

NO. 34594-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY REED,

Appellant.

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STATE OF WASHINGTON
BY: M REED

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-01084-1

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED December 29, 2006, Port Orchard, WA *R. Blauke*

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....2

 A. PROCEDURAL HISTORY.....2

 B. FACTS.....2

III. ARGUMENT.....9

 A. REED IS PROHIBITED FROM CHALLENGING THE “TO CONVICT” INSTRUCTIONS ON APPEAL BECAUSE ANY ERROR IN THE INSTRUCTIONS WAS INVITED ERROR.....9

 B. REED HAS FAILED TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE FAILED TO SHOW THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL’S ERRORS, THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT.....12

 C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING OFFICER SCHROATH TO TESTIFY THAT HE WAS AWARE THAT REED’S MEDICAL RECORDS INDICATED THAT HE WOULD BECOME VOLATILE IF HE DID NOT TAKE HIS MEDICATION BECAUSE THE ISSUE OF WHETHER OFFICER SCHROATH’S FEAR THAT REED WOULD CARRY OUT HIS THREAT WAS REASONABLE WAS A CRITICAL ELEMENT OF THE CRIME CHARGED, AND EVIDENCE OF SCHROATH’S AWARENESS OF REED’S POTENTIAL FOR FUTURE VOLATILITY WAS HIGHLY PROBATIVE REGARDING THIS ELEMENT.....17

D. VIEWED IN AN LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT TO SHOW THAT OFFICERS SCHROATH AND TRUMP WERE LAW ENFORCMENT OFFICERS BECAUSE BOTH OFFICERS TESTIFIED THAT THEY WORKED AS CORRECTIONS OFFICERS AT THE KITSAP COUNTY JAIL.....21

IV. CONCLUSION.....25

TABLE OF AUTHORITIES
CASES

Abbott v. Cooper,
218 Cal. 425, 23 P.2d 1027 (1933)25

Anchondo v. Corrections Department,
100 N.M. 108, 666 P.2d 1255 (1983)24

Armstrong v. State,
91 Wn. App. 530, 958 P.2d 1010 (1998).....23

City of Seattle v. Patu,
147 Wn. 2d 717, 58 P.3d 273 (2002).....11

In re Det. of Gaff,
90 Wn. App. 834, 954 P.2d 943 (1998).....10

McLean v. Department of Corrections,
37 Wn. App. 255, 680 P.2d 65.....24

State v. Barragan,
102 Wn. App. 754, 9 P.3d 942 (2000).....18, 19

State v. Binkin,
79 Wn. App. 284, 902 P.2d 673 (1995).....19, 20

State v. Bradley,
141 Wn. 2d 731, 10 P.3d 358 (2000).....9, 10

State v. Brown,
132 Wn. 2d 529, 940 P.2d 546 (1997).....22

State v. C.G.,
150 Wn. 2d 604, 80 P.3d 594 (2003).....12, 13

State v. Green,
94 Wn. 2d 216, 616 P.2d 628 (1980).....21

<i>State v. Keller,</i> 143 Wn. 2d 267, 19 P.3d 1030 (2001).....	22, 23
<i>State v. Mills,</i> 154 Wn. 2d 1, 109 P.3d 415 (2005).....	13
<i>State v. Neher,</i> 112 Wn. 2d 347, 771 P.2d 330 (1989).....	9
<i>State v. Pirtle,</i> 127 Wn. 2d 628, 904 P.2d 245 (1995).....	21
<i>State v. Ragin,</i> 94 Wn. App. 407, 972 P.2d 519 (1999).....	17, 18, 20
<i>State v. Smith,</i> 122 Wn. App. 294, 93 P.3d 206 (2004).....	10, 14
<i>State v. Stewart,</i> 43 Wn. App. 744, 719 P.2d 184 (1986).....	24, 25
<i>State v. Studd,</i> 137 Wn. 2d 533, 973 P.2d 1049 (1999).....	9, 10
<i>State v. Sullivan,</i> 143 Wn. 2d 162, 19 P.3d 1012 (2001).....	22, 23
<i>State v. Summers,</i> 107 Wn. App. 373, 28 P.3d 780 (2001).....	11
<i>State v. Summers,</i> 107 Wn. App. 373, 28 P.3d 780 (2001).....	9
<i>State v. Winings,</i> 126 Wn. App. 75, 107 P.3d 141 (2005).....	10
<i>Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs.,</i> 133 Wn. 2d 894, 949 P.2d 1291 (1997).....	23

STATUTES

RCW 9.94A.535(3).....21, 23, 25

RCW 9A.46.02018

RCW 9A.46.020(1).....18

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Reed is prohibited from challenging the “to convict” instructions on appeal when any error in the instructions was invited error?

