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Division II
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NO. 53555-6-II

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

STATE OF WASHINGTON,
Respondent,

v.

TODD KYLE WALKER,
Appellant.

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

THE HONORABLE STEPHEN E. BROWN, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. Response to first assignment of error.

The trial court did not err when it denied Appellant's motion to dismiss because the officer's conduct was not outrageous.

2. Response to second assignment of error.

The trial court correctly instructed the jury that threats to injure immediately or in the future can be felony harassment.

3. Response to third assignment of error.

The State presented sufficient evidence to find the Defendant guilty of felony harassment.

RESPONDENT'S COUNTER STATEMENT OF THE CASE

At about 9:30 p.m. on November 2, 2018, Trooper Christopher Mann with the Washington State Patrol and Officer Joshua Goffena with the Elma Police Department responded to a call that a male subject was swinging an axe or hatchet at another person in Elma. RP 157, 214. When Trooper Mann arrived, Deputy Steiner of the Grays Harbor Sheriff's Office was already on scene with the suspect, later identified as

Appellant Todd Walker, handcuffed and sitting on the ground. RP 158 – 159. Deputy Steiner had in fact taken a hatchet away from Mr. Walker; Mr. Walker had a sheath on his belt to carry the hatchet. RP 161. Mr. Walker was highly intoxicated. He was demanding that the officers let him go and that he be allowed to stand up; he was also trying to get the handcuffs from behind his back to his front. Trooper Mann could detect the odor of intoxicants coming from Mr. Walker. Mr. Walker had extremely slurred speech and was uncoordinated. He couldn't follow directions nor the conversations the officers were trying to have with him. He wouldn't listen to the officers as they were telling him to wait, sit down and stop so that they could work with him; he kept repeating the same thing over and over again. RP 159 – 162. Mr. Walker kept trying to stand up so eventually the officers had to hold onto him to keep him seated. RP 163.

About 15 minutes after Trooper Mann arrived, Officer Goffena arrived on scene. RP 161. After talking to other officers and people at the scene, Officer Goffena determined that there was probable cause to arrest the Defendant for violating a court order and placed him under arrest. RP 217 – 18. It took several officers to get Mr. Walker into the back seat of Officer Goffena's patrol car, as he was actively resisting. RP 218. Due to

Mr. Walker's level of intoxication, Officer Goffena decided to take him to Summit Pacific Medical Center to get him cleared for incarceration. RP 219. Because of Mr. Walker's behavior, Trooper Mann followed Officer Goffena in case he needed help with Mr. Walker. RP 166, 219. During the trip to the hospital, Mr. Walker continued to yell and scream. RP 220.

Once at the hospital, Mr. Walker refused to get out of Officer Goffena's patrol car, cursing at him and telling him not to touch him; he had to be physically removed from the car. Somehow, one of Mr. Walker's wrists had slipped out of the handcuffs and he had to be re-handcuffed by Officer Goffena and Trooper Mann on the ground after a short struggle. Mr. Walker would not willingly walk into the hospital and had to be carried/dragged in by Officer Goffena and Trooper Mann as he was yelling and cursing at them and calling them derogatory names. RP 22. Nor would he cooperate with medical staff as he continued to yell, scream, curse and flail about. During the examination, he had to be physically restrained by either Trooper Mann or Officer Goffena. RP 166 – 168, 220 – 223.

Mr. Walker was cleared for incarceration. RP 223. Given Mr. Walker's continued belligerence, Trooper Mann decided to follow Officer Goffena to the jail in Montesano. RP 168 – 169. While en route from

Summit Pacific to the jail, Officer Goffena heard a thump come from the back seat, which he recognized as Mr. Walker banging his head on the Plexiglas partition between the front and back seat of the patrol car. Officer Goffena told Mr. Walker to stop and Mr. Walker yelled at Officer Goffena, “fuck you,” (which, according to Officer Goffena, seemed to be his favorite phrase that night). RP 225. Mr. Walker then struck his head several more times on the Plexiglas partition while Officer Goffena repeatedly told him to stop doing so. Mr. Walker refused to stop, so Officer Goffena decided to pull over and make sure that he hadn’t injured himself. RP 223 – 225. Officer Goffena pulled over to the side of SR 12, just west of the Elma Third Street interchange. As he exited the vehicle, Officer Goffena grabbed his can of OC spray (pepper spray) from the door pocket. RP 225 – 226. Officer Goffena went around the car and opened the rear passenger door. Mr. Walker turned towards Officer Goffena and kicked his foot into the doorway. RP 226, 170. This prevented Officer Goffena from closing the door and exposed him to the risk of being kicked by the Defendant, possibly enabling him to escape, RP 226 – 227, and posing the risk that Mr. Walker could run into traffic on Highway 12. RP 170. Mr. Walker started to lean forward. He had a large cut or gash on his face that was bleeding profusely. RP 170, 227. Officer Goffena gave

