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Court of Appeals
Division II
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NO. 53555-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

TODD WALKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

When Officer Joshua Goffena arrested Todd Walker, Mr. Walker was so incoherent that he could not follow basic commands. The officer needed to take him to the hospital before booking him to determine whether he was fit for jail.

After going to the hospital and on the way to jail with Mr. Walker, the officer stopped his car to spray Mr. Walker in the face with pepper spray. Mr. Walker was confined in the car's back seat. He was handcuffed. There was no way for Mr. Walker to get out or endanger anyone.

Mr. Walker was charged with harassment for the threats he made to the officer. The charge was elevated to a felony because the officer was a criminal justice participant.

This Court should dismiss this charge because the officer's outrageous conduct violated Mr. Walker's due process rights. Dismissal is also required because the government failed to present sufficient evidence of present and future ability to commit the crime. Alternatively, a new trial is necessary for instructional error.

B. ASSIGNMENTS OF ERROR

1. In violation of the Fifth and Fourteenth Amendments, the outrageous conduct of the officer when he pepper sprayed Mr. Walker in the face required the trial court to grant Mr. Walker's motion to dismiss.

2. The court failed to include the essential element of "present and future ability to carry out the threat" in the "to convict" instruction, requiring reversal.

3. In violation of the Fourteenth Amendment and article I, section three of the Washington constitution, the prosecution failed to present sufficient evidence of Mr. Walker's present and future ability to carry out the threat made.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Outrageous government conduct violates the Fifth and Fourteenth Amendments. Police conduct that violates these due process principles acts as a bar to prosecution. After Mr. Walker was arrested, placed in handcuffs, and while being transported to the jail, the arresting officer stopped his

car, opened up the back door, and sprayed Mr. Walker in the face with pepper spray. Mr. Walker did not make his threat to the officer until after he was sprayed in the face. Mr. Walker moved to dismiss, but the court denied his motion. Should this Court find that the officer's outrageous conduct in pepper spraying a handcuffed and immobile prison required dismissal of the underlying charges?

2. For a verdict to be sustained, the "to convict" instruction must include every essential element of a charged crime. To prove felony harassment against a criminal justice participant, the "to convict" instruction must include the essential element that the person charged had the present and future ability to carry out the threat. The jury instructions omitted this essential element. Is reversal of Mr. Walker's conviction required because the jury was provided with an incomplete "to convict" instruction, and the error cannot be shown to be harmless beyond a reasonable doubt?

3. The government is required to prove all essential elements of an offense beyond a reasonable doubt. An

essential element of felony harassment against a criminal justice participant is proof that the person has the present and future ability to carry out the threat. Mr. Walker, who was confined in the backseat of a sealed police car with his hands cuffed behind his back, had no present ability to carry out the threats the officer claimed he made. Is dismissal of the charge of felony harassment required because there was no evidence of this essential element?

D. STATEMENT OF THE CASE

When the police first contacted Todd Walker, he was in crisis. He would not listen to instructions or work with the police. RP 160.¹ He was intoxicated, ultimately providing a blood alcohol sample of .23. RP 162, 237. His speech was “extremely slurred.” *Id.* He was uncoordinated, could not understand directions, and could not follow the conversation the officers were trying to have with him. *Id.*

¹ The trial transcripts are largely sequential. Where they are not, this brief refers to the date of the hearings, in addition to the page where the reference can be found.

Officer Joshua Goffena did not believe Mr. Walker could be booked into jail without medical clearance. RP 165. Mr. Walker was taken to the hospital, where he continued to have trouble following basic instructions. RP 168.

Eventually, the hospital staff determined Mr. Walker was fit for jail. Mr. Walker was handcuffed and placed into the back seat of the officer's car. RP 218. A Plexiglas partition separated Mr. Walker from the officer. RP 228. The doors were locked from the outside. There was no way Mr. Walker could leave the car without assistance.

It was a short distance between the hospital and the jail. RP 26. On the way to the jail, Mr. Walker began to hit his head on the partition. RP 225. Officer Goffena pulled over, grabbed his pepper spray, and went to the back of the car. RP 186, 227. As he approached the back seat of the car, he shook his can of pepper spray to get it ready to use. RP 246. The officer opened the back seat and sprayed Mr. Walker in the face with the pepper spray. RP 247-48.

