

NO. 44447-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

KANE BOYLE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00416-0

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the charged offenses beyond a reasonable doubt?

2. Whether the trial court properly found: (1) that the language of RCW 9A.46.020(2)(b) does not require that State prove that a defendant simultaneously had both the present and future ability to carry out his or her threat; and (2) that the plain language of the statute stands merely for the proposition that if it appears to the victim that the defendant did not have the present ability to carry out the threat and also did not have the future ability to carry out the threat, then the threat would not qualify as harassment since it appeared that the defendant would never have the ability to carry out the threat?

3. Whether the trial court abused its discretion in rejecting the Defendant's claim of juror misconduct when: (1) the Defendant failed to show that the juror improperly hid information that, if revealed, would have supported a challenge for cause; and (2) the juror properly applied her life experiences during deliberations and did not interject "highly specialized information that was outside the realm of a typical juror's general life experience?"

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Kane Boyle, was charged by an amended information filed in the Kitsap County Superior Court with one count of Felony Harassment (Threats to Kill) and one count of Felony Harassment (Criminal Justice Participant). CP 69-72. Following a jury trial the Defendant was found guilty of Felony Harassment (Criminal Justice Participant). CP 120. The jury found the Defendant not guilty on the other count. CP 120. After denying a motion for a new trial, the trial court imposed a standard range sentence. CP 420, 423. This appeal followed.

B. FACTS

On December 21, 2011, Officer Stephen Morrison of the Port Orchard Police Department was on patrol and drove through the parking lot of a bar and restaurant named “Tommy C’s.” RP 70, 75-77.¹ As he drove through the parking lot, Officer Morrison saw a man get out of a parked truck and stumble up towards a nearby business. RP 78. The man was staggering and “wobbly,” and as he approached the building it

¹ The Report of Proceedings in the present case includes the actual trial below as well as several pre-trial and post-trial hearings. The trial itself began on December 4 and continued through December 11. The transcript of the actual trial is contained in three consecutively paginated volumes, and references to the trial portion of the transcripts will be cited in this brief as “RP.” References to the pre-trial and post-trial hearings will be cited as “RP (date).”

appeared that he was unzipping his pants in an effort to urinate on the building. RP 78. Officer Morrison turned on the spotlight on his patrol car and illuminated the man. RP 79. The man then stopped what he was doing and returned to the truck. RP79. Officer Morrison parked nearby and watched the truck. RP 80-81.

After a few minutes, the truck began to back out of its parking stall until it was in a position where the driver would have been able to see Officer Morrison's patrol car. RP 81. The truck then pulled back into the parking spot. RP 81-82. Officer Morrison then moved his patrol car to a lower parking lot where his car would be less visible to the truck and its driver, and continued to watch the truck. RP 82.

After approximately ten minutes, the truck again pulled out and began to drive through the parking lot. RP 82. Officer Morrison followed the truck as it briefly left the parking lot and went onto to adjacent street, but the truck then turned back into the parking lot and parked near "Tommy C's." RP 82-83. Officer Morrison pulled in behind the truck and activated the emergency lights on his patrol car. RP 83.

Officer Morrison contacted the driver (later identified as the Defendant) and asked for his license, registration, and insurance proof of insurance. RP 86. The Defendant's speech was slurred and Officer Morrison could smell a strong odor of alcohol on the Defendant. RP 87-

88.

Officer Morrison testified that it was apparent (based on the tone of the Defendant's voice and his responses to the officer) that the Defendant was becoming "increasingly agitated" throughout the contact. RP 89. Officer Morrison ultimately decided to arrest the Defendant for DUI, had him step out of the truck, placed the Defendant in wrist restraints, and explained to him that he was under arrest. RP 89-90. At this point the Defendant became "very angry" and started yelling profanities at the officer, including "Fuck you swine, I hope you burn in hell." RP 90.

Officer Morrison then walked the Defendant to the patrol car and seated him in the back seat. RP 91. The Defendant was then advised of his Miranda warnings, and throughout the reading of the warnings the Defendant continued to curse at the officer. RP 91-92. Officer Morrison then called for a tow truck to impound the Defendant's vehicle, and he began filling out an impound form. RP 93. During this time the Defendant remained in the back of the patrol car where he was "getting worked up more and more." RP 93. The Defendant then began yelling again and started kicking the side panel of the patrol car. RP 93-94.

The tenor and the subject matter of the Defendant's comments began to change at this point, and Officer Morrison began noting the

specific statements that the Defendant made while waiting for the tow truck and on his way to (and after his arrival at) the Kitsap County jail. RP 94-95. The specific statements made by the Defendant included the following:

threats:

“People will look you and your family up and do them in. I would never threaten your family.” RP 96-97.

“I would never attack children, but cops and child molesters were fair game.” RP 97.

“People should shoot you guys in the face, and I will be glad when they do. I would not do it myself, but you know someone will.” RP 98.

“Remember Forza Coffee, it was good stuff.” RP 98.²

“Forza Coffee, that’s what should happen to all cops and their families.” RP 99.

“You wait and see what happens when I get out . . . I’m not threatening you.” RP 99.

“I hope your children die.” RP 100.

“Punch me in the face, twice. I know you want to.” RP 100.

“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.” RP 102.

“Fuck your face, fucking swine. Read my record. Read it twice.” RP 101.

Officer Morrison testified that he wrote the Defendant’s statements down as they were being made and that the Defendant repeated several of these

² Officer Morrison testified that he understood the statement regarding “Forza Coffee” to be a reference to the murder of four Lakewood Police officers that occurred at a Forza

statements multiple times. RP 96, 123-24. The Defendant also made other statements that Officer Morrison wasn't able to write down at the time or that he didn't recall clearly enough to include in the report. RP 96.

