

NO. 50291-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SAMUEL JAMES MCHERRON, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 16-1-02582-1

Brief of Respondent

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

Does ample evidence support the reasonable fear element of defendant's felony harassment conviction when any rational officer would wisely fear the imminent threat he posed? For he was an enraged able-bodied man in a fighting stance within striking distance of the lone deputy he threatened to attack as the deputy struggled to protect defendant's wife from him amid an escalating episode of domestic violence.

B. STATEMENT OF THE CASE

1. Facts

On June 22, 2016, Deputy Nielson was serving Pierce County as a uniformed officer on routine patrol in a marked car. 3RP 171-173. As he pulled into a transit center parking lot, he heard a woman scream, "Let go of me," "Stop hitting me," "Someone help me." 3RP 172, 203. She continued to scream while he exited his car to investigate. RP 175. He saw a man, later identified as defendant, grabbing then pulling the arm of a woman later identified to be defendant's wife, Kristina McHerron.¹ 3RP 175, 182. She tried to pull away. 3RP 175-77, 182.

¹ Kristina McHerron will be referred to by her first name for clarity. No disrespect intended.

Nielson identified himself as a police officer. 3RP 186. He directed them to separate. 3RP 186. He told defendant to sit on the curb. 3RP 186. Defendant refused. 3RP 186. He waived his arms about while screaming, "Fuck off," "What are you going to do, shoot me?" *Id.* Nielson suspected he or Kristina were about to be attacked. 3RP 187. So he called for backup, then tried to deescalate defendant; biding time for help to arrive. *Id.* Nielson positioned himself between defendant and Kristina. 3RP 186, 187. He repeatedly told defendant to sit on the curb. 3RP 188. But defendant would not obey. 3RP 189.

Instead, defendant returned his attention to Kristina. 3RP 188. He moved toward her several times. 3RP 188. Nielson intercepted the third advance by pushing him back. 3RP 188-189. Defendant grew increasingly agitated. *Id.* He threw off his backpack, jacket, shirt and assumed a "bladed" fighting stance with clenched fists. RP 190. He said he was going to "kick [Nielson's] ass." 3RP 189, 191. Nielson's backup had yet to arrive. *Id.* Defendant appeared able to make good on the threat, for he was "reasonably fit with ...above-average ... muscle," roughly matching Nielson in height, weight and age. 3RP 192. Those attributes led Neilson to predict he "was going to be in for a knock-down drag-out fight" if he tried to place defendant in handcuffs before backup arrived. *Id.*

Nielson drew his taser. 3RP 193. Defendant twisted to expose his back. 3RP 197. Nielson fired taser darts from 10 feet away. RP 193-194. They struck defendant's back. 3RP 194-196. A 5 second electric shock was

administered. *Id.* Defendant barely flinched. RP 196-97. With his fists still clenched, he looked back at Nielson and asked, "Is that all you fuckin got?" *Id.* Nielson chanced wrestling him to the ground. *Id.*

A few other officers finally arrived. 3RP 199. They ordered defendant to surrender his hands. 3RP 200. As they struggled to subdue him, he screamed, "Get the fuck off me," "What are you doing?" *Id.* He buried his hands beneath his body to avoid being cuffed. *Id.* The struggle ensued for 15 to 20 seconds until the officers were able to restrain him. *Id.*

Defendant accused Nielson of lying about their encounter. 3RP 251-268. According to defendant, Nielson used excessive force to interrupt the argument defendant was having with his wife. 3RP 235-257. That story was contradicted by a statement she gave Deputy Robinson. 2RP 123. She said defendant hit her, pulled her, threw water on her and tried to force her to return home. 2RP 185-86. She cried. 3RP 119-120, 184. Her hair and clothing were disheveled; she seemed frightened. *Id.*

2. Procedure

Defendant was charged with felony harassment, assault in the fourth degree and resisting arrest. CP 3-4. The jury convicted him as charged. CP 66-69. Only the evidence's sufficiency to prove the reasonable fear element of his harassment conviction is challenged. Error is not assigned to his other convictions. His notice of appeal was timely filed. CP 93.

C. ARGUMENT

1. THE REASONABLE FEAR ELEMENT OF DEFENDANT'S HARASSMENT CONVICTION IS SUPPORTED BY AMPLE EVIDENCE HE WAS POISED IN A FIGHTING STANCE WITHIN STRIKING DISTANCE OF THE LONE DEPUTY HE THREATENED TO ATTACK AS THE DEPUTY TRIED TO PROTECT DEFENDANT'S WIFE AMID AN ESCALATING DV INCIDENT.

Our communities expect police to be more than spectators. *State v. Young*, 135 Wn.2d 498, 511-12, 957 P.2d 681 (1998). It is well established effective law enforcement requires police to interact with citizens on the street. *Id.* It is in those encounters officers expose themselves to the greatest risk for the common good. "[I]n the last decade, more than half a million police were assaulted in the line of duty. More than 160,000 were injured, and 536 were killed—the vast majority while performing routine ... tasks like ... responding to domestic disturbance calls." *Gonzales v. City of Anaheim*, 747 F.3d 789, 803-03 (9th Cir. 2014) (citing *Mattos v. Agarano*, 661 F.3d 433, 453 (9th Cir. 2011) (concurring and dissenting in part)).

Defendant claims the evidence cannot support the reasonable fear element of his felony harassment conviction. One commits the crime of felony harassment if, without lawful authority, one knowingly threatens to cause bodily injury to a criminal justice participant, immediately or in the future, by words or conduct that place the participant in reasonable fear the

threat will be carried out. RCW 9A.46.020(1)(a)(i), (b). The reasonable fear element contains a subjective and objective component. *State v. Alvarez*, 74 Wn.App. 250, 260, 872 P.2d 1123 (1994).

Deputy Nielson's unchallenged testimony about his fear makes the subjective component a verity on appeal; leaving this Court to decide if his fear was objectively reasonable. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Equally reliable direct and circumstantial evidence of the dire situation that induced his fear is reviewed *de novo*; however, each fact supporting the element must be accepted as true with every attending inference. *See State v. White*, 150 Wn.App. 337, 342, 207 P.3d 1278 (2009). Conflicting inferences are resolved in favor of the State. *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482 (1992). Credibility assessments are unreviewable. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

- a. A reasonable officer dropped into the chaos Nielson was called upon to confront without backup would fear defendant was poised to carry out his threat to attack.

As applied to officers like Nielson, fear inspired by a threat must be a reaction reasonable criminal justice participants would share under the circumstances. RCW 9A.46.020(2)(b); 9A.46.020(4)(a). A verbal threat can constitute harassment if accompanied by the assailant's present or future ability to carry the threat out. *State v. Boyle*, 183 Wn.App. 1, 6-7, 335 P.3d

954 (2014). Such threats are measured against an objective standard, which assesses an assailant's words with his conduct within any relevant context capable of adding meaning to both. *Alvarez*, 74 Wn.App. at 260-261; *State v. J.M.*, 101 Wn.App. 716, 731-732, 6 P.3d 607 (2000).

