73250-1

NO. 73250-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BEE SAYKAO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Palmer Robinson, Judge

REPLY BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
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A. ARGUMENT IN REPLY

SAYKAO'S INTERPRETATION OF THE HARASSMENT STATUTE IS CORRECT AND BOYLE[1] IS BOTH WRONGLY DECIDED AND HARMFUL.

On appeal, Saykao challenges the sufficiency of the evidence to convict him of felony harassment of a criminal justice participant under RCW 9A.46.020(2)(b). Saykao asserts that despite this Court's decision in Boyle, under that statutory provision the State was required but failed to prove CCO Johnson reasonably believed Saykao had the present and future ability to carry out his threat, rather than the mere present or future ability to carry out the threat.

In response, the State stands by the decision in Boyle, supra, and claims Saykao's contrary interpretation requires "engage[ing] in confusing semantic contortionism in which the word 'and' becomes an all-powerful talisman in deriving the Legislature's meaning." Brief of Respondent (BOR) at 13. Ironically, the State's attempt to defend Boyle engages the same process the State accuses Saykao of when it dissects and then reconfigures the relevant statutory language in an effort to convince the reader that "present and future ability" really means " present or future

[1] State v. Boyle, 183 Wn. App. 1, 335 P.3d 954 (2014) (interpreting RCW 9A.46.020(2)(b) to require only proof the criminal justice participant reseasonably believed the person making the threat had either present or future ability to carry out the threat instead of a reasonable belief the person making the threat had the present and future ability to carry it out)..

ability." BOR at 12-13. The State's argument makes no sense, violates rules of statutory construction and is contrary to legislative intent.

The crux of the State's argument, as well as that of the decision in Boyle, seems to be that because the relevant language[2] "is written in the negative, as an exception, means it is not an affirmative requirement of proof." BOR at 12; see Boyle, 183 Wn. App. at 11 ("'This sentence is phrased as an exception, not as an element,'" (quoting the trial court)). No authority for this proposition is cited by the State or the Boyle decision. This is not surprising; there is none.

In fact, language negatively phrased in criminal statutes has previously been interpreted to impose an affirmative burden of proof on the State. For example, former RCW 10.99.040(4) provided, "Any assault that is a violation of an order issued under this section and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony punishable under chapter 9A.20 RCW, ..." Emphasis added.[3] Despite this language, this Court held it would be absurd if a first or second degree assault could not be the predicate offense

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[2] "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)

[3] In 2000, the Legislature deleted this language. Laws of 2000, chapter 119, § 18.

to elevate violation of a court order to a felony because otherwise such a violation would result in only a misdemeanor conviction instead of a felony conviction even though it was violated by way of a more egregious assault. State v. Azpitarte, 95 Wn. App. 721, 728, 976 P.2d 1256 (1999), reversed, 140 Wn. 2d 138, 995 P.2d 31 (2000). The Washington Supreme Court disagreed:

> By finding that any assault can elevate a violation of a no-contact order to a felony, the Court of Appeals reads out of the statute the requirement that the assault "not amount to assault in the first or second degree." We will not delete language from a clear statute even if the Legislature intended something else but failed to express it adequately. No part of a statute should be deemed inoperative unless the result of obvious mistake. Cox v. Helenius, 103 Wn.2d 383, 387–88, 693 P.2d 683 (1985). There is no obvious mistake. All assault convictions connected to violation of a no-contact order will result in a felony, either through the assault itself or through the application of subsection (b). The felony verdict here must be set aside because the jury could have relied on Azpitarte's second degree assault in finding him guilty of felony violation of a court order.

State v. Azpitarte, 140 Wn.2d 138, 142, 995 P.2d 31 (2000).

Much like this Court's erroneous concern in Azpitarte, the Boyle court's concern that interpreting RCW 9A.46.020(2)(b) as Boyle suggested would result in some threats being non-criminal is simply incorrect. To the contrary, threats of present or future harms are at least gross

misdemeanors under RCW 9A.46.020, and therefore still criminal, regardless of who they are committed against.

As the Supreme Court did in Azpitarte, this Court should recognize that Boyle effectively and incorrectly eliminates the very language it sought to interpret. If the State need only prove either present or future ability to carry out the threat, then the sentence, "Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat" - is completely superfluous. This is because the statute already makes it criminal to threaten bodily harm to someone, either "immediately or in the future." RCW 9A.46.020(1).

A review of the legislative amendments that led to inclusion of the language at issue here is revealing, and supports Saykao's argument.

In January 2011, House Bill 1206 was introduced as "AN ACT Relating to harassment against criminal justice participants; amending RCW 9A.46.020; and prescribing penalties." 2011 Reg. Sess. H.B. 1206.[4] This version of the bill made it a class C felony to harass a criminal justice participant, but did not include the language at issue here. Id. at 2, lines 12-17.

