SUPREME COURT NO. 98814-5
COA NO. 52792-8-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KALOB KINDT,

Petitioner.

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

The Honorable Jennifer A. Forbes, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kalob Kindt asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Kindt requests review of the decision in State v. Kalob Carl Kindt, Court of Appeals No. 79589-9-I (slip op. filed June 23, 2020), attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Under the criminal justice participant prong of the harassment statute, whether a law enforcement officer's act of walking into his house to visit with his family constitutes the performance of an official duty and, if not, whether the evidence is insufficient to convict because the State failed to prove the threat was made while the officer was performing an official duty?

D. STATEMENT OF THE CASE

Deputy Olvera of the Kitsap County Sheriff's Office was on shift in his patrol vehicle. 1RP[1] 456-58. He tagged a vehicle left on the side of the road. 1RP 460, 474. He then drove home to have dinner with his family and spend time with them before his kids went to bed. 1RP 461,

[1] The verbatim report of proceedings is cited as follows: 1RP - four consecutively paginated volumes consisting of 10/22/18, 10/23/18, 10/24/18, 10/29/18, 10/30/18; 2RP - 10/31/18; 3RP - 11/30/18.

474. He did not do "any other law enforcement stuff" on his way home. 1RP 474.

As Olvera drove home, he saw someone waving his hands out of a vehicle ahead of him near the Maui Lane intersection. 1RP 462. He recognized the vehicle was associated with the residence at the end of the driveway. 1RP 463-64. Olvera continued on his way. 1RP 463. After he pulled into his own driveway, he was informed by dispatch via radio that they received a 911 call of somebody wanting to shoot an officer. 1RP 464-65, 477-78. Olvera had exited his patrol car and was just about to walk into his residence when he heard the dispatch call. 1RP 465.

Olvera suspected the vehicle he saw on his way home was involved. 1RP 466. Knowing he was the only one in the area, Olvera believed the call was directed towards him, although the caller did not mention Olvera by name. 1RP 468, 485. Olvera requested extra units. 1RP 466. He told his wife that he could not be with them because he had to respond to the call. 1RP 466. He went and sat in his patrol car for a minute, then drove to Deputy Baker's nearby residence and told Baker what happened. 1RP 466-67. He saw the notes of the call on Baker's computer aided dispatch. 1RP 476.

After the two deputies parked about a block away from Maui Lane, Baker retrieved the voice call. 1RP 467. At some point Baker told Olvera

that Kindt was the caller, having recognized his voice. 1RP 470-71. In the 911 call, Kindt reported a cop had followed him and stopped at the end of his driveway. Ex. 2 (transcript of 911 call); Ex. 3 (911 call recording). Kindt requested "you can send 'em down here." Id. He said, "I'm so getting ready to get a fuckin' AK and blast him." Id. He later said, "Next time I talk to 'em they're gonna have a fuckin' gun in their mouth." Id. Olvera did not listen to the complete call. 1RP 468, 476. Olvera had never contacted Kindt before. 1RP 471. After other units arrived, Olvera and Baker approached the residence and contacted Kindt. 1RP 468-71. Baker placed Kindt under arrest for harassment. 1RP 429.

Deputy Baker had known Kindt for many years, beginning when the latter was a young child and a friend to Baker's daughter. 1RP 424-26. Baker knew his mother and father and many of his family members. 1RP 427. Kindt had never made any threats to law enforcement in the past. 1RP 440, 449-50. Baker had previously stopped Kindt for driving-related violations but had never taken enforcement action. 1RP 426, 440, 444. A few days before, Baker made a "traffic stop" on Kindt. 1RP 441. Kindt was emotional, upset and crying. 1RP 441. He felt like he was being harassed by the police. 1RP 442.

