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No. 70740-0-I

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

STATE OF WASHINGTON,

Respondent

v.

KEITH RATLIFF,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Mr. Ratliff uttered a “true threat,” in violation of his First Amendment right to free speech.

2. The State failed to prove beyond a reasonable doubt every essential element of felony harassment as charged, in violation of Mr. Ratliff’s Fourteenth Amendment right to due process, in that the State failed to prove Ms. Cavallo’s fear was reasonable, under the circumstances.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict a defendant of harassment of a criminal justice participant, the constitutional right to free speech requires the State to prove beyond a reasonable doubt that the threat was a “true threat.” A “true threat” to cause bodily injury 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 cause bodily injury. In the absence of evidence to prove beyond a reasonable doubt that a reasonable person in Mr. Ratliff’s position would foresee his statement as a serious expression of

intention to cause such injury, must his conviction for harassment be reversed?

2. 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 person threatened reasonably feared Mr. Ratliff would act upon his threat, must the conviction for harassment be reversed?

C. STATEMENT OF THE CASE

At a routine court appearance at the King County Courthouse on November 15, 2012, Keith Ratliff was seated at counsels' table with his attorney, Janet Cavallo. RP 266, 283. Without notifying Mr. Ratliff of her intentions, Ms. Cavallo decided to inform the court that Mr. Ratliff should be scheduled for a competency evaluation, over his objection. RP 279-81. Mr. Ratliff told the court that he no longer wanted to be

represented by Ms. Cavallo or her office.¹ RP 264-67, 270, 281; Ex. 6 (at 1:23, 3:45). The court and Ms. Cavallo ignored Mr. Ratliff's request for new counsel. Ex. 6. Shortly thereafter, Mr. Ratliff leaned over to Ms. Cavallo and said, "Bitch, you're dead." RP 265; Ex. 6 (at 4:09).²

Ms. Cavallo testified that she did not react to the comment and continued to do her job, waiting for the court to set a date for Mr. Ratliff's next hearing. RP 267-68, 272. Ms. Cavallo testified that this comment did not cause her any concern for her safety, as "I've had angry clients before." RP 266. She also noted that she "was in an open courtroom and there were two marshals present, and they were standing right behind us." RP 266. Ms. Cavallo stated that she felt safe. *Id.* She testified, "I wasn't afraid because I was in the safest place where I could be." RP 273.

After some passage of time, while Ms. Cavallo sat at the table next to her client, she was suddenly hit on the jaw by Mr. Ratliff, and has experienced resulting medical complications ever since. RP 192-93, 268-70, 275-79.

¹ Ms. Cavallo works as an attorney for Associated Counsel for the Accused (ACA). RP 262.

² At trial, Ms. Cavallo testified that said the phraseology was, "You're dead, bitch;" however, the audiotape speaks for itself. RP 272.

Mr. Ratliff was charged with assault in the second degree and harassment of a criminal justice participant. RCW 9A.46.020(2)(b)(iii); CP 37-38.

Following a jury trial, Mr. Ratliff was convicted as charged. CP 39-40.

D. ARGUMENT

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. RATLIFF MADE A “TRUE THREAT” TO CAUSE BODILY INJURY TO MS. CAVALLO, AND THAT MS. CAVALLO REASONABLY BELIEVED HE WOULD CARRY OUT HIS THREAT TO HARM HER.

a. The State is required to prove every essential element of the crime beyond a reasonable doubt and, where the crime implicates speech, the State is further required to prove the proscribed speech is not protected by the Constitution. 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).

Where a challenge to the sufficiency of evidence implicates core First Amendment rights, the appellate court must conduct an independent review of the record to determine whether the speech in question was unprotected. State v. Johnston, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006). “It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court’s findings.” State v. Kilburn, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004). Rather, the “rule of independent review” requires an appellate court to “freshly examine ‘crucial facts.’” – those facts that are intricately intermingled with the legal question. Id. at 50-51. “Also, the appellate court may review evidence ignored by a lower court in deciding the constitutional question.” Id. at 51; accord State v. Locke, 175 Wn. App. 779, 790, 307 P.3d 771 (2013).

b. The State failed to produce sufficient evidence to prove beyond a reasonable doubt that Mr. Ratliff communicated a “true threat.” A threat is pure speech. State v. Williams, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). The United States Constitution and the Washington Constitution guarantee freedom of speech. U.S. Const. amend. I; Wash. Const. art. 1, § 5; R.A.V. v. St. Paul, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992); City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). To comport with the constitutional right to free speech, a statute that criminalizes pure speech must be limited to unprotected speech only, such as “true threats,” “fighting words,” or words that produce a “clear and present danger.” Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L.Ed.2d 1031 (1942); Schenck v. United States, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L.Ed.2d 470 (1919); State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013).

Not all threats are “true threats.” Watts, 394 U.S. at 707.
“Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listener.”

Bauer v. Sampson, 261 F.3d 775, 783 (9th Cir. 2001) (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)).