[4] A copy of the original bill is attached as Appendix A.

Two amendments to HB 1206 were adopted on March 3, 2011, identified as "1206-S2 AMH DAHL WALK 022" (hereafter the "Dahlquist Amendment") and "1206-S2 AMH KAGI WALK 027" (hereafter the "Kagi Amendment"). Copies are attached as appendices B & C, respectively. The Dahlquist Amendment provided little if any clarification of the issue here, as its stated "Effect" was to;

> (1) Makes harassment of a criminal justice participant a seriousness level III, class C felony offense.
> (2) Clarifies that only a criminal justice participant who actually "is" a target (instead of one who "believes" he/she is a target) for threats or harassment, and any family members residing with him or her are eligible for the address confidentiality program.
> (3) Provides that it is a class C felony offense for a person to knowingly provide false or incorrect information upon an application for the Address Confidentiality Program stating that disclosure of the applicant's address would endanger the safety of the criminal justice participant or his/her family.
> (4) Makes other technical corrections.

Appendix B at 4.

The stated "Effect" of the Kagi Amendment, however, was to:

> • Clarifies that the threat that a criminal justice participant receives must create a fear that a reasonable criminal justice participant would have under all the circumstances and that "threatening words" do not constitute harassment if it is apparent to the victim that the offender does not have the present and future ability to carry out the threat.
> • Requires the Sentencing Guidelines Commission to annually report to the Legislature on the number of prosecutions of harassment crimes against criminal justice participants under the act.

• Requires the act to expire on July 1, 2018.

Appendix C at 1-2.[5]

The Kagi Amendment imposes a more restrictive concept of what constitutes reasonable fear in the context of felony harassment of a criminal justice participant. The Kagi amendment requires not the generic reasonable fear that would suffice for harassment against all others (see RCW 9A.46.020(1)(b)("The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.")), but instead for felony harassment of a criminal justice participant the fear must be a reasonable fear for a criminal justice participant to have. The only reasonable interpretation of this language is that a more definitive threat is required in light of criminal justice participants' professional experiences in dealing with criminals, as allowing for some less reasonable level of fear simply make no sense.

The Kagi Amendment also added the specific language at issue in this appeal, which on its face requires that it be apparent to the criminal justice participant that the person making the threat has the present and future ability to carry it out. As discussed previously, without the language at issue here, a present or future ability to carry out a threat is

[5] Governor Christine Gregoire vetoed the requirement for an annual report by the Sentencing Guideline Commission and the expiration date of July 1, 2018. VETO MESSAGE ON E2SHB 1206 (attached as Appendix D).

already sufficient for gross misdemeanor and felony harassment convictions. See RCW 9A.46.020(1)(a)(i) (a person is guilty of harassment if they threatens "To cause bodily injury immediately or in the future to the person threatened or to any other person," emphasis added) and RCW 9A.46.020(2)(a) & (b)(i)-(ii) (applying definition of "harassment" in subsection (1) to all forms of harassment except those involving criminal justice participants).

Therefore, if the Kagi Amendment language has any meaning, it must mean something different than the default standard set out in RCW 9A.46.020(1)(a)(i). The only logical meaning it can have is that to constitute a threat for purposes of prosecuting a person for felony harassment of a criminal justice participant, it must be apparent to the victim that the person has both the present and future ability to carry out the threat. Any other interpretation renders the entire sentence superfluous, in violation of established rules of statutory construction requiring all statutory language be given effect, with no portion rendered meaningless or superfluous absent obvious mistake by the Legislature. State v. Reis, 183 Wn.2d 197, 210, 351 P.3d 127 (2015); Azpitarte, 140 Wn.2d at 142. There is no obvious mistake that would justify eliminating the sentence at issue.

The Boyle decision is both wrong and harmful, and therefore should not be followed. It is wrong because it is renders the very language at issue meaningless and superfluous in violation of well-established rules of statutory construction. It is also wrong because it erroneously concluded Boyle's interpretation would render various types of threats non-criminal, which it would not.

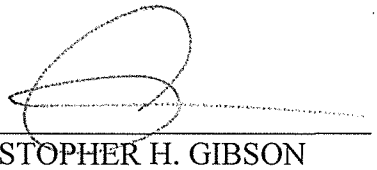
The Boyle decision is harmful because it allows individuals to be convicted of felony harassment when only a conviction for gross misdemeanor harassment is warranted. Although no criminal conviction is good, the existence of a felony conviction, unlike most misdemeanor convictions, subjects a person to potential incarceration within the Department of Corrections instead of the county jail, deprives the person of the right to vote and bear arms, can increase the penalties imposed for any future felony convictions and is likely impede a person's ability to obtain gainful employment. Boyle is wrong and harmful and should not be followed.

