Supreme Court No. 97115-3
COA No. 77606-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HARJINDER KABARWAL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. Harjinder Kabarwal was the appellant in Court of Appeals No. 77606-1-I. See Appendix A.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the decision issued April 15, 2019.

C. ISSUES PRESENTED ON REVIEW

1. The defendant's conviction was entered in violation of the Fourteenth Amendment's Due Process clause, and the First Amendment. U.S. Const. amend. XIV; U.S. Const. amend. I.

First, to prove felony harassment, the State must show the defendant knowingly threatened to cause bodily injury to "the person threatened or to any other person" and that he placed "the person threatened in reasonable fear that the threat [would] be carried out." RCW 9A.46.020(1). The crime is a felony if the defendant threatened to kill the person, or if he threatened bodily injury to a criminal justice participant such as a prosecutor. RCW 9A.46.020(1)(2)(b). The defendant was also charged with intimidating a judge, under RCW 9A.72.160, requiring a threat directed at a judge. CP 91.

Here, the State presented evidence that Mr. Kabarwal, during several counseling sessions at Valley Cities Behavioral Health, made

qualified statements suggesting a desire to kill the prosecutor and the judge in his then-pending DUI case in Shoreline District Court. The therapists reported the statements to police primarily because of Valley Cities' office policy regarding mandatory reporting, and the prosecutor, and the judge, testified they became fearful upon learning of the statements via the two previous intermediaries. Did the State fail to prove felony harassment, requiring reversal of the convictions and dismissal of the charges with prejudice?

2. Second, because the First Amendment protects speech, an alleged threat may not be criminalized unless it is a "true threat." Under Washington law, a true threat is a statement made in a context wherein a reasonable person would foresee that the statement would be taken as a serious expression of intent to inflict the required harm. In contrast, idle talk is not a true threat. Did the State fail to prove a true threat under Washington law, where Mr. Kabarwal made his statements in a qualified manner, and would not foresee that the prosecutor or judge, upon hearing of the statements, would take them as serious expressions of intent to harm?

3. The United States Supreme Court has made clear that the First Amendment in fact requires proof of a more culpable mental state

for true threats than the "reasonable person" standard used in Washington. Instead, constitutionally sufficient evidence requires proof that the defendant "intended" to induce fear of the harm. Did the State fail to meet this standard?

D. STATEMENT OF THE CASE

1. Facts. According to the affidavit of probable cause and the State's allegations at trial, Mr. Kabarwal was attending a confidential counseling assessment with therapist Dhanapati Neopaney, of Valley Cities Behavioral Health, on May 12, 2016. CP 2; 10/4/17RP at 460.

During counseling, Mr. Kabarwal supposedly stated that he was going to kill the prosecuting attorney if he was "convicted" on June 2. CP 2. However, at trial, therapist Neopaney actually indicated that Mr. Kabarwal simply said that he was "frustrated with," and "wants to harm the attorney who is prosecuting him," and that he said he "will," and "I would like to kill that person." [1] 10/4/17RP at 463, 471.

Because she believed she was statutorily required to do so, Neopaney reported the matter to the Federal Way Police Department.

[1] During counseling, Neopaney was speaking with Mr. Kabarwal in English and Hindi; Kabarwal's native language is Punjabi (for which he had an interpreter at trial), but Neopaney's native language is Nepali. 10/4/17RP at 401, 473.

10/2/17RP at 295-96; 10/4/17RP at 459, 469. Kabarwal allegedly used the word "guarantee" at some point, but no further context was testified to regarding use of the word. 10/4/17RP at 463-64. Neopaney noted that Mr. Kabarwal was suffering from post-traumatic stress disorder (PTSD) and psychosis at the time, and also noted that Mr. Kabarwal had made no statements about when or how he supposedly was going to act on any statement. 10/4/17RP at 464, 466-68.

Prosecutor Carmen McDonald was told on May 19, 2016, by a Federal Way detective, that Mr. Kabarwal had made statements regarding a threat "to kill," reported by his therapist earlier. 10/3/17RP at 378-79. 10/9/17RP at 522-23. McDonald was "alarmed" and took the statements "seriously." 10/9/17RP at 524-26

After receiving the report, the police learned that Mr. Kabarwal had been found guilty of DUI (physical control) by a jury in Shoreline District Court on April 28, 2016; he was set to be sentenced on June 2. Federal Way Detective Annette Scholl contacted the prosecutor in the case, Carmen McDonald, and related Kabarwal's statement. CP 2; 10/9/17RP at 384.

Subsequently, Mr. Kabarwal's June 2 sentencing hearing was continued to July 7. CP 2. On June 6, another therapist at the Valley

Cities clinic, Olivia Uhart, reported that Mr. Kabarwal had made statements categorized as mental health terms as "suicidality" and "homicidality;" she stated that he said was going to "harm the people in his court case" and mentioned "the judges and attorneys," and "part of the intent of that was for him to die in the process of that, which can be common in suicidality." 10/2/17RP at 300-01; 10/3/17RP at 349-52. At one point, the prosecutor used the term "kill" when asking the witness if Mr. Kabarwal made statements of threat regarding "his attorney and a judge." 10/3/17RP at 365.

