

NO. 40942-9-II

---

---

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

HEIDI JO COREY, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Stephanie A. Arend

No. 09-1-04609-5

---

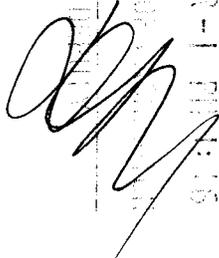
**BRIEF OF RESPONDENT**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
BRIAN WASANKARI  
Deputy Prosecuting Attorney  
WSB # 28945

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

11 APR -1 PM 1:15  
STATE OF WASHINGTON  
BY 

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Whether, viewing the evidence in the light most favorable to the state, there was sufficient evidence from which a jury could have found the essential elements of the crime of harassment beyond a reasonable doubt..... 1

    2. Whether the trial court properly denied defendant’s motion for a new trial based on an alleged violation of *Brady v. Maryland* where the evidence at issue was not material to her convictions.... 1

B. STATEMENT OF THE CASE..... 1

    1. Procedure..... 1

    2. Facts..... 3

C. ARGUMENT..... 13

    1. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A JURY COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME OF HARASSMENT BEYOND A REASONABLE DOUBT..... 13

    2. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION FOR A NEW TRIAL BASED ON AN ALLEGED VIOLATION OF *BRADY V. MARYLAND* WHERE THE EVIDENCE AT ISSUE WAS NOT MATERIAL TO HER CONVICTIONS. .... 20

D. CONCLUSION..... 22

## Table of Authorities

### State Cases

<i>In Re Brennan</i> , 117 Wn. App. 797, 805, 72 P.3d 182 (2003).....	20, 21, 25
<i>In re Pers. Restraint of Sherwood</i> , 118 Wn. App. 267, 270, 76 P.3d 269 (2003).....	21
<i>Matter of Personal Restraint of Benn</i> , 134 Wn.2d, 868, 916, 952 P.2d 116 (1998).....	21
<i>State v. Brockob</i> , 159 Wn.2d 311, 336, P.3d 59 (2006).....	14, 17
<i>State v. Cannon</i> , 120 Wn. App. 86, 90, 84 P.3d 283 (2004).....	14
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	14
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	14
<i>State v. Hickman</i> , 135 Wn.2d 97, 101, 954 P.2d 900 (1997).....	15
<i>State v. Kilburn</i> , 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).....	16
<i>State v. Lopez</i> , 107 Wn. App. 270, 276, 27 P.3d 237 (2001).....	13
<i>State v. McDaniel</i> , 83 Wn. App. 179, 920 P.2d 1218 (1996).....	22
<i>State v. Myers</i> , 133 Wn.2d 26, 37, 941 P.2d 1102 (1997).....	14
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	14
<i>State v. Schaler</i> , 169 Wn.2d 274, 283, 236 P.3d 858 (2010).....	16, 17, 18, 19
<i>State v. Sublett</i> , 156 Wn. App. 160, 200, 231 P.3d 231, <i>review granted</i> , 170 Wn.2d 1016, 245 P.3d 775 (2010).....	20, 21, 22, 25
<i>State v. Thomas</i> , 150 Wn.2d 821, 850, 83 P.3d 970 (2004).....	20, 21
<i>State v. Williams</i> , 144 Wn.2d 197, 208, 26 P.3d 890(2001).....	16

*State v. Wilson*, 60 Wn. App. 877, 808 P.2d 754 (1991) ..... 22

*State v. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009)..... 14

**Federal and Other Jurisdictions**

*Benn v. Lambert*, 283 F.3d 1040, 1053 (9<sup>th</sup> Cir.), *cert denied*,  
537 U.S. 942, 123 S. Ct. 341, 154 L. Ed. 2d 249 (2002)..... 21

*Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194,  
10 L. Ed. 2d 215 (1963)..... 1, 20, 21, 22, 25

*Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936,  
144 L. Ed. 2d 286 (1999)..... 20

*U.S. v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375,  
87 L. Ed. 2d 481 (1985)..... 21

