

Supreme Court No. \_\_\_\_\_  
Court of Appeals No. 47888-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

**JOSEPH NICKOLS,**

Petitioner.

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

The Honorable James W. Lawler, Judge

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**PETITION FOR REVIEW**

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A. IDENTITY OF PETITIONER

Petitioner Joseph Nickols asks this Court to review the decision of the Court of Appeals referred to in Section B.

B. COURT OF APPEALS' DECISION

Petitioner seeks review of the Court of Appeals' December 6, 2016, unpublished opinion in State of Washington v. Joseph Lee Nickols, COA No. 47888-9-II. See opinion attached as Appendix.

C. ISSUE PRESENTED FOR REVIEW

Whether this Court should accept review of the Court of Appeals' opinion that the State proved beyond a reasonable doubt that Joseph Nickols committed the crimes of harassment of a criminal justice participant even though there was insufficient evidence Mr. Nickols knowingly harassed corrections participants Ms. Lupo or Mr. Haskins?

D. STATEMENT OF THE CASE

Jack Haskins is the Lewis County Jail classification and compliance officer. RP Trial 92. His duties include monitoring inmate mail. RP Trial 92. He worked for the jail for 31 years. RP Trial 93. He knew Joseph Nickols both as a current inmate and as a person incarcerated in the jail on prior instances.

To send mail, an inmate acquires paper and envelopes from the jail. The inmate must address an outgoing letter in a specific manner. The inmate puts the finished letter in their cell window and a corrections officer picks it up around midnight. RP Trial 94-95. Outgoing letters must be reviewed by Officer Haskins or other officers before they are mailed. RP Trial 96.

On May 26, 2015, Mr. Nickols attempted to mail a letter to his girlfriend, Lori Heller. RP Trial 95; Exhibit 1. Officer Haskins received the letter for review. RP Trial 96. After reading the letter, Officer Haskins decided it contained information that might interest detectives because it mentioned drugs and how to obtain them. RP Trial 100. Rather than mailing the letter to Ms. Heller, Officer Haskins gave it to a Lewis County Sheriff's detective. RP Trial 98-100; Exhibit 1.

Because Officer Haskins did not mail the letter to its intended recipient, jail policy required Mr. Nickols be notified. Officer Haskins directed jail support technician Kari Lupo to draft a Notice of Restricted Mail. Both Officer Haskins' name and Ms. Lupo's name appear near the bottom of the typed form: "By: K. LUPO PER OFC. HASKINS." Exhibit 3. The notice specified, "Letter has been turned over to detectives for possible

criminal charges.” Exhibit 3. Corrections officers deliver inmate mail, to include restriction notices, to inmates daily. RP Trial 102.

On May 28, another letter written by Mr. Nickols to Ms. Heller appeared on Officer Haskins’ desk. RP 103. Exhibit 2. The letter referred to the first letter (Exhibit 1) and included the following content:

You will never believe what this punk ass jail did now lol I got them fucken with my mail again and there sending my letter to the DA for criminal charges fuck you you punk as Bitches hope and want to see you kids get raped and shoot in the head or hit by a car.

Officer Haskins’ reaction to the letter was that Mr. Nickols wrote a note to “all of the officers who read his mail.” RP Trial 105. He thought it was “out of the ordinary” and also interpreted it to specifically threaten him and his children and he feared Mr. Nickols would carry out the threat. RP Trial 106. In the body of the letter Mr. Nickols further wrote:

lol I need them to fuck up again and send my letter to the DA now im going to shoot all who fucked with it with there own gun lol like in my last law suit I should have never let up on them when I had the gun there so dumb they gave me a gun and this time I got money for a attorney

Exhibit 2.

As a long term corrections officer, Officer Haskins had been threatened over his career 200-300 times. RP Trial 106. Although he had a history with Mr. Nickols, Officer Haskins felt this was different because of

the specificity. He worried too that Mr. Nickols was scheduled to be released soon and, in the first letter, Exhibit 1, he believed Mr. Nickols wrote about having access to a handgun. RP Trial 107.

Kari Lupo did not know Mr. Nickols. RP 125. Creating orders restricting mail was part of her duties. RP Trial 114. Ms. Lupo did not read either of Mr. Nickols' letters. RP 125. Instead, she read log entries written by Officer Haskins. RP Trial 116, 122-23. Officer Haskins' entries said the letters contained threats that "their children get raped and hit by a car" and that Mr. Nickols said he would shoot people who messed with his mail using their own gun. RP Trial 123. Officer Haskins also concluded that Mr. Nickols put a hit on his girlfriend's son and Mr. Nickols wanted his girlfriend to deal drugs for him while he was in jail. RP Trial 124-35. Reading the log entries made Ms. Lupo feel like she was a person who messed with Mr. Nickols' mail as her name was on the Notice of Restricted Mail. She became hysterical and left her desk. RP Trial 124-35.

