

69209-7

69209-7

NO. 69209-7-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

DANIEL LUSE, JR.,

Appellant.

---

---

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

The Honorable George N. Bowden, Judge

---

---

BRIEF OF APPELLANT

---

---

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 JAN 30 PM 4:47

CHRISTOPHER H. GIBSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSINGMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	4
THE EVIDENCE WAS INSUFFICIENT TO CONVICT LUSE OF FELONY HARASSMENT.....	4
D. <u>CONCLUSION</u> .....	9

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

State v. C.G.

150 Wn.2d 604, 80 P.3d 594 (2003)..... 7

State v.E.J.Y.

113 Wn. App. 940, 55 P.3d 673 (2002)..... 7

State v. Green

94 Wn.2d 216, 616 P.2d 628 (1980)..... 4

State v. Hickman

135 Wn.2d 97, 954 P.2d 900 (1998)..... 5, 6, 8

State v. Schaler

169 Wn.2d 274, 236 P.3d 858 (2010)..... 5

FEDERAL CASES

Jackson v. Virginia

443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)..... 4

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.46.020 ..... 5

A. ASSIGNMENT OF ERROR

The evidence was insufficient to convict Appellant of felony harassment.

Issues Pertaining to Assignment of Error

1. Was the evidence insufficient to convict Appellant of felony harassment when there was no evidence Appellant threatened to kill the complaining witness?

2. Was the evidence insufficient to convict Appellant of felony harassment when there was no evidence Appellant's words or conduct placed the complaining witness in reasonable fear the alleged threat would be carried out?

B. STATEMENT OF THE CASE

The State charged appellant Daniel Luse, Jr., with one count of felony harassment, alleging Luse threatened to kill his ex-girlfriend, Patricia Neuroth, while he was housed in the Snohomish County Jail. CP 56-57, 59.

Snohomish County Jail mental health professional Elizabeth Bellmer met with Luse after he said he was having "suicidal thoughts."

3RP 19, 38-39.<sup>1</sup> Luse told Bellmer, "I have thoughts in my head about suicide and harming myself after release. I can't sleep and I have sweats."

3RP 32-33. He also explained he had lost his girlfriend and did not want to live without her. 3RP 33. Luse told Bellmer he had tried getting treatment, but it had not helped. 3RP 34.

Luse allegedly then told Bellmer:

I'm going to go out there with a gun. And I have a lot of ugliness in my head. I have had thoughts of taking her down with me. Bad thoughts. The devil is in my head and I can't get him out. I need closure on this situation to see if she lied to me. If she did, I'll go in the house and shoot him and wait until she gets home.

3RP 34.<sup>2</sup>

Bellmer considered Luse's remarks threatening and immediately reported them to Deputy Timothy King. 3RP 34-36, 50. Bellmer admitted Luse never identified the "girlfriend" or the "him" referenced in his statements, and she was unaware of how many girlfriends Luse had. 3RP 42, 45-46. Bellmer also admitted Luse never actually said he was going to "kill" anyone. 3RP 42, 48.

---

<sup>1</sup> There are five volumes of verbatim report of proceeding referenced as follows: 1RP - 5/17/12; 2RP - 5/31/12; 3RP - 7/2/12; 4RP - 7/3/12; and 5RP - 7/5/12.

<sup>2</sup> Bellmer claimed this was a "verbatim" quote from Luse. 3RP 42.

King testified that after taking Bellmer's statement, he conducted some investigation, which led him Neuroth, but he could only leave a message asking her to contact Deputy Edward Covington. 3RP 57-59.

The following day, Bellmer provided Covington with a written statement stating she was afraid for the safety of Luse's ex-girlfriend. 3RP 36-38.

Covington met with Neuroth later that day and informed her "of the situation." 3RP 64. He could not, however, recall precisely what he told her. 3RP 64. Covington was not sure whether he read or showed Neuroth Bellmer's written statement, or simply gave Neuroth a paraphrased version of what Bellmer had reported. 3RP 67-69. Covington did not think he ever used the word "kill" when speaking to Neuroth. He did tell her, however, that her boyfriend was mentioned in the statement, to which Neuroth replied she had no boyfriend. 3RP 71-72.

According to Neuroth, she and Luse became romantically involved after Luse was living "at a recovery house across the street" from her home. 3RP 74-75. They lived together for several months and shared the rent. 3RP 74-75. They split up in February 2012, however, after Luse allegedly assaulted her with a remote control. 3RP 76, 81-82.

Neuroth recalled Covington telling her that Luse said "he was going to get a gun and he was going to kill me and anybody else that was with me." 3RP 77; see also 3RP 80 (Covington told Neuroth that Luse

"was going to get a gun and come and kill me and anybody with me."). Neuroth said she "fell apart" when she heard this. 3RP 77. She knew Luse had access to weapons. 3RP 78.

After the State rested, defense counsel moved to dismiss, arguing the evidence showed Neuroth became fearful not because of what Luse actually told Bellmer, but instead because of Covington's interpretation of what Luse said, which was not in fact what Luse told Bellmer. 3RP 85. The court denied the motion, finding it was "unclear" what Neuroth was told, but concluded there was enough evidence for the jury to find Luse guilty. 3RP 86-87.

The jury convicted Luse as charged. CP 29, 46; 4RP 1-3. The trial court imposed a standard range sentence of 18 months. CP 14-24; 5RP 6. Luse appeals CP 1-13.

C. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO CONVICT LUSE OF FELONY HARASSMENT.

Under the state and federal constitutions, a criminal conviction must be reversed where no rational trier of fact could have found the State proved all of the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). There is insufficient

evidence to sustain the harassment conviction here because the State failed to prove Luse ever threatened to kill Neuroth, and because the State failed to prove Neuroth's fear resulted from anything Luse actually said.

To convict Luse of felony harassment as charged and tried, the State had to prove:

(1) That . . . [Luse] knowingly threatened to kill Patricia Neuroth immediately or in the future;

(2) That the words or conduct of [Luse] placed Patricia Neuroth in reasonable fear that the threat to kill would be carried out;

(3) That [Luse] acted without lawful authority; and

(4) That the threat was made or received in the State of Washington.

CP 38 (Instruction 6).

The first element required proof of a "true threat" by Luse to kill Neuroth. State v. Schaler, 169 Wn.2d 274, 283-87, 236 P.3d 858 (2010); see also State v. Hickman, 135 Wn.2d 97, 102-03, 954 P.2d 900 (1998) (State must prove the elements set forth in the jury instructions). Jurors were informed of this by the following instruction:

To be a true threat, a statement or act must occur 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.

CP 40 (Instruction 8).

There was no evidence of a "true threat" by Luse to kill Neuroth. The closest evidence is that Luse told Bellmer he had "thoughts of taking her down with me". 3RP 34. But "thoughts" of taking someone "down" does not constitute a "serious expression" of intent to actually kill that person. At most it shows the speaker has considered the idea but had not yet decided whether to act.

Similarly, Luse's statement that he would "shoot him and wait until she gets home" if he found out "she lied" did not satisfy the State's burden. 3RP 34. This did not constitute a "serious expression of intention to carry out" the act of killing Neuroth. Rather, it was at best a conditional threat to harm "him" (presumably the boyfriend he suspected she had lied about) and then "wait" for Neuroth to come home. 3RP 34. Although it might be sufficient to constitute a threat to kill "him" because he would "shoot him" if Neuroth had lied, Luse never made a true threat to kill Neuroth.

The State failed to present any evidence to support finding the first element proved beyond a reasonable doubt. Luse's conviction should therefore be reversed and the charge dismissed with prejudice. Hickman, 135 Wn.2d at 103

The State also failed to prove that Luse, by words or conduct, placed Neuroth in reasonable fear that the threat to kill would be carried

out. CP 38. Proof of the second element may be satisfied only by proof of the actual threat allegedly made by the accused. State v. C.G., 150 Wn.2d 604, 609, 80 P.3d 594 (2003). The State must show that the person threatened subjectively felt the fear that the specific threat made by the accused would be carried out and the jury must find that subjective fear was reasonable. State v. E.J.Y., 113 Wn. App. 940, 952-53, 55 P.3d 673 (2002).

Neuroth did not testify she feared Luse would carry out the thoughts he expressed to Bellmer. Nor could she; the record fails to show Neuroth was ever told what Luse actually said to Bellmer. Although Covington told her that Luse planned to get a gun and kill her and anyone with her, this was not what Luse told Bellmer. 3RP 77, 80. Thus, even if Luse's statements to Bellmer can be interpreted as a threat to kill Neuroth, those remarks were never relayed to Neuroth.

Instead, Luse heard only Covington's interpretation of what he could recall from Bellmer's written statement. 3RP 64, 70-71, 77, 80. This was the basis for Luse's counsel's motion to dismiss and his argument to the jury in closing, pointing out that what Covington told Neuroth was

so different from what Luse actually told Bellmer, that it was like the end result in a "game of telephone."<sup>3</sup> 3RP 85, 101.

Because Neuroth was never told what Luse actually said, whatever fear she felt was not the result of Luse's words or conduct. Put another way, Neuroth was put in fear by Covington's erroneous recollection of what Bellmer said Luse said, and not *the* threats made by Luse, as required by C.G., 150 Wn.2d at 609. As such, the State failed to meet its burden to prove the second element beyond a reasonable doubt. CP 38. Like the failure to prove the first element, the State's failure to prove the second element warrants reversal of Luse's conviction and dismissal with prejudice. Hickman, 135 Wn.2d at 103.

---

<sup>3</sup> According to Wikipedia, "telephone game, also known as "Chinese Whisper";

is a game played around the world, in which one person whispers a message to another, which is passed through a line of people until the last player announces the message to the entire group. Errors typically accumulate in the retellings, so the statement announced by the last player differs significantly, and often amusingly, from the one uttered by the first. Some players also deliberately alter what is being said in order to guarantee a changed message by the end of it.

[http://en.wikipedia.org/wiki/Chinese\\_whispers](http://en.wikipedia.org/wiki/Chinese_whispers)

D. CONCLUSION

For the reasons stated, this Court should reverse Luse's harassment conviction and dismiss the charge with prejudice.

DATED this 30th day of January 2013,

Respectfully Submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'C. Gibson', written over a horizontal line.

CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69209-7-1
	)	
DANIEL LUSE, JR.,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF JANUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIFE OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201  
[Diane.Kremenich@co.snohomish.wa.us](mailto:Diane.Kremenich@co.snohomish.wa.us)
  
- [X] DANIEL LUSE, JR.  
DOC NO. 972711  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 JAN 30 PM 4:47

SIGNED IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF JANUARY 2013.

x *Patrick Mayovsky*