

Supreme Court No. 96812-8
Court of Appeals No. 51136-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID WILSON

Petitioner.

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

The Honorable Kevin D. Hull, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, David Wilson, through his attorney, Lisa E. Tabbut, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Wilson seeks review, in part, of the January 3, 2019, unpublished opinion of Division Two of the Court of Appeals (Appendix).

C. ISSUE PRESENTED FOR REVIEW

Whether the State's failure to prove all the elements of felony harassment beyond a reasonable doubt violated Wilson's constitutional due process rights?

D. STATEMENT OF THE CASE

Often times, Bremerton's Sylvan Way is congested with cars parked on both sides. It turns the double lane into something more like a single lane with extra room. RPII 202. On a late afternoon in July 2016, David Wilson was on his way home. RPII 231, 234. He turned on Sylvan Way. RPII 234. A car coming in the opposite direction caused Wilson to pull all the way to the right. RPII 234-35. Wilson just missed hitting two parked cars. RPII 235. The driver of the other car, David Ely, flipped Wilson off and screamed, "Fuck you." RPII 235-37. Wilson, upset by the near miss with the

parked cars, went around the block hoping to catch up with the car and get its license plate. RPII 237.

In the time it took for Wilson to get around the block, Ely had parked his car and gotten out. RPII 203, 237. Wilson parked his car and got out. RPII 238. He walked toward Ely. RPII 238. When Wilson was about 35 feet from Ely, he yelled at Ely asking him why he had flipped him off. RPII 238. Ely threw up his hands and told Wilson he was “all over the road.” RPII 239. In response, Wilson threw up his hands and said something like, “If I were a different black man, you probably would have gotten yourself hurt.” RPII 239. By his statement, Wilson meant to convey to Ely he should be careful about who he flipped off. RPII 249. The two men exchanged words for about 90 seconds. RPII 239. Wilson got back in his car and went home. RPII 239.

Wilson had no weapons. RPII 240. He certainly had no gun. RPII 240, 247. He fears guns. RPII 247.

Ely described the incident differently. He is familiar with how congested Sylvan Way can be. RPII 201-02. On this day, as he was driving to the post office, he saw no one coming in his direction, so he “entered the gauntlet.” RPII 202. A landscaper with a lawnmower tractor trailer entered the road in front of him. RPII 202. Per Ely, another car, the car

driven by Wilson, came around the corner “at a pretty good clip.” RPII 202. The car seemed to speed up and Ely looked to get out of its way. RP 202. He got ahead of a line of parked cars and jogged to the right. RPII 203. Wilson flew past him almost hitting his car. RPII 203. Ely, mad, yelled “fuck you” and flipped off Wilson. RPII 203. Ely then parked his car and got out to go into the post office. RPII 203.

Wilson came back around the corner with his tires squealing. RPII 204. Wilson pulled almost head to head with Ely’s car. RP 204. The two men were two feet apart, and Wilson remained in his car. RPII 204-06. Wilson said, “You got a problem with me motherfucker.” Ely thought Mr. Wilson seemed angry. RPII 205. Ely told Wilson he had been trying to get out of his way. RPII 206. Ely felt “pretty threatened.” RPII 205.

Per Ely, Wilson opened the car door and Ely could see a long gun next to Wilson’s leg along the transmission tunnel. RPII 206. Wilson pulled the gun slightly and said something like “you need to be careful who you are flipping off, might get your head blown off or something.” RPII 206. Ely backed away. Wilson drove off. RPII 206.

Ely called 911 and gave the operator Wilson’s license plate and a brief description of what happened from his perspective. RPII 208-09.

Bremerton Officer Forbragd arrived and spoke with Ely. Officer Forbragd described Ely as a little upset and rattled. RPII 171.

Officer Forbragd did a computer search, discovered the car's registered owner, and put together a photo montage to see if Ely could identify the driver. RPII 173, 180. The montage included a photo of Wilson. RPII 172-73, 211. Detective Jacob Switzer showed Ely the photo montage, and Ely identified a picture of Wilson as the driver. RPII 182, 211.

