FILED
OCT 04, 2013
Court of Appeals
Division III
State of Washington

NO. 31390-5

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

V.

AHMIN SMITH

APPELLANT.

RESPONDENT'S BRIEF

Jennifer Richardson, WSBA 29988
Deputy Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Response to Assignments of Error

1. **The deputy did not express a personal opinion regarding the guilt of the accused and Exhibit 105 was imprinted with innocuous identifying information and neither resulted in actual prejudice.**

2. **The deputy's remark was a mere reference to silence and did not prejudice the defendant. Any reference to silence in this context was harmless error.**

3. **The defendant's post-arrest behavior was highly relevant and the issue of whether it was prejudicial was not preserved at trial. Any error in its admission was harmless.**

4. **No evidence was seized by law enforcement, so there was nothing for the court to suppress. Exigent circumstances justified a warrantless arrest. Any violation was harmless error.**

5. **Any rational trier of fact would have found that the evidence was more than sufficient to convict the defendant, given the overwhelming number of threats to kill and the fear expressed by the victims.**

6. **There was no basis for the court to determine that there was any doubt as to the defendant's competency.**

7. **Any errors were harmless and did not give rise to the cumulative error doctrine.**

Statement of Facts

In August 2012, Crystal Miller-Smith, and her husband, the defendant, were living in separate residences. RP 366. On August 12, 2012, Ms. Miller-Smith called the police to report that she had been receiving threatening text messages from the defendant. RP 367. Around 6:00 or 7:00 that evening, she saw that she had 20 plus missed messages from the defendant. RP 368. The content of those messages made her upset and nervous, so she went to her dad's house to show them to him. RP 368. Some of the threats were directed toward her dad, Mark Miller. RP 368. Ms. Miller-Smith continued to receive the same type of text messages from the defendant until he was arrested. RP 369-370.

Ms. Miller-Smith called the defendant around 8:00 P.M. to see what his mindset or attitude was, given the disturbing nature of the text messages. RP 370. During that phone conversation, the defendant threatened and "cussed" at her, and was yelling and screaming at her, and the defendant ended up hanging up on his wife. RP 370-371. Ms. Miller-Smith called the defendant at the same number that was sending her the text messages and recognized the voice of the person that she spoke with as her husband. RP 371. Ms. Miller-Smith identified the defendant's cell

phone as the one that she knows belongs to him. Ms. Miller-Smith also identified the contact listing for her on the defendant's cell phone, both by the phone number, and by the name listing of "wifey." RP 373.

Ms. Miller-Smith testified that the content of the text messages caused her concern for the safety of herself as well as for the safety of her family. RP 373. The messages made her very upset. RP 373. Ms. Miller-Smith testified that she had gone to stay at her parents during this time in their marriage because the defendant had become increasingly angry and hostile. RP 374.

According to Deputy Newport the defendant had sent her 92 text messages that evening that she in turn provided to the deputy. RP 257. The defendant's cell phone that he used to send the threatening text messages was also recovered and admitted into evidence. Exhibits 1-53 were photos of the texts sent by the defendant to Ms. Miller-Smith and included such threats as "If I don't see you, I will kill your dad quick;" "He got three days I will kill (inaudible) if I don't see you;" "I am going to kill your dad and your mom in one night;" "Might cut his head off and send it to your mom;" "By 10 a.m. your whole family will be dead;" "I promise leaving now, will enjoy cutting throat;" "I will make sure you never breathe;" "I promise please stop me plan in motion;" "I love you

but will kill to get to you literally." RP 262-267. Exhibits 57-105 were also admitted, the majority of which were photos of similar text messages from the defendant to the victim. RP 280.

The deputy testified that he observed the defendant texting on a cell phone when he approached the defendant at his residence on the night of the offense. RP 251. Crystal Miller-Smith's testimony concerning the time that the defendant finally stopped texting her coincided with the defendant's time of arrest. RP 251, RP 368-370.

