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NO. 54163-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

KALOB HACKETT,

Appellant.

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**BRIEF OF RESPONDENT**

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## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The charging document appropriately apprised Hackett of the essential elements of the crime of felony harassment.
2. The trial court properly instructed the jury of the elements of felony harassment.
3. Sufficient evidence supported Hackett's conviction for felony harassment because the evidence showed his statements were a true threat, that a reasonable officer would have been frightened, and that Hackett had the present or future ability to carry out the threat.
4. The State concedes that the trial court did not inquire into Hackett's ability to pay LFOs before imposing them, but review should nonetheless be denied as Hackett did not object at the sentencing hearing.

## **II. STATEMENT OF THE CASE**

On March 22, 2019, Washington State Patrol Trooper Nicholas Macomber was conducting general traffic patrol on I-5 in Cowlitz County. RP 64. As he was stationed in the median, he observed a vehicle travelling at a high rate of speed – 86 miles per hour in a 70 mile per hour zone. RP 65. Trooper Macomber stopped the vehicle and contacted the driver, Kalob Hackett, and a female passenger. RP 66–7.

Upon contacting Hackett, Trooper Macomber observed that he had slurred speech and watery eyes. *Id.* The trooper could also smell an odor of intoxicants coming from the inside of the vehicle. RP 67. When asked, Hackett denied consuming alcohol so Trooper Macomber asked him to

step out of the car. RP 67. Once outside the vehicle, Trooper Macomber could smell the odor of intoxicants coming from Hackett directly. RP 68. When confronted with this fact, Hackett admitted that he had consumed alcohol. *Id.* Additionally, his performance on the field sobriety tests indicated that he may have been impaired. RP 75. Trooper Macomber placed him under arrest for driving under the influence, driving on a suspended license, and driving in violation of an ignition interlock device requirement. RP 75–6.

After being placed under arrest, Hackett became extremely belligerent and vulgar toward Trooper Macomber. RP 77. His belligerent attitude continued throughout his contact with the trooper. RP 96. According to the trooper, “He made statements about fucking my mother. He called me a child molester and a faggot. And he asked me how my wife was. Then he said, throughout the night, that someone would be – or that he would see me around town and that someone would be paying me a visit.” RP 80. Specifically, Hackett stated, “Is there something you can actually do? You going to take me out of the car and beat me? Okay. I’m sure you live in the area, I’ll find out.” RP 86. At trial, the jury was able to see and hear Hackett’s behavior because a copy of the recording from Trooper Macomber’s in-car camera was admitted into evidence. RP 83. Trooper Macomber took Hackett’s threatening statements seriously,

stating that he had no reason to believe Hackett would not follow through with his threats. RP 80–1.

Hackett ultimately refused to provide a breath sample. Additionally, his driver’s license was suspended and he was required to have an ignition interlock device in his car, which he did not have. RP 76, 79, 101.

The State charged Hackett with felony harassment of a criminal justice participant, driving under the influence, driving while his license was suspended in the third degree, and violation of an ignition interlock device. CP 1–3. Hackett was found guilty of all charges on November 13, 2019, and now timely appeals, challenging only the felony harassment charge. CP 34, 48.

### **III. ARGUMENT**

#### **A. The charging document appropriately apprised Hackett of the essential elements of the crime of felony harassment.**

RAP 2.5(a) generally prohibits a party from raising claims for the first time on appeal. RAP 2.5(a)(3), however, allows appellants to raise claims for the first time on appeal if such claims constitute manifest error affecting a constitutional right. *State v. Locke*, 175 Wn. App. 779, 796–97, 307 P.3d 771, 779 (2013); *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). An alleged error is manifest if it results in actual

prejudice; that is, if it had “practical and identifiable consequences” at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

A challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal. The Court reviews the charging information de novo. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991), *State v. Pittman*, 185 Wn. App. 614, 619, 341 P.3d 1024 (2015).

Where, as here, an appellant challenges a charging document for the first time on appeal, the reviewing court construes the document liberally, in favor of its validity. *Kjorsvik*, 117 Wn.2d at 103. A liberal standard of review is used because otherwise “the defendant has no incentive to timely make such a challenge, since it might only result in an amendment” of the charge. *Id.* In upholding this liberal standard of review, the Washington Supreme Court stated,

The orderly administration of criminal justice *demand*s that a defendant who is dissatisfied with the form or substance of an indictment or information filed against him shall make that known to the trial court at or before the time when sentence is imposed... It would create an intolerable situation if defendants, after conviction, could defer their attacks upon indictments or informations until witnesses had disappeared, statutes of limitation had run, and those charged with the duty of prosecution had died, been replaced, or had lost interest in the cases.

