

NO. 41546-1-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ALONZO BRADLEY, SR., APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable James Orlando for CrR 3.5 and 3.6 Hearing  
The Honorable Bryan Chushcoff for Trial

No. 09-1-04682-6

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**Response Brief**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was sufficient evidence adduced at trial to support the jury's guilty verdict for unlawful possession of a controlled substance when a baggie of cocaine was found where moments earlier the defendant had shoved his closed fist into the shrubberies during the course of being arrested?

2. Was sufficient evidence adduced at trial to support the reasonable fear element of felony harassment where defendant was angry and agitated in the car, made his threat to kill repeatedly which caused a veteran officer to fear that his life was in danger?

B. ASSIGNMENTS OF ERROR ON CROSS-APPEAL.

1. The trial court abused its discretion in excluding admissible evidence relevant to an essential element of the crime of felony harassment.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ON CROSS-APPEAL:

1. Did the trial court abuse its discretion in excluding Officer Eugley's knowledge of defendant's criminal history where it was relevant to the jury's determination of the reasonableness of the officer's fear that defendant would carry out his threats?

D. STATEMENT OF THE CASE.

1. Procedure

On October 19, 2009, the State filed an information charging defendant, Alonzo Bradley, with unlawful possession of a controlled substance, felony harassment, and obstructing a law enforcement officer. CP 1-2. On November 30, 2010, the State filed its fourth amended information, adding the aggravating circumstance on all three counts that defendant's unscored misdemeanor history results in a presumptive sentence that is too lenient. CP 124-25. The fourth amended information also added the aggravating circumstance on all three counts. CP 124-25. It also added an aggravating circumstance that defendant knowingly made his threats against a law enforcement officer who was performing his duties to the count of felony harassment. CP 124-25.

On September 7, 2010, a CrR 3.5/3.6 hearing was held before the Honorable Judge Orlando. RP(09/07/10) 1. The court ruled that defendant's statements and the evidence collected at the scene were admissible. RP(09/07/10) 71-74, CP 43-47, 48-52. The court also ruled that defendant's criminal history was inadmissible. RP(09/07/10) 18.

Prior to trial, the State sought review of the order in limine excluding defendant criminal history. RP(09/07/10) \_\_\_\_\_. The State requested to be permitted to adduce testimony from Officer Eugley that his fear that the threats defendant made would be carried out were due, in

part, to the fact that he knew defendant had been flagged as a “violent offender” in his criminal record. RP 49-50. The State argued that the evidence was relevant to prove an element of felony harassment, that the officer’s fear that the defendant would carry out his threats was reasonable. RP 50. Defense objected to the introduction of that evidence, arguing it was not relevant. RP 57. The court denied the State’s motion, holding that the statute required that the State prove that the defendant’s words or conduct placed the victim in reasonable fear that the threat would be carried out. RP 59. The court held that the information in Officer Eugley’s computer system was not words or conduct of the defendant, and therefore did not go to an element of the offense. RP 61.

The case proceeded to a jury trial on October 26, 2010. RP 79. At the close of the State’s case, defendant made a half time motion to dismiss the unlawful possession and felony harassment charges for insufficient evidence. RP 344, 353. The court found that sufficient evidence was presented to send the case to the jury. RP 353, 359. The defendant testified in his own defense, and then rested his case. RP 360, 420-21. On November 4, 2010, the jury found defendant guilty on all counts. CP 108-09, 112. RP 557. The jury also found, by special verdict, that defendant committed the crime of felony harassment against a law enforcement officer who was performing his duties at the time of the crime, and that the defendant knew that the victim was a law enforcement officer. CP 111, RP 557.