*U.S. v. Woodley*, 9 F.3d 774, 777 (9<sup>th</sup> Cir. 1993) ..... 20

*Williams v. Scott*, 35 F.3d 159, 163 (5<sup>th</sup> Cir. 1994)..... 21

**Statutes**

RCW 9A.46.020..... 15, 19

RCW 9A.46.020(1)(a)(i)..... 16

**Rules and Regulations**

CrR 3.5 ..... 2

ER 608(b)..... 22

**Other Authorities**

WPIC 2.24..... 15

WPIC 36.07..... 15

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether, viewing the evidence in the light most favorable to the state, there was sufficient evidence from which a jury could have found the essential elements of the crime of harassment beyond a reasonable doubt.
2. Whether the trial court properly denied defendant's motion for a new trial based on an alleged violation of *Brady v. Maryland* where the evidence at issue was not material to her convictions.

B. STATEMENT OF THE CASE.

1. Procedure

On October 14, 2009, Heidi Jo Corey, hereinafter referred to as the "defendant," was charged by information with third-degree assault in count I, resisting arrest in count II, and harassment in count III. CP 1-2. See RP 13.

The case was called for trial on March 24, 2010, RP 3, and the defendant was arraigned on an amended information, which changed count II from resisting arrest to attempting to disarm a police officer, but

left counts I and III unaltered. RP 13-14. CP 59-60. The defendant entered pleas of not guilty to all counts. RP 14.

The parties selected a jury on March 24, 2010, RP 29, and gave opening statements on March 25, 2010. RP 51.

The court conducted a CrR 3.5 hearing at which the State called Milton Reserve Officer David Savage, RP 261-75, and ruled that the statements of the defendant made in the presence of Savage were admissible at trial. RP 286-88.

The State called Officer William L. Downey, RP 52-130, Judge Sandra L. Allen, RP 131-67, Cathy Fisher, RP 171-211, Krista White-Swain, RP 211-55, 319-22, Officer David W. Savage, RP 291-319, and Milton Police Chief William P. Rhoads, RP 322-62. The State also admitted and played a digital recording of the events inside the courtroom. RP 192, 197. The State then rested. RP 362.

The defense moved to dismiss the harassment charge in count III and appeared to move to dismiss the attempting to disarm a police officer charge of count II, as well, though it never explicitly stated as much. RP 362-64. The court denied both motions. RP 370-71.

The defendant called Robert Jensen, RP 374-406, and Kurt Baumgardner, RP 406-21. The defendant did not testify. RP 419, RP 1-524. The defendant then rested. RP 436.

The court took exceptions to its jury instructions, RP 427-28, and then instructed the jury on April 1, 2010. RP 437-38. CP 33-58.

The parties gave closing arguments, RP 439-64 (State's closing argument), 464-79 (defendant's closing argument), 479-94 (State's rebuttal argument).

On April 2, 2010, the jury returned verdicts of guilty to assault in the third degree as charged in count I, not guilty to attempted disarming of a law enforcement officer in count II, and guilty to harassment as charged in count III. RP 516-17. CP 106-08.

On June 25, 2010, the defendant moved for a new trial based on a discovery violation. RP 3-31. The court denied that motion. RP 31.

The defendant was sentenced the same day to eight months in confinement on count I and 365 days suspended for two years on count II, in addition to legal financial obligations and no contact orders pertaining to the victims in counts I and III. 06/25/10 RP 46-48. CP 83-94, 95-99.

The defendant filed a timely notice of appeal. RP 100. *See* CP 06/25/10 58-59.

## 2. Facts

On the morning of October 13, 2009, Milton Police Officer William Downey was working basic patrol and courtroom security for Milton Municipal court when he was told that the defendant, who was

scheduled to appear before the court that day, “smelled like freshly burnt marijuana.” RP 52-55, 59-60.

Apparently, if Milton Municipal court judge Sandra Allen is given information that a defendant comes to court under the influence of drugs, she will either bring that person into custody or set another date for that person to come back to court. RP 134-35. She will also often have Milton police investigate such suspicions. RP 57-58. In this instance, Milton city prosecutor Krista White-Swain asked Officer Downey to do so in advance of the defendant’s hearing. RP 220-21. *See* RP 60, 99.