2. Whether Reed has failed to show that he received ineffective assistance of counsel when he has failed to show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different?

3. Whether the trial court abused its discretion in allowing Officer Schroath to testify that he was aware that Reed’s medical records indicated that he would become volatile if he did not take his medication when the issue of whether Officer Schroath’s fear that Reed would carry out his threat was reasonable was a critical element of the crime charged, and evidence of Officer Schroath’s awareness of Reed’s potential for future volatility was highly probative regarding this element?

4. Whether, viewed in a light most favorable to the State, the evidence was sufficient to show to show that Officers Schroath and Trump were law enforcement officers when both officers testified that they worked as corrections officers at the Kitsap County jail?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jeffrey Reed was charged by amended information filed in Kitsap County Superior Court with three counts of felony harassment with special allegations that the victims were law enforcement officers. CP 79-83. After a jury trial, Reed was convicted of two of the three counts, and the jury found that the two victims were law enforcement officer. CP 159. This appeal followed.

B. FACTS

Wade Schroath testified that he worked as a corrections officer at the Kitsap County jail. RP 78. On April 14th, 2005, Officer Schroath was assisting in serving lunch to inmates, and placed food in the slot in Reed's door. RP 78-9. Reed was sitting on his bed, and looked directly at Officer Schroath and said, "How you doing Officer Schroath?" RP 79. Officer Schroath replied, "Good, Mr. Reed. How are you?" Reed responded, "You will be doing worse when I shoot you and I shoot your family." RP 79. Reed was staring directly at the officer and never turned away. RP 79. Officer Schroath walked away, reported the incident to his sergeant, and wrote a report. RP 79.

Officer Schroath testified that he reported this incident to his sergeant, "Because to me the threat felt really credible. Just from the – his – the way

he voiced it and the look on his face made me feel like he was serious.” RP 79. Officer Schroath later described the threat as, “he made the statement of killing me and my family.” RP 89. Officer Schroath said he had had prior dealings with Reed, and that there had been times when Reed was upset, and that Reed had yelled at him before, but that he had never threatened his life before. RP 79-80.

When asked if he had ever received a death threat from an inmate before, Officer Schroath stated, “No.” RP 80. Officer Schroath told his wife that there had been a threat, and took more secure measures such as placing wood slats in his windows at home so they wouldn’t open and told his wife to look out for anyone she didn’t recognize around their property. RP 80-1.

Outside the presence of the jury, the State sought permission from the trial court to introduce evidence that Officer Schroath, during the course of his duty as a medical liaison with Western State Hospital (and prior to the date of the threats), became aware of Western State’s Hospital’s evaluation of Reed which indicated that Reed was a danger to society when he was not taking his medication. RP 58. The proposed testimony also included Officer Schroath’s observations that Reed would refuse to take his medications while at the jail, and appeared volatile when off his medication. RP 58, 60. These facts contributed to Officer Schroath’s fear regarding the threats made by Reed. RP 58. The State argued that this evidence was relevant concerning

the issue of whether Officer Schroath reasonably feared that Reed would carry out his threats, and asked the court to allow this testimony. RP 59-60. Although he conceded that the evidence was probative, Reed objected to the admission of such testimony, and argued that the probative value was outweighed by the danger of unfair prejudice. RP 61, 63-64. The trial allowed the evidence to be presented with some limitations, and ruled as follows:

First, as we've discussed earlier, the focus that I believe the jury needs to have is on the victim, and their beliefs and their knowledge. And the case law is quite clear that they are entitled to know what the victim knew at the time the threat was made.

