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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JEREMY PAWLEY, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. ISSUE PRESENTED**

Viewing the evidence in a light most favorable to the jury's verdict, was there sufficient evidence introduced to prove the threat to kill Officer White and that a reasonable corrections officer would foresee, under all the circumstances, that the defendant's threats to kill Officer White would be interpreted as a serious expression of his intent to carry out that threat?

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

### Procedural history.

Jeremy Pawley was charged by information in the Spokane County Superior Court with custodial assault and felony harassment. CP 1. The matter proceeded to trial and the defendant was convicted of only the felony harassment. CP 248. With an offender score of "9 plus," Mr. Pawley was sentenced to a mid-range sentence. CP 251, 253. This appeal timely followed.

### Substantive facts.

Kevin White was a corrections officer employed by Spokane County Detention Services. RP 107-09. As part of his employment, Mr. White wore a standard duty uniform, including a badge affixed to his left shoulder. RP 109. On the day of the incident, Officer White worked at

Geiger Corrections, where he had been employed for ten years. RP 108, 125-26. Geiger Corrections is an adult correctional facility. RP 126.

On May 3, 2016, Mr. Pawley, an inmate, was removed by Officer White from his cell because of a loud remark made by Mr. Pawley to another inmate. RP 110-11, 116. Mr. Pawley was handcuffed and compliant with Officer White until the pair reached an access door to a stairwell, which Mr. Pawley forcefully kicked, causing the door to recoil against Officer White and Mr. Pawley. RP 116, 148. Thereafter, Mr. Pawley stepped back into Officer White, causing the officer to strike the railing in the stairwell. RP 118-19.

Mr. Pawley became more physically aggressive and angry. RP 118-19. Officer White called for assistance. RP 116-17. Mr. Pawley became combative with Officer White and other officers, and disregarded their multiple commands to comply, as they attempted to place Mr. Pawley on the floor. RP 116, 170-71, 197-98, 259, 314, 317, 329-31. Thereafter, the defendant began directly threatening Officer White, such as “you’re a fucking dead man. When I get out of this facility, I’ll kill you.”<sup>1</sup> RP 119-20, 153, 243-44. Mr. Pawley continued to yell his threats to kill Officer White

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<sup>1</sup> The trial court conducted a CrR 3.5 hearing and found the defendant’s statements made at the time of the offense admissible at the time of trial. CP 234-37.

during the entire struggle and stated he would do so when the opportunity availed itself. RP 120, 342. Mr. Pawley also threatened other officers that once the handcuffs were removed, he would “beat their asses.” RP 119-20, 248, 271. When it was safe to do so, Officer White removed himself from the situation, and let other officers contend with Mr. Pawley. RP 120.

After the encounter, Officer White had several lacerations on his right arm. RP 121, 256-57, 356. Officer White went to the hospital to have the wounds cleaned and was administered several shots. RP 123.

Officer White took Mr. Pawley’s threats seriously. He stated:

Our population turns over constantly. I have no -- at that time no knowledge of how long Mr. Pawley would be incarcerated. They know our schedule. Our trucks are in the parking lot.<sup>2</sup> The ability is there. He made the threat. Don’t think it would be intelligent on my part not to take a threat on my life seriously.

RP 125.<sup>3</sup>

Corrections Officer, Ian Scholz, heard the defendant cussing at the officers, and made the following remarks to Officer White:

[S]aid things to the effect of Officer White is a punk-ass bitch. He said that he would be assaulted -- or he would beat

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<sup>2</sup> Inmates had the ability to peer through the facility windows and observe the guards’ vehicle in the parking lot and watch the guards enter and exit the facility. RP 154. However, Officer White had no specific knowledge the defendant had observed him outside. RP 154.

<sup>3</sup> Officer White previously had been threatened two times by different inmates during his tenure at the facility, which he did not consider serious threats. RP 126.

Officer White to a bloody pulp. He was saying if he ever saw White on the street, he'd kill him.

RP 190.

Other corrections officers were concerned for Officer White's safety regarding the threats directed at him. RP 173-74, 190, 343. For instance, Corrections Officer, Joshua Cobb, who helped subdue the defendant, took the threats made toward Officer White seriously, stating:

The manner in what he was saying it. He said it. The manner of the way Geiger facilities is set up, our parking lot is right outside, so inmates can see anything that we come in with; vehicles, license plates, things like that. So it's very plausible that he can make those threats, and then know enough about us to follow through.