A number of menacing attributes are recognized to induce fear that is objectively reasonable. Among them, an assailant's projection of extreme anger, belligerence or assaultive conduct toward the threatened officer. *See State v. Miller*, 71 Wn.2d 143, 146, 426 P.2d 988 (1967); *Boyle*, 183 Wn.App. at 9; *see also State v. Ellison*, 172 Wn.App. 710, 722, 291 P.3d 921 (2013); *State v. MacDicken*, 171 Wn.App. 169, 176, 286 P.3d 413 (2012); *State v. Cross*, 156 Wn.App. 568, 573, 584, 234 P.3d 288 (2010); *e.g., State v. Little*, 191 Wn.App. 1043 (2015 WL 9036274)² (reasonable fear where Little threatened to "beat [the officer's] ass" and "fuck [him] up" from striking distance). The reasonableness of fear can increase as distance between the assailant and threatened officer decreases. *E.g., Id.; Alvarez*, 74 Wn.App. at 262; *Boyle*, 183 Wn.App. at 9. This is true even where the assailant is restrained. *See Cross*, 156 Wn.App. at 573 (handcuffed offender can commit assaults through kicking, biting, or headbutting).

² GR 14.1(a) allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. Pursuant to GR 14.1(e), the unpublished opinions are attached.

Each of those recognized markers of a reasonably-feared threat is present in defendant's case. Defendant appeared to be mentally disposed to violence. For he threatened to attack Deputy Nielson in a screaming fit of bellicose rage. Only moments before Nielson saw him publically assault his own wife. Nielson's intervention enraged him. Responsive-antagonistic remarks punctuated defendant's refusal to comply with Nielson's directions. *Defendant must have momentarily forgotten how invulnerable he perceives police to be.* Perhaps it was because Nielson was unmistakably alone. This left him with the disadvantage of needing to divide his attention between defendant and Kristina, who could not be discounted as a potential threat if love or loyalty prompted her to enter the fray on her husband's behalf.

Defendant's assaultive conduct throughout the encounter made it reasonable to believe he was poised to attack. Despite being several times directed to separate from his wife, he persistently approached her. He recoiled into a "bladed" fighting stance with fists clinched at the ready rather than relent when Nielson repelled his third advance. Nielson's experience as an officer led him to conclude defendant was physically capable of making good on his threat. For Nielson perceived defendant's strength matched his own. That assumption was dramatically corroborated by defendant's imperviousness to being tased. And he could rapidly commit his strength to the assault he threatened by charging across the few feet separating him from the target of his threatened aggression. A foreseeably injurious result was reasonably feared.

The danger defendant posed exceeded the reasonable fear inspiring harm threatened in *Cross* and *Boyle*, where the assailants were handcuffed. Defendant was unrestrained in unconfined space as he stood ready to fight. In two unpublished cases, this Court recently decided threats issued during more comparable confrontations between civilians and police engendered reasonable fear on the part of the threatened officers. In *State v. Madarash*, the assailant also attempted to resist a lone officer.³ The officer likewise took Madarash to the ground to apply handcuffs. *Id.* And Madarash reacted as defendant did by refusing to surrender his hands while yelling: "You're a f***ing pig and I will kick your ass," "I'm gonna f***ing kill you." Both defendants retained an ability to access any weapons concealed on their person. *Id.* This Court held Madarash's ability to carry out his threat made the officer's fear reasonable. *Id.* The same result should follow here.

An analogous ruling issued in *State v. Popejoy*; however, the threat deemed sufficient to inspire reasonable fear was significantly more remote as it was conveyed over the phone.⁴ *Id.* Popejoy threatened to "shoot [an officer] on sight." This Court concluded the officer's fear was reasonable since Popejoy would not calm down, expressed persistent hostility toward the officer and possessed a future ability to execute the threat. Whereas, defendant posed an immediate threat to Nielson. Defendant even stripped off clothing that might inhibit his attack. Nielson's fear of it was reasonable.

³ *State v. Madarash*, 192 Wn.App. 1045 (2016 WL 687278, *3-4).

⁴ *State v. Popejoy*, 199 Wn.App. 1068 (2017 WL 3142710* 3-4).

- b. Defendant's claim that police officers cannot reasonably fear being harmed by civilians betrays an unfortunate failure to acknowledge or appreciate the *blood* officers too often shed to protect even ingrates from harm.

Defendant's challenge to the reasonable fear element depends on the indefensible premise officers equipped with firearms cannot reasonably fear being victimized by apparently unarmed civilians. *One wonders if he would say as much to the families of the fallen.* Despite courage and training and equipment, officers experience a death rate five times the national average, often due to being killed by civilians they pursued.⁵ DV incidents, like the one defendant committed, accounted for about 22 percent of line-of-duty deaths from 1996 to 2010.⁶ Washington's courts recognize DV incidents are inherently volatile situations that can quickly become lethal to anyone involved. *See State v. Schultz*, 170 Wn.2d 746, 750, 755-56, 248 P.3d 484 (2011); *Feis v. King County Sheriff's Dept.*, 165 Wn.App. 525, 548, 267 P.3d 1022 (2011). Such incidents have resulted in hundreds of thousands of assaulted officers. *Gonzalez*, 747 F.3d at 803-04.

Pierce County has lost too many officers to precisely the type of DV and daytime encounters defendant claims they cannot reasonably fear. We are approaching the anniversary of Tacoma Police Officer Jake Gutierrez's

⁵ *Tiesman HM, Hendricks SA, Bell JL, et al. Eleven years of occupational mortality in law enforcement: the census of fatal occupational injuries, 1992–2002. Am J Ind Med. 2010;53:940–9.*

⁶ *FBI. Law enforcement officers killed and assaulted. Washington, DC: United States Department of Justice, 2004.*

murder. ER 201.⁷ He was killed by a DV offender upon responding to a domestic disturbance call shortly after 5 p.m. *Id.* We are also nearing the anniversary of the infamous morning Maurice Clemmons murdered four Lakewood officers at a coffee shop. *State v. Allen*, 178 Wn.App. 893, 900, 317 P.3d 494 (2014), *rev'd*, 182 364 (2015). A King County deputy was killed as officers tried to separate people at a party. *State v. Reyes-Brooks*, 165 Wn.App. 193, 197, 267 P.3d 465 (2011), 175 Wn.2d 1020 (2012); *see also e.g., In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 199, 53 P.3d 17 (2002). Officers have even been murdered by people already handcuffed. *State v. Ellison*, 172 Wn.App. 710, 722, 291 P.3d 921 (2013).

So despite their superior training and equipment, officers can be foreseeably injured or killed by people like defendant, especially during the kind of DV incident he created. It does not require much imagination to envision a different conclusion to this case. Defendant strikes. Momentum carries them to the ground. Luck or skill enables defendant to seize an early advantage. A struggle for Nielson's gun ensues. It ends up in defendant's hand. Enraged, defendant murders Nielson with his own gun. *Thankfully* that did not occur. So defendant retains an opportunity to move on with life upon release. Nielson got to go home—yet it defies reason to contend he could not have reasonably feared defendant's capacity to bring about the injurious end he threatened during their encounter.

⁷<http://www.odmp.org/officer/23044-police-officer-r-jake-gutierrez>; <http://www.Thenews-tribune.com/news/local/crime/article150091942.html>.