In this particular case, because of his position as medical liaison, Officer Schroath was privy to information that typically would not be available to corrections officers, but nonetheless, plays a part in his reaction to the alleged threat. It is of extremely high probative value. Unfortunately, it is balanced with something that is extremely prejudicial. And I think we all recognize what people's reactions are when they hear somebody is, quote-unquote, mentally ill, especially in the current community with the violence being reported in the newspaper by, quote-unquote, mentally ill people.

In order to minimize that prejudice, I'm going to allow the testimony in a sanitized version. And that sanitized version will be that Officer Schroath was privy to the medical records of Mr. Reed, and those records indicated that he would be volatile when he was off meds, since that is consistent with what he will be testifying from his own experiences and observations, it is sanitized in the sense that it minimizes the prejudice while getting in the information available to the victim.

However, Officer Schroath should not mention mental illness, mental health, danger, danger to the community,

danger to society, any of those giant and inflammatory buzz words that Western State is so fond of using in their reports. And he will be able to give the issue of volatility off meds; off meds, his observation; his concern, off meds on the street, and that's a sufficient line, I believe.

RP 64-65.

When the jury was brought in, Officer Schroath testified that one of his duties as a corrections officer was to serve as a medical liaison, and that during these duties he became familiar with Reed's medical reports. RP 82. When asked if there was anything in the records that he felt related to the threats from Reed, Officer Schroath stated that the records had indicated that Reed would become volatile when off his medications. RP 82. Officer Schroath was also aware from going with the nurses dispensing medicine that Reed wasn't taking his medications, and Officer Schroath also observed that he observed Reed acting volatile, including aggressively yelling, kicking doors, throwing things, and things of this nature. RP 82-3. Officer Schroath also stated that if Reed was on his medication there were times when he and Reed had cordial conversations, but that when Reed was off his medications he was out of control. RP 83-4. Officer Schroath, therefore, was not confident that Reed would take his medications once he was released from the jail, and all of this information "just added to the fact" that he felt that thought there was a chance that Reed would become very volatile towards

him. RP 82-3.

Officer Kevin Trump also worked as a corrections officer with the Kitsap County jail. RP 103. On April 1, 2005, Reed asked Officer Trump, who was in uniform, to take some legal mail for him. RP 103, 109. Officer Trump took the mail, and Reed then demanded that Trump make copies of and “document” it. RP 103. Officer Trump explained that this wasn’t the procedure used at the jail, and told Reed that his mail would go to booking and be sent out with the mail. RP 103, 119. Reed then got upset and started yelling at Officer Trump. He then pointed at Officer Trumps face and was jumping around. RP 103-04. Officer Trump understood the pointing was to signify the pointing of a gun. RP 104. Reed then stated that he was going to kill Officer Trump’s family and that when officer Trump came home, he was going to blow his brains out. RP 104. Reed also stated that Officer Trump would never know when it was going to be coming. RP 105.

Although Officer Trump had worked for six years as a correction officer at McNeil Island and had worked for three years at the Kitsap County jail, Officer Trump had never previously received a death threat from an inmate, and had never previously written a report concerning a threat he received from an inmate. RP 106-07. After Reed threatened him, however, Officer Trump wrote a report on the incident. RP 107. Officer Trump did so because of “the way he said the threat at me and the fact that he brought my

family into it.” RP 107. When asked if took the threat seriously, Officer Trump stated, “Yes.” RP 107. Officer Trump also stated that the reason he took Reed’s threat seriously was because of the way in which Reed “said it to” him, and because of the way in which Reed was jumping around and was agitated. RP 107-08. Officer Trump also stated that he didn’t consider Reed’s threats as mere “venting” because Reed threatened his life and his family’s life, and it was these specific words that caused him significant concern. RP 113. Officer Trump stated that when made the to kill him and his family he “started to worry.” RP 117.

Officer Trump contacted his supervisor and wrote a report after the threats, and also checked a few times to make sure that Reed was still incarcerated, and because he was concerned as to whether Reed had been released into the community. RP 108-09, 117. At the time of his testimony, Officer Trump stated that he still feared Reed because, “someday he will be out on the street and the threat was made. I can’t forget that.” RP 117.