The State charged Wilson with felony harassment, threat to kill. CP 1-2.

The jury heard Ely's 911 call. RPII 213. Exhibit 3. During the 911 call, Ely never said he interpreted any of Mr. Wilson's statements as a threat to kill him.

Ely testified that before calling 911, he paused for a moment to think about possible repercussions for himself for making the call. RPII 209. By calling, he thought the person in the other car would discover who he was and he feared that person. RPII 209.

Ely testified about how talking to Wilson in the street made him feel "pretty threatened" and that Wilson made an "implied threat" by showing him the gun. RPII 205, 206. Also, because it was wise to assume a

gun is loaded, he was “scared.” RPII 207. In hindsight, the incident brought back “unpleasant memories.” RPII 214.

The jury found Wilson guilty. RPII 297; CP 5.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Because the State failed to present sufficient evidence of felony harassment, the jury’s verdict and the appellate court’s affirmation of the verdict denied Wilson due process.

An essential element of the crime of felony harassment is that the threat placed the person threatened in reasonable fear the threat to kill would be carried out. RCW 9A.46.020(1)(b). Because the State did not prove this element beyond a reasonable doubt, presenting insufficient evidence to show Ely was afraid for his life, this Court should accept review and reverse Wilson’s felony harassment conviction.

It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.

Under RAP 13.4, this Court may accept a petition for review

(1) If the decision of the Court of Appeals conflicts with a decision of the Supreme Court; or

- (2) If the decision of the Court of Appeals conflicts 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.

A person is guilty of felony harassment, per RCW 9A.46.020(1), (2), when “[w]ithout lawful authority, the person knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person,” and “[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1). CP 1. To “threaten” is “to communicate, directly or indirectly the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person.” RCW 9A.04.110(28)(a). The crime is elevated to a felony if the threat to cause bodily injury is a threat “to kill the person threatened or any other person.” RCW 9A.46.020(2)(b).

To prove felony harassment, the State must show the defendant's words or conduct placed the person threatened in reasonable fear the threat would be carried out. *State v. J.M.*, 144 Wn.2d 472, 482, 28 P.3d 720 (2001); RCW 9A.46.020(1). The State must show the person threatened was in reasonable fear of the actual threat made. *State v. C.G.*, 150 Wn.2d

604, 610, 80 P.3d 594 (2003) (“the State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out.”). Because felony harassment requires proof that the threat made was a threat to kill, the State must show the person threatened was placed in reasonable fear the threat to kill would be carried out. *Id.* at 609-10, 612. It is not enough for the State to show the threat caused the victim to fear generalized lesser harm, such as the threat of injury. *Id.*

Felony harassment also requires the State to prove an accused knowingly threatened to kill a person, and that the threat was reasonably interpreted as “a serious expression of intention to inflict bodily harm upon or to take the life” of another. *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). Because the First Amendment protects free speech, only “true threats” are proscribed by law. *Id.* at 49; *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). A person placed in fear of being killed is, in general, harmed more than a person threatened with bodily injury. *Id.* This greater harm accords with the Legislature's elevation of a threat to kill to a felony. *Id.* The State must show the threat caused the victim to fear being killed. *Id.* (reversing felony harassment conviction, finding victim’s generalized “concern” or fear that the defendant might harm someone in future was insufficient proof of a threat to kill).

To determine whether sufficient evidence supports a conviction, this Court views the evidence in the light most favorable to the State and determine whether any rational factfinder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Circumstantial evidence is as reliable as direct evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Any inferences “must be drawn in favor of the State and interpreted most strongly against the defendant.” *Homan*, 181 Wn.2d at 106 (*quoting State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

Even when viewed in the light most favorable to the State, the evidence cannot prove felony harassment. Ely’s trial testimony fell far short of showing fear of being killed resulting from Wilson’s purported words.

