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

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent

v.

TODD WALKER,

Appellant.

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

REPLY BRIEF OF APPELLANT

TRAVIS STEARNS
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A. ARGUMENT IN REPLY

1. **Without the officer's outrageous conduct, no crime would have occurred. This error warrants dismissal of Mr. Walker's harassment conviction.**

A person handcuffed and confined in the back seat of a police car should not be pepper-sprayed. This conduct was outrageous. Given the nature of these charges, the trial court erred when it did not grant Mr. Walker's motion to dismiss. This Court should reverse the trial court's decision and order dismissal of the felony harassment charge.

The government acknowledges that police behavior may be so outrageous that due process principles may absolutely bar the government from invoking judicial processes to obtain a conviction. *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). But here, the government asks this Court to find the officer's conduct was not so outrageous as to justify dismissal. BOR at 9.

Instead, this Court should hold that spraying an immobile prisoner in the face with pepper spray is outrageous. Mr. Walker's 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. *Id.* He did not present a risk to anyone. *Id.*

The officer's use of intermediate force that should only be used when all other methods have been exhausted, and there is a risk of physical confrontation was not present here. RP 46. Instead, the officer's conduct was "officer-created jeopardy," which national organizations state should not be used to justify the use of force and is instead grounds for reprimands and officer termination. Police Executive Research Forum, *Guiding Principles on Use of Force*, Critical Issues in Policing Series, 37-38 (2016).¹

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 them out. The

¹ <http://www.policeforum.org/assets/30%20guiding%20principles.pdf> (last accessed January 5, 2020).

threats were made directly after the officer sprayed him with pepper spray. Without the officer's outrageous conduct, 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 warranted. *Id.*

2. The trial court failed to instruct the jury on all the essential elements of felony harassment of a court official. This error requires reversal of Mr. Walker's conviction.

The government improperly argues that RCW 9A.46.020(2)(b) does not require the government to prove a "present and future ability to carry out the threat" made, despite plain language to the contrary in the statute. BOR at 12. This Court should reject this argument and interpret felony harassment as the legislature intended. Because the jury instructions failed to inform the jury of all of the essential elements of felony harassment as charged, the reversal of Mr. Walker's conviction is required.

a. *“And” means “and.” The court’s error in interpreting it as “or” fails to give effect to the legislature’s intent.*

Division One of the Court of Appeals interprets “and” to mean “or.” *State v. Boyle*, 183 Wn. App. 1, 12, 335 P.3d 954 (2014). This opinion is misguided. Courts should only reinterpret statutory language where the result of enforcing it is so inconceivable as to make it absurd. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.2d 892 (2011); *State v. Ervin*, 169 Wn.2d 815, 824, 239 P.3d 354 (2010). Because the plain language does not result in an absurdity, this Court should not use statutory construction canons to reinterpret the statute.

Instead, this Court should apply the plain language doctrine to give effect to the legislature’s intent. 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)).

Also, Washington courts have consistently followed the rule of lenity, which requires this Court to construe the statute strictly against the prosecution. *State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015). This rule states that a court may only interpret a criminal statute adversely to a person charged with a crime only where statutory construction “clearly establishes” the legislature intended such an interpretation. *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013) (quoting *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009)). Because the interpretation in *Boyle* expands liability, it must be strictly construed against the government. The rule of lenity requires this Court to find that the legislature intended for the word

“and” to mean “and.” Interpreting this word as “or” violates the rule of lenity and the legislature’s intent.

Mr. Walker does not escape liability if this Court interprets “and” to mean “and.” The government can still charge him with harassment. It is only limited by not being able to charge the elevated felony charge. This result is not absurd. It is not a strain to believe that this limitation was placed on the government for a reason, which was to restrict when the government could charge felony harassment. The legislature did not include the word “and” by mistake. This Court should give the word “and” meaning and hold that the failure to include the statutory language of “present and future ability to carry out the threat” was an error.

b. The failure to instruct the jury on the essential elements of felony harassment requires the reversal of Mr. Walker’s conviction.

The government does not address the remedy for failure to properly instruct the jury on an essential element, because it argues the court’s instructions did not improperly interpret the law. This Court should recognize that

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. This Court should order the reversal of Mr. Walker's conviction. *Id.*

3. The government failed to present sufficient evidence of Mr. Walker's present and future ability to carry out the threat he made. This error requires the dismissal of Mr. Walker's conviction.

Despite offering no evidence of Mr. Walker's present ability to carry out the alleged threats, the government argues it presented sufficient evidence of this essential element. BOR at 15. This Court should find otherwise and hold that the government failed to present sufficient evidence of an essential element of the charged crime.

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 remedy for this error is reversal. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016).

While the government argues Mr. Walker had the future ability to carry out the threats made, it does not address his present ability to carry out the alleged threats. BOR at 16. Even if this Court does not agree that the jury must be instructed on this element, it should find that there must be sufficient evidence of this element to sustain the conviction. *Winship*, 397 U.S. at 358. The prosecution does not contest that it did not present sufficient evidence of this essential element. This Court should order reversal. *Hummel*, 196 Wn. App. at 359.

B. CONCLUSION

The outrageous government conduct warrants dismissal. Without the conduct, there would have been no charge. This Court should order dismissal.

In the alternative, the court should find that the trial court erred when it did not 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's failure to prove Mr. Walker had the present and future ability to carry out the threat made to the officer requires dismissal.

DATED this 12th day of May 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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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 53555-6-II
)	
TODD WALKER,)	
)	
APPELLANT.)	

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WASHINGTON APPELLATE PROJECT

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