

NO. 34594-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY B. REED

Appellant.

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STATE OF WASHINGTON  
CLERK OF COURT

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

The Honorable Anna M. Laurie, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to instruct the jury on an essential element of felony harassment.

2. Trial counsel's proposal of erroneous jury instructions denied appellant effective representation.

3. The court's erroneous admission of irrelevant and highly prejudicial evidence denied appellant a fair trial.

4. There is no evidence to support the jury's findings that the victims were law enforcement officers.

Issues pertaining to assignments of error

1. Appellant was convicted of two counts of felony harassment, based on threats to kill. Where the jury was never instructed it had to find beyond a reasonable doubt that the victims reasonably feared the threats to kill would be carried out, and where the instructional error could have contributed to the verdicts, is remand for a new trial required?

2. Although the trial court did not give the precise instructions proposed by defense counsel, counsel's proposed instructions contained the same error as the instructions given by the court. If the instructional error was invited, did appellant receive ineffective assistance of counsel?

3. The court admitted evidence that one of the alleged victims learned, subsequent to the threat, that appellant's medical records indicate

he is volatile when off his medications. Where the victim did not have this information when the threat was made, was the evidence irrelevant to whether he was placed in reasonable fear by appellant's words or conduct? Did admission of this highly prejudicial evidence regarding appellant's mental health status deny appellant a fair trial?

4. The court imposed exceptional sentences based on the jury's findings that the victims were law enforcement officers performing official duties at the time of the charged offenses, and appellant knew they were law enforcement officers. The evidence showed that the victims had contact with appellant only in their capacity as corrections officers at the Kitsap County Jail. Where the exceptional sentence statute does not define "law enforcement officer" but the aggravating factor has been defined in case law as applying to police officers, does the evidence fail to support the jury's findings?

B. STATEMENT OF THE CASE

1. Procedural History

On July 20, 2005, the Kitsap County Prosecuting attorney charged appellant Jeffery Reed with two counts of felony harassment. CP 1-4; RCW 9A.46.020(1) and (2). The information was amended to add a third count on February 21, 2006. The amended information also contained special allegations that the victims were law enforcement officers

performing their official duties, that Mr. Reed knew they were law enforcement officers, and that the status of the victims was not an element of the charged offenses. CP 79-83.

The case proceeded to jury trial before the Honorable Anna M. Laurie. The jury acquitted Mr. Reed on Count I and entered guilty verdicts on the remaining counts. CP 159. Relying on the jury's findings as to the law enforcement officer special allegations, the court imposed exceptional sentences of 34 months. CP 168, 175. The Court also ordered nine to 18 months of community custody. CP 168-69. Mr. Reed filed this timely appeal. CP 189. On September 1, 2006, the trial court amended the Judgment and Sentence, removing the order of community custody. Supp. CP 1-2.

## 2. Substantive Facts

In April 2005, Jeffery Reed was in custody at the Kitsap County Jail, being held in a single-person cell. 7RP<sup>1</sup> 34; 8RP 104. On occasion he became frustrated with his situation, and he would vent his frustration by becoming verbally aggressive toward corrections officers or other inmates. 7RP 46; 8RP 80, 86-87, 110.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in ten volumes, designated as follows: 1RP—8/11/05; 2RP—8/31/05; 3RP—2/6/06; 4RP—2/7/06; 5RP—2/21/06; 6RP—2/21 and 22/06 (Supplemental Report of Proceedings); 7RP—2/22/06; 8RP—2/23/06; 9RP—2/24/06; 10RP—3/17/06.

On April 1, 2005, corrections officer Kevin Trump was doing his hourly check of the unit where Reed was being housed, when Reed asked him if he would take some legal mail. Trump agreed, and Reed told him he needed to document that he was receiving the mail. 8RP 103. When Trump explained that that was not the procedure, Reed got upset. He started yelling and calling Trump names. 8RP 103-04. Reed held his hand as if he were pointing a gun, jumped around, and told Trump he was going to kill Trump's family and blow Trump's brains out. 8RP 104. Trump let Reed vent for two to three minutes and then reported the outburst to his supervisor. 8RP 105, 107. Trump testified that he took the threat seriously because of Reed's agitated behavior. 8RP 107-08. He did not tell his family or take precautionary measures because Reed has been incarcerated since the threat was made. 8RP 108. He has not worked in the unit where Reed was housed since then, however, and he has checked on occasion whether Reed was still incarcerated. 8RP 108-09.