D. CONCLUSION

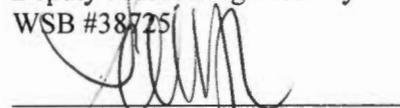
The reasonable fear element of defendant's harassment conviction was amply supported by evidence adduced at trial. A sad history of loss refutes his claim police cannot reasonably fear threats made by people like him. So his convictions should be affirmed.

RESPECTFULLY SUBMITTED: October 25, 2017

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SANAA NAGI
Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by E.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.

10-25-17 [Signature]
Date Signature

APPENDIX "A"

191 Wash.App. 1043

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,

v.

Matthew Jack LITTLE, Appellant.

No. 45942-6-II.

Dec. 15, 2015.

Appeal from Kitsap Superior Court; Hon. Kevin D. Hull,
J.

Attorneys and Law Firms

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Port Orchard, WA, for Respondent.

UNPUBLISHED OPINION

BJORGEN, A.C.J.

*1 A jury returned a verdict finding Matthew Jack Little guilty of felony harassment of a criminal justice participant. Little appeals his conviction, asserting that (1) the State failed to present sufficient evidence in support of his conviction, (2) the prosecutor committed misconduct during closing argument by commenting on his right to silence, (3) defense counsel was ineffective for failing to object to the prosecutor's improper comments on his right to silence, and (4) defense counsel was ineffective by indicating that he would refuse to ask Little any questions if Little exercised his constitutional right to testify.

We hold that the State presented sufficient evidence in support of Little's conviction and that the prosecutor did not commit misconduct during closing argument. We further hold, however, that Little has established that his defense counsel performed deficiently by preventing Little from exercising his constitutional right to testify, but that

the record is not sufficient to determine whether such deficient performance prejudiced Little. Accordingly, pursuant to *State v. Robinson*, 138 Wn.2d 753, 982 P.2d 590 (1999), we remand for an evidentiary hearing at which the trial court must determine whether defense counsel's deficient performance prejudiced Little.

FACTS

In 2008, Bremerton Police Sergeant William Endicott contacted Little at Little's residence in response to a 911 call. During this contact, Little became "extremely upset" with Endicott. Verbatim Report of Proceedings (VRP) at 15. Little also became upset with Endicott when Endicott and several other officers contacted him in 2009. Following those contacts, Endicott would occasionally see Little walking at a ferry terminal but did not interact with him.

On July 1, 2013, Endicott went to a Safeway grocery store to purchase a lottery ticket. Endicott stopped at the store on his way to work and was wearing his civilian clothing. While in line to purchase a lottery ticket, Endicott heard someone behind him say, "It is you." VRP (Dec. 11, 2013) at 25. Endicott turned around, recognized that the person speaking was Little, and said, "How you doing, Mr. Little?" VRP (Dec. 11, 2013) at 26.

Little responded, "You're not so tough without your gun and your badge." VRP (Dec. 11, 2013) at 30. Because Endicott had not interacted with Little for several years, he believed that Little was mistaking him for someone else and asked Little, "Are you sure you know who I am?" VRP (Dec. 11, 2013) at 30. Little replied, "You're [expletive] Endicott, and you're not so tough without a gun and a badge." VRP (Dec. 11, 2013) at 30-31. Little challenged Endicott to a fight, "got right in [Endicott's] face," and told Endicott that "[h]e'd find [him] one day and he'd beat [Endicott's] ass." VRP (Dec. 11, 2013) at 33-34. Endicott told Little that he was going to call the police, to which Little responded, "You ever try to arrest me again, and I'll [expletive] you up." VRP (Dec. 11, 2013) at 36. Endicott left the store and called the police. Based on this incident, the State charged Little with felony harassment of a criminal justice participant.

*2 At a September 17, 2013 omnibus hearing, Little requested the trial court to appoint him new counsel based

on a disagreement with defense counsel about Little's desire to testify at trial. In support, Little stated, "I want to take the stand. I want to speak the truth. [Defense counsel] has been disagreeable with that. So I got a problem with proceeding on right now." VRP (Sep. 17, 2013) at 4. When the trial court asked defense counsel if he believed he could continue representing Little, defense counsel stated, "I have nothing to add, Your Honor." VRP (Sep. 17, 2013) at 5. The trial court denied Little's request for the appointment of new counsel, noting that the trial was still over a month away.

At trial the State called one witness, Endicott, who testified consistently with the facts as stated above. Additionally, Endicott testified that he took Little's threats seriously. The State also presented security video footage showing the interaction between Little and Endicott at the Safeway store.

Little called one witness, Safeway employee Cali Mandak. Mandak testified that she was present during the interaction between Endicott and Little. Mandak stated that it appeared to her that Endicott and Little were engaged in a casual conversation that did not appear to be threatening. On cross-examination Mandak testified that, after Endicott left the store, Little told her, "People in law enforcement hide behind their badges" and that "[t]hey get away with things." VRP (Dec. 11, 2013) at 66. Mandak further testified that Little told her that he would like to get in a fight with the law enforcement officer, but only if the officer did not have his badge or gun. Following Mandak's testimony, the trial court excused the jury for a recess, and defense counsel stated that he intended to rest his case when the jury returned to the courtroom. After defense counsel announced his intention to rest his case, the following exchange occurred:

[Little]: Your Honor, I don't know why my counsel—even if I took the stand, he says he won't ask me any questions, so I guess I won't take the stand.

[Trial court]: [Defense counsel], do you need more time with Mr. Little?

[Little]: It's not going to change anything, sir.

[Trial court]: Okay. I'm asking [defense counsel].

[Little]: I'm sorry.

[Defense counsel]: We have discussed this at length, Your Honor.

[Defense counsel]: Well, the conflict here is this: He has the right to testify, but I have a—the tactical decision of what questions to ask him, and he wants to get into issues that I believe are either irrelevant or harmful to the theory of the case.

VRP (Dec. 11, 2013) at 68–69.

Following this exchange, and without further addressing Little's concern regarding his desire to testify, the trial court called the jury back into the courtroom. The defense and the State then rested their cases, and the trial court again excused the jury. While counsel and the trial court discussed jury instructions, Little again interjected to inform the trial court of his desire to testify, and the following exchange took place:

*3 [Little]: Your Honor, I want to exercise my right to testify. Whether my attorney doesn't want to question me or not, I'm willing to take on what the prosecutor says.

After hearing what is here, and all this is out there, at least I need to be able to look the jury in the eye ... and say this is my side. I did not approach Sergeant Endicott like it's all been led on to believe. Sergeant Endicott spoke to me first. I did nothing wrong in this case. I just told the man that you got no business talking to me. You're the reason I moved out of the city limits. And I—I don't approve of how the defense has handled this so far. Everything is running around. No. At least at this point after lunch and listening to these jury instructions and whatnot, I would like to exercise my right and testify.

[Trial court]: [Defense counsel], do you want to respond to those comments of your client in any way?

[Defense counsel]: Your Honor, I would move to reopen the defense case in chief.

....

[State]: Well, Your Honor, we went over this at some length. The defense rested. I released what is a potential rebuttal witness at this point. I guess before we make a decision—I'm not sure what the legal standard is for asking to reopen a case at this point. There's—

[Defense counsel]: The standard is abuse of discretion.....

[Trial court]: Based on the record before me, [defense counsel], I am going to deny your motion to reopen the case. I believe there has been an ample opportunity for you and your client to converse about whether or not he's going to testify.

