

**NO. 49261-0**

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

STATE OF WASHINGTON, RESPONDENT

v.

GARY PINKNEY, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Edmund Murphy, Judge

No. 15-1-04455-1

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**BRIEF OF RESPONDENT**

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

1. Whether the State adduced sufficient evidence for a jury to find defendant guilty of misdemeanor harassment?
2. Whether defendant has failed to meet his burden to show prosecutorial error that was flagrant, ill-intentioned, and could not have been cured by an instruction to the jury?
3. Whether defendant's unpreserved corpus delicti claim fails when the State presented sufficient evidence that *prima facie* established the corpus delicti?
4. Should this Court make a determination as to whether appellate costs are appropriate before the State seeks enforcement of costs if the State is to prevail on appeal?

B. STATEMENT OF THE CASE.

1. Procedure

On November 9, 2015, the Pierce County Prosecutor's Office (State) charged Gary Pinkney with one count of felony harassment. CP 1. During trial, the State presented testimony from the victim, Jill Clark-Pinkney, and the three Tacoma Police Officers that responded to the incident. 5/18/16RP 81, 94, 103, 111. Defendant testified at trial but called no other witnesses. 5/19/16RP 131-140. Defendant made no objections during the State's closing arguments. 5/19/16RP 143-152, 156-158.

Defendant adopted the State's proposed jury instructions, which included the lesser-included offense of harassment. 5/18/16RP 149, 5/19/16RP 142. On May 19, 2015, a jury found defendant guilty of the lesser included offense of harassment. CP 58. The jury also found the defendant and victim were members of the same family or household. CP 59. On June 3, 2016, defendant was sentenced to 364 days with 334 days suspended. CP 62. Defendant filed a timely notice of appeal on June 15, 2016. CP 65.

2. Facts

On November 7, 2015, defendant was living with his ex-wife, Jill Clark-Pinkney at her house in Pierce County. 5/18/16RP 116-117. That morning, Clark-Pinkney went into her living room where defendant was sleeping on the couch. 5/18/16RP 118. She asked him to leave the room so she could do some work. 5/18/16RP 118. When defendant got up from the couch to let his dog inside, Clark-Pinkney sat on the couch to prevent him from returning. 5/18/16RP 119. Defendant became angry and went down the hallway to his bedroom while yelling and calling Clark-Pinkney names. 5/18/16RP 120.

Clark-Pinkney heard defendant talking on speaker phone to someone. 5/18/16RP 122. After about an hour, she saw there were overhead lights on in the bedroom so she walked back there, reached in the bedroom, and turned them off. 5/18/16RP 122. Then she heard defendant start screaming and realized he was still on the phone.

5/18/16RP 123. Clark-Pinkney heard defendant tell the person on the phone, "I am going to kill her." 5/18/16RP 124-125. After that, defendant came flying out of the bedroom in a rage, screaming, calling Clark-Pinkney names, and saying "I am going to kill you." 5/18/16RP 125. Clark-Pinkney got her phone, called defendant's daughter and told her what was going on. 5/18/16RP 126. Defendant came into the kitchen where Clark-Pinkney was, got in her face in a rage, threatened to punch her in the face, and stated he was going to kill her. 5/18/16RP 127. Clark-Pinkney went to the bathroom and locked herself in. 5/18/16RP 131.

Tacoma Police Officers Leah Mixon, Brandon Crockcroft, and Danilo Bambico were dispatched to Clark-Pinkney's house for a welfare check in response to a call from the crisis line with whom defendant had been speaking. 5/18/16RP 86. Defendant was still on the phone with the crisis line when he opened the door and let the Officers in. 5/18/16RP 88. Officer Bambico contacted Clark-Pinkney while Officer Mixon contacted defendant. 5/18/16RP 88-89. Officer Crockcroft observed the contact between Mixon and defendant. 5/18/16RP 97. Defendant told Officer Mixon that he was afraid he might kill Clark-Pinkney. 5/18/16RP 89. Officer Crockcroft heard defendant state he wanted to harm Clark-Pinkney. 5/18/16RP 98-99. Defendant was arrested and read his rights, after which he continued to admit he said he would kill his ex-wife. 5/18/16RP 90.

In his testimony at trial, defendant denied making any threats to Clark-Pinkney but stated he had his fist clenched in her face and growling. 5/19/16RP 131, 134. He also denied telling officers he made any threats. 5/19/16RP 133. Defendant testified that he did tell the crisis line that he was concerned he was going to kill his wife. 5/19/16RP 138.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR A JURY TO FIND DEFENDANT GUILTY OF MISDEMEANOR HARASSMENT.