On June 16, 2016, William Greenwood of Valley Cities called law enforcement to report that Mr. Kabarwal had stated, in a counseling session that day, that he would do "what happened in Orlando" or "would have to do like they did in Orlando," in the courtroom if he was incarcerated at his next court date on July 7. 10/2/17RP at 301-03; 10/3/17RP at 326-28, 331. This was approximately four days after a very serious shooting incident had occurred at a nightclub in Orlando, Florida. 10/3/17RP at 327.

At the defendant's sentencing in Shoreline on July 7, Judge Marcine Anderson was prevented by officers from entering the courtroom, because of security concerns arising from the defendant's

statements. Prosecutor McDonald had previously been removed from handling the case for similar reasons. CP 2; 10/4/17RP at 423.

Judge Anderson, who was told by her court manager about the alleged threats by Kabarwal, also learned of the defendant's statements from legal documents in the case; she stated she feared for her personal safety that the defendant might carry out "what he said he was going to do." 10/4/17RP at 423-27, 439-40.

Detective Annette Scholl had also telephoned prosecutor Judge Anderson and informed her about the specifies of the statements Mr. Kabarwal made. 10/9/17RP at 384-88.

2. <u>Verdicts and sentencing</u>. Following the evidence phase of his jury trial, Mr. Kabarwal was found guilty of count 1, felony harassment under RCW 9A.46.020(1),(2)(b), as to prosecutor Carmen McDonald (charged in the alternative as threat to kill, and threat of injury to a criminal justice participant), along with counts 2 and 3, felony harassment (threat to kill), and intimidating a judge pursuant to RCW 9A.72.160, by directing a threat to Judge Anderson. CP 65-66, CP 97, 98, 99. At sentencing, Mr. Kabarwal was given a first time offender waiver and was released from jail, with a further requirement to be under 12 months community custody. CP 100-07. Mr. Kabarwal

appealed; Division One of the Court of Appeals affirmed. Appendix A.

E. ARGUMENT

Harjinder Kabarwal did not threaten McDonald or Anderson or direct a threat to Anderson, and as a result his convictions must be reversed because they were entered in violation of his constitutional rights under the 14th Amendment's Due Process clause and Wash. Const. art. 1, § 3 and the 1st Amendment.

1. Review is warranted under RAP 13.4(b)(3).

Review is warranted in this case, which presents significant questions of law under the Washington Constitution, and the United States Constitution. Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Trey M., 186 Wn. 2d 884, 903-04, 383 P.3d 474, 483 (2016), cert. denied, 138 S. Ct. 313, 199 L. Ed. 2d 207 (2017); Virginia v. Black, 538 U.S. 343, 367, 123 S. Ct. 1536, 155 L. Ed.2d 535 (2003); see RAP 13.4(b)(3).

2. There was no evidence in this case of a knowing threat.

a. Due Process requires the State to prove every element of the crime charged beyond a reasonable doubt.

Harjinder Kabarwal did not threaten prosecutor McDonald, or Judge Anderson, or direct a threat toward Judge Anderson. As a result, all three of his convictions must be reversed because they were entered in

violation of his constitutional rights under the 14th Amendment's Due Process clause, Washington's Due Process clause, Wash. Const. art. 1, § 3, and the 1st Amendment. First,

> an essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

State v. Hummel, 196 Wn. App. 329, 352, 383 P.3d 592 (2016) (quoting Jackson v. Virginia, 443 U.S. at 316.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). The beyond a reasonable doubt standard is designed to impress "upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused." Jackson, 443 U.S. at 315. It "symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." Id.

A conviction based on insufficient evidence violates a defendant's fundamental right to due process. U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to

support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 318; State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

Where a determination of sufficiency of the evidence requires statutory construction, review is *de novo*. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

In this case, the State charged Mr. Kabarwal with harassment as to McDonald and Judge Anderson, and intimidating a judge as to Anderson. The harassment statute provides, in relevant part:

> (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; …
> … and
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. …
> (2) …
> (b) A person who harasses another is guilty of a class C felony if … (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.

RCW 9A.46.020. The intimidating a judge statute provides:

> A person is guilty of intimidating a judge if a person directs a threat to a judge because of a ruling or decision of the judge in any official proceeding, or if by use of a threat directed to a judge, a person attempts to influence a ruling or decision of the judge in any official proceeding.

RCW 9A.72.160(1). As explained below, the State failed to prove all of the elements of the crimes.

b. The State failed to prove that the selected complainants actually or reasonably feared that a threat would be carried out**.**

The State presented insufficient evidence as to the "fear" element set forth in the harassment statute, for counts 1 and 2. The State must prove that the person threatened was placed in reasonable fear of bodily harm (if a criminal justice participant, like Ms. McDonald), or that the person threatened was placed in reasonable fear of death. State v. C.G., 150 Wn.2d 604, 607-08, 80 P.3d 594 (2003); RCW 9A.46.020. The State failed to prove any of these requirements.

