

NO. 49261-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

GARY PINKNEY,
Appellant.

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

The Honorable Edmund Murphy, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT..... 5

I. Mr. Pinkney’s conviction for misdemeanor harassment cannot be based on his nonverbal conduct of raising his fist in Clark-Pinkney’s face, alone..... 5

A. The criminal harassment statute does not criminalize purely nonverbal “threatening” behavior..... 6

B. The prosecutor committed misconduct by misstating the law to the jury. 9

C. The state presented insufficient evidence to convict Mr. Pinkney of misdemeanor harassment..... 11

II. There was insufficient evidence to convict Mr. Pinkney under the rule of corpus delicti because the state did not produce independent evidence that he did anything to “threaten” to cause physical injury to Clark-Pinkney.12

III. If the state substantially prevails on appeal, this court should decline to impose appellate costs upon Mr. Pinkney, who is indigent..... 13

CONCLUSION 14

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	9, 10, 11
<i>Lenander v. Washington State Dep't of Ret. Sys.</i> , 186 Wn.2d 393, 377 P.3d 199 (2016).....	7
<i>State v. Baker</i> , 194 Wn. App. 678, 378 P.3d 243 (2016).....	8
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	14
<i>State v. Boyle</i> , 183 Wn. App. 1, 335 P.3d 954 (2014), <i>review denied</i> , 184 Wn.2d 1002, 357 P.3d 666 (2015).....	7
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	12, 13
<i>State v. Chouinard</i> , 169 Wn. App. 895, 282 P.3d 117 (2012) <i>review denied</i> , 176 Wn.2d 1003, 297 P.3d 67 (2013).....	11, 12
<i>State v. Dow</i> , 168 Wn.2d 243, 227 P.3d 1278 (2010).....	12, 13
<i>State v. Evans</i> , 163 Wn. App. 635, 260 P.3d 934 (2011)	6, 9, 11
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	12
<i>State v. Kilburn</i> , 151 Wn.2d 36, 84 P.3d 1215 (2004), <i>as amended</i> (Feb. 17, 2004).....	7
<i>State v. Pierce</i> , 169 Wn. App. 533, 280 P.3d 1158 (2012).....	10
<i>State v. Schaler</i> , 169 Wn.2d 274, 236 P.3d 858 (2010).....	7
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3 612 (2016).....	14
<i>State v. Swanson</i> , 116 Wn. App. 67, 65 P.3d 343 (2003).....	8
<i>State v. Trey M.</i> , 92593-3, 2016 WL 6330476 (Wash. Oct. 27, 2016).....	7

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI..... 1, 9
U.S. Const. Amend. XIV 1, 9
Wash. Const. art. I, § 22..... 9

WASHINGTON STATUTES

RCW 9A.04.110..... 7
RCW 9A.46.010..... 8
RCW 9A.46.020..... 1, 6, 7, 8, 9

OTHER AUTHORITIES

American Bar Association Standards for Criminal Justice std. 3–5.8 9
GR 34..... 14

ISSUES AND ASSIGNMENTS OF ERROR

1. The criminal harassment statute at RCW 9A.46.020 does not criminalize purely nonverbal conduct.
2. If the RCW 9A.46.020 is ambiguous, the rule of lenity requires this court to construe it in Mr. Pinkney's favor.
3. Prosecutorial misconduct deprived Mr. Pinkney of his Sixth and Fourteenth Amendment right to a fair trial.
4. The prosecutor committed misconduct by misstating the law to the jury.
5. The prosecutor's misconduct was flagrant and ill-intentioned.
6. Mr. Pinkney was prejudiced by the prosecutor's misstatement of the law.

ISSUE 1: A prosecutor commits misconduct by mischaracterizing the law to the jury during closing argument. Did the prosecutor commit misconduct at Mr. Pinkney's trial by telling the jury that they could convict him of harassment based on purely nonverbal conduct when she had no legal authority supporting that contention?

7. The state presented insufficient evidence to convict Mr. Pinkney of misdemeanor harassment.

ISSUE 2: A harassment conviction requires a verbal threat. Did the state present insufficient evidence to convict Mr. Pinkney of misdemeanor harassment when his only "threat" to injure the alleged victim was the nonverbal conduct of raising his fist?

8. The state presented insufficient evidence to convict Mr. Pinkney under the rule of *corpus delicti*.
9. The state failed to present independent evidence that Mr. Pinkney threatened to injure Clark-Pinkney.
10. Absent Mr. Pinkney's statement, the state presented insufficient evidence to convict Mr. Pinkney of misdemeanor harassment.