Mr. Walker several instructions to sit back and he refused. He was still being belligerent, wouldn't cooperate, was pushing his feet against the door and was kicking his feet around. RP 170, 227. Neither Officer Goffena, nor Trooper Mann had protective equipment (gloves, masks, etc.) and, given the amount of blood from Mr. Walker's injuries, going "hands on" in an attempt to physically restrain Mr. Walker in the confined space of the back seat of the patrol car, wasn't a safe option. RP 170, 228. Nor did Officer Goffena want to use his Taser; it would only immobilize Mr. Walker for about five seconds and he considered it too high a level of response for the situation. Given the situation, Officer Goffena felt that the pepper spray was the best and safest response to subdue the Defendant and prevent him from injuring himself further. RP 228. After several warnings, Officer Goffena deployed the pepper spray. RP 228.

Once Mr. Walker was sprayed with the pepper spray, he stopped his active resistance. Officer Goffena and Trooper Mann were able to get the back door closed and proceeded to the Grays Harbor County Jail with lights on¹. RP 227, 228. The pepper spray had its desired effect in that

¹ Officer Goffena testified that "due to the distance" he wanted to get Mr. Walker to the jail as quickly as possible to get him decontaminated. RP 228. Although not part of the record, the distance between where Officer Goffena pulled over to the side of SR 12 and the jail was about 8 - 9 miles.

the Defendant quit banging his head on the Plexiglas partition, RP 228, although during the rest of the trip to the jail Mr. Walker continued to yell and curse. Five times during the trip to the jail, Mr. Walker looked directly at Officer Goffena and said, “I am going to find you and I will kill you.” RP 29. The last time was as officer Goffena was exiting SR 12 in Montesano. RP 231. Officer Goffena could see Mr. Walker looking at him in the rear view mirror as Officer Goffena was keeping an eye on him during the trip to the jail. RP 229.

Officer Goffena took the threat from Mr. Walker seriously and felt that he could follow through with it at any time. RP 231 – 233. It made Officer Goffena very uncomfortable every time Mr. Walker made the threat. RP 233 – 234. Officer Goffena has a family and small children. Mr. Walker knew where he worked, and a lot of information about police officers is public knowledge. With a web search, Mr. Walker would have no trouble finding Officer Goffena’s home address. RP 235.

Prior to trial, Mr. Walker moved to dismiss based upon outrageous government conduct. CP 17 – 26. A hearing on the motion was held on April 8, 2019. 04/08/19 RP 14 et seq. The motion was denied. 04/08/19 RP 64 – 68. Findings of Fact and Conclusions of Law were entered on April 11, 2019, and were not objected to. CP 42 – 52; 04/11/19 RP 2.

Contrary to the assertion in the Appellant's brief, Officer Goffena did not spray Mr. Walker with, "little warning." Appellant's Brief at 7. After assessing the situation with Mr. Walker in the back seat and considering other options, Officer Goffena gave Mr. Walker several warnings to sit back in the car and, when Mr. Walker continued to refuse, applied the pepper spray. 04/08/19 RP 30 – 31; RP 170, 227-228. Nor was the testimony that pepper spray should only be used when all other use of force methods have been exhausted. Appellant's brief at 7. Rather, Officer Goffena's testimony at the CrR 3.6 hearing was that the spray should only be used after all verbal means have been exhausted. 04/08/19 RP 46.

The case went to trial and the jury was instructed on the elements of felony harassment in Instruction No. 5 as follows:

INSTRUCTION NO. 5

To convict the Defendant of the crime of Felony Harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (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.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 59.

The Defendant was found guilty, CP 62, and was sentenced. CP 63

– 73. This appeal followed.

ARGUMENT

1. The trial court did not err when it denied Appellant’s motion to dismiss because the officer’s conduct was not outrageous.

Under the totality of the circumstances—the Defendant’s belligerent behavior, his active resistance, his self-harm, and the officer’s use of non-deadly force—there was not outrageous government conduct warranting dismissal.

Standard of review.

Whether police officer conduct violates a defendant’s due process rights is a question of law. *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). Constitutional violations are reviewed de novo. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482.

Officer Goffena’s use of pepper spray to subdue the Defendant was not outrageous government conduct.

