COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent	)	COURT OF APPEALS NO. 318664
v.	)	
THOMAS MITZLAFF Appellant	)	Response to State's Motion On The Merits To Affirm

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I. Identity of Party

Appellant Thomas Mitzlaff, by and through his attorney, Marie Trombley, respectfully requests the relief designated in Part II.

II. Statement of Relief Sought

Mr. Mitzlaff respectfully asks this Court to deny the State's motion on the merits as to his convictions because this case does not meet the requirements of RAP 18.14 and requires full appellate review.

III. Statement of Facts Relevant To Motion

The relevant facts are set forth in Mr. Mitzlaff's opening brief and are incorporated by reference pursuant to RAP 18.14(c), and the following facts are added.

In the respondent's motion, the knife the officer found and testified to at trial is referred to as a "butcher knife." (Motion of Resp. at 5, 8). However, the record demonstrates that the witnesses referred to the object as "a knife". (RP 12, 20). The prosecuting attorney referred to it as a "butcher knife type of thing".

(RP 20). Witness Page testified, "It was bigger than a steak knife, but not as big as a butcher knife..." (RP 42).

Respondent's brief cites that Ms. Topel "reported that the defendant hit her in the head with a potted plant." (Motion of Resp. at 5). The record is that Ms. Topel reported the potted plant fell and hit her on the head: not that Mr. Mitzlaff hit her in the head with the plant. (RP 27).

Defense counsel raised a hearsay objection to the officer's testimony regarding statements Ms. Topel made to him. (RP 13). Counsel also addressed the trial court regarding the hearsay statement offered by Witness Page, that Ms. Topel told her "he has done this before but never like this." (RP 44). Counsel stated:

> But I indicated to my client, I had some concern about Ms. Page's testimony about, "He has done similar things like this before, but never this bad." I indicated to my client I debated about raising an objection at that time. And, quite frankly, I felt to do so would be to only enhance that testimony." (RP 44).

IV. Argument

RAP 18.14(e) provides that a motion on the merits will only be granted if the appeal is determined to be clearly without merit. The relevant factors for determining whether an appeal is without merit are whether the issues on appeal (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c)

are matters of judicial discretion and the decision was clearly within the discretion of the court. RAP. 18.14(e).

The motion on the merits appears to have conflated the elements of two separate crimes of felony harassment and first-degree assault and misstates the argument of appellant. (Motion on the Merits p. 12-14).

The offense of harassment is elevated from a misdemeanor to a felony when the threat is a threat to kill. *State v. Mills,* 154 Wn.2d 1, 12, 109 P.3d 415 (2005). As charged, to sustain a conviction for felony harassment, the State bore the burden to prove beyond a reasonable doubt that Mr. Mitzlaff knowingly threatened to kill Ms. Topel and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out. RCW 9A.46.020(1)(a)(b), (2)(b)(ii) (CP 31). In other words, there must be a knowing threat to kill, heard by the person and then by the words or conduct of the accused, that person is placed in reasonable fear the threat to kill will be carried out.

The record substantiates Mr. Mitzlaff's argument that Ms. Topel said that the *only* thing she heard Mr. Mitzlaff say was, "See how easy this would be." (RP 8). She specifically stated she did *not* hear him say anything else; i.e. that he said he would kill her. (RP 27). The prosecutor, in closing argument, also pointed out that Ms.

Topel "did not say anything about him threatening to kill her." (RP 66). There was no evidence that Ms. Topel was aware of a threat to kill, an essential element of felony harassment. *State v. C.G.* 150 Wn.2d 604, 609, 80 P.3d 594 (2003); *State v. J.M.,* 144 Wn.2d 472, 482, 28 P.3d 720 (2001); *State v. Kiehl,* 128 Wn.App. 88, 113 P.3d 528 (2005).

The State argues that because a third-party witness reported she heard a threat to kill, it is sufficient to presume Ms. Topel also heard it. (Motion on the Merits p. 8). This is in direct contradiction to Ms. Topel's testimony. The existence of a fact cannot rest on speculation, guess, or conjecture. *State v. Hutton,* 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

The State also argues that because Ms. Topel was frightened she reasonably feared her would kill her. (Motion on the Merits at p.8,11). Setting aside the issue of the failure of the State to produce evidence that Ms. Topel was aware of a threat to kill: there was also a complete absence of testimony that she reasonably feared the unheard threat would be carried out. As stated above, the distinguishing feature of felony harassment is the threat to kill and a victim being placed in reasonable fear of *that* threat being carried out. *Mills,* 154 Wn.2d at 11-12.

Ms. Topel described the events, the fact that her head hurt (no marks or blood) and there was a small red mark on her neck. (RP 16,27). Ms. Topel may have been reasonably frightened of bodily injury, without being placed in reasonable fear of being killed. *Mills,* 154 Wn.2d at 15.

The law and evidence do not support a conviction for felony harassment. The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *State v. Colquitt,* 133 Wn.App. 789, 796, 137 P.3d 892 (2006).

It appears the State's motion on the merits slightly misstates appellant's argument with respect to the first-degree assault conviction. Appellant argues the evidence was insufficient to establish intent to inflict great bodily harm. The State has added that appellant argues the State must show a substantial step to kill. (Motion on the Merits at 12). This is incorrect.

Appellant argued the State must prove a specific intent to inflict great bodily harm in order to establish first-degree assault. RCW 9.94A.011(1)(a). The State bore the burden to prove beyond a reasonable doubt that Mr. Mitzlaff specifically intended to inflict a bodily injury which created the probability of death, or which causes significant serious permanent disfigurement, or which causes a

significant permanent loss or impairment of the function of any bodily part or organ. RCW 9A.04.110(4)(c).

The distinguishing features between first and second-degree assault are the specific intent to inflict great bodily harm and the level of bodily harm. RCW 9A.35.011, .021. Using the dull edge of a knife does not evidence intent to inflict injury, which creates a probability of death or caused significant serious permanent disfigurement, a significant permanent loss, or impairment of the function of any bodily part or organ. The evidence here shows that Ms. Topel's head hurt and she had a small red mark on her neck. Additionally, the only evidence that there was a previous incident was the statement made by the neighbor- which was actually inadmissible hearsay and should not have been considered for the truth of the matter. ER 801(c), 802.

Mr. Mitzlaff incorporates the remaining arguments by reference and rests on the facts and authorities cited in appellant's opening brief.

V. Conclusion

The facts of this case do not support the convictions. Mr. Mitzlaff's appeal has merit. He respectfully asks this Court to deny the State's motion on the merits and set this case for determination by the panel on the Court's next available calendar.

Dated this 2nd day of October, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Thomas Mitzlaff, do hereby certify under penalty of perjury under the laws of the State of Washington, that a true and correct copy of the Response to the Motion on the Merits was mailed on October 2, 2014, USPS, first class postage paid or emailed by agreement between the parties to:

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