

No. 36849-8-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,
Respondent,
vs.
BRYANT DENNIS NOLAN
Appellant.**

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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RESPONDENT'S BRIEF

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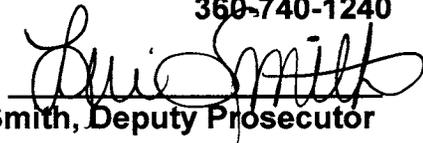
by: 
Lori Smith, Deputy Prosecutor

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STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR WHEN IT SUSTAINED THE STATE'S OBJECTION REGARDING DISMISSAL OF THE ASSAULT CHARGES.

Nolan claims that the trial court erred when it sustained the State's objection to a question by defense counsel regarding the fact that assault charges in this case were dismissed. Nolan's argument is misplaced.

First of all, the trial court ruled outside the presence of the jury that Nolan's assaultive behavior could come because it was relevant to the reasonableness of the officer's fear of Nolan's threat. RP 16. And defense counsel agreed that the assaultive behavior was relevant to the "mental state" of the officer. RP 16. And even Nolan concedes on appeal that the fact of Nolan's prior assaultive behavior was relevant to show that the victim's fear was reasonable. Brief of Appellant 13. Admission of evidence is within the trial court's sound discretion. State v. Stubsjoen, 48 Wn.App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). The appellant bears the burden of proving abuse of discretion.

State v. Hentz, 32 Wn.App. 186, 190, 647 P.2d 39 (1987), *reversed on other grounds*, 99 Wn.2d 538 (1983). Erroneously admitted evidence is not grounds for reversal unless it unfairly prejudices the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Evidentiary error is not prejudicial 'unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.' Bourgeois, 133 Wn.2d at 403 (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Case law holds that a prior bad act can be relevant to the reasonableness of a victim's fear. See State v. Binkin, 79 Wn.App. 284, 286, 902 P.2d 673 (1995) *overruled on other grounds*, State v. Kilgore 147 Wn.2d 288, 53 P.3d 974 (2002) (Washington courts allow evidence of a prior bad act or threat to show that the victim's fear was reasonable). The trial court did not abuse its discretion when it allowed evidence of Nolan's assaultive behavior to be discussed by the officers because this behavior was relevant to the reasonableness of the officer's fear that Nolan's threat would be carried out. Id. Significantly, Nolan cites no cases in this section of his argument standing for the proposition that it was error for the trial court to sustain the objection regarding dismissal of the

assault charges. Accordingly, this court should disregard this particular argument by Nolan.

II. THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO ALLOW A LESSER INCLUDED INSTRUCTION FOR MISDEMEANOR HARASSMENT.

Nolan claims the trial court erred when it refused to instruct the jury on the lesser-included offense of misdemeanor harassment. Nolan is mistaken.

First of all, Nolan misstates the rule on when a lesser-included instruction must be allowed. A defendant is entitled to an instruction on a lesser included offense if "(1)each element of the lesser offense is necessarily included in the charged offense; and (2) the evidence in the case supports an inference that the defendant committed only the lesser crime." State v. Gamble, 137 Wn.App. 892, 905-906, 155 P.3d 962 (2007)(emphasis added) (Under Workman, "Gamble was required to demonstrate to the trial court that . . . the jury could find him guilty of the inferior or lesser offense only"; State v. Peters, 47 Wn.App. 854, 737 P.2d 693 (1987)(unless the evidence supports an inference that only the lesser crime had been committed, defendant was not entitled to an instruction on the lesser), accord State v. Speece, 115 Wn.2d 360, 798 P.2d 294 (1990); State v. Jacobson, 74 Wn.App. 715, 876 P.2d

916 (1994); State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000). So, a lesser included instruction in the present case would only have been proper if there was an inference that only the lesser included offense of misdemeanor harassment was committed. That is the rule. But Nolan omits the important, limiting word "only" from his discussion of the legal rule on lesser included instructions (Nolan represents that this section of the rule is "the evidence in the case affirmatively supports an inference that the defendant committed the lesser crime." Brief of Appellant 15). Accordingly, Nolan's entire analysis of this issue is incorrect and this Court should disregard it.

Using the correct legal standard in the present case, the evidence did not show that Nolan committed only the lesser crime of misdemeanor harassment and the trial court was correct to refuse the lesser included instruction. As the trial court discussed, the evidence here was that Nolan committed only the greater crime of felony harassment:

THE COURT: What evidence is there that there was a threat to cause bodily injury? It wasn't, as I understand it, a threat of "I'm going to beat the heck out of you," or I'm going to --It was basically nothing other than --it seems to me its all or nothing. "I'm going to kill you." He either made the threat and it was reasonable that Officer Elder believed that he was actually going to be carrying it out, or he didn't make the

threat, or it wasn't reasonable that he actually --and he claims he thought it was going to be carried out. He didn't make a threat to injury Officer Elder. He either made a threat to kill him or he didn't.

RP 155, 156. And the trial court thus properly denied the lesser included instruction for misdemeanor harassment because there was no evidence that only that lesser crime had been committed. Accordingly, because the evidence here did not show that Nolan committed only the lesser offense, the trial court did not err in refusing a lesser included instruction for misdemeanor harassment. Nolan's argument to the contrary should be disregarded.