On April 14, corrections officer Wade Schroath was serving inmate lunches at the jail. When he placed a food tray through the slot in Reed's door, Reed greeted him and asked how he was doing. Schroath said he was doing well, and Reed responded "You will be doing worse when I shoot you and I shoot your family." 8RP 79. Schroath reported the incident because the threat felt credible. The way Reed voiced it and

the look on his face made Schroath feel that Reed was serious. 8RP 79. Schroath told his wife there had been a threat but that the inmate who made it was still incarcerated. He also took measures to secure his home, placing wood slats in the windows so they could not be opened, and asking his wife to keep track of anyone around the property that she did not recognize. 8RP 80-81. Schroath also checked on his computer terminal to see if Reed was still incarcerated. 8RP 91.

Reed was charged with felony harassment based on these incidents. CP 79-83. Prior to trial, the state offered evidence that Officer Schroath had seen a medical report regarding Reed in his capacity as medical liaison for the jail. The report indicated that Reed was a danger to society if he stopped taking his medications. 7RP 58. Schroath had observed Reed refusing to take his medication at the jail, and that information reasonably caused him fear regarding Reed's threat. 7RP 59. Defense counsel objected that information about a medical evaluation which concluded Reed might be dangerous was unfairly prejudicial. There is a stigma associated with allegations of mental illness which could prejudice the jury, and since no mental defense was being offered, the evidence should be excluded as more prejudicial than probative. 7RP 61-6-43.

The court ruled that the jury was entitled to know what Schroath knew at the time of the threat. The information Schroath had gained as medical liaison played a part in his reaction to the threat and was highly probative. To minimize the prejudice, the court ruled that the officer could testify he had seen medical records that indicated Reed could be volatile if he was off his medications, excluding any reference to mental illness and danger. 7RP 64-65.

The court revised its ruling the next day, after reviewing State v. Johnson, 156 Wn.2d 355, 127 P.3d 707 (2006). 8RP 74. The court ruled that since the question for the jury is whether a reasonable person in Reed's circumstances would foresee that the threat would be taken seriously, then the content of Reed's medical records was admissible, because he certainly was aware of those records and the consequences of being off his medications. 8RP 92.

The state explained that Schroath's testimony regarding the medical records was being offered to show its effect on him. It proposed that the jury be instructed as to this limited purpose for evidence which was otherwise hearsay, and defense counsel agreed that an instruction was appropriate. 8RP 76-76. As requested, the court instructed the jury that Schroath would be testifying to hearsay, but the evidence was not offered for the truth of the matter, but rather for its effect on Schroath. 8RP 77-78.

Schroath testified that as a medical liaison at the jail he comes into contact with medical documents, and he became privy to certain medical records of Reed's. Those records stated that when Reed was not taking his medication, he would become volatile. 8RP 82. Schroath explained that this information added to the fact that he knew from going with the medication nurse that Reed had refused to take his medication while in jail. He believed that because Reed was not taking his medication, there was a chance Reed would become volatile with him. 8RP 82-83. Schroath testified that, in his opinion, there was a very slim chance Reed would take his medication once released. 8RP 83. He explained that when he considered Reed's initial threat along with this subsequently obtained information, he felt that when Reed was not taking his medication, he was out of control. 8RP 83-84.

At the close of evidence, the jury was instructed on the definition of harassment and given instructions purporting to set forth the elements that must be proven in order to convict Reed of the charged offenses. CP 146, 152-53. In a special verdict form, the jury was asked whether, if it found Reed guilty of harassment, the threats he made were threats to kill and true threats. CP 161-62. After deliberating, the jury answered these questions in the affirmative. Id.

The jury was also asked whether the victims were law enforcement officers performing official duties at the time of the offenses and whether Reed knew they were law enforcement officers. CP 161-62. No instruction was given as to the definition of law enforcement officer. Defense counsel argued in closing that to answer the special verdict in the affirmative, the jury had to find that Reed knew the victims were law enforcement officers, not just corrections officers, and there was no evidence concerning that. 8RP 192. The prosecutor responded that because the jury was not instructed as to the definition of law enforcement officer, the meaning of the term was up to the jury. 8RP 200. The jury answered this question in the affirmative as well, and the court determined that an exceptional sentence was appropriate based on the jury's finding. CP 161-62, 175; 10RP 17.

