71810-0

71810-0

No. 71810-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARVIN KRONA,

Appellant.

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

REPLY BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
oliver@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Jurisdictions

Constitutional Provisions

Rules and Statutes

A. REPLY ARGUMENT

1. There was insufficient evidence to prove that a reasonable *criminal justice participant* would have reasonably feared that Mr. Krona's threat would be carried out .

The State contends that Mr. Krona's state of physical and mental inability is not pertinent to the question whether Deputy Navarro could reasonable have believed that Mr. Krona would carry out the alleged threatening language that was testified to. Brief of Respondent, at p. 12.

However, when the threat involves a criminal justice participant, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. RCW 9A.46.020(1)(a)(i), (b); RCW 9A.46.020(2)(b)(iii)-(iv).

In this case, the evidence failed to establish that Deputy Navarro's claimed fear from the threat was a fear that a reasonable criminal justice participant would have under the circumstances. These very officers transported Mr. Krona not to jail, but first to the hospital, because of his incapacity. 3/3/14 RP 123-24. Mr. Krona could not stand properly upon exiting the car -- much less strike at a person physically. 3/3/14 RP 117, 137. In fact, he went in and out of consciousness at the hospital. Such a person poses no reasonable threat. 3/3/14 RP 122, 140.

To the extent he uttered any threat, Mr. Krona threatened everyone he came into contact with that evening, including the aid crew, medical staff, hospital security, and law enforcement. 3/3/14 RP 124, 126. No person could take his threats seriously, especially not a reasonable deputy, who would be used to dealing with obstreperous arrestees. And of course, during much of the contact with Deputy Navarro, Mr. Krona was in handcuffs or restrained to a hospital bed throughout the contact. 3/3/14 RP 116, 125, 126.

No reasonable criminal justice participant would fear that Mr. Krona would single him out of all the people threatened and carry out his threat in the future. RCW 9A.46.020(2)(b) makes clear that "[t]hreatening 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." RCW 9A.46.020(2)(b).

A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Mr. Krona's conviction should be reversed.

2. <u>There was insufficient evidence to prove that Mr. Krona's words were a "true threat" where a reasonable person in his place would not have foreseen that the listener would interpret the statement as a serious expression of his intentions</u>.

The State argues that Mr. Krona made a true threat, Brief of Respondent, at pp. 8-9, but concedes that, on an appeal of a conviction for harassment, reviewing courts apply the rule of independent review because the sufficiency of evidence question involves the essential First Amendment question of whether the defendant's statements constituted a "true threat" and therefore unprotected speech. *State v. Kilburn*, 151 Wn.2d 36, 52, 84 P.3d 1215 (2004). <u>See</u> Brief of Respondent, at pp. 8-10.

This Court should find that no true threat was made. From his perspective, Mr. Krona testified that he remembered getting "foul mouthed," but he did not remember much of what he said during his arrest and at the hospital. 3/4/14 RP 124. As noted, he could not stand without falling over and was restrained during his entire tirade. 3/3/14 RP 116, 125, 126, 137. A reasonable person in Mr. Krona's situation (i.e., either handcuffed or restrained to a bed, in and out of consciousness, and exceedingly drunk) would not have foreseen that Deputy Navarro would interpret his invective as a serious threat.

Importantly on this point, the United States Supreme Court recently granted certiorari in *Elonis v. United States*, 134 S. Ct. 2819, June 16, 2014. The Third Circuit affirmed the defendant's conviction for harassment in *United States v. Elonis*, 730 F.3d 321 (3rd Cir. 2013). The case presented the question of whether the true threats exception to speech protection under the First Amendment requires a jury to find the defendant subjectively intended his statements to be understood as threats. *Id.* at 323. The Third Circuit held that an objective standard applies and a true threat occurs when a reasonable speaker would foresee the statement would be interpreted as a threat. *Id.* at 332. The Ninth Circuit has previously held that speech may be deemed a true threat only upon proof that the speaker subjectively intended the speech as a threat. *United States v. Cassel*, 408 F.3d 622, 632-33 (9th Cir. 2005). Viewed subjectively, there was no true threat.

Mr. Krona's conviction must be reversed.

3. The Confrontation Clause of the Sixth Amendment provides that an accused has the right to be confronted with the witnesses against him, and hearsay admitted here violated that rule, the evidence rules.

The evidence that Mr. Krona was dangerous and had a history of threatening law enforcement and resisting arrest was testimonial because it was an assertion of past events. Mr. Krona could not cross

examine the officer or officers who entered that caution into the computer system. Cross examination would have revealed the circumstances that led to the caution, allowing the jury to independently assess how to consider this evidence.

In this case, neither Mr. Krona nor the jury had the benefit of having this testimony subjected to cross examination to uncover bias, expose error, and reveal the truth. Mr. Krona had a constitutional right to confront and cross examine the declarant of this testimonial statement, which was made for the purpose of establishing and proving a past and specific fact: that Mr. Krona was dangerous because he had previously threatened law enforcement officers. Mr. Krona had no opportunity to assess the reliability of this evidence by testing it "in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 60, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Because the evidence was testimonial and Mr. Krona had no opportunity to cross examine the witness about these assertions, its admission violated the Sixth Amendment.

Further, unless an exception or exclusion applies, hearsay is inadmissible. ER 802. In this case, the trial court concluded that the law enforcement caution was relevant to Deputy Navarro's state of

mind. 3/3/14 RP 13. However, the statement is only relevant if it is truthful and thus it was offered for the truth of its matter: that Mr. Krona was dangerous because he had previously threatened law enforcement. "A statement is not hearsay if it is used only to show the effect on the listener, *without regard to the truth of the statement.*" *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) (emphasis added).