Evidence is sufficient to support a conviction if any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* All inferences must be drawn most strongly against the defendant. *Id.* Criminal intent may be inferred from the conduct where "it is plainly indicated as a matter of logical probability." *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

RCW 9A.46.020 proscribes conduct constituting harassment. The statute requires the State to prove the following elements beyond a reasonable doubt:

(1) That on or about November 7, 2015, the defendant knowingly threatened to cause bodily injury immediately or in the future to Jill Clark-Pinkney; (2) That the words or conduct of the defendant placed Jill Clark-Pinkney in reasonable fear that the threat 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 50; *See* RCW 9A.46.020(1)(a)(i),(b).

Here, the evidence showing defendant committed the crime of harassment is overwhelming. The State presented sufficient evidence to prove defendant knowingly threatened to cause bodily injury to Jill Clark-Pinkney. The court's instructions to the jury defined knowingly as

A person knows or acts with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact circumstance or result. It is not necessary that the person know that the fact circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 44.

The State presented significant evidence to support the first element that defendant knowingly threatened Clark-Pinkney. The victim, Clark-Pinkney, testified to multiple threats defendant made against her.

She testified that defendant was in her face in a rage when he said, "I'm going to punch you in the face. I am going to put my hands around your neck and this time I am going to kill you." 5/18/16RP 127, 128. She heard defendant say he was going to kill her while he was talking on the phone. 5/18/16RP 124. She saw defendant come "flying out of the bedroom he was in," after which he screamed at her in a very agitated state, called her names, and said, "I am going to kill you." 5/18/16RP 125. Clark-Pinkney's testimony showed defendant made threats to harm her in a way that would, at the very least, cause bodily injury. Defendant repeated the statements regarding harming Clark-Pinkney and there is nothing in the record to suggest defendant was unaware he was making those statements. A reasonable person in the same situation would believe defendant's statements about punching and killing Clark-Pinkney were threats and that defendant knowingly made those threats.

The State also presented sufficient evidence to support the second element that defendant's words or conduct placed Clark-Pinkney in reasonable fear that he would carry out his threats. Clark-Pinkney testified about a prior incident in which defendant put his hands around her neck and threw her down to the ground. 5/18/16RP 129. Defendant referenced that prior incident when he told Clark-Pinkney "this time I will kill you." 5/18/16RP 128. Clark-Pinkney thought of that prior incident when defendant made the threats in this incident and that added to her fear he would carry out his threats to kill and physically harm her. 5/18/16RP

128-129. Clark-Pinkney described defendant as being in a rage and agitated, screaming loudly, and “pretty out of control.” 5/18/16RP 125-126. She called defendant’s daughter to tell her defendant was out of control and that she was afraid in an attempt to get help, then locked herself in the bathroom. 5/18/16RP 126-127. Clark-Pinkney’s testimony showed her fear that defendant was going to follow through on his threats was reasonable based on defendant’s demeanor when he made the threats and based on the prior incident in which he physically harmed her.

As to the third element that defendant acted without lawful authority, the State met its burden of proof. There was no testimony or evidence indicating defendant had any authority to threaten Clark-Pinkney; therefore, a jury could reasonably infer defendant acted without lawful authority.

As to the fourth element, the State presented sufficient evidence that the threats were both made and received in the state of Washington. Clark-Pinkney, Officer Mixon, and Officer Cockcroft all testified that the incident took place in Pierce County, Washington. 5/18/16RP 87, 97, 117.

Additionally, testimony adduced by the State from three Tacoma Police Officers who responded to the incident supported Clark-Pinkney’s account of the threats and that she reasonably feared defendant would carry out his threats. Tacoma Police Officer Leah Mixon testified defendant told her he was at his wit’s end with Clark-Pinkney and he was afraid he might kill her. 5/18/16RP 89. Defendant continued to admit to

Mixon after he was arrested and read his rights that he stated he would kill his ex-wife. 5/18/16RP 90. Mixon took defendant's threats seriously. 5/18/16RP 89-90. Tacoma Police Officer Brandon Cockcroft testified he heard defendant say he wanted to harm Clark-Pinkney. 5/18/16RP 98-99. He observed defendant's demeanor as agitated and stressed. 5/18/16RP 99. Tacoma Police Officer Danilo Bambico's testimony that Clark-Pinkney was in the bathroom when he contacted her was consistent with Clark-Pinkney's statement that she locked herself in the bathroom during the incident. 5/18/16RP 107.

