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Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

KALOB CARL KINDT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01075-6

BRIEF OF RESPONDENT

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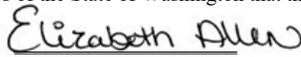
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED August 22, 2019, Port Orchard, WA 
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether there was insufficient evidence to support beyond a reasonable doubt the element that the victim deputy sheriff must have been performing his official duties at the time of the threat?

2. Whether the trial court erred in imposing a \$500 discretionary legal financial obligation at the same time the trial court found Kindt indigent? (CONCESSION OF ERROR)

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kalob Carl Kindt was charged by information filed in Kitsap County Superior Court with harassment of a criminal justice participant, naming Victor M. Olvera as the threatened person. CP 1-2. Later, a first amended information alleged a second count of harassment of a criminal justice participant, naming Aaron J. Baker as the victim. CP 13.

The first amended information alleged two alternative ways in which the crime lies as a felony: at the time of the threat the victim was performing his or her official duties as a criminal justice participant or the threat was made because of actions taken or decisions made in the performance of official duties as a criminal justice participant. CP 12-13. But the jury was instructed on the former alternative only. CP 51 (instruction #12).

The defense challenged the second count in the first amended information by *Knapstad*¹ motion. 1RP 81-82; CP 16. The trial court agreed with the defense and dismissed count II. 1RP 127.

Kindt was found guilty of the remaining count. CP 54. He was sentenced within the standard range to 60 days in custody. CP 56. Kindt was ordered to pay legal financial obligations that included a \$500 victim assessment, a \$500 court appointed attorney fee, and a \$100 DNA fee. CP 61.

Kindt timely appealed. CP 67.

B. FACTS

A Kitsap County Deputy Sherriff, Aaron Baker, was just signing in to duty when he received a call about an unknown problem. 3RP 412. Another deputy, Olvera, stopped at the head of Baker's driveway and asked Baker to look at the call. 3RP 413. Considering the nature of the call from notes on Olvera's in-car computer, Baker and Olvera went to a nearby location and requested additional units. 3RP 414. Eventually the deputies listened to the phone call that caused the dispatch. 3RP 415-16, 423.

¹ *State v. Knapsted*, 107 Wn.2d 346, 729 P.2d 48 (1986).

The call they listened to:

Q: Kitsap 911, what are you reporting?

A: Um, I'm reportin' a cop stoppin' at the end of my driveway followin' me home. I just -I just followin' me home.

Q: Okay, what's your address?

A: Don't know what he was doing, he had no reason to pull me over, just followed me home.

Q: Okay, what's your address?

A: Uh, so, yeah, you can send 'em down here. (1384 O'Malley Lane).

Q: Okay, what city are you in?

A: Fuckin' (unintelligible)

Q: What city are you in?

A: I'm so gettin' ready to get a fuckin' AK and blast him. (Unintelligible).

Q: Okay, sir what city are you in?

A: I'll be sittin' right fuckin' here askin' 'em what the fuck they want.

Q: Okay, sir, what's your address one more time? Can you hear me?

A: Fuckin' yes. Now there's gonna be a cop comin' 'cause they stopped here so I called 'em in. 911 for the cop stoppin' in my road, followed me home I don't I know what the fuck he's doin'. Uh, it's (1384 O'Malley Lane) click.

Q: Can you hear me?

A: What the fuck (unintelligible) give a actual fuck. Yeah, I talked to him, too. Next time I talk to "em they're gonna have a fuckin' gun in their mouth. Fuckin' idiot.

Exh. 2, Supp CP at 108-09 (recording is Exhibit 3, published at 3RP 423).

Deputy Baker recognized Kindt's voice on the call, having known him for many years. 3RP 424. The two deputies discussed what was to be done. 3RP 426. Other deputies came and Baker went first to contact Kindt because of his long acquaintance with Kindt and his family. 3RP 427. Baker contacted Kindt and Kindt's father. 3RP 428. Baker put Kindt under arrest for harassment. 3RP 429.

Deputy Olvera, the named victim, was on a shift from 1:00 p.m. to 11:40 p.m. 3RP 457. He was tagging an abandoned vehicle as a traffic

hazard. 3RP 460. Because he lived close to the location of the tagging, Olvera decided to go to his home to see his family and have a bite to eat. 3RP 461. He saw a person waiving his hands out a car window and hanging half his body out. 3RP 462. Olvera did not stop the car and did not see it turn off the road. 3RP 463-64. He did not recognize the people in the car. 3RP 464.

Arriving at his driveway, Deputy Olvera received a CENCOM call. 3RP 464. The 911 operator inquired as to Olvera's location. 3RP 463-64. The operator relayed that there had been a threat to shoot an officer in the face or put a gun in his mouth and blast him. 3RP 465. Olvera verified that he had seen the vehicle and requested extra units. 3RP 466. He went a short distance down the road and contacted Deputy Baker. 3RP 466.

