

NO. 41797-9

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

STATE OF WASHINGTON, RESPONDENT

v.

KEITH EDWARD BERRY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 10-1-04063-5

RESPONDENT'S BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence to prove that the defendant communicated a "true threat" to cause bodily harm for felony harassment?
2. Was there sufficient evidence to prove that the conduct occurred during the charging dates?

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecutor's Office ("state") charged Keith Edward Berry ("defendant") on September 23, 2010, with one count of harassment, one count of malicious mischief in the third degree, and one count of domestic violence court order violation. CP 1-2. The information was amended on January 13, 2011, for the second time, adding four counts of domestic violence court order violation and two counts of harassment. CP 3-5.

On December 8, 2010, defendant waived his right to an attorney and proceeded pro se. CP 10. On February 3, 2010, defendant waived his right to jury trial and proceeded bench trial. CP 19. Trial proceeded before the Honorable Rosanne Buckner. 4 RP 1.

The court found the defendant guilty of all charges. CP 40-55; 3 RP 195-196. Defendant was sentenced to 43 months on each count of

harassment, and 60 months on each count of domestic violence court order violation, all concurrent. CP 40-55; 3 RP 195. The court entered a suspended sentence for 365 days for the misdemeanor crime of malicious mischief. CP 65-71; 3 RP 192.

The defendant appealed in a timely manner on February 23, 2010. CP 20-22.

2. Facts

A no contact order preventing defendant from contacting Jessica Reed was issued in February of 2009 from Tacoma Municipal Court in case number D00039371. CP 23-25 (Finding of Fact 9). The no contact order was set to expire in February of 2011. CP 23-25 (Finding of Fact 9).

Defendant admitted that he understood that he was not to contact Ms. Reed by any means at all, or come within 500 ft of her. CP 23-25 (Finding of Fact 9); 3 RP 162. Defendant also admitted to pleading guilty to domestic violence harassment in April 2008 against Ms. Reed. CP 23-25 (Finding of Fact 3); 3 RP 162.

Ms. Reed met the defendant six years ago and they have a four-year-old daughter. CP 23-25 (Finding of Fact 13); 4 RP 58-59. Defendant and Ms. Reed were romantically involved until June or July of 2010. 3 RP 61. The defendant had also previously been living with Irene Reed and Ms. Reed at Irene Reed's home for about two years. CP 23-25 (Finding of Fact 5); 3 RP 63.

Irene Reed is Ms. Reed's deceased mother who passed away from pancreatic cancer. CP 23-25 (Finding of Fact 5); 3 RP 62. Irene Reed also had obtained a protection order against the defendant in May 2008. CP 23-25 (Finding of Fact 4). The order said that the protection order was permanently in effect. CP 23-25 (Finding of Fact 4). The defendant acknowledged that he knew that the protection order remained in effect from 2009 onward. CP 23-25 (Finding of Fact 4).

In July of 2010, Ms. Reed was living at her mother's house in Tacoma, Washington. 3 RP 63. During the period between June 1, 2010, and July 13, 2010, defendant had been calling Ms. Reed's phone repeatedly. CP 23-25 (Finding of Fact 6); 3 RP 84-85.

Defendant left voicemails in a hostile and aggressive tone threatening to come to Irene Reed's house and harm Ms. Reed. CP 23-25 (Finding of Fact 6); 3 RP 65. The defendant threatened, "you are going to get hurt," on Ms. Reed's voicemail. CP 23-25 (Finding of Fact 6); 3 RP 134-135. The defendant also threatened to harm Ms. Reed on Irene Reed's phone by saying, "That bitch would be laying in the motherfucking grave wit you." CP 23-25 (Finding of Fact 10); 3 RP 135. Officer Strain also testified that Ms. Reed stated that defendant had threatened to come and burn her house down and shoot her. 3 RP 37.

Ms. Reed stated that she was scared of these threats because defendant had been violent with her before and that there had been multiple times when she thought that defendant was going to kill her. 3

RP 63-64; 3 RP 37. Ms. Reed described specific instances of being abused by the defendant: being choked while sleeping, riding in the car and getting punched in the mouth, and being threatened that defendant was going to kill her. 4 RP 64.

On July 13, 2010, Ms. Reed called 911 and described to the operator what was occurring at the time. 3 RP 84. The tape was submitted as evidence. 3 RP 70.

After Ms. Reed got off the phone, defendant was at the front door. 3 RP 65. Ms. Reed stated that it looked like the defendant was trying to get into the house. 3 RP 66. Irene Reed opened the door and told the defendant that he needed to leave because there was a restraining order against him. 3 RP 65.

After defendant spoke with Irene Reed, he walked over to the side of the house, picked up a rock and smashed out the side of Ms. Reed's car window. CP 23-25 (Finding of Fact 7); 3 RP 66. Defendant then got into the car and was waving the CD faceplates from the stereo and walked away. 3 RP 25.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF FELONY HARASSMENT.

a. Sufficiency of the evidence standard

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. Thomas*, 166 Wn.2d 380, 390, 208 P.3d 1107 (2009). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *Id.* at 201.

Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses

and decide disputed questions of fact. *State v. Rose*, 160 Wn. App. 29, 32, 246 P.3d 1277 (2011). Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Unchallenged findings are verities on appeal. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). Evidence that supports the determination of a fact must be substantial. It must attain such character as would convince an unprejudiced mind of the truth of the fact to which the evidence is directed. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The existence of a fact cannot rest on mere guess, speculation, or conjecture. *Id.* “[A] verdict does not rest on speculation or conjecture when founded upon reasonable inferences drawn from circumstantial facts.” *Douglas v. Freeman*, 117 Wn.2d 242, 254-55, 814 P.2d 1160 (1991).

To convict defendant of the crime of felony harassment, the State had to prove:

- (1) That on or about the June 1, 2010, and July 13, 2010, the defendant unlawfully and feloniously, without lawful authority, knowingly threatened to cause bodily injury immediately or in the future to Jessica Reed or to any other person;
- (2) By words or conduct placed the person threatened in reasonable fear that the threat will be carried out;
- (3) The defendant has been previously convicted in this or any other state of any crime of harassment of the same victim or of any member of the victim’s family

- or household against or any person specifically named in a no-contact or no-harassment order;
- (4) That this act occurred in the State of Washington.

CP 3-5; *see also* RCW 9A.46.020.

b. “True threat” requirement

Defendant challenges the sufficiency of the State’s evidence that he communicated a “true threat” to cause bodily harm. Brief of Appellant

1. Defendant does not dispute that he had been previously convicted of harassment. Brief of Appellant 9. Defendant also does not dispute that this act occurred in the State of Washington. Brief of Appellant 4-9.

There is more than sufficient evidence to prove beyond a reasonable doubt that defendant committed felony harassment. The defendant knew that he unlawfully left messages on Ms. Reed’s and Irene Reed’s phone because he admitted to understanding that he was not to contact Ms. Reed or Irene Reed due to the no contact orders. 3 RP 160-162; CP 23-25 (Finding of Fact 9); CP 23-25 (Finding of Fact 4). The defendant called Irene Reed and threatened that he would come to her house and cause harm to her and/or Ms. Reed. CP 23-25 (Finding of Fact 6, 10).

The defendant placed Ms. Reed in reasonable fear by suggesting bodily injury to Ms. Reed by leaving voicemails threatening, “you are going to get hurt.” CP 23-25 (Finding of Fact 6); 3 RP 134-135. The defendant also left threats on Irene Reed’s phone by saying, “that bitch

would be laying in the motherfucking grave wit you.” CP 23-25 (Finding of Fact 10); 3 RP 135. Ms. Reed’s reasonable fear of suffering bodily injury from the defendant was based upon her personal experience with the defendant’s violent history. The defendant has choked Ms. Reed while she was sleeping, punched her in the mouth, and threatened to kill her. 4 RP 64.

The defendant has been previously convicted of the crime of harassment with the same victim because defendant pleaded guilty to domestic violence harassment in April 2008 against Ms. Reed. CP 23-25 (Finding of Fact 3); 3 RP 162.

“The First Amendment, applicable to the States through the Fourteenth Amendment, provides that ‘Congress shall make no law ... abridging the freedom of speech.’” *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010), quoting *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L.Ed.2d 535 (2003). However, the First Amendment does not extend to “unprotected speech.” *State v. Schaler*, 169 Wn.2d at 283, citing *State v. Kilburn*, 151 Wn.2d 36 at 42-43, 84 P.3d 1215 (2004).

A “true threat” is one category of unprotected speech. *Kilburn*, 151 Wn.2d at 43. A “true threat” is a statement that is made in a context or under such circumstances where a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person. *Schaler*, 169 Wn.2d at 283, quoting *Kilburn*, 151 Wn.2d at 43 (quoting *State v.*

Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001)). The speaker does not actually need to intend to carry the threat out. *Schaler*, 169 Wn.2d at 283, citing *Kilburn*, 151 Wn.2d at 42-43. “It is enough that a reasonable speaker would foresee that the threat would be considered serious.”

Schaler, 169 Wn.2d at 283. In addition, the First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole.

Schaler, 169 Wn.2d at 283, citing *Kilburn*, 151 Wn.2d at 283.

In *Schaler*, the defendant argued that there was insufficient evidence to sustain a conviction. *Id.* at 290. The court reversed and remanded Schaler’s conviction for a new trial because of error in the jury instructions. *Id.* at 292. However, the court found that there was sufficient evidence that Schaler’s threats were “true threats.” *Id.* at 291. Schaler admitted that he had been planning to kill his neighbors for months and that he wanted to do so. *Id.* at 291. In addition, his demeanor did not suggest that his words were idle-talk or a joke. *Id.* Therefore, the court held that a jury could have concluded that a reasonable speaker in Schaler’s position would have foreseen that his threats would be interpreted as a serious expression of his intention to take the life of another. *Id.* at 291.

