No. 44447-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KANE BOYLE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Kane Boyle was convicted of felony harassment of a criminal justice participant for drunken comments he made to a police officer while under arrest for driving while under the influence of alcohol. Boyle's conviction must be dismissed because the State did not produce sufficient evidence that (1) a reasonable person in Boyle's position would have known his statements would be perceived as a threat, (2) that a reasonable criminal justice participant in the officer's position would have interpreted Boyle's statements as a threat, and (3) that it was apparent to the officer that Boyle had the present and future ability to carry out any threats.

Boyle's conviction must also be reversed because jury instruction omitted the statutory requirement that it appear to the criminal justice participant that the defendant had both present and future ability to carry out any threats, violating his constitutional right to due process. In addition, a juror did not reveal her personal experiences in voir dire and then used them in jury deliberations, violating Boyle's constitutional right to a fair and impartial jury.

B. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Kane Boyle committed harassment of a criminal justice participant.

2. Conviction for harassment of a criminal justice participant based only upon speech violated Boyle's federal and state constitutional rights to free speech.

3. Instruction 17 relieved the State of proving every element of the crime of felony harassment of a criminal justice participant.

4. Instruction 9 relieved the State of proving every element of the crime of felony harassment of a criminal justice participant.

5. The trial court erred by refusing to give Boyle's proposed "to convict" instruction for the crime of felony harassment of a criminal justice participant.

6. The trial court erred by refusing to give Boyle's proposed instruction defining felony harassment of a criminal justice participant. CP 91.

7. The trial court erred by denying Boyle's motion for a new trial based upon the incorrect instructions.

8. The trial court erred by denying Boyle's motion for a new trial based upon juror misconduct.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Kane Boyle was highly intoxicated, handcuffed, and in the custody of an armed patrol officer when he made statements revealing his opinion that people in the community were going to harm police officers. Based upon these statements, Boyle was convicted of harassment of a criminal justice participant, but the State did not prove beyond a reasonable doubt that a reasonable person in his position would believe his statements would be taken as a threat against the police officer. Based upon the independent review of the critical facts required by the First Amendment, must Boyle's conviction be reversed and dismissed? (Assignments of Error 1, 2)

2. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The harassment of a criminal justice participant statute requires the State to prove beyond a reasonable doubt (1) that a reasonable criminal justice participant in the position of the person threatened would interpret Boyle's drunken

statements as a threat. In addition, the statute provides that threatening words do not constitute a threat unless it is apparent to the criminal justice participant that the speaker has the "present and future ability to carry out the threat." RCW 9A.46.020(2)(b). Boyle was handcuffed and in the custody of an armed police officer or in jail at the time of his statements, and the officer did not believe Boyle had the present ability to harm him. Based upon an independent review of the critical facts of the case, must Boyle's conviction be dismissed because the State did not prove beyond a reasonable doubt that (1) under the circumstances, a reasonable criminal justice participant would interpret Boyle's statements as a threat and (2) it was apparent to the police officer that Boyle had the present ability to carry out any threats. (Assignments of Error 1, 2)

3. The due process clauses of the federal and state constitutions require the State to prove each element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The jury may not be instructed in a manner that reduces or eliminates this burden of proof. The harassment of a criminal justice participant statute requires that it appear to the criminal justice participant that the defendant had the "present and future ability to carry out the threat."

RCW 9A.46.020(2)(b). Boyle proposed jury instructions that included this language, but the trial court instead instructed the jury that it need only find that it was apparent to the police officer that Boyle had "the ability to carry out the threat." CP 106, 114. Must Boyle's conviction be reversed because the jury instructions eliminated the requirement that the jury find beyond a reasonable doubt that it appeared to the officer that Boyle had both the present and the future ability to carry out the alleged threats in violation of due process? (Assignments of Error 3-7).

3. The defendant has the due process right to a fair trial with a fair and unbiased jury. U.S. Const. amends. VI, XIV; Cont. art. I §§ 3, 21, 22. Potential jurors are required to honestly answer questions during jury selection, and seated jurors may not use undisclosed information or extrinsic evidence in deliberations. Juror 4 was a nurse who was often threatened by patients, once for 12 hours, but she did not tell the court that she had an experience similar to felony harassment. During deliberations, Juror 4 told the jury that she would be unable to recognize the person who harassed her during a discussion of evidence that the police officer in this case did not remember Boyle during an encounter two months after the arrest. Juror 4 also told the jury that

hospital notes are regularly destroyed because the office patient record is the "legal" document when some jurors were concerned that the police officer in Boyle's case destroyed his notes memorializing Boyle's concerning statements. Must Boyle's conviction be reversed where the trial court used the wrong legal standard and made incorrect conclusions in denying Boyle's motion for a new trial based upon jury misconduct? (Assignments of Error 7-8)

D. STATEMENT OF THE CASE

Patrol officer Stephen Morrison often drove by a popular Port Orchard restaurant and bar in the evening hoping his presence would remind people not to drive while under the influence of alcohol. 2RP 76-77.[1] One evening he saw a man who appeared to be preparing to urinate in the parking lot that served the restaurant and other strip mall businesses. 2RP 75, 78. The man appeared intoxicated, as he was staggering and had to support himself by holding onto his pickup truck. 2RP 78-79. Officer Morrison shined his spotlight on the man, who stopped and returned to his truck. 2RP 79

The officer parked down the aisle and waited several minutes until the pickup backed up out of its parking spot enough to see the

[1] The portions of the verbatim report of proceedings labeled Volume I, II and III will be referred to as 1RP, 2RP, and 3RP. Other volumes will be referred to by date.

patrol car and then pulled back into its parking space. 2RP 80-81. Morrison then hid in the lower level of the parking lot and waited several minutes until the pickup left its parking spot, drove to another level of the parking garage, and parked in front of the restaurant. 2RP 82-83. The path took the car onto a public street for a few feet. 2RP 118-19.

Officer Morrison contacted the driver, Kane Boyle. 2RP 84-85. Boyle had a strong odor of alcohol, flushed face, watery bloodshot eyes, and his speech was slurred. 2RP 87-88. Boyle provided the officer with his license but was confused when asked to provide car registration and insurance information, believing he had already given it to the policeman. 2RP 88. When Boyle refused to take field sobriety tests, the officer arrested him for driving while under the influence of alcohol. 2RP 89.