Officer Downey walked out of his office and into the foyer that separates the courtroom from the police department, where he found the defendant with her public defender and one other man. RP 60. This other man had a white belt with marijuana leaf emblems on it. RP 61. When Downey walked past them, he “could very clearly smell what [he] believed to be freshly burnt marijuana.” RP 60.

Downey went to his car to get some paperwork when he saw the defendant leaving the building and engaged her in conversation. RP 62. Specifically, he asked if she was “Ms. Corey,” and then said “I’m Officer Downey from Milton PD.” RP 63. He told her that he “had received information from the court that she potentially smelled like freshly burnt marijuana.” RP 63. The defendant was alone when she left the building, and Downey did not smell marijuana while standing with her outside. RP 62-63. The defendant told him, “I don’t have anything on me.” RP 63.

When asked when she last smoked, she replied that she had not “smoked any today.” RP 64. Downey asked the defendant if she would mind sticking out her tongue and when she did so, he saw a green tint to it. RP 64. Downey indicated that, over the course of his seventeen-year career, he had contacted thousands of people under the influence of marijuana, that he had received training in recognizing when people had recently used marijuana, and that the green tint he observed on the defendant’s tongue was a very common indicator of marijuana use. RP 52, 65-66. Downey indicated that his intent at the time was to gather this information and give it to the prosecutor, White-Swain. RP 64.

When he told the defendant that he believed that she had recently used marijuana, she became belligerent, called him a “bitch,” and told him he was “talking crazy shit.” RP 69. Downey asked the defendant to keep her voice down to avoid disrupting the court, but the defendant responded, “Fuck you, Bitch; I’m going in to talk to that bitch judge.” RP 70. The defendant then walked into the courtroom during another proceeding and began yelling and swearing at the judge. RP 71-72. Judge Allen instructed the defendant several times to be quiet or leave the courtroom. RP 73. The defendant did not comply with those orders. RP 73.

Officer Downey then told the defendant that she was “about two seconds from going to jail” if she did not leave the courtroom. RP 73. The defendant refused to do so. RP 73. Instead she continued to yell at the officer. RP 73. She was waiving her hands, and on several different

occasions pumping her fists. RP 73. The defendant told Officer Downey, “This bitch is about to get his ass kicked.” RP 73.

Downey then drew his taser. RP 73-75. He told the defendant that she was under arrest and that if she did not place her hands behind her back, he would use the taser. RP 73-76, 146. Officer Downey instructed the defendant to put her hands behind her back four times, but she refused to do so. RP 77, 129, 146, 158, 163. Instead, she continued to pump her fists, told the officer “no” several times, said “fuck you,” several times, and said “this bitch is going to get his ass kicked.” RP 77-78, 148. *See* RP 229-30.

Downey then deployed the taser, but it had no effect on the defendant. RP 81, 147, 231. The defendant swiped the wires away and said, “What are you going to do now?” RP 81.

Judge Allen began to evacuate the courtroom. RP 149. Contract prosecutor Krista White-Swain testified that she was “really scared” and “ready to run,” and that she was “the first one out the door” when the courtroom was evacuated. RP 231-32.

Officer Downey told the defendant to get on the ground. RP 82. Milton Police Chief Rhoads came into the courtroom and told her to stop resisting and Downey again told her to get onto the ground. RP 82; RP 328-29.

The defendant said, “Get the fuck away from me, bitch. This bitch is crazy.” RP 332-33.

The then sixty-year-old Rhoads tried to place the defendant's arm behind her, but she was able to pull away. RP 83. RP 329-30. Downey tried to grab her right arm, but she pulled away from him. RP 83. The defendant then swung at Officer Downey, but Downey dodged the blow. RP 83, 127; RP 333.

Downey then swept her foot and took her to the ground, after which he tried to gain control of her right arm while she used her left fist to strike him in the face. RP 84. RP 334-35. The defendant punched Downey three to four times in the area of his mouth and, told him that she was going to "kick [his] ass" while doing so. RP 85, 198, 335. Downey suffered a "fat lip" as a result. RP 122.

Two other officers came in and assisted. RP 86-87. It required four officers in all to bring the defendant under control. RP 87, 151. *See* RP 188. The defendant continued to be verbally abusive throughout the struggle. RP 88, 152.