This Court's decision in C.G. is dispositive. There, the defendant yelled obscenities and – directly and in the complainant's

presence -- told the alleged victim, "I'll kill you Mr. Haney, I'll kill you." C.G., 150 Wn.2d at 606-07. At trial, the alleged victim "testified that C.G.'s threat caused him concern." Id. at 607. "He testified that based on what he knew about C.G., she might try to harm him or someone else in the future." Id. In that case, even drawing all reasonable inferences in favor of the State, the Court held that this evidence was insufficient to prove the specific fear required under the felony harassment provision. C.G., 150 Wn.2d at 610 ("C.G.'s conviction for felony harassment must be reversed because there is no evidence that Mr. Haney was placed in reasonable fear that she would kill him.").

The same is true here. Similar to the facts in C.G., the witnesses expressed "alarm[]." Prosecutor McDonald learned through two intervening intermediaries about past statements the defendant made in a counseling context. 10/3/17RP at 378-79; 10/9/17RP at 522-23. McDonald, understandably, took the statements "seriously;" however, when asked if she was afraid, she answered only, "I was certainly worried that he would potentially carry that out." 10/9/17RP at 524-26. She also stated, "I can't just necessarily brush that aside and hope that

it's not true. I didn't discount it, based upon his condition, at all." 10/9/17RP at 525. This is inadequate to show actual or reasonable fear.

This is also the case as to Judge Anderson. Judge Anderson was also told by several intermediaries about the statements Kabarwal made in a therapy session, and she also learned of the alleged threat from legal documents – written on paper -- in the present case. 10/4/17RP at 423-27. She did state that she afraid that the defendant might carry out "what he said he was going to do." 10/4/17RP at 423-27, 439-40. However, although Judge Anderson also obtained a protection order and an anti-harassment order as to Mr. Kabarwal, the latter was obtained a full ten months after the claimed threat. 10/4/17RP at 433-38.

The State did not prove the fear required by the statute. Accordingly, the convictions should be reversed, and the charge dismissed with prejudice. Hummel, 196 Wn. App. at 359 (remedy for insufficiency of the evidence, where lesser-included offense was not presented to fact-finder, is dismissal of the charge with prejudice).

3. In the alternative, the convictions should be reversed and the charges dismissed with prejudice because the State failed to prove true threats as required under the First Amendment.

The harassment statute criminalizes pure speech, and therefore "must be interpreted with the commands of the First Amendment clearly in mind." State v. Kilburn, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004); see U.S. Const. amend. I (government may not abridge freedom of speech); Gitlow v. New York, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925) (First Amendment applies to the states through the Fourteenth Amendment). Because the right to free speech is "vital," only a few narrow categories of communication may be proscribed. Kilburn, 151 Wn.2d at 42. Although a "threat" is one of those categories, the only type of threat which may be criminalized without running afoul of the First Amendment is a "true threat." Id. at 43.

Similarly, the statute prohibiting intimidation of a judge requires a threat. RCW 9A.72.160(2). Mr. Kabarwal properly obtained a jury instruction as to the true threat requirement for count 3. CP 91.

As explained below, under either the "reasonable person" definition of "true threat" or the subjective intent definition of "true threat," the State failed to meet its burden to prove that Mr. Kabarwal's

anger expressed in private counseling fell outside the protection of the First Amendment.

a. The State failed to prove a true threat under the reasonable person standard.

This Court has defined a true threat as "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." Kilburn, 151 Wn.2d at 43 (internal quotations omitted). This is an objective standard that focuses on the viewpoint of a reasonable speaker under all of the circumstances. Id. at 44. A statement is not a true threat if it is meant as a joke, idle talk, or argument. Id.

Given "the First Amendment values at issue," the true threat standard is "a difficult standard to satisfy." Id. at 53. Not only is the State's burden weighty, but the reviewing court also must "be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech." Id. at 49.

In this case, the State failed to meet its weighty burden to show that Mr. Kabarwal's statements in counseling were true threats rather

than protected speech. A reasonable person in Mr. Kabarwal's circumstances would not have foreseen his statements would be interpreted as a serious expression of intention to inflict harm.

For example, when talking to therapist Neopaney, Mr. Kabarwal merely told the counselor that he was frustrated and "would like to" kill that person (the prosecutor), which is not a threat to kill, or a true threat. 10/4/17RP at 463. Therapist Neopaney explained to the jury that the mandatory reporting laws, as made a part of the office policy and procedure at Valley Cities, require the making of a report "if there is any issue of threat to self or others[.]" 10/4/17RP at 459. Thus the reporting of the statements, in context, did not support a conclusion that Mr. Kabarwal made them with the mental state required. And for his part, Neopaney himself was not concerned:

> Q: Did you take the threat seriously?
> A: I did not.
> Q: Why not?
> A: Because the client might be going through some kind of mental-health issue that I was not aware of to be assessed by some professionals.

10/4/17RP at 471-72. Neopaney reported the matter to police "anyway," because he believed he was under a statutory duty to do so. 10/4/17RP at 475.