The State and Reed both submitted proposed jury instructions to the trial court. The definition of harassment instruction and the “to convict” instructions submitted by both parties were substantially the same and were modified versions of WPICs 36.06 and 36.07. CP 92, 94, 95, 108, 114, 115,

and CP TBD.¹ Both parties' instructions essentially used the misdemeanor harassment definition and to convict instructions, along with a special verdict instruction and verdict form asking the jury to determine if the threat was a threat to kill. CP 92, 94, 95, 96, 108, 114, 115, 117. Neither of the parties' instructions directly required the jury to find that the victims specifically feared that Reed would kill them, rather the instruction required that the jury find that there was a threat, the victims reasonably feared that the threat would be carried out, and that the threat was a threat to kill.

Although there were slight differences between the State's proposed instructions and the defense instructions, when the trial court went through the instructions with both parties, defense counsel did not object to the court using the State's proposed instructions. RP 147-51. The slight difference, it should be noted, did not involve the language or missing language disputed in this appeal. With respect to the State's proposed instruction on the definition of harassment, defense counsel stated that, "The State's proposal is acceptable to me," and stated that this was true even given the slight difference in the defense's proposed instruction. RP 148. Defense counsel

¹ After submitting its first set of proposed instructions, the State submitted several amended instructions that incorporated language regarding a "true threat." These amended instructions included an amended definition of harassment and amended to convict instructions that were eventually used by the court in instruction the jury. The State has filed a supplemental designation of Clerk's papers to include these amended instructions. The amended to convict instructions, however, are identical to the instructions used by the court that were attached to the Appellant's Brief as Appendix A.

also stated that he had no objection to the State's "to convict" instructions, and further stated that they were "appropriate." RP 149.

III. ARGUMENT

A. REED IS PROHIBITED FROM CHALLENGING THE "TO CONVICT" INSTRUCTIONS ON APPEAL BECAUSE ANY ERROR IN THE INSTRUCTIONS WAS INVITED ERROR.

Reed argues that the "to convict" instructions in the present case were defective because they omitted an element of the offense. This claim is without merit because Reed is foreclosed from challenging the jury instructions on appeal.

The doctrine of invited error bars a defendant from claiming on appeal that jury instructions were deficient when the defendant proposed the instructions. *State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358 (2000) (citing *State v. Neher*, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989)); *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Summers*, 107 Wn. App. 373, 381, 28 P.3d 780 (2001), modified by 43 P.3d 526 (2002). This holds true even if the defendant simply proposes standard Washington Pattern Jury Instructions (WPIC) approved by the courts. *Studd*, 137 Wn.2d at 548-49; *Summers*, 107 Wn. App. at 381. In fact, "even where constitutional rights are involved, [an appellate court is] precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its

wording.” *State v. Winings*, 126 Wn. App. 75, 107 P.3d 141, 149 (2005) (citing *Bradley*, 141 Wn.2d at 736); *In re Det. of Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (1998); see also, *Studd*, 137 Wn.2d at 547.

Furthermore, under the invited error doctrine, jury instructions not objected to become the law of the case. *State v Smith*, 122 Wn. App. 294, 299, 93 P.3d 206 (2004), citing *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). If defense counsel participates in crafting the instructions and then later, on appeal, challenges those instructions, the error, if any, was invited and the instructions became the law of the case. *Smith*, 122 Wn. App. at 299, citing *Studd*, 137 Wn.2d at 546 (defendant may not set up an error at trial and complain about it on appeal).

In *Studd*, a consolidated case, the six defendants all proposed instructions that erroneously stated the law of self-defense. *Studd*, 137 Wn.2d at 545. Some, however, also proposed an instruction that effectively remedied the error. While concluding that the error was of constitutional magnitude and therefore presumed prejudicial, the Supreme Court held that those defendants who had proposed the erroneous instruction without attempting to add a remedial instruction had invited the error and could not therefore complain on appeal. *Studd*, 137 Wn.2d at 546-47.

The Supreme Court has noted that it has treated cases involving jury

instructions with missing elements with special care. *See, City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). “Nevertheless, the invited error doctrine has been applied in cases where, as here, the ‘to convict’ instruction omitted an essential element of the crime.” *Patu*, 147 Wn.2d at 720-21, *citing State v. Henderson*, 114 Wn.2d 867, 869, 792 P.2d 514 (1990) (failing to specify the intended crime in a conviction for attempted burglary); *State v. Summers*, 107 Wn. App. 373, 380-82, 28 P.3d 780 (2001) (omitting the knowledge element of unlawful possession of a firearm). The court in *Patu* affirmed the defendant’s conviction despite the use of a defective instruction which failed to include every element of the crime, and in so doing specifically stated that it was reaffirming its holding in *Studd* that, “A party may not request an instruction and later complain on appeal that the requested instruction was given.” *Patu*, 147 Wn.2d at 721, *citing Studd*, 137 Wn.2d at 546, 973 P.2d 1049 (*quoting State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)).