Ely testified described how he felt after Wilson showed him what he believed was a long gun:

It was definitely an implied threat. He didn't – he never pointed the gun at me. He never said, "I'm going to shoot you."

But he said, you know, "Be careful who you are flipping off. You might get your head blown off." RPII 206.

The prosecutor asked how he took that and Ely replied,

I took it as a threat. I mean, whenever someone shows me a gun, my understanding is, always treat a gun as though it's loaded, you know. I had no idea what was going to transpire. I was very thankful when he closed the door and drove off.

RPII 206-07.

In response to further questioning from the prosecutor, Ely said,

I had no idea what was going to transpire. I mean, when someone pulls a gun out, whether they point it at you or not, it's a pretty serious situation. I was scared.

RPII 207.

Ely shed further light on his feelings when describing why he called the police.

It was like, it's the right thing to do, so I'm going to call. Having the gun, running around with a gun in a car, it not the right thing.

RPII 209.

In the same vein, Ely's statements in his call to 911 supported no reasonable threat to kill. Ely described his response to Wilson showing him

what he believed was a gun: “I was, like, whatever dude.” Exhibit 3A (page 4, line 139).

Officer Steven Forbragd was the first to contact Ely and described his demeanor. “[H]e was a little upset, a little rattled, kind of concerned for what had just happened.” RPII 171. Ely told the officer “he called 911 out of concern for somebody having a firearm.” RPII 171.

The prosecutor never asked Ely if he interpreted the statements he attributed to Wilson as a threat to kill. RPII 198-215. The record is devoid of evidence suggesting Ely interpreted Wilson’s alleged statements as a threat to kill.

Ely was not afraid that Wilson would kill him and he did not testify to such a fear. RPII 198-222. As in *C.G.*, the level of “concern” Ely expressed to 911, to Officer Forbragd, and while testifying are insufficient to convict. *C.G.*, 150 Wn.2d at 612; *Kilburn*, 151 Wn.2d at 43. A felony harassment conviction requires a specific threat to kill. *Schaler*, 169 Wn.2d at 283-84. As this Court held in *C.G.*, without a reasonable fear that a threat to kill will be carried out, the State has only proved fear of bodily injury, a misdemeanor. *C.G.*, 150 Wn.2d at 611.


And lastly, the First Amendment prohibits the State from criminalizing language that may resemble a threat but is merely idle talk or hyperbole. *Schaler*, 169 Wn.2d at 283-84; *Kilburn*, 151 Wn.2d at 49.

The State failed to prove the essential element of a threat to kill. The trial court erred in entering a judgment of felony harassment, and the appellate court erred in affirming Wilson's conviction.

F. CONCLUSION

This court should accept review of this miscarriage of justice and remand to the trial court with instructions to reverse Wilson's conviction.

Respectfully submitted February 4, 2019.



LISA E. TABBUT/WSBA 21344
Attorney for David Wilson

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I filed the Petition for Review to (1) Kitsap County Prosecutor's Office, at kcpa@co.kitsap.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to David Wilson, 629 Highland Ave, Apt. 1, Bremerton, WA 98337.

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

Signed February 4, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344
Attorney for David Wilson, Petitioner

APPENDIX

January 3, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DAVID LEE WILSON,

Appellant.

No. 51136-3-II

UNPUBLISHED OPINION

WORSWICK, J. — David Lee Wilson appeals his conviction for felony harassment. Wilson argues that insufficient evidence supports his conviction. In a supplemental brief, Wilson argues that the \$200 criminal filing fee is improper under Engrossed Second Substitute House Bill (E.S.S.H.B.) 1783 and the State concedes this issue. We affirm Wilson’s conviction, but we remand for the trial court to strike the \$200 criminal filing fee.