In these circumstances, the statement was not a knowing threat, and indeed, at the time, Neopaney merely noted it in Mr. Kabarwal's "progress notes," continued the counseling session, and only later talked to his supervisor, who told him that Valley Cities was required to call the police. 10/4/17RP at 463-65.

As noted, this context is critical. See Kilburn, 151 Wn.2d at 43; accord Virginia v. Black, 538 U.S. 343, 367, 123 S. Ct. 1536, 155 L. Ed.2d 535 (2003) (noting importance of "contextual factors" in First Amendment true threat analysis). Here, the context in which Mr. Kabarwal made his statements was in counseling sessions where he was encouraged to relate his feelings and troubles. Mr. Kabarwal's statements were emotional hyperbole about his struggles with the criminal justice system, not true threats.

None of Mr. Kabarwal's statements meet the required level of proof. This Court has stated that whether the totality of the circumstances determines whether a defendant's statements "were serious threats and that a reasonable speaker would so regard them, [or] . . . a cry for help from a mentally troubled [person], directed toward mental health professionals who could help him" is an appropriate question for the fact finder. State v. Trey M., 186 Wn. 2d 884, 903-04,

383 P.3d 474, 483 (2016), cert. denied, 138 S. Ct. 313, 199 L. Ed. 2d 207 (2017) (citing State v. Schaler, 169 Wn.2d 274, 289-90, 236 P.3d 858 (2010)).

Here, Ms. Uhart testified that she reported the matter because she was required to do so if it was a "valid threat;" yet, her questions to Mr. Kabarwal and his answers during the remainder of the counseling session actually "alleviated [her] concern." 10/3/17RP at 354-55. Ms. Uhart continued to meet with Mr. Kabarwal after that session, and she was not concerned "any more than usual" because, she said, "I do this all day." 10/3/17RP at 356. She clarified that her understanding of a "valid threat" was one that had "specific details." 10/3/17RP at 357. She also stated, in further cross-examination, that Mr. Kabarwal did not make any "specific threats." 10/3/17RP at 362. She reported the statements to police, however, because she figured that judges and attorneys in a case would be people the police could "potentially identify." 10/3/17RP at 364.

And for his part, therapist Greenwood also noted that Valley Cities had an obligation to report anything that was a "concrete threat" even if he believed "it may not go anywhere." 10/3/17RP at 325. He called the police on the department's non-emergency line because it

was not an immediate emergency, and he also did not feel unsafe continuing to be Mr. Kabarwal's therapist. 10/3/17RP at 333-35, 338. In fact, as Greenwood later reported to the defense investigator, Mr. Kabarwal said in counseling on June 18 that he recognized he felt that he had suffered, but he would not "do anything violent:"

> [He] wouldn't do anything like that; that he didn't plan to do it. He was frustrated and upset, but he wasn't going to do anything to harm anyone.

10/3/17RP at 336-37.

This is inadequate for guilt. See Watts v. United States, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed.2d 664 (1969). In Watts, the United States Supreme Court stated these sorts of speech statutes "must be interpreted with the commands of the First Amendment clearly in mind." Id. at 707. Here, Mr. Kabarwal's angry statements about his legal troubles and the persons litigating against him in the court system were protected by the First Amendment. These were not true threats, and may not be criminalized. For this reason this Court should reverse the convictions and remand for dismissal of the charges with prejudice. State v. E.J.J., 183 Wn.2d 497, 508, 354 P.3d 815 (2015) (remedy for convictions that violate First Amendment is reversal and dismissal).

b. The State failed to prove a true threat under the subjective intent standard.

Unlike the Washington courts, federal and other courts have held that the First Amendment requires proof of a higher mental state than the reasonable person standard, in order to criminalize speech as a true threat. Based on their reading of Virginia v. Black, those courts hold the the government must prove the defendant subjectively intended to induce fear of the harm. See, e.g., United States v. Heineman, 767 F.3d 970, 976 (10th Cir. 2014); Brewington v. State, 7 N.E.3d 946, 964-65 (Ind. 2014); O'Brien v. Borowski, 961 N.E.2d 547, 556 (Mass. 2012); United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011). The Washington Supreme Court has not read Black to require this standard, State v. Trey M., 186 Wn. 2d at 893, but Mr. Kabarwal raises this issue to preserve it in the event the U.S. Supreme Court expressly resolves the conflict against Washington's reasonable person standard.

Here, the State plainly failed to prove Mr. Kabarwal issued any true threats under the *subjective* intent standard. The evidence was sufficient to establish only one fact beyond a reasonable doubt, see Jackson, 443 U.S. at 315, that Mr. Kabarwal did not subjectively mean to threaten anybody but was instead vocally expressing personal upset

about being prosecuted for an offense – unfairly, he believed – in private counseling sessions. Accordingly, this Court should reverse the conviction and remand for dismissal of the charge with prejudice. Virginia v. Black, 538 U.S. at 367; Jackson, 443 U.S. at 315.

F. CONCLUSION

Based on the foregoing, Mr. Kabarwal's convictions should be reversed.

Respectfully submitted this 23 day of April, 2019.