None of these deputies had personal knowledge of Mr. Krona's prior incidents with law enforcement. *See* 3/3/14 RP 140; 3/4/14 RP 28, 40-41. Deputy Navarro was the only law enforcement officer whose state of mind was relevant because he was the alleged victim of the harassment charge – but crucially, the trial court also permitted Deputy Johnson and Deputy Koziol to testify about Mr. Krona's alleged history of threatened violence towards police officers. 3/4/14 RP 28, 40-41. If this evidence was to show only Deputy Navarro's state of mind, Deputy Koziol and Deputy Johnson should not have been permitted to testify in this manner because their knowledge of Mr. Krona's past threats is not relevant to Deputy Navarro's state of mind.

Additionally, this evidence caused unfair prejudice is that which is more likely to arouse an emotional response than a rational decision

and which creates an undue tendency to suggest a decision on an improper basis. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Mr. Krona's history of prior threats towards law enforcement was of minimal relevance to Deputy Navarro's fear.

Finally, Mr. Krona argues that ER 404(b) required exclusion of this evidence where it was plainly admitted for the purpose of painting Mr. Krona as a person of bad character and to show that he acted in conformity with that character on July 13, 2013. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The State argues A sentence that is based upon an incorrect offender score is "a fundamental defect that inherently results in a miscarriage of justice." *Id.* at 867-68 (citing *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997)). A defendant cannot waive a challenge to a miscalculated offender score because an improperly calculated score lacks statutory authority. *State v. Wilson*, 170 Wn.2d 682, 688, 244 P.3d 950 (2010). A sentencing court's offender score calculation is reviewed de novo. *Id.* at 687

4. <u>Mr. Krona's offender score was incorrectly calculated.</u>

First, RCW 9.94A.525 governs the calculation of an offender score for DUI. <u>See</u> RCW 9.94A.525(2) (2011). Here, the Judgment and

Sentence indicates that a 1985 taking a motor vehicle without permission conviction and a 1995 attempting to elude conviction were used for purposes of calculating Mr. Krona's offender score. CP 30. Neither of these convictions falls within the class of offense in former RCW 9.94A.525(2)(e) and therefore should not have been included in his driving under the influence offender score.

Next, and relatedly, Mr. Krona's other current conviction for harassment under the same cause number should be treated as a prior conviction when calculating his offender score and is subject to the same restrictions of former RCW 9.94A.525(2)(e) previously discussed. It therefore should not have been included in his offender score. The State concedes this point. Brief of Respondent, at pp. 21-22.

Finally, the State failed its burden of proof at sentencing. *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). The State provided certified copies of the judgments or dockets for all the prior convictions listed in the Judgment and Sentence. CP 30; Sent. Exs. 1-4. The State established that Mr. Krona was convicted of taking a motor vehicle without permission in 1985 and ordered to serve 60 days of confinement. Sent. Ex. 4. The next conviction for which the State provided proof was attempting to elude; the judgment on that

conviction entered July 21, 1995. *Id.* But class C prior felony convictions, other than sex offenses, shall not be included in the offender score if "since the last date of release from confinement (including full time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender has spent five consecutive years in the community without committing any crime that subsequently results in a conviction." Former RCW 9.94A.525(2)(c) (2011). The State failed to prove that Mr. Krona did not spend five years in the community without committing a crime that resulted in conviction after his release on the 1985 charge. CP 30; Sent. Exs. 1-4.

Similarly, Mr. Krona's 1995 conviction for attempting to elude a police vehicle should not have been included because the State did not establish that it did not "wash out" pursuant to RCW 9.94A.525(2)(c). The State's evidence established that he was convicted on July 21, 1995. Sent. Ex. 4. While Mr. Krona obtained other convictions within the five years after his initial release, the State's evidence established that he was arrested on September 7, 2002 for driving under the influence. CP 30. He was not subsequently arrested again until May 9, 2008, which is more than five years after his 2002 arrest. *Id.* Therefore, this

crime free period indicated by the State's evidence also causes the 1995 attempting to elude conviction to wash.

Contrary to the State's arguments, *Hunley* makes clear that the State must prove the offender score by proving the prior convictions and necessary intervening misdemeanors by something more than a "supported" list of crimes. See Brief of Respondent, at pp. 24-26. What is adequate is a matter of Due Process. The *Hunley* Court stated that

> a criminal history summary may be accompanied by sufficient evidence to establish the prior convictions without violating due process. . . . In other words, there exists a set of circumstances under which the statute can be constitutionally applied. The amendment to RCW 9.94A.500(1) is unconstitutional only insofar as it allows a prosecuting authority to establish the existence and validity of a defendant's prior convictions with an unsupported criminal history summary from the prosecutor.

Hunley, at 916-17. Mr. Krona argues that the State's evidence did not meet *Hunley*, *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); or U.S. Const. amend. XIV and Const. art. I, § 3, because the evidence did not meet the preponderance of the evidence standard under the requirement that the State must at least introduce "evidence of some kind to support the alleged criminal history." *Ford*, 137 Wn.2d at 480.

B. CONCLUSION

This Court should reverse the trial court judgment and remand for the further reason that the trial court miscalculated Mr. Krona's offender score on both the driving under the influence and harassment convictions.

DATED this 18 day of February, 2015.

Respectfully submitted,

OLIVER R. DAVIS, WSBA No. 24560
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, MARVIN KRONA, Appellant.	)))))))))	NO. 71810-0-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **REPLY 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:

[X]	JOHN JUHL, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	MARVIN KRONA 908843 MCC- TWIN RIVERS UNIT PO BOX 888 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 18TH DAY OF FEBRUARY, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711