Officer Morrison explained that these statements were of particular concern to him. RP 94-95. Officer Morrison described the Defendant's tone of voice as "extremely angry" and further stated that the Defendant was "furious." RP 96. The Defendant was angry throughout the period in which these comments were made, and at no time did it appear that the Defendant was joking. RP 97.

As the Defendant had told him to "check his record," Officer Morrison checked the Defendant's criminal history record on the computer terminal in his patrol car and saw that the Defendant had a previous conviction for assault. RP 101-02. Officer Morrison explained that this fact concerned him, as did the fact that the Defendant wanted him to know about the criminal history. RP 101-02.

Officer Morrison further testified that he felt threatened by the Defendant's comments, and was concerned about his own safety and the safety of his family. RP 102-03. Officer Morrison acknowledged that he did not think that something might happen while the Defendant was in the patrol car or on the way to jail, but Officer Morrison was concerned what

Coffee shop. RP 98-99.

the Defendant might do when he was released from jail. RP 103.

Officer Morrison acknowledged that he as a police officer this was not the first time he had been threatened, but he explained that this instance was different from other instance as it was distinguished by:

Just the fury that he was emanating. He was so angry that you could just – I mean, it was almost palatable in the car. You can almost cut the anger with a knife. It was so thick in the car. And the way he kept repeating stuff. And he would say, well – and he'd follow it up with, "Well, I'm not threatening you," I mean, he knew what he was saying because he's following that comment up with, "Well, I'm not threatening you."

RP 104. Furthermore, Officer Morrison explained that the Defendant would then follow those comments up with additional threats. RP 104.

Officer Morrison further testified that he did not routinely discuss the events of his day with his wife or family. RP 105. After his interaction with the Defendant was over, however, Officer Morrison discussed the episode with his wife as he wanted her to be "very vigilant" and wanted her to be on the lookout for unknown cars or people or anything that looked "weird." RP 106-07. When he was asked why he chose to discuss the incident with his wife, Office Morrison stated,

Because of the threats that he had made towards my family. You know, when he was saying some of this stuff, he was referring to my family. That concerned me greatly because it's not that difficult to find out who a person is and where they live, you know, with the information age that we live

in today. But I was really concerned about those comments, specifically towards my family, that he could possibly show up at my house or wait for someone to be leaving and – I don't know? It concerned me greatly. That's why I had a discussion with my wife about what was said, not specifics, but that there was threats to me, her, the family.

RP 106.

At the conclusion of evidence the parties reviewed the proposed jury instructions. RP 163. With respect to the “to convict” instruction for the crime of harassment of a criminal justice participant, the Defendant proposed an instruction which included the following phrase as an element,

That it was apparent to Stephen Morrison that the defendant had the present and future ability to carry out the threat.

CP 84. The Defendant claimed this language was necessary because the statute included language that “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.” RP 169-70. *See also* RCW 9A.46.020(2)(b) (“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”). The Defendant argued that the statutory language meant that a threat could only constitute harassment if “the circumstances are such that a person has the present

ability to carry out a threat as well as the future ability.” RP 175.

The State argued that the Defendant’s reading of the statute lead to an absurd result because the harassment statute specifically provides that a threat can be a threat to do something “immediately” or “in the future.” RP 170-72. Thus it would be bizarre to conclude that the statute meant that for a criminal justice participant a threat only constituted harassment if the threat could be carried out both in the present and in the future. RP 172, 174. The State thus proposed an instruction that said 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.” RP 173; CP 106.

The trial court ultimately declined to give the Defendant’s proposed instruction and gave the State’s proposed instruction. RP 194; CP 106. The trial court further explained its understanding of the statutory language at issue as follows:

Well, the sentence is phrased in the negative. “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.” This is an exception –

. . .

But this sentence is phrased as an exception, not as an element. “Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person not have the present . . .”

Doesn’t have the present ability and if he doesn’t have the future ability. But if he has either the present ability or

the future ability, then it is felony harassment. Can you see my thinking on that? The way the sentence is an exception to the general rule.

RP 187-88. The trial court further explained,

So I think what the legislature meant to say there is that threats do not constitute a harassment if the officer knows that the person does not have the present ability and it is not harassment if the person does not have the future ability. But if he has either the present or the future ability, the threat is real. I can't believe that the legislature would have any other thoughts about that.

And I think the state's instruction which says [“]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[“] is actually a good compromise under the circumstances because arguably you could read ability to be present ability or future ability. I think that the legislature thought that if the threat was credible, that it was actionable. That's my ruling on that.

RP 194-95.

The jury ultimately found the Defendant guilty of the charge of Felony Harassment of a Criminal Justice Participant. CP 120.

Prior to sentencing the Defendant filed a motion for a new trial pursuant to CrR 7.5. CP 354. In the motion the Defendant again raised the issue of the jury instruction discussed above, and the Defendant also claimed that a juror had failed disclose that she had a prior experience that was similar to the charged offense. CP 354-66. Defense counsel claimed that she had talked to Juror #4 after the verdict was returned and that she

believed Juror #5 mentioned that she had been held for 12 hours by an individual who had threatened her. CP 367.

In response the trial court summoned Juror #4 to court for a future hearing and testimony on the allegations. RP (12/20) 19-21. At the hearing the juror testified that after the trial she did have a conversation with defense counsel about her prior experiences. RP (1/11) 4. At the hearing defense counsel asked the juror to explain the nature of the conversation and her previous experiences, and the juror testified that other jurors had raised some questions regarding use of notes to document an incident. RP (1/11) 4. The juror explained that she works as a nurse and that she discussed with the other jurors that when an incident occurs at work she will take notes and then write a report and that the report (and not the notes) are considered the “finalized statement.” RP (1/11) 4-5.