_____
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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. 77606-1-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:

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Date: April 23, 2019

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4/15/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. HARJINDER SINGH KABARWAL, Appellant.	No. 77606-1-I DIVISION ONE UNPUBLISHED OPINION FILED: April 15, 2019

APPELWICK, C.J. — Kabarwal appeals his convictions for felony harassment and intimidating a judge. He argues that the State failed to prove beyond a reasonable doubt that (1) the victims were placed in actual and reasonable fear that a threat would be carried out, and (2) his statements constituted a "true threat." We affirm.

FACTS

In April 2016, Harjinder Kabarwal was a defendant in a jury trial at the King County District Court in Shoreline. He had been charged with driving under the influence (DUI), physical control, and driving with a suspended license. The jury found Kabarwal guilty of physical control. The court set Kabarwal's sentencing for June, but later continued his sentencing to July 7. Judge Marcine Anderson presided over the trial, and Carmen McDonald was the prosecuting attorney.

In May and June 2016, Kabarwal was a patient at Valley Cities Behavioral Health, a community-based outpatient treatment center in Federal Way. Around May 12, 2016, Kabarwal met with Dhanapati Neopaney, a care-coordination intern at Valley Cities. Neopaney had conducted Kabarwal's initial case management assessment. The May 12 meeting was a regular case management counseling session. During the session, the two discussed how Kabarwal was feeling about his pending case in Shoreline.

Kabarwal told Neopaney that he was very frustrated with his prosecuting attorney, and that he wanted to harm that attorney. Kabarwal said, "'I'm very frustrated with the ongoing prosecution, and if I have to go to jail, then I'll kill my prosecuting attorney.'" Kabarwal did not name the prosecutor, but referred to the prosecutor as "she" and said he wanted to kill her because she did not hear him very well. After consulting his supervisor, Neopaney reported Kabarwal's statements to the Federal Way Police Department.

On June 6, 2016, Olivia Uhart, a psychiatric nurse practitioner at Valley Cities, saw Kabarwal for a follow up visit. During the visit, Uhart observed that Kabarwal was exhibiting "suicidality," thoughts about death, and "homicidality," plans or thoughts to harm other people. Uhart testified that this was abnormal for Kabarwal. She testified that "[Kabarwal] mentioned wanting to harm people in his court case that he had been dealing with," and part of his intent was for him to die in the process. Specifically, he called the judges and attorneys in his case liars, and said that was why he wanted to harm them. Due to the nature of the threat, Uhart consulted her supervisor and reported Kabarwal's statements to police.

On June 16, 2016, Kabarwal visited Valley Cities again and met with William Greenwood, a mental health clinician. This was the first time the two had met. During the session, Kabarwal brought up his DUI case. Kabarwal stated he intended to "'do like what happened in Orlando'" if he was sentenced to serve time in prison on July 7. He further stated that he would "'feel bad having to hurt innocent people, but I have to do it.'" And, he stated, "'They have ruined my life.'" The previous weekend, there had been a shooting at an Orlando, Florida nightclub, during which a single shooter killed a large number of people, and injured many more.

Greenwood noted that Kabarwal was not interested in engaging in the problem solving process. After the session ended, Greenwood spoke with his supervisor about Kabarwal's statements, and reported them to the Federal Way Police Department.

On May 19, 2016, Annette Scholl, a major crimes detective for the city of Federal Way, was assigned the case involving Kabarwal's statements. That day, she contacted McDonald, the prosecutor handling Kabarwal's DUI case, and told her about Kabarwal's statements to Neopaney. She spoke with McDonald two more times during the investigation.

On July 7, 2016, while Judge Anderson was getting ready to preside over Kabarwal's sentencing, members of her court staff entered her chambers and told her that she could not go into the courtroom. After not being allowed in the courtroom, she learned that Kabarwal had threatened to kill her and had been

arrested that day.[1] On July 12, Detective Scholl notified Judge Anderson of Kabarwal's statements.

On September 28, 2017, the State charged Kabarwal with felony harassment of McDonald (count 1), felony harassment of Judge Anderson (count 2), and intimidating a judge (count 3).[2] A jury found him guilty on all counts. Kabarwal appeals.

DISCUSSION

Kabarwal makes two arguments. First, he argues that the State failed to prove that McDonald and Judge Anderson actually and reasonably feared that a threat would be carried out, an element of felony harassment. Second, he argues that the State failed to prove that his statements constituted a true threat, a requirement under the felony harassment and intimidating a judge statutes.

The sufficiency of the evidence is a question of constitutional law that this court reviews de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's

[1] In her testimony, Judge Anderson could not remember if it was court staff who told her Kabarwal had threatened to kill her and had been arrested, but stated that it was probably court staff. She then testified that she thought her court manager told her, and that she read the probable cause statement for his arrest.

[2] The State first charged Kabarwal with felony harassment of McDonald on June 29, 2016. In a November 14, 2016 first amended information, the State added the charge for felony harassment of Judge Anderson. In a September 28, 2017 second amended information, the State last added the charge for intimidating a judge.

evidence and all inferences that reasonably can be drawn therefrom." Id. We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. See State v. Johnston, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006).