When Ms. Miller-Smith was asked if she believed the defendant would carry out the threats, she stated "well, possibly, yes. I had no idea what he was capable of at that point, he was so angry and - - threatening that I didn't - - didn't feel like I could just wait to see what he would do. " RP 374-375. She was then asked if she thought that the defendant was capable of carrying out the threats and she replied "yes." RP 375. Ms. Miller-Smith's father helped her change the locks on her residence after the defendant made the threats. RP 376.

Mark Miller testified that he had concerns for his safety after viewing the text messages threatening to kill him, and because of that

fear, turned on exterior lighting at his residence and set out game cameras. RP 300.

The defendant threatened to kill Crystal Miller-Smith's dad, and his wife. Ex. 19-20. He also threatened to kill her entire family, which would include Debra Miller. Ex. 10, 20. Ms. Miller testified that the defendant's threats to her made her feel scared and threatened. RP 359. Debra Miller testified that she believed the defendant could carry out those threats. RP 360.

Deborah McDonald was the subject of multiple threats to kill by the defendant. Ms. McDonald testified that the threats made her feel shocked, scared and upset. RP 363. She thought it was very possible that the defendant would carry out those threats. RP 363-364.

Argument

1. **The deputy did not express a personal opinion regarding the guilt of the accused and Exhibit 105 was imprinted with innocuous identifying information, and neither resulted in actual prejudice.**

The testimony complained of by the defendant was not a comment on the defendant's guilt. While it is certainly true that it is improper for a witness to express a personal opinion regarding the guilt

of the accused, there was no such testimony in this case. State v. Garrison, 71 Wash. 2d 312, 315, 427 P.2d 1012 (1967) *e v. Garrison,* 71 Wash.2d 312, 315, 427 P.2d 1012 (1967). In order to determine whether statements constitute impermissible opinion testimony, the court must consider the circumstances of the case, including: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. (quoting City of Seattle v. Heatley, 70 Wash. App. 573, 579, 854 P.2d 658 (1993)).

During its opening remarks, the trial court itself advised the jury as to the crimes for which the defendant was accused. RP 227-228. Deputy Newton's testimony was that he decided to arrest the defendant for felony harassment, and that he told the defendant he was under arrest for felony harassment. RP 248, 252, 254. Neither is a comment on guilt. The deputy was merely recounting his investigation and the steps and procedures he followed in that investigation. The deputy was simply telling the jury the name of the crime for which he arrested the defendant. This is in no way prejudicial. Nowhere in the record does the deputy actually say this is a case of felony harassment. Even if he had made that statement, it would not be prejudicial. Again, the jury already possessed

this knowledge from the court's opening remarks. The jury does not need to be kept in the dark as to the nature of the charges.

The witness was a police officer, but there is absolutely no testimony from the officer that even suggests that he is commenting on the defendant's guilt.

Exhibit 105 is a photograph of an evidence bag containing a cell phone and is labeled with, among other things, the sheriff's office case number, the charge, date, and includes the defendant's name and date of birth next to the word "suspect." "Suspect" means "regarded or deserving to be regarded with suspicion." Meriam-Webster. An accused is "one charged with an offense; *especially* : the defendant in a criminal case." Meriam-Webster. An accused is one step closer to guilt than a suspect, as it requires that the person has already been charged with a crime. The jury already possessed knowledge that the defendant was charged and accused of threatening to kill. As in every criminal case, the court initially instructs the jury on the nature of the charges prior to jury selection. The exhibit was clearly not a comment on the defendant's guilt, nor was it used in any such way during the proceedings. The exhibit was a standard evidence bag that was labeled with basic

identifying information so it could later be associated with the correct case and defendant.

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest constitutional error." State v. Kirkman, 159 Wash. 2d 918, 936, 155 P.3d 125, 135 (2007). A "manifest" error under RAP 2.5(a)(3) requires a showing of actual prejudice, which requires " 'a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.' " (quoting). Under these circumstances, a manifest error requires "an explicit or almost explicit witness statement" that the defendant is guilty. . The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not necessarily make the testimony an improper opinion on guilt. City of Seattle, 70 Wash. App., 579.