Defense counsel then asked the juror if she had discussed being held hostage and threatened by a patient. RP (1/11) 5. The juror answered “No,” and she also testified that she had not said she had been held hostage. RP (1/11) 5. Defense counsel asked if she had mentioned a “time frame of 12 hours,” and the juror testified that she had said that she worked a “12 hour shift.” RP (1/11) 5-6. The juror also specifically testified that during deliberations she had never discussed being held hostage for 12 hours. RP (1/11) 7.

The juror did acknowledge that there had been occasions when patients at the hospital had made threats or had tried to kick at her. RP (1/11) 4-5, 8. She also mentioned that she wouldn't be able to pick the person out of crowd. RP (1/11) 9. The juror also acknowledged that she had not disclosed her experiences during voir dire. RP (1/11) 7. The juror explained, however, that when the court asked the jurors if they had had any similar experiences, that she had not drawn a connection between what had happened to her and the charges in the case. RP (1/11) 9-10. When asked if she had any prejudice or anger towards the Defendant based on anything that ever happened to her at work, the juror specifically answered "No." RP (1/11) 10.

At the conclusion of the hearing the trial court denied the motion for a new trial. RP (1/11) 18-19. The trial court explained that he found the juror's testimony to be "truthful in every respect," and that her experiences as a nurse was very dissimilar from a law enforcement officer and his family being threatened with death by an arrestee. RP (1/11) 17-18. The court thus found that the juror's failure to disclose this information when the court asked if any of the jurors had had similar experiences was not an "omission." RP (1/11) 18. The court also noted that it found that her experiences with not being able to remember the person who had threatened her was not "anything other than a common

experience of all people and, of course, the jury is entitled to and encouraged to use their life experience and common sense in their deliberations.” RP (1/11) 18.³

The trial court subsequently entered written findings of fact and conclusions of law noting, among other things,

That the juror did not describe this incident in voir dire because it did not appear to be germane to any of the questions asked of her in voir dire.

...

That the experiences of the juror were not something about which she was directly asked and that she did not fail to disclose any information that she was asked to disclose. Furthermore, even if she had disclosed the information it would not have given rise to a successful challenge for cause. Furthermore, the experiences that she described in deliberation were a valid application of life experience and common sense used to weigh and evaluate the evidence presented at trial, and was not the introduction of any improper new evidence concerning the case.

CP 421-22.

³ The trial court, as it had done at trial, also rejected the Defendant’s arguments regarding the jury instructions on harassment of a criminal justice participant. RP (12/28) 12-13.

III. ARGUMENT

A. THE DEFENDANT’S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSES BEYOND A REASONABLE DOUBT.

The Defendant argues that the evidence presented below was insufficient to support the guilty verdict. App.’s Br. at 11. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the crimes beyond a reasonable doubt

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. An appellate court is to defer to the trier of fact on “issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*. 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). Circumstantial evidence and direct evidence are equally reliable.

State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A court may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. *State v. Locke*, 175 Wn.App. 779, 788, 307 P.3d 771 (2013), citing *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

A defendant is guilty of harassment if, without lawful authority, he or she “knowingly threatens ... [t]o cause bodily injury immediately or in the future to the person threatened or to any other person,” and “by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1). This form of harassment is a class C felony if the defendant harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or 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)(iii) and (iv). For the purposes these sections relating to criminal justice participants, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. RCW 9A.46.020(2)(b).⁴

The crime of harassment applies only to “true threats.” A true

⁴ RCW 9A.46.020(2)(b) also includes a sentence stating that “Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.” That sentence will be

threat is a serious threat, not one said in jest, idle talk, or political argument. *Locke*, 175 Wn.App. at 790, citing *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (citing *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir.1984)). Stated another way, communications that “bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole” are not true threats. *Locke*, 175 Wn.App. at 790, citing *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). The nature of a threat “depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken.” *State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (“the nature of a threat depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken”). Thus, statements may “connote something they do not literally say....” *Locke*, 175 Wn.App. at 790, citing *Planned Parenthood of Columbia/Willamette, Inc. v. A.C.L.A.*, 290 F.3d 1058, 1085 (9th Cir.2002). Consistently with this recognition, our court has held that “whether a statement is a true threat or a joke is determined in light of the entire context” and that a person can indirectly threaten to harm or kill another. *Locke*, 175 Wn.App. at 790, citing *Kilburn*, 151 Wn.2d at 46, 48. Further, “[t]he speaker of a ‘true threat’ need not actually intend to carry it out. It is enough that a reasonable

discussed in the next section of the brief.

speaker would foresee that the threat would be considered serious.” *Locke*, 175 Wn.App. at 790, *citing Schaler*, 169 Wn.2d at 283 (citation omitted).

In addition, this Court has explained that neither RCW 9A.46.020 nor the definition of ‘threat’ in RCW 9A.04.110 requires the State to prove a “nonconditional present threat.” *State v. Cross*, 156 Wn.App. 568, 582, 234 P.3d 288 (2010), *citing State v. Edwards*, 84 Wn.App. 5, 12, 924 P.2d 397 (1996) (The State is not required to prove a “nonconditional present threat” where the charging statute and applicable statutory definitions do not establish such an element). Assuming evidence shows the victim’s subjective fear, the standard for determining whether the fear was reasonable is an objective standard considering the facts and circumstances of the case. *State v. Alvarez*, 74 Wn.App. 250, 260–61, 872 P.2d 1123 (1994), *aff’d*, 128 Wn.2d 1, 904 P.2d 754 (1995).

