

NO. 47362-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNY G. MADARASH,

Appellant.

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

The Honorable Michael Evans, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
C. STATEMENT OF THE CASE.....	2
1. <u>Procedural history and trial testimony</u>	2
2. <u>Trial, verdict, and sentencing</u>	6
3. <u>CrR 3.5 hearing</u>	6
D. ARGUMENT	7
1. <u>THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. MADARASH MADE A "TRUE THREAT" TO CAUSE BODILY INJURY TO THE OFFICERS AND FAILED TO PROVE THAT THE OFFICERS REASONABLY BELIEVED MR. MADARASH WOULD CARRY OUT HIS THREATS</u>	7
a. A criminal conviction must be based upon proof beyond a reasonable doubt of every element of the crime.....	7
b. The State did not prove beyond a reasonable doubt that Mr. Madarash's words would be interpreted as a threat by a reasonable criminal justice participant or that he had the present ability to carry out any threat	9
c. The State did not prove beyond a reasonable doubt that Mr. Madarash's threat to Officers angel and Shelton constituted misdemeanor harassment	11
d. The convictions must be dismissed	12
E. CONCLUSION.....	13

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Cantu</i> , 156 Wn.2d 819, 132 P.3d 725 (2006).....	8
<i>State v. Drum</i> , 168 Wn.2d 23, 225 P.3d 237 (2010).....	9
<i>City of Seattle v. Slack</i> , 113 Wn.2d 850, 784 P.2d 494 (1989).....	8
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Jackson v. Virginia</i> , 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970).....	9
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	8
<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 9A.46.020(1).....	5, 10, 11, 12
RCW 9A.46.020(1)(a)(i),(b)	9
RCW 9A.46.020(1), (2)(b).....	2, 10, 11, 12, 13
RCW 9A.46.020(2)(b)(iii).....	5
<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
Wash. Const. art. 1, § 3	8
U. S. Const. Amend. XIV	8
<u>COURT RULES</u>	<u>Page</u>
CrR 3.5	6

A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that appellant Kenny Madarash committed misdemeanor harassment in Count 1 and Count 2.

2. The State did not prove beyond a reasonable doubt that Mr. Madarash committed harassment of a criminal justice participant as alleged in Count 3.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of the crime beyond a reasonable doubt. To convict a defendant of harassment of a criminal justice participant, the State must prove beyond a reasonable doubt that, *inter alia*, the defendant uttered a threat to cause bodily injury, and the criminal justice participant threatened reasonably feared that the threat would be carried out. In the absence of evidence to establish beyond a reasonable doubt that the officer threatened reasonably feared Mr. Madarash would act upon his threat, must the conviction be reversed? (Assignment of Error 2)

2. The harassment of a criminal justice participant statute requires the State to prove beyond a reasonable doubt (1) that a reasonable criminal justice participant in the position of the person threatened would

interpret the statement as a threat. In addition, the statute provides that threatening words do not constitute a threat unless it is apparent to the criminal justice participant that the speaker has the "present and future ability to carry out the threat." RCW 9A.46.020(2)(b). Where Mr. Madarash was on the ground and the officer was in the process of handcuffing him when Mr. Madarash swore and said he would "kick his ass," did the State prove beyond a reasonable doubt that (1) under the circumstances, a reasonable criminal justice participant would interpret Mr. Madarash's statement as a threat and (2) it was apparent to the officer that Mr. Madarash had the present ability to carry out any threat. (Assignment of Error 2)

3. Was the evidence insufficient to prove misdemeanor harassment where there was no evidence that Mr. Madarash threatened to injure the officers? (Assignment of Error 1)

C. STATEMENT OF THE CASE

1. Procedural history and trial testimony:

Kenny Madarash was on supervision by the Department of Corrections (DOC) in Clark County, Washington. 1Report of Proceedings (RP) at 71.¹ As a requirement of his DOC supervision, Mr. Madarash was

¹The record of proceedings consists of three volumes: June 5, 2014, June 19, 2014, July 17, 2014, July 22, 2014, and August 5, 2014

prohibited from leaving Clark County without a written “travel permit.” IRP at 30-31, 74.