Mr. Little your—

[Little]: Your Honor, when I—

[Trial court]: Mr. Little, please don't interrupt me. Please don't interrupt me, Mr. Little.

You've indicated a desire to testify at this point. You've made an objection to the strategy of counsel. At this point I'm satisfied that the matter—both parties have rested, and at this point I'm satisfied that the case should not be reopened. You have had an ample opportunity to discuss this issue with counsel, and so I'm going to deny the motion to reopen by [defense counsel].

[Little]: At least for the record, I continue to try, but he says, "No, I will not ask you a question. I don't want you on the stand." And I've always wanted to be on the stand.

[Trial court]: Okay.

VRP (Dec. 11, 2013) at 93–95. Before calling the jury back into the courtroom, the trial court made oral findings on the record, stating:

I want to make a record before we proceed further and bring the jury in for instructions and closing.

Mr. Little did indicate an earnest desire to testify in this matter this afternoon and requested that I permit the parties to reopen the case, specifically the defense to reopen their case. I am making a couple of findings:

One, the two witnesses that previously testified in this case, Ms. Mandak and Sergeant Endicott, were under subpoena. They were released upon the parties resting this morning and are no longer under the authority of the court or under subpoena powers; and therefore, I do find that there is a prejudice to the prosecution by reopening the case.

*4 [Defense counsel] also articulated this morning, for strategic reasons he would not be asking his client any questions should his client take the stand, and articulated that on the record as a matter of strategy.

Furthermore, we broke at 11:30. Mr. Little's request was [at] approximately 1:45. Over two hours had elapsed between the time of those discussions and when Mr. Little had asked the Court to reopen the case. So I'm making those findings.

VRP (Dec. 11, 2013) at 99–100.

During closing argument, the State argued:

[State]: I don't know if Matthew Little feels justified. He didn't tell us—

[Defense counsel]: Objection.

[State]:—in his statement.

[Trial court]: Sustained.

[State]: He didn't tell us in his statement on the 1st of July 2013 when he was talking to Cali Mandak and when he was talking to Sergeant Endicott precisely why he was so angry. He didn't explain to either one of them, "This is the very particular reason why my anger is so high." But the point is, regardless of what it was that happened back in 2008 and 2009 that made him so angry, of all the things that he was entitled to do, he was not entitled to walk up to the detective and to threaten to beat his ass. He crossed the line.

VRP (Dec. 11, 2013) at 113–14. The jury returned a verdict finding Little guilty of felony harassment of a criminal justice participant.

After the jury returned its verdict, Little filed a pro se motion requesting in part to proceed with private counsel, or in the alternative, to proceed pro se, and for an evidentiary hearing on whether his constitutional right to testify had been violated by defense counsel's conduct.¹ The trial court held a hearing to address Little's motion on January 3, 2014. At the January 3 hearing, defense counsel stated:

If I were substitute counsel, after talking with Mr. Little and myself, I think that I would want to have me testify.

And I can tell the Court that what I'm going—I would testify to is that Mr. Little and I had a disagreement from the beginning about trial strategy, and that I didn't have any questions to ask Mr. Little on the stand that were going to further the trial strategy that I was pursuing. I don't know if that's error or not. And, quite frankly, at the—at the trial level, I'm not sure it makes that big of a difference. But at this point, I think that the appellate record is less than complete. And whether it's error or not I think is going to be determined by courts higher than this, but I would like Mr. Little to have a chance to have a complete record when he gets up there.

VRP (Jan. 3, 2014) at 7. The trial court granted Little's motion for the substitution of counsel, but deferred ruling on his motion for an evidentiary hearing.

After the trial court appointed substitute counsel, that counsel moved for a new trial, asserting that Little's prior defense counsel rendered ineffective assistance by preventing Little from testifying. At the hearing on January 24 addressing the motion for a new trial,² substitute counsel argued that Little's prior defense counsel coerced him into not testifying by indicating he would not ask Little any questions and, thus, Little's waiver of the right to testify was involuntary. The trial court denied the motion for a new trial, concluding that Little failed to meet either prong of the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Specifically, with regard to the deficient performance prong, the trial court stated:

*5 There is no evidence of force or coercion by trial counsel or the Court preventing the defendant from testifying. The defendant was informed that his lawyer would not ask him any questions, but the defendant made the choice, after knowing he had a right to testify, he could nevertheless take the stand and testify.

VRP (March 3, 2014) at 7. Regarding the prejudice prong, the trial court stated that Little had failed to proffer any evidence of what his testimony would have been and, thus, he could not establish a reasonable probability that the jury's verdict would have been different had he testified. Little appeals.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Little first contends that the State failed to present sufficient evidence in support of his conviction for harassment of a criminal justice participant. Specifically, Little contends that the State failed to prove that (1) he made a “true threat” and (2) Endicott reasonably feared he would carry out his threat. Br. of Appellant at 26. We disagree.

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420–21, 5 P.3d 1256 (2000). We interpret all reasonable inferences in the State's favor. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Direct and circumstantial evidence carry the same weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Credibility determinations are for the trier of fact and are not subject to review. *State v. Cantu*, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

To convict Little of harassment of a criminal justice participant as charged here, the State had to prove beyond a reasonable doubt that Little (1) without lawful authority (2) knowingly threatened to cause bodily harm immediately or in the future (3) to a criminal justice participant (4) because of actions taken or decisions made by the criminal justice participant while performing official duties, and that Little (5) by such words or conduct placed the criminal justice participant in reasonable fear that the threat would be carried out. RCW 9A.46.020(1)(a)(i), (2)(b)(iv). RCW 9A.46.020 criminalizes only “true threats.” *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). “A ‘true threat’ is ‘a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm ...’ of another person.” *Kilburn*, 151 Wn.2d at 43 (alteration in original) (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 207–08, 26 P.3d 890 (2001)).

“A true threat is a serious threat, not one said in jest, idle talk, or political argument.” *Kilburn*, 151 Wn.2d at 43. “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." *Kilburn*, 151 Wn.2d at 46. Thus, "whether a true threat has been made is determined under an objective standard that focuses on the speaker." *Kilburn*, 151 Wn.2d at 44. In light of these considerations, RCW 9A.46.020 "does not require that the State prove that the speaker intended to actually carry out the threat." *Kilburn*, 151 Wn.2d at 48.

*6 Here, the State presented evidence that Little approached Endicott and, without provocation, told Endicott, "You're not so tough without your gun and your badge," then got in Endicott's face, challenged him to a fight, and threatened to "beat [his] ass" and "fuck [him] up" at some point in the future. RP (Dec. 11, 2013) at 30–34, 36. Endicott testified that when Little made these threats, Little's manner in which he said them did not "appear to be humorous" and that he took Little's threats seriously. VRP (Dec. 11, 2013) at 31, 36. The State also presented evidence that Endicott and Little did not have a personal relationship with each other and that previous professional encounters between Little and Endicott in 2008 and 2009 left Little "extremely upset" with Endicott. VRP (Dec. 11, 2013) at 15. Taken together and viewed in a light most favorable to the State, this evidence was sufficient for a jury to find that a reasonable criminal justice participant in Endicott's position would view Little's threats as serious, and not simply made in jest. Accordingly, we hold that the State presented sufficient evidence from which a jury could find that Little expressed a "true threat" and that Endicott's fear that Little would carry out his threats was reasonable.