In the present case the Defendant argues that the State presented insufficient evidence because the Defendant’s statements merely expressed his “political views” that police officers were properly in danger from attacks by citizens. App.’s Br. at 11. The Defendant also argues that the evidence was insufficient to show that a reasonable police officer would interpret the Defendant’s statements as a genuine threat. App.’s Br. at 11, 14, 18.

In support of his claims, the Defendant cites this Court’s recent

decision in *Locke*, 175 Wn.App. 779. App.'s Br. at 19. The Defendant specifically claims that this Court in *Locke* found that two emails sent by the defendant in that case were not true threats and were "more in the nature of hyperbolic political speech." App.'s Br. at 19. This claim, however, is incorrect, as this Court specifically found that the second email did constitute a true threat when viewed in combination with a third communication. Furthermore, this Court's reasoning in *Locke* is instructive and applicable to the present case, as discussed below.

In *Locke*, the defendant first sent two email messages to the Governor through a section of the Governor's website. *Locke*, 175 Wn.App. at 785. In the first email message the defendant identified himself by name and listed his "city" as "Gregoiremustdie." *Id* at 785. The message itself stated,

I hope you have the opportunity to see one of your family members raped and murdered by a sexual predator. Thank you for putting this state in the toilet. Do us a favor and pull the lever to send us down before you leave Olympia.

Id at 785. In a second email sent minutes later, the defendant called the Governor a name and then stated "You should be burned at the stake like any heretic." *Id*. Finally, a few minutes later the defendant accessed another section of the Governor's website titled, "Invite Governor Gregoire to an Event." *Id* at 786. Through a form on this web page,

Locke requested an event (again identifying himself by name and noting that he lived in Washington State) and he identified his organization as “Gregoire Must Die [sic].” *Id.* He requested that the event be held at the Governor's mansion and stated the event's subject would be “Gregoire's public execution.” *Id.* He wrote that the Governor's role during the event would be “Honoree.” *Id.* The defendant was charged and convicted of threatening the Governor, and on appeal this Court addressed the issue of whether the defendant's communications constituted “true threats.”

This Court held that the first email, while crude and upsetting, was more in the nature of hyperbolic political speech, and thus did not rise to the level of a true threat. *Locke*, 175 Wn.App. at 791. This Court noted that, unlike the first email, the second email (which expressed the defendant's opinion that the Governor should be “burned at the stake like any heretic”) expressed more than the desire that the Governor's policies will lead to horrible consequences to her family. “Rather, its message, expressed twice, is that the Governor should be killed.” *Locke*, 175 Wn.App. at 791. This Court did note that the second email did not state that the defendant would personally kill the Governor. Rather, the email used passive language and conveyed that someone should kill her. *Id.* at 791. Given this language, this Court held that “viewed in isolation” this second email would not constitute a true threat. *Id.* However, when this

email was viewed together with the third communication, those two “considered together, do cross into the territory of a true threat.” *Id* at 792.

This Court further explained that the third communication (the “event” request) “escalated the violent tone and content of his communications.” *Locke*, 175 Wn.App. at 792. The defendant identified his organization as “Gregoire Must Die [sic],” requested that the event be held at the Governor's mansion, and stated the subject of the event would be “Gregoire's public execution,” at which she would be the “Honoree.” *Id*. This court further explained that a member of Congress had been shot in the weeks before the defendant’s emails, and that in such a context a reasonable speaker would foresee that the Governor would take the “event request” seriously. *Id*. Furthermore, “Although Locke did not directly state that he himself would kill her, a direct threat is not required for his communication to constitute a true threat.” *Id* at 792, citing *Schaler*, 169 Wn.2d at 283–84; *Kilburn*, 151 Wn.2d at 48.⁵ This Court further noted that the details of the defendant’s threat threw “the threat into higher relief and translate it from the realm of the abstract to that of the practical,” and

⁵ The Defendant in the present case also cites *Kilburn* for support for his claim that his comments were not true threats. App.’s Br. at 20. The *Locke* court, however, noted that in *Kilburn* the defendant had regularly joked with other students and was “laughing when he made the statement at issue. *Locke*, 175 Wn.App. at 794. These circumstances led the Supreme Court to conclude that there was not a true threat, but the *Locke* court found that “nothing approaching these circumstances is present here.” *Locke*, 175 Wn.App. at 794. In the present case, as in *Locke*, there was not evidence that the Defendant was joking or laughing. Rather, Officer Morrison clearly described that the Defendant was very angry

they “plainly suggest an attempt to plan an execution, even though Locke may have intended nothing.” *Id* at 793. Furthermore, the evidence showed a “rapid-fire e-mail sequence of increasing specificity and menace,” and the e-mails suggested a “troubling explosiveness lying behind them.” *Id* at 793. Thus, this Court concluded that the “message would be taken seriously by a reasonable person.” *Id*. Finally, this Court explained that,

The sentiments expressed in the second and third e-mails conveyed no view or position on public issues or policies. To suggest a “profound national commitment” to the protection of such threatening outbursts risks trivializing our critical commitment to uninhibited speech on public issues, even if it crosses into the vehement and caustic. The second and third e-mails were not political speech.

Locke, 175 Wn.App. at 795. This Court thus concluded that the event request, either “viewed alone or together with the second e-mail” was sufficient to show that a reasonable person would foresee that it would be interpreted as a serious expression of intention to harm or kill. *Id* at 796-97.

