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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA WARREN WILLS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01300-3

BRIEF OF RESPONDENT

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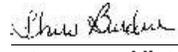
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the state presented sufficient evidence to establish that the victim criminal justice participant reasonably believed that defendant Wills had the present or future ability to carry out the threat?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Joshua Warren Wills was charged by information filed in Kitsap County Superior Court with harassment of a criminal justice participant and driving under the influence. CP 1-2.

Pretrial, Wills moved, *inter alia*, to suppress evidence obtained from an unlawful arrest, to suppress a preliminary breath test, to suppress evidence acquired in violation of *Miranda* and CrR 3.1, to suppress a claimed refusal to submit to a breath test, and, finally, to dismiss pursuant to “*State v. Knapstad*, 107 Wn.2d 346 (1986).” CP 66.

A pretrial hearing was had on various motions. RP, 11/1/17, 1-118. The trial court took the matters under advisement. RP, 11/1/17, 116. The trial court orally denied the *Knapstad* motion. RP, 11/3/17, 13.

The trial court entered findings and conclusions, deciding that Wills was not unlawfully arrested. CP 128-30. In findings and conclusions regarding CrR 3.5, the trial court ruled that Wills’ prearrest

admissions were admissible, that statements made between the time of arrest and the reading of *Miranda* warnings were not admissible, and that post-*Miranda* statements were admissible via a knowing waiver by Wills.

CP 131-33.

The trial court also ruled that a prior similar incident resulting in Wills' convictions for third degree assault and harassment threats to kill were admissible. CP 135-36. The prior was admissible because Wills referred to it when threatening the present trooper and because the trooper knew of this prior incident and that knowledge went to the element of reasonable fear in the present prosecution. *Id.* An appropriate limiting instruction was given telling the jury that the prior convictions could be used on the issue of reasonable fear only. CP 146.

When the state rested, Wills moved to dismiss the harassment charge, claiming that the element of reasonable fear was not proven. 2RP 216-226. The trial court ruled that the evidence established a "future ability to fight," including the possibility of head-butting or kicking. 2RP 228. This situation met the statutory requirements of a threat. *Id.* Moreover, the trial court viewed the threat as one that could be reasonably foreseen as being interpreted as a serious expression of intent to inflict bodily harm. 2RP 228-29.

A verdict of not guilty was had on the driving under the influence

charge. CP 161. But the jury found Wills guilty of harassment of a criminal justice participant. Id.

Wills was sentenced to a standard range sentence of nine months. CP 163. The present appeal was timely filed. CP 174.

B. FACTS

Washington State Patrol Trooper Nickolaus Lull encountered defendant Wills at about 2:20 of an August morning. 1RP 81. The Trooper noted a car stopped on the side of the highway with its lights on. Id. Trooper Lull pulled over to see if there was a need for assistance, activating his emergency lights for safety. Id.

As he approached the car, Trooper Lull noted that the car was running and, looking inside, saw that the occupant appeared to be asleep in the driver's seat. 1RP 82. The sleeping person was identified as defendant Wills. Id. Trooper Lull rapped on the car window but got no response. Id. Eventually, the Trooper tapped on the window with his metal flashlight and got a response. Id.

Wills appeared to be confused. 1RP 82. His eyes were bloodshot and watery. 1RP 83. The car window was rolled down and the trooper smelled "intoxicants" coming from inside the car. Id. Leaving Wills

seated in the car, the Trooper ran a records check and discovered prior convictions for third degree assault felony harassment-threats to kill. 1RP 84. The Trooper later discovered that the threats had been directed at a police officer. Id.

Back at the car, Wills was asked to alight. 1RP 84. As he did so, the Trooper noted that he was unsteady on his feet. Id. Wills was questioned about drinking, he denied doing so and the Trooper requested that he preform field sobriety tests. Id. Wills refused the tests and he was arrested. 1RP 85.