ISSUE 3: The evidence is insufficient to convict under the rule of *corpus delicti* if the state fails to present independent

evidence of each element of the alleged crime. Must Mr. Pinkney's conviction be reversed under the rule of *corpus delicti* when his own admission was the only evidence that he threatened to injure the alleged victim?

11. The Court of Appeals should decline to impose appellate costs, if Respondent substantially prevails on appeal and request such costs.

ISSUE 4: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Pinkney is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Gary Pinkney is a sixty-seven-year-old veteran. RP (5/19/16) 122-23.

In his anger management classes in the late 1990's, Mr. Pinkney learned to seek help when his emotions felt out of control. RP (5/19/16) 129; RP (6/3/16) 175.

In 2015, Mr. Pinkney was living with his ex-wife, Jill Clark-Pinkney. RP (5/19/16) 126. He became angry and called a Veteran's Administration (VA) crisis phone line. RP (5/19/16) 129. He spoke to the crisis worker for about three hours. RP (5/19/16) 129. The crisis worker said that she was going to call the police. RP (6/3/16) 177. She told Mr. Pinkney that the officers would take him to the emergency room or to a crisis center where he could receive help. RP (6/3/16) 177.

When the officers arrived at the house, Mr. Pinkney invited them in. RP (5/18/16) 88. He was happy to see them. RP (6/3/16) 177. He willingly told them what he had told the crisis worker on the phone. RP (5/18/16) 88-89.

But the officers did not take Mr. Pinkney to a hospital or crisis center. Instead, after speaking with Clark-Pinkney, they arrested him. RP

(5/18/16) 90. The state charged Mr. Pinkney with felony harassment against Clark-Pinkney. CP 1.

At trial, Clark-Pinkney testified that Mr. Pinkney had threatened to kill her while he was on the phone with the crisis worker. RP (5/18/16) 125, 127.

Clark-Pinkney admitted that she did not call the police after the alleged threats. RP (5/18/16) 138. She also did not try to leave the house after Mr. Pinkney had allegedly threatened to kill her. RP (5/18/16) 138.

The three police officers testified that they were dispatched to the house for a welfare check of a veteran. RP (5/18/16) 85, 97, 109. The officers said that Mr. Pinkney was still on the phone with the crisis worker when he answered the door. RP (5/18/16) 88. They said Mr. Pinkney sounded like he wanted help. RP (5/18/16) 89. Mr. Pinkney was calm the whole time but said that he was afraid he might harm Clark-Pinkney. RP (5/18/16) 89, 99.

The officer who talked to Clark-Pinkney testified that she did not seem to know why he was there when she saw him. RP (5/18/16) 107.

Mr. Pinkney also testified. He denied threatening Clark-Pinkney. RP (5/19/16) 131. He admitted, though, that he had put his face very close to hers while raising a fist. RP (5/19/16) 131.

The court instructed the jury on the lesser-included offense of misdemeanor harassment, based on an alleged threat to cause bodily injury to Clark-Pinkney. CP 48-50.

During closing argument, the prosecutor told the jury that they could convict Mr. Pinkney for misdemeanor harassment based on his admission to getting in Clark-Pinkney's face with a raised fist:

That act alone, where the defendant is in that kitchen with his fist in Ms. Clark-Pinkney's face, is conduct that is a threat that is putting her in fear of physical harm.
RP (5/19/16) 149.

The jury left the verdict form for the felony harassment charge blank. CP 57. The jury convicted Mr. Pinkney only of misdemeanor harassment. CP 58.

This timely appeal follows. CP 65.

ARGUMENT

I. MR. PINKNEY'S CONVICTION FOR MISDEMEANOR HARASSMENT CANNOT BE BASED ON HIS NONVERBAL CONDUCT OF RAISING HIS FIST IN CLARK-PINKNEY'S FACE, ALONE.

The jury did not convict Mr. Pinkney of threatening to kill Clark-Pinkney. CP 57. Instead, they convicted him only of misdemeanor harassment, based on a threat to injure her. CP 50, 58.

The jury did not believe Clark-Pinkney's claims that Mr. Pinkney had made the statements she recounted. But the only other evidence that

Mr. Pinkney had done anything illegal was his admission that he had raised his fist in Clark-Pinkney's face. PR (5/19/16) 131.

Even though there is no legal authority to support such a claim, the prosecutor told the jury in closing argument that they could convict Mr. Pinkney of misdemeanor harassment based on this nonverbal conduct alone. RP (5/19/16) 149. The prosecutor committed misconduct by misstating the law to the jury. *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011).