Defendant had an offender score of 10. CP 144-148. At sentencing on December 8, 2010, the court sentenced defendant to 60 months, the high end of the standard range for the felony harassment. CP 144-148; RP(sentencing) 58. The court also imposed a low end sentence of 12 months for the unlawful possession charge. CP 144-148; RP(sentencing) 58. The court imposed the sentences to run consecutively, resulting in an exceptional sentence because defendant's prior unscored misdemeanor history resulted in the standard range sentence being too lenient, and because the jury had found that defendant knowingly committed his crime against a law enforcement officer. CP 130-143, 149-152; RP(sentencing) 58. The court entered findings of fact and conclusions of law for the exceptional sentence, concluding that either aggravating factor standing alone would be sufficient to support the exceptional sentence. CP 149-152. The court imposed a suspended 365 day sentence for the misdemeanor charge of obstructing a law enforcement officer. CP 144-148; RP(sentencing) 58.

Defendant entered a timely notice of appeal. CP 127.

## 2. Facts

On October 18, 2009, Fife police officer Robert Eugley was on duty near Pacific Highway East and 54<sup>th</sup> Avenue East in a fully marked patrol car. RP 185. While waiting at a red light at that intersection, he noticed a cyclist, later identified as defendant, coming rapidly toward the intersection from the west. RP 185, 189. Defendant was dressed in dark

clothing, and did not have any lights or reflectors visible. RP 180, 195. At the intersection, defendant went through a red light. RP 195. The officer crossed the intersection, and pulled up alongside the bicycle, and attempted to contact defendant. RP 195. Using the public address speaker in his patrol car, the officer told defendant, "Stop. Fife police." RP 195. Defendant looked over his shoulder, but did not stop. RP 196. Defendant kept riding, and began shouting at the officer. RP 197. The officer continued with his command, "Stop. Fife police," over the loud speaker, but could not hear what the rider was shouting back at him. RP 197-98. As defendant continued to ride along Pacific Avenue, Officer Eugley, followed him in the patrol car and rolled down his windows. RP 256. He was then able to hear the rider shouting, "You have no probable cause," and "I didn't stop at any stores or hotels." RP 203. The officer turned on his emergency lights, and again told defendant to stop. RP 196-97. Defendant did not comply. *Id.*

Defendant reached into his jacket with his left hand, and appeared to be trying to grab something. RP 198. Fearing that the defendant was reaching for a weapon, Officer Eugley dropped back, allowing the distance between himself and the defendant to expand to between 30 and 40 feet. RP 199-200. The officer continued to follow defendant and to tell the rider to stop. RP 201.

Defendant eventually jumped off his bike, and with his left hand in a fist, and his right hand waiving around open palmed, defendant took a fighting stance. RP 202-03, 218-19. The officer drew his taser and told the defendant to get on the ground. RP 219-20. Defendant did not comply immediately, and the officer repeated his commands. RP 221-22.

Defendant stepped around his bicycle, off the sidewalk and moved to the shrubberies near a building. RP 222. The defendant then lay down on the dirt, and stretched his hands straight out in front of him. RP 222-24.

Defendant still had not released his fist. RP 225. Officer Eugley ordered defendant to show his hands, and defendant removed his hands from the bushes. RP 225. As Officer Eugley handcuffed defendant, his backup arrived. RP 226. Officer Hobbs helped Officer Eugley to lift the defendant to his feet, and place defendant in the back of the patrol car. RP 226-27.

Once defendant was secured, Officer Eugley went to collect the things that had been removed from defendant's pockets during the frisk for weapons, as well as to search the bushes that defendant had reached into. RP 227-28. Officer Eugley suspected that the defendant had removed something from his jacket pocket, held it in his hand, and then shoved it into the bushes when he had laid on the ground. RP 224-25. The search revealed a baggie containing what the officer suspected was crack cocaine recovered from where defendant's left hand had been. RP

229. As the officer looked at the baggie and its contents, his back was to the defendant. RP 234-35. The substance was later confirmed to be two grams of crack cocaine. RP 155. The officer walked back to the patrol car to place the evidence and defendant's belongings into the trunk and transport defendant to the police station. As he did so, defendant shouted, "That's your cocaine. I saw you. You can't put that on me." RP 235-36. The officer had not shown or told the defendant what was in his hand. RP 236-37.

