

69248-8

69248-8

NO. 69248-8-1

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

---

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL T. DONERY,

Appellant.

---

BRIEF OF RESPONDENT

---

MARK K. ROE  
Prosecuting Attorney

JOHN J. JUHL  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

2013 MAY 30 PM 1:34

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

## TABLE OF CONTENTS

I. ISSUES .....	1
II. STATEMENT OF THE CASE.....	1
A. FACTS OF THE CRIME.....	1
B. PROCEDURAL HISTORY.....	6
III. ARGUMENT .....	7
A. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT DEFENDANT HARASSED DEPUTY SIGH BECAUSE OF HER RACE OR COLOR.....	7
B. THE EVIDENCE WAS SUFFICIENT TO SHOW THAT DEFENDANT MADE A TRUE THREAT TO DEPUTY SIGH.....	14
C. A REASONABLE PERSON IN DEPUTY SIGH'S POSITION WOULD REASONABLY FEAR DEFENDANT'S THREATS BECAUSE IT WAS APPARENT THAT DEFENDANT COULD CARRY OUT HIS THREATS.....	20
D. THE JURY INSTRUCTIONS AS A WHOLE CORRECTLY STATED THE APPLICABLE LAW AND DID NOT LESSEN THE STATE'S BURDEN OF PROOF.....	22
1. Jury Instruction 12.....	24
2. Jury Instruction 9.....	25
IV. CONCLUSION .....	28

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>Bodin v. City of Stanwood</u> , 130 Wn.2d 726, 927 P.2d 240 (1996).	27
<u>In re Winship</u> , 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	24
<u>Keller v. City of Spokane</u> , 146 Wn.2d 237, 44 P.3d 845 (2002) ....	27
<u>State v. Acosta</u> , 101 Wn.2d 612, 683 P.2d 1069 (1984) .....	24
<u>State v. Aguirre</u> , 168 Wn.2d 350, 229 P.3d 669 (2010).....	28
<u>State v. Barnes</u> , 153 Wn.2d 378, 103 P.3d 1219 (2005).....	27
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	22, 23
<u>State v. Buzzell</u> , 148 Wn. App. 592, 200 P.3d 287 (2009).....	24
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995).....	22, 24
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	23
<u>State v. Halstien</u> , 122 Wn.2d 109, 857 P.2d 270 (1993) .....	13
<u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986).....	23
<u>State v. J.M.</u> , 144 Wn.2d 472, 28 P.3d 720 (2001).....	14, 15
<u>State v. Johnson</u> , 115 Wn. App. 890, 64 P.3d 88 (2003) ...	9, 10, 11, 26
<u>State v. Johnston</u> , 156 Wn.2d 355, 127 P.3d 707 (2006).....	14, 15
<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1215 (2004) ....	8, 9, 14, 15, 16, 17, 19
<u>State v. Knowles</u> , 91 Wn. App. 367, 957 P.2d 797 (1998).....	15, 16
<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	23
<u>State v. Linehan</u> , 147 Wn.2d 638, 56 P.3d 542 (2002).....	23, 27
<u>State v. Peters</u> , 163 Wn. App. 836, 261 P.3d 199 (2011).....	23
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995) .....	22, 23
<u>State v. Pollard</u> , 80 Wn. App. 60, 906 P.2d 976 (1995).....	9, 11, 26
<u>State v. Read</u> , 163 Wn. App. 853, 261 P.3d 207 (2011) <u>review denied</u> , 173 Wn.2d 1021, 272 P.3d 850 (2012) and <u>cert. denied</u> , 133 S. Ct. 176, 184 L. Ed. 2d 37 (2012)....	8, 9, 11, 12, 13, 14, 15, 17, 21, 25, 26
<u>State v. Riley</u> , 137 Wn.2d 904, 976 P.2d 624 (1999) .....	27
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	15
<u>State v. Schaler</u> , 169 Wn.2d 274, 236 P.3d 858 (2010) .....	16, 17
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988) .....	24
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997) .....	22, 23
<u>State v. Smith</u> , 93 Wn. App. 45, 966 P.2d 411 (1998).....	15
<u>State v. Talley</u> , 122 Wn.2d 192, 858 P.2d 217 (1993)..	8, 12, 13, 25, 26

**FEDERAL CASES**

United States v. Gilbert, 884 F.2d 454 (9th Cir.1989), cert. denied,  
493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1044 (1990) ..... 17

Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d  
436 (1993) ..... 12, 13

**U.S. CONSTITUTIONAL PROVISIONS**

First Amendment ..... 8, 12, 14

**WASHINGTON STATUTES**

RCW 9A.04.110(28)(a)..... 16

RCW 9A.36.080 ..... 7, 20, 26

RCW 9A.36.080(1)(c)..... 7, 20, 21

RCW 9A.36.080(7) ..... 7

**COURT RULES**

ER 402 ..... 13

ER 403 ..... 13

ER 404 ..... 13

**OTHER AUTHORITIES**

Webster's Third New International Dictionary..... 16

WPIC 36.03 ..... 23

## **I. ISSUES**

1. Did defendant's actions show that he intentionally and maliciously threatened Deputy Sigh because of her race or color?
2. Was the evidence presented sufficient to show that defendant made a true threat to Deputy Sigh?
3. Would a reasonable person of Deputy Sigh's race in her position reasonably fear defendant's threats when it was apparent that he could carry out his threats?
4. Did the court's instructions to the jury lessen the state's burden of proof?

## **II. STATEMENT OF THE CASE**

### **A. FACTS OF THE CRIME.**

On March 8 and 9, 2012, Michael Thanh Donery, defendant, was incarcerated at the Snohomish County Jail in Four North, a maximum security unit. Inmates in Four North are housed in single-person cells; each cell has a sink, a toilet, and a bunk. The metal cell door has a window about five feet off the floor and a food-slot / cuff-port. The door has ventilation slots that allow communication to and from the cell when the door is closed. Inmates are allowed one jail uniform, three pair of socks, underwear and T-shirts, personal hygiene items, and up to three

books. Inmates can use cleaning supplies in the cell, but are not allowed to accumulate the items in the cell. In Four North the inmate's physical movement is highly restricted. The inmates are only allowed out of their cells for recreation one hour per day, and are not allowed direct personal contact with other inmates. 1RP 93-101, 127, 139-141; 2RP 45-46, 51; 3RP 90-91, 114.

On March 8, 2012, Corrections Deputy Sigh was working swing shift in Four North with Deputy Ellison from 4:00 p.m. to midnight. Deputy Sigh is black, Deputy Ellison is white. Around 9:30 p.m. Deputy Sigh observed defendant wearing vinyl gloves and wiping down the wall of his cell with a rag. Deputy Sigh asked defendant where he got the items. Defendant replied it was none of her business and she should not worry about it. Deputy Sigh repeated her question and defendant replied that he got the items from an officer, but refused to say who. When Deputy Sigh told defendant to give her the items he flushed them down the toilet. Deputy Sigh contacted her supervisor regarding the incident. 1RP 92, 99-103, 126-128, 133-134, 139, 144-147, 155; 2RP 21.

Sergeant Sweeney and Deputy Ray responded to Four North. Sergeant Sweeney and Deputy Ray are white. Sergeant Sweeney had defendant cuffed, removed from his cell, searched,

and placed in another cell, so his cell could be searched. Defendant was found to be wearing an extra pair of pants. None of defendant's personal items were transferred to the new cell. Extra books were found in defendant's cell when it was searched. The extra pants and books were confiscated. Defendant was moved to the new cell around 10:00 p.m. The new cell was just like defendant's prior cell. 1RP 104-105, 107-109, 121, 128, 136-137, 146-151, 157-158; 2RP 21, 107-108, 119-121, 136-137, 139-140, 157.

Shortly after defendant was moved the toilet in the new cell overflowed and water began running out under the door into the common area and the adjacent cells. Deputy Sigh called her supervisor and requested inmate workers be sent to clean up the water. Flooding<sup>1</sup> is caused by repeatedly pushing the flush button when the plumbing is obstructed.<sup>2</sup> Deputy Ellison heard the toilet in the new cell being flushed several times just prior to the flooding. 1RP 104, 109-110, 153, 155-159; 2RP 128-129, 138-139, 143-144, 180-181; 3RP 54.

---

<sup>1</sup> Flooding is the term used in the jail for when inmates back-up the plumbing and cause the water to overflow and flood the cells and adjacent areas. Flooding is a recurring problem in the jail. 1RP 103-104; 2RP 143, 178-179.

<sup>2</sup> On March 9, 2012, maintenance determined the blockage obstructing the drain line was caused by other inmates. 2RP 173-178.