In Mr. Smith's case, the defendant did not object to this testimony or to admission of the exhibit, and was thus required to show that the officer made an explicit or near explicit comment on his guilt that resulted in actual prejudice. Kirkman, 159 Wash. 2d at 936. The defendant has made no such showing. The testimony of the officer was a simple statement of the name of the charge for which he arrested the

defendant and was not an explicit or near explicit comment on his guilt, nor did it result in actual prejudice. Likewise, Exhibit 105 was an evidence bag that had identifying information on the outside and was not a comment on the defendant's guilt and did not prejudice the defendant.

2. The deputy's remark was a mere reference to silence and did not prejudice the defendant. Any reference to silence in this context was harmless error.

The deputy did not make any statement that the defendant's refusal to speak with him was any proof of guilt. When the defendant's silence is raised, the court must consider "whether the prosecutor manifestly intended the remarks to be a comment on that right." . A remark that does not amount to a comment is considered a "mere reference" to silence and is not reversible error absent a showing of prejudice. State v. Lewis, 130 Wash. 2d 700, 706, 927 P.2d 235 (1996). Thus, the focus is largely on the purpose of the remarks, and there is a distinction between "comments" and "mere references" to an accused's pre-arrest right to silence. "Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence." Lewis, 130 Wash. 2d, 706. "A comment on an accused's silence occurs when used to the State's advantage either as

substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." Lewis, 130 Wash. 2d at 707.

In the defendant's case, the officer was merely providing context to the circumstances in which he initially approached the defendant. The officer testified that he "got Ahmin's attention by making a comment to him I needed to speak with him at that point." RP 252. The deputy further indicated that he wanted to see how the defendant reacted to him. RP 252. Further, the deputy testified that the defendant stood up and the officer felt he was going to go back inside the house, so the deputy told him at that point that he was under arrest. RP 252. The deputy, without being asked a question by the prosecutor, stated that the defendant got up, was on the porch saying "I don't want to talk to you," and went inside the residence." RP 253.

The deputy's testimony was essentially telling the jury how he conducted his investigation which included making contact with the defendant and placing him under arrest. The defendant's statement that he did not want to talk to the deputy was in no way used as substantive evidence of guilt. It was never brought up again during testimony and was not used in closing argument as evidence of guilt. It was a mere

reference during the deputy's testimony of how he contacted the defendant at his residence.

In any case, there was no actual prejudice to the defendant by the deputy's reference to the defendant's statement, and is harmless error. "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Burke, 163 Wash. 2d 204, 220, 181 P.3d 1, 12 (2008). The evidence was strong in this case for a conviction. There were approximately 100 photos admitted into evidence at trial, most of which were photos of the threatening text messages that the defendant had sent to his estranged wife, threatening very graphic violent deaths to her and her family members. His estranged wife testified, as well as the other three family members who were subjects of the defendant's threats to kill. The defendant's statement that he did not want to talk to the officer was not in response to a question of whether the deputy had asked the defendant for a statement, and it was a mere reference in the deputy's testimony of how he contacted and apprehended the defendant. It was not used during testimony or in later argument as evidence of the defendant's guilt.

3. The defendant's post-arrest behavior was highly relevant and the issue of whether it was prejudicial was not preserved at trial. Any error in its admission was harmless.

Any objection to the defendant's post-arrest behavior under ER 404 was waived, as it was not raised during trial. Because the defendant objected on other grounds at trial, this issue may not now be raised for the first time on appeal. State v. Boast, 87 Wash. 2d 447, 553 P.2d 1322 (1976); State v. Chase, 59 Wash. App. 501, 508, 799 P.2d 272, 275 (1990). Improperly admitting evidence in violation of ER 403 and ER 404(b) are "not of constitutional magnitude." Chase, 59 Wash. App., 508; *citing* State v. Jackson, 102 Wash. 2d 689, 695, 689 P.2d 76 (1984).