RP 171, 174.

The defendant had to be carried by corrections officers to the transport office. RP 192. Outside the presence of Officer White, Mr. Pawley again made a threat to kill Officer White. RP 192. Officer Scholz later conveyed this threat to Officer White. RP 193.

Spokane County Deputy Mark Smoldt responded to the Geiger facility several hours after the incident. RP 357 He spoke with Officer White, who stated he was "extremely concerned" about the threats made to him by the defendant, and believed the threats were legitimate. RP 356-57. The officer was concerned for himself and for his family regarding a potential future event with Mr. Pawley. RP 356-57.

At trial, the defendant denied struggling with Officer White and claimed he did not make any threat toward the officer. RP 415, 429-33.

Rather, he asserted that he stated at the time of the event:

White, you're a fucking faggot, you're a punk, you're a bitch. You guys do this as soon as the handcuffs are on. This is crazy. I didn't do anything to deserve this.

RP 414-15.

Mr. Pawley further alleged on the stand that Officer White struck him several times, and he informed Officer White at the time:

You hit like a fucking bitch or like my grandma. Didn't sound good afterward. Yeah, I said, My grandma is hurting you, and she'd [sic] dead. Afterwards it didn't sound too great to me, but I actually thought about that.

RP 414.

### **III. ARGUMENT**

#### **A. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT OFFICER WHITE REASONABLY FEARED THE DEFENDANT WOULD CARRY OUT HIS THREAT TO KILL HIM.**

Mr. Pawley challenges the sufficiency of the evidence supporting the jury's determination that the State proved Officer White reasonably feared that the defendant would carry out his threat to kill him.

#### *Standard of review.*

The standard of review for a sufficiency of the evidence claim in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each

element of the offense proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State’s evidence and all reasonable inferences that can be drawn from it. *Id.* at 201. Any inferences “must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* In addition to the above criteria, because of the constitutional implications inherent in an appellate court’s review of a “true threat,” an appellate court conducts a limited independent review of the facts crucial to the true threat inquiry to determine whether the statements fall within or outside of the First Amendment. *State v. Kilburn*, 151 Wn.2d 36, 50, 84 P.3d 1215 (2004). A reviewing court is required “to freshly examine ‘crucial facts’ – those so intermingled with the legal question as to make it necessary, in order to pass on the constitutional question, to analyze the facts.” *Id.* at 50-51.

The State may establish the elements of a crime by either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). “Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266

(2009), *review denied*, 168 Wn.2d 1041 (2010). In like manner, the credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and is not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

RCW 9A.46.020(1)(a), (2)(b)(1)(a)(i) and (3) make it a felony for a person to knowingly threaten to harm or kill a criminal justice participant performing his official duties. In the present case, the trial court provided WPIC 36.07.02, the harassment elements instruction to the jury, which read in pertinent part:

To convict the defendant of the crime of harassment each of the following six elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 3, 2016, the defendant knowingly threatened to cause bodily injury immediately or in the future to Kevin White;
- (2) (a) That Kevin White was a criminal justice participant who was performing his or her official duties at the time the threat was made; or  
  
(b) That Kevin White was at the time a criminal justice participant and the threat was made because of an action taken or decision made by Kevin White during the performance of his duties;
- (3) That the words or conduct of the defendant placed Kevin White 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 the threat was made or received in the State of Washington.

CP 78.

“Threat” means to communicate, directly or indirectly, the intent to cause bodily injury. RCW 9A.04.110(28)(a). Communication means “[t]he expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception.” *State v. Toscano*, 166 Wn. App. 546, 554, 271 P.3d 912 (2012).

*Criminal Justice Participant.*

Harassment is a felony if the person “harasses a criminal justice participant<sup>4</sup> who is performing his or her official duties at the time the threat is made.” RCW 9A.46.020(2)(b)(iii). “When the threat involves a criminal justice participant, ‘the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances.’” *State v. Boyle*, 183 Wn. App. 1, 7, 335 P.3d 954 (2014), *review denied*, 184 Wn.2d 1002 (2015) (quoting RCW 9A.46.020(2)(b)).

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<sup>4</sup> “[A] criminal justice participant includes any ... (c) staff member of any adult corrections institution or local adult detention facility.” RCW 9A.46.020(4).