On April 4, 2014, James Kelly II of the Longview Police Department saw Mr. Madarash while on patrol in Longview, Cowlitz County, Washington. IRP at 73. He saw Mr. Madarash while crossing Alabama Street in Longview outside the designated crosswalk while talking on his cellphone. IRP at 73, 83. Officer Kelly recognized Mr. Madarash from previous contact with him approximately a week earlier and noted that Mr. Madarash appeared to be wearing the same clothing he was wearing during their contact in March, 2014. IRP at 74, 84. Officer Kelly believed that Mr. Madarash was under DOC supervision and that he was not permitted to be in Cowlitz County without written DOC permission. IRP at 74.

Officer Kelly stopped Mr. Madarash, directed him to stand in front of his patrol car, and asked him for identification. IRP at 75. Mr. Madarash initially complied, and then swore at the officer and began to walk away from the patrol car down the middle of the street. IRP at 75, 76. Officer Kelly grabbed his left arm and told him that he was under arrest. IRP at 76. Mr. Madarash pulled his arm away from the officer and continued to walk away.

(sentencing);
1RP—June 11, 2014, CrR 3.5 hearing, jury trial; and
2RP—June 12, 2014, jury trial.

IRP at 74, 75, 76, 84. Officer Kelly testified that Mr. Madarash said that he did not have reason to stop him and that he was leaving. IRP at 75. Officer Kelly attempted to grab Mr. Madarash's arm a second time and Mr. Madarash again pulled his arm away. IRP at 76, 77. The officer pushed him against a parked car and told him that he needed to put his arms behind his back. IRP at 77. Mr. Madarash continued to try to pull away and sworn at the officer and said that he was "not going to jail." IRP at 77. While struggling with him, Officer Kelly called for additional units on his radio. IRP at 77. Officer Kelly pushed him against a parked car and then forced Mr. Madarash to the ground. IRP at 77, 78. While on the ground, Mr. Madarash continued to resist attempts to place him in handcuffs. IRP at 79. During the struggle, while still on the ground and before additional officers arrived, Mr. Madarash told Officer Kelly that he was a "fucking pig" and that he would "kick your ass." IRP at 79. After struggling with him on the ground, Officer Kelly was able to put him in handcuffs. IRP at 79.

Officer Kelly testified that he did not know what Mr. Madarash had in his pockets during the struggle, that he was concerned that Mr. Madarash could have obtained a weapon, and that he was afraid that Mr. Madarash would follow through on his threat. IRP at 79.

After Mr. Madarash was handcuffed, seven or eight patrol cars arrived at the scene, including Officer Tori Shelton and Officer Chris Angel. IRP at 81. Mr. Madarash was searched and Officers Shelton and Angel then using an “escort hold,” walked him to Officer Kelly’s patrol car. IRP at 81, 101. Officers Shelton and Angel testified that Mr. Madarash resisted being taken to the car, said that he was not going to go to jail, and that while struggling with the officers he angrily said “I’m gonna fucking kill you.” IRP at 81, 101, 119. The officers testified they were afraid that he would carry out his threat to kill them. IRP at 101, 119.

After he was put in the back of the car, Mr. Maradash was transported to the Longview city jail. IRP at 82. No weapons were found on his person when he was searched. IRP at 93.

The Cowlitz County Prosecuting Attorney charged Mr. Madarash by amended information with felony harassment—threat to kill in Count 1, (pertaining to Tori Shelton), felony harassment—threat to kill in Count 2, (pertaining to Chris Angel), and harassment of a criminal justice participant in Count 3 (pertaining to James Kelly). RCW 9A.46.020(1), (2)(b)(iii). Clerk’s Papers (CP) 13-15.

2. CrR 3.5 hearing:

A CrR 3.5 hearing was held to determine the admissibility of Mr. Madarash's statements to law enforcement. IRP at 27-48. John Robarge, a Community Corrections Supervisor for the Department of Corrections, testified that Mr. Madarash was on active DOC supervision in Clark County. RP at 30. As part of his restrictions, he was not permitted to leave Clark County without a written "travel permit" or that he would be subject to arrest. RP at 32.

The court found that Mr. Madarash's initial statements to Officer Kelly were noncustodial because he was free to leave at any time. IRP at 48. After he was taken into custody, his statement to Officer Kelly and to Officers Shelton and Angel were not made as a result of interrogation and that his statements were therefore admissible. IRP at 46.