At trial, Olvera described being "a little bit shaken" by the call. 1RP 468. His wife noticed he was bothered. 1RP 472. He subsequently

changed his behavior. 1RP 473. He now carried a backup gun and went to a different store instead of the one down the street. 1RP 473. He lost his appetite. 1RP 477. After the incident, Olvera had seen Kindt around town multiple times. 1RP 486. At the WinCo, Kindt said "Oh, I see we see each other around all the time." 1RP 486. Olvera acknowledged who he was and went about his business. 1RP 486. Other times at the mall, Kindt and Olvera saw one another when they were with their respective families. 1RP 487. Olvera also encountered Kindt when the latter stopped to help a driver pull his car out of the ditch. 1RP 489-90.

Kindt testified in his own defense. On the day at issue, he was in a car driven by his girlfriend Brittney Beasley. 1RP 516. He was upset when an officer pulled out behind them, as it was not the first time "something like that's happened." 1RP 517. He had not done anything wrong and was stressed. 1RP 517. The officer followed him until his girlfriend turned into Kindt's driveway. 1RP 523. The officer stopped at the end of the driveway. 1RP 534. Kindt denied waving his arms out of the passenger window. 1RP 535. He threw his arms up after the car was parked in the driveway and he stepped out. 1RP 535. He did not know Deputy Olvera. 1RP 523.

Kindt called 911 to report being followed and requested someone come see him. 1RP 524, 535. He thought he hung up after stating his

address. 1RP 524. He put his phone in his pocket. 1RP 525. The comment about shooting was made after the phone was in his pocket, after he thought he'd hung up. 1RP 525. He was ranting to his girlfriend and a few other people who were present at the time. 1RP 526, 536. He was mad and, regarding the AK-47, said the first thing that came to mind. 1RP 527-28. He thought the only people who heard him were his friends. 1RP 544-45. When the police showed up at his house, he thought they were there because he had asked police to come. 1RP 529. He was shocked when so many officers arrived with rifles drawn. 1RP 529, 539. After being arrested for making the gun threat, he realized the phone was not hung up when he spoke to those with him. 1RP 530.

Kindt explained he was mad about the officer stopping at the end of his road, but it wasn't about this one incident, but rather a culmination of incidents.[2] 1RP 525-26. Kindt had been stopped multiple times before with no resulting arrest. 1RP 517, 542. He wondered why he was getting stopped more than other people. 1RP 517-18, 534, 542. He remembered being pulled over by Deputy Baker a few days before. 1RP 519. Baker talked to him for an hour about making better choices, moving out of his parent's house, and getting a job. 1RP 519. Kindt was frustrated by being

[2] Police had been out to the address multiple times in response to service calls. 1RP 592-94. Kindt was not a suspect in any of these incidents. 1RP 595.

talked to in that manner, "almost talking down to me" and telling him how to live his life. 1RP 519-20. Someone had to come get his car because his license was suspended. 1RP 520.

Kindt's girlfriend, Beasley, testified an officer pulled out behind them, followed them up the hill, and stopped at the end of the driveway. 1RP 547. Beasley was nervous that the officer followed them for such a long time. 1RP 548. She heard Kindt's 911 call. 1RP 549-50. After hanging up and putting the phone in his pocket, they went outside. 1RP 549. Kindt was upset and "We were all venting to each other." 1RP 549.

The jury found Kindt guilty of felony harassment of a criminal justice participant. CP 54. The court sentenced Kindt to 60 days in jail. CP 56.

On appeal, Kindt argued the evidence was insufficient to convict because Olvera was not performing an official duty at the time the threat was made. The Court of Appeals disagreed and affirmed. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW IS WARRANTED TO DETERMINE WHETHER THE PERFORMNCE OF AN OFFICIAL DUTY IN THE HARASSMENT STATUTE SIMPLY MEANS BEING ON DUTY.