B. CONCLUSION

For the reason set forth her and in the opening brief, Saykao asks this Court to reverse his conviction for felony harassment.

Respectfully submitted this 14th day of October 2015

NIELSEN, BROMAN & KOCH



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Appendix A

H-0406.1

HOUSE BILL 1206

State of Washington 62nd Legislature 2011 Regular Session

By Representatives Dahlquist, Hurst, Pearson, Harris, Parker, Lytton, Rivers, Johnson, Taylor, Wilcox, Ross, Kelley, Ladenburg, Armstrong, Dammeier, Frockt, and Schmick

Read first time 01/14/11. Referred to Committee on Public Safety & Emergency Preparedness.

AN ACT Relating to harassment against criminal justice participants; amending RCW 9A.46.020; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 9A.46.020 and 2003 c 53 s 69 are each amended to read as follows:

(1) A person is guilty of harassment if:

(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 other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is 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 or

conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; ((~~or~~)) (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person; (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.

(3) For purposes of this section, a criminal justice participant includes a peace officer, a prosecuting attorney, a deputy prosecuting attorney, a defense attorney, a member of the indeterminate sentence review board, a community corrections officer, a probation or parole officer, a full-time or part-time staff member of any juvenile corrections institution or local juvenile detention facilities, or a full-time or part-time staff member of any adult corrections institution or local adult detention facilities.

(4) The penalties provided in this section for harassment do not preclude the victim from seeking any other remedy otherwise available under law.

--- END ---

Appendix B

1206-S2 AMH DAHL WALK 022

2SHB 1206 - H AMD **148**
By Representative Dahlquist

ADOPTED AS AMENDED 03/03/2011

Strike everything after the enacting clause and insert the following:

"Sec. 1. RCW 9A.46.020 and 2003 c 53 s 69 are each amended to read as follows:

(1) A person is guilty of harassment if:

(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 other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is 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 or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if ((~~either~~)) any of the following ((~~applies~~)) apply: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named

in a no-contact or no-harassment order; ((~~or~~)) (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person; (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.

(3) Any criminal justice participant who is a target for threats or harassment prohibited under subsection (2)(b)(iii) or (iv) of this section, and any family members residing with him or her, shall be eligible for the address confidentiality program created under RCW 40.24.030.

(4) For purposes of this section, a criminal justice participant includes any (a) federal, state, or local law enforcement agency employee; (b) federal, state, or local prosecuting attorney or deputy prosecuting attorney; (c) staff member of any adult corrections institution or local adult detention facility; (d) staff member of any juvenile corrections institution or local juvenile detention facility; (e) community corrections officer, probation, or parole officer; (f) member of the indeterminate sentence review board; (g) advocate from a crime victim/witness program; or (h) defense attorney.

(5) The penalties provided in this section for harassment do not preclude the victim from seeking any other remedy otherwise available under law.

Sec. 2. RCW 40.24.030 and 2008 c 312 s 3 and 2008 c 18 s 2 are each reenacted and amended to read as follows:

(1)(a) An adult person, a parent or guardian acting on behalf of a minor, or a guardian acting on behalf of an incapacitated person, as defined in RCW 11.88.010, and (b) any criminal justice participant as defined in RCW 9A.46.020 who is a target for threats or harassment prohibited under RCW 9A.46.020(2)(b)(iii) or (iv), and any family members residing with him or her, may apply to the secretary of state

to have an address designated by the secretary of state serve as the person's address or the address of the minor or incapacitated person. The secretary of state shall approve an application if it is filed in the manner and on the form prescribed by the secretary of state and if it contains:

((~~(a)~~)) (i) A sworn statement, under penalty of perjury, by the applicant that the applicant has good reason to believe ((~~(i)~~)) (A) that the applicant, or the minor or incapacitated person on whose behalf the application is made, is a victim of domestic violence, sexual assault, trafficking, or stalking((~~,~~)) and ((~~(ii)~~)) that the applicant fears for his or her safety or his or her children's safety, or the safety of the minor or incapacitated person on whose behalf the application is made; or (B) that the applicant, as a criminal justice participant as defined in RCW 9A.46.020, is a target for threats or harassment prohibited under RCW 9A.46.020(2)(b)(iii) or (iv);

((~~(b)~~)) (ii) If applicable, a sworn statement, under penalty of perjury, by the applicant, that the applicant has reason to believe they are a victim of (A) domestic violence, sexual assault, or stalking perpetrated by an employee of a law enforcement agency, or (B) threats or harassment prohibited under RCW 9A.46.020(2)(b)(iii) or (iv);

((~~(c)~~)) (iii) A designation of the secretary of state as agent for purposes of service of process and for the purpose of receipt of mail;

((~~(d)~~)) (iv) The residential address and any telephone number where the applicant can be contacted by the secretary of state, which shall not be disclosed because disclosure will increase the risk of (A) domestic violence, sexual assault, trafficking, or stalking, or (B) threats or harassment prohibited under RCW 9A.46.020(2)(b)(iii) or (iv);

((~~(e)~~)) (v) The signature of the applicant and of any individual or representative of any office designated in writing under RCW 40.24.080 who assisted in the preparation of the application, and the date on which the applicant signed the application.