3. Trial, verdict, and sentencing:

Trial commenced June 11, 2014, the Honorable Michael Evans presiding.

The defense did not note exceptions to requested jury instructions not given or object to instructions given. 2RP at 47.

The jury found Mr. Madarash guilty of the lesser included charge of misdemeanor harassment in Counts 1 and 2, and guilty of threatening a

criminal justice participant as charged in Count 3. 2RP at 115; CP 84, 86, 87.

At sentencing, Mr. Madarash argued that his two prior convictions in 2007 for intimidating a public servant, obtained by plea, were facially invalid. RP (8/5/14) at 41-42. The court ruled that the Judgment was not facially invalid merely because it did not contain all the elements of the offenses as asserted by defense counsel. RP (8/5/14) at 48-49.

The court imposed a standard range sentence of 34 months. RP (8/5/14) at 57; CP 142.

Timely notice of appeal was filed August 5, 2014. CP 151. This appeal follows.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. MADARASH MADE A "TRUE THREAT" TO CAUSE BODILY INJURY TO THE OFFICERS AND FAILED TO PROVE THAT THE OFFICERS REASONABLY BELIEVED MR. MADARASH WOULD CARRY OUT HIS THREATS

- a. A criminal conviction must be based upon proof beyond a reasonable doubt of every element of the crime.**

Kenny Madarash was convicted in Count 3 of felony harassment of a criminal justice participant resulting from a comment Mr. Madarash made to Officer Kelly that he would “kick your ass” while the officer was in the process

of placing him under arrest. 1RP at 79. At the time of the statement, Mr. Madarash had been pushed against a parked car and then forced to the ground by the officer, who was in the process of handcuffing him. 1RP at 79. Mr. Madarash was convicted in Counts 1 and 2 of misdemeanor harassment resulting from the threat that he would kill the officers escorting him to the patrol car after he was placed under arrest and handcuffed.

In each of the three counts, the State did not prove beyond a reasonable doubt (1) that a reasonable person in the officers' position would understand his comments would be perceived as a threat to harm the officer, (2) that a reasonable police officer would interpret the statements as a genuine threat, or (3) that it appeared to the officers that Mr. Madarash had the present and future ability to carry out any threats. His convictions must therefore be reversed and dismissed.

Due process requires the State to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). An accused person's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support

a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

- b. The State did not prove beyond a reasonable doubt that Mr. Madarash's words would be interpreted as a threat by a reasonable criminal justice participant or that he had the present ability to carry out any threat.**

Mr. Madarash was convicted in Count 3 of felony harassment of a participant in the criminal justice system. RCW 9A.46.020(1), (2)(b). The statute provides in relevant part:

A person is guilty of harassment if:

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

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

(iv) To maliciously do any act that was intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

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

sending of an electronic communication.

RCW 9A.46.020(1).

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

A person who harasses another is guilty of a class C felony if any of the following apply: . . . (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties.

Under RCW 9A.46.020(2)(b), the State is also required to prove:

the fear from the threat must be a reasonable fear that a reasonable criminal justice participant would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.

As noted *supra*, the felony harassment statute requires that the defendant place "the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(b). When the person threatened is a criminal justice participant, their fear must be "a fear that a reasonable criminal justice participant would have under all the circumstances." RCW 9A.46.020(2)(b). Threatening words do not constitute a threat unless it is apparent to the criminal justice participant that the defendant has the "present and future ability

to carry out the threat." RCW 9A.46.020(2)(b).

Here, Mr. Madarash's comments to Officer Kelly were not "true threats" because a reasonable person in his position would not believe that the comments would place the police officer in fear that he would be injured, and (2) the officer was in the process of handcuffing Mr. Madarash, who was on the ground with the officer on top of him and did not have the present ability to carry out the purported threat to the officer and the conviction must be reversed.

c. The State did not prove beyond a reasonable doubt that Mr. Madarash's threat to Officers Angel and Shelton constituted misdemeanor harassment.

Mr. Madarash's convictions for misdemeanor harassment must also be reversed for insufficiency of the evidence. Pursuant to RCW 9A.46.020(1) a person is guilty of harassment when:

(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

...

(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.

See RCW 9A.46.020(1)(a)(i), (b).