*True Threat.*

RCW 9A.46.020 proscribes only “true threats.” *Boyle*, 183 Wn. App. at 7. A true threat is a “statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of another person.” *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013). The test for determining a “true threat” is an objective test that focuses on the speaker.” *Kilburn*, 151 Wn.2d at 54. The question is whether a reasonable person in the speaker’s position would foresee that the threat would be interpreted as a serious expression of intention to inflict the harm threatened. *Allen*, 176 Wn.2d 611; *accord Kilburn*, 151 Wn.2d at 46. The speaker does not have to intend to carry out the threat for a communication to constitute a true threat, and the State need not prove such intent. *Kilburn*, 151 Wn.2d at 48. A true threat is one that arouses fear in the person threatened, and that fear does not depend on the speaker’s intent. *Id.* at 46.

More specifically, “[w]hether a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant’s place would foresee that in context the listener would interpret the statement as a serious threat or a joke.” *State v. Trey M.*, 186 Wn.2d 884, 894, 383 P.3d 474 (2016), *cert.*

*denied*, 138 S.Ct. 313, 199 L.Ed.2d 207 (2017). Accordingly, “[a] true threat is a serious threat, not one said in jest, idle talk, or political argument.” *Kilburn*, 151 Wn.2d at 43.

For instance, in *Trey M.*, the defendant was a high school student. During a counseling session, he described a plan to shoot three students and then himself for emotional pain caused by three boys. The defendant was convicted of three felony harassment violations. Our Supreme Court held that drawing all reasonable inferences toward the State, there was sufficient evidence to support the convictions. 186 Wn.2d at 906. Each student testified they were on the defendant’s “hit list” and they were each scared. *Id.* at 905-06.

Likewise, in *State v. Hecht*, 179 Wn. App. 497, 319 P.3d 836 (2014), the defendant told the victim Hesketh “You better not be talking about me. If I find out you are talking about me, I am going to kill you.” *Id.* at 501. Hesketh took the threat seriously. On appeal, Hecht argued that the evidence was insufficient to support his harassment conviction because it failed to support any inference that the victim had a reasonable fear that the defendant would carry out his threat, or that the defendant could have foreseen that the victim might view his statements as a true threat. *Id.* at 510-11. Division One of this Court held there was ample evidence to support the inferences that the victim was afraid and that the defendant

could foresee the victim would consider the threat to be a true threat. *Id.* at 511.

Similarly, in *Boyle*, the defendant challenged the sufficiency of the evidence regarding felony harassment of a criminal justice participant. The defendant was arrested for DUI and placed in handcuffs. Boyle became really angry and shouted profanities at the officer. *Boyle*, Wn.App. at 5. After being placed in a patrol car, Boyle made a series of threatening statements

“People will look you and your family up and do them in. I would never threaten your family.” “I would never attack children, but cops and child molesters are fair game.” “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.” “Remember Forza Coffee, it was good stuff.” “Forza Coffee, that’s what should happen to all cops and their families.” “You wait and see what happens when I get out. I’m not threatening you.” “I hope your children die.” “F\*\*k your face, f\*\*\*ing swine. Read my record. Read it twice.” “Someone will kill you and your family. I’m not saying it’s going to be me, but someone is going to snipe cops and their families.”

*Id.* at 5.

The court found sufficient evidence supported the conviction because a reasonable juror could find Boyle’s statements were a serious expression of intent to inflict bodily harm or death. *Id.* at 9. Likewise, a reasonable juror could reasonably find the officer’s fear was a fear that a

reasonable criminal justice participant would have under the circumstances.

*Id.*

Here, the question is whether the totality of the evidence established both that the officer had a subjective fear the defendant would kill him and that it was an objectively reasonable fear. It did.

Notwithstanding that Mr. Pawley was physically aggressive toward Officer White, and subsequently with other officers, Mr. Pawley made numerous threats to kill Officer White, both in and out of Officer White's presence. Although Mr. Pawley threatened other officers with only bodily harm, he did not indiscriminately spout threats to kill to the other responding officers. He concentrated on Officer White with the death threats. Other corrections officers took Mr. Pawley's threats to kill Officer White seriously. Several officers heard the death threats toward Officer White. Indeed, after Officer White absented himself from the encounter and while in the transport office, the defendant again threatened to kill Officer White, which was later conveyed to Officer White by Officer Scholz.