Even if the defendant had not waived error, there was none. First, the defendant's behavior surrounding his arrest was highly relevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence. ER 401.

The defendant's actions surrounding his arrest are relevant to show the defendant's state of mind contemporaneous to the crime. To prove the crime of harassment, the state is required to prove that the

threat was 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 individual].' " U (2013) (alteration in original) (*quoting* (*quoting* United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990)). A true threat is a serious threat, not one said in jest, idle talk, or political argument. State v. J.M., 144 Wash. 2d 472, 478, 28 P.3d 720 (2001) Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker. State v. Johnston, 156 Wash. 2d 355, 361, 127 P.3d 707, 711 (2006); *quoting* State v. Kilburn, 151 Wash. 2d 36, 44, 84 P.3d 1215 (2004). Whether a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke.

The statute requires that the defendant "knowingly threatens...." . The defendant must "subjectively know that he or she is communicating a threat, and must know that the communication he or she imparts

directly or indirectly is a threat to cause bodily injury to the person threatened or to another person." J.M., 144 Wash. 2d, 481

Under these rules, the defendant's state of mind is highly relevant, particularly in this case, when the defendant was still sending threatening texts at the time that the deputy made contact with the defendant on his porch. The defendant's actions at the time of his arrest which included his demeanor and statements to the deputy showed the defendant to be extremely angry and agitated. Being extremely angry and agitated make it much more likely that the defendant was not intending the threats to be a jest, but rather that the threats were a true threat to the lives of the four victims.

Further, the defendant's state of mind was also relevant to the defendant's claim that someone else sent the threatening texts. The defendant appeared to be texting when the deputy arrived and the victim testified that she continued to receive texts up until about the time that the defendant was taken into custody. So the fact that the defendant was still texting when the deputy arrived, was highly agitated make it significantly more likely that the defendant was the one sending the texts and that they were true threats.

In any event, it was harmless error. As noted above "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." Burke, 163 Wash. 2d, 220.

4. No evidence was seized by law enforcement, so there was nothing for the court to suppress. Exigent circumstances justified a warrantless arrest. Any violation was harmless error.

Under the exclusionary rule, evidence obtained following the infringement of a constitutionally protected freedom will be suppressed only if a causal connection exists between the constitutional violation and the uncovering of the evidence. State v. Rothenberger, 73 Wash. 2d 596, 600-01, 440 P.2d 184 (1968); (*citing*). There was no such causal connection here between any constitutional violation and the uncovering of any evidence. In fact, in this case, no evidence was seized during the detention and arrest of the defendant. There was nothing to suppress. The defendant's own conduct and interaction with the officer was not evidence "seized" by law enforcement, but conduct openly exhibited by the defendant to the officer. There is no authority for, and appellant does

not cite any authority for suppression of the defendant's own behavior openly exhibited to the officer.

The defendant did not preserve this issue as he did not specifically move to suppress this particular evidence at or before trial. The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a "manifest error affecting a constitutional right." State v. Kirwin, 165 Wash. 2d 818, 823, 203 P.3d 1044 (2009).

Counsel was not ineffective in this case by not raising this issue at or before trial. A claim of ineffective assistance of counsel in this context requires the defendant to show from the trial court record: (1) the facts necessary to adjudicate the claimed error; (2) the trial court would likely have granted the motion if it had been made; and (3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. State v. McFarland, 127 Wash. 2d 322, 899 P.2d 1251 (1995); State v. Riley, 121 Wash. 2d 22, 31, 846 P.2d 1365 (1993). As stated above, there was no evidence seized by law enforcement to suppress as a result of any potentially unlawful arrest. The defendant has not made this showing.