Downey was five feet, five inches tall and weighed less than the defendant, who was five feet, eleven inches tall. RP 128-29. *See* RP 386, 398. The defendant played professional football, RP 306, and was so large that it required two pairs of handcuffs to secure her. *See* RP 263. Downey testified that he did not believe he could have gotten the defendant under control without the assistance of the other officers. RP 129. According to court clerk Cathy Fisher, "Officer Downey's kind of a

small officer, and [the defendant] is a, you know, large woman, and was in no fear at all.” RP 186.

Although Officer Downey testified that he did not *feel* the defendant trying to take his firearm, RP 86, Chief Rhoads, who had over 33 years of law enforcement experience, RP 324, testified that he *saw* the defendant reaching for Downey’s gun. RP 336-37. Rhoads grabbed the defendant’s thumb and bent it back up to prevent her from reaching the weapon. RP 337. Indeed, the defendant herself later told Officer Savage, “[i]f I would have gotten his gun, I would have emptied it and I would have for sure hit somebody in the courtroom.” RP 267-68.

Officer Savage was transporting in-custody defendants from local jails to the courtroom when he received a radio transmission from Officer Downey that he needed assistance in the courtroom. RP 291-96. When he got to the courtroom, Savage found the defendant on her side with Chief Rhoads and Officer Downey on the floor over her. RP 296-300. The defendant then rolled over onto her stomach, and pulled her arms in, under her body. RP 300. Officers were ordering her to put them out so that she could be handcuffed. RP 296-97. She was refusing to do so. RP 296. Officer Savage pulled her right arm from beneath the defendant’s body and placed her right hand in handcuffs. RP 298. Officers were then able to pull her left hand back so that they could place the left hand in handcuffs. RP 298. However, due to the defendant’s size, officers had to use two pairs of handcuffs to secure her. RP 298.

After the defendant was handcuffed, Officer Downey read her the *Miranda* warnings. RP 125, 301. The defendant told Downey that she was injured. RP 89. Officer Downey asked her where and told her “We’ll call the fire department for you. We’ll help you.” RP 190. Officers then called the fire department, which dispatched units to examine the defendant. RP 89, 190, 264

Officer Downey then transferred control of the defendant to Officer Savage, and the defendant calmed down. RP 264-65. Savage was waiting with the defendant when Krista White-Swain exited the courtroom. RP 302. Officer Savage testified that the defendant then said, “This is all this little bitch’s fault” and yelled, “I’m going to get you” to White-Swain. RP 303. The defendant was sitting in the back of a jail van when she yelled these words to White-Swain. RP 300-04. Savage described the defendant as being angry when she yelled these words. RP 304.

White-Swain testified that, after the defendant was brought into custody and while she was being loaded into a police van, the defendant told her, “I got you,” or “I’m gonna get you, you prosecutor from Algona.” RP 235. White-Swain testified that she took this as a threat given “the totality” of her dealings with the defendant and that, based on this threat, she feared for her safety. RP 235-39, 322. White-Swain also noted that the defendant was a lot bigger than she was, RP 236, and that, when the defendant first re-entered the courtroom, the defendant called her

a “bitch.” RP 253-54. When asked if that scared her, White-Swain testified that the defendant “expressed herself in some seriously aggressive ways, and what she was doing right then was very aggressive and very threatening and scary to me.” RP 254. Officer Savage agreed that the defendant’s anger seemed to be directed at White-Swain and Downey. RP 315.

Within the next two minutes after yelling these words to White-Swain, the defendant said to the police officers in the van, “I’m going to file a lawsuit against the Milton Police, against Officer Downey,” RP 313, and “I’m going to file a lawsuit against that cop.” RP 318.

Judge Sandra Allen testified that she was presiding over an arraignment calendar in Milton municipal court on the morning of October 13, 2009. RP 131-34. The defendant was scheduled to appear before the court that day and was represented by Robert Jenson. RP 137. Mr. Bejarano was acting as prosecutor because of a conflict of interest between the defendant and the regular prosecutor, Krista White-Swain. RP 137-38, 176.

