

NO. 41797-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

KEITH EDWARD BERRY, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by finding without sufficient evidence that Mr. Berry threatened bodily harm to Jessica Reed during a voicemail left on her phone. (FF 6, CofL 4, CP 25, 30)
2. The trial court erred by convicting Mr. Berry of first degree harassment based on the voicemail message to Jessica Reed.
3. The trial court erred by finding without sufficient evidence that Mr. Berry committed harassment against Irene Reed through conduct occurring between June 1 and July 13. (CofL 8, CP 32)
4. The trial court erred by finding without sufficient evidence that Mr. Berry called Irene Reed on the phone and left a threatening message between June 1 and July 13. (FF 10, CP 27)
5. The trial court erred by convicting Mr. Berry of harassment against Irene Reed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether There was insufficient evidence that Mr. Berry communicated a “true threat” to cause bodily harm to Jessica Reed that would justify his conviction for felony harassment.

2. Whether there is insufficient evidence to convict Mr. Berry of harassment against Irene Reed where there is no evidence that the alleged conduct, the voicemail message on her phone, occurred during the charged period.

III. STATEMENT OF THE CASE

Jessica Reed (Ms. Reed) and Keith Berry had been in a tumultuous romantic relationship for years. 2/3 RP 61. Ms. Reed testified that there had been some violence in the past. 2/3 RP 64. However, Ms. Reed had never reported any physical incidents to the police. 2/3 RP 64. The couple shared a daughter and had seen each other in order to facilitate Mr. Berry's relationship with his child. 2/3 RP 58.

On July 13, 2010, Ms. Reed called the police to report that Mr. Berry was breaking the window to her car. 2/3 RP 24. Ms. Reed and her mother, Irene Berry (Mrs. Berry), were at the house at the time. 2/3 RP 26. Ms. Reed said at one point Mr. Berry went to the door and her mother, Mrs. Reed, talked with him. 2/3 RP 65. The entire incident lasted less than five minutes. 2/3 RP 69. When police arrived, they did not see Mr. Berry.

When police arrived to investigate the damage to the vehicle, Ms. Reed also accused Mr. Berry of leaving threatening phone messages for

her and her mother, Irene Reed (Mrs. Reed). 2/3 RP 25. As evidence of these calls, Ms. Reed and Mrs. Reed provided recordings of voicemail messages left on their phones. Ms. Reed testified that the voicemail left for her was left between June and July of 2010. 2/3 RP 77. Ms. Reed said she was “not sure” when the voicemail to Mrs. Reed was recorded, but thought it was July 13. 2/3 RP 84.

Both Ms. Reed and Mrs. Reed had restraining orders in effect against Mr. Berry during June and July of 2010. 2/3 RP 32, 73.

Mr. Berry denied being at the Reeds’ home on July 13. 2/3 RP 155. He testified that he had not been to their house since 2007. 2/3 RP 155. He also testified that he was at his friend, Charles Parnell’s, house all evening and had not damaged Ms. Reed’s vehicle. 2/3 RP 155, 158. Further, he denied ever leaving threatening messages for either of the Reeds. 2/3 RP 168.

Mr. Berry readily admitted that he knew about the restraining orders in effect. 2/3 RP 160. Mr. Berry also acknowledged that he had seen his daughter and Ms. Reed at a restaurant in early July and that he had broken off their relationship at that time. 2/3 RP 164.

Following a bench trial in which Mr. Berry represented himself pro se, he was convicted of two counts of DV harassment, four counts of felony violation of a domestic violence court order, and one count of

malicious mischief. CP 42-43; 2/3 RP 187-88. Mr. Berry signed a stipulation to his prior criminal history and was sentenced within the standard range. CP 35-39, 40-55. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THERE WAS INSUFFICIENT EVIDENCE THAT MR. BERRY COMMUNICATED A “TRUE THREAT” TO CAUSE BODILY HARM THAT WOULD JUSTIFY HIS CONVICTION FOR FELONY HARASSMENT.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Mr. Berry was convicted of harassment under RCW 9A.46.020(1), which provides in relevant part that a person is guilty of harassment if:

- (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . . and
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

“[T]he statute as a whole requires that the perpetrator knowingly threaten to inflict bodily injury by communicating directly or indirectly the intent to inflict bodily injury.” *State v. J.M.*, 144 Wn.2d 472, 481-82, 28 P.3d 720 (2001).

In *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004), the Washington Supreme Court held that, to avoid infringing on constitutionally protected speech under the First Amendment, RCW 9A.46.020(1)(a)(i) must be read as prohibiting only “true threats.” The term “true threat” is defined as “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 the intention to inflict bodily harm upon or to take the life” of another person. *Kilburn*, 151 Wn.2d at 43. The court applies an objective standard when determining whether a statement constitutes a true threat, which focuses on the speaker. *State v. Johnston*, 156 Wn.2d 355, 361, 127 P.3d 707 (2006) (quoting *Kilburn*, 151 Wn.2d at 44).

The trial court found that the threat on which it based the harassment conviction was the voicemail left for Jessica Reed, in which the caller, allegedly Mr. Berry, said “[y]ou are going to get hurt.” CP 25. The full statement on that voicemail was related as follows:

Why can't you tell me goodbye? It is because you fucking

somebody else. Can you just tell me goodbye. I can accept that, you know, but you're sitting up there. You are not answering your phone, you know. I already know you fucking somebody else. You know what I'm saying? I know what you -- and then there was something unintelligible. I already knew. I already knew what you doing, dude. You know what I'm saying?