III. THE STATE DID NOT ELICIT AN IMPROPER COMMENT ON THE DEFENDANT'S RIGHT TO REMAIN SILENT.

Nolan also claims that the State improperly commented on Nolan's right to remain silent when it "elicited" from the officer that after Nolan threatened to kill the officer that the officer attempted to clarify the situation by asking Nolan, "are you threatening me?" and that Nolan did not answer that question. Nolan claims that this was the State improperly eliciting a comment on Nolan's right to remain silent. Nolan is mistaken.

Our constitutions protect the right of a defendant to remain silent. Griffin v. California, 380 U.S. 609, 614-615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); State v. Easter, 130 Wn.2d 228, 235, 922

P.2d 1285 (1996). The right to remain silent may be exercised at any time. State v. Burke, 163 Wn.2d 204, 221, 181 P.3d 1 (2008). "In the post arrest context, it is well-settled that it is a violation of due process for the State to comment upon or otherwise exploit a defendant's exercise of his right to remain silent." State v. Romero 113 Wn.App. 779, 786-787, 54 P.3d 1255 (2002)(citing Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); State v. Fricks, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979). In sum, a police witness may not comment on the defendant's silence in a way that infers guilt from the defendant's refusal to answer questions. State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Nor may the State use a defendant's silence as substantive evidence of his guilt. State v. Burke, 163 Wn.2d at 221. If the State does "comment" on the defendant's right to remain silent, reversal is mandated unless the State meets its burden of proving the error harmless. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285(1996). "To do so, the State must prove beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error, and there must be untainted evidence so overwhelming that it necessarily leads to a finding of guilt." State v. Thomas, 142 Wn.App. 589, 596-597, 174 P.3d 1264 (2008), citing

Easter, 130 Wn.2d at 242. However, "[a] mere 'reference' to a defendant's silence may be permissible." State v. Burke, 163 Wn.2d at 206, 221(noting that our Supreme Court distinguishes between comments on silence and mere references to silence); State v. Lewis, 130 Wn.2d at 706-707)(distinguishing between "comments" and "references" on silence). Importantly, "when the defendant's silence is raised, [the reviewing court] must consider 'whether the prosecutor manifestly intended the remarks to be a comment on that right.'" Burke at 216, quoting State v. Crane, 116 Wn.2d 315,331,804 P.2d 10 (1991). For example, "the Crane court then noted that a prosecutor's statement will not be considered a comment on a constitutional right to remain silent if 'standing alone, (it) was so subtle and so brief that [it] did not 'naturally and necessarily' emphasize defendant's testimonial silence.'" Burke at 216 (quoting Crane at 314, quoting State v. Crawford, 21 Wn.App. 146, 152, 584 P.2d 442 (1978). Thus, "[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." Id. (citations omitted). As explained by the Burke Court:

A "comment" occurs when the State uses a defendant's silence as substantive evidence of guilt or suggests the silence was an admission of guilt. State

v. Gregory, 158 Wn.2d 759, 838, 147 P.3d 1201 (1006)(citing Lewis, 130 Wn.2d at 707, 927 P.2d 235). A comment is more likely to be found when the State refers directly to the defendant's exercise of the right to silence. See, e.g., Romero, 113 Wn.App. at 785, 54 P.3d 1255 ("I read him his Miranda warnings, which he chose not to waive, would not talk to me."); State v. Curtis, 110 Wn.App. 6, 37 P.3d 1274 (2002)(officer testified he read defendant his Miranda rights and defendant refused to talk, stating he wanted an attorney). By contrast, indirect or fleeting references to a defendant's apparent exercise of the right to silence do not rise to the level of constitutional error.

Burke, 163 Wn.2d at 225, 226 , Madsen, J. *dissenting*.

In the present case it cannot be said that the prosecutor elicited an actual "comment" on Nolan's right to silence. The prosecutor's questioning of the officer simply was not done with the intention of inviting the jury to infer guilt from Nolan's "silence" after the officer asked Nolan "are you threatening me?" and the officer testified that Nolan did not say anything in answer to that question. RP 94. Specifically, the prosecutor asked Officer Elder, "And did he continue to keep his face close to your head after he said that?" And Officer Elder said, "I asked him, 'are you threatening me?' And then he sat back and didn't say a word again until we got to the jail, and as soon as we got to the door of the jail, he started in again." RP 94. This does not represent the prosecutor's

"commenting" on Nolan's right to remain silent. This does not show that the prosecutor intentionally tried to elicit from the officer that Nolan had "invoked" his right to remain silent. There is nothing showing the prosecutor "manifestly intended" to elicit a comment on Nolan's right to remain silent. Burke, supra. Indeed, Nolan only stayed quiet for a bit of time before he started calling the officer names again. RP 94. The prosecutor only asked Officer Elder, "did he continue to keep his face close to your head after he said that?" --this is not a question designed to elicit a "comment" from the officer on Nolan's right to remain silent. However, should this court decide this was a comment on Nolan's right to remain silent, it should find that any error was harmless.