The State needed to prove beyond a reasonable doubt that Deputy Olvera was "performing his official duties" at the time the threat was

made. CP 51. Deputy Olvera was visiting his family at the time the threat was made. He was not performing an official duty. The conviction must be reversed because the State did not prove the officer was performing an official duty at the time the threat was made. This case presents an issue of substantial public interest under RAP 13.4(b)(4). The meaning of the harassment statute is at issue and its interpretation affects how other criminal cases involving threats to criminal justice participants will be handled in the future.

a. "Performing his or her official duties" in the harassment statute means doing an obligatory task of the profession, and this is what the State needed to prove the officer was doing at the time the threat was made.

Due process requires the State to prove all elements of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "To determine whether the State has produced sufficient evidence to prove each element of the offense, we must begin by

interpreting the underlying criminal statute." State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012).

A person is guilty of harassment if: "Without lawful authority, the person knowingly threatens . . . To cause bodily injury immediately or in the future to the person threatened or to any other person. . . and . . .The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1).

A person is guilty of felony harassment if "the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made." RCW 9A.46.020(2)(b)(iii). The to-convict instruction given to the jury in Kindt's case sets forth this element. CP 51.

Under the law of the case doctrine, "jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal" and are used to delineate the State's burden of proof. State v. Johnson, 188 Wn.2d 742, 755, 399 P.3d 507 (2017) (quoting Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)). The law of the case doctrine "serves to avoid prejudice to the parties and ensure that the appellate courts review a case under the same law considered by the jury." State v. Calvin, 176 Wn. App. 1, 22, 316 P.3d 496 (2013), review granted in part, remanded on other grounds, 183 Wn.2d 1013, 353 P.3d 640 (2015).

It is also a felony offense if "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(2)(b)(iv). The State, however, did not propose a to-convict instruction containing this means of committing the crime. Instead, the State proposed a to-convict instruction for the element of "performing his official duties at the time the threat is made." CP 98. This was the instruction given to the jury. CP 51. The State therefore needed to prove this particular means of committing the crime to secure a guilty verdict. Johnson, 188 Wn.2d at 762.

The statutory provision criminalizing harassment against criminal justice participants is relatively new and there is not much case law addressing it. Laws of 2011, ch. 64 § 1. The statute does not define the phrase "performing his or her official duties." RCW 9A.46.020(2)(b)(iii). The jury was not instructed on its meaning.

There is no case law interpreting this phrase under RCW 9A.46.020. There is, however, a long-standing antecedent that guides statutory interpretation. The statute defining assault against a police officer uses the same operative language: "Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." RCW

9A.36.031(1)(g). "Official duties" as used in the assault statute "encompass all aspects of a law enforcement officer's good faith performance of job-related duties, excluding conduct occurring when the officer is on a frolic of his or her own." State v. Mierz, 127 Wn.2d 460, 479, 901 P.2d 286 (1995) (quoting State v. Hoffman, 116 Wn.2d 51, 100, 804 P.2d 577 (1991)). In Kindt's case, the State and the Court of Appeals agreed this definition was applicable. Slip op. at 4.

The word "performing," as used in RCW 9A.46.020(2)(b)(iii) is not defined by statute. The plain meaning of nontechnical statutory terms may be discerned from their dictionary definitions. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). To "perform" something means to "carry out or bring about" or "do in line of duty." Webster's Third New Int'l Dictionary 1678 (1993). The harassment statute does not define "duties." "Duty" means "obligatory tasks, conduct, service, or functions enjoined by order or usage according to rank, occupation or profession." Id. at 705.

b. The State failed to prove the officer was performing his official duties at the time the threat was made, as the officer was visiting his family while on break.

The prong of the statute relied on by the State to convict is an awkward fit for a situation where the target of the threat is not present when the threat is made and then is subsequently informed of the threat

through a third party. RCW 9A.46.020(2)(b)(iii) naturally encompasses a situation where an officer personally contacts a person and the person being contacted threatens the officer right then and there. An officer, for example, conducts a traffic stop and the angry driver threatens to kill the officer. In that scenario, it makes sense to link the timing of the threat to the performance of an official duty. When an officer only learns of the threat after the fact, at a time when the officer is not engaging the threatening party, it makes little sense to tie the timing of the threat to what the officer happened to be doing at the time the threat was made. Generally, the alternate prong of RCW 9A.46.020(2)(b)(iv) is a better fit for that scenario: "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."

