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No. 35439-3-III

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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STATE OF WASHINGTON

Respondent

v.

JEREMEY DOUGLAS PAWLEY

Appellant

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**Brief of Appellant**

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Appeal from Spokane County Superior Court No. 16-1-01944-8

The Honorable Timothy B. Fennessy

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## INTRODUCTION

While incarcerated at Geiger Correctional Center, Jeremy Pawley was purportedly defiant to a corrections officer, Kevin White. When Officer White removed Mr. Pawley from the main floor in handcuffs, Mr. Pawley purportedly began acting aggressively and as a result Officer White used physical force, along with other officers, to subdue and remove Mr. Pawley from the situation. Throughout the incident Mr. Pawley purportedly threatened to kill Officer White. Mr. Pawley was subsequently charged with custodial assault and felony harassment. He was convicted of felony harassment, and timely appeals.

## ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR 1: Insufficient evidence was adduced at trial to support Mr. Pawley's conviction for felony assault.

## ISSUES

- 1. Whether sufficient evidence supports Mr. Pawley's conviction for felony assault?**
- 2. Whether, *arguendo*, if the State should prevail, this Court should exercise its discretion and decline to award fees and costs owing to Mr. Pawley's ongoing indigency?**

## MATERIAL FACTS

On May 3<sup>rd</sup>, 2016, inmate Jeremy Pawley was removed from the floor at Geiger Correctional Facility by Officer Kevin White for a perceived defiant statement. Verbatim Report of Proceedings (VRP) at 115-16. It was only once out of sight of the facility cameras on a stairwell that Officer White stated that Mr. Pawley, who had to that point been compliant with his demands, began to exhibit physical resistance. VRP at 116. Officer White then slammed Mr. Pawley into a wall while he called for backup. VRP at 117. The officer then threw Mr. Pawley on the ground in order to control him while backup arrived. VRP at 118. Upon arrival, as many as nine corrections officers began applying physical force to Mr. Pawley in an effort to gain “compliance.” VRP at 120, 152. Mr. Pawley suffered a head injury as a result of their actions. VRP at 411.

Immediately after Mr. Pawley was forcibly removed from the stairwell, Officer White noticed he too had suffered minor injuries from the fracas. VRP at 121. He also alleged, as did other officers, that Mr. Pawley threatened to kill Officer White once the cuffs were removed, and that Mr. Pawley wished to otherwise assault him, as well as all of the officers in general. VRP at 119-20, 182-83, 244, 270, 342, 315, 330-31. Other officers conveyed to Officer White that, even after Mr. Pawley’s removal, he

continued to threaten to kill Officer White. VRP at 126. As a result of this incident, Mr. Pawley was charged by amended information with custodial assault and felony harassment. Clerk's Papers (CP) at 1, 103-04.

At trial, Officer White testified on direct examination that he would be foolish not to take "the threat" on his life seriously. VRP at 125. However, he did not elaborate as to the precise fear that felt, if any. *Id.* Officer White also testified that his concern was valid because Mr. Pawley's room overlooked the parking lot where the officers parked when arriving and departing from work, and because the inmates knew the officer's work schedules. VRP at 115.

On cross examination however, Officer White acknowledged that he had no indication that Mr. Pawley had been watching him, or knew his home address. VRP at 154. Other officers involved in the incident testified that Mr. Pawley made the alleged threats, and that they were "concerned" for Officer White's safety. VRP at 182-83, 244, 271, 343, and 331. At no time was any evidence produced to demonstrate that Officer White was actually in fear that his life would be taken or even that he would otherwise be assaulted. *See generally*, VRP. Nor was any evidence submitted to demonstrate that he took any proactive measures to protect himself from Mr. Pawley as a result of the threat despite the fact that both remained at the facility subsequent to the incident. *Id.*

Mr. Pawley was found not guilty of custodial assault and was found guilty of felony harassment. He was given a mid-point sentence of 55.5, and timely appeals. CP at 253, 262-77.

## ARGUMENT

1. Insufficient evidence supports Mr. Pawley's conviction for felony harassment because the State failed to demonstrate all elements of the offense beyond a reasonable doubt.

It is axiomatic that, in order to determine whether sufficient evidence was adduced at trial to support a conviction, this Court looks to whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn. 2d 192, 201 P.2d 1068 (1992). As such, the State's evidence is taken as true, and all reasonable inferences therefore drawn in its favor. *Id.* The State may prove its case through either direct or circumstantial evidence, which are weighed equally. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Here, insufficient evidence was adduced to demonstrate the crime of felony harassment beyond a reasonable doubt.

A person commits the crime of harassment pursuant to RCW 9A.46.020 when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to the person threatened

or to any other person; [and] the person, by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a)(i), (b). Father, it is felony harassment if a person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made, or else harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. RCW 9A.46.020(b)(iii), (iv).

