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Court of Appeals
Division III
State of Washington

FILED
JUL 11 2017
WASHINGTON STATE
SUPREME COURT

Supreme Court No. 94725-2
Court of Appeals No. 34055-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN RYAN GRAHAM,

Petitioner.

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

The Honorable James Triplet, Judge

PETITION FOR REVIEW

LISA E. TABBUT
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A. IDENTITY OF PETITIONER

Petitioner, Justin Ryan Graham, through his attorney, Lisa E. Tabbut, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Graham seeks review of the April 27, 2017, unpublished opinion of Division Three of the Court of Appeals (Appendix A). The Court of Appeals denied Grahams' motion for reconsideration on May 23, 2017. (Appendix B).

C. ISSUE PRESENTED FOR REVIEW

Whether the crime of intimidating a witness by attempting to influence testimony is proven when the evidence of intent is based on speculation instead of reasonable intent?

D. STATEMENT OF THE CASE

The court, after a trial to the bench, found Justin Graham guilty of Intimidating a Witness for using a threat against a current or prospective witness, Don Maupin, to influence Maupin's testimony.¹ CP 1. RCW 9A.72.110(1)(a). CP 2; RPI² 5-7; RP III 465; CP 22-23. The statement

¹ RCW 9A.72.110(1)(a)

² "RP I" refers to volume I of the verbatim report of proceedings. There are 4 volumes of verbatim for this appeal and they are all similarly cited in the record.

identified by the State as the “threat” was made during a jail phone call between Justin Graham and his brother Brandon Graham. Justin Graham was in jail for a misdemeanor assault on his girlfriend, Amy, and a DOC hold. Maupin and his girlfriend saw the assault and had reported it to police. Justin Graham said to Brandon Graham,

Well, I just talked to DOC today, and I got – I got 20 days violation; that’s it. But I’m trying to figure out what’s up on the – on the DV assault charge because fuckin’, uh fuckin’ Don and his girlfriend, fuckin’ are – are my witnesses, our witness saying that they are fuckin’ – that I, uh, they – they said all kinds of shit on my shit dude. They need to get their faces smashed in, both them.

Ex. D103. Thereafter, Justin Graham was charged with intimidating a witness. CP 1.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The evidence was insufficient to convict Justin Graham of attempting to influence Maupin’s testimony.

This court will accept review

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

The due process clauses of the federal and state constitutions require the government prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3. “[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d. 192, 201, 829 P.2d 1068 (1992).

Graham could only be convicted if the State proved, by use of a threat against Don Maupin, a current or prospective witness, that Graham attempted to influence the testimony of Maupin. RCW 9A.72.110(1)(a). But no evidence established Graham attempted to influence the testimony of Maupin.

During the phone call, Graham told his brother that Maupin and his girlfriend should have their faces smashed in. The Court of Appeals

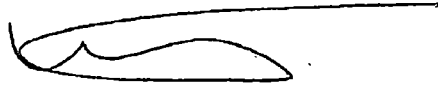
found sufficient evidence that Graham wanted Maupin's face smashed in to influence Maupin's testimony because in the phone call Graham referred to Maupin as a witness. This led the court to find the threat to Maupin was motivated, at least in part, by a desire to influence Maupin's testimony. Court of Appeals Opinion at 4.

The law recognizes a difference between an inference and speculation. An inference is, "A conclusion reached by considering other facts and deducing a logical consequence from them." Black's Law Dictionary 793 (8th ed. 2004). Speculation is "The act or practice of theorizing about matters over which there is no certain knowledge." Black's Law Dictionary 1435 (8th ed. 2004). Graham knew Maupin was a potential witness. Graham wanted Maupin's face smashed in. Without more, Graham's perceived intent was based on speculation rather than a logical inference and the Court of Appeals erred in finding to the contrary.

F. CONCLUSION

This court should accept review and reverse Mr. Graham's conviction.

Respectfully submitted June 20, 2017.



LISA E. TABBUT/WSBA 21344
Attorney for Justin Ryan Graham

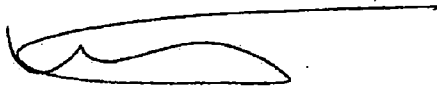
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Petition for Review to (1) Spokane County Prosecutor's Office, at SCPAAppeals@spokanecounty.org; (2) the Court of Appeals, Division III; and (3) I mailed it to Justin Ryan Graham, 1424 Courtland Ave, , Spokane Valley, WA 99205.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed June 20, 2017 in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Justin Ryan Graham, Petitioner

APPENDIX A

FILED
MAY 23, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

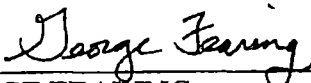
STATE OF WASHINGTON,)	
)	No. 34055-4-III
Respondent,)	
)	ORDER DENYING MOTION
v.)	FOR RECONSIDERATION
)	
JUSTIN RYAN GRAHAM,)	
)	
Appellant.)	

THE COURT has considered appellant Justin Ryan Graham's motion for reconsideration of our April 27, 2017, opinion, and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Korsmo, Siddoway and Pennell

FOR THE COURT:



GEORGE FEARING
Chief Judge

APPENDIX B

FILED
APRIL 27, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 34055-4-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
JUSTIN RYAN GRAHAM,)	
)	
Appellant.)	

PENNELL, J. — Justin Graham was convicted of one count of intimidating a witness under RCW 9A.72.110(1)(a). He appeals, arguing the evidence is insufficient to support his conviction because there is no evidence he intended to influence the witnesses' testimony. We affirm.