Finally, defendant's own testimony did more to support the State's evidence than to undermine it. He admitted he was in Clark-Pinkney's face with his fist clenched and growling. 5/19/16RP 131, 134. He testified, "I was so angry, I was seeing red. I didn't want to put myself or anybody else in danger." 5/19/16. These statements were consistent with Clark-Pinkney's testimony that he was in her face and in a rage. 5/18/16RP 127. Defendant's testimony also demonstrated the reasonableness of Clark-Pinkney's fear that defendant would cause her harm, even defendant feared he would harm her and believed he needed to be removed from the situation to avoid doing so. 5/19/16RP 133. Finally, the fact that defendant called a crisis line, to whom he expressed concern that he was going to kill his wife, showed that the threats he made were done so knowingly. 5/19/16RP 138.

Defendant's argument appears to focus only on evidence presented through his own testimony and ignores the evidence adduced by the State. Brief of App. 5, 12-13. He has provided no authority as to why the State's evidence should be disregarded and appears to argue that because the jury found defendant guilty of the lesser included charge, the testimony of the victim and three responding officers should not be considered when evaluating the sufficiency of the evidence. Brief of App. 5-6, 12-13. The test for a challenge to the sufficiency of the evidence is not whether a jury did find the defendant guilty but whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

In taking all of the evidence adduced at trial, including testimony from the victim and the responding police officers that defendant threatened Clark-Pinkney and his threats were taken very seriously, as well as the defendant's testimony, a rational trier of fact could find defendant guilty of harassment.

2. DEFENDANT HAS FAILED TO SHOW ANY IMPROPER ARGUMENT OR ONE SO PREJUDICIAL THAT IT COULD NOT BE CURED BY AN INSTRUCTION.

To prevail on a claim of prosecutorial error, a defendant must show the prosecutor's conduct was both improper and had a prejudicial effect. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). It is improper

for a prosecutor to misstate the law to the jury. *State v. Swanson*, 181 Wn. App. 953, 959, 327 P.3d 67 (2014).

Where defendant fails to object at trial, defendant on appeal must establish the prosecutor's conduct was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" that cannot be cured by a jury instruction. *State v. Sakellis*, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011). "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." *State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). To show prejudice, the defendant must show a substantial likelihood that the alleged improper statements affected the jury's verdict. *Dhaliwal*, 150 Wn.2d at 578 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

Defendant did not object to statements made by the prosecutor during closing argument that defendant now, on appeal, argues were improper. 5/19/16RP 149. He must therefore satisfy the higher burden of showing flagrant and ill-intentioned conduct that could not have been cured. *Sakellis*, 164 Wn. App. at 184. Defendant contends the State committed misconduct during closing by arguing the jury could convict Mr. Pinkney of harassment based purely on his admission that he had raised a fist in Clark-Pinkney's face. Brief of App. 9. Defendant's contention is incorrect for two reasons. First, the statement made by the State did not inform the jury it could convict based solely on the one act

but rather, “[t]hat act alone, where 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.” 5/19/16RP 149. The statement does not suggest the jury need only consider defendant’s admission that he raised his fist in Clark-Pinkney’s face. The next statement made by the State specifically asked the jury to consider all of the evidence:

A lot of this – actually, all of this evidence that you have to consider is testimony. The evidence is what the people who are there saw and experienced, what Ms. Clark-Pinkney saw and experienced, what the police officer saw and experienced, what the defendant saw and experience, because you can consider what he said, too.

5/19/16RP 149. Defendant’s claim is entirely incorrect when the actual closing argument is reviewed.

Second, defendant’s argument relies on a misguided interpretation of the applicable statute. The plain language of the statute for harassment is unambiguous:

(1) A person is guilty of harassment if: (a) Without lawful authority, the person knowingly threatens: (i) To cause bodily injury immediately or in the future to the person threatened or to any other person ... (b) The person *by words or conduct* places the person threatened in reasonable fear that the threat will be carried out. “Words or conduct” includes, in addition to any other form of communication or conduct, the sending of electronic communication.

RCW 9A.46.020(1)(a)(i), (b) (emphasis added). When the plain language of a statute is unambiguous, the legislative intent is apparent and courts will not construe the statute otherwise. *State v. Cooper*, 156 Wn.2d 475,

479, 128 P.3d 1234 (2006). Nothing in the plain language of the statute suggests that verbal statements are the only means for committing the crime of harassment. To the contrary, the statute includes a definition of “words or conduct” as applied to harassment which is “any other form of communication *or conduct*.” RCW 9A.46.020(1)(b) (emphasis added). It is entirely unnecessary to look at the legislative intent as defendant has done when the statute itself is so inherently plain on its face. Regardless, defendant is also unable to show that any misstatement of law would have resulted in flagrant and ill-intentioned conduct that could not be cured. The jury was properly instructed on the law and that the lawyers’ statements are not evidence. CP 37. A jury is presumed to follow the court’s instructions. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Defendant has failed to show the State committed any misconduct in its closing argument, let alone any that was so flagrant and ill-intentioned that defendant suffered “enduring and resulting prejudice.” *Sakellis*, 164 Wn. App. at 184.