When Mr. Bejarano put the defendant’s case on the record, he noted that the defendant smelled strongly of marijuana. RP 139. Because the defendant’s matter was being set over for a later date, Allen advised the defendant that when she came back to court, she needed to not be under the influence of marijuana or smelling of marijuana. RP 139. The defendant started to comment about her marijuana use, but Allen told her

she was not close enough to smell her and reminded her that she was simply setting the matter over. RP 139-40. The defendant then signed the order continuing her hearing. RP 140-42.

Judge Allen later saw the defendant come back into the courtroom, yelling and screaming, followed by Officer Downey. RP 142. Judge Allen testified that the defendant was coming towards her on the bench, but that Downey got between the defendant and her to prevent the defendant from coming any closer. RP 142. Allen testified that the defendant was coming at her aggressively and yelling as she did so. RP 142. Allen stood up, stunned. RP 142. The defendant continued to shout profanities and yell at the officer and Allen told her to stop yelling or she would find her in contempt of court. RP 143. The defendant ignored the judge and continued to scream. RP 143. The defendant's behavior disrupted the proceeding before the court and made it "impossible" for the court to function. RP 144; RP 183-84; RP 392; RP 413. Judge Allen told the defendant to calm down and leave and Officer Downey told her that she would be arrested if she did not follow his directions. RP 145.

Although Judge Allen made clear that the decision to arrest belonged to police officers, RP 144, she testified that she believed there was probable cause at that time to arrest the defendant for disorderly conduct and obstructing a law enforcement officer. RP 145. She testified that the defendant swore at the officer, called him names, and took a

fighting stance against him. RP 146. Judge Allen testified that the defendant “was the only aggressor there” that day. RP 146, 152.

Cathy Fisher, who is the court clerk for the Milton municipal court, testified that she was responsible for maintaining and operating the digital recording equipment in the courtroom. RP 172-73. Fisher testified that she was working on October 13, 2009, RP 174, saw the altercation in the courtroom, and that, during that altercation, the defendant “smacked” Officer Downey “a couple of times” in the head. RP 198.

Robert Jensen, who was the public defender for the City of Milton, was the defendant’s defense attorney on October 13, 2009. RP 376. Jensen, who had been practicing law for approximately three years, testified that he did not smell anything “unusual” that day. RP 375-78. On direct Jensen indicated that the prosecution made a motion to take the defendant into custody because of her alleged marijuana use, RP 380-81, but on cross testified that it was a motion to amend the terms of her release to add a condition. RP 390. Jensen testified that he did not see the defendant punch Rhoads, but indicated that he did not see the entire altercation and that there was a period of time during which the parties were out of his “line of sight.” RP 402.

Kurt Baumgardner, who was a defendant with a pending case before Milton municipal court on October 13, 2009, testified that he saw no punches being thrown, but that he exited the courtroom before the confrontation ended. RP 406-12.

After the defendant was arrested, she was transported to the hospital, and Officer Savage accompanied her there. RP 304. While at the hospital, the defendant stated that she had only taken half of her medication that day. RP 307. When Savage asked the defendant what happens when she does not take her medication, the defendant replied, “I get very violent and angry.” RP 307. The defendant went on to say that when Officer Downey put his hands on her, “I flashed back into kill mode,” RP 308, and that if she had gotten Officer Downey’s gun she would have “emptied it” and “for sure hit someone in the courtroom.” RP 308.

C. ARGUMENT.

1. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A JURY COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME OF HARASSMENT BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State’s case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). “In a claim of insufficient evidence, a reviewing court examines whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,’ ‘viewing the evidence in the light most favorable to the State.’”

*State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)); *State v. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). Thus, “[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt.” *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “Determinations of credibility are for the fact finder and are not reviewable on appeal,” *Brockob*, 159 Wn.2d at 336, and “circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In the present case, in its instruction 19, the trial court instructed the jury that

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 October 13, 2009, *the defendant knowingly threatened to cause bodily injury immediately or in the future to Krista White-Swain,*

(2) That the words or conduct of the defendant placed Krista White-Swain in reasonable fear that the threat would be carried out;

(3) That the defendant acted without lawful authority;

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

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 weighting all of 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 33-58 (emphasis added). *See* RCW 9A.46.020; WPIC 36.07.