*State v. Majors*, 94 Wn.2d 354, 358–59, 616 P.2d 1237 (1980) (emphasis added).

Because charging documents are to be reviewed liberally when not timely challenged, a reviewing court has considerable leeway to imply the necessary allegations from the language that is present. *Kjorsvik*, 117 Wn.2d at 104. The document is read as a whole, using common sense, and including facts that are implied. *State v. Nonog*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010). A charging document is sufficient even if it does not contain the exact statutory language of the crime. *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). If the necessary facts appear in any form or can reasonably be inferred from the terms of the charge, the defendant must show he or she was actually prejudiced by the inartful language in order to prevail on appeal. *Kjorsvik*, 117 Wn.2d at 105.

Here, the charging document was sufficient to apprise Hackett of the elements of the crime even though it omitted the phrase “the fear from the threat was a fear that a reasonable criminal justice participant would have under all the circumstances,” because that portion of the statute is not an essential element of the crime and because, even if it is an essential element, it can be inferred from the terms of the charge.

1. *That the fear from a threat was a fear that a reasonable criminal justice participant would have is not an essential element of the crime of felony harassment.*

An essential element of a crime is “one whose specification is necessary to establish the very illegality of the behavior charged.” *State v.*

*Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). The essential

elements of the crime of harassment are:

- (1) A person is guilty of harassment if:
  - (a) Without lawful authority, the person knowingly threatens:
    - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
    - (ii) To cause physical damage to the property of a person other than the actor; or
    - (iii) To subject the person threatened or any other person to physical confinement or restraint; or
    - (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
  - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. “Words or conduct” includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

RCW 9A.46.020(1). That crime is a gross misdemeanor unless the victim is a criminal justice participant who is performing his or her official duties at the time the threat is made. RCW 9A.46.020(2)(a), (2)(b). The statute goes on to define what “reasonable fear” means when the threat is to a criminal justice participant – “the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances.” RCW 9A.46.020(2)(b). This definition does not establish the illegality of the behavior – that is listed in subsections (1) and (2)(b). It merely defines what a reasonable fear is. Therefore, the language that Hackett claims is an essential element is actually a definition that does not need to be included in the charging language.

2. *That the fear must be one that a reasonable criminal justice participant would feel can be inferred from the language present in the charging document.*

Even if this court finds that the complained-of phrase is an essential element of felony harassment, it can be inferred from the language present in the charging information. Under the liberal construction standard that applies when a defendant challenges the charging document for the first time on appeal, all that is necessary is for the facts to appear in any form or be fairly construed from the words contained in the charging document. The charging document here states, in relevant part, “The defendant...knowingly did threaten to cause bodily injury immediately or in the future to Trooper Nicholas Macomber, and the words or conduct did place Trooper Nicholas Macomber in reasonable fear that the threat would be carried out.” CP 1. Read broadly, the words “reasonable fear” indicate that the fear must be reasonable in the context of the threat. The context of a threat against a criminal justice participant necessarily includes what would cause fear to other reasonable criminal justice participants. Therefore, Hackett was sufficiently apprised of the charges against him.

**B. The trial court properly instructed the jury on the elements of felony harassment.**

1. *Standard of review*

Jury instructions and questions of statutory interpretation are reviewed de novo. *State v. Boyle*, 183 Wn. App. 1, 10, 335 P.3d 954 (2014).

2. *The jury instructions in this case properly informed the jury of the applicable law.*

RCW 9A.46.020 prohibits threatening bodily injury “immediately or in the future.” When the person threatened is a criminal justice participant, the statute 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 them out.” RCW 9A.46.020(2)(b). Hackett claims this is an element of the crime of harassment. He is incorrect. This sentence is an exception, not an element of the crime.

The Washington Court of Appeals explicitly ruled on this issue in *Boyle*, 183 Wn. App. at 1. The facts of *Boyle* are strikingly similar to the case at bar. There, the defendant was handcuffed and in the backseat of a patrol car. 183 Wn. App. at 5. After receiving his *Miranda* warnings, Boyle became very angry, yelled profanities, and made a series of threatening statements to the officer. *Id.* On appeal, he argued that he did

not have the present ability to carry out his threats because he was restrained. *Id.* at 9.