In *Read*, the court held that the evidence supported a finding that Read made a “true threat.” *State v. Read*, - Wn. App -, 261 P.3d 207 (2011). Read challenged the sufficiency of the evidence for his conviction

of malicious harassment. *Id.* at 209. Read advanced toward the victim in “rage and clenched fists” because he received a parking ticket. *Id.* at 210. In addition, Read yelled, “you nigger!” and “you fucking Ethiopian!” as he came at the victim. *Id.* at 210. After the victim told Read that she was going to call the police, Read responded, “I don’t care about fucking cops... I know where you work.” *Id.* at 210. The court held that a person in Read’s position would foresee that the victim would interpret his statements as a serious expression of intent to cause the victim physical harm under the reasonable person standard. *Id.* at 218.

In this case, the defendant made a “true threat” that a reasonable person in the defendant’s position would foresee that Ms. Reed and Irene Reed would interpret as a serious expression of intent to cause them physical harm under the reasonable person standard. A reasonable person in the defendant’s position, knowing of the defendant’s violent history with Ms. Reed, would have been aware that Ms. Reed and Irene Reed would have taken his threats as “true threats.” Defendant has choked Ms. Reed while she was sleeping, punched her in the mouth, and threatened to kill her. 4 RP 64. Defendant would certainly have been aware that by leaving threatening voicemails suggesting bodily injury to Ms. Reed by saying “you are going to get hurt,” or “that bitch would be laying in the motherfucking grave wit you,” would cause Ms. Reed and Irene Reed to be in fear.

Given all of these circumstances, the fact finder could conclude from all the evidence that a reasonable person would foresee that these threats would be taken seriously and that the defendant's threats were "true threats."

State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004) is distinguishable from this case. There, the court found that a reasonable person in Kilborn's position would foresee that his comments would not be interpreted seriously. *Id.* at 53. K.J., the victim, testified that at the end of the last class the students were chatting, giggling, and laughing. *Id.* at 52. Kilborn and K.J. started talking about books they were reading and Kilborn had a book that had military men and guns on it. *Id.* Kilborn then turned to K.J. and half smiling said that he was going to bring a gun the next day and shoot everyone, beginning with her. *Id.* Kilborn then began giggling, and said maybe not her first. *Id.* K.J. testified that Kilborn had never had a fight or disagreement with her. *Id.* Kilborn had always treated her nicely. *Id.* Kilburn also argued that he was joking. *Id.* at 40. The Supreme Court concluded that the evidence was insufficient for a reasonable person in Kilborn's place to foresee that K.J. would interpret his statement as a true threat because of his past relationship with K.J., joking with K.J. in the class before, the discussion about the books they were reading, and Kilborn's laughing and giggling when he made the comments. *Id.* at 53.

c. Charging period

Defendant also challenges the sufficiency of the evidence that the alleged conduct occurred during the charging period. Brief of Appellant 8.

The voicemails from Ms. Reed's cell phone and Irene Reed's home phone voicemails were both submitted into evidence. Exhibit 1. Ms. Reed stated that they were from between the dates of June 1 and the first week of July 2010. Exhibit 1; 3 RP 77-79. Ms. Reed authenticated that the voicemails were from defendant. 3 RP 79. Detective Tscheuschner recorded and transcribed the threatening voicemails. 3 RP 131-132. Officer Strain responded to the incident at Irene Reed's house on July 13, 2010. 3 RP 23-24. The court found the state's witnesses: Officer Strain, Detective Tscheuschner, and Ms. Reed as credible. CP 23-25 (Findings of Fact 2). From this evidence, the fact finder could conclude from all the evidence that the voicemails occurred on or about June 1, 2010, through July 13, 2010.

The defendant unlawfully and knowingly threatened to cause bodily harm to Ms. Reed by leaving threatening voicemails on Ms. Reed and Irene Reed's phones. The defendant made explicit remarks, such as, "you're going to get hurt," and "that bitch would be laying in the motherfucking grave wit you." Ms. Reed was placed in reasonable fear given that the defendant has choked her, punched her in the mouth, and

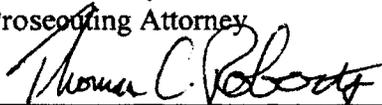
threatened to kill her. The defendant had also been previously convicted of harassing Ms. Reed in 2008. Therefore, the State proved beyond a reasonable doubt that the defendant committed felony harassment.

D. CONCLUSION.

For the reasons argued above, the State respectfully requests that the Court affirm his convictions.

DATED: November 23, 2011.

MARK LINDQUIST
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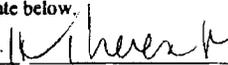


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