While being transported to the police station, defendant was agitated, and aggressive. RP 238. He yelled insults and threats at Officer Eugley. RP 238. Defendant called the officer, "white boy," and "pig" and threatened that the officer would, "get a 12-gauge shotgun shoved in [his] mouth and [his] head is going to be blown off." RP 238. Defendant continued to tell Officer Eugley that he had "made [his] worst mistake in arresting [defendant]," and to "wait and see." RP 241. He yelled, "oh look, you're face is bruised." RP 241.

Throughout the ride, defendant was sliding back and forth across the seat, and leaning forward to yell things through the Plexiglas barrier. RP 322. The officer called ahead to the jail, and asked that there be corrections officers there to meet him to help move the defendant from the car to the jail. RP 327. Officer Eugley testified that he had the officers meet him at the jail because defendant's behavior was increasingly aggressive and threatening. RP 237. The officer was aware that his name

and badge number were both visible on his uniform and the officer testified that he feared the threat would be carried out in the future. RP 242, 322. The officer also spoke with a superior about the incident, and related that he was afraid because of the threats he had received. RP 320.

Defendant testified that the night before he was arrested, he had been contacted by law enforcement in each of the three jurisdictions he passed through on his bike route home. RP 367-68. The officers yelled something at him that he could not understand, but he kept riding, and no one ever stopped him. RP 367-68. October 18, 2009, he was riding the same route home to Federal Way from work in Browns Point. RP 361. Defendant testified that he was not wearing a helmet, and had no working lights on his bicycle. RP 400. He saw a police officer “posted in the parking lot.” RP 361. He was listening to a CD player but still noticed that the officer had pulled out behind him. When defendant heard the officer say, “Stop. Fife Police,” he asked the officer “typical questions that any person would ask,” but did not stop RP 371. Defendant didn’t believe he had committed any infractions, and he “wasn’t going to consensually stop.” RP 373. Defendant then reached into his jacket to turn down his music. RP 372. He eventually stopped and jumped off his bicycle believing the officer was “going to hit [him] off the bike.” RP 374. Defendant was upset and angry about going to jail. RP 416-17. He testified that he was trying to “distract the officer at all cost” to “avoid being entrapped in crimes that [he] never committed.” RP 420.

Defendant denied ever threatening the officer. RP 381. He also denied ever possessing cocaine. RP 418.

E. ARGUMENT.

1. SUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO SUPPORT THE JURY'S GUILTY VERDICTS FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, AND FELONY HARASSMENT.

In determining whether the evidence presented at trial was sufficient to support a guilty verdict, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Any reasonable inferences from the evidence must be interpreted most strongly against defendant in favor of the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Challenging a verdict based on insufficiency of the evidence admits all evidence presented by the State and any reasonable inferences as true. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Circumstantial evidence is no less reliable than direct evidence. *State v. Lubers*, 81 Wn. App 614, 619, 915 P.2d 1157 (1996). In order to determine defendant's intent, the trier of fact may infer that he intended for the natural and probable consequences of his actions to occur. *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983).

Additionally, “intent may be inferred from circumstantial evidence.” *Id.* (citing *State v. Shelton*, 71 Wn.2d 838, 839, 431 P.2d 201 (1967)).

When there is a conflict in the evidence or testimony, it is up to the jury to determine which is credible. *Id.* (See also *State v. Young*, Wn.2d 613, 618, 574 P.2d 1171 (1978); *State v. Reynolds*, 51 Wn.2d 830, 833, 322 P.2d 356 (1958)). Determinations of credibility are not reviewable on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

- a. The evidence adduced at trial was sufficient to support the jury’s guilty verdict for unlawful possession of a controlled substance.

In order to convict for unlawful possession of a controlled substance, the jury must find:

- 1) That on or about the 18<sup>th</sup> day of October, 2009, the defendant possessed a controlled substance; and
- 2) That this act occurred in Washington State.