The Court of Appeals disagreed, holding that the “present and future” portion of the harassment statute is an exception, not an element of the charged offense. *Boyle*, 183 Wn. App. at 11. RCW 9A.46.020(2)(b) states, in relevant part:

For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. *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).

The challenged language, italicized above, is placed distinctly and separately from the elements of the offense, which are detailed in subsection (1). It is also phrased as an exception. *Boyle*, 183 Wn. App. at 11. “The sentence plainly states 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.* Alternatively, if it was apparent that the speaker had *either* the present or future ability to carry out the threat, the statements would constitute harassment. *Id.* This reading is also consistent with the language of the statute, which defines

harassment as threatening to cause bodily injury “immediately or in the future.” *See id.* When reading the challenged language in the context of the whole statute it is clear the legislature intended this as an exception to the crime of felony harassment, not as an element.

The jury instructions here correctly stated the law and did not relieve the State’s burden. Therefore, this Court should follow *Boyle* and affirm Hackett’s convictions.

**C. Sufficient evidence supported Hackett’s conviction for felony harassment because the evidence showed his statements were a true threat, that a reasonable officer would have been frightened, and that Hackett had the present or future ability to carry out the threat.**

Due process requires that the State prove every element of the crime charged beyond a reasonable doubt. *State v. France*, 180 Wn.2d 809, 814, 329 P.3d 864 (2014). The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court does not determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced. *Seattle v. Slack*, 113 Wn.2d 850, 589, 784 P.2d 949 (1989).

A claim of insufficient evidence admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. *Id.* at 202. A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Price*, 127 Wn. App. 193, 202, 110 P.3d 1171 (2005); *State v. Camarilla*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Finally, circumstantial evidence is considered no less reliable than direct evidence. *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991).

The crime of felony harassment of a criminal justice participant requires the State to prove that: (1) the defendant knowingly threatened to cause bodily injury to another person immediately or in the future; (2) the words or conducts placed the victim in reasonable fear that the threat would be carried out; (3) the defendant harassed a criminal justice participant who is performing his official duties at the time the threat is made; (4) the fear from the threat is a fear that a reasonable criminal justice participant would have under all the circumstances; and (5) the defendant acted without lawful authority. RCW 9A.46.020.

1. *The evidence established that a reasonable officer would have been afraid Hackett would carry out his threats.*

In order to prove the crime of felony harassment of a criminal justice participant, the State must prove both that the victim experienced

actual fear and that the fear experienced was a fear that a reasonable criminal justice participant would have under all the circumstances. RCW 9A.46.020. That was proved here.

First, the evidence supports the jury's determination that Hackett's threats placed Trooper Macomber in fear that the threats would be carried out. Trooper Macomber testified that he took Hackett's threats seriously. RP 80–81. This alone is sufficient to meet the requirement that the victim experienced actual fear. *State v. Hecht*, 179 Wn. App. 497, 501–02, 511, 319 P.3d 836 (2014). Courts have readily affirmed harassment convictions in cases where the victim took the threat seriously. *See id.*; *State v. Trey M.*, 186 Wn.2d 884, 905, 383 P.3d 474 (2016); *Boyle*, 183 Wn. App. at 8–9. Taking the evidence in the light most favorable to the State, there is sufficient evidence to show that Trooper Macomber was afraid Hackett would carry out his threats.

Second, if the evidence in a case establishes the victim's subjective fear, the issue then is whether a rational trier of fact could have found that the victim's fear was reasonable. *State v. Alvarez*, 74 Wn. App. 250, 260, 872 P.2d 1123 (1994). The reasonableness of a victim's fear is determined by applying an objective standard to the threat and the context around it. *State v. Ragin*, 94 Wn. App. 407, 411, 972 P.2d 519 (1999). Context can include the defendant's conduct and demeanor as well as the

tone or nature of the threat. *See Hecht*, 179 Wn. App. at 501, 511; *Boyle*, 183 Wn. App. at 9. The reasonableness of a victim's fear is "a question for the trier of fact in light of the total context." *Trey M.*, 186 Wn.2d at 906.