C. ARGUMENT

1. OMISSION OF AN ESSENTIAL ELEMENT FROM THE JURY INSTRUCTIONS REGARDING FELONY HARASSMENT DENIED REED A FAIR TRIAL.

- a. **The jury was not instructed it had to find the alleged victims reasonably feared that the threats to kill would be carried out.**

Reed was charged with felony harassment. Under RCW 9A.46.020<sup>2</sup>, a person is guilty of harassment if he or she knowingly

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<sup>2</sup> RCW 9A.46.020 provides as follows:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2) (a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person

threatens to cause bodily injury immediately or in the future to the person threatened or another person and the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1). When the threat to cause bodily injury is a threat to kill, the harassment is a felony. RCW 9A.46.020(2)(b)(ii).

When a defendant is charged with felony harassment, it is not enough that the state prove the alleged victim was placed in fear. A conviction of felony harassment based on a threat to kill requires proof that the person threatened reasonably feared the threat to kill would be carried out. State v. C.G., 150 Wn.2d 604, 606, 610, 80 P.3d 594 (2003). The jury instructions must clearly set forth this requirement. State v. Mills, 154 Wn.2d 1, 15, 109 P.3d 415 (2005).

In Mills, the defendant was charged with felony harassment. The to convict instruction set forth the elements of misdemeanor harassment based on a threat to cause bodily injury. In addition, a special verdict form asked the jury whether the threat to cause bodily injury was a threat to kill. The Washington Supreme Court held that such bifurcation is constitutionally permissible where the legislature has created a base crime

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specifically named in a no-contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

(3) The penalties provided in this section for harassment do not preclude the victim from seeking any other remedy otherwise available under law.

with elevated penalties upon the finding of an additional fact, as long as the jury finds the additional element beyond a reasonable doubt. Mills, 154 Wn.2d at 10. It nonetheless reversed, because neither the to convict instruction nor the special verdict form required the jury to find beyond a reasonable doubt that the alleged victim was placed in reasonable fear that the threat to kill would be carried out. Id. at 15.

The to convict instruction in Mills informed the jury that it needed to find beyond a reasonable doubt that the defendant threatened to cause bodily injury and that the defendant's words or conduct placed the person threatened in reasonable fear that the threat would be carried out. Mills, 154 Wn.2d at 13. The special verdict form then asked whether the state proved beyond a reasonable doubt that the threat to cause bodily harm was a threat to kill, but it did not ask whether the state had proved that the alleged victim was placed in reasonable fear that the threat to kill would be carried out. Id. at 13-14. Since the to convict instruction referred to the threat to cause bodily injury, the jury might have convicted the defendant based on the belief that she placed the victim in reasonable fear of bodily injury, without ever considering whether she placed the victim in reasonable fear of being killed. Id. at 15. Thus, the instructions did not meet the requirement that all elements of the offense be clearly set forth, and reversal was required. Id.

The instructions given in this case contain the same flaw as the instructions in Mills, and reversal is required in this case as well. It should first be noted that Reed may raise this issue on appeal even though defense counsel did not take exception to the court's instructions at trial. The court's failure to instruct the jury on every element of the charged crime is an error of constitutional magnitude which may be raised for the first time on appeal. Mills, 154 Wn.2d at 6; RAP 2.5(a)(3).

Here, the to convict instruction for Count II reads as follows:

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

- (1) That on or about April 1, 2005, the defendant knowingly threatened to cause bodily injury immediately or in the future to Kevin Bruce Trump;
- (2) That the words or conduct of the defendant placed Kevin Bruce Trump in reasonable fear that the threat would be carried out;
- (3) That the threat was made in a context, or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon another person;
- (4) That the defendant acted without lawful authority; and
- (5) That the acts occurred in the State of Washington, County of Kitsap.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 152. The to convict instruction for Count III was identical except for the date and victim's name. CP 153. In addition, for each of these counts, the jury was asked,

Did the defendant's threat to cause bodily harm consist of a threat to kill the person threatened or another person and was that threat made in a context, or under such circumstances, wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to take the life of another person?

CP 161-62.<sup>3</sup> As in Mills, neither the to convict instructions nor the special verdict questions informed the jury that it had to find beyond a reasonable doubt that the alleged victims were placed in reasonable fear that the threat to kill would be carried out. This omission relieved the state of its burden of proving that essential element of felony harassment.<sup>4</sup>

Moreover, this error cannot be deemed harmless. Such instructional error is harmless only if the state proves beyond a reasonable doubt that the error did not contribute to the verdict. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

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<sup>3</sup> The court's to convict and special verdict instructions are attached as Appendix A.