CP 74-107 (Jury Instruction no. 9). Defendant does not challenge the evidence of the date of the incident or that it occurred in Washington State. Brief of Appellant at 1. The court’s instructions defined possession as:

[H]aving a substance in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion

and control need not be exclusive to support a finding of constructive possession.

CP 74-107 (Jury Instruction no. 8). In determining dominion and control, the entirety of the circumstances must be considered, and no one factor is dispositive. *State v. Portrey*, 102 Wn. App. 898, 904, 10 P.3d 481 (2000).

Here, after reaching his left hand into his pocket, defendant kept his hand in a fist, despite the officer's orders. RP 218-19, 202-03, 225. Defendant went out of his way to the grass and stretched his hands straight out over his head into the bushes when he complied with Officer Eugley's order to lie down. RP 222-25, 292. This caused Officer Eugley some concern because suspects usually stretch their arms out to the sides, and he believed defendant was hiding something. RP 224-25, 92. Upon searching the bushes where defendant's left hand had been, Officer Eugley found the packet of cocaine. RP 229. A jury could reasonably infer that the cocaine from the bushes had been in defendant's left hand, and he had tried to hide it by walking to the bushes, and shoving his hands under them before he was handcuffed.

Further, after watching Officer Eugley search the bushes where his hands had just been, defendant, without seeing what the officer was carrying, shouted, "That's not my cocaine." RP 235-36. The logical inference is that defendant knew the officer had found cocaine because he had placed it there. If defendant had not put the cocaine in the bushes, he would neither know that the officer had a packet in his hand after

searching the bushes, nor that the packet contained cocaine. The evidence was sufficient for the jury to find defendant guilty of possession of cocaine.

- b. The evidence adduced at trial was sufficient to support the jury's guilty verdict for felony harassment.

In order to convict the defendant of felony harassment, the jury must find:

- 1) That on or about the 18<sup>th</sup> day of October 2009, the defendant knowingly threatened to kill Robert Eugley immediately or in the future;
- 2) That the words or conduct of the defendant placed Robert Eugley 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.

CP 74-107 (Jury Instruction no. 16). To threaten is to “communicate directly or indirectly the intent to cause bodily injury in the future to the person threatened or to any other person.” CP 74-107 (Jury Instruction no. 14). “Whether a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke.” *State v. Kilburn*, 151 Wn.2d 36, 46, 84 P.3d 1215 (2004), *see also*, *State v. Johnston*, 156 Wn.2d 355, 360-61, 127 P.3d 707 (2006).

In the case at hand, the officer had defendant handcuffed in his patrol car, and defendant was agitated and aggressive. RP 238, 241, 322. Defendant did not sit still in the car, but leaned forward and backward, screaming insults and threats through the Plexiglas divider. *Id.* Defendant threatened to blow off the officer's head with a 12-gauge shotgun, and repeatedly told the officer, "Wait and see." RP 241. The officer testified that he has never been threatened in that manner in his 12 years on the force. RP 241-42, 314. It "rais[ed] the hair on the back of [his] neck." RP 243. The officer watched defendant in the rearview mirror, and saw that defendant was staring at him with a "fixed look" while he threatened. RP 242. This look made the officer believe that defendant would follow through with his threat if given the opportunity. *Id.* The officer called for corrections officers to assist him in removing defendant from his patrol car. RP 327. This is not standard practice, but Officer Eugley felt it was necessary to protect his safety. *Id.* Officer Eugley testified that he even spoke with his commanding officer about the defendant's threats, and that he was afraid they would be carried out. RP 320. The jury could determine from the officer's actions and testimony that he had taken the threat seriously, and that his testimony that he feared defendant would harm him if the opportunity arose was credible. Moreover, the officer testified that his name was on his uniform. RP 242-43. The jury could

conclude from the evidence presented that the officer reasonably feared that the defendant, knowing who he was, could carry out his threat to kill the officer at a later date.