The evidence here supports the jury's finding that Trooper Macomber's fear was reasonable. The jury saw a portion of the dashboard camera recording showing Hackett's extremely belligerent attitude, vulgar statements, and pointed comments. RP 85. He made multiple comments about the trooper and the trooper's family that expressed anger directly toward them as well as a desire to harm them. RP 80, 85–7. Additionally, Trooper Macomber testified that people often use colorful language and express anger when arrested but that Hackett's anger was the most extreme example he had encountered in his ten-year career. RP 80, 61. Looking objectively at the threats of physical harm and Hackett's belligerent attitude, vulgar statements, and disparaging comments about Trooper Macomber's professionalism, the evidence is sufficient to prove that the trooper's fear was reasonable.

2. *Hackett's statements were true threats.*

In order to protect the right to free speech, statutes that make threatening statements a crime may only proscribe "true threats." *Boyle*, 183 Wn. App. at 7. A "true threat" is a statement made in a context or under

such circumstances that a reasonable person would take the statement as a serious expression of intent to inflict bodily harm upon another person. *Id.* The speaker need not actually intend to carry out the threat – “it is enough that a reasonable speaker would foresee that the threat would be considered serious.” *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). An indirect threat may constitute a true threat. *State v. Locke*, 175 Wn. App. 779, 792, 307 P.3d 771 (2013).

Additionally, a reviewing court does not limit its inquiry only to the literal words of the threat. *Boyle*, 183 Wn. App. at 8. Whether something is a true threat depends on the totality of the circumstances, including the defendant’s demeanor. *Id.* at 9.

In *Boyle*, the defendant became very angry and started yelling profanities upon his arrest for DUI. *Id.* at 5. His tone of voice was extremely angry and he made a series of threatening statements to the arresting officer. *Id.* For example, he said, “‘People will look you and your family up and do them in. I would never threaten your family....’ ‘People should shoot you guys in the face and I’ll be glad when they do. I would not do it myself, but you know someone will....’ ‘You wait and see what happens when I get out. I’m not threatening you....’ ‘Someone will kill you and your family. I’m not saying it’s going to be me, but someone is going to snipe copes and their families.’” *Id.*

Boyle appealed his conviction, claiming that the State presented insufficient evidence that his statements were true threats. *Id.* at 6. He argued that his statements were, at most, predictions that police officers are at risk, hopes that something bad would happen to the officer's family, or expression of his political views. *Id.* at 8. Division I of the Washington Court of Appeals disagreed, stating that a reasonable juror could find Boyle's statements to be a serious expression of intent to inflict bodily harm. *Id.* at 9. Even though Boyle stated multiple times that he was not threatening the officer, his demeanor, actions, and repeated threats "strongly contradict the literal translation of those disclaimers." *Id.*

Similarly, a reasonable juror could find Hackett's statements to be a serious expression of intent to inflict bodily harm. Though he stated that he would never threaten an officer and that if he saw the trooper around town he would give him a hug, his tone, demeanor, and repeated threatening statements contradict those words. First, his tone when making those two specific comments was very sarcastic, indicating that he did not mean them. RP 88. Second, he was very vulgar and profane throughout the contact. Trooper Macomber stated that Hackett's language and anger were the most extreme he had encountered in his career. RP 80. He repeatedly called the trooper a child molester, made statements about having sex with the trooper's mother, and suggested that the trooper

engaged in sexual activity with and unreasonable use of force against arrestees. RP 80, 85–6. It was in this context that Hackett stated that someone would see Trooper Macomber around town and that somebody was going to pay him a visit. A reasonable juror could find these statements to be “true threats,” i.e. as serious expressions to inflict bodily harm on the trooper.

*State v. Kilburn*, on which Hackett relies, is distinguishable from the case at hand. First, Kilburn maintained that he was joking when he made the relevant statements. *State v. Kilburn*, 151 Wn.2d 36, 52, 84 P.3d 1215 (2004). Here, Hackett did not renounce his threats in a serious way, did not testify at trial, and never indicated that he was joking.

Second, the context surrounding the statements in *Kilburn* differs greatly from the context in which Hackett made his threatening statements. For example, testimony at Kilburn’s trial indicated the students were chatting, laughing, and giggling; that Kilburn was “half-smiling” when he made the threatening comment; and that the named victim thought he may have been joking. *Id.* The named victim also testified that she did not feel scared and that she wondered whether Kilburn was serious or not. *Id.* at 53. Conversely, Trooper Macomber testified about Hackett’s belligerent and vulgar language and stated that Hackett was very sarcastic when he said he would never threaten a police

officer. RP 77, 79, 88. He also testified that he took Hackett's threats seriously and was afraid because he did not know Hackett or who he might be associated with. RP 80. Trooper Macomber then stated that he had no reason to believe Hackett would not follow through on his threats. RP 81.