The State charged Joseph Nickols with two counts of Harassment of a Criminal Justice Participant Performing Official Duties. CP 35, 36. Mr. Nickols appealed the jury's verdict finding him guilty of both counts. CP 105-17.



E. REASON WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4, a petition for review will be accepted by this Court

if:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The State did not prove beyond a reasonable doubt that Mr. Nickols committed the offense of felony harassment of a criminal justice participant.

The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, reviewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

A claim of insufficiency of evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The "to convict" instruction for harassment required the State to prove

(1) the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to another person; (2) the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out; and (3) the person threatened is a criminal justice participant who was threatened because of an action taken or a decision made during the performance of their duties.

RCW 9A.46.020(1)(a)(i) and (2)(b); see also *State v. Kilburn*, 151 Wn.2d 36, 43, 54, 84 P.3d 1215 (2004) (criminal harassment statute prohibits "true threats").

"Threat" is defined as "to communicate, directly or indirectly the intent [t]o cause bodily injury in the future to the person threatened or to any other person." RCW 9A.04.110(28)(a). "Knowingly threatens" means that "the defendant must subjectively know that he or she is communicating a threat, and must know that the communication he or she imparts directly or indirectly is a threat to cause bodily injury to the person

threatened or another person.” *State v. J.M.*, 144 Wn.2d 472, 481, 28 P.3d 720 (2001). “Under RCW 9A.46.020(1)(a)(i), the person threatened is generally the victim of the threat, i.e., the person against whom the threat to inflict bodily injury is made.” *J.M.*, 144 Wn.2d at 488.

The evidence is insufficient to show either Officer Haskins or Ms. Lupo was “the person threatened” and that Mr. Nickols “knowingly” directed his threats toward these two individuals.

In criminal harassment cases, words are important. They form the basis for conviction. It is therefore appropriate to scrutinize them and the context in which they occur.

Mr. Nickols directs comments in the second letter, Exhibit 2, to the “punk ass jail,” “punk as [sic] Bitches,” “all who fucked with” an unspecified letter he hopes gets sent “to the DA,” as well as “punks reading this.” Exhibit 2. He does not mention Officer Haskins or Ms. Lupo. The evidence is insufficient to show Mr. Nickols, in ranting at people in the jail, knowingly included Officer Haskins or Ms. Lupo in the rant.

It appears no case has directly addressed what level of specificity is needed to prove an alleged victim of harassment is “the person threatened” under RCW 9A.46.020. In other cases, the “person threatened” was clear. See *J.M.*, 144 Wn.2d at 475 (“I’d only kill Mr.

Sharper, Mr. Hashiguchi, and Mr. Boyd.”); *Kilburn*, 151 Wn.2d at 39-40 (student charged with harassing K.J. after stating “I’m going to bring a gun to school tomorrow and shoot everyone and start with you [K.J.]”); *State v. C.G.*, 150 Wn.2d 604, 607, 80 P.3d 594 (2003) (“I’ll kill you Mr. Haney, I’ll kill you.”); *State v. Boyle*, 183 Wn. App. 1, 335 P.3d 954 (2014) (defendant told Officer Morrison “someone will kill you”); *State v. Schaler*, 145 Wn. App. 628, 633-34, 186 P.3d 1170 (2008), *reversed on other grounds*, *State v. Schaler*, 169 Wn.2d 274 (2010) (defendant told mental health evaluator he wanted to kill his two neighbors); *State v. Kiehl*, 128 Wn. App. 88, 90, 113 P.3d 528 (2005) (defendant told mental health counselor “this was all Judge Matheson’s fault” and “he was going to kill him”).

In those cases, specific people were threatened. This is not what we have here. Instead, we have threats broadly directed toward a group of people who most likely work in the Lewis County Jail. Exhibit 2. Officer Haskins and Ms. Lupo were chosen as victims for the charging documents and trial seemingly because their names were on the Notice of Restricted Mail. Exhibit 3. Ms. Lupo never even read Mr. Nickols’ second letter. She only read Officer Haskins’ summarized description of both letters’ partial content.