The officer then got back into his car and drove to the jail. RP 228. On the way to the jail, the officer claimed Mr. Walker threatened him five times, telling the officer that he would kill him. RP 229.

At the jail, Mr. Walker was permitted to flush his eyes and reduce the pain from the pepper spray. RP 228. Because he had injured his head on the partition and was bleeding, he was taken to the hospital again to determine if he was fit for jail. RP 253. Rather than have Officer Goffena take him back, an ambulance was called. RP 252. Mr. Walker was given a calming medication and had no further incidents. RP 252-53.

The government charged Mr. Walker with harassment. It was elevated to a felony because the officer met the definition of “criminal justice participant.” CP 1.

Before trial, Mr. Walker moved to dismiss the charges, based on the officer’s outrageous conduct. At the hearing, the officer admitted that Mr. Walker was confined in the back seat of the car. RP 25. Mr. Walker was wearing handcuffs and could not get out of the vehicle. *Id.* The officer grabbed his

pepper spray immediately after he got out of his car. RP 28. With little warning, the officer sprayed Mr. Walker in the face. RP 45. The officer then forced Mr. Walker back into the car and drove the short distance to the station. RP 32.

The testimony also established pepper spray is an intermediate force tool. RP 46. It should only be used when all other use of force methods have been exhausted and there is a potential for physical confrontation. *Id.*

The court denied Mr. Walker's motion to dismiss. RP 68. The case then proceeded to trial.

After the evidence was heard, the court instructed the jury on the elements of the offense. CP 59. The jury instructions failed to include the statutory requirement that Mr. Walker had a present and future ability to carry out the threats. *Id.*

A jury found Mr. Walker guilty of harassment. CP 62.

At his sentencing hearing, Mr. Walker acknowledged his crisis. 5/3/19 RP 19. He had developed a support network while waiting for his trial that could assist him in dealing

with his mental illness and dependency issues. *Id.* He was thankful for the help of identifying his problems and for making significant strides in his life. *Id.* The court sentenced him to a prison-based drug offender sentence alternative, suspended half of his sentence. 5/3/19 RP 21.

E. ARGUMENT

1. **The trial court erred when it failed to grant Mr. Walker's motion to dismiss because of the officer's outrageous conduct.**

Officer Goffena's decision to stop his police car to shoot pepper spray into Mr. Walker's face while he was handcuffed and locked in the back seat was outrageous conduct that violated due process. *State v. Lively*, 130 Wn.2d 1, 19-20, 921 P.2d 1035 (1996); Mr. Walker's reaction to being sprayed in the face, which was to make threats he was incapable of carrying out, was a reaction to the misconduct. Had the officer not sprayed Mr. Walker in the face with pepper spray, Mr. Walker would not have reacted the way he did. Because this conduct is a shock to fundamental fairness, the trial court erred when it did not grant Mr. Walker's motion to dismiss.

Id. at 19. This Court should correct this error and order the trial court to dismiss this charge. *Id.*

a. The Fifth and Fourteenth Amendments prohibit outrageous police conduct.

Police conduct violates due process when it shocks a universal sense of fairness. *United States v. Russell*, 411 U.S. 423, 431–32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973); U.S. Const. amend. V, XIV. “[O]utrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be ‘so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.’” *Lively*, 130 Wn.2d at 19 (quoting *Russell*, 411 U.S. at 431-32). This Court will dismiss where the conduct is so shocking that it violates fundamental fairness. *Id.* at 19-20.

When reviewing outrageous government conduct, this Court evaluates the conduct based on the totality of the circumstances. *Lively*, 130 Wn.2d at 21. Whether the State has engaged in outrageous conduct is a matter of law, not a question for the jury. *Id.* at 19.

b. Spraying Mr. Walker in the face with pepper spray when he was confined in the back seat of the police car was outrageous government conduct.