Just tell me the [f---ing] goodbye and shit. If you tell me goodbye, I can accept that. You know what I'm saying? But you not trying to tell me goodbye. You trying to play little games that -- and there was something I couldn't make out. Unintelligible. You know what I'm saying? *You are going to get hurt. That is the only thing. You are going to get hurt in the long run.* You what know I'm saying?

Come on, man. Just tell me the [f---ing] goodbye. If that's what it is, then that's what it is. You know what I'm saying? Don't play. Don't -- don't try to play me and play some other [n----]. Come on, man. *You are going to get hurt, Jessica. I'm telling you, you are going to get hurt.*

RP 134-35 (Expletives altered from original; italics added).

In the full call, the statement “you are going to get hurt” is not a clear threat of bodily harm. There is never a threat that the caller will harm Ms. Reed. Instead, a valid interpretation is that she will suffer emotional hurt from what the caller perceives as her manipulation in a relationship. Objectively, this voicemail is not a “true threat” in that it is not one “a reasonable person would perceive as a serious expression of the intention to inflict bodily harm upon or to take the life.”

A conviction based on insufficient evidence the speech was unprotected cannot stand. *Kilburn*, 151 Wn.2d at 54. Where, as here, a challenge to the sufficiency of the evidence implicates core First

Amendment rights, the appellate court must conduct an independent review of the record to determine whether the speech in question is unprotected. *Kilburn*, 151 Wn.2d at 52. “It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court’s findings.” *Id.*, at 49. Rather, the “rule of independent review” requires an appellate court to “freshly examine ‘crucial facts’—those so intermingled with the legal question as to make it necessary, in order to pass on the constitutional question, to analyze the facts. *Id.*, at 50-51. It is appropriate for the court to carefully consider whether the statements were mere “idle talk” in determining if the speech was a “true threat.” See, e.g., *United States v. Howell*, 719 F.2d 1258 (5th Cir. 1984); *J.M.*, 144 Wn.2d at 478; *State v. Hansen*, 122 Wn.2d 712, 717 n.2, 862 P.2d 117 (1993).

Here, there was evidence that Ms. Reed was worried, but not that the particular “threat” made in the voicemail the trial court found to be the basis for conviction caused her concern—instead, Ms. Reed was worried about what had occurred in the past and other statements she said were made, which were not the acts the trial court found to substantiate the harassment charge. See 2/3 RP 63, 64, 85. This is likely because the statement made by Mr. Berry, that she would “get hurt,” was not interpreted by her as a specific threat of bodily harm. Furthermore, in the

context of the entire message, this statement is not one that a reasonable person would expect to be interpreted as a threat to cause bodily harm. Therefore, the trial court erred by finding that this was a threat to cause bodily injury immediately or in the future. Consequently, the trial court erred by finding Mr. Berry guilty of first degree harassment based on the voicemail.

ISSUE 2: THERE IS INSUFFICIENT EVIDENCE TO CONVICT MR. BERRY OF HARASSMENT WHERE THERE IS NO EVIDENCE THAT THE ALLEGED CONDUCT OCCURRED DURING THE CHARGED PERIOD.

As stated above, due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Mr. Berry was charged with and found to have committed Harassment against Mrs. Reed for conduct that occurred between June 1, 2010 and July 13, 2010. CP 32, Second Amended Information, Supp CP, p. 3. The trial court found that this conviction was based on a voicemail message left on Mrs. Reed's home phone. CP 27. Yet, there is insufficient evidence to support the trial court's finding that this message was left during the charged period.

By the time of trial, Mrs. Reed had passed away. 2/3 RP 62. The voicemail admitted into evidence did not contain a time or date stamp. 2/3 RP 137. The voicemail had been recorded by police when Mrs. Reed went to the police station after July 13 and accessed her home phone for

them. 2/3 RP 132. At trial, Ms. Reed testified that she was “not sure” when the message was left, although she thought it had been left on the night of July 13. 2/3 RP 84. There is no other evidence of the date of the voicemail.

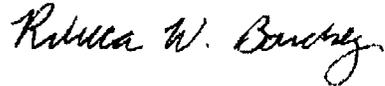
The trial court erred by concluding that the voicemail had been left between June 1 and July 13 where the only evidence was one witness, not the one who received the voicemail, could only say she was “not sure” but “believed” it was left on July 13. Without access to the original message or definite testimony of when it was left, there is no way to know, beyond a reasonable doubt, that it was not left before the charging period. The evidence submitted of when the voicemail was left was not sufficient to find beyond a reasonable doubt that the act occurred during the charging period. Therefore, Mr. Berry’s conviction for second conviction for harassment should also be reversed.

V. CONCLUSION

Both counts of harassment must be reversed for insufficient evidence. In the count naming Jessica Reed, there is insufficient evidence of a threat to cause bodily harm—an essential element—and this requires reversal. In the count naming Irene Reed, there is insufficient evidence that the act alleged—the voicemail left to Mrs. Reed’s home phone—was

left during the charging period. Therefore, both counts must be reversed and the case remanded for resentencing.

DATED: September 1, 2011



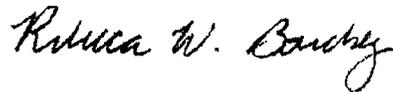
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CERTIFICATE OF SERVICE

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