The State nonetheless chose to rely exclusively on RCW 9A.46.020(2)(b)(iii) as the means to convict. The facts, therefore, are applied to that legal standard. The question, then, is whether Deputy Olvera was performing an official duty when the threat was made.

Evidence shows the 911 call was made at about 7:50 p.m. 1RP 430. Deputy Olvera's shift on July 23, 2017 was from 1:00 p.m. to 11:40 p.m. 1RP 456-57. He does not clock out during a shift. 1RP 457. If he

gets a call during his shift, he must immediately respond, even if he's having lunch with a coworker or family member. 1RP 457-58.

Olvera has a take-home patrol car. 1RP 458. Deputy Baker testified that for officers with a take-home patrol car, "when you sign in from your driveway, you're in service" and "you don't sign out of service until you're in your driveway." 1RP 409-10. Once an officer signs in for shift, the officer remains in service throughout the shift. 1RP 410-11. "[I]f we're in our patrol car, then we are on duty. We are expected to stop and help if help is needed on something." 1RP 431. Thus, for example, if an officer is eating while on shift, and a call comes in, the officer stops eating and responds to the call. 1RP 410-11.

On the night in question, Olvera tagged a vehicle on the side of the road. 1RP 460, 474. That was unquestionably the performance of an official police duty. But that is not when the 911 call containing the threat was made. After tagging the vehicle, Olvera drove home to have dinner with his family and spend personal time with them. 1RP 461, 474. By his own admission, he did not do any law enforcement related activity on his way home. 1RP 474. Olvera had exited his vehicle and was just about to walk into his residence when the dispatch call came out. 1RP 464-65.

The threat was made when Olvera was in the process of visiting his family. Visiting with family is not performing an official duty. Olvera

was on duty because he was still on his shift. But his visit with his family, a personal matter, is not a "job-related" duty. Mierz, 127 Wn.2d at 479. A family visit is not an obligatory task that rises from the status of being a law enforcement officer. The evidence is therefore insufficient to show Olvera was performing an official duty when the threat was made.

In closing argument, the State argued Olvera was performing his official duties at the time the threat was made because the call came in during his shift. 1RP 645, 671. The State contended that Olvera, although he was stopping home to visit his family at the time, had to be ready to respond if he received a call. 1RP 645. The trial court, meanwhile, denied the Knapstad[3] motion as to Officer Olvera based on its understanding that "Olvera would have been on duty until he basically got out of his car." 1RP 124. The Court of Appeals similarly interpreted the phrase "performing his or her official duties" in the statute to be synonymous with being on duty. Slip op. at 5. There are two problems with this approach. One, it rewrites the statute. Two, it leads to absurd results.

The legislature is presumed to use no superfluous words, so each word in a statute must be given meaning. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). The word "performing" must mean

[3] State v. Knapstad, 107 Wn.2d 346, 347, 729 P.2d 48 (1986) (pre-trial motion to dismiss charge for lack of probable cause).

something, and it must mean something other than simply being on official duty, otherwise the legislature would have used the phrase "being on official duty" instead of "performing" official duties. "Courts may not rewrite or add statutory language." Id. at 632. If an officer is always on duty by virtue of his or her status as a police officer, then the phrase "performing his or her official duties at the time the threat is made" becomes meaningless because there is no way a threat could be made to an officer that would not be made while the officer was performing an official duty. If this element is to have any meaning, it must mean something more than simply being a police officer.