Deputy Olvera stood by while Deputy Baker listened to the call. 3RP 468. He was "in awe" and "a little bit shaken" because he knew that he was the only patrol officer in the area and thus believed the threats to be directed at him. 3RP 468. Other sheriff units arrived and they moved toward Kindt's home. 3RP 469.

Deputy Olvera was concerned enough by the threats that he told his wife about them even though he normally did not talk to her about his work. 3RP 472. As a result of the threats, Deputy Olvera never used to

carry a gun off duty but now always carries a gun. 3RP 473. He stopped going to a nearby store in order to avoid contact. 3RP 473. Deputy Olvera was in fear by the nature of the notes about the threats that were communicated to him on his in-car computer. 3RP 476. He doesn't care to listen to the call further because it still bothers him—he get a “little thing” in his gut and loses his appetite. 3RP 477.

III. ARGUMENT

A. THE EVIDENCE SUPPORTS THE JURY'S FINDING THAT DEPUTY OLVERA WAS PERFORMING HIS OFFICIAL DUTY AT THE TIME THE THREATS WERE LEVELLED AGAINST HIM.

Kindt argues that the state's proof fails to establish beyond a reasonable doubt that Deputy Olvera was performing his official duty at the time Kindt called 911 and uttered his threats. This claim is without merit because having a meal break during a work shift does not constitute a “frolic” of Deputy Alvera's own and he was at all times performing his official duty of standing by prepared to answer any incident that came to his attention.

On review of a sufficiency of the evidence claim, while viewing the evidence in the light most favorable to the state, the court determines whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Sandova*, 8 Wn. App.2d 267,

276, 438 P.3d 165 (2019). “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.” Id.

RCW 9A.46.020 defines the crime of harassment. Kindt’s argument focuses on subsection (2)(b)(iii), which provides a manner by which the otherwise gross misdemeanor crime may be elevated to a class C felony. In relevant part, “(iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made.”

Kindt argues that the phrase “is performing his official duty at the time the threat is made” lacks definition and that the correct definition demonstrates the insufficiency of the evidence. In turn, he argues this court should interpret the statutory language narrowly and hold that Deputy Olvera was not so engaged at the time Kindt made his threat. Kindt is correct that this phrase is not statutorily defined. Kindt is also correct that this phrase is operative here because it was used in the to convict jury instruction. CP 51 9instruction #12).

Questions of statutory construction are reviewed de novo. *State v. Sandoval*, 8 Wn. App.2d 267, 273, 438 P.3d 165 (2019). Interpretation seeks to determine and implement legislative intent. Id. Further, “We consider all the terms and provisions of the act in relation to the subject of

the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.” *Sandoval*, 8 Wn. App.2d at 272-73 (internal quotation and page break omitted).

First, the same sub-phrase “official duty” has been defined by our Supreme Court in the context of the third degree assault statute “We hold that “official duties” as used in RCW 9A.36.031(1)(g) encompasses 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). Here, the state further agrees with Kindt that interpretation of the exact same phrase in the assault statute provides guidance as to the meaning of the harassment statute.

Kindt admits that Deputy Olvera was on duty when the threat was communicated. Brief at 15. The deputy said that he was “on shift” at the time and that he never clocks out during a shift. 3RP 455. During the shift, he is required to respond to a call “Even if I’m having lunch with a coworker, family, or anybody, yes.” 3RP 457-58. The call about Kindt’s threats came in as he was walking from his car to his house. 3RP 465. He was headed home to have dinner with his family. 3RP 474. He told his wife that he had to leave to take the call. 3RP 466.

Kindt questions whether these facts demonstrate performance of official duties. And the state concedes that at that time on-duty Deputy Alvera was not engaged in some sort of traditional law enforcement behavior like arresting a suspect, interviewing a witness, tagging traffic hazards and the like. But this concession points out that there is no feasible way, and therefore the legislature would not intend, to catalogue all the aspects of a deputy's official duties. If we leave rescuing a cat from a tree off the list, the deputy, as such, would not be protected from assault or harassment while doing so.

Further, the harassment statute applies the same criminal justice participant requirement of performing official duties to prosecutors, corrections staff, juvenile detention staff, community corrections officers, and defense attorneys. RCW 9A.46.020(4). Kindt's argument would require a listing of the "official duties" of each of these classes of persons.

This problem will result from Kindt's argument that a law enforcement officer "can be on duty but not performing an official duty at the time something happens." Brief at 16. While the officer is on duty, Kindt believes, something has to happen for her to be performing her official duty. Thus, says Kindt, being prepared to respond to all manner of crimes and catastrophes is not, by itself, performance of an official duty. This is a negative consequence of construing the statute as Kindt would

have it. Preparedness is an obvious and necessary part of police work.