<sup>4</sup> The state proposed a special verdict form which included this element, citing Mills. CP 131-33. It then revised the language of the special verdict form to incorporate the standard for a true threat. 8RP 152. In doing so, it omitted the reasonable fear of the threat to kill element.

In Mills, the Court recognized that it was clear from the evidence that the defendant made a threat to kill. Moreover, the victim testified that she was very scared by the threat and, after later learning about the defendant's criminal history, she thought the defendant would carry out what she said she would do. Mills, 154 Wn.2d at 5. Although there was ample evidence that the victim was placed in reasonable fear that the defendant would carry out the threat to kill, the Court could not say beyond a reasonable doubt that the jury would have found the victim was placed in reasonable fear of being killed. Id. at 12, 15 n.7.

In this case, as in Mills, there was evidence that Reed threatened to kill both Trump and Schroath. But neither testified that he was afraid Reed would carry out that specific threat. Trump testified that he took Reed's threats seriously and that he started to worry when Reed mentioned his family. He testified was fearful of Reed regarding a threat to his family because Reed will be out on the street eventually, and Trump could not forget that the threat was made. 8RP 117. Trump also testified, however, that he thought Reed's threats were merely an attempt to get Trump to change his mind about logging in Reed's mail. 8RP 120.

Similarly, Schroath testified he thought Reed's threat was credible and Reed seemed serious. 8RP 79. He had told his wife about the threat and took measures to secure his home. 8RP 80-81. Schroath said he was

worried that Reed was volatile. When Shcroath had seen Reed in that state at the jail, Reed yelled aggressively, kicked doors, and threw things in his room. 8RP 83.

Although it is possible that the jury could conclude from this evidence that Trump and Schroath reasonably feared Reed would carry out his threats to kill, the record does not show beyond a reasonable doubt that the jury would make that finding. It is reasonably likely that the jury convicted Reed of harassment because it found Trump and Schroath reasonably feared Reed would cause them bodily injury. The instructional error was not harmless, and reversal is required.

**b. If the instructional error was invited, Reed received ineffective assistance of counsel.**

Defense counsel proposed to convict instructions setting forth the elements of harassment:

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

- (1) That ... the defendant knowingly threatened to cause bodily injury immediately or in the future to [Schroath and Trump],
- (2) That the words or conduct of the defendant placed [Schroath and Trump] in reasonable fear that the threat would be carried out;
- (3) That the threat were [sic] made under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or take the life of another person.
- (4) That the defendant acted without lawful authority; and
- (5) That the acts occurred in the State of Washington.

CP 94-95.<sup>5</sup> Like the court's to convict instructions, defense counsel's proposed instructions contained a "true threat" element. Unlike the court's instructions, however, this element in the defense proposed instructions includes language regarding a threat to kill. The proposed to convict instructions did not clearly inform the jury that the state had to prove the victims reasonably feared the defendant would carry out a threat to kill, however.

Counsel also proposed an instruction informing the jury how to answer the special verdict form, which stated in relevant part:

If you find that the State has proved beyond a reasonable doubt that the defendant's threat to cause bodily harm was a threat to kill the person threatened or another person or the defendant was previously convicted of the crime of Harassment against the same person or members of that person's family or household or any person specifically named in a no-contact or anti-harassment order, it will be your duty to answer the special verdict "yes".

CP 96. Defense counsel did not propose a special verdict form. Again, this proposed instruction did not inform the jury it had to find beyond a reasonable doubt that the alleged victims reasonably feared the threat to kill would be carried out.

Under the invited error doctrine, a defendant who requests a defective instruction is precluded from complaining on appeal that the

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<sup>5</sup> Counsel's proposed instructions are attached as Appendix B.

requested instruction was given. City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002). Here, the court did not give the precise instructions proposed by defense counsel. See CP 94-96, 152-53, 157, 161. Nonetheless, the instructions proposed by counsel contained the same defect as the court's instructions.

Review of instructional error is not precluded, however, where the error is invited as a result of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). A criminal defendant is constitutionally guaranteed effective representation by counsel. U.S. Const. Amend. VI; Const. art. 1, § 22. A defendant is denied this right when counsel's representation was deficient, and the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Counsel's proposal of instructions which relieved the state of its burden of proving an essential element of the charged offense constitutes deficient performance. No sound trial strategy could account for this conduct. Moreover, State v. Mills had been decided prior to Reed's trial, specifically holding that in felony harassment cases, the jury instructions must clearly set forth the requirement that the jury find beyond a reasonable doubt that the victim reasonably feared the threat to kill. Thus, proposing instructions which omitted this element falls below an objective

standard of reasonableness for attorney conduct. See Strickland, 466 U.S. at 687; cf. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (attorney's performance not deficient where case holding proposed instruction was erroneous had not yet been decided at time of trial).