Spraying an immobile prisoner in the face with pepper spray is outrageous. Certainly, Mr. Walker was difficult. He was angry, upset, yelling, and screaming. RP 24. But he was also in custody. His hands were cuffed behind his back and he was locked in the back seat of the police car. RP 25. He could not hurt anyone. RP 25. The yelling did not present a risk to anyone. *Id.* And while he may have been hitting his head on the Plexiglas partition, the officer never stated Mr. Walker was in critical danger that required him to use intermediate force that should only be used when all other methods have been exhausted and there is a risk of physical confrontation, which was not the case here. RP 46.

The Elma police manual indicates intermediate force, including pepper spray, should only be used when all other methods have been exhausted and there is a risk of physical confrontation. RP 52.

National organizations agree. The National Institute of Justice says force should only be used under specific circumstances, such as in self-defense or the defense of another. The National Institute of Justice, *Police Use of Force*, Office of Justice Programs.² “Officer-created jeopardy” should not be used to justify the use of force; instead, it should be grounds for reprimanding or firing the officers involved. Police Executive Research Forum, *Guiding Principles on Use of Force*, Critical Issues in Policing Series, 37-38 (2016).³ What happened here was unnecessary and outrageous.

The *Lively* Court identified five factors to be considered when determining whether charges should be dismissed because of outrageous police conduct. 130 Wn.2d at 22. Not all of the factors are relevant here, but they inform what this Court should examine in determining whether Mr. Walker’s motion should have been granted.

² <https://nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx> (last accessed January 5, 2020).

³ <http://www.policeforum.org/assets/30%20guiding%20principles.pdf> (last accessed January 5, 2020).

The factors the *Lively* Court focused on were: whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity, whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, whether the government controls the criminal activity or allows for the illegal activity to occur, whether the police motive was to prevent crime or protect the public, and whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice." *Lively*, 130 Wn.2d at 22.

Had Officer Goffena kept driving to the police station to book Mr. Walker into jail, no crime would have occurred. It was a very short drive between the hospital and the jail. RP 26. Mr. Walker was confined in the back seat of the police car. RP 41. A partition separated Mr. Walker from the officer. *Id.* He was handcuffed. RP 42. Certainly, Mr. Walker was hitting his head on the Plexiglas partition, but the officer did not

have a plan to calm Mr. Walker down, except to spray him in the face with pepper spray. RP 45.

Mr. Walker was not trying to commit another crime before Officer Goffena sprayed him in the face. He was incoherent and unable to communicate with the officers. RP 24. He was so unstable that he had to be taken to the hospital before he could be booked into jail. *Id.* The officer knew he had been difficult. Mr. Walker had been unable to communicate with the officers all night long. RP 23.

There was no good reason for spraying Mr. Walker in the face with pepper spray. It was a short distance between the hospital and the police station. RP 26. Mr. Walker was in no imminent threat to himself or the officer. Officer Goffena created an unnecessary crisis. It is fundamentally unfair to hold Mr. Walker responsible for his anger under these circumstances, where the officer knew Mr. Walker was incoherent and unable to comply with instructions. There was no reason for the officer's actions, which violated Mr. Walker's right to due process.

Like *Lively*, “[t]o condone the police conduct in this case is contrary to public policy and to basic principles of human decency.” 130 Wn.2d at 27. Mr. Walker may have made threats to the officer after he was sprayed in the face with pepper spray. But he was unable to carry out those threats. The threats were made directly after the officer’s outrageous conduct. This Court should hold that the officer’s conduct in spraying Mr. Walker with pepper spray caused the anger that resulted in the threats. Without it, no crime would have occurred. Because this conduct violated Mr. Walker’s due process rights, dismissal of the crimes charged because of the officer’s actions is required. *Id.*

2. The failure to instruct the jury that the government had to prove Mr. Walker had present and future ability to carry out the threat he made requires reversal.

The court failed to properly instruct the jury on the essential elements of felony harassment, omitting from the “to convict” instruction that the government was required to prove it was apparent to the criminal justice participant, Mr. Walker had the present and future ability to carry out the

threat he made. CP 59. Because Mr. Walker’s defense rested on his ability to carry out this threat, this error was not harmless and requires reversal.

c. When made to a criminal justice participant, present and future ability to carry out the threat made is an essential element of felony harassment.