FACTS

On July 26, 2016, David Ely was driving to a post office in Bremerton. The street where the post office is located had cars parked on both sides of the street, restricting travel to one lane. As Ely drove, another vehicle driven by David Wilson came quickly from around a nearby corner and approached Ely from the other direction. In an attempt to avoid a collision, Ely accelerated and managed to pull over while Wilson passed him. Ely then raised his middle finger to Wilson and shouted f**k you. 2 Verbatim Report of Proceedings (VRP) (Oct. 11, 2017) at 203. Ely continued driving to the post office, parked his car and got out of his vehicle.

Around the same time, Ely noticed Wilson’s vehicle “flying around this corner, tires squealing” and Wilson parked his vehicle almost “head-to-head” with Ely’s vehicle. 2 VRP

(Oct. 11, 2017) at 204. Wilson, while still in his vehicle, asked Ely, “You got a problem with me, motherf**ker[?]” 2 VRP (Oct. 11, 2017) at 205. Wilson opened his vehicle door and exposed a gun next to his right leg. Wilson pulled on the gun, exposing more of it to Ely. Wilson looked at Ely and stated, “You need to be careful who you’re flipping off. You might get your head blown off or something.” 2 VRP (Oct. 11, 2017) at 206. Ely started backing away, and Wilson closed his door and drove off.

Ely then called 911 and reported the incident. During the call, Ely reported Wilson’s license plate number and stated that he was “pretty shaken.” 2 VRP (Oct. 11, 2017) at 214. Bremerton police officer Steven Forbragd responded and spoke with Ely.

The State charged Wilson with felony harassment under RCW 9A.46.020(1), (2). At trial, Officer Forbragd testified that when he arrived on the scene, Ely was “upset, a little rattled, [and] kind of concerned for what had just happened.” 2 VRP (Oct. 11, 2017) at 171. Ely testified that he felt “[p]retty threatened” when Wilson parked his car next to his at the post office and Wilson said, ““You got a problem with me, motherf**ker’ in a very threatening tone.” 2 VRP (Oct. 11, 2017) at 205. Ely further testified that he took Wilson’s statement as a threat, saying that “whenever someone shows me a gun . . . always treat a gun as though it’s loaded.” 2 VRP (Oct. 11, 2017) at 207. He stated he “had no idea what was going to transpire” when Wilson pulled out his gun and “when someone pulls a gun out . . . it’s a pretty serious situation.” 2 VRP (Oct. 11, 2017) at 207.

Ely also testified that he was unsure about whether he wanted to call 911 because he did not know if he wanted Wilson to know his identity because he was afraid of him. Ely testified that he was “pretty shaken” while making the call. 2 VRP (Oct. 11, 2017) at 214. Ely’s 911 call was admitted as an exhibit during trial.

Wilson also testified at trial. Wilson stated that he was upset that Ely had caused him to almost hit two parked cars. Wilson stated that after he first passed Ely, he went around the block and proceeded to park by where Ely was parked. Wilson testified that he got out of his vehicle, asked why Ely had flipped him off, and then told Ely that “[i]f I was somebody else, you know, another black man, I probably would have been more upset, and you probably would have gotten yourself hurt.” 2 VRP (Oct. 11, 2017) at 239. Wilson denied intending to scare Ely and having a gun.

The court instructed the jury that to convict Wilson of felony harassment, it had to find beyond a reasonable doubt that Wilson “knowingly threatened to kill [Ely] immediately or in the future,” and that “the words or conduct” of Wilson “placed [Ely] in fear that the threat to kill would be carried out.” 2 VRP (Oct. 11, 2017) at 269.

The jury convicted Wilson of one count of felony harassment. At sentencing, the trial court imposed mandatory legal financial obligations (LFOs), including a \$200 criminal filing fee. The trial court also found Wilson indigent. Wilson appeals.

ANALYSIS

Wilson argues that insufficient evidence supports his conviction for felony harassment. Wilson claims that the State failed to prove that Ely feared Wilson’s threat to kill would be carried out. We disagree.

