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November 19, 2014  
Court of Appeals  
Division I  
State of Washington

Supreme Court No. 91033-2  
(Court of Appeals No. 70740-0-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent

v.

KEITH RATLIFF,  
Petitioner.

FILED  
NOV 24 2014  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
RF

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Keith Ratliff, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Ratliff appealed from his King County Superior Court convictions for assault in the second degree and harassment of a criminal justice participant. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

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. Where there was insufficient evidence to prove that a reasonable person would foresee his statement as a serious expression of intention to cause such injury, was the Court of Appeals decision affirming the conviction in conflict with decisions of this Court and with other decisions of the Court of Appeals, requiring review? RAP 13.4(b)(1), (2).

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 alleged victim reasonably feared that the threat would be carried out. In the absence of evidence to establish beyond a reasonable doubt that the alleged victim reasonably feared Mr. Ratliff would act upon his threat, was the Court of Appeals decision in conflict with decisions of this Court and with other decisions of the Court of Appeals, requiring review? RAP 13.4(b)(1), (2).

D. STATEMENT OF THE CASE

Approximately two years ago, Keith Ratliff was appearing in the King County Courthouse on a routine calendar call on November 15, 2012, and was seated at counsels' table with his attorney, Janet Cavallo. RP 266, 283.

When Ms. Cavallo informed the court that Mr. Ratliff should be taken for a competency evaluation, Mr. Ratliff objected. RP 279-81. Mr. Ratliff told the court that he no longer wanted to be represented by Ms. Cavallo or her office.<sup>1</sup> RP 264-67, 270, 281; Ex. 6 (at 1:23, 3:45). The

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

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).<sup>2</sup>

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.

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.

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

On appeal, he argued there was insufficient evidence of a true threat, and that Ms. Cavallo's fear that he would carry out his threats was not reasonable under the circumstances.

On October 20, 2014, the Court of Appeals affirmed Mr. Ratliff's convictions. Appendix.

Mr. Ratliff seeks review in this Court. RAP 13.4(b)(1),(2).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).

a. The State failed to prove beyond a reasonable doubt that Mr. Ratliff made a "true threat" to cause bodily injury to Ms. Cavallo, or that she reasonably believed he would harm her; therefore the Court of Appeals decision should be reviewed pursuant to RAP 13.4(b)(1).

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); U.S. Const. amend. XIV; Const. art. I, § 3. 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).

To comport with the constitutional right to free speech,<sup>3</sup> 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).

Because not all threats are considered “true threats,” Watts, 394 U.S. at 707, alleged threats must 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 (9<sup>th</sup> Cir. 2001) (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9<sup>th</sup> Cir. 1990)).

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<sup>3</sup> 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).

In Washington, an objective speaker-based test is used. Kilburn, 151 Wn.2d at 43-44. A “true threat” takes into account the context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted” as one made with the intention of inflicting bodily harm. Id. 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, Ms. Cavallo, herself, stated that upon hearing Mr. Ratliff’s statements, she was not 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. Likewise, according to the objective speaker-based test, Mr. Ratliff also could not reasonably foresee that his comment would be interpreted as one made with the intention of inflicting harm, considering the circumstances. Id. Considering the words that Mr. Ratliff uttered were spoken while he was flanked by several marshals, the State did not show that these threats were anything but hyperbole or idle talk. See Schaler, 169 Wn.2d at 283.

In State v. C.G., a juvenile defendant was convicted of harassment by threats to kill based on her alleged threat to kill her vice-principal,

while she was being disciplined at school. 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. The Court of Appeals noted in dicta that Mr. Ratliff argued on appeal that "subsequent fear due to a subsequent event is not sufficient to prove the crime of harassment." Slip Opinion at 7. However, Mr. Ratliff's argument actually relied on C.G., in that Ms. Cavallo's fear must have been proved to be based upon Mr. Ratliff's actions and words – not upon assumptions of future dangerousness. 150 Wn.2d at 606-07 (reversing conviction where victim testified vaguely that defendant might try to harm him or someone else in the future).

b. Because the Court of Appeals decision is in conflict with decisions of this Court, review should be granted. RAP 13.4(b)(1).


The Court of Appeals decision upholding the conviction was in conflict with decisions of this Court, including C.G., 150 Wn.2d at 606-07, and review should be granted. RAP 13.4(b)(1).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

DATED this 19<sup>th</sup> day of November, 2014.

Respectfully submitted,

  
\_\_\_\_\_  
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Washington Appellate Project  
Attorneys for Petitioner

## APPENDIX

FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH ALAN RATLIFF,

Appellant.