The government must prove every essential element of a crime beyond a reasonable doubt. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). To meet this requirement, the “to convict” jury instruction must contain all of the elements of the crime. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). A reviewing court shall not look to other jury instructions to supply a missing element from a “to convict” jury instruction. *Id.* at 262–63.

Mr. Walker was charged with harassing a criminal justice participant. CP 1. To prove this offense, the government must prove it was apparent to the criminal justice participant Mr. Walker had the present and future ability to carry out the threat he made. RCW 9A.46.020(2)(b).

This essential element was omitted from the “to convict” instruction. CP 59. Instead, the “to convict” instruction contained only the following language:

- (1) That on or about November 2, 2018, the Defendant knowingly threatened to cause bodily injury immediately or in the future to Josh Goffena;
- (2) That Josh Goffena was a criminal justice participant who was performing his official duties at the time the threat was made;
- (3) That the words or conduct of the Defendant placed Josh Goffena in reasonable fear that the threat would be carried out;
- (4) That the fear from the threat was a fear that a reasonable criminal justice participant would have under all the circumstances;
- (5) That the Defendant acted without lawful authority; and
- (6) That this act occurred in the State of Washington.

CP 59 (emphasis added).

The legislature did not intend for present and future ability to carry out the threat to be substituted with immediately or in the future. When the legislature amended RCW 9A.46.020(2)(b) in 2011, it specifically included the

requirement that the government must prove the present and future ability to carry out the threat. RCW 9A.46.020(2)(b).

This requirement is apparent in the statute, which states:

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) (emphasis added).

When this Court is asked to determine legislative intent, it first looks to the face of the statute. Where the statute is plain on its face, “the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). This Court may determine a statute’s plain language by examining the statute in which the provision is found, related provisions, and the larger statutory scheme as a whole. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015) (citing *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)).

The plain language of RCW 9A.46.020(2)(b) is not ambiguous. The statute plainly states that the officer must have believed Mr. Walker had the present and future ability to carry out the threat he made. *Id.*

Even if this Court were to find ambiguity, statutory construction canons also lead this Court to the same conclusion. First, when examining statutory language, “the legislature is deemed to intend a different meaning when it uses different terms.” *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). “Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when ‘different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.’” *Simpson Inv. Co. v. State, Dept. of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (quoting *State ex rel. Public Disclosure Comm’n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976)).

In RCW 9A.46.020, the legislature used the word “or” when it intended a different result. For misdemeanor

harassment, persons are guilty when they threaten to cause “bodily injury immediately or in the future to the person threatened or to any other person.” RCW 9A.46.020(1)(a)(i) and (1)(b).

The legislature chose to use the word “or” when it meant one or the other. The legislature’s decision to use the word “and” rather than “or” in subsection (2)(b) indicates it did not intend for the phrase “present and future ability to carry out the threat” to mean present or future ability to carry out the threat. This Court should give effect to the plain reading of the statute and find that use of the word “and” requires the State to prove both a present and future ability to carry out the threat.

Also, the rule of lenity requires this Court to construe the statute strictly against the prosecution. *State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015); *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). The rule of lenity is a critical safeguard against corruption and abuse of power. *See State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013)

(citing *State v. Rice*, 174 Wn.2d 884, 901, 279 P.3d 849 (2012)). It “helps further the separation of powers doctrine and guarantees that the legislature has independently prohibited particular conduct prior to any criminal law enforcement.” *Evans*, 177 Wn.2d at 193 (citing *United States v. Bass*, 404 U.S. 336, 348-49, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971)).

A court may interpret a criminal statute adversely to a person charged with a crime only where statutory construction “clearly establishes” the legislature intended such an interpretation. *Evans*, 177 Wn.2d at 193 (quoting *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009)).

The “clearly established” standard is not met here. The legislature carved out a specific exception for criminal justice participants and used the word “and” when it chose to use “or” elsewhere in the statute. A reading of the statute that permits a conviction for felony harassment only on an individual’s future ability to carry out the threat is not clearly established.

See Evans, 177 Wn.2d at 193-94. The rule of lenity requires this Court to give meaning to the word “and” and adopt the interpretation that favors Mr. Walker.