Turning to the evidence in the present case, the threats made by the Defendant went far beyond any of the threats in *Locke* and were clearly sufficient to support the conviction. Viewing the evidence in the light most favorable to the State, the evidence in the present case showed that

and “furious.” Thus, *Kilburn* is inapplicable.

the Defendant clearly stated that someone would “kill” Officer Morrison and his family, and that someone would look Officer Morrison and his family up and “do them in.” RP 96-97. The Defendant also stated that while he would not personally attack children, cops “were fair game.” RP 97. The clear implication from these statements was that the Defendant himself was capable of harming the Officer, and the Defendant went even further when he asked the officer to look up his “record,” which included an assault conviction. RP 101.⁶ In case there was any confusion, the Defendant further told Officer Morrison to “wait and see what happens when I get out.” RP 99. In addition, just as the recent shooting of a congresswoman had informed the court’s analysis in *Locke*, the Defendant in the present case made a specific reference to the shooting of police officers at a Forza coffee shop. RP 98-99.

Furthermore, there was no evidence to suggest that the Defendant was joking or merely making idle threats. RP 97. Rather, the Defendant’s tone of voice as “extremely angry” and Officer Morrison further stated that the Defendant was “furious.” Although the Defendant did say “I’m not threatening you,” he followed this comment up with further threats,

⁶ Under Washington law when a defendant is charged with felony harassment, evidence of prior violent acts or threats may be admitted to show the victim’s fear of the defendant was reasonable. *State v. Binkin*, 79 Wn.App. 284, 292–93, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). The Defendant’s request that Officer Morrison look up his record clearly parallels the analysis behind this rule, as the request was designed to instill fear in the officer based upon the

suggesting that he was merely saying this in a weak attempt to cover himself. Given the Defendant's anger and his repeated and specific threats, Officer Morrison was clearly free to disregard the Defendant's absurd statement that he was not "threatening" the officer.⁷

Given all of this evidence and viewing it in a light most favorable to the State, the evidence was clearly sufficient to establish that the Defendant's statements constituted true threats and that a reasonable criminal justice participant would be placed in reasonable fear that the threats would be carried out. The Defendant's conviction, therefore, was supported by sufficient evidence and the Defendant's claim to the contrary must fail.

Defendant's prior acts.

⁷ Furthermore, Officer Morrison could have reasonably concluded that the statement that this was not a "threat" was intended to be understood as a comment that the Defendant was not making something that was a mere "threat" but was rather making statements that should be understood as a "promise" or actual intent to inflict harm on Officer Morrison as his family.

B. THE TRIAL COURT PROPERLY FOUND: (1) THAT THE LANGUAGE OF RCW 9A.46.020(2)(B) DOES NOT REQUIRE THAT STATE PROVE THAT A DEFENDANT SIMULTANEOUSLY HAD BOTH THE PRESENT AND FUTURE ABILITY TO CARRY OUT HIS OR HER THREAT; AND (2) THAT THE PLAIN LANGUAGE OF THE STATUTE STANDS MERELY FOR THE PROPOSITION THAT IF IT APPEARS TO THE VICTIM THAT THE DEFENDANT DID NOT HAVE THE PRESENT ABILITY TO CARRY OUT THE THREAT AND ALSO DID NOT HAVE THE FUTURE ABILITY TO CARRY OUT THE THREAT, THEN THE THREAT WOULD NOT QUALIFY AS HARASSMENT SINCE IT APPEARED THAT THE DEFENDANT WOULD NEVER HAVE THE ABILITY TO CARRY OUT THE THREAT.

The Defendant next claims that the State's evidence was insufficient, and that the trial court's instructions were flawed, because the statute requires the State to show that the criminal justice participant reasonably believed that the defendant had both the present and the future ability to carry out his threats. App.'s Br. at 23-30. This claim is without merit because the Defendant misconstrues the relevant statute and the trial court's instructions properly advised the jury of the applicable law. In addition, the State's evidence was sufficient to meet the actual elements of the charged offense.

The purpose of statutory interpretation is "to determine and give

effect to the intent of the legislature.” *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013); *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *In re Pers. Restraint of Williams*, 121 Wn.2d 655, 663, 853 P.2d 444 (1993). When possible, an appellate court is to derive legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *Evans*, 177 Wn.2d at 192; *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Plain language that is not ambiguous does not require construction. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). The plain meaning of a statute may be discerned “from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002); *State v. Clausing*, 147 Wn.2d 620, 630, 56 P.3d 550 (2002). A “reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.” *Delgado*, 148 Wn.2d at 733.

RCW 9A.46.020(1) provides that a person commits the crime of harassment if without lawful authority he or she knowingly threatens to

cause bodily injury “immediately or in the future” to the person threatened or to any other person. RCW 9A.46.020(2)(b) provides that the crime becomes a felony if the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made, or 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. The statute further provides that, “Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.” RCW 9A.46.020(2)(b).

The Defendant specifically argues that RCW 9A.46.020(2)(b) “clearly states that the 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 out the threat.” App.’s Br. at 30. The plain language of the statute, however, does not support the Defendant’s claim.

The actual sentence from the statute that is at issue, however, is not expressed in the positive and does not state what the State is required to prove. Rather, the sentence is expressed in the negative and explains what does **not** constitute harassment. As the trial court found, the plain language can be simply read to say nothing more than that:

Threatening words do not constitute harassment if it is apparent to the criminal justice participant that:

the person does not have the present ability to carry out the threat; AND

the person does not have the future ability to carry out the threat.