According to Morrison, Boyle became very angry when he was arrested, placed in handcuffs, and directed to sit in the back of the patrol car. 2RP 90-91. Boyle yelled obscenities, stating, "F*** you swine," "I hope you burn in hell," and "You cops act like you're going to help people, but you just f*** them." 2RP 90. Boyle yelled "F*** you" while the officer read the Miranda warnings. 2RP 92.

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Officer Morrison contacted the driver, Kayne Boyle. 2RP 84-85. Boyle had a strong odor of alcohol, flushed face, watery bloodshot eyes, and his speech was slurred. 2RP 87-88. Boyle provided the officer with his license but was confused when asked to provide car registration and insurance information, believing he had already given it to the policeman. 2RP 88. When Boyle refused to take field sobriety tests, the officer arrested him for driving while under the influence of alcohol. 2RP 89.

According to Morrison, Boyle became very angry when he was arrested, placed in handcuffs, and directed to sit in the back of the patrol car. 2RP 90-91. Boyle yelled obscenities, stating, "F*** you swine," "I hope you burn in hell," and "You cops act like you're going to help people, but you just f*** them." 2RP 90. Boyle yelled "F*** you" while the officer read the Miranda warnings. 2RP 92.

Officer Morrison called for a tow truck for Boyle's pickup and filled out paperwork as the two waited for about 20 minutes for the tow truck to arrive. 2RP 93, 126. He then drove Boyle to the jail where Boyle took the BAC test and was turned over to the jail staff. 2RP 127-28.

While they were in the patrol car and jail, Officer Morrison wrote down some of the things Boyle said "almost verbatim," and transferred them to his police report.[2] 2RP 94-96, 123-24. The statements were:

> People will look you and your family up and do them in. I would never threaten your family. 2RP 96-97.
>
> I would never attack children, but cops and child molesters are fair game. 2RP 97.
>
> 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. 2RP 98.
>
> Remember Forza Coffee, it was good stuff. 2RP 98.
>
> You wait and see what happens when I get out. I'm not threatening you. 2RP 99.
>
> I hope your children die. 2RP 100.
>
> Punch me in the face twice. I know you want to. 2RP 100.

[2] Officer Morrison destroyed his notes, but included the statements in his police report. 2RP 124

> F*** your face, f***ing swine. Read my record. Read it twice.[3] 2RP 101.
>
> I hope you and your family burns [sic] in hell. 2RP 102.
>
> 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. 2RP 102.

Morrison testified he felt threatened by these remarks because of Boyle's intense anger. 2RP 102, 103-04. He was not afraid that Boyle would attempt to hurt him that evening, but he was worried that Boyle might do something when he was released from jail. 2RP 102-03, 136.

Morrison never asked for any backup assistance from his department. 2RP 125. He told his wife to be careful, but did not describe Boyle, and he did not mention anything to his three children. 2RP 135, 145.

The Kitsap County Prosecutor charged Boyle with two counts of felony harassment, one for threats to kill and one for threatening a criminal justice participant CP 69-72; RCW 9A.46.020. The State rested its entire case on the testimony of Officer Morrison, although there were other people in front of the restaurant and in the jail when Boyle was ranting. 2RP 121, 126-27. Boyle called one witness who

[3] Over objection, the officer testified that Boyle's record included a prior assault. 2RP 54, 60-61, 101-02.

related that she had been stopped for investigation of a possible domestic violence dispute when she was in a car driven by Boyle. 2RP 157-58. Morrison was one of the officers involved in the stop, but he had no memory of the incident. 2RP 137, 158-59. The stop occurred only two months after Officer Morrison was purportedly threatened by Boyle. 2RP 75, 138, 159.

The jury found Boyle not guilty of felony harassment based upon threats to kill and guilty of felony harassment of a criminal justice participant. CP 120. Prior to sentencing, Boyle moved for a new trial based upon jury misconduct and jury instructions that reduced the State's proof of a statutory requirement of harassment of a criminal justice participant. CP 342-45, 354-68, 417-19; 12/28/12 RP 4-8; 1/11/13 RP 4-17. The motion was denied. CP 420-22; 12/28/12 RP 12-13; 1/11/13 RP 17-19.

The court sentenced Boyle to 16 months incarceration, the high end of the standard sentence range. CP 424-25; 1/18/13 RP 7-8. This appeal follows. CP 434-36.

E. ARGUMENT

1. **Boyle's conviction must be reversed because the State did not prove every element of the crime beyond a reasonable doubt.**

Kayne Boyle was convicted of felony harassment of a criminal justice participant for comments he made to a police officer who arrested him for driving while under the influence of alcohol and took him to jail. None of the comments were direct threats to harm the officer, but rather expressed Boyle's political view that police officers were properly in danger from attack by citizens. Boyle was drunk, handcuffed and in police custody when he made them. The State did not prove beyond a reasonable doubt (1) that a reasonable person in Boyle's position would understand his comments would be perceived as a threat to harm the officer or his family, (2) that a reasonable police officer in Morrison's position would interpret Boyle's statements as a genuine threat, or (3) that it appeared to the officer that Boyle had the present and future ability to carry out any threats. His conviction must therefore be revered and dismissed.

a. A criminal conviction must be based upon proof beyond a reasonable doubt of every element of the crime. The due process clauses of the federal and state constitutions forbid conviction for a

crime unless the State proves every element of the offense beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22; Apprendi v. New Jersey, 530 U.S. 471, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). On appellate review, the court looks at the evidence in the light most favorable to the prosecution to determine if a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). Because the crime of harassment implicates First Amendment rights, the appellate courts must conduct "an independent review of the whole record" to insure the conviction "does not constitute a forbidden intrusion on the field of free expression." State v. Kilburn, 151 Wn.2d 36, 50, 52, 84 P.3d 1215 (2004) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)). This involves independent review of the "crucial facts necessary to the legal determination of whether speech is protected." Id. at 51.

Boyle was convicted of one count of felony harassment of a participant in the criminal justice system, RCW 9A.46.020(1), (2)(b);

CP 69-72, 120. The statute first sets forth the elements of misdemeanor harassment. It states in relevant part:

> 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 another person; or . . .
>
> (iv) To maliciously do any act that was 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 and conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

RCW 9A.46.020(1).

The crime is elevated to a felony if the defendant harasses a criminal justice participant. RCW 9A.46.020(2)(b)(iii), (iv). The statute reads

> A person who harasses another is guilty of a class C felony if any of the following apply: . . . (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) the person 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(2)(b). Two additional requirements apply in a prosecution for harassment of a criminal justice participant:

> For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a reasonable 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). A police officer is a criminal justice participant. RCW 9A.46.020(3).