In Washington, courts adhere to an objective speaker-based test for a “true threat.”

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. A true threat is a serious one, not one said in jest, idle talk, or political argument. Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.

Kilburn, 151 Wn.2d at 43-44 (internal citations and quotations omitted); accord Allen, 176 Wn.2d at 626. Thus, statements that “bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole” are not true threats. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

Here, in context and under the circumstances, a reasonable person in Mr. Ratliff’s position would not foresee that his statement would be interpreted as a serious express of intent to cause bodily harm to Ms. Cavallo. Mr. Ratliff objected to Ms. Cavallo’s decision to recommend a competency evaluation, due to the tolling of his speedy trial clock; this was known to Ms. Cavallo. RP 264, 280-82; Ex. 6. In

fact, the source of their disagreement over representation was Ms. Cavallo's decision to recommend a competency evaluation. RP 279-82; Ex. 6. Mr. Ratliff repeatedly asked for new counsel and was ignored by both his attorney and by the court. RP 264-66; Ex. 6 (at 1:23, "I would really want my attorney really, really removed;" at 3:45; "I don't want this attorney no more.").³

Mr. Ratliff's next words to Ms. Cavallo were indeed "mean" and "awful," as one of the courtroom marshals testified at trial. RP 191-93. However, even Ms. Cavallo -- herself the target of the purported threat -- stated that she did not feel afraid, and noted that she did not react to the comment, but just "continue[d] doing my job." RP 272. Ms. Cavallo knew that she "was in the safest place where I could be," and that since she was in the courtroom, she and Mr. Ratliff were both flanked by marshals. RP 273. She recalled that if the marshals standing behind them had been any closer, they would have been touching them. Id.

³ Mr. Ratliff's testimony indicated that he did not intend for his words to be threatening to Ms. Cavallo, but were, rather, an attempt to get her to withdraw from his case, after the court disregarded his requests for a new attorney. RP 322-23; Ex.6. "Unfortunately, I didn't really mean it, but that's what happened. I'm trying to get rid of her, off my case...she's not representing me." RP 326.

In contrast, in State v. Schaler, the defendant threatened the victims with a chainsaw and told authorities that “someone was going to die.” 169 Wn.2d at 281. The defendant in Schaler also told a mental health worker, “next time he was going to get a bunch of guns, and it would be [a] blood bath.” Id. at 279. The doctor in Schaler testified that the defendant “was pretty specific that he, he wanted to kill his neighbors ... [he] specifically said that he wanted to kill them with his bare hands, by strangulation.” Id. at 280 (internal citations omitted). The victim in Schaler, unlike the victim in Mr. Ratliff’s case, testified that she believed the threat when she heard it, and after she heard the threats conveyed by the hospital staff. Id. at 281.

Likewise in contrast to Mr. Ratliff’s conduct, in State v. Locke, over a four-minute period of time, that defendant sent three e-mails to former Governor Gregoire’s government web site. 175 Wn. App, at 785. In the first e-mail, he identified his city as “Gregoiremustdie,” and wrote that he hoped she would see a family member raped and murdered by a sexual predator, and that she had put the state “in the toilet.” Id. In the second e-mail, the defendant again identified his city as “Gregoiremustdie,” and wrote that she was a “fucking c*nt,” and she should be burned at the stake. Id. In the third e-mail, the defendant

requested permission for his organization called “Gregoire Must Die” [sic] to hold an event at the Governor’s mansion, he described the event as “Gregoire’s public execution,” he invited the Governor to be the event “honoree,” stated that the event would last 15 minutes, the media would be invited, and the event would be attended by more than 150 people. Id. at 786. The court ruled that the first e-mail, albeit “crude and upsetting,” was hyperbolic political speech “threatening personal consequences from the state’s policies,” rather than a true threat. Id. at 791. The court further ruled that the second e-mail, standing alone, also was not a true threat. Id. However, the second and third e-mails, considered together, did constitute a true threat because “[t]he menace of the communication was ... heightened by its specificity,” and the defendant “had no preexisting relationship or communication with the Governor from which he might have an expectation that she would not take his statements seriously.” Id. at 792-93.

“Speech is protected, even though it may advocate action which is highly alarming to the target of the communication, unless it fits under the narrow category of a ‘true threat.’” Williams, 144 Wn.2d at 209 (citations omitted). Here, in the absence of proof beyond a reasonable doubt that a reasonable person in Mr. Ratliff’s position

would foresee that his statement would be taken out of context and deemed a serious expression of intent to cause bodily harm, immediately or in the future, to Ms. Cavallo, his statement was not a true threat and his conviction for harassment must be reversed and dismissed with prejudice. See Kilburn, 151 Wn.2d at 54.

c. The State failed to produce sufficient evidence to prove beyond a reasonable doubt that Ms. Cavallo reasonably feared that Mr. Ratliff would cause her bodily harm. As charged, the crime of harassment was elevated to a felony on the grounds the threat to cause bodily injury was a threat against a criminal justice participant. CP 37-38; 59, 63; RCW 9A.46.020(2)(b)(iii). Thus, the State was required to prove beyond a reasonable doubt that Ms. Cavallo was placed in reasonable fear that Mr. Ratliff would actually carry out his purported threat to cause her bodily harm. See State v. Mills, 154 Wn.2d 1, 10-11, 109 P.3d 415 (2005) (State must prove victim was placed in reasonable fear that the threat made, i.e., a threat to kill, would be carried out).