Right after defendant's cell flooded he began yelling racial and threatening comments directed at Deputy Sigh. Defendant continued yelling racial insults and threats during the remainder of Deputy Sigh's shift on March 8, 2012. Defendant did not direct any racial insults or threats at the other corrections officers. Defendant focused on Deputy Sigh, the only black and the only female officer present in Four North. Deputy Sigh took defendant's racial insults and threats seriously and was concerned enough to document what he was saying. She feared that defendant would follow through on his threats at any opportunity he got and wrote a report. 1RP 110-111, 114, 116-120, 121-122, 153; 2RP 32, 103-109, 114 129-130, 132, 144.

The inmate workers had cleaned common area by 10:30 p.m. After the inmate workers cleaned the common the toilet in defendant's cell flooded again. A second request was made for inmate workers to be sent to clean the area. The inmate workers finished cleaning Four North the second time at 11:51 p.m. The inmate workers are not allowed to enter a cell until the inmate in the cell has been removed. 1RP 140-141, 157-159; 2RP 17-18, 20; 3RP 56-57.

On March 8-9, 2012, Sergeant Moody was the supervisor for Four North during the graveyard shift, midnight to 8:00 a.m. When Sergeant Moody arrived at work he was informed of the ongoing flooding in Four North and that there was a problem with defendant. Sergeant Moody went to Four North to look at the situation. Sergeant Moody contacted defendant shortly after the start of his shift. Defendant complained about the water in his cell. Sergeant Moody had defendant moved to a dry cell. At 2:23 a.m. Sergeant Moody filed a work order request for maintenance regarding the flooding in Four North. Maintenance had the problem resolved by 11:00 a.m. that morning. 3RP 162-166, 168.

On March 9, 2012, Deputy Sigh was working swing shift in Four North with Deputy Matthews. Deputy Matthews is white. On March 9, 2012, defendant again made racial slurs and threats directed at Deputy Sigh after she started working. Defendant claimed that he knew people who could get Deputy Sigh's personal information. Defendant's threats included the following: "I'm going to terrorize your nigger ass all night." "If I got to stir shit up, I'm going to stir shit up." "I'll knock her nigger ass out." "That nigger bitch going to get smashed." "You're going to get yours, nigger. It's a matter of goddamn time." "[T]hat nigger bitch disrespected

me by putting me in cell with shit water. That gets people killed in prison.” “I’ll kill that nigger bitch for disrespecting me.” “Houses, homes, families. That ain’t no threat. That’s a motherfucking promise. Burn them niggers.” “Check my record for custodial assaults. I don’t fuck around.” “I stabbed a nigger on the streets in the fucking chest.” “[I]f she comes near me, the custodial assault will be on you. I warned you.” 1RP 122-129; 2RP 58, 159-162; 3RP 37, 63, 77.

On March 9, 2012, defendant did not direct racial insults or threats at any other officer. Deputy Sigh was the only black female officer present in Four North. Deputy Sigh felt overwhelmed and terrorized by defendant’s statements. Deputy Sigh feared that defendant “would make good on what he said he was going to do.” Defendant appeared to be fixated on her and would not stop until he had done something to Deputy Sigh. 1RP 127-130.

## **B. PROCEDURAL HISTORY.**

Defendant was initially charge with harassment of a criminal justice participant. CP 120-121. Prior to trial the charge was amended to two counts of malicious harassment; count 1 for March 8, 2012, and count 2 for March 9, 2012. CP 116-117. A jury acquitted defendant on count 1, and found defendant guilty of

malicious harassment on count 2. CP 68, 69. Defendant was given a standard range sentence of 20 months. CP 14-24. Defendant appeals his conviction. CP 2-13.

### **III. ARGUMENT**

#### **A. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT DEFENDANT HARASSED DEPUTY SIGH BECAUSE OF HER RACE OR COLOR.**

Defendant was charged with malicious harassment under RCW 9A.36.080. CP 116-117. Malicious harassment is a class C felony. RCW 9A.36.080(7). As charged in the present case, a person commits malicious harassment when he maliciously and intentionally threatens a person because of his perception of that person's race, color, or other characteristic<sup>3</sup> and places that person in reasonable fear of harm to person or property. RCW 9A.36.080(1)(c). Words alone cannot constitute malicious harassment "unless the context or circumstances surrounding the words indicate the words are a threat," and it is apparent that the person can carry out the threat. RCW 9A.36.080(1)(c). The intent of the malicious harassment statute is not to punish bigoted speech

---

<sup>3</sup> The other prohibited characteristics are ancestry, national origin, gender, sexual orientation, or mental, physical or sensory handicap. RCW 9A.36.080(1)(c).

or thought, “but rather the act of victim selection.” State v. Talley, 122 Wn.2d 192, 206, 858 P.2d 217 (1993).