An independent review of the critical facts of this case demonstrates that (1) Boyle's threats were not "true threats" because a reasonable person in his position would not believe that the comments would place the police officer in fear that he would be injured, (2) the officer knew Boyle did not have the present ability to carry out the purported threats, and (3) there was no evidence that a reasonable police officer in Officer Morrison's position would be afraid that Boyle would injure him.

b. The State failed to prove beyond a reasonable doubt that Boyle's statements were a "true threat" that was not entitled to First Amendment protection. The First Amendment protects the right of an individual to freely express himself in order to permit the free exchange

of ideas necessary for a democracy, even if the ideas are distasteful or offensive.[4] U.S. Const. amends. I, XIV; Virginia v. Black, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (noting national commitment to permitting robust public debate that may include vehement and even sharp attacks). Article I, section 5 of the Washington Constitution similarly guarantees the right to freely express ideas.[5] The right to free speech is both a fundamental right and a key to ensuring the exercise of other constitutional rights. Nelson v. McClatchy Newspapers, Inc., 131 Wn.2d 523, 535-36, 936 P.2d 1123, cert. denied, 522 U.S. 866 (1997).

Some speech, however, is exempt from First Amendment protections, including "true threats."[6] Black, 538 U.S. at 359; Watts v. United States, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969). Washington defines a "true threat" as "a statement made in a

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[4] The First Amendment states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." The First Amendment is applicable to the states through the Fourteenth Amendment. Black, 538 U.S. at 358.

[5] Article I, section 5 reads, "Every person may freely speak, write and publicly on all subjects, being responsible for the abuse of that right."

[6] The United States Supreme Court has not provided a definitive definition of the term "true threats," but held they include "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Black, 538 U.S. at 359.

context or under 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." Kilburn, 151 Wn.2d at 43 (internal quotation marks omitted) (quoting State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001)). Thus, the speech is viewed from the point of view of a reasonable person in the position of the speaker. Id. at 44.

Anti-harassment statutes must be narrowly drawn so as not to infringe upon free speech. City of Bellevue v. Lorang, 140 Wn.2d 19, 29, 992 P.2d 496 (2000). The harassment of a criminal justice participant statute is therefore interpreted to criminalize only true threats. State v. Schaler 169 Wn.2d 274, 283-84, 236 P.3d 858 (2010). A true threat must be a serious threat, not one said in jest, idle talk, or political argument. Kilburn, 151 Wn.2d at 43.

Whether a statement is protected by the First Amendment depends both on the words and their context. State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003). Looking first at the words uttered by Boyle shows they were not threats. The ordinary meaning of the word threat is "an expression of an intention to inflict . . . injury . . . on another." Webster's New Third International Dictionary 2382 (1976).

Although voiced in anger, Boyle's words did not show he intended to injure Officer Morrison or his family.

Some of the statements were obviously not threats. 2RP 90 ("F***-you swine, I hope you burn in Hell;" "You cops act like you're going to help people, but you just f*** them."); 2RP 92 (repeated "F*** you"); 2RP 100 ("Punch me in the face, I know you want to."). Other statements were not threats but predictions, expressing Boyle's opinion that police officers are at risk but not from him. 2RP 96-97 ("People will look you and your family up and do them in. I would never threaten your family."); 2RP 98 ("People will 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."); RP 102 ("Someone will kill you and your family. I'm not saying it is going to be me, but someone is going to snipe at cops and their families."). Others just express an immature hope that something bad would happen to Officer Morrison's family. 2RP 100 ("I hope your children die."); RP 102 ("I hope your family burns in hell."). These statements do not suggest that Boyle believes someone should hurt the officer or his family.

Only three statements, when viewed together come close to being a literal threat: "I would never attack children, but cops and child molesters are fair game;" "You wait and see when I get out. I am not threatening you," and "F*** your face, f***ing swine. Read my record. Read it twice." 2RP 97, 99, 101). Even these statements, however, are not direct threats on the officer or his family. Moreover, threats are evaluated in light of the surrounding circumstances. See Kilburn, 151 Wn.2d at 52-53. Boyle was under the control of an armed officer, drunk and under arrest for a crime. A reasonable person in that position would not foresee that the armed law enforcement officer would interpret his drunken comments seriously.

The Ninth Circuit recently addressed threats against then presidential candidate Barak Obama in United States v. Bagdasarian, 652 F.3d 1113 (9th Cir. 2011). The defendant had posted messages on an internet message board, such as "RE: Obama fk the niggar, he will have a 50 cal in the head soon," and "shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right? ? ? ? long term? ? ? ? never in history except sambos." Id. at 1115. The court noted the first statement was a prediction and the second an imperative encouraging others to action. Id. at 1119. Although the conditional

statements were alarming, the court concluded that no reasonable person who read them would understand them to be a threat to injure or kill the presidential candidate. Id. at 1119-22.

A divided court recently addressed a prosecution for threatening the governor in State v. Locke, __ Wn. App. ___, 2013 WL 3999814 (No. 42035-0-II). The defendant in that case first emailed the governor stating he hoped she saw one of her family members raped and murdered by a sexual predator, and in a second email referred to her as a f***ing c*** and stated she should be burned at the stake. In both he identified his city as "Gregoiremustdie." Slip Op. at 2. This court found these email comments did not raise to the level of a true threat because it was "more in the nature of hyperbolic political speech, predicting threatening personal consequences from the state's policies." Id. at 8.

Boyle was extremely intoxicated and expressing societal displeasure with police officers in general. His drunken comments revealed a purported belief that people in the community were going to attack police officers and their families, but Boyle did not threaten to do so himself. In fact, Boyle attempted to make it clear that he was not threatening Officer Morrison.

In addition to the wording of Boyle's statements, the surrounding circumstances also demonstrate that a reasonable person in his position would not believe his threats would be taken seriously by a law enforcement officer. The Kilburn Court reversed a felony harassment conviction after an independent review of the record showed the defendant's speech was not a "true threat" because a reasonable person in the defendant's position would not foresee his comments would be taken as a serious threat. Kilburn, 151 Wn.2d at 53. Kilburn was a student who commented to fellow student K.J. that he was going to bring a gun to school the next day and shoot everyone, starting with her. Id. at 39. Noting that Kilburn regularly joked with K.J. and other students and that he giggled and laughed when he made the statement, the Supreme Court concluded a reasonable person in Kilburn's position would not have believed his statement would be taken as a serious threat. Id. at 53. The conviction was therefore reversed. Id. at 54.