A. *Sufficiency of the Evidence Legal Principles*

Due process requires the State to prove every element of the charged crimes beyond a reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). We review sufficiency of evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the

charged crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In a challenge to the sufficiency of the evidence, the defendant admits the truth of the State’s evidence and all reasonable inferences that can be drawn from it. *Homan*, 181 Wn.2d at 106. We also defer “to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

B. *Felony Harassment—Reasonable Fear*

Wilson argues that the State presented insufficient evidence to show an alleged threat to kill caused Ely to fear for his life. We disagree.

In order to convict for felony harassment based on a threat to kill, the State must prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out as an element of the offense. RCW 9A.46.020; *State v. C.G.*, 150 Wn.2d 604, 612, 80 P.3d 594 (2003). This court uses an objective standard to determine whether the victim’s fear is reasonable. *State v. Ragin*, 94 Wn. App. 407, 411, 972 P.2d 519 (1999). The reasonableness of the person’s fear depends on the facts and circumstances. *See State v. Trey M.*, 186 Wn.2d 884, 905, 383 P.3d 474 (2016). Threatened persons need not say talismanic words such as, “I was in fear for my life” in order to prove they were in fact in fear for their life. *See Trey M.*, 186 Wn.2d at 905 (holding that the threatened individuals’ testimony that they were “scared” after being named on a hit list was sufficient to show the victims feared that the threat to kill would be carried out).

Here, the State presented sufficient evidence that Wilson’s threat caused Ely to reasonably fear for his life. Officer Forbragd testified that after arriving on the scene following the incident, Ely appeared upset, rattled, and concerned for what just happened. Ely testified that

after Wilson said, “You got a problem with me, motherf**ker,” he felt “pretty threatened.” 2 VRP (Oct. 11, 2017) at 205. He testified he perceived Wilson’s comment as a threat and backed away. He testified that he was scared and he did not know what was going to happen next, and it is a “pretty serious situation” when someone pulls out a gun. 2 VRP (Oct. 11, 2017) at 207. Ely also testified that he was unsure about whether he wanted to call 911 because he was afraid of Wilson and that he was “pretty shaken” during the 911 call.

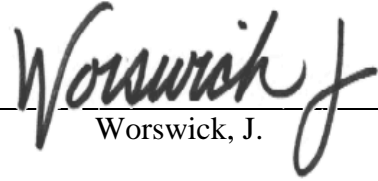
Viewing all the facts together and in the light most favorable to the State, a rational jury could make a reasonable inference that Ely was afraid for his life. Therefore, we hold that the State presented sufficient evidence to support the charge of felony harassment, and affirm Wilson’s conviction. In his supplemental brief, Wilson argues that his judgment and sentence contains a cost provision that is no longer authorized following our legislature’s enactment of E.S.S.H.B. 1783. Specifically, Wilson argues that the superior court’s imposition of a \$200 criminal filing fee is improper and should be stricken. The State agrees, and we accept the State’s concession.

E.S.S.H.B. 1783 modified Washington’s system of LFOs and prohibits the imposition of the criminal filing fee on indigent defendants. LAWS OF 2018, ch. 269, sec. 17. The new statutes apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

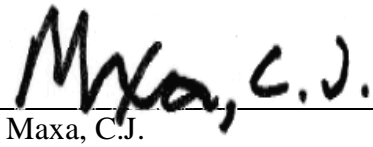
Wilson and the State agree, and the record demonstrates, that Wilson is indigent. Therefore, the \$200 criminal filing fee is improper. *See Ramirez*, 191 Wn.2d at 746.

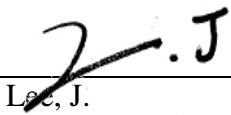
We affirm Wilson’s conviction, but we remand to the trial court to amend the judgment to strike the \$200 criminal filing fee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Worswick, J.

We concur:


Maxa, C.J.


Lee, J.

LAW OFFICE OF LISA E TABBUT

February 04, 2019 - 11:38 AM

Transmittal Information

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