[T]he Legislature ensured that, absent criminal conduct, bigoted speech and thought are protected. A person is free under the statute to make his or her odious bigoted thoughts known to the world so long as those words do not cross the boundary into criminal harassment, assault, or property damage.

Talley, 122 Wn.2d at 211. The Court found that the malicious harassment statute regulates conduct, not speech. Id. at 206.

Because the crime of malicious harassment implicates First Amendment rights, the court must conduct “an independent examination of the whole record” to assure the conviction “does not constitute a forbidden intrusion on the field of free expression.” State v. Read, 163 Wn. App. 853, 863, 261 P.3d 207 (2011) review denied, 173 Wn.2d 1021, 272 P.3d 850 (2012) and cert. denied, 133 S. Ct. 176, 184 L. Ed. 2d 37 (2012), citing State v. Kilburn, 151 Wn.2d 36, 50, 84 P.3d 1215 (2004). Review is limited to “those ‘crucial’ facts that necessarily involve the legal determination whether the speech is unprotected.” Read, 163 Wn. App. at 864; Kilburn, 151 Wn.2d at 52. “Crucial facts” are those facts that are “so intermingled with the legal questions as to make it necessary, in order to pass on the constitutional question, to analyze the facts.”

Read, 163 Wn. App. at 864; Kilburn, 151 Wn.2d at 51. However, an independent review of the record is “not complete de novo review.” Read, 163 Wn. App. at 864; Kilburn, 151 Wn.2d at 51. The appellate court must defer to credibility findings made by the trier of fact. Read, 163 Wn. App. at 864; Kilburn, 151 Wn.2d at 52.

Defendant contends that he was angry at Deputy Sigh because she kept him in an unsanitary cell and refused to move him to a clean cell; that his anger escalated when Deputy Sigh left him in the dirty cell, not because of Deputy Sigh’s race. Appellant’s Brief 13. This contention ignores the racial character of defendant’s insults and threats directed at Deputy Sigh. Slurs and threats are circumstantial evidence of the bias which is the foundation for malicious harassment. State v. Johnson, 115 Wn. App. 890, 898, 64 P.3d 88 (2003). The trier of fact need not weigh the extent to which bias played a role in the commission of the crime. Johnson, 115 Wn. App. at 896, citing State v. Pollard, 80 Wn. App. 60, 68-70, 906 P.2d 976 (1995).

In Pollard, the defendant was walking down the street drunk when he observed two young African-American boys giggling at him. 80 Wn. App. at 62. The defendant crossed the street, started hurling racial insults at the boys, threatened to beat them up and

pushed one of the boys. Id. After he was arrested, he continued to make bigoted remarks and threats. Id. at 63. On appeal Pollard argued that the State failed to prove that he assaulted the victim because of his race, arguing that the trial court improperly considered his racist remarks following the incident in determining his guilt. Id. at 64. This court concluded that the evidence established that Pollard had not merely uttered a racial slur while committing a separate crime, but had committed the crime because of the victim's race. Id. at 66.

In Johnson, a case that is directly analogous to the present case, the defendant spewed numerous profanity-laced and sexually explicit threats against the female police officer who arrested him. 115 Wn. App. at 893. On appeal, Johnson challenged the sufficiency of the evidence that his threats were made because of the officer's gender rather than the fact that he was arrested. Id. at 898. The appellate court concluded that the misogynistic nature of the threats and the fact that Johnson did not hurl insults at the male transit security officer who was present were sufficient to support the trial court's conclusion that the threats were made because of the victim's gender. Id. at 899.

In the present case, defendant chose to escalate his anger into a barrage of racial insults and threats of harm, just as the defendants in Pollard and Johnson did. Just as in Pollard, the evidence here established that defendant did not merely utter racial slurs while committing a separate crime, but had committed the crime because of the Deputy Sigh's race or color. Further, just as in Johnson, the nature of the threats directed at Deputy Sigh and the fact that defendant did not hurl insults at the white correction officers who were present<sup>4</sup> were sufficient to support the jury's conclusion that the threats were made because of Deputy Sigh's race or color. The facts present in this case are sufficient to support the jury's verdict that defendant threatened Deputy Sigh because of his perception of her race or color.