There is a reasonable probability that counsel's deficient performance was prejudicial. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. A reasonable probability is one sufficient to undermine confidence in the verdict. Strickland, 466 U.S. at 694.

As discussed above, due to the instructional error, the jury was never asked to consider whether the alleged victims in this case reasonably feared Reed would carry out his threats to kill. Although Trump and Schroath testified that they took Reed's threats seriously, Trump said Reed's demeanor when he made the threat was similar to other times Reed had vented his frustration. On those occasions, Reed had kicked doors and raised his voice, but he had never hit Trump. 8RP 112-14. Schroath described similar conduct which he associated with Reed being volatile. 8RP 83. Considering this evidence, it is reasonably likely the jury convicted Reed based on findings that Trump and Schroath reasonably feared bodily injury rather than death. Counsel's proposal of defective

jury instructions denied Reed a fair trial, and his convictions must be reversed.

2. ADMISSION OF IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE REGARDING REED'S MENTAL HEALTH STATUS DENIED REED A FAIR TRIAL.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if the court determines that the proffered evidence is logically relevant, it must then determine whether the probative value of the evidence outweighs its prejudicial effect. ER 403. In a doubtful case, "[t]he scale must tip in favor of the defendant and the exclusion of the evidence." State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983).

Reed moved to exclude evidence that Schroath had seen medical records which indicated that Reed would become volatile if he was off his medications. Defense counsel argued that the evidence was irrelevant because Reed was not relying on a mental defense, and it was unduly prejudicial because of the stigma associated with mental illness. 7RP 61-63. The trial court ruled the evidence admissible. It ultimately reasoned

that the evidence was relevant to the determination of whether Reed's threats were "true threats" since Reed knew what was contained in his medical records and also knew he was volatile when not taking his medication. 8RP 92. The court also instructed the jury, at the state's request, that the evidence was admitted to show its effect on Schroath. 8RP 77-78.

As to the court's analysis, it correctly recognized that whether a true threat has been made is determined under an objective standard that focuses on the speaker. See State v. Johnson, 156 Wn.2d 355, 361, 127 P.3d 707 (2006). Thus, Reed's circumstances were relevant to that determination. Id. (a true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intent to harm). But it does not follow that the contents of Reed's medical records were relevant. Even if it can be assumed that Reed knew what his medical records said, that fact does not make it more or less probable that a reasonable person in Reed's position would foresee that a threat he made would be interpreted as a serious expression of intent to harm. If Reed knew he was volatile when off his medications, then whether he was taking his medications at the time of the threats might be relevant to the true threat determination. The state did not offer such evidence, however.

The state's point was that Schroath knew from reading the medical records that Reed could be volatile if off his medications. Only if Reed knew that Schroath knew what was contained in his medical records would those contents be relevant to the true threat determination. Again, the evidence did not show that.

The evidence was also irrelevant for the use proposed by the state, because Schroath did not know of Reed's medical records at the time the threat was made. When the defendant is charged with harassment, the state must prove that the defendant, by words or conduct, placed the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(b). The person threatened must subjectively feel fear, and that fear must be objectively reasonable. State v. E.J.Y., 113 Wn. App. 940, 953, 55 P.3d 673 (2002). Thus, the jury is entitled to know what the victim knew at the time the threat was made, to determine whether a reasonable person, upon hearing the threat, would believe the threat would be carried out. State v. Barragan, 102 Wn. App. 754, 760, 9 P.3d 942 (2000).

In Barragan, the court admitted statements the defendant made to the victim some time before the charged incident, in which the defendant bragged about earlier assaults against fellow inmates. 102 Wn. App. at 758. This evidence was relevant to the reasonable fear element of

harassment, because the defendant's earlier statements instilled fear in the victim that the defendant's threat of violence would be carried out. The jury was entitled to know what the victim knew at the time the defendant threatened him. Id. at 759-60. See also State v. Ragin, 94 Wn. App. 407, 409, 972 P.2d 519 (1999) (evidence of prior bad acts defendant told victim about properly admitted to show reasonableness of victim's fear when defendant threatened him); State v. Kiehl, 128 Wn. App. 88, 113 P.3d 528 (2005) (state require to prove that, upon learning of threat, person threatened was placed in reasonable fear threat would be carried out), review denied, 156 Wn.2d 1013 (2006).