A law enforcement officer can be on duty but not be performing an official duty at the time something happens. A police officer must always be ready to respond to a call for service or if the officer comes across a situation calling for police intervention. Officers are expected to drop whatever they are doing and respond in their official capacity as an officer. The response, then, constitutes the performance of an official duty. But what the officer was doing before the response does not necessarily so qualify. It depends on whether the facts show the officer was performing a job-related duty at the time.

"Courts should assume the Legislature means exactly what it says." State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If the

legislature meant to criminalize harassment of a police officer while on duty, the legislature would have used the phrase "on duty at the time the threat is made" as opposed to the phrase it does use: "performing his or her official duties at the time the threat is made." Performance indicates activity. It is not a passive state of being. The focus is on what the officer is doing at the time the threat is made. If the officer is not carrying out a job-related function at the time, then no official duty is being performed. Courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." State v. Salavea, 151 Wn.2d 133, 144, 86 P.3d 125 (2004) (quoting State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)).

Elementary principles of statutory construction buttress Kindt's argument. "Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process." State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980). "Strict construction requires that, 'given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.'" In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) (quoting Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361

(1973)). A strict construction of the harassment statute requires the phrase "performing his or her official duties" to mean something more definite and specific than simply being on duty but not performing any job-related function at the time.

Further, in criminal cases, "courts should refrain from using possible but strained interpretations." State v. Garcia, 179 Wn.2d 828, 837, 318 P.3d 266 (2014). It cannot plausibly be maintained that an officer on shift is always performing an official duty during the shift. The conflation of being on duty with performing an official duty means an on-shift officer playing poker with co-workers during a break is performing an official duty in playing poker. Under the Court of Appeals' interpretation, an officer could be sitting on the toilet to answer nature's call during shift and still be considered performing an official duty in so doing. In interpreting statutes, "'we presume the legislature did not intend absurd results' and thus avoid them where possible." State v. Weatherwax, 188 Wn.2d 139, 148, 392 P.3d 1054 (2017) (quoting State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704 (2010)).

Commonsense informs statutory interpretation. State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008). The legislature intended to criminalize threats made when an officer is carrying out what common sense recognizes as an official duty. Thus, when an officer arrests a

person and the arrestee threatens the officer, the harassment statute is triggered. When an officer is threatened while carrying out a job-related activity, such as questioning a witness as part of a criminal investigation, the statute is triggered. Officers perform many job-related duties. Visiting with family, as Deputy Olvera did here, is not one of them.

Adoption of the interpretation used by the Court of Appeals yields absurd results. "When engaging in statutory interpretation, the court must avoid constructions that 'yield unlikely, absurd or strained consequences.'" State v. Barbee, 187 Wn.2d 375, 389, 386 P.3d 729 (2017) (quoting Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002)). There is no dispute "an off-duty police officer is a public servant, with the authority to respond to emergencies and to react to criminal conduct." State v. Graham, 130 Wn.2d 711, 719, 927 P.2d 227 (1996).[4] Under the common law, "police officers are considered to be under a duty to respond as police officers 24 hours a day." Id. at 718 (quoting 16A Eugene McQuillin, The Law of Municipal Corporations § 45.15, at 123 (3d rev. ed. 1992)).

Now consider application of that principle to the harassment statute. If being on duty means performing an official duty, then any

[4] In Graham, off-duty police officers employed as private security guards were acting as public servants who were discharging their official duties for purposes of the obstruction statute when they stopped the defendant for drug dealing, identified themselves as police officers, and their status as police officers was known to the defendant. Graham, 130 Wn.2d at 723.

threat to an officer is automatically converted to felony harassment, regardless of what the officer was doing at the time. An officer could be snoozing in bed, albeit ready to respond if a dispatch call is relayed in the middle of the night, and criminal liability would attach if the threat was made at that time. This result is absurd.