Defendant further argues that his angry threatening words were insufficient to support the jury's verdict that he threatened Deputy Sigh because of her race, because he did not make any aggressive physical gestures or movement. Defendant contends that State v. Read, requires the State to show a combination of actions and words to support a finding that defendant's speech was

---

<sup>4</sup> Defendant accused Sergeant Bates of sexually assaulting him after Sergeant Bates challenged defendant's racist theory. 3RP 65, 68-69.

designed to threaten Deputy Sigh. Appellant's Brief 12-13. Defendant is apparently arguing that because the conviction in Read was upheld on appeal, there is some requirement that defendant's victim selection must be shown by a combination of his actions and his words. Defendant points to no language in the case or the statute that suggests that a combination of actions and words is a necessary element of malicious harassment. Defendant's reliance on Read is misplaced.

"In Wisconsin v. Mitchell, 508 U.S. 476, 489, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993), the Supreme Court held that the First Amendment 'does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.'" Read, 163 Wn. App. at 868. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like. Mitchell, 508 U.S. at 489. Consistent with Mitchell, the Court in Talley also held that the defendant's statements may be used to prove malicious harassment:

It is true that utterances by the defendant may offer circumstantial evidence of discrimination or victim selection, but as with employment discrimination, victim selection can be shown by a pattern of conduct absent any speech. Even if speech is used to prove

victim selection, we can find no distinction between using speech to prove malicious harassment or any other crime. Only that speech relevant to proving the crime will be admitted. As is always the case, the trial judge will be required to balance the probative value of the evidence against the prejudice to the defendant.<sup>5</sup> The State cannot simply produce evidence of bigoted beliefs. Before such evidence can be admitted, the State must establish the relationship between the speech and the act of victim selection. See [ER] 402, 403, 404; accord, Mitchell, 113 S.Ct. at 2200.

Talley, 122 Wn.2d at 211; see also State v. Halstien, 122 Wn.2d 109, 125, 857 P.2d 270 (1993); Read, 163 Wn. App. at 868.

Here, an independent review of the crucial facts, with deference to the trier of fact's credibility determinations, establishes that defendant is guilty of intentionally and maliciously harassing Deputy Sigh because of her race or color. There is no question that defendant was angry about the cell he was placed in on March 8, 2012. His anger escalated and he began directing offensive racial insults at Deputy Sigh. However, defendant continued using offensive racial insults and threats directed at Deputy Sigh the next day, long after he had been moved to another cell. The record supports the jury's verdict that on March 9, 2012, defendant

---

<sup>5</sup> The record adequately shows that the trial court balanced the probative value of defendant's statements admitted as evidence against the prejudice to the defendant. 1RP 46-47, 69-70; 2RP 149-154; 3RP 29-30.

threatened Deputy Sigh because of his perception of her race or color.

**B. THE EVIDENCE WAS SUFFICIENT TO SHOW THAT DEFENDANT MADE A TRUE THREAT TO DEPUTY SIGH.**

Defendant argues that there was insufficient evidence presented at trial to establish that he made a “true threat” to Deputy Sigh. Appellant’s Brief 14-19. It is well established that the First Amendment does not protect “true threats.” State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 477–478, 28 P.3d 720 (2001); Read, 163 Wn. App. at 871.

Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. State v. Johnston, 156 Wn.2d 355, 365, 127 P.3d 707 (2006). However, an appellate court must make an independent examination of the whole record, so as to assure itself that the judgment does not constitute a forbidden intrusion on the field of free expression. Kilburn, 151 Wn.2d at 50. The appellate court is required to independently review only crucial facts—those so intermingled with the legal question as to make it necessary, in order to pass on the constitutional question, to analyze the facts. Kilburn, 151 Wn.2d at 50–51. Thus, whether a statement constitutes a true threat is a

matter subject to independent review. Johnston, 156 Wn.2d at 365.

The rule of independent appellate review does not extend to factual determinations such as findings on credibility. Johnston, 156 Wn.2d at 365–366.

In determining the sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. A challenge to the sufficiency of the evidence admits the truth of the State's evidence. Further, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.”

Read, 163 Wn. App. at 871, citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (internal citations omitted).

Washington courts have defined the term “threat” when used in statutes that prohibit threats as prohibiting only “true threats.” Johnston, 156 Wn.2d at, 364 (holding that the bomb threat statute application is limited to true threats); J.M., 144 Wn.2d at 478 (noting that the harassment statute is defined as prohibiting only true threats). “True threats” are statements made in a context or under such circumstances that a reasonable person would interpret the statement as a serious expression of intention to inflict bodily harm. Kilburn, 151 Wn.2d at 43; State v. Smith, 93 Wn. App. 45, 48-49, 966 P.2d 411 (1998); State v. Knowles, 91 Wn. App. 367, 373, 957

P.2d 797 (1998); see Webster's Third New International Dictionary, defining "threat" as "an expression of an intention to inflict evil, injury, or damage on another." Our supreme court has defined "true threat" as follows:

[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 Kilburn, 151 Wn.2d at 43. The definition of true threat includes stated intent to harm another person. RCW 9A.04.110(28)(a). A true threat is a serious threat, not one said in jest, idle talk, or political argument. Kilburn, 151 Wn.2d at 43.