In the present case, defense counsel proposed instructions containing the language that is now challenged on appeal. Furthermore, Reed raised no objection to the instructions that he now challenges on appeal. Although there were slight differences between the State’s proposed instructions and the defense instructions, when the trial court went through the instructions with both parties, defense counsel did not object to the court using the State’s

proposed instructions. RP 147-51. In particular, with respect to the State's proposed instruction on the definition of harassment, defense counsel stated that, "The State's proposal is acceptable to me," and stated that this was true even given the slight difference in the defense's proposed instruction. RP 148. Defense counsel also stated that he had no objection to the State's "to convict" instructions, and further stated that they were "appropriate." RP 149.

For all of these reasons, any potential error in the instruction was invited error, and Reed is prohibited from challenging these instructions on appeal.

B. REED HAS FAILED TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE FAILED TO SHOW THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S ERRORS, THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT.

Reed next argues that, if the instructional error was invited, then Reed received ineffective assistance of counsel. This claim is without merit because Reed has failed to show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.

In *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003), the court concluded that under the plain language of the felony harassment statute, the

State “must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out.” *C.G.*, 150 Wn.2d. at 610. The court thus reversed the defendant’s conviction based on a sufficiency of the evidence claim because the victim only stated that he was afraid the defendant might “harm” him or someone else in the future. *C.G.*, 150 Wn.2d at 607, 610.

In *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005), the court again addressed the to convict instruction in a felony harassment case. Unlike in *C.G.*, however, the issue in *Mills* was not a sufficiency of the evidence claim, as such a claim was not raised. *Mills*, 154 Wn.2d at 13. Rather, the issue was whether the to convict instruction was improper. *Mills*, 154 Wn.2d at 13. The court ultimately held that the jury instruction was improper because it failed to require that the jury find that the victim was placed in fear that the threat to kill would be carried out. *Mills*, 154 Wn.2d at 14-15. The court also rejected the State’s harmless error argument, stating that it could not say, “beyond a reasonable doubt that the jury would find that the victim was placed in a reasonable fear of being killed.” *Mills*, 154 Wn.2d at 15. The court did note, however, that unlike in *C.G.*, there was “ample evidence” in *Mills* that the victim was placed in reasonable fear that the defendant would carry out her threat to kill. *Mills*, 154 Wn.2d at 12. Thus, the court in *Mills* found that while there was sufficient evidence in that case, there was not

enough evidence for the State to carry its burden of showing harmless error by proving *beyond a reasonable doubt* that the jury would agree that the victim was placed in fear of the threat to kill being carried out. This distinction is important, as will be discussed below.

Unlike the defendant in *C.G.*, Reed has not raised a sufficiency of the evidence claim. Likewise, Reed's position is different than the defendant in *Mills* (where the court addressed the instructional issue) because Reed is precluded from challenging the jury instruction because he invited any error in this regard. Reed's only recourse, unlike the defendants in *C.G.* and *Mills*, is to argue ineffective assistance. This is a critical distinction, however, because the burdens are much different in each of these analyses, and the burden in an ineffective assistance claim is on the defendant, not on the State.

To establish ineffective assistance of counsel, the defendant must demonstrate (1) deficient performance that caused (2) prejudice to the defense. *Smith*, 122 Wn. App. at 299, citing *State v. Tilton*, 149 Wn.2d 775, 783-84, 72 P.3d 735 (2003). To overcome the strong presumption in favor of effective counsel, the defendant must prove that there is no legitimate strategic or tactical reason for the deficient performance. *Smith*, 122 Wn. App. at 299, citing *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice occurs if, "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Smith*,

122 Wn. App. at 299-300, *citing State v. Bennett*, 87 Wn. App. 73, 82, 940 P.2d 299 (1997), *aff'd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

The critical distinction, therefore, is that in the harmless error analysis in *Mills*, the State had the burden of showing beyond a reasonable doubt that the jury would have found the defendant guilty even without the error, in the present case, the burden is different. Here, Reed must show that there is reasonable probability that the result would be different with a correct instruction.