The trial court noted that as the sentence was expressed in the negative it created an exception and merely meant that it is not harassment if the defendant “Doesn’t have the present ability and if he doesn’t have the future ability. But if he has either the present ability or the future ability, then it is felony harassment.” RP 187-88. The trial court further explained,

So I think what the legislature meant to say there is that threats do not constitute a harassment if the officer knows that the person does not have the present ability and it is not harassment if the person does not have the future ability. But if he has either the present or the future ability, the threat is real. I can’t believe that the legislature would have any other thoughts about that.

RP 194-95.

The trial court’s reading of the statute was consistent with the plain language of the statute because the statute states that it is not harassment if 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). Thus if the criminal justice participant believed that that the defendant could never carry out the threat, then it is not harassment,

even if the threat itself was frightening or offensive. In essence, the statute explains that only credible threats are actionable, as the trial court found. RP 195.⁸

For instance, if an offender serving a life sentence sent word to a police officer that the offender was going to personally kill the officer, the officer may find the threat upsetting and perhaps even frightening. Nevertheless, if the officer knew that the offender was in prison serving a life sentence, then it would be apparent to the officer that the offender does not have the present ability to carry out the threat and does not have the future ability to carry out the threat. Thus it would not constitute harassment.

The Defendant's reading, of the statute, however, misconstrues its meaning. Under the Defendant's reading, the defendant must have *both* the present ability to carry out the threat and the future ability to carry out the threat. Such a reading, however, would render much of the harassment statute absurd.

The statute, for instance, clearly makes it a crime to threaten to cause bodily injury "immediately or in the future" to the person threatened

⁸ The trial court's "to-convict" instruction actually required the State to prove that "It was apparent to Stephen Morrison that the defendant had the ability to carry out the threat." CP 114. The "to-convict" instruction also required the jury to find "That the words or conduct of the defendant placed Stephen Morrison in such a fear that a reasonable criminal justice participant would have that the threat would be carried out." CP 114. As

or to “any other person,” and the defendant must also by words or conduct place the person threatened “in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1). The statute further provides that “words or conduct” includes messages sent by electronic communication. RCW 9A.46.020(1)(b). These provisions make it clear that the intent of the statute is to criminalize threats to commit harm either immediately or in the future. The fact that threats sent by electronic communication can suffice only further demonstrates that threats of future harm are included, since a person will rarely, if ever, be in a position to immediately carry out a threat communicated over electronic means.

Furthermore, in addition to expressly criminalizing threats to cause injury “in the future,” the statute provides that it is a crime to threaten to commit harm to third parties. In addition this Court has previously explained that neither RCW 9A.46.020 nor the definition of ‘threat’ in RCW 9A.04.110 requires the State to prove a “nonconditional present threat.” *Cross*, 156 Wn.App. at 582; *Edwards*, 84 Wn.App. at 12.

The trial court’s reading of the statute is entirely consistent with the other provisions of the statute and with the caselaw mentioned above. Under the trial court’s reading, it is not harassment if the criminal justice participant does not reasonably believe that the defendant could ever carry

the law requires nothing more, the Defendant has failed to show error.

out the threat. That is, it is not harassment if the defendant did not have the present ability to carry out the threat and does not have the future ability to carry out the threat. If, however, the defendant could carry out the threat either immediately or in the future, then the crime has been committed.

A contrary reading would lead to a number of absurd results. For instance,

All threats that are not conveyed in person would not qualify, since there would not be a “present” ability to carry out the threat.

All threats to harm non-present third parties (such as an officer’s wife or children) would not qualify, since there would not be a “present” ability to carry out the threat.

All threats to carry out some future threat would not qualify, since there would not be a “present” ability to carry out the threat.

In short, the Defendant has failed to show that the trial court erred, as the trial court’s reading of the statute was consistent with the plain language of the statute and was consistent with “the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” The Defendant’s claims, therefore must fail.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE DEFENDANT'S CLAIM OF JUROR MISCONDUCT BECAUSE: (1) THE DEFENDANT FAILED TO SHOW THAT THE JUROR IMPROPERLY HID INFORMATION THAT, IF REVEALED, WOULD HAVE SUPPORTED A CHALLENGE FOR CAUSE; AND (2) THE JUROR PROPERLY APPLIED HER LIFE EXPERIENCES DURING DELIBERATIONS AND DID NOT INTERJECT "HIGHLY SPECIALIZED INFORMATION THAT WAS OUTSIDE THE REALM OF A TYPICAL JUROR'S GENERAL LIFE EXPERIENCE."

Boyle next claims that the trial court erred by failing to grant his motion for a new trial based on alleged juror misconduct. This claim is without merit because the trial court's denial of the motion for a new trial was well within the broad discretion afforded to trial courts in this area.

An appellate court will disturb a trial court's decision to deny a new trial only for a clear abuse of that discretion or when it is predicated on an erroneous interpretation of the law. *State v. Cho*, 108 Wn.App. 315, 320, 30 P.3d 496 (2001); *State v. Briggs*, 55 Wn.App. 44, 60, 776 P.2d 1347 (1989). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The test on a new trial motion is whether the movant can

demonstrate that information a juror failed to disclose in voir dire was material, and also that a truthful disclosure would have provided a basis for a challenge for cause. *Cho*, 198 Wn.App. at 321, citing *State v. Carlson*, 61 Wn.App. 865, 877, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022, 844 P.2d 1017 (1993); *State v. Briggs*, 55 Wn.App. 44, 52, 776 P.2d 1347 (1989); *In re the Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994) (“Any misleading or false answers during voir dire require reversal only if accurate answers would have provided grounds for a challenge for cause”).⁹