Here, Boyle was angry, but he was also highly intoxicated, handcuffed and in the custody of an armed police officer. The State did not prove that a reasonable person in Boyle's position would believe

that the officer who arrested him for driving while under the influence would take his statements seriously.

c. The State did not prove beyond a reasonable doubt that Boyle's words would be interpreted as a threat by a reasonable criminal justice participant or that Boyle had the present ability to carry out any threat. The felony harassment statute requires that the defendant place "the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(b). When the person threatened is a criminal justice participant, their fear must be "a fear that a reasonable criminal justice participant would have under all the circumstances." RCW 9A.46.020(2)(b). Further, threatening words do not constitute a threat unless it is apparent to the criminal justice participant that the defendant has the "present and future ability to carry out the threat." Id. The State did not prove these elements beyond a reasonable doubt.

The State provided no expert testimony or other evidence to prove what a reasonable law enforcement officer in Morrison's position would believe. Police officers are expected to deal with people who are intoxicated, angry, or in distress with courtesy, and in return they are often subjected to verbal abuse. 2RP 114; see City of Pasco v. Dixon, 81 Wn.2d 510, 522-23, 503 P.2d 76 (1972); Lewis v. City of New

Orleans, 415 U.S. 130, 135, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (Powell, J., concurring). This was not the first time Officer Morrison had been threatened, and he distinguished this case from others only because Boyle was so angry and repeated his statements several times. 2RP 103-04.

Boyle was extremely intoxicated, unarmed, restrained in handcuffs, and either in a patrol car or in jail when he made the angry comments to Officer Morrison. 2RP 87-88, 91-92, 94-95, 103, 115. As argued above, the words spoken were not direct threats. The jurors were not police officers, and no expert testified about how police officers reasonably react to such comments from highly intoxicated and/or angry arrestees. Thus, the State did not prove that a reasonable criminal justice participant in Officer Morrison's position would have been afraid that Boyle would carry out the purported threats.

The State also failed to prove that it was apparent to Officer Morrison that Boyle had the present and future ability to carry out the threat as required by RCW 9A.46.020(2)(b). The policeman testified that he knew Boyle lacked the ability to act on the threats at the time, but he feared that Boyle might do something when he was released from custody. 2RP 103. The State thus did not prove beyond a

reasonable doubt that it was apparent to the officer that Boyle had the "present and future ability to carry out the threat." RCW 9A.46.020(2)(b) (emphasis added).

d. Boyle's conviction must be dismissed. Boyle was angry when he was arrested for driving a few feet on a public roadway while under the influence of alcohol. He made unsavory drunken comments to Officer Morrison expressing his belief that police officers will be harmed, but Boyle did not directly threaten to harm the policeman or his family. Boyle was handcuffed and in the custody of the armed police officer, and thus lacked the ability to carry out any threats.

Looking at the crucial facts, the State did not prove beyond a reasonable doubt that (1) a reasonable person in Boyle's position would believe the comments would be taken as serious threats, (2) a reasonable law enforcement officer would be afraid that the purported threats would be carried out, or (3) it appeared to the officer that Boyle had the present and future ability to carry out any threats. Boyle's conviction for felony harassment of a criminal justice participant must be reversed and dismissed. See, Kilburn, 151 Wn.2d at 54; State v. Kiehl, 128 Wn. App. 88, 94, 113 P.3d 528 (2005) (reversing conviction for felony harassment for threatening to kill a judge in the absence of

evidence the judge learned of the threat and was in reasonable fear it would be carried out), rev. denied, 156 Wn.2d 1013 (2006).

2. **The jury instructions eliminated the State's burden of proving every element of the crime beyond a reasonable doubt.**

The felony harassment statute requires the trier of fact to find beyond a reasonable doubt that it appeared to the criminal justice participant that the defendant had the "present and future" ability to carry out the expressed threat. Boyle proposed instructions that included this requirement, but trial court instructed the jury that it need only find that it was apparent to the police officer that Boyle had "the ability" to carry out the threat. Boyle's conviction must be reversed because the "to convict" instruction and the instruction defining felony harassment misstated this element of the crime and reduced the State's burden of proof.

a. Due process requires that the jury be instructed it must find every element of the charged offense beyond a reasonable doubt. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22; Apprendi, 530 U.S. at 300-01. The jury must therefore be

instructed that it must find every element of the charged offense in order to convict the defendant. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). It is reversible error to instruct the jury in a manner that relieves the State of its high burden of proof. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000); State v. Byrd, 125 Wn.2d 707, 714, 887 P.2d 396 (1995). This court reviews challenged jury instructions de novo. State v. Harris, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011).

b. Instructions 9 and 17 eliminated the requirement that the jury find that it was apparent to the police officer that Boyle had the present *and* future ability to carry out the threat. In defining the crime of felony harassment of a criminal justice participant, the statute provides, "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).

Boyle proposed a "to convict" instruction and an instruction defining the crime that included this language. CP 82-84; see CP 88-91. The State argued the statutory language conflicted with the definition of harassment provided in subsection (1) of the statute and was not logical. 2RP 170-74. Defense counsel countered that the

Legislature intended a stricter definition of threat for the felony of threatening a criminal justice participant. 2RP 175-77, 178-80, 191-92.

The trial court declined to give Boyle's proposed instruction including the language of RCW 9A.46.020(2). The court reasoned that the sentence in the statute was phrased in the negative and was thus an exception and not a separate element of the elevated crime. 2RP 188, 194-95. "[S]ince it's phrased as an exception as a double negative in that context, 'and' is actually a – 'and' actually reads 'or.'" 2RP 194. Later, in denying Boyle's motion for a new trial, the court said its reading was a "common understanding" of the language. 12/28/12 RP 12. The court also defended its decision by stating a threat is always to do something in the future and "it's an oxymoron, really to say threatened to do something in the present." 12/28/12 RP 12-13.

The court's Instruction 9 thus informed the jury that, "It is not harassment if it is apparent to the criminal justice participant that the person does not have the ability to carry out the threat." CP 106. And the "to convict" instruction, Instruction 17, included the element: "It was apparent to Stephen Morrison that the defendant had the ability to

carry out the threat."[7] CP 114. Boyle objected to the court's instructions. 2RP 195; 3RP 213.

In addition, the crime of felony harassment of a criminal justice participant requires the listener's fear is judged by the standard of a reasonable criminal justice participant. RCW 9A.46.020(2)(b). Instruction 9, however, omits this requirement. CP 106.