Although RAP 2.5(a) permits a party to raise for the first time on appeal a 'manifest error affecting a constitutional right,' RAP 2.5(a) does not mandate appellate review of a newly raised argument where the facts necessary for its adjudication are not in the record and therefore where the error is not "manifest." Riley, 121 Wash. 2d, 31. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." . In Mr. Smith's case, no actual prejudice was shown, as the facts necessary to adjudicate the claimed error are not in the record. The State certainly would have enquired of the officer regarding officer safety and the possible threat of the defendant possessing firearms or dangerous weapons. In fact at trial, when this question was asked, the defendant objected and the court sustained the objection. Thus, the necessary facts are not in the record.

Finally, the evidence in this case was overwhelming. The State admitted over 100 exhibits, most of which were photos of the defendant's threatening text messages sent to his estranged wife, Crystal Miller-Smith, threatening to kill her and her family over a period of hours. According to Deputy Newport the defendant had sent her 92 text messages that evening that she in turn provided to the deputy. RP 257.

The defendant's cell phone that he used to send the threatening text messages was also recovered and admitted into evidence. Exhibits 1-53 were photos of the texts sent by the defendant to Ms. Miller-Smith and included such threats as "If I don't see you, I will kill your dad quick;" "He got three days I will kill (inaudible) if I don't see you;" "I am going to kill your dad and your mom in one night;" "Might cut his head off and send it to your mom;" "By 10 a.m. your whole family will be dead;" "I promise leaving now, will enjoy cutting throat;" "I will make sure you never breathe;" "I promise please stop me plan in motion;" "I love you but will kill to get to you literally." RP 262-267. Exhibits 57-105 were also admitted, the majority of which were photos of similar text messages from the defendant to the victim. RP 280.

The deputy testified that he observed the defendant texting on a cell phone when he approached the defendant at his residence on the night of the offense. RP 251. Crystal Miller-Smith's testimony concerning the time that the defendant finally stopped texting her coincided with the defendant's time of arrest. RP 251, RP 368-370. Ms. Miller-Smith was also able to establish that the defendant was the one in possession of his cell phone during the time period that he was sending the threatening texts, as she called him and he answered his phone. RP

370-371. The defendant made threats to her during the voice call as well. RP 370-371. Ms. Miller-Smith also identified the defendant's cell phone that was used to send her threatening text messages. RP 372.

The text messages showed Ms. Miller-Smith's cell phone number and her number was associated with the contact name "wifey" on the defendant's cell phone. RP 373. When Ms. Miller-Smith was asked if she believed the defendant would carry out the threats, she states "well, possibly, yes. I had no idea what he was capable of at that point, he was so angry and - - threatening that I didn't - - didn't feel like I could just wait to see what he would do. " RP 374-375. She was then asked if she thought that the defendant was capable of carrying out the threats and she replied "yes." RP 375. Ms. Miller-Smith's father helped her change the locks on her residence after the defendant made the threats. RP 376. Mark Miller testified that he had concerns for his safety after viewing the text messages threatening to kill him, and because of that fear, turned on exterior lighting at his residence and set out game cameras. RP 300.

Mark Miller found the defendant's cell phone the day after the defendant got arrested at the base of the porch steps. RP 301. Debra Miller felt "scared" and "threatened" by the texts concerning threats to her. RP 360. Debra Miller testified that she believed the defendant could

carry out those threats. RP 360. Deborah McDonald was "shocked" and "scared" after learning of the threat to kill her. RP 363. Ms. McDonald thought "it was very possible" that the threats could be carried out." RP 363-364. Ms. McDonald was concerned that the defendant knew where she lived. RP 364.

The officer's testimony concerning the defendant's post-arrest conduct would not have changed the outcome of the trial, giving the evidence presented at trial.