II. PROSECUTORIAL MISCONDUCT

Next, Little contends that the prosecutor committed misconduct during closing argument by commenting on Little's Fifth Amendment and article I, section 9 right to silence. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. Again, we disagree.

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists when there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). When a defendant

fails to object to the prosecutor's improper statements at trial, such failure constitutes a waiver of prosecutorial misconduct claims unless the prosecutor's statements were "so flagrant and ill-intentioned" that it caused an "enduring and resulting prejudice" incurable by a jury instruction. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). In determining whether a prosecutor's misconduct warrants reversal, we consider its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005). We review a prosecutor's remarks during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

The Fifth Amendment of the United States Constitution and article I, section 9 of the Washington Constitution "guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence." *State v. Knapp*, 148 Wn.App. 414, 420, 199 P.3d 505 (2009). Due process prohibits the State from commenting on a criminal defendant's post-arrest silence. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)). Additionally, "a defendant's pre-arrest silence, in answer to the inquiries of a police officer, may not be used by the State in its case in chief as substantive evidence of defendant's guilt." *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Further, it is misconduct for the State to argue to the jury that the defendant's pre-arrest silence "was an admission of guilt." *Lewis*, 130 Wn.2d at 707.

*7 An impermissible comment on silence requires more than merely referencing the silence. *State v. Slone*, 133 Wn.App. 120, 127, 134 P.3d 1217 (2006). We must consider "whether the [State] manifestly intended the remarks to be a comment on that right." *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008) (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

Here, the prosecutor argued at closing, "I don't know if Matthew Little feels justified. He didn't tell us—." VRP (Dec. 11, 2013) at 113. Defense counsel objected to this partial statement and the trial court sustained the objection. Absent context, it does appear that the State may have begun to comment on Little's constitutionally

protected right of silence. However, following the trial court's ruling sustaining defense counsel's objection, the State continued:

He didn't tell us in his statement on the 1st of July 2013 when he was talking to Cali Mandak and when he was talking to Sergeant Endicott precisely why he was so angry. He didn't explain to either one of them, "This is the very particular reason why my anger is so high." But the point is, regardless of what it was that happened back in 2008 and 2009 that made him so angry, of all the things that he was entitled to do, he was not entitled to walk up to the detective and to threaten to beat his ass. He crossed the line.

RP (Dec. 11, 2013) at 114. Defense counsel did not again object.

Viewing the prosecutor's argument in context, it is clear that the prosecutor did not comment on Little's constitutional right to silence. Rather, the prosecutor's argument merely referred to Little's threatening statements to Endicott during their encounter at the Safeway store and illustrate how, during those statements, Little did not reveal why he was then presently angry with Endicott. The prosecutor's argument suggested that, because Little did not inform Endicott why he was then presently angry with him, the jury could infer that Little's anger and motive for uttering his threats was related to his previous encounters with Endicott in 2008 and 2009, while Endicott was performing official police duties. This, in turn, suggested that Little's threats were in response to Endicott's actions as a criminal justice participant performing official duties, a necessary element that the State had to prove to secure a conviction. *See* RCW 9A.46.020(2)(b)(iv).

Because Little fails to show that the State had commented on his constitutional right to silence, he cannot demonstrate any improper conduct on the part of the prosecutor, let alone that the prosecutor's conduct was flagrant and ill-intentioned with regard to the portion of the closing argument to which he did not object. Additionally, because Little fails to show that the prosecutor committed misconduct, he cannot demonstrate that his counsel was ineffective for failing to object to the challenged portion of the prosecutor's closing argument.

III. RIGHT TO TESTIFY/INEFFECTIVE ASSISTANCE OF COUNSEL

*8 Finally, Little contends that his defense counsel violated his constitutional right to testify by indicating that he would not ask Little any questions if Little chose to exercise his right. Pursuant to *Robinson*, 138 Wn.2d 753, we analyze this claim under the ineffective assistance of counsel test and hold that defense counsel performed deficiently by preventing Little from testifying at trial. We remand for an evidentiary hearing to determine whether defense counsel's deficient performance prejudiced Little.

Under our federal and state constitutions, criminal defendants have a fundamental right to testify, which right may not be abrogated by defense counsel. *Robinson*, 138 Wn.2d at 758. "The defendant, not trial counsel, has the authority to decide whether or not to testify." *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). Defense counsel violates a defendant's right to testify if defense counsel's conduct "actually prevented [the defendant] from testifying." *Robinson*, 138 Wn.2d at 762. We address claims that defense counsel violated a defendant's right to testify under the ineffective assistance of counsel test, which test requires the defendant to show that defense counsel performed deficiently and that such deficient performance prejudiced the defendant. *Robinson*, 138 Wn.2d at 767. As applied in this context, "a defendant who is able to prove that his attorney actually prevented him from testifying" meets the deficiency prong of the ineffective assistance of counsel test. *Robinson*, 138 Wn.2d at 766-67. A defendant may satisfy the prejudice prong if the defendant proves that his or her "testimony would have a 'reasonable probability' of affecting [sic] a different outcome." *Robinson*, 138 Wn.2d at 769. If the defendant satisfies both prongs, he or she will be entitled to a new trial. *Robinson*, 138 Wn.2d at 770.

Our Supreme Court has held that a defendant may demonstrate that defense counsel actually prevented him or her from testifying by showing that defense counsel used coercion to prevent the defendant from testifying. *Robinson*, 138 Wn.2d at 762. Examples of such coercion include telling the defendant that he or she is legally forbidden from testifying, threatening to withdraw from representation if the defendant elects to testify, or misinforming the defendant about the consequences of testifying. *Robinson*, 138 Wn.2d at 762. Additionally, even

absent coercion, defense counsel can prevent a defendant from testifying by refusing to call the defendant as a witness when counsel knows that the defendant wants to testify. *Robinson*, 138 Wn.2d at 762–63. “If a defendant is able to prove by a preponderance of the evidence that his attorney actually prevented him from testifying, he will have established that the waiver of his constitutional right to testify was not knowing and voluntary.” *Robinson*, 138 Wn.2d at 764–65.

A. Deficient Performance

*9 Although it appears that no court has addressed the question of whether defense counsel's refusal to ask the defendant any questions equates with a denial of the defendant's right to testify, the State admits that it cannot “distinguish[] between a refusal to ask *any* questions and an outright denial of the right to testify.” Br. of Resp't at 17 (alteration in original). We, too, cannot distinguish between a refusal to ask a defendant any questions and an outright denial of the right to testify. We conclude that, in essence, such conduct is tantamount to a refusal to call the defendant as a witness.