Instructions 9 and 17 reduced the State's burden of proving harassment of a criminal justice participant by lessening the requirement of this statutory element of the crime, and Instruction 9 confused the jury by eliminating one of the elements of that crime.

c. The trial court's interpretation of the felony harassment is in conflict with the statute's plain language. Whether the court's instructions improperly reduced the State's burden of proof in this case raises an issue of statutory construction. The meaning of a statute is a question of law reviewed de novo. C.G., 150 Wn.2d at 608. The court's primary goal is to give effect to the Legislature's intent. Id. This begins with an analysis of the plain language of the statute. In re Custody of E.A.T.W., 168 Wn.2d 335, 343, 227 P.3d 1284 (2010).

[7] Copies of Instructions 9 and 17 and Boyle's proposed instruction are attached as appendix.

There is no need to resort to rules of statutory construction if the statute is "clear and unambiguous on its face." Id.

The plain meaning of a statute is discovered by examining "everything the legislature has said in the statue itself and any related statutes that reveal legislative intent regarding the provision at issue." E.A.T.W., 168 Wn.2d at 343. This includes analyzing how the words of the statue relate to the subject and goals of the legislature as well as the results of different constructions. Id. at 343-44.

The statutory structure demonstrates that the court's interpretation of the felony harassment statute was wrong. RCW 9A.46.020 criminalizes both misdemeanor and felony harassment. The elements of the gross misdemeanor are found at RCW 9A.46.020(1). RCW 9A.46.020 (2). The crime is elevated to a felony when the defendant (1) has a prior record for harassing the same victim or members of the victim's family, (2) threatens to kill the victim or another person, or (3) harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant in the performance of his duties. RCW 9A.46.020(2)(b); State v. Mills, 154 Wn.2d 1, 10-11, 109 P.3d 415 (2005) (threats to kill are element of the greater crime of felony harassment); C.G., 150 Wn.2d at 609-10

(accord). For purposes of misdemeanor harassment, the victim must be placed in "reasonable fear" that the threat will be carried out. RCW 9A.46.020(1)(b). But the felony crime of harassing a criminal justice participant requires the threat must be one that, under the circumstances, places a "reasonable criminal justice participant" in fear. RCW 9A.46.020(2). In addition, it must be apparent to the criminal justice participant that the person has the "present and future ability to carry out the threat." Id.

When the defendant is charged with felony harassment, the felony requirements apply. For example, RCW 9A.46.020(1)(b) requires that the hearer be placed in reasonable fear that "the threat" will be carried out. The threats mentioned in RCW 9A.46.020(1)(a) do not include threats to kill, but it is nonetheless necessary in a prosecution for felony harassment by means of threats to kill that the hearer reasonably believe the threat to kill will be carried out. C.G., 150 Wn.2d at 610. Similarly, the portions of section (2)(b) that define the crime of felony harassment of a criminal justice participant must be added to the elements found in section (1) or substituted as appropriate.

Courts also construe statutes so that all of the language is given effect, with no portion rendered meaningless. State v. Kirwin, 166 Wn.

App. 659, 666, 217 P.3d 310 (2012). Instead of giving effect to the statute, however, the trial court decided that "and" really meant "or." The court's theory was based upon its incorrect interpretation of the sentence construction. While the sentence does include two negatives, this does not transform the word "and" into the word "or." Despite its structure, the sentence clearly states that threatening words only constitute harassment if it is apparent to the criminal justice participant that the defendant has the present and future ability to carry them out. "The Legislature would have used the word 'or' if it had intended to convey a disjunctive meaning." Ski Acres, Inc. v. Kittitas County, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992); accord Ahten v. Barnes, 158 Wn. App. 343, 352 n.5, 242 P.2d 35 (2010) (declining to read "or" into statute using word "and").

While Washington courts have occasionally interpreted the word "and" to mean "or," they have only done so when necessary to avoid absurd results. State v. Keller, 98 Wn.2d 725, 729, 657 P.2d 1384 (1983). The trial court seemed to believe the statute as written was absurd because a threat is always a threat to do something in the future. 12/28/12 RP 12-13. The statute, however, was addressing whether the hearer reasonably believed the defendant has the present

and future ability to to carry out the threat, not whether the threat involved immediate or future action. In addition, the court's analysis conflicts with RCW 9A.46.020(1), which makes it a misdemeanor to threaten to cause bodily injury "immediately or in the future," as well as the court's own instructions which include this language. CP 106, 114. The trial court's interpretation of RCW 9A.46.020 was contrary to the statute's plain language.

"In instructing a jury, a trial court should use the statute's language 'where the law governing the case is expressed in the statute'" Harris, 164 Wn. App. at 387 (quoting State v. Hardwick, 74 Wn.2d 828, 830, 447 P.2d 80 (1968)). The trial court did not do that here, and as a result the jury was not instructed as to all of the elements of the crime, reducing the State's burden of proof.

d. Boyle's conviction must be reversed. A constitutional error is presumed prejudicial unless the government can demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict." Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); accord Lorang, 140 Wn.2d at 32. When an element in a jury instruction is omitted, the error is

harmless only if the element is supported by uncontroverted evidence. Neder, 527 U.S. at 18; State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The appellate court must thoroughly examine the record and may only affirm the conviction if the court determines the jury verdict would have been the same absent the error. Brown, 147 Wn.2d at 341. In addition, the definition of "threat" implicates Boyle's First Amendment right to free speech, and this Court must therefore engage in an independent review of the record "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." Schaler, 169 Wn.2d at 282 (quoting Kilburn, 151 Wn.2d at 49-50).

Boyle's defense was that his statements, while regrettable, did not constitute a true threat. Boyle also argued that Officer Morrison's fear was not reasonable because Boyle was extremely intoxicated and was handcuffed and in police custody. His defense depended in part on the RCW 9A.46.020(2)(b) exception because he had no ability to follow through on the purported threats at the time they were made. Boyle was thus prejudiced by the court's decision to omit this statutory language from its instructions to the jury.

The importance of the omission of the statutory language to Boyle's defense can be seen in the discussion when the court initially considered giving Boyle's proposed instructions including the "present and future" language. The State was concerned the court would therefore dismiss the harassment of a criminal justice participant count, acknowledging there was no evidence of a present ability to carry out a threat. 2RP 18-082.