IV. EVIDENCE WAS SUFFICIENT TO SUPPORT NOLAN'S CONVICTION FOR FELONY HARASSMENT.

Nolan also argues there was insufficient evidence shown at trial to find him guilty of felony harassment. This argument, too, is without merit.

The standard for determining sufficiency of the evidence on appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192,

201, 829 P.2d 1068 (1992). In challenging the sufficiency of the evidence, the appellant admits the truth of the State's evidence and all inferences that can reasonably drawn from it. State v. McNeal, 145 Wn.2d 352,360,37 P.3d 280 (2002). Circumstantial and direct evidence have equal weight. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The State bears the burden of proving all the elements of the crime beyond a reasonable doubt. State v. Teal, 152 Wn.2d 333, 337, 96 P.3d 947 (2004); State v. McCullum, 98 Wn.2d 484, 489, 656 P.2d 1064(1983). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the evidence's overall persuasiveness. State v. Lubers, 81 Wn.App. 614, 619, 915 P.2d 1157, *review denied*, 130 Wn.2d 1008 (1996).

In order to prove the Nolan committed felony harassment as charged here, the State had to prove that on the date specified Nolan, without lawful authority, knowingly threatened to kill Officer Elder, either immediately or in the future, and, by words or conduct, placed Elder in reasonable fear that Nolan would carry out the threat. RCW 9A.46.020(1)(a). Whether the threat was reasonable

is an essential element of the crime of felony harassment. State v. Ragin, 94 Wn.App. 407,4110412, 972 P.2d 519 (1999); State v. C.G., 150 Wn.2d 604,609-610, 80 P.3d 594 (2003). When a defendant is charged with felony harassment, Washington courts allow evidence of a prior bad act or threat to show that the victim's fear was reasonable. State v. Binkin, 79 Wn.App. 284,286,902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002).

To prove felony harassment the State had to prove that Nolan threatened to kill Officer Elder, either immediately or in the future, and, by words or conduct, placed Elder in reasonable fear that he would carry out the threat. RCW 9A.46.020(1). There was sufficient evidence here to meet these elements. The evidence presented, viewed in the light most favorable to the State, show there was sufficient evidence to prove that Nolan committed the crime of felony harassment when he threatened to kill Officer Elder. Nolan had been assaultive prior to police going to the residence and in fact it was due to allegations of an assault that officers were called to the residence. RP 86, 87. Nolan was combative and would not comply with officers requests. RP 89. Nolan continued his verbal assault on Officer Elder when he was in the police car.

RP 94. Nolan "leaned forward up to the cage and said, "I'm going to kill you." RP 94. Officer Elder said that he took the threat seriously, stating:

You've got to look at the whole picture, you know. We're already there for an assault on one and threatened assault on another. He just defeated my taser, and now he's making threats to kill me. I live in this community and in our line of work you have to take threats seriously like that. I've actually had him flagged in the system as an officer safety, in case other officers come in contact with him.

RP 95. Credibility determination are for the finder of fact. Obviously, the jury here believed Officer Elder, There was sufficient evidence presented to find the elements of felony harassment. The conviction should be affirmed.

CONCLUSION

The trial court did not err when it sustained the State's objection regarding Nolan's attempt to enter into evidence the fact that his assault charges had been dismissed. Evidence of Nolan's assaultive behavior that evening was relevant to the reasonableness of Officer Edler's fear that Nolan would carry out the threat he made to Office Elder. Nor did the trial court err when it refused to instruct the jury on the lesser included offense of misdemeanor felony harassment because the evidence does not support the inference that only the lesser offense was committed.

There is no evidence to show that the State intentionally "commented" on Nolan's right to remain silent when the prosecutor questioned Officer Elder about Nolan's behavior after he made the threat. Finally, the felony harassment charge is supported by sufficient evidence. Accordingly, all of Nolan's arguments are without merit and his convictions should be affirmed in all respects.

RESPECTFULLY submitted this 18 day of July, 2008.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

by:

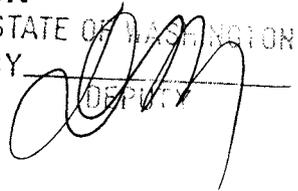


Leri Smith, WSBA 27961
Deputy Prosecutor

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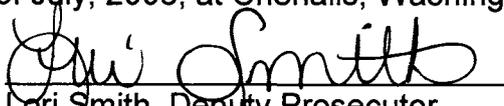
NO. 36849-8-II

DECLARATION OF MAILING

LORI SMITH, Deputy Prosecutor for Lewis County, Washington, on behalf of Respondent State of Washington, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On this 18 OF July, 2008, I served a copy of the RESPONSE BRIEF upon the Appellant by depositing the same in the United States Mail, postage pre-paid, addressed to the attorney for the Appellant addressed as follows:

John A. Hays
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Longview, WA 98632

Dated this 18 day of July, 2008, at Chehalis, Washington.


Lori Smith, Deputy Prosecutor
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Attorney for the Respondent
Lewis County Prosecuting Attorney's Office