The trial court instructed the jury:

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

To be a threat, a statement or act must occur in a 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 79 (Jury Instruction 6); RCW 9A.04.110(28)(a); Schaler, 169 Wn.2d at 283. The speaker of a true threat need not actually intend

to carry out the threat. Kilburn, 151 Wn.2d at 46; Read, 163 Wn. App. at 871. “It is enough that a reasonable speaker would foresee that the threat would be considered serious.” Schaler, 169 Wn.2d at 283. Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, 151 Wn.2d at 44. The fact that a threat is subtle does not make it less of a threat. United States v. Gilbert, 884 F.2d 454, 457 (9th Cir.1989), cert. denied, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1044 (1990).

In the present case, defendant’s threats directed at Deputy Sigh on March 9, 2012, were made in the following contexts:

White power. Nigger. Nigger bitch. Hang from the noose. Heil Hitler. Karma is a bitch. I’m going to terrorize your nigger ass all night. I hate niggers. If you ain’t white, you ain’t right. If I got to stir shit up, I’m going to stir shit up. I’ll knock her nigger ass out. Fuck that nigger bitch. I’m going to get your license plate and your address. I know people in the DMV. How you like that, nigger? Hostile workplace, nigger bitch. Get of the tier, nigger. I’m going to terrorize that nigger. Bug-eyed nigger bitch. That nigger bitch going to get smashed. You’re going to get yours, nigger. It’s a matter of goddamn time. Fat-ass jiggaboo. Shit nigger bitch.

1RP 126-127.

Keep that nigger bitch away from me. I don’t care if I get another charge. You know people – that nigger bitch disrespected me by putting me in cell with shit

water. That gets people killed in prison. ... I don't care if I get another charge. I'll kill that nigger bitch for disrespecting me. That nigger bitch pushes my buttons. I hate niggers.

2RP 162-163.

Fuck that nigger bitch Sigh. I know people on the outside. I'm going to get your first name and that's all I'll need. Technology is a bitch. Please charge me. I will get your first and last names on it. And that's all I will need. I will have every last pig's names. Tell that sergeant to charge me. Houses, homes, families. That ain't no threat. That's a motherfucking promise. Burn them niggers. Check my record for custodial assaults. I don't fuck around. You guys don't know who you're fucking with. I stabbed a nigger on the streets in the fucking chest. Bug-eyed nigger bitch. These guys done fucked with the wrong motherfucker. Your goddamn ugly-ass bug-eyes nigger bitch. I've done 15 years. I don't fucking care. Fat-ass juggaboo nigger shit nigger bitch. They have nigger kids and shit, you know. I'll have your first and last name Sigh. Two websites and I will have your shit, you dumb nigger bitch.

3RP 77.

Further, defendant told Sergeant Bates that he needed to keep Deputy Sigh away from him otherwise defendant was going to assault her, beat her up. 3RP 37. Defendant said, "Well, Bates, if she comes near me, the custodial assault will be on you. I warned you." 3RP 63.

Defendant argues that the critical facts show that a reasonable person in his position would not believe that his threats

would be taken seriously. Appellant's Brief 18-19. Defendant cites State v. Kilburn, to support this argument. His reliance on Kilburn is misplaced. The defendant in Kilburn was a middle school student who told fellow student K.J., "I'm going to bring a gun to school tomorrow and shoot everyone and start with you." Kilburn, 151 Wn.2d at 39. K.J. thought Kilburn might be joking because he had never done anything like that before. Id. K.J. testified that "he was acting kind of like he was joking, but I didn't know if he was joking or not." Id. at 53. The Court found that the facts showed that a reasonable person in the defendant's position would not foresee that his comments would be interpreted seriously and reversed the conviction. Id. at 53-54.

Here, there was no indication that defendant was joking. After making offensive racial insults directed at Deputy Sigh for several hours over two days, defendant communicate directly and indirectly his intent to cause harm to Deputy Sigh. In light of the critical facts, a reasonable person in defendant's position would foresee that defendant's statements would be interpreted as serious expressions of intent to inflict harm on Deputy Sigh. A reasonable juror could infer that the statements were made as a serious expression of intention to carry out the threats and not as

idle talk nor made in jest. The statements clearly constituted true threats.