I. Felony Harassment

Kabarwal argues that the State failed to present sufficient evidence to sustain his felony harassment convictions. Specifically, he argues that the State failed to prove that McDonald and Judge Anderson actually and reasonably feared that a threat would be carried out. And, he argues that his statements did not constitute a true threat.

RCW 9A.46.020(2)(b)(ii) makes it a felony for a person to knowingly threaten to kill the person threatened, or any other person. The statute also makes it a felony to knowingly threaten to cause bodily injury to a criminal justice participant because of an action taken or decision made by that participant during the performance of his or her official duties. RCW 9A.46.020(1)(a)(i), (2)(b)(iv).

According to the jury instructions, to convict Kabarwal of felony harassment of McDonald, the State had to prove beyond a reasonable doubt that, between May 12, 2016 and June 21, 2016:

> (i) The defendant knowingly threatened to kill Carmen McDonald immediately or in the future; and
>
> (ii) That the words or conduct of the defendant placed Carmen McDonald in reasonable fear that the threat to kill would be carried out.

In the alternative, the State had to prove beyond a reasonable doubt that,

> (i) The defendant knowingly threatened on May 12, 2016 to cause bodily injury immediately or in the future to Carmen McDonald, and
>
> (ii) (a) That Carmen McDonald was a criminal justice participant who was performing his or her official duties at the time the threat was made; or
>
> (b) That Carmen McDonald was at the time a criminal justice participant and the threat was made because of an action taken or decision made by Carmen McDonald during the performance of her duties;
>
> (iii) That the words or conduct of the defendant placed Carmen McDonald in reasonable fear that the threat would be carried out; and
>
> (iv) That the fear from the threat was a fear that a reasonable criminal justice participant would have under all the circumstances.

Under each alternative, the State also had to prove that the defendant acted without lawful authority and that the threat was made or received in Washington.[3]

To convict Kabarwal of felony harassment of Judge Anderson, the State had to prove beyond a reasonable doubt,

> (1) That between June 16, 2016 and July 7, 2016, the defendant knowingly threatened to kill Marcine Anderson immediately or in the future;
>
> (2) That the words or conduct of the defendant placed Marcine Anderson in reasonable fear that the threat to kill would be carried out;
>
> (3) That the defendant acted without lawful authority; and
>
> (4) That the threat was made or received in the State of Washington.

[3] The verdict form does not indicate under which alternative the jury found Kabarwal guilty.

A. Reasonable Fear

Relying on State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003), Kabarwal argues that the State failed to prove that McDonald and Judge Anderson actually and reasonably feared that a threat would be carried out.

If the evidence in a case establishes the victim's subjective fear, "the issue is whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found beyond a reasonable doubt" that the victim's fear was reasonable. State v. Alvarez, 74 Wn. App. 250, 260-61, 872 P.2d 1123 (1994), aff'd 128 Wn.2d 1, 904 P.2d 754 (1995). To determine whether the victim's fear was reasonable, the trier of fact uses an objective standard. Id. at 260.

In C.G., a high school student became disruptive in class when asked about a missing pencil. C.G., 150 Wn.2d at 606. The student, C.G., became angry, used profanity, kicked a study carrel, moved her chair, and made other noise. Id. The teaching assistant called in the school's vice principal, Haney, who asked C.G. to leave the classroom with him. Id. C.G. went with Haney after some resistance, and continued to yell obscenities. Id. Haney then called another teacher to assist him, at which point C.G. told Haney, "'I'll kill you Mr. Haney, I'll kill you.'" Id. at 606-07. At C.G.'s trial for felony harassment, Haney testified that C.G.'s threat caused him concern, and that, based on what he knew, she might try to harm him or someone else in the future. Id. at 607. The trial court found C.G. guilty of felony harassment of Haney. Id.

On appeal, C.G. argued that there was insufficient evidence that Haney was placed in reasonable fear that C.G. would kill him. Id. She asserted that it was not

enough for the State to prove that Haney reasonably feared bodily injury would be inflicted. Id. The State Supreme Court agreed. Id. at 612. The court stated that, to obtain a misdemeanor conviction based on the threats in RCW 9A.76.020(1)(a), the State must prove that the threat made and the threat feared are the same. Id. at 608-09. Although the "threat to kill" is not listed in subsection (1)(a), the court determined that the legislature meant to proscribe those threats because "it expressly provided that a threat to kill results in a felony." Id. at 609. Thus, like misdemeanor threats, "the fear in the case of the threat to kill must be of the actual threat made—the threat to kill." Id. The court found that there was no evidence Haney was placed in reasonable fear that C.G. would kill him, and reversed the conviction. Id. at 610, 612.

1. McDonald

On May 19, 2016, Detective Scholl first notified McDonald of Kabarwal's statements to Neopaney. At trial, when asked if she took Kabarwal's threat "to kill the prosecutor" seriously, McDonald responded, "I did." When asked if Kabarwal had indicated when his threat would be carried out, she responded, "I believe that his intention was the sentencing hearing." McDonald was removed from Kabarwal's case. On the day of his sentencing hearing, she left the courthouse when his case was coming up.[4]

[4] Specifically, McDonald was asked, "So were you present at the sentencing hearing in June?" She responded, "I was present at the courthouse, but when his case was coming up, I left the courthouse." Kabarwal's sentencing was originally set for June, but was later continued to July 7. It is unclear whether McDonald was referring to the original date of his sentencing, or to July 7.