Here, because the state was required to prove that Reed's words or conduct caused Schroath reasonably to fear that the threat would be carried out, the jury was entitled to know what Schroath knew when Reed threatened him. See Barragan, 102 Wn. App. at 759-60. The evidence showed, however, that Schroath did not know about the content of Reed's medical records at the time of the threat. He obtained that information subsequent to the threat and at that point reached the conclusion that Reed could become volatile with him. 8RP 83-84. The fact that Schroath later read Reed's medical records does not make it more or less probable that Schroath was in reasonable fear when Reed threatened him. This later-acquired information was not relevant to a material issue at trial.

The evidence was, however, extremely prejudicial, even as “sanitized” by the court. 7RP 65. A jury hearing that Reed required medication to control his behavior would surely conclude that he suffers from some type of dangerous mental illness. As defense counsel pointed out, the stigma associated with mental illness could affect the jury’s deliberations, leading to a verdict based on prejudice rather than reason. See Born v. Thompson, 154 Wn.2d 749, 755, 117 P.3d 1098 (2005) (recognizing stigma associated with commitment for mental health treatment); State v. Jones, 99 Wn.2d 735, 743, 664 P.2d 1216 (1983) (recognizing stigma of insanity); State v. Jeppesen, 55 Wn. App. 231, 237, 776 P.2d 1372 (recognizing jury can be biased by evidence that defendant suffers from dangerous mental illness), review denied, 113 Wn.2d 1024 (1989).

Reed’s defense was that, under the circumstances in which his comments were made, a reasonable person would not foresee that they would be interpreted as a serious expression of intent to harm. 8RP 184-90. There was evidence that inmates often challenge the authority of corrections officers and vent their frustrations using aggressive language. 8RP 86-87, 105-06, 111, 114, 118. Under these circumstances, the jury could conclude that Reed’s comments to Schroath and Trump were not true threats. But because the jury heard that Reed became volatile when

off his medications, it would not be illogical for the jury to conclude that it was reasonable to fear a mentally ill inmate, and thus convict Reed, regardless of whether his words constituted a true threat. Because of the likelihood of a verdict based on stigma, bias, and prejudice, Reed was prejudiced by admission of this irrelevant evidence.

3. THERE WAS NO EVIDENCE TO SUPPORT THE JURY'S FINDING THAT THE VICTIMS WERE LAW ENFORCEMENT OFFICERS.

Under RCW 9.94A.535, a court may impose a sentence above the standard range if it determines that substantial and compelling reasons justify an exceptional sentence. This determination may be based on a jury's finding beyond a reasonable doubt that "[t]he offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense." RCW 9.94A.535(3)(v). The statute does not define "law enforcement officer," however.

The meaning of a statute is a question of law, which an appellate court reviews de novo. State v. C.G., 150 Wn.2d 604, 608, 80 P.3d 594 (2003). The court's goal is to determine the legislature's intent and carry it out. Id.

The legislature amended the exceptional sentence provisions of the Sentencing Reform Act to conform to the decision in Blakely v. Washington,<sup>6</sup> that a defendant has a Sixth Amendment right to a jury determination of factors used to increase a sentence beyond the standard range. In doing so, the legislature created an exclusive list of aggravating factors which will support an exceptional sentence. RCW 9.94A.535(3). With regard to this list, the legislature stated that it intends “to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances.” Laws of 2005 c 68 § 1.

Prior to this amendment, the common law recognized the victim’s status as a police officer as a potential aggravating factor. In State v. Kidd, 57 Wn. App. 95, 786 P.2d 847, review denied, 115 Wn.2d 1010 (1990), the defendant was charged with second degree assault for firing on two undercover police officers. The trial court imposed an exceptional sentence based on the victims’ status as police officers, but the appellate court found that reliance on that factor was inappropriate because the defendant did not know the victims were police officers. Kidd, 57 Wn.

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<sup>6</sup> Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

duties. It is not clear, however, that that factor would also apply when the victim was a corrections officer.

The legislature did not intend to expand the application of this factor by using the term “law enforcement officer” in RCW 9.94A.535(3)(v). See Laws of 2005 c 68 § 1. The legislature has used that term as distinct from corrections officers in other statutes. For example, a charge of first degree murder is aggravated if the victim is “a law enforcement officer, corrections officer, or fire fighter ...”. RCW 10.95.020. Inclusion of both “law enforcement officer” and “corrections officer” in this list indicates that the two terms have different meanings. See also RCW 9A.76.023 and RCW 9A.76.025 (Disarming a law enforcement or corrections officer); also compare RCW 9A.36.100 (guilty of custodial assault, a class C felony, for assaulting staff member of any adult corrections or detention facility performing official duties) and RCW 9A.36.031 (guilty of third degree assault, a class C felony, for assaulting a law enforcement officer performing official duties).