Ms. Cavallo testified that she was not, in fact, placed in fear by Mr. Ratliff's words, themselves. RP 272, 284-85.⁴ Ms. Cavallo testified at length about her professionalism and her determination to

⁴ She did testify that, in light of her injuries, she feels retroactively fearful, but that this is not due to Mr. Ratliff's words. RP 273.

continue her representation of Mr. Ratliff, despite his angry words to her in the courtroom. RP 272, 284-85. She discussed her decision not to react to Mr. Ratliff's statement, "Bitch, you're dead," and to continue to "treat him with dignity and respect as I'd treat any other client." RP 285. Ms. Cavallo also acknowledged that, had she felt she was in danger, she could have stopped the proceedings and notified the judge and stopped the proceedings or taken a recess. RP 284. She insisted that she never felt a need to take such a recess, since, as Ms. Cavallo stated, "the marshals were standing right behind us and it just wasn't realistic to believe that anything . . . would have happened or could have happened at that time." RP 284.⁵

Although Ms. Cavallo testified at trial that the incident with Mr. Ratliff has affected her comfort level in the courtroom in general, she conceded that she has no real concern that Mr. Ratliff will attempt to contact her in the future. RP 285. Ms. Cavallo stated that Mr. Ratliff has not attempted to contact her by telephone, letter, or voicemail, but only that the incident has colored her perception of the sanctity of the courtroom in general. Id.

⁵ On the audiotape, there is a significant delay between Mr. Ratliff's angry words and the assault, during which Ms. Cavallo returns to her work; Ms. Cavallo can be heard, repeatedly asking Mr. Ratliff to sign paperwork. RP 284-85; Ex. 6 (at 4:09-4:29).

Regardless of how vulnerable this incident has made Ms. Cavallo feel, in retrospect, what Ms. Cavallo actually describes is a more generalized post-traumatic stress that she carries with her from the incident, and for which the State attempts to blame Mr. Ratliff:

Well, it's destroyed that feeling of safety. There's a sanctity in the courtroom that has been destroyed by that, by his acts, where I never felt that I was in danger before. It would never cross my mind, especially if there were marshals there and everybody's there and things are working the way they should be. And now, it crosses my mind almost every time I'm in court. And I do return to the courthouse where this happened. Every time I make a court appearance, I'm going back to where this happened, and so it does cross my mind, whereas it never occurred to me before. If there's a situation, or there have actually been a couple of situations since then with other clients that my reaction has been a lot different than it would have been a year ago. And so it's become something that I think about all the time.

RP 273-74.

The State must prove, however, that Mr. Ratliff knowingly threatened to cause bodily injury, immediately or in the future, and also that Ms. Cavallo was actually placed in fear by the threat and that her fear was reasonable. RCW 9A.46.020(2)(b). Subsequent fear due to a subsequent event is not sufficient to prove the crime of harassment.

In State v. C.G., the juvenile defendant was convicted of harassment by threats to kill based on her statement, "I'll kill you, Mr.

Haney, I'll kill you," while she was being disciplined by the school vice principal. 150 Wn.2d 604, 606-07, 80 P.3d 594 (2003). The vice principal testified that the purported threat made him concerned that C.G. might try to harm him or someone else in the future. Id. at 607. On appeal, the adjudication was reversed on the grounds that there was no evidence the vice principal's alleged fear that C.G. would actually kill him was reasonable. Id. at 610.

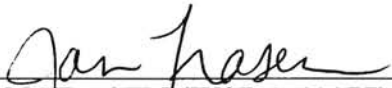
Here, as in C.G., the State established only that Ms. Cavallo was concerned after the fact, in a general sense that she was vulnerable in the workplace, but the State did not prove that she was placed in reasonable fear that Mr. Ratliff would specifically harm her, regardless of his harsh words. See Williams, 144 Wn.2d at 209 (protecting even "highly alarming" speech). Mr. Ratliff's conviction for felony harassment by a threat to criminal justice participant must be reversed and dismissed with prejudice.

E. CONCLUSION

The State failed to produce sufficient evidence to establish beyond a reasonable doubt that Mr. Ratliff uttered a true threat or that Ms. Cavallo was in reasonable fear that Mr. Ratliff actually would carry out his purported threat to cause her bodily injury. For the

foregoing reasons, Mr. Ratliff requests this court reverse his conviction with instructions to dismiss the charge with prejudice against refiling.

Respectfully submitted this 27th day of February, 2014.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70740-0-I
v.)	
)	
KEITH RATLIFF,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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