Further, Kindt's reading would devoid protection of officers, as such, most of the time they are on patrol. If the officer on patrol has not been called out or has not seen any circumstance requiring her intervention, Kindt's approach would, again, leave the officer unprotected. Perhaps an old poem said it best: "And post o'er land and ocean without rest; They also serve who only stand and wait." John Milton, Sonnet 19, circa 1652 (<https://poets.org/poem/when-i-consider-how-my-light-spent>).

But our Supreme Court has solved the problem of cataloguing what is and is not an official duty. In *Mierz*, the limitation is placed that the officer's behavior not be "a frolic of his or her own." Further, even an illegal arrest or detention is not considered such a personal frolic. *See State v. D.E.D.*, 200 Wn. App. 484, 493-94, 402 P.3d 851 (2017) *citing State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991); *see also State v. Turner*, 103 Wn. App. 515, 13 P.3d 234 (2000) (Officers are performing official duties, even during an arrest that later turns out to be without probable cause, provided they were not acting in bad faith or engaging in a "frolic" of their own.). The question in this case becomes whether it constitutes such a personal frolic or bad faith to stop for a meal break during a shift. Moreover, the character of the behavior, a meal break, does not change merely because the officer will break bread with family

members, coworkers, or others.

In fact, such meal breaks are required by Washington law.² WAC 296-126-092 provides

(1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.

(2) No employee shall be required to work more than five consecutive hours without a meal period.

See RCW 49.12.005(3)(b) and (4) (rule applies to Deputy Olvera). Thus, state law requires that Deputy Alvera have a meal break and, as he testified, his employer requires that he remain "on duty" during that break. It was not frolic to stop for a meal break. And, contrary to Kindt's argument (brief at 15), it seems that it was legally obligatory for the Deputy to have a meal break while on duty. While eating, the deputy was required, as always, to be on standby and to be instantly prepared to respond if the need arises.

Finally, the word "perform" adds little or nothing to the analysis. It is a part of an on-duty officer's official duties to be prepared to respond to any manner of crime or catastrophe. Kindt's definition that to "perform" means to "carry out or bring about" or "do in the line of duty," is apt. Deputy Alvera's carried out and

² Nothing in this record indicates that the Kitsap County Sheriff's collective bargaining agreement is contrary to state law.

performed in the line of his duty good faith readiness to respond. One charged with standing guard is performing her duty even when she challenges no interloper during her shift.

Taking the Deputy's testimony in a light most favorable to the state, the jury could readily find that Deputy Alvera was engaged in performing his official duty. This issue fails.

B. THE TRIAL COURT PROVIDED KINDT WITH APPOINTED COUNSEL AT TRIAL AND ORDERED THAT HE IS INDIGENT FOR APPEAL AND MAY NOT THEN IMPOSE A DISCRETIONARY LEGAL FINANCIAL OBLIGATION (CONCESSION OF ERROR).

Kindt next claims that that the trial court erred by imposing a \$500 discretionary legal financial obligation. This claim is without merit because the trial court was well advised of Kindt's financial situation and allowed him six months to begin paying his LFO.

These facts were before the trial court at sentencing: Kindt was 22 years of age. CP 1. The trial court sentenced him to 60 days in custody with credit for some time served. CP 56-57. He has a job. 5RP 4. He supports his family. Id. He makes approximately \$17 an hour. 5RP 5. The employer was not guaranteeing a job after jail one way or the other.

Id. The trial court inquired about other fines Kindt had and discovered that he had paid them off and gotten his driver's license reinstated. 5RP 10.

From these facts the trial court found that Kindt had a job and the trial court expected him to remain employed. 5RP 10. In light of the jail time, the trial court deferred payments for six months and advised Kindt to come back and readdress if he loses his job. Id. The trial court's approach is reasonable on its face.

But other facts in the record include that Kindt had appointed counsel in the trial and was granted an order of indigency for appeal. CP 79-80. As noted in *State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018), the legislature amended RCW 10.01.160(3) "to categorically prohibit the imposition of any discretionary costs on indigent defendants."

The state has no argument that the trial court may find Kindt indigent and impose discretionary legal financial obligations on the same day. The \$500 public defense fee should be stricken.

The state respectfully request that this concession not occasion resentencing but rather a limited remand for an order striking the \$500.

IV. CONCLUSION

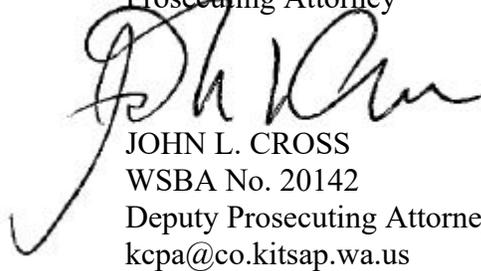
For the foregoing reasons, Kindt's conviction should be affirmed

and the matter remanded with order to strike the \$500 court appointed attorney fee.

DATED August 22, 2019.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney

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. The signature is fluid and cursive, with a large initial "J" and "C".

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KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

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