Given the common law application of this aggravating factor and the legislative differentiation between law enforcement officers and corrections officers, there is no basis to conclude that the term “law enforcement officer” in RCW 9.94A.535(3)(v) includes corrections officers. At the very least, however, since the term is undefined in the

sentencing statutes and arguably susceptible to different interpretations, the legislature's use of that term is ambiguous. This court is required under the rule of lenity to adopt the interpretation most favorable to the defendant. State v. Jackson, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999).

In this case, the jury found that Trump and Schroath were law enforcement officers performing their official duties at the time of the offenses and that Reed knew they were law enforcement officers. CP 161-62. The evidence showed only that they were corrections officers, however. Schroath testified that he worked as a corrections officer at the Kitsap County Jail, and it was in that capacity that he had contact with Reed on the date of the alleged incident. 8RP 78. Trump's testimony was the same. 8RP 103. Because a corrections officer is not a law enforcement officer, this evidence did not support the jury's findings.

Without a valid jury determination as to one of the aggravating factors listed in RCW 9.94A.535(3), the court is without authority to impose an exceptional sentence above the standard range. The exceptional sentence imposed in this case must be vacated.

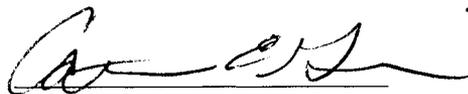
D. CONCLUSION

Instructional error, ineffective assistance of counsel, and admission of irrelevant and highly prejudicial evidence denied Reed a fair trial. His convictions should be reversed and the case remanded for a new trial.

Moreover, the jury's findings regarding the statutory aggravating circumstance are not supported by the evidence, and Reed's exceptional sentences must be vacated.

DATED this 13<sup>th</sup> day of September, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Glinski', written over a horizontal line.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

APPENDIX A

INSTRUCTION NO. 13

To convict the defendant of the crime of 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 April 1, 2005, the defendant knowingly threatened to cause bodily injury immediately or in the future to Kevin Bruce Trump;
- (2) That the words or conduct of the defendant placed Kevin Bruce Trump in reasonable fear that the threat would be carried out;
- (3) That the threat was made in a context, or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon another person;
- (4) That the defendant acted without lawful authority; and
- (5) That the acts occurred in the State of Washington, County of Kitsap.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

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

- (1) That on or about April 14, 2005, the defendant knowingly threatened to cause bodily injury immediately or in the future to Wade A. Schroath;
- (2) That the words or conduct of the defendant placed Wade A. Schroath in reasonable fear that the threat would be carried out;
- (3) That the threat was made in a context, or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon another person;
- (4) That the defendant acted without lawful authority; and
- (5) That the acts occurred in the State of Washington, County of Kitsap.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

If you find the defendant guilty of harassment, as charged in count I, count II, or count III you will complete the three corresponding special verdict forms provided to you for this purpose. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict. If you find the defendant not guilty of harassment, as charged in count I, count II, or count III do not use the corresponding special verdict form associated with that or those count or counts.

If you find that the State has proved beyond a reasonable doubt that the defendant's threat to cause bodily harm consisted of a threat to kill the person threatened or another person and that the threat was made in a context, or under such circumstances, wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to take the life of another person it will be your duty to answer the special verdict question one "yes".

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant's threat to cause bodily harm consisted of a threat to kill the person threatened or another person or that the threat was made in a context, or under such circumstances, wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to take the life of another person it will be your duty to answer the special verdict question one "no".

If you find that the State has proved beyond a reasonable doubt that the defendant committed the charged offense against a law enforcement officer while that officer was performing his or her official duties, that the defendant knew at the time of the offense that the victim was a law enforcement officer, and that the victim's status as a law enforcement officer is not an element of the offense of harassment, it will be your duty to answer the special verdict question two "yes".

On the other hand, if, after weighing all of the evidence, you have a

reasonable doubt that the defendant committed the charged offense against a law enforcement officer while that officer was performing his or her official duties, or that the defendant knew at the time of the offense that the victim was a law enforcement officer, or that the victim's status as a law enforcement officer is not an element of the offense of harassment, it will be your duty to answer the special verdict question two "no".