Because lifting a fist does not constitute a threat, the state also presented insufficient evidence to convict Mr. Pinkney of misdemeanor harassment.

A. The criminal harassment statute does not criminalize purely nonverbal "threatening" behavior.

In order to convict Mr. Pinkney for misdemeanor harassment, the state was required to prove, *inter alia*, that he

- (1) "knowingly threaten[ed]" [Clark-Pinkney] without lawful authority; and
- (2) "...by words or conduct place[d] [Clark-Pinkney] in reasonable fear that the threat would be carried out"

RCW 9A.46.020.

No published Washington case addresses whether the criminal harassment statute at RCW 9A.46.020 criminalizes purely nonverbal "threatening" conduct. Indeed, almost all of the case law construing the

harassment statute *presumes* that the requirement that the accused “knowingly threaten” the alleged victim refers to spoken or written statements. *See e.g. State v. Trey M.*, 92593-3, 2016 WL 6330476 (Wash. Oct. 27, 2016); *State v. Boyle*, 183 Wn. App. 1, 6, 335 P.3d 954 (2014), *review denied*, 184 Wn.2d 1002, 357 P.3d 666 (2015); *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010); *State v. Kilburn*, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004), *as amended* (Feb. 17, 2004).¹

In fact, the drafters of the harassment statute demonstrate their ability to specify when conduct – as well as words – can be considered in

¹ For purposes of the criminal code, in general, word “threat” is defined to mean “to communicate, directly or indirectly,” the intent to harm another person in a number of enumerated ways, including: by exposing a secret; testifying or withholding information in court; or causing harm to another person’s business, financial condition, or personal relationships. RCW 9A.04.110(28). That definition does not affect Mr. Pinkney’s claim that the criminal harassment statute does not apply to purely nonverbal conduct.

The narrow harassment statute controls over the very broad definition of “threat” at RCW 9A.04.110(28); *Lenander v. Washington State Dep’t of Ret. Sys.*, 186 Wn.2d 393, 377 P.3d 199, 209 (2016) (specific statutes control over more general ones).

Specifically, a person is guilty of harassment only if s/he threatens to:

- (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
- (ii) To cause physical damage to the property of a person other than the actor; or
- (iii) To subject the person threatened or any other person to physical confinement or restraint; or
- (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety...

RCW 9A.46.020(1)(a). The much broader definition of “threat” at RCW 9A.04.110(28), which includes threats to harm financial and business interests, to testify in court, etc. does not apply to the threats criminalized by the criminal harassment statute. *Lenander*, 186 Wn.2d 393.

subsection (1)(b), which provides that the state must prove that the accused “by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1)(b).

By failing to similarly state that conduct, as well as words, can be relied upon to meet the requirement that the accused “knowingly threaten” the alleged victim, the legislature manifests an intent to limit the definition of “threaten” to verbal threats alone. *See State v. Swanson*, 116 Wn. App. 67, 75, 65 P.3d 343 (2003) (describing the rule of statutory construction that *expressio unius es exclusio alterius*).

The legislature likewise indicates that acts do not constitute threats in its legislative findings regarding RCW chapter 9A.46. The findings provide that:

... this chapter is aimed at making unlawful the repeated invasions of a person's privacy by *acts and threats* which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim.

RCW 9A.46.010 (emphasis added).

By separating the words “acts and threats,” the legislature evinces that “acts” do not constitute “threats” under RCW chapter 9A.46.

At best, the criminal harassment statute is ambiguous regarding whether nonverbal conduct can constitute a threat. As such, the rule of lenity requires it to be construed in Mr. Pinkney’s favor. *State v. Baker*, 194 Wn. App. 678, 684, 378 P.3d 243 (2016). This court must interpret

the criminal harassment statute to apply only to threatening verbal statements.

To convict Mr. Pinkney of misdemeanor harassment, the state was required to prove that he made a verbal threat to cause bodily injury to Clark-Pinkney. RCW 9A.46.020(1); CP 50.

B. The prosecutor committed misconduct by misstating the law to the jury.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

A prosecutor commits misconduct by mischaracterizing the law to the jury. *Evans*, 163 Wn. App. at 643.

Here, the prosecutor argued that the jury could convict Mr. Pinkney of misdemeanor harassment based purely on his admission that he had raised his fist in Clark-Pinkney’s face. RP (5/19/16) 149.

As outlined above, the prosecutor had no legal support for her argument that the jury could convict Mr. Pinkney for harassment based on this nonverbal conduct. The prosecutor misstated the law to the jury.