A challenge for cause may be based on bias, either actual or implied. See RCW 4.44.170(1) and (2); *Cho*, 198 Wn.App. at 324. Where a juror's responses on voir dire do not demonstrate actual bias, in exceptional cases the courts will draw a conclusive presumption of implied bias from the juror's factual circumstances. *Cho*, 198 Wn.App. at 325. An exceptional situation warranting implied bias can exist, for instance, if a prospective juror deliberately withholds information during

⁹ In the past, Washington cases had held that the test was whether a truthful disclosure would have provided a basis for a peremptory challenge. See *Cho*, 108 Wn.App. at 321, citing *State v. Simmons*, 59 Wn.2d 381, 368 P.2d 378 (1962); *Smith v. Kent*, 11 Wn.App. 439, 523 P.2d 446 (1974). Those cases, however, predated the United States Supreme Court opinion in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), where the court held that a juror's material nondisclosure could be the basis for a new trial only if a correct response would have provided a valid basis for a challenge for cause. See *Cho*, 108 Wn.App. at 321. After *McDonough*, Washington courts have applied this newer test. *Cho*, 108 Wn.App. at 323, citing *Lord*, 123 Wn.2d at 313 (“Any misleading or false answers during voir dire require reversal only if accurate answers would have provided grounds for a challenge for

voir dire in order to increase the likelihood of being seated on the jury. *Cho*, 198 Wn.App. at 325.

In the present case the trial court advised the jury that the defendant was charged with felony harassment based on threats to kill and felony harassment based on a threat made to a criminal justice participant. RP 14-15. At the post trial hearing, Juror #4 testified that although there were occasions at her work where she had been threatened by patients, she had not drawn a connection between what had happened to her and the charges in the case. RP (1/11) 4-5, 8-10. The trial court found the juror's testimony to be "truthful in every respect," and found that her experiences as a nurse was very dissimilar from a law enforcement officer and his family being threatened with death by an arrestee. RP (1/11) 17-18. The court thus found that the juror's failure to disclose this information when the court asked if any of the jurors had had similar experiences was not an "omission." RP (1/11) 18. Furthermore, there is nothing in the record that suggests that Juror #4 did not reveal this information in an attempt to be seated on the jury.

In addition, the Defendant has failed to establish that Juror #4's experiences at work, if they had been revealed in voir dire, would have formed the basis for a challenge for cause. To the contrary, Juror #4

cause").

denied the presence of any prejudice or anger based on her work experiences and the trial court found her testimony to be truthful in every respect.” RP (1/11) 10, 17-18. The Defendant has failed to demonstrate any other facts demonstrating actual or implied bias.¹⁰

The State acknowledges that the Court of Appeals has held that when a jury withholds material information and later employs that information during deliberations, then some “additional analysis is required. Specifically, “When a juror withholds material information during voir dire and then later injects that information into deliberations, the court must inquire into the prejudicial effect of the combined, as well as the individual, aspects of the juror's misconduct.” *State v. Johnson*, 137 Wn.App. 862, 868– 69, 155 P. 3d 183 (2007) (citing *State v. Briggs*, 55 Wn.App. 44, 53, 776 P.2d 1347 (1989)).

The Defendant, however, misconstrues this test as it applies to the present case. The only potentially material fact that the juror arguably failed to disclose was that she had been threatened at work.¹¹ The analysis, therefore, is whether the fact that fact that Juror #4 did not

¹⁰ The Court of Appeals has explained that “Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.” *Cho*, 108 Wn.App. at 325 n. 5 (quoting *Smith v. Phillips*, 455 U.S. 209, 222, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (O'Connor, J., concurring)). Clearly no such factual circumstance was present in the case at bar.

¹¹ No generally questions were asked about jurors’ experiences with note taking or the

disclose that she had been threatened along with her comments during deliberations improperly caused prejudicial effects.

The Defendant cites to *Johnson* and its language that the analysis should be an objective inquiry into the purpose for which the extraneous evidence was interjected into deliberations. App.'s Br. at 40, citing *Johnson*, 137 Wn.App. at 869. In *Johnson*, the defendant had been charged with rape and a juror had failed to disclose that her daughter had been the victim of date rape. *Johnson*, 137 Wn.App. at 866. During deliberations, the juror told other jurors that they “wouldn’t understand” unless that had had the experience of their daughters being the victims of rape. *Id.* On appeal, the Court of Appeals found that the juror had injected her comment to generate sympathy for the testifying victim who claimed she had been raped. *Id.* at 870.

In the present case, there is nothing in the record to suggest that Juror #4 engaged in any activity that comes close to the attempt to generate sympathy found in *Johnson*. Rather, at best the record shows that the juror merely discussed that when she is threatened at work she takes notes of the incident. This area of discussion was not a central issue to the present case and thus cannot be considered to have caused the same “prejudicial effect” as the juror’s comments in *Johnson* which were

jurors’ experiences with memory and recall.

designed to engender sympathy for a rape victim. In addition, Juror # 4's experiences with note taking and her memory were not issues that she failed to disclose as she was not asked about note taking or memory issues during voir dire. Rather the alleged nondisclosure related to the fact that she had been threatened at work and there is no evidence that Juror #4 highlighted or otherwise relied on this past experience during deliberations.

Furthermore, while it is jury misconduct for jurors to interject extrinsic evidence into the jury deliberations, jurors may, however, rely on their personal life experience to evaluate the evidence presented at trial during the deliberations. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn.App. 266, 270, 274, 796 P.2d 737 (1990). And jurors are expected to bring opinions, insights, common sense, and everyday life experiences into deliberations. *State v. Carlson*, 61 Wn.App. 865, 878, 812 P.2d 536 (1991). Extrinsic evidence, by contrast, includes highly specialized information that is outside the realm of a typical juror's general life experience. *Richards*, 59 Wn.App. at 274.