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

JEFFERY BONIFACIO REED,

Defendant.

)  
) No. 05-1-01084-1  
)  
) SPECIAL VERDICT FORM B: COUNT II  
)  
)  
)  
)  
)  
)

THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT GUILTY OF HARASSMENT AS CHARGED IN COUNT II.

We, the jury, return a special verdict by answering as follows:

QUESTION 1: Did the defendant's threat to cause bodily harm consist of a threat to kill the person threatened or another person and was that threat made in a context, or under such circumstances, wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to take the life of another person?

ANSWER: yes (Write "yes" or "no" or "not unanimous")

DATE: 2/24/06

Amber Jacobson  
Presiding Juror's Signature

QUESTION 2: Was the offense of harassment, as charged in count II, committed against a law enforcement officer who was performing his official duties at the time of the offense, the defendant knew the victim was a law enforcement officer at the time of the offense, and the victim's status as a law enforcement officer is not an element of the offense?

ANSWER: yes (Write "yes" or "no" or "not unanimous")

DATE: 2/24/06

Amber Jacobson  
Presiding Juror's Signature

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

JEFFERY BONIFACIO REED,

Defendant.

)  
) No. 05-1-01084-1  
)  
) SPECIAL VERDICT FORM C: COUNT III  
)  
)  
)  
)  
)  
)

THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT GUILTY OF HARASSMENT AS CHARGED IN COUNT III.

We, the jury, return a special verdict by answering as follows:

QUESTION 1: Did the defendant's threat to cause bodily harm consist of a threat to kill the person threatened or another person and was that threat made in a context, or under such circumstances, wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to take the life of another person?

ANSWER: yes (Write "yes" or "no" or "not unanimous")

DATE: 2/24/06

Amber Jacobson  
Presiding Juror's Signature

QUESTION 2: Was the offense of harassment, as charged in count III, committed against a law enforcement officer who was performing his official duties at the time of the offense, the defendant knew the victim was a law enforcement officer at the time of the offense, and the victim's status as a law enforcement officer is not an element of the offense?

ANSWER: yes (Write "yes" or "no" or "not unanimous")

DATE: 2/24/06

Amber Jacobson  
Presiding Juror's Signature

## APPENDIX B

No.

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

- (1) That on or about February 11, 2005, the defendant knowingly threatened to cause bodily injury immediately or in the future to Wade A. Schroath,
- (2) That the words or conduct of the defendant placed Wade A. Schroath in reasonable fear that the threat would be carried out;
- (3) That the threat were made under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or take the life of another person.
- (4) That the defendant acted without lawful authority; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

No.

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

- (1) That on or about February 11, 2005, the defendant knowingly threatened to cause bodily injury immediately or in the future to Kevin Bruce Trump,
- (2) That the words or conduct of the defendant placed Kevin Bruce Trump in reasonable fear that the threat would be carried out;
- (3) That the threat were made under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or take the life of another person.
- (4) That the defendant acted without lawful authority; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

No.

If you find the defendant guilty of harassment, you will complete the special verdict form provided to you for this purpose. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict. If you find the defendant not guilty of harassment, do not use the special verdict form.

If you find that the State has proved beyond a reasonable doubt that the defendant's threat to cause bodily harm was a threat to kill the person threatened or another person or the defendant was previously convicted of the crime of Harassment against the same person or members of that person's family or household or any person specifically named in a no-contact or anti-harassment order, it will be your duty to answer the special verdict "yes".

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant's threat to cause bodily harm was a threat to kill the person threatened or another person or the defendant was previously convicted of the crime of Harassment against the same person or members of that person's family or household or any person specifically named in a no-contact or anti-harassment order, it will be your duty to answer the special verdict "no".

Certification of Service by Mail

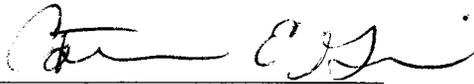
Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in

*State v. Jeffery B. Reed*, Cause No. 34594-3-II, directed to:

Randall Avery Sutton  
Kitsap County Prosecutor's Office  
614 Division Street, MS-35  
Port Orchard, WA 98366

Jeffery B. Reed  
DOC# 825058  
F-Unit/A-Pod #13  
McNeil Island Corrections Center  
P.O. Box 88-1000  
Steilacoom, WA 98588

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski  
Done in Port Orchard, WA  
September 13, 2006

FILED  
COURT OF APPEALS  
06 SEP 14 PM 1:21  
STATE OF WASHINGTON  
BY  IDENTITY