In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. To withstand constitutional scrutiny, the verdict against Mr. Nickols must be supported by substantial evidence that supports a finding of guilty beyond a reasonable doubt as measured by a rational trier of fact. *State v. Green*, 94 Wn. 2d 216, 220-22, 616 P.2d 628 (1980); *State v. Jacobs*, 121 Wn. App. 669, 680-81, 89 P.3d 232 (2004), *reversed on other grounds*, *State v. Jacobs*, 154 Wn.2d 596 (2005). Officer Haskins and Ms. Lupo as “victims” amounts to speculation, which is not substantial evidence. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). To “knowingly threaten” someone, the defendant must subjectively know that the communication he imparts is a threat to cause bodily injury to the person threatened. *J.M.*, 144 Wn.2d at 481.

Officer Haskins erroneously read into Mr. Nickols’ second letter a specific and targeted threat against both his children and himself. RP Trial 106. Per Officer Haskins, “There was a statement the he couldn’t wait to see my kids get raped or shot or run over by a car and further on down he said he would shoot me with my own handgun.” RP Trial 106. A close read of the second letter, Exhibit 2, reveals no such personalization. Similarly, Ms. Lupo just “felt” that because she could be perceived as a person who

“messed with” Mr. Nickols’ mail, Mr. Nickols must have been directing threats at her. RP Trial 123.

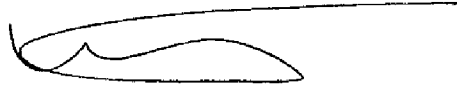
That Officer Haskins and Ms. Lupo believed Mr. Nickols included them in the people referenced in his second letter based on the content of Mr. Nickols’ letter does not support the legal conclusion that Mr. Nickols knowingly threatened Officer Haskins and Ms. Lupo. Officer Haskins’ and Ms. Lupo’s feelings or conclusions about whether they were included in the group to which Mr. Nickols directed his threats does not answer whether the state proved they were “the persons threatened” and that Mr. Nickols “knowingly” directed threats towards them. Those are two separate questions. They should not be conflated and the Court of Appeals erred in doing so. Court of Appeals Opinion at 4.

The harassment convictions must be reversed and the charges dismissed with prejudice because there is insufficient evidence to prove each element of the crimes. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

F. CONCLUSION

This Court should grant review and reverse Mr. Nickols’ convictions.

Respectfully submitted January 4, 2017.

A handwritten signature in black ink, appearing to read "Lisa E. Tabbut". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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LISA E. TABBUT/WSBA 21344  
Attorney for Joseph Nickols

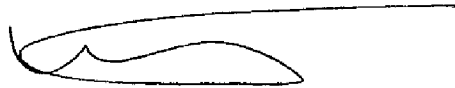
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Petition for Review to (1) Lewis County Prosecutor's Office, at [appeals@lewiscountywa.gov](mailto:appeals@lewiscountywa.gov) and [sara.beigh@lewiscountywa.gov](mailto:sara.beigh@lewiscountywa.gov); (2) the Court of Appeals, Division II; and (3) I mailed it to Joseph Nickols/DOC#345637, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 4, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Joseph Nickols, Petitioner



# APPENDIX

December 6, 2016

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH LEE NICKOLS,

Appellant.

No. 47888-9-II

UNPUBLISHED OPINION

SUTTON, J. — Joseph Lee Nickols appeals his conviction for two counts of felony harassment. Nickols argues that the State failed to present sufficient evidence to prove that he specifically threatened either Jack Haskins or Kari Lupo. The State presented sufficient evidence to convict Nickols of harassment of Haskins and Lupo, criminal justice participants who were performing their official duties, and we affirm.

**FACTS**

On May 26, 2015, Nickols, an inmate at the Lewis County Jail, attempted to mail a letter to his girlfriend. Jack Haskins, the jail's classification and compliance officer, read the outgoing mail as part of his official duties. The letter detailed Nickols's attempt to set up a criminal enterprise, discussed an inmate associate in the jail who had access to a .40 pistol and was "not afraid to use it," and discussed ordering a hit on someone named "Cory." Clerk's Papers (CP) at 65. After reading the letter, Haskins forwarded Nickols's letter to a detective at the Lewis County Sheriff's Office.

Haskins then directed jail support technician, Kari Lupo, to send a notice of restricted mail to Nickols to notify him that his outgoing letter was withheld according to the jail's protocol. The notice of restricted mail informed Nickols that his "LETTER HAS BEEN TURNED OVER TO DETECTIVES FOR POSSIBLE CRIMINAL CHARGES." Ex. 3. The notice was signed, "By: K.LUPO PER OFC. HASKINS." Ex. 3. Nickols received the notice of restricted mail on May 26, the same day he attempted to mail his letter.