On the way to jail, Wills continued to talk. 1RP 85. Wills was “very upset.” Id. He began to pray to God to bring pain and dishonor to the Trooper’s family. Id. He argued that the arrest was unlawful because he was just sleeping in his car. 1RP 86. He claimed that Trooper Lull would be punished. Id. He told Trooper Lull that he is a profit and not to be messed with. Id. He said “Guess what? They’re going to release me and your family, your mother, your father, your wife, your son, your daughter, yourself, you’re all going to suffer.” Id. But Trooper Lull had no reasonable belief that God would hurt his family. 1RP 94.

Arriving at the jail, Wills told the Trooper that he was not going to give up easily. 1RP 88. He said that as soon as Trooper Lull opened the car door he was going to fight him and that he already had a felony

conviction for beating up a cop. Id.

Trooper Lull took the threat to beat him up seriously. 1RP 88. Trooper Lull believed that given an opportunity, Wills would do just that. Id. He feared the threat. Id. He feared the threat even though Wills was, at the time, handcuffed and seat-belted into the back seat of the patrol car. 1RP 90. This because “You definitely don’t need hands to fight. Being head-butted is extremely painful, and being kicked is extremely painful...” 1RP 90-91. During the process of DUI processing, the Trooper knew that he could be head-butted, bit, or spit on. 2RP 192. The information about Wills’ prior assault conviction caused trooper Lull to start believing that “there is a chance that he could now or later cause me or my family harm.” 2RP 178. Further “Some of the specifics were that he said he would be released and that my family and myself would be harmed. And he may not have specifically have said harm, but that is how I felt his threat.” Id.

Based on the threat, the Trooper asked for assistance at the jail sally port. 1RP 88-89. It is the only time that Trooper Lull has asked for assistance in removing an arrestee from his car. 1RP 89. When the door opened, Wills yelled in an attempt to startle Trooper Lull. Id. Jail staff stood to each side as Wills came out of the car. Id. Wills started to fight with the custody officers. 1RP 90. It took four or five custody officers to subdue and handcuff Wills. Id. Within 30 seconds of being placed in a

holding cell, Wills urinated on the floor. Id.

II. ARGUMENT

A. THE REQUIRED ELEMENT OF REASONABLE FEAR THAT THE THREAT WOULD BE CARRIED OUT WAS PROVEN BEYOND A REASONABLE DOUBT.

Wills argues that he made a present threat only and since he was incapable of following through with a present threat, the trooper's fear must not have been reasonable. Therefore, Wills claims, the evidence was insufficient on an essential element. This claim is without merit because the victim criminal justice participant, Trooper Lull, heard the threat to do him bodily harm in the future, articulated the precise kind of harm he feared, understood that Wills had been previously convicted of assaulting a law enforcement officer, heard Wills expand his threat to include his family members, and understood the threats to his family to be sometime in the future when Wills is released from custody.

It is well settled that

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable

inferences therefrom. We will reverse a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. In evaluating the sufficiency of the evidence, circumstantial evidence is as probative as direct evidence.

State v. Garbaccio, 151 Wn.App. 716, 742, 214 P.3d 168 (2009) (internal citation omitted). Moreover, appellate courts defer to the trier of fact on issues of “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn.App. 672, 675, 935 P.2d 623 (1997). Wills cannot overcome these very high standards in the present case.

RCW 9A.46.020 provides that

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

The statute makes harassment a C class felony if committed against “a criminal justice participant who is performing his or her official duty at the

time the threat is made” or if “the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties.” RCW 9A.46.020 (2)(b)(iii) and (iv).

Further, for the purposes of subsections (2)(b)(iii) and (iv) “the fear from the threat must be fear that a reasonable criminal justice participant would have under all the circumstances.” And, finally, “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.” RCW 9A.46.020(2)(b).

The jury was instructed under WPIC 36.07.05, using elements from subsections (2)(b)(iii) and (iv). CP 153. The statutory caveats, fear that a reasonable participant would have under all the circumstances and apparent ability, are in the instruction. The evidence met the reasonable fear and apparent ability elements.