No. 70740-0-1

UNPUBLISHED OPINION

FILED: October 20, 2014

PER CURIAM — Keith Ratliff appeals his convictions for second degree assault and felony harassment, arguing that the harassment conviction is not supported by sufficient evidence.<sup>1</sup> He contends the State failed to prove that he made a “true threat” to attorney Janet Cavallo or that her fear was reasonable under the circumstances. Because the State presented sufficient evidence of both, we affirm.

Based on allegations that Ratliff threatened and assaulted Cavallo in court, the State charged him with second degree assault and felony harassment. At trial, the State's evidence established that on November 15, 2012, Cavallo appeared in court as Ratliff's counsel in an unrelated criminal matter. When she requested a competency evaluation, Ratliff “seemed angry” and actively objected

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<sup>1</sup> Ratliff does not challenge his assault conviction on appeal.

on the ground that an evaluation would toll his right to a speedy trial. He expressed his anger to Cavallo, saying, "[H]e did not want me to be his attorney and he did not want to be represented by ACA [Associated Council for the Accused]. He then leaned over and said, 'You're dead, bitch.'"

Cavallo did not react to Ratliff's threat and asked him to sign a document. One of two nearby marshals heard the threat and moved "a lot closer" to Ratliff and Cavallo. The marshal testified that Ratliff "stood up in his chair a little bit, looked towards his attorney, placed his right hand on the table, put his left hand on his knee, [and] leaned forward" before making the threat.

Between 30 and 45 seconds after the threat, Ratliff suddenly struck Cavallo in the jaw. Cavallo's dentist testified she suffered "soft tissue trauma to her chin, her lips, some muscle trismus [tightness of the muscles]. . . . [a]nd some tooth pain." The dentist referred her to a specialist who diagnosed her with "left TMJ arthralgia, which refers to joint pain," "myofascial pain of the masseter muscles [pain of the surrounding muscles of a joint upon palpation]," "TMJ disk displacement," and problems with chewing and speaking. Cavallo's condition made "really no change" at follow-up appointments through May 2013. To this day, Cavallo has a misaligned jaw, fractured teeth, and discomfort.

At the close of the State's case, Ratliff moved for a directed verdict, arguing that no reasonable juror could find that he made a true threat under the circumstances. The trial court denied the motion. Ratliff then took the stand and

admitted to threatening and assaulting Cavallo but denied intending to carry out his threat. A jury found him guilty as charged. He appeals.

### DECISION

Ratliff first contends his harassment conviction is not supported by sufficient evidence because the State failed to prove either that his threat was a "true threat" or that Cavallo's fear that he would carry it out was reasonable under the circumstances. We disagree.

Evidence is sufficient if, when viewed in the light most favorable to the State, it allows any rational trier of fact to find the elements of the crime beyond a reasonable doubt.<sup>2</sup> For this analysis, "[c]ircumstantial evidence is just as reliable as direct evidence."<sup>3</sup> A challenge to the sufficiency of the evidence admits the truth of the State's evidence.<sup>4</sup> We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.<sup>5</sup>

Under the instructions given in this case, the jury could convict Ratliff of harassment if it found that, without lawful authority, he "knowingly threatened to

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<sup>2</sup> State v. Maupin, 63 Wn. App. 887, 892, 822 P.2d 355 (1992) (citing State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980)).

<sup>3</sup> State v. Frawley, 140 Wn. App. 713, 721-22, 167 P.3d 593 (2007) (citing State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997)), review granted, 176 Wn.2d 1030 (2013).

<sup>4</sup> State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

<sup>5</sup> State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), abrogated on other grounds by In re Pers. Restraint of Cross, \_\_\_ Wn.2d \_\_\_, 327 P.3d 660 (2014).



cause bodily injury immediately or in the future" to Cavallo.<sup>6</sup> The jury also had to find that, by words or conduct, Ratliff placed Cavallo in reasonable fear that he would carry out the threat.<sup>7</sup> If the jury found that Cavallo was a criminal justice participant performing official duties at the time of the threat, and that the threat caused "fear that a reasonable criminal justice participant would have under all the circumstances," then the threat was a class C felony.<sup>8</sup> Finally, the jury had to find that the threat was a "true threat," i.e., that it occurred "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."

In support of his argument that there was insufficient evidence of a "true threat," Ratliff points to his testimony that he threatened Cavallo because he "wanted her off the case" and that he "didn't really mean it." He also points to Cavallo's testimony that she was not immediately afraid when the threat was made and "continue[d] doing [her] job." But Ratliff's and Cavallo's subjective beliefs are not relevant to whether the threat was a "true threat." The relevant question is whether, under the circumstances existing at the time of the threat, a

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<sup>6</sup> Clerk's Papers (CP) at 59-60; RCW 9A.46.020(1)(a)(i).

<sup>7</sup> CP 50-60; RCW 9A.46.020(1)(b).