Two days later, Haskins received another letter that Nickols had attempted to mail to his girlfriend. The letter was folded to reveal the following message, written in large letters, as soon as the letter was opened: "Fuck you punks reading this send that to the DA." Ex. 2. Haskins read the letter, which contained the following relevant passages:

You will never believe what this punk ass jail did now lol I got them fucken with my mail again and there sending my letter to the DA for criminal charges fuck you you punk as Bitches hope and want to see you kids get raped and shoot in the head or hit by a car send that to the DA Bitch . . . [.]

I need them to fuck up and send my letter to the DA now im going to shoot all who fucked with it with there own gun lol like in my last law suit I should have never let up on them when I had the gun there so dumb they gave me a gun and this time I got money for a attorney. . . [.]

Ex. 2. Nickols did not name either Haskins or Lupo in this second letter.

The State charged Nickols with two counts of felony harassment of a criminal justice participant for harassing Haskins and Lupo. At trial, Haskins testified that his reaction to the letter was that Nickols "wrote a note to all of the officers who read his mail." I Verbatim Report of Proceedings (VRP) at 105. Haskins further testified that "Nickols was - - appeared to be threatening my kids and myself. . . . I was in fear that he was going to hurt me or my kids." I VRP at 106. Although Haskins had been threatened an estimated 200-300 times over his 31-year-career

as a corrections officer, he felt that Nickols's threat in the letter was "out of the ordinary." I VRP at 106. When asked why this was different from other prior interactions with Nickols, Haskins stated that Nickols "was very specific in what he was going to do" this time. I VRP at 107. Haskins knew that Nickols was scheduled to be released within days after writing the second letter and was concerned that "he was going to be on the loose." I VRP at 107. Finally, Haskins testified that Nickols's statements in the second letter scared him because the first letter indicated that Nickols would have access to a firearm after being released.

Lupo testified that she had never met Nickols and did not read either of his letters. In order to prepare the notice of restricted mail, Lupo read an information log prepared by Haskins. In the log entry for the second letter, Haskins had quoted portions of the letter that he determined were threatening. As Lupo read these quoted passages in the log, she realized her name was on the May 26 notice of restricted mail that Nickols received before writing the second letter. Lupo felt that she was "one of those people who messed with Mr. Nickols'[s] mail." I VRP at 123. She became "hysterical and started crying" and left her desk. I VRP at 123. Lupo further testified that her knowledge that the first letter contained information about Nickols ordering a hit on someone made her more fearful after reading the passages in the second letter.

The jury found Nickols guilty on both counts. Nickols appeals.

#### ANALYSIS

Nickols argues that there was insufficient evidence to prove that he specifically threatened either Haskins or Lupo because he did not use their names in his letter and the threats were general rants broadly directed toward a group of people in the jail. Nickols further argues that the State

speculated when it identified Haskins and Lupo as the targets of the general threats. Nickols's arguments fail.

We review sufficiency of the evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A sufficiency challenge admits the truth of the State's evidence and all reasonable inferences drawn from it. *Salinas*, 119 Wn.2d at 201. All "reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are deemed equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A person is guilty of felony harassment of a criminal justice participant if he or she (1) threatens, (2) to cause bodily injury, (3) to the person threatened, (4) without lawful authority. RCW 9A.46.020. RCW 9A.46 does not define "person threatened," but our Supreme Court has explained that to be guilty of felony harassment, the defendant does not need to communicate the threat directly to the person threatened. Rather, the person making the threat must only (1) subjectively know that he or she is communicating a threat and (2) "must know that the communication he or she imparts directly or indirectly is a threat of intent to cause bodily injury to the person threatened or to another person." *State v. J.M.*, 144 Wn.2d 472, 481, 28 P.3d 720 (2001).


Here, Nickols did not have to know that the threat would be communicated directly to Haskins and Lupo. Instead, the State had to prove that Nickols knew he was communicating a threat and that he knew the threat communicated his intent to cause bodily injury to the person (or people) threatened. The State proved that Nickols knew he was communicating a threat because although he wrote the letter directly to his girlfriend, he wrote a specific message on the letter to jail staff who he believed would read the letter. And he knew the letter communicated a threat to inflict bodily harm because he included detailed descriptions of the bodily harm threatened. It was reasonable to infer that Haskins and Lupo were the people threatened because Nickols referenced the people who interfered with his mail and Haskins and Lupo were named in the restricted mail notice. Accordingly, the State presented sufficient evidence to support Nickols felony harassment convictions. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
SUTTON, J.

We concur:

  
WORSWICK, P.J.

  
LEE, J.

**LISA E TABBUT LAW OFFICE**

**January 04, 2017 - 3:49 PM**

**Transmittal Letter**

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