Consider defense attorneys, who also fall under protection of the statute as criminal justice participants. RCW 9A.46.020(4). They are always on standby in their own way. If an emergency arises on a case or a client calls in need, they are duty bound to respond as a matter of professional ethics, whatever they happen to be doing at the time. Suppose a defense attorney is shopping at the Home Depot on a lunch break. The attorney absent mindedly bumps into another patron. The patron threatens the attorney for his clumsiness. Is the patron guilty of felony harassment because the attorney was performing an official duty while shopping for a lawn mower? An unlikely and strained result.

When an officer only learns of the threat after the fact, at a time when the officer is not engaging the threatening party as part of a job-related function, it makes little sense to tie the timing of the threat to what the officer happened to be doing at the time the threat was made. Even if the Court of Appeals were right and simply being on duty means performing an official duty, the purpose of the statute is untethered from

the facts of this case. The threat that was made on the 911 call had no relation to what Deputy Olvera happened to be doing at the time, as Kindt was in no position to know what Olvera was doing when he made the call. It turns out Olvera was heading home to visit with his family. The threat has no connection to Olvera being on duty at the time.

The statute criminalizing threats to criminal justice participants under RCW 9A.46.020(2)(b)(iii) should be interpreted to apply to threats made to an officer when that officer is performing a job-related duty during the course of interacting with the person making the threat. Otherwise, the statute yields absurd results.

Even if there is some ambiguity in the statute, "in criminal cases the rule of lenity is a basic and required limitation on a court's power of statutory interpretation whenever the meaning of a criminal statute is not plain." In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). The rule of lenity requires "any ambiguity in a statute must be resolved in favor of the defendant." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979). "The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991). The rule of lenity

requires the statute be interpreted in Kindt's favor. The Court of Appeals did not address the rule of lenity.

Kindt's conviction must be reversed and the charge dismissed with prejudice because the State failed to prove its case. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction).

F. CONCLUSION

For the reasons stated, Kindt requests that this Court grant review.

DATED this 23nd day of July 2020.

Respectfully submitted,

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KALOB CARL KINDT, Appellant.	No. 52792-8-II UNPUBLISHED OPINION

MELNICK, J. — A jury convicted Kalob Kindt of felony harassment based on a phone call he made to the police. Kindt called the police to report that officers were harassing him. After believing he hung up his phone, Kindt made threats about a police officer, which the police heard.

Kindt argues that insufficient evidence supports his conviction. He contends that under the jury instruction given, insufficient evidence supports the jury's finding that the officer was performing any official duties at the time Kindt made the threat. Kindt also argues that the trial court imposed an unauthorized legal financial obligation (LFO), a court-appointed attorney fee. The State concedes that we should remand for the trial court to strike the LFO.

We affirm the conviction but remand for the trial court to strike the unauthorized LFO.

FACTS

In July 2017, Deputy Victor Olvera was on shift between 1:00 PM and 11:40 PM. Around 7:45 PM, he tagged an abandoned car as a traffic hazard. Because he lived approximately 4.5 miles away, a nine-minute drive, Olvera decided to go home to see his family and eat dinner. He did not plan to perform any "law enforcement stuff" on his way home. 3 Report of Proceedings (RP) at

474. After tagging the car, Olvera drove on to the road behind a car driven by Kindt's girlfriend. Kindt was a passenger.

Kindt became upset when Olvera began following them because he felt that the police had recently been hassling him. Kindt's girlfriend eventually drove into Kindt's driveway. Olvera never stopped them.

After arriving home, Kindt called 911 to report that the police had been following him, and he requested an officer come speak with him. Kindt thought he had hung up his phone. However, he did not.

Kindt then began speaking to his girlfriend and others who were at the house. Because the 911 operator remained on the line, the police heard Kindt's subsequent statements. Kindt said that the next time he saw the police, he was "so gettin' ready to get a f****** AK and blast him." Ex. 2, at 108. He also said that the "next time [he] talk[ed] to 'em they're gonna to have a f****** gun in their mouth." Ex. 2, at 109.