Police behavior “may be so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *Lively*, 178 Wash.2d at 19 (internal quotation marks omitted). But for officer conduct to violate due process “the conduct must shock the universal sense of fairness” *Id.* This “requires more than a mere demonstration of flagrant police conduct.” *Id.* at 20. “Dismissal based on outrageous conduct is reserved for only the most egregious circumstances.” *Lively*, supra.

Courts reviewing an allegation of outrageous government conduct evaluate the totality of the circumstances. *Id.* at 21. The Washington Supreme Court has outlined five factors to analyze as part of this analysis:

whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity; whether the defendant’s resistance 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 simply allows the criminal 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 at 22 (citations omitted).

The few cases in which appellate courts have upheld dismissals because of outrageous government conduct have involved extreme and extended entrapment by a state actor. In *Lively*, police officers infiltrated a drug treatment program, and instigated criminal activity by repeatedly asking the defendant to purchase drugs. *Lively* at 27. In *State v. Solomon*, 3 Wn. App. 2d 895, 910-914, 419 P.3d 436 (2018), the court found outrageous conduct when the police instigated immoral communication via a Craigslist ad and a detective authored the vast majority of some 200 sexually explicit messages despite seven attempts by the defendant to discontinue contact.

The Washington Supreme Court did not find outrageous government conduct in a case where the defendant was placed under arrest for refusing to sign a citation for failure to signal, and was subsequently wrestled to the ground and subjected to a chokehold. *State v. Valentine*, 132 Wash.2d 1, 5, 935 P.2d 1294 (1997).

The use of pepper spray to subdue a belligerent detainee is not outrageous government conduct sufficient warrant dismissal. When Officer Goffena stopped his car to check on the defendant, the Defendant had already bashed his head against the barrier between him and the officer multiple times, which caused him to bleed from his head. 4/8/19

RP 66. The Defendant was highly intoxicated. 4/8/19 RP 67. Officer Goffena warned the Defendant about the pepper spray. 4/8/19 RP 65. The Defendant stuck his foot out the door when the Officer opened it, and prevented the officer from closing it again. 4/8/19 RP 66. In this situation, the officer was confronting ongoing hostile activity and self-harm.

None of the five factors outlined in *Lively* apply to this situation. There is no evidence that the Officer instigated the threats the Defendant made against him, encouraged or egged the Defendant on to make the threats controlled the Defendant's behavior, or overcame the Defendant's reluctance to commit the crime through persistent solicitation. Officer Goffena did not cultivate a relationship under false pretenses. There is absolutely no evidence to suggest a situation was created to elicit a threat of bodily harm. The chokehold in *Valentine* arguably presents a more compelling case for finding outrageous government conduct than Officer Goffena's reaction, and yet even the chokehold in *Valentine* did not warrant dismissal. *Valentine* at 5.

Conclusion.

Washington courts have held that dismissal is "appropriate only in the most egregious cases, such as when the governmental agents direct a crime from beginning to end or a crime is fabricated for the sole purpose

of obtaining a conviction and not to protect the public from criminal behavior.” *State v. Athan*, 160 Wn.2d 354, 377, 158 P.3d 27 (2007). That is decidedly not the case here. Officer Goffena’s use of pepper spray was not outrageous government conduct violating fundamental fairness.

2. The trial court correctly instructed the jury that threats to injure immediately or in the future can be felony harassment.

To find a defendant guilty of felony harassment, a threat of bodily injury can be either immediately executable or executable in the future.

Standard of review.

Review of alleged errors of law in jury instructions and questions of statutory interpretation are reviewed de novo. *State v. Boyle*, 183 Wn. App. 1, 10, 33 P.3d 954 (2014).

The state is not required to prove both that the speaker had the ability to carry out the threat immediately *and* in the future.

RCW 9A.46.020(2)(b) states that “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.” In *State v. Boyle*, supra, Division One of the Court of Appeals held that this is an exception to, not an element of, felony harassment. *Boyle* at 11. Under this exception threatening words are not harassment when it is apparent that the speaker has neither the present or future ability to carry

out a threat. *Id.* The meaning of this exception, correctly interpreted, is that “threatening words are not harassment if it is apparent to the criminal justice participant that (1) the speaker does not have the present ability to carry out the threat and (2) the speaker does not have the future ability to carry out the threat.” *Id.* Both present and future execution of a threat must be impossible for the exception to apply. Mr. Walker asks this court to find just the opposite: that both must be *possible* for it to be harassment.