In addition, the jury was obviously concerned about understanding the elements of the crime, asking the court for clarification because different words were used in Instructions 9 and 17 and asking for a definition of the term "reasonable fear" used in Instruction 9. CP 118-19. The jury questions show the jury noticed an important difference between them - Instruction 9 omitted the statutory requirement that the fear from the threat is based upon the reasonable criminal justice participant standard rather than the reasonable person standard, but it is part of Instruction 17. CP 106, 114; compare RCW 9A.46.020(2)(b), CP 82. Boyle's jury was thus carefully analyzing the elements of the crime and would have applied the correct statutory language if it had been given.

"[E]rror is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds." Schaler, 169 Wn.2d at 288. This Court cannot conclude beyond a reasonable doubt that Boyle would have been convicted if the jury had been correctly instructed as to the elements of felony harassment of a criminal justice participant. Boyle's conviction must be reversed and remanded for a new trial. Kilburn, 169 Wn.2d at 289-90 (omission of "true threat" instruction not harmless); Brown, 147 Wn.2d at 344 (improper accomplice liability instructions not harmless); Harris, 164 Wn. App. at 387-88 (reversing assault conviction because definition of recklessness did not conform with applicable statute); Kiehl, 128 Wn. App. at 94 (conviction for felony harassment reversed because jury instructed the person who received the threat had to be in reasonable fear the threat would be carried out rather than the judge who was threatened).

3. **Boyle's conviction must be reversed because juror misconduct denied him a fair trial.**

A criminal defendant has the constitutional right to a jury trial, and article I, section 21 provides that "[t]he right to trial by jury shall remain inviolate." U.S. Const. amends. VI, XIV; Const. art. I §§ 21, 22. The right to a trial by jury includes the right to a fair and unbiased

jury, free from disqualifying misconduct. Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 159, 776 P.2d 676 (1989) (quoting State v. Kent, 11 Wn. App. 439, 443, 523 P.2d 446, rev. denied, 84 Wn.2d 1007 (1974)). A juror commits misconduct by (1) failing to disclose relevant information during voir dire or (2) injecting into jury deliberations case-specific information learned outside of the trial. State v. Johnson, 137 Wn. App. 862, 869, 155 P.3d 183 (2007); State v. Briggs, 55 Wn. App. 44, 50, 54, 776 P.2d 1347 (1989). Boyle's conviction must be reversed because a juror committed both types of misconduct by failing to disclose her experience as a victim of threats and then using her experience to persuade other jurors that it was not unusual that Officer Morrison did not recognized Boyle after the arrest.

a. Juror 4 failed to identify herself as a victim of threats to kill during voir dire and then related a critical aspect of her experience in jury deliberations. Boyle's attorney moved for a new trial based upon her conversation with several jurors after the trial. Defense counsel related that Juror 4, a nurse, told her that she had been held hostage for 12 hours by a patient, a fact that she had not related during voir dire. CP 344. Juror 4 also related during jury deliberations that she would not remember the patient if she saw him today. CP 344. Based upon

this information, the court summoned Juror 4 and ordered both counsel to have no contact with any of the jurors. CP 341, 352-53; 12/28/12 RP 19, 21. The court refused to summon the presiding juror who participated in defense counsel's post-verdict conversation with Juror 4. 12/28/12 RP 17.

During jury selection, the trial court told the prospective jurors that Boyle was charged with two counts of harassment - threat to kill and threatening a criminal justice participant - and read the information to them. 12/5/12 RP 13-15. The court explained that the questions asked in voir dire were designed to help select a fair and impartial jury and asked the prospective jurors not to withhold any information. 12/5/12 RP 22-23.

The court then asked the panel if anyone "had a personal experience with a similar or related type of case or incident." 12/5/12 RP 25. Juror 4 did not respond to the question. 12/5/12 RP 25. Two other jurors answered in the affirmative, and both were excused for cause because they stated it would be difficult for them to be fair and impartial in Boyle's case as a result of their experiences. 12/5/12 RP 25-26, 32-33.

At the post-trial hearing, Juror 4 said that patients frequently threaten her at work. 1/11/13 RP 8. In her conversation with counsel, she had been referring to a patient in the intensive care unit who was restrained and sedated, but was still able to kick at her when she entered the room during her 12-hour shift. 1/11/13 RP 4, 5-6. 8. The patient had not taken her hostage. 1/11/13 RP 5-6. Juror 4 said she did remember being told the nature of the charges against Boyle during voir dire or thinking the case was similar to her work experience. 1/11/13 RP 9-10.

During deliberations Juror 4 shared her experience and related that she would not be able to pick the patient out in a crowd when the jury discussed the evidence that Morrison did not recognize Boyle during a later encounter. 1/11/13 RP 9. In addition, some jurors felt that the police officer's notes should not have been destroyed. 1/11/13 RP 4. Juror 4 explained how notes were processed and "legalized" where she worked: what was in the report controlled and not notes. 1/11/13 RP 4.

The court denied Boyle's request to continue the hearing to obtain testimony from the presiding juror, whose testimony counsel anticipated would substantiate defense counsel's affidavit concerning

the post-verdict conversation. 1/11/13 RP 11-13. The court then denied Boyle's motion, finding that Juror 4 had not failed to disclose material information in voir dire. CP 421-23; 1/11/13 RP 17-18. Concerning the extraneous information Juror 4 related during deliberations, the court found that her experience in being unable to remember someone who threatened her was the kind of "life experience" juror are encouraged to relate during deliberations. CP 422; 1/11/13 RP 18. The court found that her expertise concerning note-taking was too different from the police officer's to be relevant. 1/11/13 RP 18.

b. Juror 4 committed misconduct by withholding relevant information in voir dire and interjecting related information during deliberation. Juror 4 committed two related acts of misconduct – withholding from counsel her prior experiences as a victim of threats to kill and then injecting that experience into the jury deliberations her experience as a victim and her related ability to remember the person who threatened her for several hours. In this situation, the court must review both the individual and the combined aspects of the juror's misconduct. Briggs, 55 Wn. App. at 53.

"Jury voir dire protects the right to an impartial jury by exposing possible bias." Johnson, 137 Wn. App. at 869; accord Kuhn v. Schnall, 155 Wn. App. 560, 574, 228 P.3d 828, rev. denied, 169 Wn.2d 1024 (2010). It is therefore critical that jurors truthfully answer voir dire questions. Id. (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)). Normally, the party alleging misconduct must show that the juror failed to honestly answer a material question in voir dire and that a correct response would have provided a valid basis to challenge the juror for cause. Id. at 868. If, however, the undisclosed information is later used in deliberations, the court must "inquire into the prejudicial effect of the combined, as well as the individual, aspects of the juror's misconduct. Id. at 869; Briggs, 55 Wn. App. at 53. The trial court erred by using the wrong legal standard and concluding that Juror 4's omission would not have resulted in a challenge for cause. CP 422.