The Fourth Amendment prohibits police from making a warrantless entry into a suspect's residence to effectuate an arrest without exigent circumstances. Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). In *State v. Terrovona,* the court looked at the six factors in *Dorman v. U.S.* to determine if an exigency existed. State v. Terrovona, 105 Wash. 2d 632, 716 P.2d 295 (1986). Those factors are: (1) a grave offense, particularly a crime of violence, is involved; (2) the suspect is reasonably believed to be armed; (3) there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) the suspect is likely to escape if not swiftly apprehended; and (6) the entry is made peaceably. Terrovona, 105 Wash. 2d at 644. Other factors to

consider are hot pursuit, fleeing suspect, danger to the arresting officer or to the public, mobility of the vehicle, and mobility of or the destruction of evidence. Id.

Mr. Smith's warrantless arrest falls under the exigent circumstances and pursuit exceptions to the warrant requirement. RCW 10.31.100 allows law enforcement to make a warrantless arrest of a defendant for the commission of a felony. In the present case, the defendant appeared to be still texting when the deputy approached the defendant, the defendant had just made continuous graphic and disturbing threats on the lives of four individuals over a period of hours, including threats to kill with weapons, beheading, and dismemberment. The contact with the defendant by law enforcement was in the early morning hours at a time when it was dark, the officer had concerns for his safety, it was not known if the defendant had access to weapons inside the residence, and the defendant fled when approached by the deputy. The state actually attempted to elicit information regarding the officer's knowledge of whether the defendant had access to firearms at the time of his arrest. This was objected to by the defendant and sustained by the trial court. RP 250.

Even if the court finds that the defendant's arrest was illegal and the defendant's post-arrest behavior should have been suppressed, as noted above, the evidence against the defendant in this case was overwhelming. Any error here was harmless. As noted above "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." Burke, 163 Wash. 2d, 220.

5. Any rational trier of fact would have found that the evidence was more than sufficient to convict the defendant, given the overwhelming number of threats to kill and the fear expressed by the victims.

To convict the defendant of felony harassment, threats to kill, the victim need only have a reasonable fear, not an absolute certainty, that the threat will be carried out. RCW 9A.46.020(1)(b). The focus is whether there is a fear that the threat will be carried out and whether that fear is reasonable.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to

find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. Salinas, 119 Wash. 2d at 201 P.2d at (1992). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wash. 2d 899, 906-07, 567 P.2d 1136 (1977) disapproved of by State v. Lyons, 174 Wash. 2d 354, 275 P.3d 314 (2012). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff,* 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wash.2d 385, 622 P.2d 1240 (1980).

Evidence is sufficient to prove the crime of felony harassment where the victim has testified that she was concerned about the threat taking place, and was "a little frightened." State v. E.J.Y., 113 Wash. App. 940, 953, 55 P.3d 673, 680 (2002). Even threats conditioned upon certain circumstances being in place, have withstood sufficiency challenges. State v. Cross, 156 Wash. App. 568, 582, 234 P.3d 288

(2010) review granted, cause remanded, 172 Wash. 2d 1009, 260 P.3d 208 (2011).

In the present case, as noted above, Ms. Miller-Smith did believe that the defendant was capable of carrying out the threats. RP 375. Ms. Miller-Smith was concerned for the safety of herself and her family. RP 373. She believed the defendant was so angry and threatening that she wasn't going to wait around to see what he would do. RP 375.

The defendant made a specific threat to kill Debra Miller. He threatened to kill Crystal Miller-Smith's dad, and his wife. Ex. 19-20. He also threatened to kill her entire family, which would include Debra Miller. Ex. 10, 20. Ms. Miller testified that the defendant's threats to her made her feel scared and threatened. RP 359.

Deborah McDonald was the subject of multiple threats to kill by the defendant. Ms. McDonald testified that the threats made her feel shocked, scared and upset. RP 363. She thought it was very possible that the defendant would carry out those threats. RP 363-364.

Based upon all of the exhibits and testimony admitted in this case, there was more than sufficient evidence for a rational trier of fact to find the defendant guilty on each count of felony harassment.