The court also instructed that

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened.

To be a threat, a statement or act must occur in the context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 33-58. *See* WPIC 2.24.

The defendant did not object to these instructions, RP 427-36, and therefore, they became the law of the case. *See State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1997).

“To avoid unconstitutional infringement on protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only ‘true threats.’” *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (citing *State v. Williams*, 144 Wn.2d 197, 208, 26 P.3d 890(2001)). “A true threat is “a statement *made in a context or under such circumstances* wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.” *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting *Williams*, 144 Wn.2d at 208-09) (emphasis added). “A true threat is a serious threat, not one said in jest, idle talk, or political argument,” *Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004), though “[t]he speaker of a ‘true threat’ need not actually intend to carry it out.” *Schaler*, 169 Wn.2d at 283; *Kilburn*, 151 Wn.2d at 44-48. “It is enough that a reasonable person would foresee that the threat would be considered serious.” *Schaler*, 169 Wn.2d at 283.

In the present case, Krista White-Swain testified that the defendant made two statements to her, “This is all that little bitch’s fault,” RP 320, and “I got you,” or “I’m gonna get you, you prosecutor from Algona,” RP 235. Officer David Savage also testified that the defendant told White-Swain, “This is all this little bitch’s fault, I’m going to get you.” RP 303-04. Therefore, two witnesses testified that the defendant expressed that

her present situation was White-Swain's fault and then told White-Swain, I'm going to get you. RP 303-04.

The statement, "I'm going to get you," even taken by itself without considering the context in which it was said, could be considered a communication of the defendant's intent to cause bodily injury to White-Swain in the future. Because the evidence must be viewed in the light most favorable to the State, *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006), this statement must, for purposes of this review, be interpreted as a direct communication of the defendant's intent to cause bodily injury to White-Swain.

This statement, however, need not and should not be considered in a vacuum, but in the context and circumstances in which it was uttered. See *Schaler*, 169 Wn.2d at 283.

That context included White-Swain watching the defendant walk into a courtroom, disrupt a criminal case docket, call her a "bitch," disregard the orders of a municipal court judge, and tell an armed police officer that he was "about to get his ass kicked." RP 73; RP 253-54. The defendant did all of this across the hall from a police station minutes after the conclusion of her own unrelated criminal case. When the defendant disregarded the officer's commands, White-Swain watched the defendant sustain at least one hit from a taser without any effect, RP 81, 147, 231, and then saw the defendant engage four armed police officers in a fist

fight in the middle of a crowded courtroom, all because she did not like being accused of smoking marijuana. RP 69-87, 151. *See* RP 188.

White-Swain was the one who accused her of doing so and sent the officer with whom the defendant had fought to investigate. RP 220-21. *See* RP 60, 99.

The defendant was a lot larger than White-Swain, RP 236, played professional football, RP 306, and, indeed, was so big that it required two pairs of handcuffs, *see* RP 186, 263, and four police officers to secure her.

The defendant had been arrested and was in handcuffs, sitting in the back of a jail van when she yelled “[t]his is all this little bitch’s fault, I’m going to get you” to White-Swain. RP 300-04. Savage described the defendant as being angry when she yelled these words. RP 304.

In this context and under these circumstances, a reasonable person in the defendant’s position would foresee that the words, “I’m going to get you” were a serious expression of the defendant’s intention to inflict bodily harm, and therefore a threat as defined by the jury instructions and supported by caselaw. *See* CP 33-58; **Schaler**, 169 Wn.2d at 283.

Moreover, while at the hospital, the defendant told Officer Savage that she had only taken “half her meds that day,” that she gets “very violent and angry” when she does not take her medication, and that when Officer Downey put his hands on her, she “flashed back into kill mode.” RP 307-08. This supports the conclusion that a reasonable person in

defendant's position would have foreseen that her attitude and demeanor at the time would have conveyed a seriousness and aggressiveness that would have engendered fear in the target of such a verbal threat.