In the present case, Juror # 4's personal experiences with note taking and with memory were not central to the case nor were they the type of "highly specialized information that is outside the realm of a typical juror's general life experience" that would qualify as extrinsic

evidence. In addition, the issue of note taking related only to the defense's brief cross examination of whether Officer Morrison had destroyed his notes after writing his report. The fact was not central to the defense case, as the defense did not directly challenge whether the statements had been made. Rather, the defense theory at trial was that it was not reasonable for Officer Morrison to be fearful of the Defendant's statements and that Officer Morrison actions did not demonstrate actual fear. *See* RP 227-38. This was the sole theme of the Defendant's closing argument, and the fact that the Defendant had made the actual statements was not challenged in any way. In addition, the issue of note taking was never even mentioned during closing argument. Any interjection by Juror #4 regarding her experiences with note taking was thus clearly harmless and caused no unfair prejudice.

Similarly, Juror # 4's experience with not being able to recognize a patient, even after receiving a threat from that person, did not address a central issue of the case nor was it extrinsic evidence of "highly specialized information that is outside the realm of a typical juror's general life experience." At trial, there was some mention of a traffic stop that occurred some weeks after the Defendant had threatened Officer Morrison, but the actual evidence was that although Officer Morrison was involved in a traffic stop where the Defendant was a passenger in a car,

there was no evidence that Officer Morrison had any direct contact at all with the Defendant during this stop. *See* RP 148-51.

The Defendant did call one witness who testified that in February of 2012 she had been driving a car and that the Defendant was a passenger in the car when she was pulled over by the police. RP 157. The witness claimed that the officer who pulled her over was Officer Morrison. RP 158. She described that the officer came to her driver's side window and that the interaction lasted only a few minutes. RP 158-61. There was no testimony that the officer ever had any interaction or contact with the Defendant during this stop. RP 158-61. The relevance of this brief encounter was thus, minimal at best. First, although Officer Morrison did not recall the Defendant being involved with the later traffic stop, there was no evidence that he had any direct contact with the Defendant during this stop which he should have remembered. Secondly, the issue at trial was whether Officer Morrison reasonable feared the Defendant at the time the threats were being made, not whether he remained fearful of the Defendant months later. Thus any issue regarding whether he recognized or remembered the Defendant in the February traffic stop was of marginal relevance at best. Not surprisingly, the Defendant made absolutely no mention of the February traffic stop during closing argument; further demonstrating that it was not central to the case.

Finally, the facts of the present case closely mirror the facts in *State v. Carlson*, 61 Wn.App. 865, 812 P.2d 536 (1991), where the Court of Appeals found no juror misconduct warranting a new trial.

In *Carlson*, the juror in question had been asked during voir dire if she had “any particular background in the subject of child sexual abuse or evidence of sexual abuse.” *Carlson*, 61 Wn.App. at 877. The juror said she had not. *Id.* After the verdict, the juror revealed that over the years she had read a great deal about dysfunctional families and that during deliberations she had used the term “pedophile” several times and commented that pedophiles come from all walks of life. *Id.* On appeal the defendant argued that the juror’s answer during voir dire was false and that the misrepresentation required a new trial. *Id.* at 877-78. The court, however, disagreed, noting that,

As for [the juror’s] comments during deliberations, a juror is expected to bring his or her opinions, insights, common sense, and everyday life experiences into deliberations. He or she may not, however, introduce highly specialized knowledge into the jury’s deliberations. The comments at issue here are not “highly specialized knowledge”. Instead, [the juror’s] comment that child abusers come from all walks of life was a simple common sense observation. Her use of the term “pedophile” indicates that [the juror] has a good vocabulary, but hardly qualifies as introducing specialized knowledge or specific facts to the jury.

Carlson, 61 Wn.App. at 878 (internal citations omitted).

Given the circumstances of the present case and the law outlined above, the fact that Juror # 4 mentioned that she would not recognize a patient that had threatened her cannot be said to be of the sort of highly specialized information that is outside the realm of a typical juror's general life experience. Rather, the trial court properly found that,

That the experiences of the juror were not something about which she was directly asked and that she did not fail to disclose any information that she was asked to disclose. Furthermore, even if she had disclosed the information it would not have given rise to a successful challenge for cause. Furthermore, the experiences that she described in deliberation were a valid application of life experience and common sense used to weigh and evaluate the evidence presented at trial, and was not the introduction of any improper new evidence concerning the case.

CP 422. Given the holding in *Carlson* outlined above, and the broad discretion afforded to trial courts in this arena, the Defendant has failed to show that the trial court's conclusion in this regard was an abuse of discretion. The Defendant's claim in the present appeal, therefore, must fail.

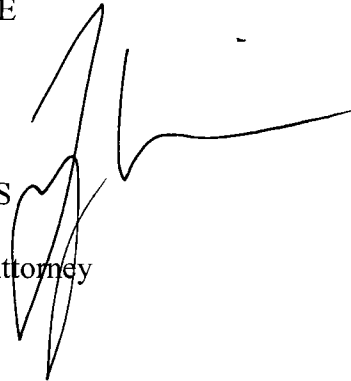
IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED November 18, 2013.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
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A handwritten signature in black ink, appearing to be 'R. Hauge', written over the typed name of Russell D. Hauge.

KITSAP COUNTY PROSECUTOR

November 18, 2013 - 2:24 PM

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