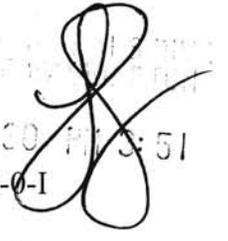


69538-0 REC'D

AUG 30 2013
King County Prosecutor
Appellate Unit

69538-0



NO. 69538-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

SERGIO DONATO,

Appellant.

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

The Honorable Marianne Spearman, Judge

REPLY BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

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A. ARGUMENT IN REPLY

1. THE FAILURE TO PROVIDE A "TRUE THREAT" INSTRUCTION WAS NOT HARMLESS ERROR.

Sergio Donato contends the trial court committed reversible error by failing to instruct the jury that any threat that forms the basis of a felony harassment charge must be a true threat. Brief of Appellant (BOA) at 6-8. He also argues the error was not harmless, primarily because his threat was conditional: "If I kill you, I will kill you, I won't do anything to the child." BOA at 8-9.

The State maintains the failure to provide the instruction was harmless error. Brief of Respondent (BOR) at 10-15. Donato asks this Court to reject the State's claim.

An instructional error is presumed prejudicial unless it affirmatively appears that it was harmless. City of Bellevue v. Lorang, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Such error requires reversal unless it is trivial or "merely academic," did not prejudice substantial rights, and in no way affected the verdict. State v. Townsend, 142 Wn.2d 838, 848, 15 P.3d 145 (2001).

This Court cannot find with confidence that the failure to provide the "true threat" instruction did not affect the jury's verdict. Donato did not tell his girlfriend he was going to kill her. The "true threat"

requirement is critical because it protects against being punished for protected speech. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). By omitting the requirement here, the trial court lessened the State's burden of proving Donato guilty.

Providing the "true threat" definition is not an onerous burden. It is the final paragraph of WPIC 2.24. A reasonable juror hearing the threat within the context of the entire conversation could have found Donato guilty without concluding he uttered a true threat. The court's error was not harmless and the harassment conviction should be reversed.

2. THE FELONY HARASSMENT AND THIRD DEGREE ASSAULT CONVICTIONS INVOLVED THE SAME CRIMINAL CONDUCT.

Donato asserts his felony harassment and third degree assault convictions involved the same criminal conduct. BOA at 13-21. The State argues to the contrary, claiming Donato's intent changed when he assaulted his girlfriend.

The State first contends the harassment and assault statutes "require disparate mens rea for the commission of each crime[.]" BOR at 21. This analysis ignores the longstanding rule that "intent," in the context of same criminal conduct, is not the statutory mens rea element of the crime, but instead is the defendant's objective criminal purpose in committing the crime. State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d

37 (2013) (citing State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990)).

The State next argues the crimes were not the same criminal conduct because the harassment was complete before Donato assaulted his girlfriend with a belt. BOR at 21-22. The State relies on State v. Grantham, 84 Wn. App. 854, 856, 932 P.2d 657 (1997), where the court found that two simultaneous rapes did not involve the same criminal conduct.

Grantham is readily distinguishable. The defendant there first committed forcible anal sex with the complainant. Once finished, he kicked her, called her names, grabbed her face and turned her to face him. He also threatened her not to tell. After further resistance and pleas to stop, the defendant told her to perform oral sex with him. He slammed her head into the wall, grabbed her hair, and forced her to comply with his request. Grantham, 84 Wn. App. at 856.

The court found the defendant's intent changed between rapes and that he formed a new intent before the second rape. The court held the defendant "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. He chose the latter, forming a new intent to commit the second act." Id. at 859.

In contrast with Grantham, here the facts are not so clear-cut. For one thing, Donato's girlfriend did not testify. The evidence was, primarily, the contents of the 911 recording. The recording was only three minutes and forty-three seconds long. There was no cessation of the conflict between Donato and his girlfriend during this time. They struggled over a telephone and the call ended.

Furthermore, felony harassment required the State to show Donato's actions placed his girlfriend in reasonable fear the threat to kill would be carried out. Donato's objective purpose was to cause such fear. The assault served to further this purpose. There was no discernible change in intent between the assault and harassment.

The trial court erred by finding the crimes did not involve the same criminal conduct. This Court should reverse and remand for resentencing.

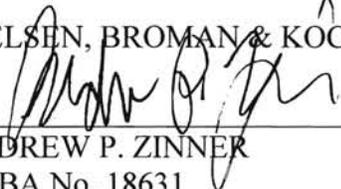
B. CONCLUSION

For the reasons set forth above and in the Brief of Appellant, this Court should reverse the felony harassment conviction and remand for retrial. Alternatively, this court should find the harassment and assault convictions involved the same criminal conduct.

DATED this 7th day of August, 2013.

Respectfully submitted,

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WSBA No. 18631

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69538-0-1
)	
SERGIO DONATO,)	
)	
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 30TH DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SERGIO DONATO
P.O. BOX 1495
ISSAQUAH, WA 98027

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF AUGUST 2013.

x *Patrick Mayovsky*