Jurors also have the duty to consider the case based only on the evidence presented at trial. Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); CP 96 (Instruction 1). Such extrinsic evidence is not subject to objection, cross-examination, explanation or rebuttal. State v. Balisok, 123 Wn.2d 14, 118, 866 P.2d

1631 (1994). When a juror interjects personal undisclosed information into the jury's deliberations, a new trial is warranted if there are reasonable grounds to believe the information prejudiced the defendant, with any doubt resolved in favor of granting a new trial. Johnson, 137 Wn. App. at 869 (citing Briggs, 55 Wn. App. at 55). "This is an objective inquiry into whether the extraneous evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence, which includes consideration of the purpose for which the extraneous evidence was interjected into deliberations." A new trial must be granted unless the court is convinced beyond a reasonable doubt that the extraneous evidence did not contribute to the jury's verdict. Id.

After the defendant in Johnson was convicted of several sexual offenses, counsel learned that a juror did not disclose in voir dire that her daughter had been the victim of a date rape. Johnson, 137 Wn. App. at 865-86. The juror also mentioned her daughter's experience during deliberations. The juror believed her comment was simply "small talk," but others remembered the juror mentioned the incident when she was "frustrated" during a "lively debate." Id. at 870. The trial court found that the juror had not been dishonest during jury

selection, noting the court had asked if any jurors or family members had been involved in a sexual assault "case," not incident. Id. at 867.

In reversing the trial court, this Court noted that if the juror had answered the voir dire question honestly, defense counsel could have questioned her about the matter so as to elicit information to warrant excusing her for cause or ensure that she could refrain from discussing the experience during deliberations. Johnson, 137 Wn. App. at 869. Every prospective juror who had answered the court's question concerning experiences with sexual assault cases in the affirmative was asked if he or she could be fair, and five were excused for cause based upon their answers. Id. This Court concluded that the juror's interjection of her personal experience into the deliberations demonstrated her inability to be objective due to her daughter's experience – "the precise danger that voir dire is designed to prevent" – and the defendant was therefore "denied the protection voir dire offers to preserve jury impartiality." Id.

The Johnson Court also held that the defendant was likely prejudiced by the juror's use of the undisclosed personal information during deliberations. Johnson, 137 Wn. App. at 869. The juror's comment seemed to be designed to generate sympathy for the victim in

Johnson's case, no doubt giving greater credibility and sympathy to the witness. Id. at 869-70. In denying Johnson's motion for a new trial, the trial court did not consider the combined effects of the juror's nondisclosure in voir dire and use of the undisclosed information in deliberations. Id. at 871. This Court reversed the trial court and ordered a new trial, concluding the juror's misconduct deprived Johnson of an impartial jury and a fair trial. Id.

Boyle's case is similar to Johnson, and a new trial is warranted. A juror failed to reveal during voir dire her experience being threatened by a patient, even though the court read the information to the jury and asked if any of the jurors or their family members had a similar experience. Two other jurors revealed their former experiences, and both were excused for cause. The trial court found that the juror's failure to answer the question was "truthful" because her experience was different than the police officer's. 1/11/13 RP 18.

The court's analysis was incorrect. A juror's experience need not be identical to that of the complaining witness to be prejudicial to the defense. In Johnson, for example, the juror's daughter's date rape was relevant even though it was not identical to Johnson's attack in her bed by someone who had visited the home where she was staying

earlier that evening. Johnson, 137 Wn. App. at 864, 866. The court also utilized the wrong standard of review, concluding that even if Juror 4 had revealed her past experience, it would not have led to a challenge for cause. When the juror also uses the undisclosed experience in deliberation, however, this standard does not apply.

The court also found the extrinsic information Juror 4 shared during deliberations was not prejudicial because (1) her opinion that she would not be able to identify the patient who had threatened her was the kind of life experience jurors are encouraged to share during deliberations and (2) the information about the legal impact of notes in the nursing profession was not relevant to note taking by a police officer. CP 422; 1/11/13 RP 18.

Jurors are expected to bring their common sense and life experience into the deliberation process. Briggs, 55 Wn. App. at 58. They are not, however, permitted to share specialized knowledge that was not disclosed in voir dire. Id. In Briggs, a juror did not disclose his speech problem in a case where it was critical that the defendant stuttered but none of the witnesses noticed that their attacker stuttered. Id. at 47. The Briggs Court held that the juror's experience with hesitant speech was specialized knowledge "outside the realm of a

typical juror's life experience." Id. at 59. Juror 4's hospital experience that the report and not the notes taken before writing that report were the final and "legal" version of events was similarly outside the realm of most juror's experience.

The information was prejudicial because Boyle's defense was that the police officer's somewhat lackadaisical reaction to Boyle's comments demonstrated he was not really afraid. Boyle's only witness testified that she, Boyle, and Officer Morrison were all involved in a traffic stop after the purported threats, which the police officer could not remember. Juror 4's comments that she would not be able to pick the patient who threatened her out of a crowd easily could have swayed the jurors in reaching their guilty verdict.

In addition, Boyle pointed out in cross-examination and closing argument that there was no corroboration of Officer Morrison's testimony, even though there were witnesses at the restaurant and at the jail, and that he had destroyed his original notes of from the incident. Juror 4 testified that some jurors were concerned about the destruction of the notes, but she used her work as "an example of legalized documentation." 1/11/13 RP 4-5, 7. Juror 4 thus acted as an expert in

what parts of a report are "legal." This extrinsic information also could have impacted the jury's verdict.

Finally, when a juror commits misconduct by both withholding information during voir dire and then using the information in jury deliberations, the court must look at both the individual and combined misconduct. Johnson, 137 Wn. App. at 869. In Johnson, for example, this Court reasoned that the juror's injection of undisclosed information during deliberation "illustrated that she could not be objective about the case in hand – the precise danger that voir dire is designed to prevent." Id. at 869. Like the trial court in Johnson, the court in Boyle's case did not consider the combined effect of Juror 4's nondisclosure in voir dire and sharing of the undisclosed information during deliberations.