(2) Applications shall be filed with the office of the secretary of state.

(3) Upon filing a properly completed application, the secretary of state shall certify the applicant as a program participant. Applicants shall be certified for four years following the date of filing unless the certification is withdrawn or invalidated before that date. The secretary of state shall by rule establish a renewal procedure.

(4) A person who knowingly provides false or incorrect information upon making an application or falsely attests in an application that disclosure of the applicant's address would endanger (a) the applicant's safety or the safety of the applicant's children or the minor or incapacitated person on whose behalf the application is made, or ((~~who knowingly provides false or incorrect information upon making an application~~)) (b) the safety of any criminal justice participant as defined in RCW 9A.46.020 who is a target for threats or harassment prohibited under RCW 9A.46.020(2)(b)(iii) or (iv), or any family members residing with him or her, shall be ((~~punishable~~)) punished under RCW 40.16.030 or other applicable statutes."

Correct the title.

EFFECT: (1) Makes harassment of a criminal justice participant a seriousness level III, class C felony offense.

(2) Clarifies that only a criminal justice participant who actually "is" a target (instead of one who "believes" he/she is a target) for threats or harassment, and any family members residing with him or her are eligible for the address confidentiality program.

(3) Provides that it is a class C felony offense for a person to knowingly provide false or incorrect information upon an application for the Address Confidentiality Program stating that disclosure of the applicant's address would endanger the safety of the criminal justice participant or his/her family.

(4) Makes other technical corrections.

--- END ---

Appendix C

1206-S2 AMH KAGI WALK 027

2SHB 1206 - H AMD TO H AMD (1206-S2 AMH DAHL WALK 022) 273
By Representative Kagi

ADOPTED 03/03/2011

On page 2, line 8 of the striking amendment, after "duties" insert ". For the purposes of (b)(iii) and (b)(iv) of this subsection, the fear from the threat must be a 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"

On page 4, after line 19 of the striking amendment, insert the following:

"NEW SECTION. **Sec. 3.** A new section is added to chapter 9.94A RCW to read as follows:

The sentencing guidelines commission shall report to the appropriate committees of the legislature by December 1, 2011, and every year thereafter, on the number of prosecutions under section 1(2)(b)(iii) and section 1(2)(b)(iv) of this act.

NEW SECTION. **Sec. 4.** Sections 1 through 3 of this act expire July 1, 2018."

Correct the title.

EFFECT:

- Clarifies that the threat that a criminal justice participant receives must create a fear that a reasonable criminal justice participant would have under all the circumstances and that "threatening words" do not constitute harassment if it is apparent to the victim that the offender does not have the present and future ability to carry out the threat.
- Requires the Sentencing Guidelines Commission to annually

report to the Legislature on the number of prosecutions of harassment crimes against criminal justice participants under the act.

- Requires the act to expire on July 1, 2018.

--- END ---

Appendix D

VETO MESSAGE ON E2SHB 1206

April 13, 2011

To the Honorable Speaker and Members,
The House of Representatives of the State of Washington

Ladies and Gentlemen:

I have approved, except for Section 3 and Section 4, Engrossed Second Substitute House Bill No. 1206 entitled:

> "AN ACT Relating to harassment against criminal justice participants."

Section 3 directs the sentencing guidelines commission to report to the appropriate committees of the legislature by December 1, 2011, and annually thereafter, the number of prosecutions for criminal harassment of a criminal justice participant. Several bills now before the legislature either eliminate the sentencing guidelines commission or eliminate it as a regularly standing commission. The data identified in this section will be retained by a yet to be identified agency. Therefore, I am vetoing Section 3 and the appropriate committees of the legislature may request the data from the appropriate agency.

Section 4 causes the act to expire July 1, 2018. I believe the legislature should monitor the impact of the act and affirmatively take action to amend or repeal particular aspects of the act at a future date, if needed. Therefore, I am vetoing Section 4.

For these reasons, I have vetoed Section 3 and Section 4 of Engrossed Second Substitute House Bill No. 1206.

With the exception of Section 3 and Section 4, Engrossed Second Substitute House Bill No. 1206 is approved.

Respectfully submitted,
Christine Gregoire
Governor