Given this context and these circumstances, a reasonable person in the defendant's position would foresee that the statement "I'm going to get you" would be interpreted as a serious expression of intention to inflict bodily harm," *State v. Schaler*, 169 Wn.2d at 274. The defendant had already inflicted bodily harm on one of two people she thought was responsible for her present situation by punching Downey in the face. RP 85, 122, 198, 335. She was clearly not deterred by a judge, the courtroom, or armed police in doing so. There was no reason that a reasonable person in her position would think that White-Swain would interpret her words as anything other than an expression of the intent to inflict bodily harm.

Therefore, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a jury could have found beyond a reasonable doubt that the defendant's statement, "I'm going to get you" was a threat to cause bodily injury within the meaning of RCW 9A.46.020. As a result, there was sufficient evidence to support the defendant's conviction of harassment and that conviction should be affirmed.

2. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION FOR A NEW TRIAL BASED ON AN ALLEGED VIOLATION OF **BRADY V. MARYLAND** WHERE THE EVIDENCE AT ISSUE WAS NOT MATERIAL TO HER CONVICTIONS.

“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *See State v. Thomas*, 150 Wn.2d 821, 850, 83 P.3d 970 (2004). A challenge to a conviction based on an alleged *Brady* violation is reviewed *de novo*. *U.S. v. Woodley*, 9 F.3d 774, 777 (9<sup>th</sup> Cir. 1993).

“There are three components to a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material, meaning that the evidence must have resulted in prejudice to the accused.” *State v. Sublett*, 156 Wn. App. 160, 200, 231 P.3d 231, *review granted*, 170 Wn.2d 1016, 245 P.3d 775 (2010) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)); *In Re Brennan*, 117 Wn. App. 797, 805, 72 P.3d 182 (2003).

“Prejudice occurs ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *Sublett*, 156 Wn. App. at 200. *Brennan*, 117 Wn. App. at 805 (citing *Matter of Personal Restraint of Benn*, 134 Wn.2d, 868, 916, 952 P.2d 116 (1998) (quoting *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985))). “Prejudice is determined by analyzing the evidence withheld in light of the entire record.” *Sublett*, 156 Wn. App. at 200 (citing *In re Pers. Restraint of Sherwood*, 118 Wn. App. 267, 270, 76 P.3d 269 (2003) (citing *Benn v. Lambert*, 283 F.3d 1040, 1053 (9<sup>th</sup> Cir.), *cert denied*, 537 U.S. 942, 123 S. Ct. 341, 154 L. Ed. 2d 249 (2002))).

“Although the prosecution cannot avoid its obligations under *Brady* by keeping itself ignorant of matters known to other state agents, it has no duty to independently search for exculpatory evidence.” *Brennan*, 117 Wn. App. at 805. “‘A *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information’ at issue.” *Sublett*, 156 Wn. App. at 200 (citing *Benn*, 134 Wn.2d at 916 (quoting *Williams v. Scott*, 35 F.3d 159, 163 (5<sup>th</sup> Cir. 1994))). *Thomas*, 150 Wn.2d at 851.

In the present case, the defendant argues that a failure to disclose, before trial, information that Officer Downey lied in an unrelated civil case amounted to a *Brady* violation. See Brief of Appellant, p. 10-14. She

is mistaken. Even assuming the first two components of a *Brady* violation were satisfied, the third cannot be shown.

The evidence at issue was not, of itself, exculpatory of the defendant. At best, the information could have been used as impeachment in the cross examination of Officer Downey. *See* ER 608(b); *State v. McDaniel*, 83 Wn. App. 179, 920 P.2d 1218 (1996); *State v. Wilson*, 60 Wn. App. 877, 808 P.2d 754 (1991). Therefore, the first component of a *Brady* violation is probably satisfied.

There is no dispute that the State inadvertently failed to disclose the evidence at issue to the defense before the conclusion of the trial of this case. RP 06/25/10 3-6. Therefore, the second component of a *Brady* violation is also probably satisfied.

The third component, however, cannot be. Indeed, the evidence at issue was not material because it did not result in prejudice to the defendant. *See State v. Sublett*, 156 Wn. App. at 200. Even if the defendant were entirely successful in impeaching Downey's testimony and the jury completely disregarded such testimony, there is no reasonable probability that the result of this proceeding would have been any different.

