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State of Washington  
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COA NO. 52792-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KALOB KINDT,

Appellant.

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

The Honorable Jennifer A. Forbes, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

**THE EVIDENCE IS INSUFFICIENT TO CONVICT BECAUSE THE STATE DID NOT PROVE THE OFFICER WAS PERFORMING AN OFFICIAL DUTY AT THE TIME THE THREAT WAS MADE.**

A person is guilty of felony harassment if the person harasses a criminal justice participant, which includes a police officer, "who is performing his or her official duties at the time the threat is made." RCW 9A.46.020(2)(b)(iii). The parties agree that the meaning of the phrase "official duties" as used in the assault statute should apply to the harassment statute at issue here. Brief of Respondent (BOR) at 8. To reiterate, official duties "encompass all aspects of a law enforcement officer's good faith performance of job-related duties, excluding conduct occurring when the officer is on a frolic of his or her own." State v. Mierz 127 Wn.2d 460, 479, 901 P.2d 286 (1995) (quoting State v. Hoffman, 116 Wn.2d 51, 100, 804 P.2d 577 (1991)).

The crux of the State's argument is that Deputy Olvera was on duty and, as such, was ready to respond to any job-related incident if the need arose. BOR at 6. The State interprets "performing his or her official duties" in the statute to be synonymous with being on duty. There are two problems with this approach. One, it rewrites the statute. Two, it leads to absurd results.

In terms of rewriting the statute, the State asserts the word "performing" adds nothing to the analysis. BOR at 11. But "each word of a statute is to be accorded meaning." State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (quoting State ex rel. Schillberg v. Barnett, 79 Wn.2d 578, 584, 488 P.2d 255 (1971)). The legislature is presumed to use no superfluous words. Id. So "performing" must mean something, and it must mean something other than simply being on official duty, otherwise the legislature would have used the phrase "being on official duty" instead of "performing" official duties. "Courts may not rewrite or add statutory language." Roggenkamp, 153 Wn.2d at 632.

Adoption of the State's propose interpretation would also yield absurd results. "When engaging in statutory interpretation, the court must avoid constructions that 'yield unlikely, absurd or strained consequences.'" State v. Barbee, 187 Wn.2d 375, 389, 386 P.3d 729 (2017) (quoting Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002)). There is no dispute "an off-duty police officer is a public servant, with the authority to respond to emergencies and to react to criminal conduct." State v. Graham, 130 Wn.2d 711, 719, 927 P.2d 227 (1996).<sup>1</sup> Under the common

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<sup>1</sup> In Graham, off-duty police officers employed as private security guards were acting as public servants who were discharging their official duties for purposes of the obstruction statute when they stopped the defendant for

law, "police officers are considered to be under a duty to respond as police officers 24 hours a day." Id. at 718 (quoting 16A Eugene McQuillin, The Law of Municipal Corporations § 45.15, at 123 (3d rev. ed. 1992)).

Now consider application of that principle to the harassment statute. If being on duty means performing an official duty, then any threat to an officer is automatically converted to felony harassment, regardless of what the officer was doing at the time. An officer could be snoozing in bed, albeit ready to respond if a dispatch call is relayed in the middle of the night, and criminal liability would attach if the threat was made at that time. This result is absurd.

More than that, this interpretation of the statute renders the phrase "performing his or her official duties at the time the threat is made" superfluous. If an officer is always on duty by virtue of his or her status as a police officer, then the phrase "performing his or her official duties at the time the threat is made" becomes meaningless because there is no way a threat could be made to an officer that would not be made while the officer was performing an official duty. If this element is to have any meaning, it must mean something more than simply being a police officer.

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drug dealing, identified themselves as police officers, and their status as police officers was known to the defendant. Graham, 130 Wn.2d at 723.

Consider defense attorneys, who also fall under protection of the statute as criminal justice participants. RCW 9A.46.020(4). They are always on standby in their own way. If an emergency arises on a case or a client calls in need, they are duty bound to respond as a matter of professional ethics, whatever they happen to be doing at the time. Suppose a defense attorney is shopping at the Home Depot on a lunch break. The attorney absent mindedly bumps into another patron. The patron threatens the attorney for his clumsiness. Is the patron guilty of felony harassment because the attorney was performing an official duty while shopping for a lawn mower? An unlikely and strained result.

As noted in the opening brief, when an officer only learns of the threat after the fact, at a time when the officer is not engaging the threatening party as part of a job-related function, it makes little sense to tie the timing of the threat to what the officer happened to be doing at the time the threat was made. The purpose of the statute is untethered from the facts of this case. The statute criminalizing threats to criminal justice participants under RCW 9A.46.020(2)(b)(iii) should be interpreted to apply to threats made to an officer when that officer is performing a job-related duty during the course of interacting with the person making the threat. Otherwise, the statute yields the type of absurd results set forth in this brief and the opening brief.

In this regard, the State's focus on whether Deputy Olvera was on a "frolic" of his own is unilluminating. The Supreme Court did not define "frolic" in this context, probably because it simply means the converse of the good faith performance of a job-related duty. An officer who is performing a job-related duty in good faith is not on a frolic, while an officer is on a frolic if not performing such a job-related duty. The circularity of the analysis is self-evident.

The State claims Kindt's argument would require a listing of "official duties" that by nature cannot be exclusively described. BOR at 9. The State attacks a straw man argument. Kindt's statutory interpretation requires no such thing. His approach looks to the plain language of the statute defining the offense, focuses on the performance of official duty element, and then asks whether what Deputy Olvera was doing at the time the threat was made constitutes the performance of an official duty. Application of facts to the law. Nothing strange about that.

The State also says Kindt's reading of the statute would mean officers on patrol would not be protected. BOR at 10. This is another straw man argument. Officers on patrol are clearly performing an official duty. They are surveilling the community in their official capacity as police officers. Unlike Deputy Olvera, they are not visiting with their family at home on a break.

**B. CONCLUSION**

For the reasons stated above and in the opening brief, Kindt requests reversal of the conviction and dismissal of the charge with prejudice.

DATED this 7<sup>th</sup> day of October 2019

Respectfully Submitted,

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