The distinction raised above can be demonstrated by the following example. If, for instance, the effect of the instructional defect is unclear, and this court can only say, “the defect may have affected the jury or it may not have, we just can’t say,” then under a harmless error analysis the State would lose, as it would be unable to show beyond a reasonable doubt that the deficient instruction would not affect the outcome. Under an ineffective assistance claim, the defense argument would fail under this scenario, because the defense would be unable to meet its burden to show that there was a “reasonable probability” that the result would have been different. It is on the “middle ground” cases (where the effect of the defect is unclear or falls just short of the beyond a reasonable doubt standard) where the shift in the burden is critical.

The present case is one of these “middle ground” cases. The threats in the present case were unquestionably threats to kill. The victims testified that they felt the threats were credible and took the threats seriously. The jury was instructed that to convict the defendant they had to find that that was a threat, that the victims felt the threat would be carried out, and that “the threat” was a threat to kill. Although the court’s have found that the way the instructions in the present were constructed was defective, the jury in the present case still had to find that the threat was a threat to kill and that the victim’s feared the defendant’s threat would be carried out. Furthermore, no other threats (consisting of something other than a death threat) were mentioned at trial.

For all of these reasons, Reed cannot show that there is a reasonable probability that the jury would have reached a different conclusion with an accurate instruction. Rather, the State would suggest that the defect in the instructions in this case was essentially a technical defect and that it is more likely than not that jury’s verdict would be the same even with a technically accurate instruction. In any event, Reed cannot show that there is a reasonable probability that the verdict would have been different with a different instruction. As this is one of those “middle ground” cases, and because the burden in this case is on Reed, his argument regarding ineffective assistance of counsel must fail because he cannot show that there is a

reasonable probability that the verdict would have been different if his counsel has proposed an accurate instruction.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING OFFICER SCHROATH TO TESTIFY THAT HE WAS AWARE THAT REED'S MEDICAL RECORDS INDICATED THAT HE WOULD BECOME VOLATILE IF HE DID NOT TAKE HIS MEDICATION BECAUSE THE ISSUE OF WHETHER OFFICER SCHROATH'S FEAR THAT REED WOULD CARRY OUT HIS THREAT WAS REASONABLE WAS A CRITICAL ELEMENT OF THE CRIME CHARGED, AND EVIDENCE OF SCHROATH'S AWARENESS OF REED'S POTENTIAL FOR FUTURE VOLATILITY WAS HIGHLY PROBATIVE REGARDING THIS ELEMENT.

Reed next claims that the trial court abused its discretion in allowing Officer Schroath to testify that he was aware that Reed's medical reports indicated that Reed would become volatile if he did not take his medication. This claim is without merit because the evidence was relevant to the issue regarding whether Officer Schroath's fear was reasonable.

A trial court's decision to admit evidence of a defendant's prior acts is reviewed for abuse of discretion. *State v. Ragin*, 94 Wn. App. 407, 411, 972 P.2d 519 (1999). Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person or to show that the person acted in conformity with that character. ER 404(b). Such evidence may be

admissible for other purposes, however. ER 404(b).

A defendant is guilty of felony harassment if he or she knowingly threatens to kill the person threatened. RCW 9A.46.020. The defendant must also place the victim in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(b). An objective standard is applied to determine whether the victim's fear is reasonable. *Ragin*, 94 Wn. App. at 411. Accordingly, the State had to prove that it was reasonable for the victims to believe that Reed would carry out his threats to kill.

Washington courts have held that a victim's knowledge of the defendant, including prior acts of the defendant, are relevant and admissible with respect to the reasonable fear element of felony harassment. *See, e.g., State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000), *Ragin*, 94 Wn. App. at 411.

In *Barragan*, the State introduced evidence that the defendant had bragged about earlier assaults against others, and that this caused the victim to fear that the defendant would carry out the threats he made to the victim. *Barragan*, 102 Wn. App. at 758. On appeal, the court held that "the jury was entitled to know what [the victim] knew at the time [the defendant] threatened him, to better decide whether a reasonable person with that knowledge would believe that [the defendant] would carry out his threats."