FACTS¹

On June 28, 2015, Justin Graham's neighbors observed him assaulting his girlfriend and called the police. After law enforcement responded, Mr. Graham was arrested and taken to a police car. During this process, Mr. Graham's brother, Brandon

¹ Because Mr. Graham appeals the sufficiency of the State's evidence, we construe the facts and inferences therefrom in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Graham, arrived at the scene. Mr. Graham told Brandon² his neighbors, Don Maupin and his girlfriend, had called the police on him. Mr. Graham also said, "You're dead," as he passed by Mr. Maupin under police escort. 1 Verbatim Report of Proceedings (VRP) (Sept. 28, 2015) at 141. Brandon subsequently confronted Mr. Maupin and repeated the same warning.

In either late June or early July, Brandon went back to the apartment complex and again confronted Mr. Maupin. This time, Brandon tried to attack Mr. Maupin with brass knuckles. However, someone alerted Brandon that he was being recorded. Brandon then left the scene, threatening Mr. Maupin that he would be back.

On July 2, 2015, the Graham brothers participated in a recorded jail call and engaged in the following discussion:

JUSTIN GRAHAM: Well I just talked to [Department of Corrections] today and I got, I got twenty days violation, that's it. But I'm trying to figure out what's up on the, on the [domestic violence] assault charge cause fuckin, uh, fuckin, Don and his girl, fuckin, are, are my witnesses, our witness saying that they fucking, that I, uh, they, they said all kinds of shit on my shit dude. They need to get their faces smashed in, both them.

BRANDON GRAHAM: Yeah, I tried to run em over and fucking hop out the car and break his face, last night when there was I saw I was on camera so I had to take off, came back next morning, had him hemmed up, got my mother fucking (INAUDIBLE) but I need to get him off camera.

² For ease of reference, Brandon Graham is referred to by his first name.

JUSTIN GRAHAM: I know. Um, yeah, cause they, uh, and then I went to court and they're saying that Don, Don went there saying that I did all kinds of shit to [my girlfriend] and all bunch of weird of shit. But hey I was told that, uh, somebody in here told me that if you put money on my books on Fri[day] or on Saturday that I, uh, that they won't take it from me.

Ex. 103 at 6-7.

About a week after the call, Brandon returned to Mr. Maupin's apartment complex. He assaulted one of Mr. Maupin's associates and then turned on Mr. Maupin and punched him in the face. Brandon told Mr. Maupin, "This is for snitching on my brother." 1 VRP (Sept. 28, 2015) at 149.

Justin Graham was charged with one count of intimidating a witness in an attempt to influence the witness' testimony. RCW 9A.72.110(1)(a). He was found guilty after a bench trial. This appeal follows.

ANALYSIS

A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to influence the testimony of said witness. RCW 9A.72.110(1)(a). The nature of the threat contemplated by the witness intimidation statute is very specific. It is not enough that the threat was made in an attempt to deter a witness from providing information to the police, as opposed to testifying in court. *State v. Brown*, 162 Wn.2d 422, 430, 173 P.3d 245 (2007). In addition, the statute does not

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State v. Graham

cover a defendant's ill-informed attempt to negotiate an out-of-court settlement with a victim witness. *State v. Jensen*, 57 Wn. App. 501, 509-10, 789 P.2d 772 (1990), *aff'd*, 116 Wn.2d 466, 805 P.2d 806 (1991). In evaluating the meaning of a defendant's statements, the trier of fact must consider both the inferential and literal meaning of the words used by the threatening party. *State v. Scherck*, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973); *State v. Gill*, 103 Wn. App. 435, 445, 13 P.3d 646 (2000).

The State's evidence supports the trial court's finding that, in commenting to his brother that Mr. Maupin needed his face smashed in, Mr. Graham intended to influence Mr. Maupin's testimony at his upcoming trial.³ During the recorded phone call, Mr. Graham did not merely state he wished to harm Mr. Maupin. He made threatening comments while referencing Mr. Maupin and his girlfriend as "witnesses" to his pending "[domestic violence] assault charge." Ex. 103 at 6. This context connects Mr. Graham's assaultive intentions with Mr. Maupin's anticipated testimony thereby permitting an inference that the threat to Mr. Maupin was motivated, at least in part, by a desire to influence Mr. Maupin's testimony.

³ The fact that Mr. Graham's threat was communicated through a third party is no bar to the State's charge. *State v. Ozuna*, 184 Wn.2d 238, 247, 359 P.3d 739 (2015) (a threat is still a threat even if communicated to a third party and not the intended target).

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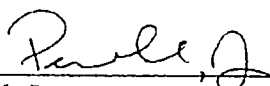
APPELLATE COSTS

In his opening brief, Mr. Graham requests this court decline to award appellate costs to the State. Because Mr. Graham has not complied with our general order requiring a report of continued indigency, we deny his request at this juncture. If the State seeks costs, Mr. Graham may attempt to seek relief under RAP 14.2.

CONCLUSION

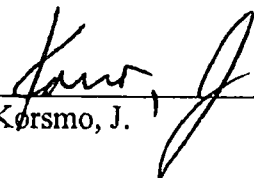
The trial court's judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

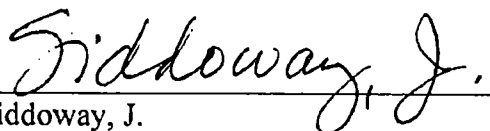


Pennell, J.

WE CONCUR:



Korsmo, J.



Siddoway, J.

LAW OFFICE OF LISA E TABBUT

June 20, 2017 - 6:21 AM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Justin Ryan Graham
Superior Court Case Number: 15-1-02723-0

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