On the facts, it is first apparent that Wills’ argument spins the facts too far. For the purpose of argument, the state assumes that Wills is correct; since he was secured in handcuffs and seatbelt at the time of his utterance, he could not have been offering to fight Trooper Lull “immediately.” Of course he was not. The words of the threat were spoken in the future tense: when Trooper Lull opens the door, he is not

going to give up easily and he going to fight him. 1RP 88. Since the car was moving at the time of the statement, it is highly unlikely that Wills was speaking of the present moment when he referred to the opening of the car door. No reasonable trier of fact would ignore the temporal logic of the evidence and find reasonable fear of an immediate attempt to cause bodily injury. *See City of Seattle v. Allen*, 80 Wn. App. 824, 831, 911 P.2d 1354 (1996) (“Because every threat, by necessity, refers to an act sometime in the future, to prove harassment the prosecution is required to produce evidence that the threat is one to cause injury at a different time or place than the time and place where the defendant makes the threat.”).

The second factual observation is that Wills seems to discount the phrase “under all the circumstances” in his argument. Insofar as Wills argues that the threat made must be the threat feared, he is correct. *See State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003). Thus the stated intention to fight Trooper Lull should be the threat that Trooper Lull feared. Further, the reasonableness of the fear does not depend on the knowledge or intention of the threatener but rather on the standard is focused on a reasonable criminal justice participant under all the circumstances. *See State v. J.M.*, 144 Wn.2d 472, 479-80, 28 P.3d 720 (2001) (Person may fear the threat and possibility it will be carried out “regardless of whether the speaker intends or knows that the threat will be

communicated to the victim.”).

The threat made and feared in this case is the future threat by Wills to fight with the trooper when the car door opens. But other evidence in the case goes to the reasonableness of Trooper Lull’s fear. First, Trooper Lull clearly identified the future acts that he feared Wills would attempt—headbutting, kicking, spitting. Next, the Trooper was aware, at least in part on Wills’ invitation to look, of Wills’ similar conduct in the past. Further, there was threatening of the Trooper’s family. And, finally, there was the knowledge that Wills would in fact get out of jail one day. These facts clearly bottom a finding of reasonable fear under all the circumstances.

Moreover, the circumstances also include Wills’ anger at getting arrest. That anger was expressed in Wills’ stated intention to cause bodily harm to Trooper Lull in the not too distant future and his less temporally precise threat of future harm to the Trooper’s family. The record is clear that Wills’ anger arose from a decision or action taken by Trooper Lull in the performance of his official duties. The evidence supporting the reasonableness of Trooper Lull’s fear was overwhelming. Moreover, as noted, Trooper Lull feared headbutting, kicking, and spitting even though Wills was still handcuffed.

Lull’s statements to Trooper Lull are very close to the same as the

statements made in *State v. Boyle*, 183 Wn. App. 1, 335 P.3d 954 (2014), review denied 184 Wn.2d 1002 (2015). In *Boyle*, it was noted that [t]he nature of a 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.” 183 Wn. App. at 8. Facts and circumstances that the court deemed important were Boyle’s reference to the shooting of four police officers at Café Forza, a “furious” demeanor, violent kicking in the patrol car, and continual yelling. *Id.* at 9. From these facts a reasonable jury could find a serious expression of intention to inflict bodily injury. *Id.* Moreover, it was observed that from those facts a reasonable criminal justice participant may fear that Boyle would carry out his threats upon his release. *Id.*

By any standard, it was proven beyond a reasonable doubt that the trooper reasonably believed that Wills could carry out his future threat of fighting the trooper when they got to the jail. The evidence was completely un rebutted. In a light most favorable to the state and taking all reasonable inferences in the state’s favor, there is no doubt that the necessary elements were proven. This claim fails.

III. CONCLUSION

For the foregoing reasons, Wills's conviction and sentence should be affirmed.

DATED September 19, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross", is written over the typed name and title of the Deputy Prosecuting Attorney.

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