

FILED
Court of Appeals
Division II
State of Washington
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No. 49845-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO BRADLEY,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The State did not prove Mr. Bradley committed felony harassment against a criminal justice participant beyond a reasonable doubt.

The State charged Mr. Bradley with two counts of felony harassment based upon statements he made to a police officer after he was placed under arrest. CP 3-4; RP 47. The State alleged in count one that Mr. Bradley committed felony harassment for making a threat to kill. CP 3. In count two, the State alleged Mr. Bradley committed felony harassment because the threat was directed at a police officer who was performing his official duties at the time of the threat, or in response to an action taken or decision made by the officer during the performance of his official duties. CP 4.

Following a bench trial, the judge found Mr. Bradley guilty on both counts, but the court later vacated count one on the State's motion. CP 11, 12, 35, 36. This left only count two, involving a threat directed at a criminal justice participant.

It was undisputed at trial, and is undisputed on appeal, that Mr. Bradley did not have the current ability to carry out any threat made because he was handcuffed and in the back of a police vehicle at the time. RP 35; Resp. Br. at 7. Pursuant to RCW 9A.46.020(b),

threatening words directed at a criminal justice participant “do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.”

As Mr. Bradley discussed in his opening brief, this language is unambiguous. *See* Op. Br. at 7-8; *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Because the statute is plain on its face, the court must give effect to its plain meaning. *See Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

The State relies on *State v. Boyle* for its claim that, despite using the word “and,” the legislature intended for threats directed at a criminal justice participant to constitute harassment if the individual had the present *or* future ability to carry out the threat. 183 Wn. App. 1, 11, 335 P.3d 954 (2014). However, the State does not address the glaring deficiencies of the *Boyle* analysis, which were discussed in Mr. Bradley’s opening brief. *See* Op. Br. at 7-13.

For instance, the State relies on the Court’s determination in *Boyle* that reading the statute to require both the present and future ability to carry out the threat would produce “absurd results.” 183 Wn. App. at 12; Resp. Br. at 10-11. But it fails to explain how the plain

reading of the statute is *inconceivable*, as is required to apply the absurd results canon of statutory construction. *See Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.2d 892 (2011) (a result may be held absurd only where it is inconceivable, given the separation of powers concerns raised when the court disregards the plain meaning and changes statutory language).

Indeed, the effect of the plain language of the statute is not inconceivable. An individual commits a gross misdemeanor when he knowingly threatens someone.¹ However, the statute raises the offense to a class C felony where additional conditions exist, including where the individual harasses a criminal justice participant. RCW 9A.46.020(2)(b)(iii)-(iv). Because the statute raises all threats, rather than just threats to kill, against a criminal justice participant to a felony, it is conceivable the legislature means what it said: that the conditions have not been met if it is apparent to the criminal justice participant the

¹ It is gross misdemeanor to knowingly threaten: “(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 physical or mental health or safety...” RCW 9A.46.020.

In contrast, a threat “to kill the person threatened or any other person” is a class C felony. RCW 9A.46.020(2)(b)(ii).

individual did “not have the present and future ability to carry out the threat.” RCW 9A.46.020(2)(b); *see also* Op. Br. at 12-13.

The State’s claim that rewriting the statute is appropriate because the *Boyle* interpretation is “consistent” with the statutory definition of harassment misapprehends the absurd results canon. *See* Resp. Br. at 11. A court may not disregard the plain language of a statute simply because the rewritten version remains consistent with the remainder of the statute. *See* Resp. Br. at 11. Because the effect of the plain language is not inconceivable, it is not absurd. *Five Corners Family Farmers*, 173 Wn.2d at 311; *see* Op. Br. at 12-13. This Court must give effect to the plain meaning of the statute.

In addition, the State ignores the rule of lenity, which requires the Court to construe the statute strictly against the State and in favor of Mr. Bradley. *State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015). This critical safeguard against corruption and the State’s abuse of power permits the court to interpret a criminal statute adversely to a defendant only where “statutory construction ‘clearly establishes’ that the legislature intended such an interpretation.” *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013). Because the plain language favors Mr. Bradley’s interpretation, this has not been established here.

This Court should give effect to the legislature’s plain, unambiguous statement and find that RCW 9A.46.020(2)(b) requires the State to prove it was apparent to the officer that the individual had the present *and* future ability to carry out the alleged threat. Because it is undisputed the evidence did not show Mr. Bradley had the present ability to carry out the threat, this Court should reverse and dismiss. *See* Op. Br. at 13-14; Resp. Br. at 7.

2. The State’s request for affirmative relief, to reinstate the conviction on count one, is not properly before this Court and should be denied.

The appropriate remedy on appeal is reversal and dismissal of count two. The State’s request for additional affirmative relief, to reinstate Mr. Bradley’s conviction on count one, is not properly before this Court and should be rejected. *See* Resp. Br. at 15.

RAP 2.4(a) provides:

The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

This Court has found “[a] notice of cross review is essential if the respondent ‘seeks affirmative relief as distinguished from the urging of additional grounds for affirmance.’” *Robinson v. Khan*, 89

Wn. App. 418, 420, 948 P.2d 1347 (1998) (quoting *Phillips Building Co. v. An*, 81 Wn. App. 696, 700 n. 3, 915 P.2d 1146 (1996)). “While RAP 2.4(a) does not limit the scope of argument a respondent may make, it qualifies any relief sought by the respondent beyond affirmation of the lower court.” *State v. Sims*, 171 Wn.2d 436, 442, 256 P.3d 285 (2011). Where no cross-appeal has been filed, the issue is not properly before the Court, and will not be reviewed on appeal. *Robinson*, 89 Wn. App. at 420.

The State’s request to reinstate Mr. Bradley’s conviction on count one is a request for affirmative relief. It did not file a cross-appeal and has not shown that reinstatement of count one is “demanded by the necessities of the case.” As this Court has noted, “[a]lthough appellate courts may grant affirmative relief to a respondent who did not file a cross appeal ‘if demanded by the necessities of the case,’ we are unaware of any published case reversing the trial court in favor of the respondent absent a cross appeal.” *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 787, 271 P.3d 356 (2012).

Indeed, the relief requested by the State is an attempt to remedy an error it invited. “The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal.” *State*

v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). As the State concedes, it chose to file a motion to vacate count one in the trial court despite the fact that both counts are class C felonies with the same potential for punishment. Resp. Br. at 18; CP 11-12. There is no question it created the error about which it now complains.

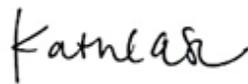
Having invited the error, the State cannot show reinstatement of the conviction it moved to dismiss is demanded by the necessities of the case. This Court should decline to consider the State's request for affirmative relief.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse Mr. Bradley's conviction.

DATED this 22nd day of November, 2017.

Respectfully submitted,



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DIVISION TWO**

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| STATE OF WASHINGTON, |) | |
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| Respondent, |) | |
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| ANTONIO BRADLEY, |) | |
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| Appellant. |) | |

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