The court's decision to grant or deny a new trial is discretionary, but a decision to deny a new trial is given less deference than a decision to grant one. Johnson, 137 Wn. App. at 871; Briggs, 55 Wn. App. at 60. A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or untenable reasons. Id. Here, the trial court reviewed Boyle's motion under the incorrect legal standard, exercised its discretion for incorrect reasons, and refused to permit Boyle to call any other jurors to testify as to Juror 4's

statements during deliberation. The trial court abused its discretion in denying Boyle's motion for a new trial.

c. Boyle's conviction must be reversed and remanded for a new trial. Boyle's constitutional right to a fair and impartial jury was violated. Juror 4's failure to disclose her experience as the victim of harassment and later discussion in jury deliberations of her ability to identify the person who harassed easily could have affected the jury verdict. This Court cannot be convinced beyond a reasonable doubt that the juror's misconduct was harmless. Boyle's conviction must be reversed and remanded for a new trial. Johnson, 137 Wn. App. at 871.

In addition, the trial court prohibited counsel from contacting any of the jurors, refused to subpoena any jurors other that Juror 4 to the hearing on Boyle's motion for a new trial, and denied his request to continue the hearing to have the presiding juror testify. This Court was thus deprived of a full record of the juror misconduct. In the alternative, the case should be remanded to the superior court for a hearing where other jurors will testify about Juror 4's comments during deliberations.

F. CONCLUSION

Kane Boyle's conviction for harassment of a criminal justice participant must be reversed and dismissed because the State did not prove all of the elements of the crime beyond a reasonable doubt.

In the alternative, his conviction must be reversed and remanded for a new trial because the jury instructions reduced the prosecutor's burden of proving every element of the crime and because jury misconduct violated Boyle's constitutional right to a fair and impartial jury.

DATED this 20th day of August 2013.

Respectfully submitted,

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APPENDIX A

Court's Jury Instructions 9 and 17

CP 106, 114-15

INSTRUCTION NO. 9

A person commits the crime of felony harassment of a criminal justice participant when he or she, without lawful authority, knowingly threatens a criminal justice participant who is performing his or her official duties at the time the threat is made, or the threat is made because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties, and the threat is to cause bodily injury immediately or in the future to the criminal justice participant or any other person or maliciously to do any act which is intended to substantially harm the criminal justice participant or another person with respect to his or her physical health or safety and when he or she by words or conduct places the criminal justice participant threatened in reasonable fear that the threat will be carried out.

It is not harassment if it is apparent to the criminal justice participant that the person does not have the ability to carry out the threat.

INSTRUCTION NO. 17

To convict the defendant of the crime of felony harassment (criminal justice participant) as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 21st, 2011, the defendant knowingly threatened:

(a) to cause bodily injury immediately or in the future to Stephen Morrison or his family, or

(b) maliciously to do any act which was intended to substantially harm Stephen Morrison or his family with respect to his or his family's physical health or safety;

(2) That at the time of the threat Stephen Morrison was a criminal justice participant:

(a) who was performing his official duties, or

(b) who had taken an action or made a decision and the threat was made because of that action or decision;

(3) That the words or conduct of the defendant placed Stephen Morrison in a such a fear that a reasonable criminal justice participant would have that the threat would be carried out;

(4) It was apparent to Stephen Morrison that the defendant had the ability to carry out the threat;

(5) That the defendant acted without lawful authority; and

(6) That the threat was made or received in the State of Washington.

If you find from the evidence that elements (3), (4), (5) and (6) and either of the alternative elements (1)(a) or (1)(b), and either of the

alternative elements of (2)(a) or (2)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b), or which of the alternatives of (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative of element (1), and one alternative of element (2) has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5) or (6), then it will be your duty to return a verdict of not guilty.

APPENDIX B

Defendant's Proposed Jury Instructions
Corresponding to Instructions 9 and 17

CP 82-84

INSTRUCTION NO. _____

A person commits the crime of felony harassment when he or she, without lawful authority, knowingly threatens a criminal justice participant who is performing his or her official duties at the time the threat is made, or the threat is made because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties, and the threat is to cause bodily injury immediately or in the future to the criminal justice participant or any other person, or to maliciously do any act which is intended to substantially harm the criminal justice participant or another with respect to his or her physical health or safety and when he or she by words or conduct places the criminal justice participant threatened in reasonable fear that the threat will be carried out. In addition, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances.

It is not felony harassment if it is apparent to the criminal justice participant that the defendant does not have the present and future ability to carry out the threat.

WPIC 36.06, (modified by RCW 9A.46.020(2)(b))

INSTRUCTION NO. ____

To convict the defendant of the crime of felony harassment as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 21st, 2011, the defendant knowingly threatened:

(a) to cause bodily injury immediately or in the future to Stephen Morrison or to any other person, or

(b) to maliciously do any act which was intended to substantially harm Stephen Morrison or another with respect to his or her physical health or safety; and

(2) That at the time of the threat Stephen Morrison was a criminal justice Participant:

(a) who was performing his official duties, or

(b) who had taken an action or made a decision and the threat was made because of that action or decision; and

(3) That the words or conduct of the defendant placed Stephen Morrison in such a fear that the threat would be carried out; and

(4) A reasonable criminal justice participant would have, under all the circumstances, the fear that the threat would be carried out; and

(5) That it was apparent to Stephen Morrison that the defendant had the present and future ability to carry out the threat; and

(6) That the defendant acted without lawful authority, and

(7) That the threat was made or received in the State of Washington.

If you find from the evidence that elements (3), (4), (5), (6) and (7) and either of the alternative elements (1)(a) or (1)(b), and either of the alternative elements of (2)(a) or (2)(b), have been proved beyond a reasonable doubt, then it will by your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternative (1)(a) or (1)(b), or which of the alternatives of (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative of element (1), and one alternative of element (2) has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), (6) or (7), then it will be your duty to return a verdict of not guilty.

WPIC 36.07.02 (modified by RCW 9A.46.020(2)(b))

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

STATE OF WASHINGTON, Respondent, v. KANE BOYLE, Appellant.	)	NO. 44447-0-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] RUSSELL HAUGE KITSAP COUNTY PROSECUTING ATTORNEY 614 DIVISION ST. PORT ORCHARD, WA 98366-4681 e-mail: kcpa@co.kitsap.wa.us	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA PORTAL
[X] KANE BOYLE 888065 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF AUGUST, 2012.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711

WASHINGTON APPELLATE PROJECT

August 20, 2013 - 4:05 PM

Transmittal Letter

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Case Name: STATE V. KANE BOYLE

Court of Appeals Case Number: 44447-0

Is this a Personal Restraint Petition? Yes ■ No

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