Division One determined “present and future” ability to carry out the threat was not an essential element. *See, State v. Boyle*, 183 Wn. App. 1, 12, 335 P.3d 954 (2014). In *Boyle*, the trial court eliminated the requirement of “present and future” ability to carry out the threats from the jury instructions. *Id.* at 10. Division One affirmed the conviction, holding that including this requirement would lead to an absurd result. *Id.* at 12.

This decision is misguided. The absurd results canon, by its terms, refuses to give effect to the plain meaning of a statute. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.2d 892 (2011). This necessarily results in the court inserting or removing statutory language, a task delegated to the legislature. *Id.* Because this statutory construction canon raises separation of powers concerns, a

result may be held absurd only where it is inconceivable. *Id.*; *Ervin*, 169 Wn.2d at 824.

Division One found it absurd that certain threats would not be actionable if it gave plain meaning to the statute. *Boyle*, 183 Wn. App. at 12. But this analysis fails to account for the fact that such threats can be prosecuted under a different section of the statute. RCW 9A.46.020(1)(a).

The court's interpretation of the statute also fails to account for the special status of criminal justice participants and why the legislature added the additional requirement of proving present and future ability to carry out the threat. Like Mr. Walker, persons involved in the criminal justice system are in crisis. The legislature probably added the additional requirement of present and future ability to carry out the threat because a threat made under circumstances like Mr. Walker's is not likely to be carried out unless there is a present and future ability to carry out the threat.

It is unlikely that the legislature included the word "and" by mistake. This Court should give it meaning and hold

that the failure to include the statutory language of “present and future ability to carry out the threat” was error.

d. Omission of the essential element of present and future ability to carry out the threat made was not harmless beyond a reasonable doubt.

Instructional error requires reversal unless the government can prove the error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Because the government cannot prove the error did not contribute to the verdict obtained, reversal is required. *Id.* at 344.

The government presented no evidence Mr. Walker had a present ability to carry out the threat he made. He was trapped in the backseat of the officer’s car. RP 218. He was handcuffed. RP 159. A second officer was following the first officer in a separate vehicle. RP 165. The two cars were on their way to jail to book Mr. Walker. RP 169. Under no circumstances was he capable of presently carrying out the threat he made.

The record does not establish that the omission of an essential element from the “to convict” instruction error did not contribute to the jury’s verdict. This Court should order reversal of Mr. Walker’s conviction. *Brown*, 147 Wn.2d at 344.

3. The government presented insufficient evidence Mr. Walker had the present and future ability to carry out the threats he made, which requires dismissal.

The government bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). The fundamental right to due process is violated when a conviction is based on insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

If this Court finds the government presented insufficient evidence to prove an element of the crime, reversal is required. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Retrial following reversal for insufficient

evidence is “unequivocally prohibited,” and dismissal is the remedy. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016).

When Mr. Walker made threats towards the officer, he was in the back seat of the police car. RP 218. A barrier separated him from the officer. RP 228. He was in handcuffs. RP 218. There was no way that he could carry out any threat to hurt the officer.

Mr. Walker was in crisis when he made his threats. He was unable to follow directions. RP 162. Mr. Walker was so incoherent he had to be taken to the hospital when he was first arrested. RP 165. Immediately before the threats, he was hitting his head on the protected barrier, causing an injury to himself. RP 225. His crisis was so significant the officer stopped his car. *Id.* But rather than providing Mr. Walker with aid, he shot pepper spray into his face. This did not calm Mr. Walker down. RP 247-28. Rather than return him to the hospital, the officer proceeded to the police station. RP 171.

Mr. Walker could not carry out the threats the officer claimed he made. The government failed to prove Mr. Walker had the present and future ability to carry out the threats made. RCW 9A.46.020(2)(b). Mr. Walker's conviction should be reversed, and this matter dismissed. *Hummel*, 196 Wn. App. at 359.

F. CONCLUSION

The trial court failed to instruct the jury on an essential element of the crime of harassment of a criminal justice participant. Failure to properly instruct the jury requires reversal of Mr. Walker's conviction.

The government failed to prove Mr. Walker had the present and future ability to carry out the threat made to the officer. The remedy for this error is dismissal.

DATED this 7th day of January 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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