Here, there is evidence that McDonald was placed in subjective fear based on the threats Kabarwal made—that he would kill the attorney who prosecuted his trial, wanted to harm the attorneys in his case, and would "do like what happened in Orlando" if he was incarcerated on July 7. And, unlike C.G., the threats made and the threats feared are the same. Viewed in the light most favorable to the State, the evidence was sufficient to establish that McDonald actually feared that Kabarwal would carry out his threats.

The evidence supports the conclusion that it was reasonable for McDonald to fear the threats. At trial, McDonald was also asked what went through her mind when she heard Kabarwal's threat. She responded,

> Well, I recalled Mr. Kabarwal and I recalled how upset he was, and I recalled that there was some pretty significant mental instability there. And that, coupled with his use of alcohol, it's not unheard of in my line of work that someone may self-medicate mental illness with alcohol.
>
> The fact that he was seeking therapy and that he had gone through one therapist and on to another therapist and was making these specific threats to me, frankly, I've got small kids and, you know, when someone gets really angry, I can't just necessarily brush that aside and hope that it's not true. I didn't discount it, based upon his condition, at all.

McDonald stated that she was familiar with Kabarwal's use of alcohol based on "the facts of his physical-control case" and the information she was privy to in preparation for that trial.

In May through July of 2016, McDonald's office was in the courthouse, directly across the hallway from the courtroom. Her office also had a window, which faced the parking lot.

In her testimony, McDonald recalled how upset Kabarwal had been. She cited his multiple threats to more than one therapist, and stated that she believed he intended to carry out those threats at his sentencing. And, her office was across the hallway from the courtroom, with a window that faced the parking lot. Viewed in the light most favorable to the State, the evidence was sufficient to establish that McDonald reasonably feared that Kabarwal would carry out his threats.

2. Judge Anderson

On July 7, 2016, Judge Anderson was about to take the bench for Kabarwal's sentencing hearing when her court staff stopped her. She then learned that Kabarwal had threatened to kill her, had threatened to do "like Orlando" in the courthouse, and had been arrested. At trial, she testified that she did not know if Kabarwal was sentenced on July 7.

When asked if she understood immediately the reference to the shooting in Orlando, Judge Anderson responded that she did.[5] And, when asked if she thought that Kabarwal would do what he said he was going to do, she responded, "Yes. And I still do." She stated that the Orlando reference made her feel "[s]cared of what could happen to the people I work with, the public who might come into our courthouse, and scared for my o[wn] personal safety, as well." While she had been threatened before, she stated, "This seems a little bit more surreptitious, a little bit more sneaky, a little bit more something that I really needed to be concerned

[5] In her testimony, she stated, "There were a lot of people who were shot by a single person, and many people died and many people were injured and it was a complete and total surprise to all the people who were there."

about." She sought a protection order against Kabarwal, and, closer to trial, sought an anti-harassment order against him.[6]

Here, there is evidence that Judge Anderson was placed in subjective fear based on the threats Kabarwal made—that he wanted to harm the judge in his case, and would "do like what happened in Orlando" if he went to prison on July 7. And, unlike C.G., the threats made and the threats feared are the same. Viewed in the light most favorable to the State, the evidence was sufficient to establish that Judge Anderson actually feared that Kabarwal would carry out his threats.

The evidence supports the conclusion that it was reasonable for Judge Anderson to fear the threats. In her testimony about the nature of Kabarwal's threats, Judge Anderson cited the fact that Kabarwal had made threatening statements regarding his case to more than one person. She also stated,

> Based on the evidence that I heard at his trial about his mental-health condition, his traumatic brain injury, the types of medication he was on, the quantity of medication that he was on, the possibility that he was an alcoholic just given the high [blood alcohol concentration], the fact that he was mixing alcohol with all of these other chemicals, I really couldn't rely on his judgment to not do what he said he was going to do.

At the Shoreline courthouse in July 2016, bags were hand checked and did not go through an x-ray machine. Where Judge Anderson sat in her chambers on

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[6] Kabarwal points to Judge Anderson's failure to obtain an anti-harassment order until months after his threats, but she already had a protection order in place. She had asked the King County Prosecutor's Office to get an order of protection in this case, and an order of protection was then assigned. Judge Anderson did not obtain the anti-harassment order until closer to trial, because she understood that protection orders connected with criminal cases last only as long as the criminal case is active.

the first floor,[7] she was visible from outside, and her window did not have bulletproof glass.

Judge Anderson testified that she immediately understood the reference to the Orlando shooting. She cited what she knew about Kabarwal from trial, and the fact that he had made threatening statements to more than one person. She was prevented from entering her courtroom to preside over his sentencing hearing. And her chambers window, through which she was visible from outside, did not have bulletproof glass. Viewed in the light most favorable to the State, the evidence was sufficient to establish that Judge Anderson reasonably feared that Kabarwal would carry out his threats.