Officer Downey did not observe and did not testify to any facts concerning the harassment charge. Therefore, even had his testimony been entirely impeached and completely disregarded, there is no probability that the result of the proceeding with respect to that charge

would have been different. Therefore, the harassment conviction must be affirmed.

A similar result can be reached with respect to the third-degree assault charge. Even if the defendant was entirely successful in impeaching Downey and the jury completely disregarded his testimony, there would have to be overwhelming evidence that the defendant committed the third-degree assault.

Specifically, Milton Municipal Court Judge Allen testified that the defendant swore at the officer, called him names, and took a fighting stance against him. RP 146. Judge Allen testified that the defendant “was the only aggressor there” that day. RP 146, 152.

Court clerk Cathy Fisher testified that the defendant subsequently “smacked” Officer Downey “a couple of times, two times it looked like to [her], in the head.” RP 198.

Milton Police Chief William Rhoads, who had over thirty years of law enforcement experience, RP 323-24, likewise testified that he saw the defendant strike Officer Downey in the head at least once with her fist. RP 334-35. Contrary to the defendant’s assertion that “only Officer Downey testified that this was intentional, rather than ‘flailing,’” Brief of Appellant, p. 12, Rhoads testified that the defendant’s strike was a “closed fist strike” and “an intentional punch.” RP 335.

No witness who was in the courtroom during the entire altercation disputed such testimony. *See* RP 1-513. Specifically, *Judge Allen*

testified that she was too busy “working on getting the people out” of the courtroom to notice if the defendant physically struck any of the officers. RP 151. *White-Swain* testified that she left the courtroom just as the physical altercation was starting. RP 232. What she described seeing of that altercation occurred before the punches described by Fisher and Rhoads. Compare RP 232-33 with RP 198-99 (Fisher) and RP 334-35 (Rhoads). Similarly, *Officer Savage* seemed to describe events in the confrontation that occurred after the punches described by Fisher and Rhoads. Compare RP 296-300 with RP 198-99 (Fisher) and RP 334-35 (Rhoads). Savage did, however, testify that the defendant told him that when Downey touched her, she “flashed back into kill mode,” and that if she had gotten his gun she would have emptied it and “hit someone in the courtroom.” RP 308. *Defense attorney Jensen*, called by the defendant, testified that he did not see the defendant punch Rhoads, but indicated that he did not see the entire altercation and that there was a period of time during which the parties were out of his “line of sight.” RP 402. Lastly, *Kurt Baumgardner*, who was a defendant in Milton Municipal court that day, testified that he did not “see” a punch, but also testified that he was filing out the side door while the altercation was beginning. RP 410.

In short, the jury had before it the undisputed testimony of the court clerk and the chief of police that the defendant intentionally punched Officer Downey in the head at least once. Therefore, there is no reasonable probability that, had the evidence been disclosed to the

defense, the result of the proceeding with respect to the assault charge would have been different, and therefore, there is no prejudice. *See Sublett*, 156 Wn. App. at 200. *Brennan*, 117 Wn. App. at 805.

Because the failure to disclose the evidence at issue resulted in no prejudice to the defendant, the evidence was not “material” for purposes of *Brady* violation analysis, and the third component to a *Brady* violation cannot be satisfied.

Therefore, the defendant’s convictions should be affirmed.

D. CONCLUSION.

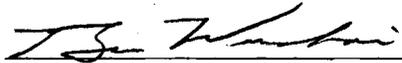
Viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a jury could have found beyond a reasonable doubt that the defendant’s statement, “I’m going to get you,” was a threat to cause bodily injury. Therefore, the defendant’s harassment conviction should be affirmed.

The trial court properly denied the defendant's motion for a new trial because there was no violation of *Brady v. Maryland* where the evidence at issue did not result in prejudice to the defendant.

Therefore, the defendant's convictions should be affirmed.

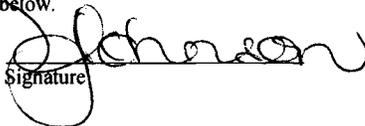
DATED: March 31, 2011

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
BRIAN WASANKARI  
Deputy Prosecuting Attorney  
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/31/11   
Date Signature

11 APR -1 PM 1:15  
STATE OF WASHINGTON  
BY 