6. There was no basis for the court to determine that there was any doubt as to the defendant's competency.

A defendant is competent if he has the capacity to understand the nature of the proceedings against him and to assist in his own defense. ; . A competency hearing is required "[w]henever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency". . Thus, unless an insanity defense is raised, a hearing is required only if the court makes a threshold determination that there is reason to doubt the defendant's competency. If the court determines that there is reason to doubt the defendant's fitness, the court must hold a competency hearing in accordance with statutory procedures. *Seattle v. Gordon,* 39 Wash.App. 437, 441, 693 P.2d 741, *review denied,* 103 Wash.2d 1031 (1985).

These determinations are within the trial court's discretion. A motion to determine competency does not have to be granted merely because it has been filed, United States v. McEachern, 465 F.2d 833, 837 (5th Cir. 1972), and is not of itself sufficient to raise a doubt concerning competency. *Gordon,* 39 Wash.App. at 441, 693 P.2d 741. Thus, the motion must be supported by a factual basis. Only then will the court inquire to verify the facts. *Gordon,* 39 Wash.App. at 441–42, 693 P.2d

741. In reviewing the motion, considerable weight should be given to the attorney's opinion regarding his client's competency and ability to assist the defense. *Gordon,* 39 Wash.App. at 442, 693 P.2d 741.

The test for competency to stand trial is if the defendant has the capacity to understand the nature of the proceedings against him and to assist in his own defense. State v. Ortiz, 104 Wash. 2d 479, 482, 706 P.2d 1069 (1985); . Defendant was competent to stand trial where defendant's counsel stated at competency hearing that defendant was capable of assisting in defense, and defendant's testimony indicated that he understood nature of charge and recalled events in question, even though he was apparently delusional about his role as an undercover agent. *State v. Hahn*, (1985) 41 Wash.App. 876, 707 P.2d 699, reconsideration denied, review granted, reversed on other grounds 106 Wash.2d 885, 726 P.2d 25.

The court in this case merely expressed a concern due to the defendant's unwillingness or inability to comprehend and understand what's going on. It appears that the court was more frustrated with the defendant bringing up the same issues repeatedly and interrupting court proceedings. However, inappropriate and obstinate behaviors do not automatically give rise to a claim of incompetency. The court did not

make the necessary threshold determination that the defendant's competency was in question. There were no facts to support a doubt as to the defendant's competency. Defendant's counsel, who would have had the most information on this subject due to his more frequent contact with his client did not feel the defendant's competency was an issue in this case.

7. Any errors were harmless and did not give rise to the cumulative error doctrine.

Finally, Smith argues that cumulative error denied him his right to a fair trial. The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible errors materially affects the trial outcome. State v. Russell, 125 Wash. 2d 24, 93-94, 882 P.2d 747 (1994). Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. Id. at 94. Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. Id.

Because Smith has shown no error, the doctrine does not apply here. Furthermore the evidence of Mr. Smith's threats, voluminous and brutal in nature, was overwhelming. That the jury took its time in deliberating this matter does not vitiate that fact.

Dated this 4th day of October 4th, 2013 .

Respectfully Submitted by:

JENNIFER RICHARDSON
WSBA #29988
Deputy Prosecuting Attorney
Okanogan County, Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent vs. AHMIN SMITH Defendant/Appellant	COA No. 31390-5-III PROOF SERVICE

I, Jennifer Richardson, do hereby certify under penalty of perjury that on October 4th, 2013, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Respondent's brief to:

Ahmin Smith, DOC #363293
2321 West Dayton Airport Road
PO Box 900
Shelton, WA 98584

Having obtained prior permission, I also served this document on Kristina M. Nichols at Wa.Appeals@gmail.com by email using Division III's e-service feature.

Dated this 4th day of October, 2013.

/s/Jennifer R. Richardson
Jennifer R. Richardson, WSBA #29988
Okanogan County Prosecutor's Office
PO Box 1130
Okanogan, WA 98840