grandmother when confronted by the neighbor, he did not intend to kill. Brief of Appellant at 9. All this shows is his desire not be caught or witnessed in the act. His fear at being caught does not touch upon his previous intent in grabbing, threatening, and assaulting his grandmother.

The Defendant argues that he could not have intended to kill Ms. Topel, because she was his grandmother and they lived together. Brief of Appellant at 8-9. A familial and residential relationship is not by definition a relationship in which no violence occurs. Mr. Mitzlaff repeatedly slammed the head of his elderly

grandmother against the wall of the home they shared. Violence occurred.

The Defendant cites *State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989) in support. This case briefly explains that evidence of intent is gathered from all of the circumstances, including the nature of the prior relationship between the assailant and victim, citing *State v. Mitchell,* 65 Wash.2d 373, 374, 397 P.2d 417 (1964). In that five paragraph case, the court affirmed a conviction of first degree assault where Mitchell shot a woman in the abdomen, an ex-girlfriend whom he had previously threatened. Nowhere do either of these cases suggest that violence does not occur within a domestic relationship. In fact, we know the opposite to be true. RCW 10.99.010.

The Defendant argues that there "was no evidence of previous threats or violence between them." Brief of Appellant at 9. First, there is no requirement that the State prove previous threats or violence. Second, the record is that there *were* previous threats or violence. Ms. Topel informed Ms. Page that her grandson "has done this before." RP 40.

Where the Defendant repeatedly threatened to kill his

grandmother while assaulting her by knocking her head into a wall and holding a knife to her throat, there is sufficient evidence of an intent to kill or seriously injure.

C. TRIAL COUNSEL'S ASSISTANCE WAS NOT INEFFECTIVE FOR FAILING TO REQUEST AN INSTRUCTION DEFINING GREAT BODILY HARM WHERE THE DEFENDANT WAS ACCUSED OF THREATENING TO KILL HIS GRANDMOTHER WHILE HOLDING A KNIFE TO HER THROAT.

The Defendant argues that he received ineffective assistance of counsel, because his attorney did not request a jury instruction defining "great bodily harm." Brief of Appellant at 10, 14. Because the State's allegation was an intent to kill, the argument fails.

To establish ineffective assistance of counsel, the Defendant must show both that his counsel's performance was deficient and that this deficient performance prejudiced him. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Grier,* 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011). Representation is deficient if, after considering all the circumstances, it falls "below an objective standard of reasonableness." *State v. Grier,* 171 Wn.2d at 33 (quoting

Strickland, 466 U.S. at 688). Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. *State v. Grier,* 171 Wn.2d at 34 (citing *State v. Kyllo,* 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

The threshold for deficient performance is high; a defendant must overcome a strong presumption that counsel's performance was reasonable. *State v. Kyllo,* 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

A trial court need not define words and expressions that are of ordinary understanding or are self-explanatory. *State v. Brown,* 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). Whether words used in an instruction require definition is necessarily a matter of judgment for the trial court. *State v. Castro,* 32 Wn. App. 559, 648 P.2d 485 (1982). A court should exercise sound discretion to determine the appropriateness of acceding to a request that words of common understanding be specifically defined. *State v. Brown,* 132 Wn.2d at 612. Failure to give a definitional instruction is not failure to instruct on an essential element. *State v. Brown,* 132 Wn.2d at 612.

Great *bodily* harm is injury to the body, not mind. *State v. Van Woerden*, 93 Wn. App. 110, 967 P.2d 14 (1998) (holding that post-traumatic stress disorder is not bodily injury). Many types of injuries can be great, e.g. injuries which permanently disfigure or cause impairment of an organ. WPIC 2.04. The most obvious one is an injury that creates a probability of death. WPIC 2.04. And this is what the State alleged.

The Defendant was charged with assaulting the victim with a deadly weapon having the intent to inflict great bodily harm. CP 41. Here the prosecutor argued that the intent was to kill.

> First degree assault adds one additional element and that is the intent. He held a knife to her throat and said, "I'm going to [expletive] kill you." It is pretty obvious what his intent was.

RP 66.

> [H]e put a knife to his grandmother's throat. What do you think his intent would have been?

RP 71.

The Defendant did not threaten to gouge out an eye or disfigure her face. He threatened death. He threatened to kill his grandmother. There was no confusion, which would have required the instruction. Given the facts of this case, counsel's failure to

request a superfluous instruction was not deficient performance. The trial court would have had discretion to deny the request under the facts of this case; and the instruction would have provided no benefit to the jury or Defendant. It cannot be said that the failure to include a superfluous instruction would have changed the result of trial.

D. THE APPEAL IS TIME BARRED.

While maintaining its objection to the timeliness of the appeal, the State notes that collateral challenges to the sufficiency of the evidence may be raised at any time. RCW 10.73.100(4). Accordingly, the Defendant's challenges to the sufficiency of the evidence could have been raised in a personal restraint petition and the State is not prejudiced by the Court's review of these claims.

V. Conclusion:

Respondent finds no meritorious issues which can be or have been raised by the Appellant and submits that Appellant's conviction should be affirmed.

Dated this 22nd day of September 2014.

Respectfully submitted,

JAMES L. NAGLE
Prosecuting Attorney

By: _____
Teresa Chen,
WSBA 31762
Deputy Prosecuting Attorney

Marie J. Trombley marietrombley@comcast.net	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 22, 2014, Pasco, WA _____ **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

WALLA WALLA COUNTY PROSECUTOR

September 22, 2014 - 4:41 PM

Transmittal Letter

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Case Name:	State v. Thomas Joseph Mitzlaff
Court of Appeals Case Number:	31866-4
Party Respresented:	State of Washington
Is This a Personal Restraint Petition?	☐ Yes ☑ No
	Trial Court County: Walla Walla - Superior Court # 08-1-00437-3

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- ☐ Statement of Arrangements
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- ☐ Objection to Cost Bill
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Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to jnagle@co.walla-walla.wa.us and marietrombley@comcast.net.

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