<sup>8</sup> CP 60; RCW 9A.46.020(2)(b).

reasonable person uttering the threat would foresee that it would be interpreted as a “serious expression of intention to inflict bodily harm upon or to take the life’ of another.”<sup>9</sup>

Viewing the evidence in the light most favorable to the State, a rational trier of fact could find that a reasonable person uttering the threat would foresee that it would be taken as a serious threat to inflict bodily harm. Ratliff’s “angry” demeanor, his “glare,” and the marshal’s description of, and reaction to, the threat support that conclusion. And because the threat occurred during Cavallo’s first encounter with Ratliff, there was no prior history suggesting that the threat should not be taken seriously.<sup>10</sup> In addition, Ratliff’s virtually contemporaneous assault of Cavallo and the very real possibility they could cross paths again given Cavallo’s profession strongly support the foreseeability of the threat being carried out. The State thus presented sufficient evidence that Ratliff’s threat was a “true threat.”

Ratliff also contends the State failed to prove that he placed Cavallo in reasonable fear that his threat would be carried out. He argues that “the State established only that Ms. Cavallo was concerned after the fact, in a general

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<sup>9</sup> State v. Kilburn, 151 Wn.2d 36, 43-44, 84 P.3d 1215 (2004) (internal quotation marks omitted) (quoting State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001)).

<sup>10</sup> See State v. Locke, 175 Wn. App. 779, 793, 307 P.3d 771 (“Locke had no preexisting relationship or communications with the Governor from which he might have an expectation that she would not take his statements seriously.” (citing Kilburn, 151 Wn.2d at 52-53)), review denied, 179 Wn.2d 1021 (2013).

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." This argument overlooks the fact that the jury could consider Ratliff's "words or conduct"<sup>11</sup> and whether his conduct caused Cavallo to fear "bodily injury immediately or in the future."<sup>12</sup>

While Cavallo was not immediately afraid that the threat would be carried out, her testimony supports an inference that she immediately feared that the threat could be carried out when she was no longer protected by the courtroom setting and the presence of the marshals. She testified that the courtroom was "the safest place where I can be with a client" and that "[i]t wasn't realistic for me to have that concern [for my physical safety] because of the setting of being in open court and having the marshals standing right behind me."<sup>13</sup>

And even assuming Ratliff's verbal threat did not, by itself, cause Cavallo reasonable fear that the threat would be carried out, his contemporaneous conduct did. Cavallo testified that "based on the fact that he threatened me and . . . assaulted me, I would be concerned about whether or not he would assault me again." Ratliff's conduct made her "realize that he was capable of unprovoked and unpredictable violence." She testified that he has "destroyed

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<sup>11</sup> (Emphasis added) CP 59; RCW 9A.46.020(1)(b).

<sup>12</sup> (Emphasis added) CP 59; CP 60; RCW 9A.46.020(2)(b).

<sup>13</sup> (Emphasis added).

No. 70740-0-1 / 7

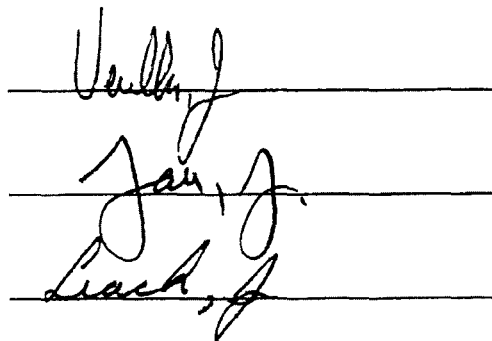
[her] feeling of safety" and that she is "scared of him." Although she never felt that she was in danger before, she testified that "now, it crosses my mind almost every time I'm in court." The State thus provided sufficient evidence that Ratliff's words or conduct placed Cavallo in reasonable fear that he would carry out his threat.

In a single conclusory sentence in his brief, Ratliff argues that "[s]ubsequent fear due to a subsequent event is not sufficient to prove the crime of harassment." Because this statement is unsupported by any authority or meaningful analysis, we decline to consider it.<sup>14</sup>

In summary, Ratliff's conviction for felony harassment is supported by sufficient evidence.

Affirmed.

FOR THE COURT:



The image shows three handwritten signatures, each written over a horizontal line. The signatures are in cursive and appear to be: 1. A signature that looks like 'V. J. ...' 2. A signature that looks like 'J. J. ...' 3. A signature that looks like 'L. J. ...'


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<sup>14</sup> Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument not supported by authority); State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (insufficient argument); Saunders v. Lloyd's of London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (insufficient argument and authority).

### DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70740-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Roger Davidheiser, DPA  
[PAOAppellateUnitMail@kingcounty.gov]  
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party

  
MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: November 19, 2014