In *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961), the United States Supreme Court addressed a state statute allowing a criminal defendant to give unsworn testimony, but preventing defense counsel from asking the defendant any questions. Although not addressing the precise issue before us, the *Ferguson* court highlighted the fundamental role defense counsel's questioning of the defendant plays in giving life to the defendant's constitutional right to testify, stating that absent questioning from defense counsel, a defendant “‘has been set adrift in an uncharted sea with nothing to guide him, with the result that his statement in most cases either does him no good or is positively hurtful.’” 365 U.S. at 593 (quoting 7 Ga.B.J. 432, 433 (1945)). The *Ferguson* Court further stated:

The tensions of a trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely. Left without the “guiding hand of counsel,” *Powell v. State of Alabama*, [287 U.S. 45, 69, 53 S.Ct. 55, 77 L. Ed 158 (1932)], he may fail properly to introduce, or to introduce at all, what may be a perfect defense. “... though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”

365 U.S. at 594–95 (alteration in original).

Although the *Ferguson* Court did not address whether defense counsel's decision to refrain from asking questions of a defendant denies the defendant's constitutional right to testify, the reasoning in *Ferguson* informs our decision that such conduct would be tantamount to a refusal to call the defendant as a witness. Accordingly, following *Robinson* and *Ferguson*, where defense counsel knows the defendant wishes to testify, we hold that defense counsel's refusal to ask the defendant any questions violates the defendant's constitutional right to testify.

The State contends that, even assuming that a refusal to ask a defendant questions amounts to a denial of the right to testify, the record is unclear as to whether Little's defense counsel actually indicated such a refusal. We disagree. Here, before defense counsel rested its case, Little informed the trial court that he wanted to testify but that his defense counsel informed him that he would refuse to ask Little any questions if he testified. When addressing the trial court, defense counsel did not refute Little's assertion, instead indicating that he was having a conflict with Little over trial tactics. The trial court later orally found on the record that “for strategic reasons [defense counsel] would not be asking his client any questions should his client take the stand.” VRP (Dec. 11, 2013) at 99. Defense counsel did not refute this finding. Finally, in addressing Little's post-trial pro se motion, defense counsel stated that he “didn't have any questions to ask Mr. Little on the stand that were going to further the trial strategy that [defense counsel] was pursuing.” RP (Jan. 3, 2014) at 7.

*10 We conclude that the above adequately establishes that defense counsel refused to ask Little any questions if Little elected to testify at trial. *Robinson*, 138 Wn.2d at 764. Because Little repeatedly expressed his unequivocal desire to testify in his defense, such conduct by defense counsel violated his constitutional right to testify. *Robinson*, 138 Wn.2d at 762–63. We thus hold that Little has satisfied his burden of showing his defense counsel performed deficiently.

B. Resulting Prejudice

To be entitled to a new trial, Little must also establish that his defense counsel's deficient performance in preventing him from testifying prejudiced him; prejudice is not

presumed. *Robinson*, 138 Wn.2d at 769–70. To establish prejudice, Little must demonstrate “that his testimony would have a ‘reasonable probability’ of affecting a different outcome.” *Robinson*, 138 Wn.2d at 769–70 (quoting *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). Here, the record does not establish what Little’s testimony would have been had defense counsel not prevented him from testifying. Although the trial court held a hearing at which it found that Little failed to proffer evidence of what he “could have testified to [that] would [have] raise[d] a reasonable probability that the verdict would have been different,” the parties did not present evidence at this hearing, and it is unclear whether the parties were permitted to present evidence at the hearing. RP (3/3/14) at 4. Accordingly, we remand for an evidentiary hearing comporting with *Robinson* to determine whether Little was prejudiced by being

prevented from testifying. At this hearing, Little may make an offer of proof as to the substance of his proposed testimony. 138 Wn.2d at 567–70.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur: JILL M. JOHANSON, C.J., and RICH MELNICK, J.

All Citations

Not Reported in P.3d, 191 Wash.App. 1043, 2015 WL 9036274

Footnotes

- 1 Little’s pro se motion also requested a continuance of his sentencing hearing and for the trial court to set aside his conviction.
- 2 Although Little’s appellate brief characterizes this proceeding as an evidentiary hearing, neither party presented evidence at the hearing, and it is unclear from the record whether the parties were permitted to present evidence at the hearing.

APPENDIX "B"

192 Wash.App. 1045

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,

v.

Kenneth George MADARASH, Appellant.

No. 47362-3-II.

Feb. 17, 2016.

Appeal from Cowlitz Superior Court; Hon. Stephen
Warning, Michael Evans, Marilyn K. Haan, J.

Attorneys and Law Firms

Eric H. Bentson, Cowlitz County Prosecutor, Kelso, WA,
for Respondent.

Peter B. Tiller, The Tiller Law Firm, Centralia, WA, for
Appellant.

UNPUBLISHED OPINION

MAXA, J.

*1 Kenneth Madarash appeals his convictions of felony harassment of a criminal justice participant and two counts of gross misdemeanor harassment. We hold that sufficient evidence supported these convictions, and therefore we affirm Madarash's convictions.

FACTS

On March 28, 2014, Longview police officer James Kelly had contact with Madarash and learned from the Department of Corrections (DOC) that Madarash was under supervision in Clark County and not allowed in Cowlitz County without a trip permit. At that time, DOC officers took Madarash into custody.

On April 4, Kelly was on patrol when he saw a man he recognized as Madarash cross the street without using the crosswalk. Kelly pulled over and asked Madarash to stand in front of his car. When Kelly asked Madarash for identification, Madarash responded, "F* * * you, I did nothing wrong." Report of Proceedings (RP) (June 11, 2014) at 75. When Kelly asked Madarash if he had an outstanding arrest warrant, Madarash began walking away down the middle of the street.

Kelly then grabbed Madarash's arm and told him that he was under arrest. When Madarash pulled his arm away and said he was leaving, Kelly grabbed him again. Madarash again pulled away, so Kelly pushed him up against a vehicle and told him to put his arms behind his back. Madarash responded, "F* * * you, I am not going to jail." RP (June 11, 2014) at 77. Kelly radioed for backup and took Madarash to the ground where he attempted to handcuff him. At first, Madarash refused to put his hands behind his back and continued to yell at Kelly. He yelled, "You're a f* * *ing pig and I will kick your ass." RP (June 11, 2014) at 79.

After Kelly handcuffed Madarash, officers Tori Shelton and Chris Angel arrived to assist. They escorted Madarash to Kelly's patrol car. Madarash refused to get in the patrol car and told Angel and Shelton that he was not going to jail. When they began forcing Madarash inside the car, Madarash looked directly at both officers and screamed, "I'm gonna f* * *ing kill you." RP (June 11, 2014) at 101, 119.

The State charged Madarash with felony harassment against a criminal justice participant for his threat to Kelly, and two counts of felony harassment for his threats to kill Angel and Shelton.

Kelly testified at trial that at the time Madarash threatened him, he was afraid that Madarash might follow through on his threat because he did not know what was in Madarash's pockets, Madarash was not in handcuffs yet, and Madarash was actively resisting. Kelly believed that Madarash "could have easily tried to have done something, grabbed something, a weapon or anything like that." RP (June 11, 2014) at 79.

Shelton and Angel testified that they did not fear that Madarash had the present ability to carry out his threat to kill them, but that they were afraid that he might carry

out the threat in the future. Both believed that Madarash's threat was serious.

A jury found Madarash guilty of felony harassment of Kelly and guilty of the lesser included offenses of harassment by threat of bodily injury of Shelton and Angel. Madarash appeals his convictions.