**C. A REASONABLE PERSON IN DEPUTY SIGH'S POSITION WOULD REASONABLY FEAR DEFENDANT'S THREATS BECAUSE IT WAS APPARENT THAT DEFENDANT COULD CARRY OUT HIS THREATS.**

Defendant argues that his statements do not constitute malicious harassment because it was apparent that he could not carry out his threats and no reasonable person in Deputy Sigh's position would reasonably fear defendant's threats. Appellant's Brief 16-18.

As charged, defendant is guilty of malicious harassment by maliciously and intentionally threatening Deputy Sigh and placing her in reasonable fear of harm. RCW 9A.36.080(1)(c). The fear must be fear that a reasonable person who is a member of the victim's race would have under all the circumstances. *Id.*; CP 81 (Jury Instruction 8). Words alone cannot constitute malicious harassment "unless the context or circumstance surrounding the words indicates the words are a threat." RCW 9A.36.080(1)(c); CP 80 (Jury Instruction 7). Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat. RCW

9A.36.080(1)(c); CP 80 (Jury Instruction 7); see Read, 163 Wn. App. at 864.

Defendant contends that it was not reasonable for Deputy Sigh to fear defendant's threats because he was housed in a maximum security module at the county jail where he was under surveillance and had limited access to items he could use as weapons. This argument ignores the evidence in the record. In Four North it was common for inmates to assault officers through the cuff-port by grabbing officer's hands or hitting the officer with the food tray. 3RP 83. Inmates also threw stuff at officers through the cuff-port. 3RP 84. Defendant stated that he was "notorious for shit-bombing,"<sup>6</sup> had a record for custodial assault, and that he did not care about serving more time. 1RP 116; 3RP 77. The record clearly shows that defendant could carry out his threats.

Defendant further argues that his claim to know people outside the jail who could find Deputy Sign was puffery. Again this argument ignores the evidence in the record. Inmates in maximum security are allowed visitors and can communicate with people outside the jail. 3RP 38. Nor was any evidence presented that

---

<sup>6</sup> In the jail context shit-bombing is when a person collects feces and or urine and throws it at someone. 1RP 116-117.

defendant would not get out of jail at some point. In context and under all the circumstances in the present case, it was apparent to a reasonable person in Deputy Sigh's place that defendant had the ability to carry out his threats. A reasonable person who was a member of the Deputy Sigh's race would have been placed in reasonable fear from defendant's threats.

**D. THE JURY INSTRUCTIONS AS A WHOLE CORRECTLY STATED THE APPLICABLE LAW AND DID NOT LESSEN THE STATE'S BURDEN OF PROOF.**

Defendant argues that the trial court's jury instructions eliminated the State's burden of proving that defendant's acts were malicious and reduced the State's burden of proving defendant's actions were based on his perception of Deputy Sigh's race. Appellant's Brief 21-27. An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002), citing State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997) and State v. Byrd, 125 Wn.2d 707, 713–714, 887 P.2d 396 (1995).

Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Defendant was

charged with malicious harassment and the trial court correctly instructed the jury on the elements of that offense. CP 86 (Jury Instruction 13, WPIC 36.03). Jury instructions must be relevant to the evidence presented. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). However, not every omission or misstatement in a jury instruction relieves the State of its burden. Brown, 147 Wn.2d at 339.

A constitutional error is harmless only if the court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. State v. Linehan, 147 Wn.2d 638, 643, 56 P.3d 542 (2002); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). “A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” Smith, 131 Wn.2d at 264 (citations omitted). Whether jury instructions as a whole correctly state the applicable law is a question of law reviewed de novo. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); Pirtle, 127 Wn.2d at 656; State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011).

## 1. Jury Instruction 12.

Defendant argues that Instruction 12, based on a proposed defense instruction,<sup>7</sup> eliminated the State's burden of proving that defendant's actions were both intentional and malicious. Appellant's Brief 21-22. To be constitutional, jury instructions need instruct the jury about each element of the offense charged. State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988). In this case, the jury was properly instructed regarding each element of malicious harassment and of the State's burden to prove each element beyond a reasonable doubt. CP 86 (Jury Instruction 13, the to-convict instruction).