Those same facts establish that the fear was reasonable. Not only was there a threat to kill coming from an individual housed in a correctional facility, the threats came from an inmate who was angry and very physically aggressive, attempting to cause bodily harm toward the officer. It can be inferred that Officer White had concern because he worked in an

environment where individuals are housed for committing crimes or awaiting disposition of charged crimes. He found it was incumbent upon him to take the threat seriously when an inmate had threatened his life. RP 125.

Officer White expressed to the investigating deputy that he was extremely concerned that Mr. Pawley would carry out his death threats. Not only did Officer White express his concern to the responding deputy, he explained his concern on the stand that inmates can observe the officers' entry and exit from the parking lot and which vehicle an individual employee takes to work. Moreover, Officer White did not know when Mr. Pawley would be released from the facility. The jury could have reasonably inferred that Officer White was fearful that the defendant would follow him in the future to carry out his threat to kill. There was sufficient evidence for the jury to conclude the officer's fear was reasonably justified.

The defendant relies on *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (1980), for the proposition that the State did not establish Officer White took the threat seriously that he would be killed. *C.G.* is inapt. There, a vice principal testified only that a student's threat to kill caused him "concern" and that he thought the student "might try to harm him or someone else in the future." *Id.* at 607. The issue in *C.G.* was whether, under the harassment statute, RCW 9A.46.020, a conviction for felony harassment based upon a

threat to kill requires proof that the person threatened was placed in reasonable fear that the threat would be carried out. *Id.* at 606. The Supreme Court reversed the defendant's conviction for felony harassment because there was no evidence the vice principal was placed in reasonable fear that the defendant would kill him. *Id.* at 610 The court held the felony harassment statute requires a victim to reasonably fear the threat to kill will be carried out, not just fear bodily injury will be inflicted. *Id.*

At trial, Officer White testified that “[the defendant] made the threat, [d]on’t think it would be intelligent on my part not to take *a threat on my life* seriously.” The jury could have reasonably inferred that “a threat on my life” was the same as a threat to kill. Certainly, there are several tautologies for the phrase “threat to kill.” Under the defendant’s rationale, every victim of felony harassment would have to utter the specific magic words “threat to kill,” rather than a different form of the same expression, to sustain a conviction. The defendant’s argument elevates form over substance and he has provided no authority to support such a strict interpretation of the Supreme Court’s *C.G.* opinion. Here, the officer’s testimony and the testimony of other witnesses established that Officer White greatly feared Mr. Pawley’s death threats and believed him capable of carrying out those threats. A rational trier of fact could find that

Mr. Pawley's words and conduct placed Officer White in reasonable fear that he would carry out the threat to kill.

Mr. Pawley further argues that Officer White's fear was not reasonable because the defendant did not have the present ability to carry out the threat. That claim was squarely addressed in *Boyle* and rejected. In *Boyle*, the defendant was handcuffed and told a police officer that he would kill him and his family. The court held that statements to a criminal justice participant constitute felony harassment if it is apparent to the participant that the speaker had either the present *or* future ability to carry out the threat. *Boyle*, 183 Wn. App. at 11. Here, the fact that Mr. Pawley was handcuffed and housed in a correctional facility is of no consequence. Officer White testified that he was concerned the death threat would be carried out at some point in the future, when the defendant was released from incarceration. After all, the threat conveyed by the defendant, "when I get out of this facility, I will kill you," evidenced an intent to carry out the threat in the future.

Finally, the defendant never suggested an innocent purpose for his threats, but rather denied making them. Certainly, the jury was free to disregard Mr. Pawley's denial and conclude the officer subjectively feared Mr. Pawley's threats to kill and that his belief was objectively reasonable. There was sufficient evidence to support the conviction.

#### IV. CONCLUSION

Mr. Pawley could have reasonably foreseen that his threats to kill Officer White would have been taken seriously. He repeated his threats to kill Officer White multiple times, both in and out of the officer's presence. He was extremely angry and physically aggressive and was housed in a facility of convicted criminals or those awaiting disposition of their cases. Furthermore, his threats were not idle talk or jokes, and it was objectively reasonable for the officer to take the threats seriously. The evidence proffered by the State was sufficient to support the determination that Officer White feared the defendant would kill him and a reasonable officer would have had the same fear. The State requests this Court affirm the jury verdict in this case.

Dated this 5 day of March, 2018.

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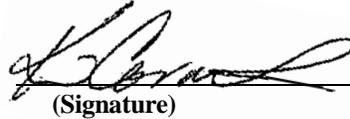
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