ANALYSIS

A. STANDARD OF REVIEW

*2 Madarash challenges the sufficiency of the evidence presented on both forms of harassment. The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the fact at issue beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In evaluating a sufficiency of the evidence claim, we assume the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* at 106. We defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *Id.*

B. LEGAL PRINCIPLES

1. Harassment by Threat of Bodily Injury

A person is guilty of the crime of harassment by threat of bodily injury if that person, (a) without lawful authority, knowingly threatens to "cause bodily injury immediately or in the future to the person threatened or to any other person", and (b) "by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(a)(i), (b). This offense is a gross misdemeanor. RCW 9A.46.020(2)(a).

Harassment becomes a felony if the person threatens to kill the threatened person. RCW 9A.46.020(2)(b)(ii). Harassment also becomes a felony if the person "harasses a criminal justice participant who is performing his or her official duties at the time the threat is made." RCW 9A.46.020(2)(b)(iii). However, "the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances" and "[t]hreatening words 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." RCW 9A.46.020(2)(b).

2. True Threat

RCW 9A.46.020 proscribes only "true threats." *State v. Boyle*, 183 Wn.App. 1, 7, 335 P.3d 954 (2014), *review denied*, 184 Wn.2d 1002 (2015). A true threat is a "statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life" of another person." *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 208–09, 26 P.3d 890 (2001)). A statement can constitute a true threat even if the speaker has no actual intent to cause bodily injury. *Kilburn*, 151 Wn.2d at 46. A true threat is one that arouses fear in the person threatened, and that fear does not depend on the speaker's intent. *Id.* Therefore, a statement will be considered a true threat if a "reasonable speaker would foresee that the threat would be considered serious." *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

C. FELONY HARASSMENT OF A CRIMINAL JUSTICE PARTICIPANT

*3 Madarash argues that the evidence was insufficient to convict him of felony harassment because a reasonable criminal justice participant would not interpret his words as a threat or believe that he had the present ability to carry out a threat. We disagree.

Kelly testified that he was afraid that Madarash would carry out his threat to injure him. He explained the reasons for his fear: he did not know what was in Madarash's pockets, Madarash was not in handcuffs yet, and Madarash was actively resisting. As a result, Kelly believed that Madarash could have grabbed a weapon and injured him.

Viewing Kelly's testimony in a light most favorable to the jury's verdict, we hold that sufficient evidence supported findings that Kelly's fear was reasonable and that Kelly reasonably believed that Madarash had the present ability to carry out the threat. Accordingly, we affirm Madarash's conviction for felony harassment.

D. MISDEMEANOR HARASSMENT

Madarash argues that the evidence was insufficient to convict him of misdemeanor harassment of Officers Shelton and Angel because the only alleged threat was a threat to kill, which the jury rejected when it found him not guilty of felony harassment. Madarash also argues that there was insufficient evidence that his threat placed the officers in reasonable fear that he would injure them or that he had a present or future ability to carry out the threat. We disagree.

First, that the jury found Madarash not guilty of the felony charge indicates only that it did not believe that Madarash actually intended to kill Shelton and Angel. That finding did not foreclose the jury from concluding that Madarash meant only that he was going to injure the officers rather than kill them. Such a conclusion is inherent in the jury finding Madarash guilty of the lesser included offenses of harassment by threat of bodily injury of Shelton and Angel.

Second, both Shelton and Angel testified that they feared that Madarash would carry out his threat in the future. Shelton testified that the anger and rage with which Madarash made his threat caused him serious concerns. The threat appeared sincere to him. In addition, the fact that Madarash had physically resisted Kelly, even though Kelly was bigger and stronger than Shelton, caused him to fear that Madarash would try the same thing with him. Finally, Shelton expressed concern because Longview is a fairly small town and Madarash easily could find him.

Angel also testified that Madarash was angry and upset and that the threat appeared serious. He testified that

he was afraid that Madarash might do something in the future because Madarash was looking at him and officer Shelton in the eye and was very direct and pointed in what he said. Angel believed that Madarash meant what he said and "that someday he was gonna see me out on the street and I don't know what's gonna happen, but he said he's gonna kill me, so I have to assume the worst." RP (June 11, 2014) at 120.

*4 Viewing the officers' testimony in a light most favorable to the jury's verdicts, we hold that sufficient evidence supported a finding that Shelton's and Angel's fear was reasonable and that they reasonably believed that Madarash had the future ability to carry out the threat. Accordingly, we affirm Madarash's two convictions for misdemeanor harassment.

We affirm Madarash's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur: MELNICK, SUTTON, JJ.

All Citations

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APPENDIX "C"

199 Wash.App. 1068

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,

v.

Craig Arnold POPEJOY, Appellant.

No. 49172-9-II

July 25, 2017

Appeal from Pierce County Superior Court, 16-1-00230-9, Honorable Frank E. Cuthbertson, Judge.

Attorneys and Law Firms

Lise Ellner, Attorney at Law, Vashon, WA, for Appellant.

James S. Schacht, Deputy Prosecuting Attorney, Tacoma, WA, for Respondent.

UNPUBLISHED OPINION

Melnick, J.

*1 Craig Arnold Popejoy appeals his conviction of felony harassment. We conclude sufficient evidence supports his conviction. We affirm.

FACTS

Late in the evening on January 11, 2016, Popejoy's truck ran out of fuel. Because his lights went completely black, he pushed the vehicle off the road. Popejoy walked to his house to get gas to refuel the vehicle.

Pierce County Sheriff's Department dispatch called Deputy Tyson Vea about a vehicle in a ditch, Popejoy's truck. Vea saw an unoccupied truck in the ditch near the fog line, almost on the road.

Vea ran the license plate on the truck to find the name of the registered owner. Vea learned that the truck was sold in June of the previous year. Vea called dispatch

for assistance in locating the owner. Popejoy was not associated with the vehicle. Vea also saw that the truck had a damaged ignition. Vea had the car towed and impounded because it posed a safety hazard.

On January 12, at 2:00 A.M., Popejoy obtained gas and returned to the place where he left the truck. When he arrived and saw his vehicle missing, Popejoy called 911 to ask why his vehicle had been impounded. During the call, Popejoy told the dispatcher that he would sue Pierce County. Dispatch then called Vea explaining that Popejoy wanted contact involving the vehicle.

Vea phoned Popejoy. Popejoy told Vea that he wanted to speak to the officer who towed his truck. Vea identified himself as the officer. Then Popejoy "just went off and was angry." RP at 48. Vea described Popejoy as "very, very upset." Report of Proceedings (RP) at 49. Vea tried to explain why he towed the car. They discussed the confusion about who owned the truck. Vea explained that he found no information that Popejoy was the registered owner of the truck.

In response, Popejoy continued to yell at Vea and express his anger. He called Vea "a dumb motherf**ker, ... a stupid cop." RP at 50. Vea tried to calm Popejoy down and apologized three or four times throughout the phone call. Popejoy responded with more anger. Popejoy "said that he was going to shoot [Vea] on sight if he ever saw [Vea] and that he was going to come back for his car and he was going to shoot [Vea]. And then he threatened to sue [Vea]." RP at 51.

Vea believed that because of Popejoy's extreme anger that Popejoy meant his threat. Vea did not know Popejoy and did not know what he looked like. Popejoy's threats scared Vea. Vea feared that because of Popejoy's negativity towards police officers in general, he also posed a risk to other officers' safety.