The 911 operator typed into the police's computer dispatch system what Kindt had said. The dispatch system said that Kindt had made a threat to shoot an officer in the face and put a gun in the officer's mouth.

When he pulled into his driveway at home, Olvera received a radio call. A 911 dispatcher told him that "they received a call of somebody trying to shoot an officer in the face or put a gun into his mouth and blast him." 3 RP at 465. Olvera had exited his car and was about to walk into his house when the dispatcher told him this information. Olvera then told his family he could not stay and left to respond to Kindt's residence. He requested extra police officers.

Olvera and another police officer stopped and talked before proceeding to Kindt's residence. While stopped, the other officer played the actual audio of the call. Olvera was not

"listening [one] hundred percent," but the other officer heard the full audio. 3 RP at 468. Olvera also read what the 911 operator had typed into the police's computer dispatch system. Olvera believed Kindt had directed his threats at him. It caused Olvera to fear for his safety.

The State charged Kindt with two counts of felony harassment.[1] The State alleged that Kindt knowingly threatened to cause Olvera bodily injury, immediately or in the future, which placed Olvera in reasonable fear that the threat would be carried out. The State also alleged that, when Kindt threatened him, Olvera "was performing his or her official duties as a criminal justice participant, and/or, the threat was made because of an action taken or decision made by [Olvera] during the performance of his . . . official duties as a criminal justice participant." Clerk's Papers (CP) at at 13. Kindt pled not guilty, and the case proceeded to trial.

At trial, a Kitsap County Sheriff's Office deputy testified that when officers have take-home patrol cars, they can sign into service as soon as they get into their patrol car. They are deemed to be "in service" until returning home at the end of shift. 3 RP at 410. Similarly, Olvera testified that his department required him to respond to an incident while on shift, even if he was eating.

At the conclusion of the evidence at trial, the court instructed the jury. Relevant here, the court instructed the jury that, to convict Kindt of felony harassment, the jury was required to find, among other elements, "[t]hat Victor Olvera was a criminal justice participant who was performing his official duties at the time the threat was made." CP at 51. The court provided no definitional instruction for "official duties."

[1] The court dismissed count two.

The jury found Kindt guilty of felony harassment. The court sentenced Kindt to 60 days of confinement. It found Kindt indigent. The court imposed a court-appointed attorney fee on Kindt. Kindt appeals.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Kindt argues that pursuant to the jury instruction given, insufficient evidence supports his conviction because the State failed to prove that Olvera was "performing his official duties" at the time he threatened Olvera. Br. of Appellant at 7. Kindt admits that Olvera was on duty at the time but contends that being on duty is not synonymous with performing an official duty. We disagree.

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). "In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

By convicting Kindt of felony harassment, the jury found "[t]hat Victor Olvera was a criminal justice participant who was performing his official duties at the time the threat was made." CP at 51. The instruction followed the law. RCW 9A.46.020(2)(b)(iii). Neither the statute nor the instructions given defined "official duties." However, the parties agree that we should look to judicial interpretation of "official duties" as used in the assault in the third degree statute, RCW 9A.36.031(1)(g).

Under RCW 9A.36.031(1)(g), a person commits assault in the third degree if they "[a]ssault[] a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault."

In *State v. Mierz*, 127 Wn.2d 460, 479, 901 P.2d 286 (1995), the court "h[e]ld that 'official duties' as used in RCW 9A.36.031(1)(g) encompasses all aspects of a law enforcement officer's good faith performance of job-related duties, excluding conduct occurring when the officer is on a frolic of his or her own." The court noted that an officer is acting in his official duties when making an arrest, even if that arrest later turns out to be unlawful. *Mierz*, 127 Wn.2d at 475; *see also State v. D.E.D.*, 200 Wn. App. 484, 497, 402 P.3d 851 (2017) (similar).