Barragan, 102 Wn. App. at 760. The court also held that, “under the circumstances, the probative value of the evidence outweighs its prejudicial effect.” *Barragan*, 102 Wn. App. at 760.

Similarly, in *State v. Binkin*, 79 Wn. App. 284, 291-92, 902 P.2d 673 (1995), the court held that evidence regarding a prior threat to kill the victim’s unborn child, while certainly offensive, was nevertheless “probative of and necessary to prove the victim’s state of mind in order to establish that her fear that [the defendant] would carry out the threat was reasonable.” *Binkin*, 79 Wn. App. at 292. The *Binkin* court also pointed out that the fact-finder applies an objective standard to determine whether the victim’s fear that the threat will be carried out is reasonable, and this requires the jury to “consider the defendant’s conduct in context and to sift out idle threats from threats that warrant the mobilization of penal sanctions.” *Binkin*, 79 Wn. App. at 292, citing, *State v. Alvarez*, 74 Wn. App. 250, 261, 872 P.2d 1123 (1994). The court then concluded that whether the victim’s fear that the defendant might carry out his second threat was reasonable was a critical element of the crime charged, and evidence of the prior threat was “highly probative of this element.” *Binkin*, 79 Wn. App. at 292-93. The court also held that the prejudicial effect did not outweigh the probative value of this evidence, despite the “offensive” nature of the prior threat, and noted that the charged threat was egregious enough on its own to have already put the

defendant in a bad light before the jury. *Binkin*, 79 Wn. App. at 291.

In *Ragin*, the defendant had previously told the victim that he had been convicted of armed robbery, had been involved in domestic violence, was well known to the police, and suffered from episodic rages. *Ragin*, 94 Wn. App. at 409. The defendant then later threatened the victim, and at trial, the trial court allowed the State to present testimony on the defendant's statements to the victim in order to prove the reasonableness of the victim's fear. *Ragin*, 94 Wn. App. at 410. On appeal, the defendant argued that this evidence should not have been admitted and that "the evidence simply proved the he was a bad or violent person who needed to be locked up." *Ragin*, 94 Wn. App. at 412. The court of appeals, disagreed, stating,

The jury was entitled to know what [the victim] knew at the time *Ragin* threatened him to decide whether a reasonable person knowing what [the victim] knew would believe *Ragin* could carry out the threats. The State was therefore allowed to use the frightening stories *Ragin* revealed to [the victim] to prove its case. Although the prior bad acts evidence admitted in felony harassment cases generally involves the victim, the same rationale applies here. In both instances, the earlier acts are necessary to put the threats in context. Although the stories may have put *Ragin* in a bad light before the jury, the evidence was necessary to prove an essential element of the charged crime, so its probative value outweighed its prejudicial effect.

Ragin, 94 Wn. App. at 412, citing *Binkin*, 79 Wn. App. at 289.

As in *Ragin*, *Binkin*, and *Barragan*, the challenged evidence in the present case was necessary to put the threats in context and to prove the

reasonableness of the victim's fear. In addition, the trial court did not abuse its discretion in finding that probative value outweighed any unfair prejudice, especially given the fact that the jury already was aware that the defendant had made several death threats. For all of these reasons, the trial court did not abuse its discretion.

D. VIEWED IN AN LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT TO SHOW THAT OFFICERS SCHROATH AND TRUMP WERE LAW ENFORCMENT OFFICERS BECAUSE BOTH OFFICERS TESTIFIED THAT THEY WORKED AS CORRECTIONS OFFICERS AT THE KITSAP COUNTY JAIL.

Reed next claims that there was insufficient evidence to support the jury's finding that Officer Schroath and Officer Trump were law enforcement officers. This claim is without merit because there was sufficient evidence to support the jury's finding in this regard.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Pursuant to RCW 9.94A.535(3)(v), a trial court may impose an

exceptional sentence if the jury finds that the offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense. As Reed correctly points out, the statute, however, does not define "law enforcement officer." App.'s Br. at 24.