Defendant cites *State v. C.G.* as an analogous case. 150 Wn.2d 604, 80 P.3d 594 (2003); Appellant's brief at 12. In that case, when the vice principal of her school was escorting C.G. from her classroom for being disruptive, she shouted, "I'll kill you, Mr. Haney. I'll kill you." *C.G.*, 150 Wn.2d at 606. Mr. Haney testified that, "based on what he knew about C.G., she might try to harm him, or someone else." *Id.* at 595-96. He did not testify that he thought C.G. would try to kill anyone, in other words, carry out the specific threat that she made. *Id.* at 596.

This case is distinguishable. The principal in *C.G.* did not believe that C.G. would carry out her threat to kill him. 150 Wn.2d at 596. Without this belief, there is insufficient evidence to meet the elements of felony harassment. *Id.* at 612. In *C.G.* the threats were coming from a teenager, with whom the vice principal was familiar. *Id.* at 595-96. The difference here is Officer Eugley testified that he feared that defendant would carry out his threat to kill him, because of defendant's aggressive behavior, and his repeated statement that Officer Eugley was "making the biggest mistake of his life." Further, unlike the principal in *C.G.*, Officer Eugley was unfamiliar with defendant. RP 243. He had not had previous contact with him, and did not have a way of knowing what defendant was likely to do or not. *Id.* He did not know what sort of access to weapons

defendant might have when he was not in custody. *Id.* In addition, defendant was a large man, standing at 6'2" and 220 pounds. RP 332. In *C.G.* the defendant was a teenage girl. 150 Wn.2d at 606. The jury found that Officer Eugley's testimony that he feared for his life was credible, and under the circumstances the fear was reasonable. Sufficient evidence was adduced to uphold the jury's verdict of guilt for felony harassment.

F. ARGUMENT AS TO CROSS-APPEAL ISSUE

1. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT PERMITTING EVIDENCE THAT OFFICER EUGLEY KNEW OF DEFENDANT'S PREVIOUS VIOLENT BEHAVIOR.

For reasons outlined below, even if this case can be affirmed on the sufficiency of the evidence, the State urges the court to consider the cross-appeal issue regarding the trial court's evidentiary ruling because it affected the State's ability to present evidence on a critical element and is capable of repetition while evading review. A trial court's ruling admission of evidence is reviewed for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Discretion is abused where a decision is based on untenable grounds or untenable reasons. *State v. Fualaau*, 155 Wn. App. 347, 356, 228 P.3d 771, *review denied*, 169 Wn.2d 1023 (2010), *cert. denied*, 131 S. Ct. 1786 (2011), *citing State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Alternatively, the court considers whether any reasonable judge would

have made the same ruling. *Id. citing State v. Nelson*, 108 Wn.2d 491, 504–05, 740 P.2d 835 (1987).

The harassment statute requires that the State prove the victim's fear that defendant would carry out his threats was reasonable. *State v. J.M.*, 101 Wn. App. 716, 728, 6 P.3d 607 (2000), *see* RCW 9A.46.020(1). The reasonableness of the fear requires that the jury take the entirety of the situation into account. "The fact finder applies an objective standard to determine whether the victim's fear that the threat will be carried out is reasonable. This requires the jury to consider the defendant's conduct in context." *State v. J.M.*, 101 Wn. App. at 728, *quoting State v. Ragin*, 94 Wn. App 407, 411-412, 972 P.2d 519 (1999). "The victim's knowledge of the defendant's prior violent acts [is] relevant to the reasonable fear element of felony harassment... The jury [is] entitled to know what the victim knew at the time the defendant threatened him to decide whether a reasonable person knowing what the victim knew would believe the defendant could carry out the threats." *State v. J.M.*, 101 Wn. App. at 728, *quoting State v. Ragin*, 94 Wn. App 407, 411-412, 972 P.2d 519 (1999).