Popejoy admitted that when he spoke with Vea on the phone, he swore at him and said, "he was a bunch of pieces of sh*t for doing that to me." RP at 74. Popejoy recalled that he threatened to sue Vea and get him fired, but denied threatening to shoot him or harm him. Popejoy also denied threatening to kill any law enforcement personnel.

The State charged Popejoy with felony harassment of a criminal justice participant and bail jumping.¹ A jury

found Popejoy guilty of felony harassment and bail jumping. Popejoy appeals, only raising issues related to the felony harassment.

ANALYSIS

*2 Popejoy argues that the State violated his due process rights because insufficient evidence supports his conviction for felony harassment of an officer. He argues that Popejoy's threats were "mere hyperbole" and there existed no evidence he had the present or future ability to carry out the threat. Br. of Appellant at 8. Finally, Popejoy argues that Ve'a's fear was not reasonable because Popejoy had no ability to recognize, find, or encounter Ve'a. We disagree.

I. STANDARD OF REVIEW

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). " 'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Circumstantial evidence is equally as reliable as direct evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Any inferences " 'must be drawn in favor of the State and interpreted most strongly against the defendant.' " *Homan*, 181 Wn.2d at 106 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). In addition, we "must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *Homan*, 181 Wn.2d at 106.

II. SUFFICIENT EVIDENCE SUPPORTS POPEJOY'S CONVICTION

To convict Popejoy of felony harassment, the State had to prove beyond a reasonable doubt that Popejoy knowingly threatened to cause bodily injury in the future to Ve'a, that the Popejoy's words placed Ve'a in reasonable fear

that the threat would be carried out, that Popejoy acted without lawful authority, and that Ve'a was a criminal justice participant who was performing his official duties at the time the threat was made. RCW 9A.46.020.

"When the threat involves a criminal justice participant, 'the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances.' " *State v. Boyle*, 183 Wn. App. 1, 7, 335 P.3d 954 (2014) (quoting RCW 9A.46.020(2)(b)). " 'Threatening words 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.' " *Boyle*, 183 Wn. App. at 7 (quoting RCW 9A.46.020(2)(b)).

A. TRUE THREAT

First, Popejoy argues that the State failed to prove that he made a "true threat." Br. of Appellant at 8. He argues that the threats were "mere hyperbole." Br. of Appellant at 8.

"A statute that makes a threat a crime may proscribe only 'true threats.' " *Boyle*, 183 Wn. App. at 7. A "true threat" is defined as " 'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of another person.' " *State v. Locke*, 175 Wn. App. 779, 789, 307 P.3d 771 (2013) (internal quotation marks omitted) (quoting *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013)). Here, the court instructed the jury that a threat "means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person." CP at 27 (Instr. 27).

*3 "This objective standard 'focuses on the speaker, who need not actually intend to carry out the threat: [i]t is enough that a reasonable speaker would foresee that the threat would be considered serious.' " *Boyle*, 183 Wn. App. at 8 (quoting *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010)). " 'A true threat is a serious threat, not one said in jest, idle talk, or political argument.' " *Boyle*, 183 Wn. App. at 8 (quoting *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)). But, an indirect threat may still constitute a true threat. *Boyle*, 183 Wn. App. at 8. "The nature of the threat depends on a totality of the circumstances, and a reviewing court does not limit its inquiry to a literal translation of the words spoken." *Boyle*, 183 Wn. App. at 8.

Vea testified that Popejoy displayed great anger during their phone call, despite Vea's continued explanations and apologies. Popejoy continued to yell at Vea and express his anger. He called Vea "a dumb motherf**er, ... a stupid cop." RP at 50. Popejoy "said that he was going to shoot [Vea] on sight if he ever saw [Vea] and that he was going to come back for his car and he was going to shoot [Vea]. And then he threatened to sue [Vea]." RP at 51.

This language constituted a "true threat" because a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm. Popejoy, while in a state of incredible anger, stated he would shoot Vea on sight. Popejoy's statements cannot be described fairly as "mere hyperbole," especially when considered in the light most favorable to the State. Accordingly, the State presented sufficient evidence of a true threat.

B. REASONABLE FEAR

Second, Popejoy argues that the State failed to prove that Vea reasonably feared that Popejoy would carry out any threat to shoot him or cause bodily harm.

Vea testified the he believed Popejoy legitimately threatened him. Popejoy would not calm down. He continually expressed anger. Popejoy's threats scared Vea. Vea feared that because Popejoy generally had a negative attitude towards police officers that other officers were also at risk. Even though Vea did not know Popejoy, that does not mean that Popejoy did not have a future ability to carry out his threat. When considering the evidence in the light most favorable to the State a jury could conclude that Vea's fear that Popejoy would carry out his threat was "a fear that a reasonable criminal justice participant would have under all the circumstances." *Boyle*, 183 Wn. App. at 7 (quoting RCW 9A.46.020(2)(b)). The State presented sufficient evidence that Vea reasonably feared Vea would carry out his threat.

Popejoy analogizes his case to *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003), and argues that Vea did not reasonably fear bodily harm. Popejoy also distinguishes his case from *Boyle*.

In *C.G.*, the defendant's conviction for felony harassment was reversed because the victim testified she feared only bodily harm, not death. 150 Wn.2d at 610. The court

held that the State needed to prove that the victim was "placed in reasonable fear that the threat made [was] the one that will be carried out." *C.G.*, 150 Wn.2d at 610. But the court noted that when the evidence shows a defendant threatened to kill, the State might also charge the defendant "with threatening to inflict bodily injury, in the nature of a lesser included offense." *C.G.*, 150 Wn.2d at 611. Thus, a defendant may be convicted on the "misdemeanor charge even if the person threatened was not placed in reasonable fear that the threat to kill would be carried out, but was placed in fear of bodily injury." *C.G.*, 150 Wn.2d at 611.

*4 Popejoy argues that like *C.G.*, his anger and belligerence led Vea, like the victim in *C.G.*, to understand that Popejoy was just angry. However, in *C.G.* the State proved only a fear of bodily harm, not death. 150 Wn.2d at 610. Here, unlike in *C.G.*, the State did not have to prove a threat of death. It had to prove a threat of bodily injury in the future to Vea, a criminal justice participant who acted in his official capacity.

Popejoy also tries to distinguish *Boyle* from his case. He argues there is insufficient evidence that Vea reasonably feared his threats.

In *Boyle*, the issue was whether Boyle's threat was a "true threat," not whether the officer's fear was reasonable. 183 Wn. App. at 8-9. Regardless, the court found the officer had a reasonable fear of Boyle after he made a series of threatening statements to the officer, including that although he would not hurt the officer's family, someone else would kill the officer and his family. *Boyle*, 183 Wn. App. at 5. Here, the evidence presented showed that Popejoy said he would shoot Vea upon sight. Sufficient evidence exists for a juror to reasonably find Vea possessed "a fear that a reasonable criminal justice participant would have under all the circumstances." *Boyle*, 183 Wn. App. at 7 (quoting RCW 9A.46.020(2)(b)).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Bjorgen, C.J.

All Citations

Sutton, J.

Not Reported in P.3d, 199 Wash.App. 1068, 2017 WL 3142710

Footnotes

1 RCW 9A.46.020(1)(a)(i), (2)(b)(iii); RCW 9A.76.170(1), (3)(c).

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