The State must prove every essential element of a crime beyond a reasonable doubt in order for the court to uphold a conviction. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). It is reversible error to instruct the jury in a manner that relieves the State of this burden. Byrd, 125 Wn.2d at 714. In the present case, the jury was instructed that a necessary element of the crime of malicious harassment was that "defendant acted

---

<sup>7</sup> A trial court's refusal to give a jury instruction is reviewed for abuse of discretion. State v. Buzzell, 148 Wn. App. 592, 602, 200 P.3d 287 (2009).

maliciously and intentionally.” CP 86 (Jury Instruction 13). The to-convict instruction also told the jury that each element had to be proved beyond a reasonable doubt. Id. Nothing in this instruction, or any other instruction, informed the jury of any circumstance in which it could return a verdict of guilty on the charge of malicious harassment without finding all of the elements. The jury instructions clearly required the jury to find beyond a reasonable doubt that the defendant acted maliciously and intentionally. There was no instructional error or due process violation.

## **2. Jury Instruction 9.<sup>8</sup>**

Defendant argues that Instruction 9 reduced the State’s burden of proving defendant’s actions were based on his perception of Deputy Sigh’s race. Appellant’s Brief 23-27. Defendant acknowledges that instruction 9 included the language of his proposed instruction. Id. 23; CP 92. Defendant’s proposed instruction cited State v. Read, 163 Wn. App. 853, 865-866. Defendant asserts that the additional language included in the court’s instruction is not consistent with State v. Talley, 122 Wn.2d

---

<sup>8</sup> The context indicates that defendant is addressing Instruction 9. The reference to Instruction 11 in Appellant’s Brief at 23, appears to be in error.

192, 858 P.2d 217 (1993). The “additional language” included in

Instruction 9 reads:

There may be multiple reasons for a defendant's acts. The defendant's perception of the person's race or color need not be the only or primary reason, but it must be proved<sup>9</sup> to be a reason without which the defendant's acts would not have happened.

CP 82. This language is supported by this court's analysis in State

v. Read:

Relying on the supreme court's interpretation of the meaning of “because of” in Talley, we rejected the argument that absent a substantial factor requirement the statute was unconstitutionally vague, and held that it is not necessary “to read a substantial factor requirement into RCW 9A.36.080.” Pollard, 80 Wn. App. at 68–69, 906 P.2d 976.

163 Wn. App. at 866 (footnote omitted). The “additional language”

is further supported by the court's analysis in State v. Johnson:

“The trier of fact need not weigh the extent to which bias played a role in the commission of the crime.” 115 Wn. App at 896.

Instruction 9 is supported by the applicable law. The instruction did not reduce the State's burden of proving defendant's actions were based on his perception of Deputy Sigh's race.

---

<sup>9</sup> Defendant's claim that the jury's question shows that the jury was confused by this language is not supported by the facts. Appellant's Brief 25, 26. The jury question shows that the jury misread the instruction substituting the word “provided” for “proved”. The court properly responded by directing the jury to re-read the instruction. CP 70.

Defendant further argues that because the jury acquitted him on count 1, his defense “that he was complaining about Deputy Sigh because she improperly left him in an unsanitary jail cell for several hours with only a mattress and the clothing he was wearing ... was critical to their deliberations.” Appellant’s Brief 26.

“Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002), quoting Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996); State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Before addressing whether an instruction fairly allowed the parties to argue the case, the court must first determine whether the instructions accurately stated the law without misleading the jury. Linehan, 147 Wn.2d at 643. Even if an instruction may be misleading, it will not be reversed unless prejudice is shown by the complaining party. Keller, 146 Wn.2d at 249. If, on the other hand, a jury instruction correctly states the law, the trial court’s decision to give the instruction will not be disturbed absent an abuse of

discretion. State v. Aquirre, 168 Wn.2d 350, 363-364, 229 P.3d 669 (2010).

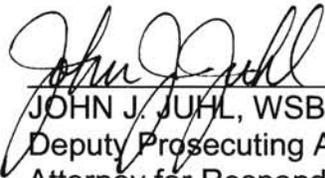
Here, Instruction 9 correctly states the law. Further, defendant has not show how he was prejudiced by Instruction 9. The instruction fairly allowed the parties to argue the case. Viewing the instructions in the present case as a whole and in the context of the testimony and arguments, the jury instructions correctly informed the jury of the applicable law, were not misleading, and allowed each party to argue its theory of the case.

#### **IV. CONCLUSION**

For the foregoing reasons, the defendant's conviction should be affirmed and his appeal should be denied.

Respectfully submitted on May 29, 2013.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
JOHN J. JUHL, WSBA #18951  
Deputy Prosecuting Attorney  
Attorney for Respondent