There were no other physical threats communicated to Officers Angel and Shelton other than the alleged threat to kill, an allegation which the jury rejected. IRP at 100-102, 118-120. The harassment statute requires proof of a communicated threat. The evidence presented at trial did not support a conviction for harassment by threats to injure under RCW 9A.46.020(1)(a)(i). Nor was there any evidence of any threat to harm the officers' physical health or safety, other than the threat to kill, which the jury did not accept. See RCW9A.46.020(1)(a)(iv).

d. The convictions must be dismissed.

The State did not prove the elements of misdemeanor harassment or felony harassment of a criminal justice participant beyond a reasonable doubt. Unfortunately, police officers are expected as part of their duties to deal with people who are intoxicated, acting irrationally, angry, agitated, or in states of mental or physical distress. They are trained to deal with the public in a professional manner, but are unfortunately often subjected to varying degrees of verbal abuse when making an arrest or in the process of securing arrested

persons. Mr. Madarash was under distress when contacted by Officer Kelly and when he was escorted to the car by Officers Angel and Shelton. He was either in the process of being arrested or already placed in handcuffs and when he made the comments to the officers. 1RP at 93. He was subsequently determined to be unarmed when searched incident to arrest. He apologized for his comments when being transported to jail. RP at 88.

The State did not prove that a reasonable criminal justice participant in Officer Kelly's position would have been afraid that Mr. Madarash would carry out the purported threat to "kick his ass," nor did the State prove that Officers Angel and Shelton were placed in reasonable fear that Mr. Madarash would cause bodily injury to them immediately or in the future. The State also failed to prove that it was apparent to the officers that Mr. Madarash, who remained in custody after the arrest, had the present and future ability to carry out the threats as required by RCW 9A.46.020(2)(b).

Mr. Madarash's convictions for felony harassment of a criminal justice participant and misdemeanor harassment must be reversed and dismissed.

E. CONCLUSION

The State failed to produce sufficient evidence to establish beyond a reasonable doubt that Mr. Madarash uttered a true threat or that Officers Kelly, Angel and Shelton were in reasonable fear that Mr. Madarash actually would

carry out his purported threats. In addition, the record fails to show any threat of bodily injury to Officers Shelton and Angel other than the threat to kill, which was rejected by the jury. For the foregoing reasons, Mr. Madarash's convictions must be reversed and remanded to the trial court with instructions to dismiss the charges with prejudice against refiling.

DATED: March 18, 2015.

Respectfully submitted,
THE TILLER LAW FIRM

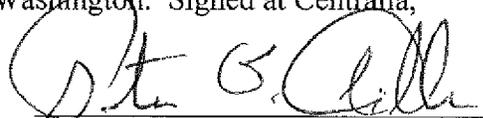


PETER B. TILLER-WSBA 20835
Of Attorneys for Kenny Madarash

CERTIFICATE OF SERVICE

The undersigned certifies that on March 18, 2015, that this Opening Brief was sent by JIS link, to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and true and correct copies were mailed by first class mail, postage prepaid Mr. Eric Bentson, Cowlitz County Prosecutor's Office, 312 SW 1st Ave., Rm 105, Hall of Justice, Kelso, WA 98625 and to the appellant, Mr. Kenny G. Madarash, DOC #887250, W.S.P., 1313 North 13th Avenue, Walla Walla, WA 99362 LEGAL MAIL/SPECIAL MAIL.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 18, 2015.



PETER B. TILLER

APPENDIX A

RCW 9a.46.020

Definition — Penalties.

(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 any of the following apply: (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 specifically named in a no-contact or no-harassment order; (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; (iii) the person harasses a criminal justice participant who is

performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.

(3) Any criminal justice participant who is a target for threats or harassment prohibited under subsection (2)(b)(iii) or (iv) of this section, and any family members residing with him or her, shall be eligible for the address confidentiality program created under RCW 40.24.030.

(4) For purposes of this section, a criminal justice participant includes any (a) federal, state, or local law enforcement agency employee; (b) federal, state, or local prosecuting attorney or deputy prosecuting attorney; (c) staff member of any adult corrections institution or local adult detention facility; (d) staff member of any juvenile corrections institution or local juvenile detention facility; (e) community corrections officer, probation, or parole officer; (f) member of the indeterminate sentence review board; (g) advocate from a crime victim/witness program; or (h) defense attorney.

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

TILLER LAW OFFICE

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