3. DEFENDANT’S UNPRESERVED CORPUS DELICTI CLAIM FAILS AS THE STATE PRESENTED SUFFICIENT EVIDENCE THAT PRIMA FACIE ESTABLISHED THE CORPUS DELICTI.

Corpus delicti is a judicially created rule of evidence which sets the standard for laying the proper foundation before admitting a defendant’s confession at trial. *State v. Cardenas-Flores*, 194 Wn. App. 496, 507, 374 P.3d 1217 (2016); see *City of Bremerton v. Corbett*, 106

Wn.2d 569, 576, 723 P.2d 1135 (1986). “The corpus delicti rule is not mandated by either the Washington Constitution or the United States Constitution.” *Cardenas-Flores*, 194 Wn. App. at 508 (citing *State v. Dow*, 168 Wn.2d 243, 249-50, 227 P.3d 1278 (2010)).

- a. Defendant’s corpus delicti claim was not preserved as he did not raise the issue during trial.

An issue that is not timely raised by a criminal defendant at trial is waived unless it results in manifest constitutional error. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011); RAP 2.5(a). Insistence on issue preservation avoids unnecessary appeals and undesirable retrials by safeguarding the opportunity to correct errors at trial. *Id.* at 305. An error in admitting evidence subject to the corpus delicti rule is not such that it is a manifest error affecting a constitutional right. *Cardenas-Flores*, 194 Wn. App. at 509. Failure to move to suppress evidence at trial constitutes a waiver of the right to have it excluded. *State v. Lee*, 162 Wn. App. 852, 857, 259 P.3d 294 (2011). It follows that failure to timely raise corpus delicti waives its review. *State v. C.D.W.*, 76 Wn. App. 761, 763-64, 887 P.2d 911 (1995).

Defendant waived his corpus delicti claim when he failed to assert it at trial. Defendant made no objection during trial to the admission of the statements he made to officers. 5/18/16RP 76. He made no argument as to why the statements should not be admitted during the CrR 3.5 hearing but

instead deferred to the court on the issue. 5/18/16RP 76. Defendant raises his corpus delicti claim now for the first time on appeal. Brief of App. 12-13. His failure to timely raise a corpus delicti claim denied the trial court an opportunity to correct any alleged error in admitting his statements. Defendant's untimely claim has therefore been waived.

- b. The State adduced sufficient independent evidence in compliance with corpus delicti's minimal foundation showing of corroborative proof.

Regardless, even if this Court were to review the issue, defendant's claim still fails. Washington's corpus delicti rule requires proof of a criminal act and cause. *State v. Angulo*, 148 Wn. App. 642, 653, 200 P.3d 752 (2009). It is the State's burden to establish these requirements on a *prima facie* basis which, in this context, means that the evidence must preponderate in favor of the existence of a criminal act or agency. *Id.* When there is independent evidence of the crime, the defendant's confession may "be considered therewith and the corpus delicti established by a combination of the independent proof and the confession." *State v. Baxter*, 134 Wn. App. 587, 596, 141 P.3d 92 (2006) (quoting *State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996)). The independent evidence need not establish the corpus delicti beyond a reasonable doubt or even by a preponderance of proof. *Aten*, 130 Wn.2d at 656. Evidence of "sufficient circumstances which would support a logical

and reasonable inference of the facts sought to be proved” establishes the corpus delicti. *Id.*

Defendant’s confession was properly admitted because the State presented sufficient evidence to establish the corpus delicti for the crime of harassment with proof independent of the confession. *See State v. Powers*, 124 Wn. App. 92, 102, 99 P.3d 1262 (2004). As demonstrated in the first section, the State presented testimony from the victim, Jill Clark-Pinkney, sufficient to prove defendant knowingly threatened her. 5/18/16RP 124-129. Clark-Pinkney’s testimony that defendant threatened to punch her in the face, put his hands around her neck, and kill her, along with her testimony regarding the prior incident of violence, more than supports a logical and reasonable inference that defendant committed the crime of harassment. Her testimony *prima facie* established corpus delicti thereby allowing for the admission of defendant’s confession.

4. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT OF THE TRIAL COURT AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL AND WERE TO SEEK ENFORCEMENT OF COSTS.

Under RCW 10.73.160, an appellate court may order the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Because the State has yet to file a cost bill, this Court should decline to determine an award of costs at this time. If defendant does not prevail, and if the State files a cost bill, defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction and to decline to review defendant's objection to appellate costs until and if the State substantially prevails and the State submits a cost bill.

DATED: March 7, 2017.

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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.

3.7.17 Chelsea Miller  
Date Signature

**PIERCE COUNTY PROSECUTOR**  
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