In *State v. C.G.*, our Supreme Court overturned a felony harassment conviction because insufficient evidence supported the conviction. 150 Wn.2d 604, 80 P.3d 594 (2003). In that case, C.G. was disciplined by a school vice-principal, Tim Haney. When Mr. Haney asked her to leave the classroom, she stated “I’ll kill you, Mr. Haney, I’ll kill you.” *Id.* at 607. C.G. was subsequently charged with felony harassment. *Id.*

At trial, Mr. Haney testified that the threat caused him concern, and that based upon what he knew of C.G., she might try to harm him or someone else in the future. *Id.* C.G. was found guilty of felony harassment for her statements to Mr. Haney. *Id.*

On appeal, Division One of this court affirmed the conviction over a challenge to the sufficiency of the evidence. *Id.* On review, the Supreme Court determined that insufficient evidence supported the conviction

because Mr. Haney expressed *concern* about bodily harm from the threat rather than a fear that the actual threat, *i.e.* to kill, would be carried out as stated. *Id.* at 612. The gravamen of the *C.G.* court’s holding was the idea that “the threat made and the threat feared are the same.” *Id.* at 609.

Here, as in *C.G.*, insufficient evidence supports Mr. Pawley’s conviction for felony harassment because the State failed to elicit sufficient evidence to demonstrate that Officer White actually feared that the threat uttered, *i.e.*, to kill, would actually be carried out.

While it is true that Officer White testified that he took “the threat on [his] life seriously,” he did not actually state that he feared he would lose his life to Mr. Pawley. VRP at 125. Indeed, at no point did he testify that he express anything other than that he took “the threat” seriously. Accordingly, the record is simply unclear as to what fears he may have had as a result of Mr. Pawley’s utterances.

Even construing the evidence in a light most favorable to the State, the inherent vagaries of taking a threat “seriously” means the testimony adduced at trial is simply insufficient to demonstrate that Officer White was actually placed in fear that his life would be taken. While certainly it can be acknowledged that a genuine fear of either serious bodily injury or death would satisfy the threat element for purposes of RCW 9A.46.020(2)(iii) and (iv) that were charged, the State must nonetheless demonstrate that the fear

felt by Officer White was the same as the actual threat uttered. Accordingly, the failure of the State to actually “nail down” what specific fear, if any, was felt by Officer White means that insufficient evidence supports the conviction. This is particularly important where, as here, the evidence adduced shows that Officer White was potentially concerned about a threat to his life, while the “to convict” instruction merely required a fear of bodily harm – a distinction which has been repeatedly recognized by both the Washington legislature and its courts. *See e.g.*, RCW 9A.46.020; *C.G.*, 150 Wn.2d at 609; VRP at 125; CP at 213.<sup>1</sup>

Even if the evidence were sufficient to demonstrate that Officer White was placed in fear, the State further failed to demonstrate that such a fear was reasonable under the circumstances. Certainly, Officer White testified that in his opinion there was a theoretical possibility that Mr. Pawley could carry out a threat to kill because his room overlooked the parking lot, and the inmates were familiar with shift times. Too, there was ample testimony by other corrections officers that they were “concerned”

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<sup>1</sup> While it may be argued that *any* fear as a result of a threat to kill is sufficient to for the State to meet its burden on that element, such an argument should not be well taken. That is because such a distinction is relevant only where the State charges felony harassment and seeks the misdemeanor offense as a lesser-included. Here, because the State elected to pursue a felony based upon Officer White’s employment status rather than the actual threat uttered, such a distinction is irrelevant, and the State still was required to demonstrate that the threat feared was the threat uttered.

for Officer White as a result of the purported threat. VRP at 182-83, 244, 271, 343, and 331. However, even reckoning this information in a light most favorable to the State, it is insufficient to demonstrate that Officer White's fear for his life, if present, was *reasonable* given the evidentiary absence of a present ability to carry out the threat, and the dearth of evidence required to show that Mr. Pawley could carry out such a threat on corrections property in the future.

When taken as a whole, insufficient evidence supports Mr. Pawley's conviction for felony harassment, and his conviction should be vacated, and the matter dismissed with prejudice.

2. If, *arguendo*, the State nonetheless prevails on appeal, Mr. Pawley requests that the Court exercise its discretion and decline to award costs to the State.

RCW 10.73.160 and RAP Title 14 provide for the recoupment of appellate costs from a convicted defendant upon request by the State. However, this court has discretion to waive costs if it determines that the award will work a hardship upon the defendant or his or her immediate family. RCW 10.73.160(1); RAP Title 14.

This court presumes a defendant's indigency throughout the review or his or her appeal, unless the court finds that a party's financial condition has improved so that he or she is no longer indigent. RAP 15.2(e). However, that need not be the case once review is completed, and therefore,

this Court has enacted a general rule requiring information confirming the ongoing indigency of the appellant, consistent with the Supreme Court's holding in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

In this matter, the trial court found Mr. Pawley to be indigent, and signed an order permitting his appellate costs to be forwarded at public expense. CP at 282-83. Moreover, as his Report as to Continued Indigency shows, he is not only unable to repay the obligation, but is likely to be unable to repay the obligation in the foreseeable future given his substantial obligations. As such, this Court should find that Mr. Pawley's indigency is ongoing and exercise its equitable discretion to decline the award of costs to the State should it substantially prevail on appeal.

### CONCLUSION

For reasons discussed above, insufficient evidence supports Mr. Pawley's conviction for felony harassment, and his conviction should be vacated and dismissed. Even if, *arguendo*, the State should prevail, Mr. Pawley should not be obligated to pay fees and costs due to his ongoing indigence.

Respectfully submitted this 31<sup>st</sup> day of January, 2018 by:

s/ John C. Julian

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I personally caused this INITIAL BRIEF OF APPELLANT to be delivered to the following individual(s) addressed as follows:

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