B. True Threat

Kabarwal argues that the State also failed to prove a true threat under the reasonable person standard, thereby violating the First Amendment.[8]

To avoid violating the First Amendment, a statute criminalizing threatening language must also be construed "as proscribing only unprotected true threats." State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013). Here, the trial court instructed the jury that

> To be a threat, a statement must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be

[7] The Shoreline courthouse is on one floor.

[8] Kabarwal also argues that the State failed to prove a true threat under the subjective intent standard. He recognizes that Washington does not apply this standard, but "raises this issue to preserve it in the event the U[nited] S[tates] Supreme Court expressly resolves the conflict against Washington's reasonable person standard." Because Kabarwal does not actually argue that the subjective intent standard should apply, we do not address this argument.

> interpreted as a serious expression of intention to carry out the threat rather than as something said in jest, idle talk, or political argument.

"[T]he First Amendment does not require that the speaker actually intend to carry out the threat in order for a communication to constitute a true threat." State v. Kilburn, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004). Rather, "[i]t is enough that a reasonable speaker would foresee that the threat would be considered serious." State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

When examining the sufficiency of the evidence of a true threat, the First Amendment demands more than "the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings." Kilburn, 151 Wn.2d at 49. "We must independently review the crucial facts in the record, i.e., those which bear on the constitutional question." Id. at 52. In true threat cases,

> [I]t is not just the words and phrasing of the alleged threat that matter, but also the larger context in which the words were uttered, including the identity of the speaker, the composition of the audience, the medium used to communicate the alleged threat, and the greater environment in which the alleged threat was made.

State v. Kohonen, 192 Wn. App. 567, 580, 370 P.3d 16 (2016).

Kabarwal told Neopaney that he was very frustrated with the ongoing prosecution in his case, and that if he had to go to jail he would kill his prosecuting attorney. He later stated that he wanted to harm the judge and attorney in his case, and would "do like what happened in Orlando" if he was sentenced to prison on July 7. He stated that he would feel bad having to hurt innocent people, but that he had to do it.

Kabarwal underscored his threats to kill or cause bodily injury to McDonald by specifically referring to the "prosecuting attorney," whom he called "she," and

stating he would "do like what happened in Orlando" if he went to prison on a specific date, July 7. See State v. Locke, 175 Wn. App. 779, 793, 307 P.3d 771 (2013) ("menace of the communication . . . further heightened by its specificity"). McDonald was the prosecuting attorney at Kabarwal's trial, and July 7 was the date of his sentencing hearing. Days before Kabarwal's Orlando statements, a single person had shot and killed many people at an Orlando nightclub. Therefore, Kabarwal's statements suggest a plan to shoot his prosecuting attorney at his July 7 sentencing hearing.

Kabarwal underscored his threat to kill Judge Anderson by stating that he wanted to harm the judge in his case specifically. Judge Anderson presided over Kabarwal's trial, and had planned to preside over his July 7 sentencing. Thus, his Orlando statements also suggest a plan to kill people, including the judge, in the courtroom at his sentencing hearing.

And, Kabarwal made his Orlando statements to Greenwood after meeting him for the first time in a counseling session. Thus, the two did not have a preexisting relationship or communications from which Kabarwal might have expected that Greenwood would not take his statements seriously. See Locke, 175 Wn. App. at 793.

Under these circumstances, a reasonable person in Kabarwal's position would foresee that his statements would be interpreted as a serious expression of intention to carry out his threats against McDonald and Judge Anderson. Thus, the evidence was sufficient to establish a true threat.

II. Intimidating a Judge

Kabarwal argues next that the State failed to present sufficient evidence to sustain his conviction for intimidating a judge. Again, he argues that the State failed to prove that his statements constituted a true threat.

To convict a defendant of intimidating a judge under RCW 9A.72.160, the State must prove (1) that "a person direct[ed] a threat," either directly or indirectly; (2) to a judge; and (3) "because of a ruling or decision" by that judge "in any official proceeding." Here, the trial court instructed the jury that to convict Kabarwal, the State must prove beyond a reasonable doubt:

> (1) That on June 16, 2016, the defendant directed a threat, directly or indirectly, to a judge, and
>
> (2) the threat was made because of a ruling or decision of the judge of any official proceeding, or the threat was made in an attempt to influence a ruling or decision of the judge in any official proceeding, and
>
> (3) That the threat was made or received in the State of Washington.

We construe RCW 9A.72.160 as prohibiting "only unprotected true threats." See Allen, 176 Wn.2d at 626.

As established above, Kabarwal underscored his threat against Judge Anderson by specifically referring to his sentencing date, July 7, and stating that he would "do like what happened in Orlando" if he went to prison on July 7. Days before he made that statement, a single person had shot and killed many people at an Orlando nightclub. Under these circumstances, a reasonable person in Kabarwal's position would foresee that his statement would be interpreted as a

serious expression of intention to carry out his threat. Thus, the evidence was sufficient to establish a true threat.

We affirm.

Appelwick, C.J.

WE CONCUR:

WASHINGTON APPELLATE PROJECT

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