But the court in *Boyle* pointed out some of the many absurdities that would result were that the case: “the statute would not prohibit many electronic threats as it explicitly does,” “[n]o threats to third persons not in the speaker’s presence would be actionable,” and “threats of exclusively future harm” would also evade prosecution. *Id.* at 12. On top of this, the court reasoned that because RCW 9A.46.020(1) defines harassment as threats to cause bodily injury “immediately or in the future,” it cannot also be that the State must prove *both* the present and future ability. *Id.* at 11.

Four times in the last three years, in unpublished opinions², Divisions II and III of this court has agreed with the *Boyle* court that under this exception either present or future ability is sufficient for felony

² *Bradley, Wills, Popejoy, and Pawley* are unpublished and are cited pursuant to GR 14.1(a) as persuasive, non-binding authority.

harassment. All three address situations where only future harm was possible either because the threat was made telephonically or the defendant was restrained as the Defendant in this case was. In *State v. Bradley*, 3 Wn. App. 2d 1035, 2, WL 1919818 (2018) (Division II), a nearly identical situation to the Defendant's arose: the court found that a defendant handcuffed in the back of a patrol car, despite not having the present ability to carry out a threat, did have the future ability and that both were not required for felony harassment. In *State v. Wills*, 9 Wn. App. 2d 1080, 3, WL 3430826 (2019) (Division II), the defendant was also handcuffed in the back of a patrol car when he made threats against an officer. The court found that he could be found guilty of felony harassment based purely on the basis of his future ability to harm the office. In *State v. Popejoy*, 199 Wn. App. 1068, 3, WL 3142710 (2017) (Division II), the court found that a threat made over the phone to "shoot [the officer] on sight if he ever saw [the officer]" in the future was—despite not present ability to carry out the threat—sufficient for felony harassment. Division III has also endorsed the *Boyle* court's understanding of this felony harassment exception: "[W]hile Mr. Pawley's physical restraints during the altercation made it improbable he could have killed Officer White when he communicated the threat, those restraints did not

prohibit a future attack.” *State v. Pawley*, 5 Wash.App.2d 1043, 3, WL 4998796 (2018).

Each time this issue has come up, Washington courts have found either present *or* future possibility of the threat being executed is sufficient for felony harassment.

Conclusion.

The Defendant threatened Officer Goffena five times saying, “I’m going to find you and I will kill you.” 4/8/19 RP at 229; Officer Goffena feared that these threats would be realized in the future. RP at 231. That future threat of harm is sufficient for a finding of felony harassment. It is unnecessary to prove also that he had the ability at that moment to carry out the threat. The jury was correctly instructed.

3. The State presented sufficient evidence to find the Defendant guilty of felony harassment.

Standard of Review.

“Sufficient evidence supports a conviction if after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Boyle*, supra, at 7. When a defendant challenges the sufficiency of the State’s evidence, they “[admit] the truth of the State’s evidence and all reasonable inferences from that evidence.” *Id.* The

reviewing court defers to the trier of fact on issues of credibility and persuasiveness. *Id.* The reviewing court also only needs to find “substantial evidence” to support the State’s case, not itself be convinced beyond a reasonable doubt. *Id.*

There was substantial evidence that the Defendant had the future ability to carry out threats to Officer Goffena’s life.

The Defendant argues only that the state did not present evidence sufficient to show that he had “the present and future ability to carry out the threats made.” Appellant’s brief at 26. The Appellant references how he was handcuffed in the back of a patrol car, how he was “incoherent” and “in crisis,” and experiencing the effects of pepper spray. *Id.* at 25.

While all of this certainly suggests the defendant had no immediate ability to carry out a threat, this only affects the sufficiency of the State’s evidence if the court disavows its prior holdings and finds that both immediate and future capability of carrying out a threat are necessary for felony harassment. The State maintains that the Appellant had the future ability to carry out his threats on Officer Goffena’s life, that Officer Goffena was performing his official duties, that Officer Goffena was in reasonable fear that the threat would be carried out, and that any reasonable officer would feel the same fear.

Conclusion.

Because the State must show either the immediate *or* future ability to carry out a threat and not both, and there is substantial evidence of the Appellant's future ability, the evidence is sufficient to affirm the Appellant's conviction.

CONCLUSION

Officer Goffena's actions in subduing the Defendant with pepper spray were not the type of outrageous government conduct that warrant dismissal. The Defendant made credible threats on a law enforcement officer's life, with the future ability to carry them out. This is supported by substantial evidence. The Defendant's conviction should be affirmed.

DATED this 27th day of April, 2020.

Respectfully Submitted,



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GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

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