A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

There is a substantial likelihood that the prosecutor's misstatement of the law affected the outcome of Mr. Pinkney's trial. *Id.* The jury's failure to convict Mr. Pinkney of felony harassment indicates that they did not believe Clark-Pinkney's claim that he had verbally threatened her. CP 57.

But the prosecutor told the jury that it could nonetheless convict Mr. Pinkney of misdemeanor harassment based on his admission to raising his fist in her face. PR (5/19/16) 149. That is exactly what the jury did. CP 58. Mr. Pinkney was prejudiced by the prosecutor's misstatement of the law. *Id.*

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). Misconduct is flagrant and ill-

intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement.

Glasmann, 175 Wn.2d at 707.

Here, the prosecutor had access to long-standing caselaw prohibiting her from mischaracterizing the law in closing argument. *See e.g. Evans*, 163 Wn. App. at 643. The prosecutor's improper argument was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed misconduct by mischaracterizing the law to the jury. *Evans*, 163 Wn. App. at 643. Mr. Pinkney's conviction must be reversed. *Id.*

C. The state presented insufficient evidence to convict Mr. Pinkney of misdemeanor harassment.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found each element met beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

As outlined above, nonverbal conduct is insufficient to establish that Mr. Pinkney threatened to injure Clark-Pinkney, as required to convict

him of misdemeanor harassment.² But Mr. Pinkney's admission to raising his fist was the only evidence that he threatened to cause bodily injury.

The state presented insufficient evidence to convict Mr. Pinkney of misdemeanor harassment. *Chouinard*, 169 Wn. App. at 899. His conviction must be reversed. *Id.*

II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. PINKNEY UNDER THE RULE OF *CORPUS DELICTI* BECAUSE THE STATE DID NOT PRODUCE INDEPENDENT EVIDENCE THAT HE DID ANYTHING TO “THREATEN” TO CAUSE PHYSICAL INJURY TO CLARK-PINKNEY.

The *corpus delicti* rule precludes conviction based solely on the accused's confession.³ *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010).

A factfinder may not consider an accused person's statements unless the prosecution *prima facie* establishes the *corpus delicti* of each element of the charged crime by evidence independent of those statements. *Dow*, 168 Wn.2d at 255; *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006).

² Mr. Pinkney's action of raising his fist in Clark-Pinkney's face may have constituted simple assault. But the state did not charge him with assault. CP 1.

³ If the state does not provide independent evidence to corroborate each element of a charged crime under the rule of *corpus delicti*, the evidence is insufficient to convict. *Dow*, 168 Wn.2d at 254. Issues regarding the sufficiency of the evidence may be raised for the first time on appeal. *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998). The admissibility of the accused's statement under the *corpus delicti* rule is a mixed question of law and fact, reviewed *de novo*. *Dow*, 168 Wn.2d at 249.

If the state fails to provide corroborating evidence for each element, the conviction must be reversed for insufficient evidence. *Dow*, 168 Wn.2d at 254

The state's independent evidence must corroborate "*the specific crime* with which the defendant has been charged." *Brockob*, 159 Wn.2d at 329 (emphasis in original). To prove a *prima facie* case, the state's independent evidence of the *corpus delicti* must be consistent with guilt and inconsistent with a hypothesis of innocence. *Brockob*, 159 Wn.2d at 329.

Here, Mr. Pinkney's own admission to raising his fist was the only evidence that he threatened to injury Clark-Pinkney. Because there was no independent evidence that Mr. Pinkney "threatened" to harm Clark-Pinkney, the evidence was insufficient under the rule of *corpus delicti*. *Dow*, 168 Wn.2d at 254. Mr. Pinkney's conviction must be reversed. *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS UPON MR. PINKNEY, WHO IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should

it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016).⁴

Appellate costs are “indisputably” discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Pinkney indigent at the end of the trial proceedings. CP 71-72. That status is unlikely to change. Mr. Pinkney is sixty-seven years old. RP (5/19/16) 122. He lives off of Social Security and Veteran’s Administration benefits alone. RP (5/19/16) 128; CP 68.

The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

The prosecutor committed flagrant, ill-intentioned misconduct by misstating the law to the jury. The state presented insufficient evidence to convict Mr. Pinkney of misdemeanor harassment. The state also failed to

⁴ Division II’s commissioner has indicated that Division II will follow *Sinclair*.

produce independent evidence under the rule of *corpus delicti*. Mr. Pinkney's conviction must be reversed.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Pinkney who is indigent.

Respectfully submitted on November 8, 2016,



Skylar T. Brett, WSBA No. 45475
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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Seattle, Washington on November 8, 2016.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

ELLNER LAW OFFICE

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