Washington courts have repeatedly held that the victim's knowledge of the defendant's prior violent acts is relevant to show the reasonableness of their fear. *See State v. Cross*, 156 Wn. App 568, 582, 234 P.3d 288 (2010), *State v. J.M.*, 101 Wn App. 716, 6 P.3d 607 (2000), *State v. Alvarez*, 74 Wn. App. 250, 872 P.2d 1123 (1994), *State v. Ragin*, 94 Wn. App 407, 972 P.2d 519 (1999)(holding that evidence of the

victim's knowledge of the defendant's prior violent acts is relevant to show that the victim is not overreacting to the threats). It is therefore not reasonable to determine that the defendant's actions and words make up the only relevant evidence of the circumstances under which the threat was made. The victim's knowledge of prior violent behavior is a major component of the circumstances under which the threat is made when determining whether the victim's fear is objectively reasonable.

In *Ragin*, the case provided to the trial court during argument, the defendant had told his victim he had been convicted of armed robbery, had episodic rages, had been involved in a domestic violence situation with his wife, and was "well known by the Bellevue Police department." 94 Wn. App at 409. Ragin called the victim "screaming and yelling and cursing and swearing." *Id.* The victim tried to calm Ragin down, and later took him to the hospital, where Ragin regained control of his behavior. *Id.* at 409-10. A few weeks later, Ragin called the victim again, asking for help posting bail. *Id.* at 410. When the victim refused, Ragin threatened to kill him and his family, as well as a mutual friend of theirs. *Id.* The court in *Ragin* held that testimony from the victim about his knowledge of Ragin's prior bad acts to prove the reasonableness of the victim's fear. *Id.* at 411-412. "The earlier acts are necessary to put the threats in context." *Id.* at 412, citing *State v. Binkin*, 79 Wn. App. 284, 289, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015, 911 P.2d 1343 (1996).

This principal was further clarified in *J.M.* There, the defendant was a middle school student, who threatened to come to school with a gun and shoot multiple faculty members, including the principal. 101 Wn. App. at 719-20. J.M. had disciplinary problems in the past, and the principal was aware of those. *Id.* at 731. J.M. made his threat within one week after the Columbine High School shooting, which was highly publicized. *Id.* The court in that case determined that the principal's knowledge of the defendant's disciplinary history, and the recent school shooting, were relevant to the jury's determination of the reasonableness of the principal's fear. *Id.* An officer's knowledge that a defendant has previously been involved in violent incidents is certainly within the circumstances of the threat for the purposes of the reasonableness of the officer's fear if the actions of two teenage shooters in another state are relevant to the reasonableness of the victim of a threat to bring a gun to school.

In *State v. Cross*, the court used the experiences of one officer which was related to a second as evidence of the reasonableness of the second's fear that Cross's threat would be carried out. 156 Wn. App. at 584. In that case, Cross was riding in a vehicle which was stopped by Tacoma Police Department Officer Lopez-Sanchez. *Id.* at 572. Cross fled the scene of the traffic stop, and was chased by Officer Lopez-Sanchez. *Id.* at 574. After finding himself without an avenue for flight, Cross "put up his fists in an offensive fighting stance." *Id.* Officer Lopez-Sanchez

applied his stun gun to gain compliance from Cross, and handcuffed him. *Id.* Officer Williams arrived as Officer Lopez-Sanchez was escorting Cross back to the patrol car. *Id.* While in the back of the patrol car, Cross threatened Officer Williams. *Id.* at 575. The court reasoned that because Officer Lopez-Sanchez had described to Williams the chase and the fight, that Williams “had knowledge of the extent of Cross’s assaultive ability from his efforts to resist arrest and from his fight with Lopez-Sanchez.” *Id.* at 584.