Here, viewing the evidence in the light most favorable to the State, the evidence shows that Olvera was on duty and driving in his police car at the time Kindt made the threats toward him. A Kitsap County Sheriff's Office deputy testified that officers with take-home patrol cars are able to sign into service as soon as they get into their patrol car and that, until an officer returns home at the end of their shift, they are deemed to be in service. Olvera testified that his department required him to respond to an incident while on shift even if he was eating, which he did in this case.

We conclude that, when viewing the evidence in the light most favorable to the State, a reasonable juror could have found that the State had proved all of the essential elements of the crime beyond a reasonable doubt. Accordingly, we reject Kindt's argument.

II. LFOs

Kindt argues that we should strike the court-appointed attorney fee from his judgment and sentence because of his indigency status.

The court-appointed attorney fee is a discretionary cost. *See In re Pers. Restraint of Dove*, 196 Wn. App. 148, 155, 381 P.3d 1280 (2016). A trial "court shall not order a defendant to pay

costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)." RCW 10.01.160(3).

While it is unclear whether Kindt is indigent under RCW 10.101.010(3)(a)-(c), the State implicitly concedes that the court's inquiry into indigency was inadequate. Therefore, we remand for the trial court to strike the imposition of the court-appointed attorney fee.

We affirm Kindt's conviction but remand for the trial court to strike the court-appointed attorney fee.

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.

Melnick, J.

We concur:

Sutton, A.C.J.

Cruser, J.

From:	OFFICE RECEPTIONIST, CLERK
To:	"Casey Grannis"
Cc:	coa2; "rsutton@co.kitsap.wa.us"
Subject:	RE: State v. Kindt, No. 52792-8-II, petition for review for filing
Date:	Monday, July 27, 2020 8:01:26 AM

Received 7/27/2020

From: Casey Grannis [mailto:grannisc@nwattorney.net]
Sent: Saturday, July 25, 2020 6:40 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: coa2 <coa2@courts.wa.gov>; 'rsutton@co.kitsap.wa.us' <rsutton@co.kitsap.wa.us>
Subject: State v. Kindt, No. 52792-8-II, petition for review for filing

Attached is the petition for review for State v. Kalob Kindt, No. 52792-8-II. The appellate filing portal has not been allowing filings, a problem I became aware of July 23 when trying to file the present petition. The portal allows the user to log in, but when a valid case number is entered, an error page comes up and the filing cannot proceed. For this reason, the petition in Mr. Kindt's case was unable to be filed through the portal on July 23. My office has been unable to file anything through the portal since then. As per the email from the Supreme Court clerk (see below), I am now filing the petition via email, and ask that it be accepted due to a technological problem with the portal. If anything further is needed, please let me know. Thank you.

Casey Grannis
#37301
Nielsen Koch, PLLC
Attorney for Petitioner

From: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Sent: Friday, July 24, 2020 9:46 AM
To: Casey Grannis <grannisc@nwattorney.net>
Subject: RE: Filing portal not working - petitions for review

Dear Mr. Grannis:

If you have trouble filing through the portal, we will accept the filings via attachment to email. If you can include information about the portal issue when you file something (include the information in the comment field if using the portal or in your email), we can likely accommodate the late filing. We will make this determination as to each filing and, if a motion for extension of time is needed, we will let you know.

Susan L. Carlson, Clerk

From: Casey Grannis [mailto:grannisc@nwattorney.net]
Sent: Friday, July 24, 2020 9:03 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Filing portal not working - petitions for review

Greetings,

Petitions for review in State v. Anthony Clark, COA No. 52330-2-II and State v. Kalob Kindt, COA No. 52792-8-II, were due July 23. My office was unable to file them because the appellate courts portal was down. It appears the portal is still having problems. I'm sure the Supreme Court is aware of the issue. Will motions for extension be required to file once the portal is up and working again, or is the Court going to recognize a grace period corresponding to the time that the portal is down?

Sincerely,
Casey Grannis
Nielsen Koch, PLLC
206-623-2373