The facts in *Kilburn*, including the past history and friendship between Kilburn and the named victim, the regularity of Kilburn joking with friends, and his laughing when he made the comments, make it unlikely a reasonable person would take them seriously. *Kilburn*, 151 Wn.2d at 53. The facts here indicate the opposite. Because Hackett's statements to Trooper Macomber were true threats, this Court should follow *State v. Boyle* and affirm Hackett's conviction.

3. *The State is not required to prove that Hackett had both the present and future ability to carry out his threats.*

Hackett also argues that the evidence was insufficient to prove he had the present and future ability to carry out the threat, claiming the statute is conjunctive. This argument fails as case law is clear that RCW 9A.46.020 is a disjunctive statute that only requires the State to prove that a defendant had the present or future ability to commit the threatened act.

The Court of Appeals explicitly ruled on the issue of whether a defendant must have the present *and* future ability to commit the

threatened action or the present *or* future ability to commit it. *Boyle*, 183 Wn. App. at 1. Boyle argued on appeal that he did not have the present ability to carry out his threats because he was restrained. *Id.* at 9.

The Court disagreed, holding that Boyle’s argument would lead to the absurd result that threats made electronically or to a third person, and threats of an exclusively future nature could not be prosecuted. *Id.* at 12. The harassment statute, however, explicitly allows for the prosecution of threats made via electronic communication. RCW 9A.46.020(1)(b). When a court interprets a statute, it is a well-established rule that absurd results are to be avoided. *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979).

Additionally, it is clear that the harassment statute is meant to be taken in the disjunctive because, as discussed in Section B(2), above, the “present and future” portion of it is an exception, not an element of the charged offense. Subsection (1) also defines harassment as threatening to cause bodily injury “immediately or in the future.” Acts that then enhance harassment from a gross misdemeanor to a class C felony are listed in RCW 9A.46.020(2)(b)(i)-(iv). When reading the challenged language in the context of the whole statute it is clear the legislature intended this as an exception to the crime of felony harassment, not as an element.

Hackett asks this Court to break with the precedent established by *Boyle*. Because the “present and future” sentence is phrased as an exception, and because requiring proof of both the present *and* future ability to carry out a threat would lead to absurd results, this Court should follow *Boyle* and find that sufficient evidence proved Hackett had the future ability to carry out his threatening statements.

**D. The State concedes that the trial court did not inquire into Hackett’s ability to pay LFOs; however, review should be denied.**

The State concedes that the trial court did not inquire into Hackett’s ability to pay legal financial obligations. However, the general rule for appellate disposition of issues not raised in the trial court is that appellate courts will not entertain them. RAP 2.5; *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013). Appellate courts can also refuse to address a RAP 2.5(a) issue sua sponte. *Id.*; *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012). In fact, this Court has previously declined to review the imposition of legal financial obligations when raised for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) (“Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.”).

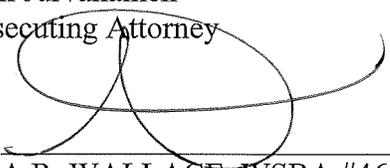
Here, Hackett was sentenced on November 21, 2019, well after *Blazina* was issued. Because Hackett failed to object to the imposition of LFOs at sentencing, this Court should not review the trial court's imposition of LFOs. However, if this Court reviews this issue and finds the imposition was improper, the remedy is remand so the trial court may strike the relevant LFOs. *State v. Bertrand*, 165 Wn. App. 393, 406, 237 P.3d 511 (2011).

#### IV. CONCLUSION

Because the charging document was sufficient, the jury instructions were proper, and sufficient evidence was presented to prove every element of felony harassment beyond a reasonable doubt, Hackett's convictions should be affirmed.

Respectfully submitted this 24 day of August, 2020.

Ryan Jurvakainen  
Prosecuting Attorney

By:   
\_\_\_\_\_  
AILA R. WALLACE, WSBA #46898  
Deputy Prosecuting Attorney

**CERTIFICATE OF SERVICE**

I, Julie Dalton, do hereby certify that the opposing counsel listed below was electronically served BRIEF OF RESPONDENT via the Appellate Courts' portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 24, 2020.

  
\_\_\_\_\_  
Julie Dalton

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

**August 24, 2020 - 11:07 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54163-7  
**Appellate Court Case Title:** State of Washington, Respondent v. Kalob Hackett, Appellant  
**Superior Court Case Number:** 19-1-00354-2

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