In the case at hand, the State argued that Officer Eugley should be permitted to testify that his fear of defendant carrying through with the threat to kill him was based, in part, on his knowledge that defendant had been flagged as a “violent offender.” RP 49-50. The court believed the statute required that the reasonableness of the fear must be based solely on the words and conduct of the defendant. RP 61-62. The State, citing *State v. Ragin*, argued that the officer’s knowledge of the defendant went to the reasonableness of the officer’s fear. RP 65-66. Contrary to case law, and the ruling in *Ragin*, the court reasoned that the prior knowledge the victim had of the defendant was not the defendant’s actions or words, and was therefore not relevant to any element of the crime. RP 61, 74. The court ruled that Officer Eugley could not testify regarding his knowledge that defendant had been flagged a “violent offender.” RP 61, 74.

The officer’s knowledge in this case, like the knowledge in *Cross*, is not a result of direct interaction with the defendant, but from

information given to him by other officers from their experiences with the defendant. *Id.*, **Cross**, 156 Wn. App. at 584. However the victim comes across the knowledge of the defendant's prior violent actions, that knowledge is relevant to the jury's evaluation of the circumstances surrounding the threat. The defendant's words or actions must place the victim in fear, but the reasonableness of that fear must be evaluated objectively based on the totality of the circumstances, including the victim's prior knowledge of defendant's behavior. **J.M.**, 101 Wn. App. at 731; **Ragin**, 94 Wn. App. at 411-12; **Cross**, 156 Wn. App. at 584. The trial court erred in finding evidence of the officer's knowledge of defendant's prior violent acts irrelevant to the determination of reasonable fear.

The State urges the Court to consider the issue on cross-appeal even if it is moot because defendant's conviction was supported by sufficient evidence. This is necessary in order to provide clarity and future guidance as this issue is of "continuing public interest, capable of repetition yet easily evading review." **State v. Hale**, 94 Wn. App. 46, 52, 971 P.2d 88 (1999)(holding that an otherwise moot issue of trial court's sentencing authority was reviewable on appeal) quoting **State v. Clark**, 91 Wn. App. 581, 584, 958 P.2d 1028 (1998), see also **State v. Harris**, 148 Wn. App. 22, 27, 197 P.3d 1206 (2009) (holding an otherwise moot issue as to the admissibility of evidence to support a criminal history finding at sentencing was reviewable on appeal). The State must prove all elements of a crime beyond a reasonable doubt. **City of Tacoma v. Luvane**, 118

Wn.2d 826, 849, 927 P.2d 1374 (1992). In the case of felony harassment, one of the elements the State must prove is the reasonableness of the victim's fear that the defendant's threat will be carried out. *State v. J.M.*, 101 Wn. App. 716, 728, 6 P.3d 607 (2000), *see* RCW 9A.46.020(1). Here, the trial court's ruling put in jeopardy the State's ability to prove each and every element of the charged crime beyond a reasonable doubt. Without correction from this Court that the law does not require reasonable fear to be shown only from the words and actions of the defendant, the trial court may continue to make evidentiary rulings consistent with its ruling in this case. *Harris*, 148 Wn. App. at 28-29. Should the jury in such a case acquit the defendant, the State has no opportunity to seek review of the evidentiary ruling. RAP 2.2(b)(1). "[I]t is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous." *State v. Ridgley*, 70 Wn.2d 555, 556, 424 P.2d 632 (1967), *quoting Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 224, 2 L.Ed.2d 199 (1957); RAP 2.2(b)(1). Therefore, the issue is of substantial public interest. Moreover, defendant challenged the sufficiency of the evidence to prove the element of reasonable fear in this case, the precise element the State's proposed evidence would have supported. Thus, defendant seeks to take advantage of the erroneous ruling on appeal. Correcting the trial court's interpretation of the law prevents future injustices where the State might be improperly precluded

from adducing admissible evidence necessary to meet its burden of proof on an essential element of the crime.

G. CONCLUSION.

For the foregoing reasons, the State respectfully requests that defendant's convictions and sentence be upheld.

DATED: August 5, 2011.

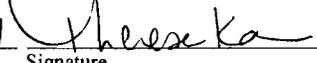
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.5.11   
Date Signature