Statutory interpretation is a question of law that is reviewed de novo. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent and purpose of the Legislature in creating the statute. *State v. Sullivan*, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001). To determine legislative intent, a court first looks to the language of the statute. If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. *Keller*, 143 Wn.2d at 276, 19 P.3d 1030. Legislative definitions included in the statute are controlling, but in the absence of a statutory definition this court will give the term its plain and ordinary meaning ascertained from a standard dictionary. *Sullivan*, 143 Wn.2d at 175, 19 P.3d 1012. In addition, if a term is not defined by statute, addressed by a pattern jury instruction, or defined by an appellate court, it is likely a term of common understanding and its meaning comes from common usage. *State v. Brown*, 132 Wn.2d 529, 611, 940 P.2d 546 (1997). Furthermore, "When

words are not defined by statute, the court may refer to dictionary definitions and to common usage in light of the context in which the word is used.” *Armstrong v. State*, 91 Wn. App. 530, 538, 958 P.2d 1010 (1998), *review denied*, 137 Wn.2d 1011, 978 P.2d 1099 (1999).

The appellate courts have also consistently held that an unambiguous statute is not subject to judicial construction and have declined to insert words into a statute where the language, taken as a whole, is clear and unambiguous. *Keller*, 143 Wn.2d at 276, 19 P.3d 1030. Furthermore, a court will not add to or subtract from the clear language of a statute even if it believes the Legislature intended something else but did not adequately express it unless the addition or subtraction of language is imperatively required to make the statute rational. *Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 904, 949 P.2d 1291 (1997); *Sullivan*, 143 Wn.2d at 175, 19 P.3d 1012 (*citing State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982)).

The plain language of the statute in the present case uses the phrase “law enforcement officer.” RCW 9.94A.535. This language, on its face, thus encompasses officers who enforce the law. Both Officer Schroath and Officer Trump testified that they were corrections officers at the Kitsap County jail. This testimony was sufficient to support the jury’s finding that they officer were, in fact, “officers.” In addition, any reasonable juror would

understand that a corrections officer at a county jail “enforces the law” by detaining those offenders who have been found to have broken the law and those who are being detained pending a trial to determine if the law was broken. A common sense understanding of the term “law enforcement officer,” therefore, necessarily includes corrections officers at a county jail. The evidence, therefore, was sufficient.

Even if this court were to look beyond the plain language of the statute, a corrections officer at a county jail would still qualify as a “law enforcement officer.” At least one Washington court has previously addressed the issue of what the term “law enforcement officer” means in the context of assault in the third degree (where the term is also not defined) and has held that the term includes “custody” officers whose duties include holding a person in custody. For instance, in *State v. Stewart*, 43 Wn. App. 744, 746, 719 P.2d 184 (1986), the court found that the defendant had assaulted a “custody” officer after being booked at the Clark County Law Enforcement Center, and stated,

Furthermore, “[a] law enforcement officer has been defined as one ‘whose duty it is to preserve the peace,’” *McLean v. Department of Corrections*, 37 Wn. App. 255, 257, 680 P.2d 65, *review denied*, 101 Wn.2d 1023 (1984); and “ ‘any ... employee of a governmental entity whose principal duties under law are to *hold in custody* any person accused of a criminal offense, to maintain public order or to make arrests for crimes ...’ ” (Italics ours.) *Anchondo v. Corrections Department*, 100 N.M. 108, 666 P.2d 1255 (1983) (quoting

New Mexico Tort Claims Act § 41-4-3(D)). *See also Abbott v. Cooper*, 218 Cal. 425, 23 P.2d 1027, 1030 (1933) (officer in charge of a county jail had authority to detain persons charged with crime on a suitable writ or process).

Stewart, 43 Wn. App. 744, 746 (emphasis in original).

Both officers in the present case testified that they worked as corrections officers at the jail, and a the jury could reasonably infer from this evidence that the officers job was to “hold people in custody.” Pursuant to *Stewart*, therefore, this evidence was sufficient to show that the officers were law enforcement officers.

For all of these reasons, the evidence was sufficient to support the jury’s finding that the victims were law enforcement officers for purposes of RCW 9.94A.535.

IV. CONCLUSION

For the foregoing reasons, Reed’s conviction and sentence should be affirmed.

DATED December 29, 2006.

Respectfully submitted,

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